

**DEPARTMENT OF THE INTERIOR**

**Office of the Secretary**

**43 CFR Part 10**

[NPS–WASO–NAGPRA–NPS0036506; PPWOCRADNO–PCU00RP14.550000]

RIN 1024–AE19

**Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony**

**AGENCY:** Office of the Secretary, Interior.

**ACTION:** Final rule.

**SUMMARY:** This final rule revises and replaces definitions and procedures for lineal descendants, Indian Tribes, Native Hawaiian organizations, museums, and Federal agencies to implement the Native American Graves Protection and Repatriation Act of 1990. These regulations clarify and improve upon the systematic processes for the disposition or repatriation of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. These regulations provide a step-by-step roadmap with specific timelines for museums and Federal agencies to facilitate disposition or repatriation. Throughout these systematic processes, museums and Federal agencies must defer to the Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations.

**DATES:** This rule is effective January 12, 2024. Comments on the information collection requirements in this final rule must be submitted to the Office of Management and Budget by January 12, 2024.

**ADDRESSES:** All public comments and attachments received, as well as supporting documentation used in the preparation of these regulations, are available online at <https://www.regulations.gov> in Docket No. NPS–2022–0004. Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to <https://www.reginfo.gov/public/do/PRAMain>. Find this information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 13461 Sunrise Valley Drive, Reston, VA 20191. Please include

“1024–AE19” in the subject line of your comments.

**FOR FURTHER INFORMATION CONTACT:** Melanie O’Brien, National NAGPRA Program, National Park Service, (202) 354–2201, [melanie\\_o'brien@nps.gov](mailto:melanie_o'brien@nps.gov). Questions regarding the NPS’s information collection request (ICR) may be submitted to Phadrea Ponds, NPS Information Collection Clearance Officer, [phadrea\\_ponds@nps.gov](mailto:phadrea_ponds@nps.gov). Please include “1024–AE19” in the subject line of your email request. In compliance with the Providing Accountability Through Transparency Act of 2023, the plain language summary of the proposal is available on <https://www.regulations.gov> in the docket for this rulemaking.

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**I. Background**

On November 16, 1990, President George Bush signed into law the Native American Graves Protection and Repatriation Act (NAGPRA or Act) (25 U.S.C. 3001, *et seq.*). The Act recognizes the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations (NHOs) in Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. The Secretary of the Interior is responsible for promulgating regulations to carry out the provisions of the Act and delegated this authority to the Assistant Secretary. Since 1993, the Department of the Interior (Department) has published rules under the title “Native American Graves Protection and Repatriation Act Regulations” including:

- RIN 1024–AC07, 1993 Proposed Rule (58 FR 31122, May 28, 1993) and 1995 Final Rule (60 FR 62134, December 4, 1995);
- RIN 1024–AC84, Civil Penalties Final Rule (68 FR 16354, April 3, 2003) and Future Applicability Final Rule (72 FR 13184, March 21, 2007);
- RIN 1024–AD68, 2007 Proposed Rule Disposition of Culturally Unidentifiable Human Remains (72 FR 58582, October 16, 2007) and 2010 Final Rule Disposition of Culturally Unidentifiable Human Remains (75 FR 12378, March 15, 2010); and
- RIN 1024–AE00, Disposition of Unclaimed Cultural Items Final Rule (80 FR 68465, November 5, 2015).

**II. Summary of Public Comments and Responses**

The Department (we) published a proposed rule (RIN 1024–AE19) in the **Federal Register** on October 18, 2022 (87 FR 63202, hereafter 2022 Proposed Rule) to clarify and improve upon the systematic processes for disposition or repatriation of Native American human remains and cultural items. We accepted public comments for 90 days via the mail, hand delivery, and the Federal eRulemaking Portal at <https://www.regulations.gov>. After considering several requests for extensions of the public comment period beyond the original 90 days, we extended the comment period an additional 14 days until January 31, 2023.

All comments received by the deadline are publicly available on <https://www.regulations.gov>, Docket No. NPS–2022–0004. During the comment period, we received a total of 206 submissions which included 181 individual submissions posted to the docket and 25 attachments as identified by the submitter. When necessary, we have cited to specific submissions as NPS–2022–0004–XXXX. We received submissions from a range of sources including individual members of the public, Indian Tribes, museums, and organizations. Table 1 shows the number of submissions by type of submitter.

**TABLE 1—SUBMISSIONS RECEIVED BY SUBMITTER**

Submitter	Submissions
Individuals .....	95
Federally recognized Indian Tribes* .....	48
Museums .....	13
Museum or scientific organizations** .....	9
Native American organizations .....	8
Duplicate submissions .....	4

TABLE 1—SUBMISSIONS RECEIVED BY SUBMITTER—Continued

Submitter	Submissions
Indian groups without Federal recognition .....	3
Federal Advisory Review Committee .....	1
Native Hawaiian organizations .....	0

\* Two submissions were on behalf of multiple Indian Tribes making the total number of Indian Tribes represented 55.

\*\* These submissions are by professional organizations representing museums or scientific professionals and they are separate and distinct from the museums above.

In these final regulations, we focus our discussion on changes from the 2022 Proposed Rule based on comments we received during the comment period and our further consideration of the issues raised. For background on the statutory and legislative history and case law relevant to these regulations, we refer the reader to the previously

published rules under the title “Native American Graves Protection and Repatriation Act Regulations” referenced in I. Background. We reviewed and considered all comments prior to developing this final rule. We have provided 124 summaries of comments and our direct responses below; we combined similar comments where appropriate. Table 2 shows the largest number of comments by issue.

TABLE 2—TOP 10 ISSUES BY NUMBER OF COMMENTS

Issue	Number of comments	See comment and response
Changes to “affiliation” .....	102	Comment 58. to 61.
Role of Indian groups without Federal recognition .....	53	Comment 3. and 39. See also Comment 91. and 114.
Steps for consultation .....	53	Comment 64.
Timelines under Subpart C .....	46	Comment 92.
Require consent or consultation before allowing scientific study.	45	Comment 15.
Duty of care, including scientific study .....	44	Comment 12. to Comment 17.
“Possession or control” .....	44	Comment 49.
Specific steps in Subpart C .....	42	Comment 94.
Purpose of this rule .....	42	Comment 9.
“Consultation” .....	39	Comment 30.

In addition, we received 109 comments generally supporting the regulations and the changes (see Comment 1.), and we received 96 comments on the estimated burden and information collection requirements for the revised regulations (see Comment 4.). We received 43 comments requesting action by the Department of the Interior outside of the scope of these regulations (see Comment 6.). Four comments requested changes in these regulations from business days to calendar days, which is significant in that it impacts all the timelines under this final rule (see Comment 19).

In response to these comments and others discussed in detail below, we made the following major changes in the final rule:

1. Removed “geographical affiliation” in its entirety, simplified the process for cultural affiliation to provide that one type of information, including geographical information, is sufficient for cultural affiliation, and replaced “preponderance of the evidence” with “clearly or reasonably identify” (§ 10.3 Determining cultural affiliation).

2. Removed all reference to Indian groups without Federal recognition and prioritized the rights of federally recognized Indian Tribes in disposition and repatriation (§ 10.2 Definitions for this part “Indian Tribe” and §§ 10.7(d) Disposition and 10.10(k) Repatriation).

3. Required free, prior, and informed consent before any exhibition of, access to, or research on human remains or cultural items (§ 10.1(d) Duty of Care).

4. Extended the timeline to allow five years (rather than two as proposed) for museums and Federal agencies to consult and update inventories of human remains and associated funerary objects (§ 10.10(d) Repatriation).

5. Replaced “business days” with “calendar days” and extended deadlines as a result (§ 10.1(f) Deadlines).

6. Revised “consultation” to provide more instruction on goals and process (§ 10.2 Definitions for this part “Consultation”).

7. Removed the requirement for written requests to consult from Indian Tribes or NHOs, and therefore removed the requirement for a museum or Federal agency to respond within a set timeframe (§§ 10.4(b), 10.9(b), and 10.10(b) Initiate consultation).

Despite receiving many comments, we have not revised the definitions or application of “possession or control” and “custody.” As in the Act, “possession or control” is a jurisdictional requirement for human remains or cultural items subject to these regulations and for repatriation (§ 10.2 Definitions for this part “custody” and “possession or control”).

A. General Comments

1. Comment: We received 109 comments generally supporting these

regulations and the overall goals of disposition or repatriation. Comments from individuals, including many students in high school, college, and graduate school, offered support for the general principle of returning ancestors and objects to lineal descendants, Indian Tribes, and NHOs. Museum and museum and scientific organizations supported the overall goals to clarify and improve upon the systematic processes for disposition and repatriation. A few comments from museums focused on the impact the revised regulations would have on the museum profession. One comment stated “Overall, the language in the proposed draft reflects contemporary best practices around repatriation and codification in 43 CFR part 10 makes sense in an effort to standardize repatriation activities across diverse institutions, agencies, and Tribes” (NPS–2022–0004–0129). Another museum commented:

A fundamental shift in priorities is necessary at institutions who have fallen short in their efforts to comply with the legislation’s intent. It is time for institutions to prioritize this work, in both the allocation of resources and the ethical commitment to genuinely engage in consultation with Native Nations. The passage of these proposed revisions is a necessary step towards addressing the legacy of colonial injustices imposed upon Indigenous Peoples in the United States (NPS–2022–0004–0115).

Many Indian Tribes and Native American organizations also expressed appreciation and support for the revisions and felt the changes better reflected Congressional intent. One Indian Tribe stated:

We appreciate the difficult work and coordination the Department has undertaken to make vast and meaningful changes to shift the burden of NAGPRA compliance to where it belongs—to federal agencies and museums. We explain below several changes that we support. While in the interest of brevity, we focus our comments on areas of concern, the Department should understand that our Tribes welcome this proposed rule. With our comments below addressed, we believe the new regulations will better implement NAGPRA and facilitate the repatriation of our Ancestors and sacred objects as Congress intended (NPS–2022–0004–0158).

*DOI Response:* As discussed more fully throughout this document, we agree with many of these statements; and, as a result, we are publishing this final rule. We appreciate the comments from individuals, especially from students, not only for supporting this effort but for engaging in the rulemaking process. We appreciate the supportive, yet constructive comments from museums and museum and scientific organizations. We are indebted to the many Indian Tribes who provided comments as well as those who provided input during consultation throughout the process of developing these regulations.

*2. Comment:* We received nine comments generally objecting to the changes to these regulations. One comment stated the process was more of a political statement than a necessity. One comment supported the idea of clarifying the repatriation process but felt the proposed rule would undermine existing efforts and result in a rushed, transactional process. One comment felt the proposed regulations would hinder meaningful consultation and impede the progress that museums, Indian Tribes, and NHOs have made so far. One comment believed the revisions compounded difficulties that both museums and Indian Tribes already face and would reduce efficiency rather than improve it. One comment stated that in addition to a lack of statutory authority for some of the revisions, the Department had not identified any inadequacies or difficulties in the existing regulations, particularly with respect to Subpart B. One comment saw the revisions as a reversal rather than a strengthening of Congressional intent and stated that, as the drafted, the revisions are “based upon ‘restorative justice’ rather than the words and intent of Congressional legislation, [and] has

gone too far.” The comment stated the revisions reflected a larger cultural shift and that Native activist groups “have urged aggressive claims for repatriation and demanded that [T]ribal permission be sought for the transfer of objects long in legal circulation” (NPS–2022–0004–0188). Three comments from Indian Tribes expressed concerns that the revisions would slow down or even stop the work of repatriation. All three comments believed the revisions are too extensive and too complex and will, ultimately, create more issues than the revisions resolve. One of these comments was especially concerned that the revisions did not address two central and persistent issues that Indian Tribes have long asked for: enhanced enforcement and protection of private information.

*DOI Response:* As discussed more fully throughout this document, we disagree with many of these statements; and, as a result, we are proceeding with publication of this final rule despite these objections. These regulations reflect and implement the legal requirements established by Congress. We understand that some of the timelines under this final rule will require faster action by museums and Federal agencies than under the existing regulations. However, certain deadlines can be extended or actions delayed, provided the appropriate lineal descendant, Indian Tribe, or NHO has agreed to extend or delay the process. We believe the changes in these regulations will enhance meaningful consultation and ensure that resulting efforts are based on consensus or agreement. We believe that the increased transparency and communication required by these regulations will resolve some of the existing challenges faced by all parties. As discussed in more detail throughout this document, these revisions are within the Secretary’s statutory authority and based on over 30 years of input, comment, and experience in implementing the Act. As reflected in the supportive comments above, these revisions reflect best practices and changes in the wider professional disciplines, while at the same time adhering to the language and limits provided by Congress. We have incorporated requests from Indian Tribes and NHOs to the maximum extent possible, but we do not believe these revisions will stop the work of repatriation or create more issues than are resolved. We do anticipate that the work of repatriation may be slowed as all parties adjust to the revisions in these regulations and especially as all

parties re-evaluate past practices considering these simplified, clarified, and streamlined regulations. We reiterate here, as we have throughout this document, that the goal of this final rule is to clarify and improve the systematic processes for disposition and repatriation by making the requirements clear to all parties involved.

*3. Comment:* We received 53 comments on the standing of Indian groups without Federal recognition under these regulations. Of that total, 40 comments supported giving standing to Indian groups without Federal recognition while 13 comments opposed it. Some comments also suggested changes to 25 CFR part 83 to recognize more groups and that the National NAGPRA Program should help educate groups on how to achieve Federal recognition.

*DOI Response:* The recognition process and training concerning it are outside the scope of these regulations. Furthermore, as discussed below under that definition, these regulations cannot expand the definition of “Indian Tribe” beyond that provided in the Act. Indian groups without Federal recognition, including State recognized tribes, are not completely excluded from the disposition or repatriation processes. As is the current practice, Indian groups without Federal recognition can work with federally recognized Indian Tribes as part of a joint claim for disposition or joint request for repatriation. See also Comment 39.

*4. Comment:* We received 96 comments about the estimated burden and related information collection requirements of the proposed regulations. Of that total, nine comments supported some part of the burden estimate, including agreeing that there is a wide variation in the actual time required because of differences in size and complexity of the required responses. Two of these comments supported the overall burden estimate and agreed that the changes would yield long-term savings, despite the short-term increased costs. Five of these comments agreed that the collection of information is necessary and has a practical utility. One comment specifically stated the information collected had no practical utility and should not be required. Five comments suggested one way to minimize the burden of these regulations was for the Department to provide online resources to assist with identifying Indian Tribes with potential cultural affiliation.

Eighteen comments generally objected to the burden estimate. Many of these comments felt the methods and assumptions were flawed and did not

reflect the actual amount of effort required to comply with these regulations. Several comments stated that the proposed regulations significantly expanded the administrative, staffing, and financial burdens already imposed on museums and Federal agencies and that museums and Federal agencies are already facing capacity and resource limitations that prevent them from completing the already burdensome requirements under the existing regulations. Five comments stated that, regarding the quality, utility, and clarity of the information to be collected, there was a disconnect between oral statements by the National Park Service staff and the proposed regulations on the requirements for consultation and reporting (see NPS–2022–0004–0081). A few comments stated additional financial resources must be provided before any additional tasks can be required and that it was unreasonable and misguided to expect museums and Federal agencies to comply without providing additional funds. Two comments stated that the estimates should not rely on responses from the last three years to estimate costs due to the pandemic. One comment requested that the General Accountability Office estimate the costs of the proposed regulations. One comment questioned the authority of the Department to collect information that could be used to monitor the repatriation process.

A total of 31 comments specifically discussed the impact of these regulations on Indian Tribes and NHOs and suggested some possible solutions to lessen the burden. Of that total, 18 comments suggested the Department create a dedicated grant program for Indian Tribes and NHOs. One of these comments expressed that museums have been wasting grant funds on unnecessary tasks since 1994 and more grant funding should be provided to Indian Tribes and NHOs. Five comments felt the burden on Indian Tribes and NHOs in these regulations was underestimated, too high, or prohibitively expensive. One comment from an individual stated the burden on Indian Tribes and NHOs could not be minimized with technology due to a general lack of access to the internet in Indian Country. One comment requested the regulations provide more funding as well as flexibility for Indian Tribes to engage with repatriation at their own pace. Seven comments questioned the costs to Indian Tribes under Subpart B of the proposed regulations, which some estimated to be \$40 million per year.

Eighteen comments provided input or alternative estimates for specific tasks. Two comments believe tasks are missing from the estimate, such as documentation review, correspondence after consultation, travel arrangements, hosting arrangements, inventory/packet/documentation preparation, room setup, consultation participation, documentation of consultation, administrative requirements, moving items to or from storage, and implementation of care guidance. One comment stated the costs of physical transfer should be included and, for a large repatriation, staff time alone can exceed \$100,000 for physical transfer. Two comments stated the estimate for initiating consultation should be much higher, from 40 hours to at least 140 hours, to include the time required to identify consulting parties, prepare, and distribute letters or emails, and to make follow up phone calls. One comment suggested the estimate for conducting consultation be increased to provide for staff to retrieve collections from storage and travel by many representatives (sometimes up to ten people) from Indian Tribes or NHOs to conduct a physical review. Three comments stated the estimate for completing an inventory was too low as even an inventory update was an enormous undertaking that required significant time and resources. One of these comments noted that a previously prepared inventory did not reduce the necessary time, as previous inventories are generally “woefully inadequate.” One of these comments stated that, based on experience, it takes 10 hours to inventory one box plus an additional 6–8 hours to describe each individual or object in the box and an additional 40 hours per site to produce a final report. The comment estimated that for 200 boxes, it would take 2,000 hours to inventory the boxes, and this did not include additional time to describe each object or write a site report (NPS–2022–0004–0125). One comment stated the estimate for a summary was also underestimated and stated it takes anywhere from 6 months to two years to prepare a summary and then an additional six months for illustration and documentation of the objects. Five comments believe the estimate for preparing notices (either for inventory completion or intended to repatriation) were underestimated. One of these comments estimated it takes 120 hours to facilitate a notice of inventory completion plus additional time to verify the information with a physical review. Four of these comments suggested that for each notice type, the

minimum amount of time required was 2 hours while the maximum amount of time was between 10 and 30 hours per notice, plus additional time to consult on the draft notice. One comment stated evaluating competing requests and resolving stays of repatriation required significantly more time, estimating between 100 and 1,000 hours, especially when considering the involvement of legal departments, executives, and board members in those tasks. Two comments stated the rate used to calculate costs should be \$100 to \$120 per hour.

Fourteen comments provided estimates for the total costs of Subpart C of these regulations. For Indian Tribes and NHOs several estimated a cost of \$17.2 million per year. For museums and Federal agencies one comment estimated \$19.4 million per year. The two estimates were developed by one individual, using grant awards from 2011 to 2021 to estimate the average cost for a notice of inventory completion (\$14,416 per notice). After calculating an estimated cost for museums and Federal agencies to comply with the proposed regulations, the estimate calculated the costs for Indian Tribes and NHOs by using the percentage of funding awarded in grants from 2011–2021 to museums (58%) and Indian Tribes or NHOs (42%) to estimate a total burden for the proposed regulations at \$91.4 million over 30 months or \$36.6 million per year (see NPS–2022–0004–0174). Other comments estimated a total for museums only between \$25 million and \$118 million per year. One museum provided a variety of estimates based on current project budgets which ranged from \$200,000 to \$500,000 per project per year for one museum. The comment estimated the burden for the single museum at 19,000 hours per year (\$1.273 million per year per museum assuming an hourly rate of \$67/hour). When applied to all 407 museums that will be required to update inventories under these regulations, that amounts to the highest estimate of \$518.1 million per year for museums alone, although the comment noted that not all museums will require the same number of hours). The same comment questioned how the Department estimated that the proposed regulations do not impose an unfunded mandate on State, local, or [T]ribal governments or the private sector of more than \$100 million per year (see NPS–2022–0004–0125).

One comment detailed the hours involved in one part of a two-part project over 15 months. The first phase of the project included 13 consultation meetings which required hundreds of

hours of time by Indian Tribes and museum staff, including hundreds of phone calls. Consultants hired to develop and complete the first phase of the project spent thousands of hours on the first phase and travel expenses totaled \$3,000. In the first phase, 31 notices of inventory completion were published, although the comment stated that the number of notices could be irrelevant as each notice involved a single group of Indian Tribes and one museum and could have been a single notice. The first phase of the project covered 1,021 individuals and 11,590 associated funerary objects. The comment noted that these estimates do not include the hours involved in preparation of the original inventory of human remains and associated funerary objects completed in the early 1990s. Although a total estimated cost for this phase of the project was not provided, elsewhere the comment suggested at minimum \$100 to \$120 an hour should be used in dollar estimates (see NPS–2022–0004–0135). Using the lower hourly figure and the number of hours provided, the estimate for the first phase of the project is \$123,000 over 15 months or \$98,400 per year. When applied to all 407 museums that will be required to update inventories under these regulations, it equals an estimated \$40 million per year for museums.

*DOI Response:* We appreciate the specific input on the estimated costs for certain requirements in these regulations. We have addressed many of these comments in the revised Cost-Benefit and Regulatory Flexibility Threshold Analyses for the final regulations. We reiterate that the Department believes the short-term increased costs of these regulations are justified by the associated long-term quantitative and qualitative benefits. We believe the information collected under these regulations is necessary and any information collected by the Department under these regulations is required by the Act for administrative purposes (such as publishing notices) and is not used for monitoring or evaluating the quality of that information. The Department will develop and provide templates for all information collection requirements, and we will provide additional resources to assist with identifying consulting parties to minimize the burdens of these regulations, as discussed further in Comment 95. Any changes to the amount of available funding through grants are beyond the scope of these regulations and are the purview of Congress and the appropriations process. We cannot limit the grant

awards to only Indian Tribes and NHOs as that would be inconsistent with the Act.

Regarding the hourly rate used to calculate costs, we used the Bureau of Labor Statistics (BLS) News Release USDL–23–1305, March 2023 Employer Costs for Employee Compensation—released June 16, 2023 (<https://www.bls.gov/news.release/ecec.nr0.htm>, accessed 12/1/2023). This is a standard source we have used in estimating the burden of these regulations as a part of our compliance with the Paperwork Reduction Act. Any person equates to Civil workers. Table 2 lists the hourly rate for full-time workers as \$43.07, including benefits. Lineal descendants equate to Private Industry Workers: Table 6 lists the hourly rate for all workers as \$40.79, including benefits. Any Affected Party, Indian Tribes/NHOs, Federal agencies, and museums equates to State and Local Government Workers. Table 3 lists the hourly rate for Professional and related Workers as \$67.01, including benefits.

Regarding the impact of these regulations on Indian Tribes and NHOs, we anticipate a change in how grant funds are awarded due to the changes in these regulations. During the first five years after publication of the final regulations, grant funds will likely continue to go to consultation and documentation projects to consult and update inventories. After five years, we anticipate more grant funds will be requested by Indian Tribes or NHOs for repatriation assistance or for making requests for repatriation. As noted in Comment 102, the Notice of Funding Opportunity for NAGPRA grants is where any changes to the allowable activities for grants will be made. We do not intend to impose requirements on lineal descendants, Indian Tribes, or NHOs to respond to invitations to consult or to submit claims for disposition or requests for repatriation. Those are actions that lineal descendants, Indian Tribes, and NHOs may choose to take but are not required.

We agree there are new requirements for Indian Tribes to take certain actions under Subpart B that under the existing regulations are voluntary. We disagree that all those requirements under Subpart B are new, and we strongly disagree with the estimate provided. As discussed in Comment 70 and Comment 83, we disagree that the Act, the existing regulations, or any other regulations designate that the BIA is responsible for discovery, excavation, and disposition on Tribal lands in Alaska and the continental United States. We agree that Indian Tribes have discretion under the existing regulations in responding to a

discovery on Tribal lands and that the final regulations will require Indian Tribes to respond to discoveries on Tribal land. This is to improve consistency with the Act and clarify the responsibilities in these regulations. We understand that in some cases these responsibilities may exceed the capacity or resources of an Indian Tribe, and in those cases, the Indian Tribe can delegate these responsibilities to the Bureau of Indian Affairs or another Federal agency with primary management authority. Lastly, we note that Tribal laws, policies, and administrative capacity vary greatly, and the comments do not seem to take that into account by applying a blanket assumption of the same cost for each Indian Tribe. The comments also do not consider the small number of actions on Tribal lands per year, which is not likely to significantly change based on the final regulations.

Regarding the alternative estimates provided by some comments, we believe that any estimate based on current practice or past grant awards is inherently flawed and does not account for the specific objective of the proposed and final regulations to simplify and improve the systematic processes within specific timeframes. We understand that our estimates do not reflect the actual amount of time some museums and Federal agencies currently spend on compliance with these regulations. We strongly disagree, however, that our estimates do not reflect what is required by these regulations. In the 33 years since the passage of the Act, each museum or Federal agency has approached the requirements of these regulations in different ways, and, as a result, there is a wide variation in how much time and money is spent to comply with these regulations. As noted in the proposed regulations and elsewhere in this document, one of our goals in revising the regulations is to improve efficiency and consistency in meeting these requirements. Necessarily, this will mean a difference between our estimated costs for these regulations and current practices. While we understand the objections to our estimates and the concerns about insufficient funding to carry out these requirements, the Secretary, the Assistant Secretary, and the Department are committed to changing the implementation of the Act and to clearing a path to expeditious repatriation as Congress intended.

Concerns about the financial burden of the Act and these regulations on museums were expressed even before the Act was passed. In discussing the key compromises made to the final bill

in 1990, Representative Campbell stated that limiting the inventory requirement to only human remains and associated funerary objects “will go a long way to reduce cost to museum and at the same time encourage both sides to sit down early together to discuss their options” (136 Cong. Rec. 31938). With this change and the authorization of a grant program to assist museums with the inventory requirements, the Association of American Museums and the Antique Tribal Arts Dealers Association withdrew their objections to the final legislation.

As envisioned by Congress, most of the requirements for repatriation under the Act should have been completed by 1995, although extensions were authorized in some cases. In 1990, the Congressional Budget Office (CBO) reviewed the Act and estimated the legislation would cost between \$20 million and \$50 million over five years. The main costs of the Act were in preparing inventories of human remains, estimated between \$5 million and \$30 million over five years, “for museums to provide [T]ribes with the basic information required by the bill.” The CBO acknowledged that to some extent, “the total cost is discretionary—the more funds made available, the more accurate and comprehensive will be the information collected by museums.” More extensive and expensive studies might be required for some human remains, but, as the CBO noted, such studies were not required by the Act. CBO noted that “If museums were required to identify all of their holdings definitively, the costs of this bill would be significantly higher than the \$30 million estimate.” The other \$15 million to \$20 million in estimated costs were for identifying funerary objects and completing summaries as well as for Indian Tribes to make claims and repatriate human remains or cultural items (H. Rpt. 101–877, at 21–22).

After nearly 33 years of implementation, the total cost of repatriation is clearly discretionary, and, in addition to funds, the more time that has been available to complete an inventory of human remains, the more comprehensive, extensive, and expensive the inventories have become. After meeting the initial deadline for inventories in 1995, many museums and Federal agencies have continued to update inventories at their own discretion, going beyond what is required by the Act and the existing regulations. Under the Act and the existing regulations, an inventory of human remains only requires use of “information possessed by such museum or Federal agency” (25 U.S.C.

3003(a)). Yet, despite the minimum requirements, hundreds of museums and several Federal agencies submit updated inventories each year. The number of museums updating inventory data is relatively large and accounts for multiple submissions each year from a single museum because the data is updated on a case-by-case basis at the discretion of the museum.

Since 1993, the Department has provided estimated hours for tasks under these regulations as a part of its compliance with the Paperwork Reduction Act. These estimates are far below the estimates provided by some comments, but these estimates have been consistently used by the Department and reflect what the Department believes is required by the Act and these regulations. The 1993 Proposed Rule included an estimate of “100 hours for the exchange of summary/inventory information between a museum or Federal agency and an Indian [T]ribe or Native Hawaiian organization . . .” (58 FR 31124). From 1993 until publishing the proposed regulations in 2022, we continued to use the estimate of 100 hours per museum for a new summary or inventory. This is far less than the comment that stated a museum spends 19,000 hours per year on its inventory and summary and related tasks.

The 1993 Proposed Rule included an estimate of “six hours per response for the notification to the Secretary, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collected information” (58 FR 31124). In 2012, we increased this estimate to 10 hours per notice. This is less than the estimate provided in the comments of 120 hours to facilitate a notice, including gathering and maintaining data and reviewing and verifying the information, or the estimated range of two hours to 30 hours, for a median of 16 hours, to just complete the notice template. The estimate based on previous grants suggests a notice costs \$14,416 each which equates to between 120 hours and 225 hours per notice, depending on the hourly rate applied. We agree with the one comment that stated the number of notices is irrelevant to estimating the burden involved. Although not explicitly stated in the existing regulations, the final regulations clearly state that museums or Federal agencies may include in a single notice all human remains and associated funerary object having the same lineal descendant or cultural affiliation for efficiency and expediency. The

comment that stated 31 notices could have been combined in to one notice demonstrates the discretion museums and Federal agencies exercise in complying with these regulations.

The 2010 Final Rule added a new estimate related to the new regulatory requirements. Under the regulations, museums and Federal agencies were required to (1) provide to Indian Tribes and NHOs a list of Indian groups without Federal recognition that may have a relationship to human remains and associated funerary items and (2) request from Indian Tribes and NHOs the temporal and/or geographic criteria used to identify the groups of human remains to be included in consultation. The estimated burden on museums for this collection of information was 30 minutes total, including time for reviewing existing data sources, gathering and maintaining data, and preparing a transmission to other consulting parties. In the 2022 Proposed Rule, we renamed this requirement “Initiating consultation and requesting information,” and we increased the estimated time required to range from less than one hour, or 0.50 hours, up to 5 hours, or a median of 2.75 hours. This is far less than the comments that suggested this should be much higher and range from 40 hours to 140 hours, or a median of 90 hours to initiate consultation and request information.

In preparing the Cost-Benefit and Regulatory Flexibility Threshold Analyses for the 2022 Proposed Rule, we accounted for all actions that are required under the existing regulations to calculate the baseline conditions. We disagree that our estimate is missing required tasks, and the tasks identified by comments as missing are generally included in the estimate for conducting consultation. The costs of conducting consultation vary greatly, depending on the size and complexity of the consultation. However, we note that consultation does not require any specific documentation beyond what was already prepared in the initial summary or inventory. The additional tasks of inventory/packet/documentation preparation or even moving items from storage for purposes of consultation are not required by the regulations. A physical inspection of a collection is not required by these regulations, although we understand that for some museums, lineal descendants, Indian Tribes, or NHOs, in person consultation is preferred. As for the costs of physical transfer, we address this further in Comments 51 and 66 in this document. Physical transfer, and any costs that accompany that effort, are not required by these

regulations, and we note that grants are provided specifically for assisting with the costs of physical transfer.

As these comments clearly emphasize, the burden estimates vary widely. In its 1990 evaluation of the Act, the Congressional Budget Office made a similar conclusion, noting “[t]here is considerable disagreement about the nature of the inventory required by H.R. 5237,” and widely varied estimates of costs. In the end, the CBO estimated only \$5 million to \$30 million over five years would be required which reflected the “costs of an inventory of museums’ collections, as well as a review of existing information to determine [Tribal] origin” (H. Rpt. 101–877, at 22).

5. *Comment:* We received 25 comments expressing concerns for the protection of sensitive information in the regulations. Some comments suggested use of the Privacy Act and the Archeological Resources Protection Act (ARPA) to withhold information about human remains and cultural items. Other comments suggested changes to the regulations to require that museums and Federal agencies keep sensitive information confidential.

*DOI Response:* While we appreciate the suggestions, we cannot make the requested changes. First, neither the Privacy Act nor ARPA apply. Deceased individuals do not have any Privacy Act rights, nor do executors or next-of-kin. See, generally, OMB 1975 Guidelines, 40 FR 28, 40 FR 951 (also available at [https://www.justice.gov/paoverview\\_omb-75](https://www.justice.gov/paoverview_omb-75), accessed 12/1/2023) (stating “the thrust of the Act was to provide certain statutory rights to living as opposed to deceased individuals” and “the Act did not contemplate permitting relatives and other interested parties to exercise rights granted by the Privacy Act to individuals after the demise of those individuals”). Similarly, the exemption from disclosure under ARPA applies specifically to “the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under [ARPA] or under any other provision of Federal law” (16 U.S.C. 470hh(a)). Thus, the ARPA provision is directed to archaeological resources that would require a permit for excavation or removal, which applies to some but not all human remains and cultural items under the Act and these regulations.

In the proposed regulations and in these final regulations, the Department has taken steps to remove requirements for museums or Federal agencies to disclose sensitive information in an inventory, summary, or notice. While we cannot dictate how a museum or

Federal agency responds to a request for disclosure of sensitive information, we encourage a museum or Federal agency, at the request of a lineal descendant, Indian Tribe, or NHO, to ensure that information of a particularly sensitive nature is not made available to the public. Since 1995, the Department has recommended museum or Federal officials ensure that sensitive information does not become part of the public record by not collecting, or writing down, such information in the first place (1995 Final Rule, 60 FR 62154).

6. *Comment:* We received 43 comments requesting additional action by the Department of the Interior outside of these regulations. Of that total, nine comments requested the Department impose NAGPRA-related conditions on any museum that received any Federal grant. Seven comments requested the Department move the National NAGPRA Program out of the National Park Service. A total of 11 comments requested the Department conduct more consultation on these regulations before issuing final regulations; five comments requested consultation with only Indian Tribes and NHOs while six comments requested consultation with all constituents. Five comments requested further engagement with the Department on these regulations. Five comments requested the Department conduct or request an audit of the National NAGPRA Program, Federal agency compliance, or the grant program. Four comments requested the Department provide more information about the changes to these regulations, either through training or simplified documents outlining the changes. One comment requested the Department ensure its own bureaus follow these regulations. One comment requested the proposed regulations be withdrawn and the Department start a new effort to develop these regulations in consultation with Indian Tribes and NHOs.

*DOI Response:* We appreciate the requests for additional action by the Department. We agree that additional information about changes to these regulations will be needed, and we plan on providing as many opportunities as we can for training sessions, discussions, and guidance documents once the regulations are effective. We welcome any other suggestions for how we can support museums, lineal descendants, Indian Tribes, or NHOs with these regulations. We are working to ensure all the bureaus within the Department of the Interior have

adequate staffing and support to ensure compliance with these regulations.

We decline to include in these regulations a requirement for imposing NAGPRA-related conditions on Federal grants. All Federal grant recipients are required to provide assurances that they will comply with all applicable requirements of Federal laws, regulations, and policies (see “Assurances for Construction/Non-Construction Programs (SF–424D and SF–424B)” at <https://www.grants.gov/forms/forms-repository/sf-424-family>, accessed 12/1/2023). While we cannot include the requested provisions in these regulations, we agree to work with the Office of Management and Budget to explore whether and how a NAGPRA-specific condition might be included in the general assurances required for all Federal grant programs. We decline to withdraw the proposed regulations or to engage in additional consultations at this time. We are committed to implementing the final regulations as soon as possible to ensure these long-overdue changes are implemented.

Regarding the location of the National NAGPRA Program, we appreciate the input we received during Tribal consultation in 2021 and in response to the proposed regulations. Currently, we have not decided about the future location of the National NAGPRA Program. Regarding the requests for an audit of the National NAGPRA Program, Federal agency compliance, or the grant program, all Federal agency programs, including the National NAGPRA Program, Federal agency NAGPRA programs, and the NAGPRA grant program, are subject to regular internal control reviews under the Office of Management and Budget Circular A–123, Management’s Responsibility for Enterprise Risk Management and Internal Control (revised 7/15/2016). Along with other management and performance evaluation processes, the National NAGPRA Program and all Federal agency programs undergo routine and regular review. We will continue to consider the need for additional management oversight.

7. *Comment:* We received 22 comments concerning how the regulations should balance the interests of, on the one hand, repatriation, and on the other hand, scientific study. Of that total, 17 comments outright objected to the regulations giving museums or Federal agencies decision-making authority for disposition or repatriation. Thirteen of these comments, which came from one submission, asserted that decisions on cultural affiliation, evaluation of requests, repatriation, and competing requests should be in the

hands of the appropriate Indian Tribes or NHOs and not museums and Federal agencies (see NPS–2022–0004–0157). Four comments provided similar sentiments. One comment requested that an independent authority evaluate decisions made by museums and Federal agencies. One comment noted that despite positive changes, the proposed regulations still had not truly shifted the burden of having to prove the identity or cultural affiliation of human remains or cultural items off Indian Tribes or NHOs because the regulations did not give the power of decision making to Indian Tribes or NHOs.

By contrast, two comments objected to the proposed regulations claiming that they eliminate the balance of interests that Congress intended when it passed the Act. Both comments referenced or quoted from statements made by Senators Inouye and McCain in 1992, to the effect that the Act represents a balance between scientific study and respectful treatment of human remains and cultural items. One of these comments stressed that the proposed regulations were inherently imbalanced because they were developed through consultation only with Indian Tribes and NHOs and not with museums, scientific organizations, and Federal agencies (see NPS–2022–0004–0150). Citing to “. . . words such as ‘balance’ and ‘compromise’ [in] describing the law in a special issue of the Arizona State Law Journal published shortly after the bill was passed (vol. 24, 1992),” the other objecting comment stated, “[i]n my view, a rule published in 2010 (43 CFR 10.11) began to move NAGPRA away from the balance that Congress intended. The new regulations proposed here would make that balance go away entirely” (see NPS–2022–0004–0172).

Three comments directly refuted the two objecting comments as gross misrepresentations of the Act. One of these comments concluded that the imbalance is because the Act vests decision making with museums and Federal agencies and stated “where there is disagreement between institutions and Tribes regarding affiliation, it requires that the Tribes take extraordinary lengths to press claims. The challenge is, can this rule or any rule really overcome the inherent imbalance in the Act?” (see NPS–2022–0004–0129). Another comment supported the proposed regulations in trying to shift the balance more toward Indian Tribes and NHOs because, since 1990, repatriation has been too slow, and the burdens placed on Indian Tribes and NHOs has been too great. The

comment supported the proposed regulations as representing the “continued evolution to ensure NAGPRA’s relevance to its true constituents—Indian [T]ribes and Native Hawaiian organizations” (see NPS–2022–0004–0080). A third comment refuting the objecting comments stated:

Though some argue that repatriation is a weighing of interests between science and human rights, that interest is absent from the Act, which is singularly aimed at providing restitution. The Act creates an administrative process for repatriation and disposition to provide restitution for harms that have been called out by Congress as genocide and human rights violations. The only exception the Act provides to repatriation is when a museum or agency can prove that they have a “right of possession.” Even permitting completion of a scientific study of major benefit to the United States does not prevent repatriation, and will only delay it. 25 U.S.C. 3005(b).

Museums—even well-funded ones—have admitted that they will not be proactive with their CUI inventories, even with the NAGPRA funding they request, and that instead, they will continue to work to overcomplicate the process, based on the current regulations and criteria outlined there. Thus, it is imperative that the Secretary take over this duty and correct the Ancestors and their belongings that languish under a label called “unidentifiable” (NPS–2022–0004–0153).

*DOI Response:* Nowhere in the Act did Congress say that decisions about disposition or repatriation are made by balancing the interests of science against the interests of human rights. While we are aware of the statements made by Senators Inouye and McCain in 1992, we understand those statements to say that the Act itself is the product of balancing these interests. The lengthy process of developing, drafting, and agreeing to the language of the Act is how Congress ensured a balance between scientific study and respectful treatment of human remains and cultural items.

To ensure all information related to the Congressional record is available, the documents that provide legislative intent are available on the National NAGPRA Program website (<https://www.nps.gov/subjects/nagpra/the-law.htm>, accessed 12/1/2023). Beyond the two reports, the Congressional Record provides statements by individual members of Congress. In the Senate, Senator Inouye’s full statement is available in the Congressional Record Senate (October 26, 1990) on page 35678–35679. Senator McCain’s opening statement is on the preceding page 35677. A discussion of the impact of the legislation on development activities on Federal lands by Senators McCain and Simpson is on page 35679–

35680. In the House, Representatives Campbell (D–CO), Rhodes (R–AZ), Collins (D–IL), Richardson (D–NM), Bennett (D–FL), Mink (D–HI), and Udall (D–AZ) provided statements in the Congressional Record House (October 22, 1990) on pages 31937–31941.

We agree with the objecting comments that the Congressional record is replete with references to the balance, compromise, and agreement in both the process to develop the Act and in the content of the Act itself. We agree with the objecting comments that the Act creates a balance, but we believe that the balance is built into the Act itself through compromises made in the Act before its final passage. The objecting comments appear to indicate that the balance Congress intended comes in only repatriating some human remains and even fewer associated funerary objects (as suggested by the objecting comments reference to the 2010 Final Rule) or that in each decision on disposition or repatriation, a museum or Federal agency must balance the interests of science with those of human rights. We disagree with this interpretation of the legislative history.

The Congressional record of the House clearly identified “points of compromise” in the final version of the Act. Representatives Campbell and Richardson stated the Act represents a compromise on the following issues:

1. Limiting the inventory requirement to only human remains and associated funerary objects rather than all Native American collections;
2. Clarifying the definition of cultural affiliation to incorporate anthropological and archeological criteria (*i.e.*, traced historically or prehistorically);
3. Adding a standard of repatriation for unassociated funerary objects, sacred objects, and objects of cultural patrimony by defining “right of possession;”
4. Tightening the definitions of unassociated funerary objects and sacred objects;
5. Clarifying the definition of museum to not apply to private individuals who receive Federal payments such as social security; and
6. Balancing representation of the Review Committee to include all groups affected by the Act.

Representative Campbell’s statement included two other compromises in the final version of the Act:

The bill takes into account that many of these items may be of considerable scientific value and allows for current studies to continue *with repatriation occurring after the completion of such a study*. It further acknowledges that repatriation is not the only alternative and I encourage all sides to try and work out agreeable compromises where all interested parties can benefit from

access to some of the items (136 Cong. Rec. 31938, emphasis added).

We agree with the last comment summarized above that the only exception to expeditious repatriation under the Act is proving a “right of possession” (25 U.S.C. 3005(c)). Any need to complete a scientific study does not prevent repatriation but only delays it (25 U.S.C. 3005(b)). In addition, we note that any need to excavate human remains or cultural items on Federal or Tribal lands is only permitted after consultation (on Federal lands) or consent (on Tribal lands), and that regardless of any scientific study, disposition of human remains or cultural items to the appropriate lineal descendant, Indian Tribe, or NHO is always required (25 U.S.C. 3002(c)). Accordingly, we conclude that the objective of the systematic processes in the Act is the disposition or repatriation of human remains or cultural items, not to achieve any kind of balance between the interests of science and the interests of human rights.

We intend these regulations to better align with the processes for disposition and repatriation found in the Act. In these regulations, we cannot remove the decision-making authority vested in museums and Federal agencies because doing so would be inconsistent with the Act. We can, and have, included requirements for museums and Federal agencies to consult, collaborate, and, in the case of scientific study or research, obtain consent from lineal descendants, Indian Tribes, or NHOs (see Comment 15). In addition, these regulations require museums and Federal agencies to defer to the Native American traditional knowledge of lineal descendants, Indian Tribes, and NHOs in all decision-making steps.

In developing both the proposed and final regulations, we emphasized consultation with Indian Tribes and NHOs and incorporated comments from consultation to the maximum extent possible. This does not indicate an imbalance in the process to develop these regulations or in the resulting product, but rather reflects the special relationship between the Federal government and Indian Tribes and NHOs (25 U.S.C. 3010). Furthermore, while the Act is the primary authority for these regulations, Congress authorized the Secretary to make such regulations for carrying into effect the various provisions of any act relating to Indian affairs (25 U.S.C. 9). As the Act is Indian law (*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000)), the Secretary may promulgate

this provision under the broad authority to supervise and manage Indian affairs given by Congress (*United States v. Eberhardt*, 789 F. 2d 1354, 1360 (9th Cir. 1986)).

Finally, a statement in the Congressional record by Senator Inouye is directly relevant to the objective of these revised regulations to better reflect Congressional intent:

This legislation is designed to facilitate a more open and cooperative relationship between native Americans and museums. For museums that have dealt honestly and in good faith with native Americans, this legislation will have little effect. For museums and institutions which have consistently ignored the requests of native Americans, this legislation will give native Americans greater ability to negotiate. Mr. President, I believe this bill represents a major step in correcting an injustice that started over 100 years ago. It is appropriate that Congress take an active role in helping to restore these rights to native Americans and I urge the adoption of this measure by the Senate (136 Cong. Rec. 35678).

*8. Comment:* We received two comments requesting the Department develop guidance and a framework to establish reburial areas for repatriated collections. The comments point to the U.S. Department of Agriculture, Forest Service, as an example of how land-managing Federal agencies can assist and support reburials on Federal lands.

*DOI Response:* We appreciate the request, and we understand the significant issues involved with securing lands for reburial. While this request is outside the scope of these regulations, the Department will consider how guidance and policy might be used to effectuate the requested change.

#### *B. Section 10.1 Introduction*

*9. Comment:* We received 42 comments on § 10.1(a) Purpose. Of that total, 18 comments supported the revised paragraph, specifically the inclusion of deference to lineal descendants, Indian Tribes, and NHOs in the purpose paragraph. An additional 19 comments, while generally supportive, also suggested changes to the paragraph. Suggested changes include adherence to the purpose as stated by Congress, emphasizing the limited exceptions to disposition or repatriation, a significant change to verb tense, and defining and referencing deference in the regulatory text. On the other hand, four comments specifically objected to the inclusions of deference in the purpose paragraph and expressed concerns about how deference applies when there are disagreements among Indian Tribes or when other requirements or definitions do not allow

for deference to lineal descendants, Indian Tribes, or NHOs. One comment generally objected to the change in the purpose as an entire rewrite of the regulations that would impede the systematic repatriation process.

*DOI Response:* We specifically requested input on the proposed purpose paragraph, and we appreciate the response and have made changes where permissible. As many comments indicate, the proposed purpose paragraph was not as clear or effective as we had intended. Although some comments suggested we delete the sentence on the rights the Act recognizes, we have retained the sentence given the number of supporting comments we received, but we have changed the verb tense as requested. We have revised the purpose paragraph as suggested by several comments to paraphrase the language used by Congress (H. Rpt. 101–877, at 8) which outlines the two separate processes for disposition and repatriation under the Act. The purpose paragraph uses plain language to describe the overall goals of these two separate processes for disposition and repatriation (protect and restore). In response to the objections and concerns about deference, we have included both consultation and deference as a part of the purpose for these regulations to ensure meaningful consideration of Native American traditional knowledge throughout these processes. It is through consultation and deference that these regulations ensure the rights of lineal descendants, Indian Tribes, and NHOs the Act recognizes.

*10. Comment:* We received four comments on § 10.1(b) Applicability. Three comments suggested editorial changes to the paragraph while one comment strongly supported the paragraph, especially with its focus on museums and Federal agencies as the applicable party.

*DOI Response:* Considering the revisions to § 10.1(a), we have made changes to this paragraph to emphasize the applicable parties that are responsible for each major section of these regulations. We tried to make this paragraph clear that many parts of the Act and these regulations are not limited to Federal or Tribal lands. In response to other comments on the requirements of these regulations, we have clarified that lineal descendants, Indian Tribes, and NHOs are not required to consult or to make a claim for disposition or a request for repatriation.

*11. Comment:* We received two comments related to § 10.1(c) Accountability. One comment suggested

requiring a duty of candor by museums and Federal agencies to disclose any human remains or cultural items that were destroyed, deaccessioned, lost, or in any other way removed from the provisions of these regulations. One comment suggested adding transparency to the accountability requirements.

*DOI Response:* We cannot make the requested change regarding candor as it is contrary to the requirements of the Act. A museum or Federal agency must compile a summary of cultural items and an itemized list of human remains and associated funerary objects in its possession or control (25 U.S.C. 3003(a) and 3004(a)). Based on the information available, a museum or Federal agency must determine if human remains or cultural items that are destroyed, deaccessioned, lost, or in any other way removed are under its possession or control and therefore subject to these regulations. We note that in these regulations, as in the proposed regulations, a museum or Federal agency must ensure the summary and itemized list are comprehensive and cover any holding or collection relevant to § 10.9 and § 10.10.

*12. Comment:* We received five comments objecting to § 10.1(d) Duty of care because the requirements went beyond the statutory authority and should be recommendations not requirements. Some of these comments suggested that the costs to comply with this paragraph would be substantial, that additional curation and collections facilities may need to be constructed, and that conflicts might arise with standard curation, conservation, and preservation principles or practices. One comment questioned how conflicts among Indian Tribes should be handled. Another comment stated that research on human remains and cultural items is necessary to determine cultural affiliation and, therefore, the requirements in this paragraph conflict with the requirements in § 10.3. One comment suggested that “to the maximum extent possible” and “safeguard and preserve” should be replaced with “reasonable effort” and a cross-reference to requirements in 36 CFR part 79, respectively.

*DOI Response:* We disagree that these requirements go beyond the statutory authority or that these requirements should only be recommendations. The Secretary’s authority for promulgating these regulations is discussed extensively in other responses to comments (see Comment 7), the 2010 Final Rule (75 FR 12379), and the 2022 Proposed Rule (87 FR 63207). Given the number of supporting comments for this paragraph during consultation in 2021,

including from the Secretary’s Federal Advisory Review Committee (Review Committee), and comments on the proposed regulations requesting we strengthen these requirements (see Comments 13–17), we chose not to revise these requirements into recommendations. We strongly disagree with the comment that research on human remains or cultural items is required by the Act or these regulations to determine cultural affiliation or for any other purpose. Rather, the Act explicitly and specifically does not require new scientific studies or other means of acquiring or preserving information (25 U.S.C. 3003(b)(2)), and we have incorporated similar language into this paragraph to clarify (see Comment 16).

Earlier drafts of these regulations referenced 36 CFR part 79, as suggested by one comment, but we received substantial negative feedback on this during consultation in 2021 and from the Review Committee. Most of that feedback felt the inclusion of 36 CFR part 79 in these regulations was confusing or concerning. Federal agencies and their repositories must still care for and manage collections that are covered by the provisions of 36 CFR part 79. Regarding speculation on substantial costs, conflicts with conservation and preservation principles, and conflicts among lineal descendants, Indian Tribes, or NHOs, the final regulations now require museums and Federal agencies to make a “reasonable and good-faith effort” to incorporate and accommodate Native American traditional knowledge in the storage, treatment, or handling of human remains or cultural items (see Comment 14).

*13. Comment:* We received 16 comments supporting § 10.1(d) Duty of care as proposed while 23 comments were generally supportive but suggested changes to strengthen the requirements. Many comments requested this paragraph clearly apply to all Native American collections, even those on loan or where specific cultural items subject to the Act have not been identified. Some comments specifically requested “custody” be deleted from the paragraph in line with requested changes to expand “possession or control” or that this paragraph clearly state that a museum or Federal agency only has a duty of care and does not have rightful ownership of Native American human remains or cultural items. Several comments requested a definition of “care for, safeguard, and preserve.” One comment requested this paragraph include a requirement for the National NAGPRA Program to make

sporadic inspections of all museums and Federal agencies to ensure professional museum and archival standards are met, including physically securing collections through clean, rodent-free, and locked areas with limited access. One comment requested additional clarifying language to ensure these requirements do not serve as a justification to delay or avoid repatriation. One comment requested two additional paragraphs be included to require museums and Federal agencies to provide specific and detailed information on any study or research of Native American collections conducted after 1990, including copies of published work and photographs.

*DOI Response:* We cannot require that this paragraph, or this part, apply to all Native American collections as that would be inconsistent with the Act (25 U.S.C. 3003(a) and 3004(a)). The requirements of this paragraph are limited to human remains and cultural items as defined by the Act and these regulations. We cannot remove “custody” from the first sentence and still ensure that this paragraph will apply to human remains and cultural items that are on loan but still subject to the Act (see the definitions of “custody” and “possession or control” discussed elsewhere). We have intentionally included “custody” in the duty of care requirement to ensure all Native American human remains and cultural items are cared for, safeguarded, and preserved until the disposition and repatriation processes are complete. However, the inclusion of museums or Federal agencies with “custody” is not intended to limit the ability of the museum or Federal agency with possession or control of the human remains or cultural items from carrying out its responsibilities under this paragraph or these regulations. We cannot include the requested statement on rightful ownership as it would be contrary to the provisions of the Act where a museum or Federal agency can prove it has a right of possession to a cultural item. We have not changed or defined “to care for, safeguard, and preserve,” and these terms should be understood to have a standard, dictionary definition. We believe these terms, along with paragraphs (d)(1), (d)(2), and (d)(3), are sufficient to ensure an adequate standard of care for human remains and cultural items, including that the human remains or cultural items are properly stored and physically secured in a clean and locked area and are reasonably believed to be safe from damage or destruction by pests or natural elements. We believe the

timelines included in the disposition or repatriation processes ensure that these requirements will not be used to delay or avoid repatriation, and we note that any request for an extension of the deadlines for repatriation or for a stay of repatriation for scientific studies would require consultation with and consent of the appropriate lineal descendant, Indian Tribe, or NHO. While we appreciate the suggestion to require information on any past research or study be provided to lineal descendants, Indian Tribes, or NHOs as a part of a duty of care, this provision is already provided for in §§ 10.9(c)(4) and 10.10(c)(4). Under the Act and these regulations, lineal descendants, Indian Tribes, and NHOs have a right to request records, catalogues, relevant studies, or other pertinent data (25 U.S.C. 3003(b)(2) and 25 U.S.C. 3004(b)(2)), and museums and Federal agencies are required to share that information (25 U.S.C. 3005(d)). As required by the Act, additional information is only provided upon request of an Indian Tribe or NHO, and we cannot make this a requirement that applies to all human remains or cultural items absent such a request.

In conjunction with that reasoning, we have removed the requirement for lineal descendants, Indian Tribes, or NHOs to first make a request for the duty of care requirements that follow, and we have removed “to the maximum extent possible” from the introductory phrase (see Comment 14). We have revised this paragraph to include paragraphs (d)(1), (d)(2), and (d)(3) on what a museum or Federal agency must do as a part of its more general duty of care for human remains or cultural items. These three requirements align with the purpose of the Act, these regulations, and Congressional intent, which was stated as follows:

The [Senate] Committee intends the provisions of this Act to establish a process which shall provide a framework for discussions between Indian [T]ribes and museums and Federal agencies. The Committee believes that the process established under this Act will prevent many of the past instances of cultural insensitivity to Native American peoples. The Committee has received testimony describing instances where museums have treated Native American human remains and funerary objects in a manner entirely different from the treatment of other human remains. Several [T]ribal leaders expressed their outrage at the manner in which Native American human remains had been treated, stored or displayed and the use of culturally sensitive materials and objects in violation of traditional Native American religious practices. In the long history of relations between Native Americans and museums, these culturally insensitive practices have occurred because of the failure of museums

to seek the consent of or consult with Indian [T]ribes (S. Rpt. 101–473, at 3).

Section 10.1(d)(1) requires museums and Federal agencies to consult on the appropriate storage, treatment, or handling of human remains or cultural items, which was reiterated in the proposed regulations at §§ 10.4, 10.9, and 10.10. In these final regulations, we have revised those specific sections to refer to this paragraph.

Section 10.1(d)(2) requires museums and Federal agencies to make a reasonable and good-faith effort to incorporate and accommodate requests made by consulting parties (see Comment 14).

Section 10.1(d)(3) requires museums and Federal agencies to obtain consent from consulting parties prior to any exhibition of, access to, or research on human remains or cultural items (see Comment 15–17).

*14. Comment:* Of the 23 comments requesting we strengthen the duty of care requirements, many requested “deference” replace “to the maximum extent possible.” In addition, all comments objecting to the duty of care requirements raised concerns about the vagueness of this phrase and the potential for conflict between and among consulting parties on the implementation of this phrase.

*DOI Response:* We have removed the phrase and revised § 10.1(d)(2) to require museums and Federal agencies make a reasonable and good-faith effort (in place of “to the maximum extent possible” in the proposed regulations) to incorporate and accommodate the Native American traditional knowledge in caring for human remains or cultural items. As the purpose of the Act and these regulations is the disposition or repatriation of human remains and cultural items, museums and Federal agencies must prioritize requests for storage, treatment, or handling by lineal descendants, Indian Tribes, or NHOs who will be the future caretakers of the human remains or cultural items. These requests may require alterations or exceptions to standard curation or preservation practices. In addition, as noted elsewhere, when consultation on the duty of care does not result in consensus, agreement, or mutually agreeable alternatives, the consultation record must describe the concurrence, disagreement, or nonresponse of the consulting parties.

As an example of how this requirement might be implemented, a consulting Indian Tribe might request that an offering of organic material be placed with human remains until repatriation and physical transfer of the

collection is complete. During consultation, the museum and Indian Tribe might agree on how to accommodate this request while still protecting and preserving the collection. The resulting agreement might include increased pest monitoring in the area with the offering, enclosing the offering in a glass jar next to the human remains or cultural items, or identifying an alternative location for the offering.

As another example of this requirement, a consulting Indian Tribe might request that a particular type of oil or substance be applied to an animal hide that is incorporated into a cultural item. Traditional knowledge indicates that the oil or substance provides both physical and spiritual protection of the cultural item until it is repatriated. During consultation, the museum and Indian Tribe could agree on the appropriate individual, possibly a trained conservator or a Tribal member, and the appropriate method to apply the substance that does not affect other parts of the cultural item or other items in the collection.

Other examples of requests a lineal descendant, Indian Tribe, or NHO might make for specific human remains or cultural items in a collection include smudging in a collection storage space; using specific cloth to cover collections; restrictions on who, how, or when collections are handled; orienting collections in a certain direction; storing certain collections separately or storing certain collections together. Each of these requests must be considered in light of other policies or systems, such as safety precautions, fire suppression systems, human resource policies, or space limitations. Through consultation, these requests may be incorporated and accommodated in a mutually agreeable way. Resources from the School for Advanced Research and the American Alliance of Museums are available to assist all parties with these types of discussions and accommodations (“Standards for Museums with Native American Collections,” May 2023, <https://sarweb.org/iarc/smnac/>, and “Indigenous Collections Care Guide,” publication pending, <https://sarweb.org/iarc/icc/>, accessed 12/1/2023).

*15. Comment:* Of the 23 comments requesting that we strengthen the duty of care requirements, many requested that museums and Federal agencies must obtain consent from lineal descendants, Indian Tribes, or NHOs before any activity occurs that involves any Native American collections, but especially prior to allowing access to or research on human remains and cultural items. Some comments requested adding a requirement to remove human

remains or cultural items from display or public access. Some comments requested replacing “Limit” with “Prohibit” and include “exhibition of” with “access to and research on” in § 10.1(d)(3). One of the comments objecting to the duty of care requirement stated that a limitation on research conflicted with the requirements for determining cultural affiliation, which requires research.

In addition to these comments, 45 comments on provisions for “scientific study” found in Subpart C echoed these requests that the regulations strengthen the protection of human remains or cultural items in holdings or collections. Most of these comments requested that museums and Federal agencies obtain consent from lineal descendants, Indian Tribes, or NHOs prior to allowing any research on human remains or cultural items. The second largest group of comments suggested that museums and Federal agencies must consult with lineal descendants, Indian Tribes, or NHOs prior to allowing research on human remains or cultural items. One comment from a museum and scientific organization requested that the regulations better align with the ethical principles of professional archaeological and anthropological organizations, which call for input, consensus, and informed consent from descendant communities (NPS–2022–0004–0139). One comment from an Indian Tribe explained that research and scientific studies continue to be conducted on human remains and cultural items, despite the repeated requests of Indian Tribes, and this research and study has delayed or even prevented repatriation in some cases. The comment states:

We have raised these issues many times at the Congressional level before the Senate Committee on Indian Affairs and before the NAGPRA Review Committee and nothing was done to prevent the illegal study of our relatives or the lengthy delays in their repatriation and reburial. Changes must be made now to prevent any further privileged use of the Act by agencies and museums who have been allowed to ignore the plain speech in the Act regarding the study of our deceased ancestors and their burial property.

It is plain to see that agencies and museums have had more than enough time (the 33 years that NAGPRA has existed plus all the decades our relatives sat ignored and collecting dust in museum or agency repositories) to conduct their illegal studies and analyses of our poor deceased relatives and their burial property and insist that steps be taken now to prevent any further studies of our deceased relatives and their burial property (NPS–2022–0004–0123).

**DOI Response:** In response to these comments, we revised § 10.1(d)(3), by replacing “Limit” with “Obtain free,

prior, and informed consent” and adding “exhibition of” to “access to or research on human remains or cultural items.” We cannot, as requested by some comments, prohibit exhibition, access, or research on human remains or cultural items as that would exceed the Secretary’s authority under the Act and would be contrary to Congressional intent. While the Act is the primary authority for these regulations, Congress authorized the Secretary to make such regulations for carrying into effect the various provisions of any act relating to Indian affairs (25 U.S.C. 9). As the Act is Indian law (*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000)), the Secretary may promulgate this provision under the broad authority to supervise and manage Indian affairs given by Congress (*United States v. Eberhardt*, 789 F. 2d 1354, 1360 (9th Cir. 1986)). Ambiguities in statutes passed for the benefit of Indians are to be construed to the benefit of the Indians (*Bryan v. Itasca County*, 426 U.S. 373 (1976)).

The Act does not prohibit museums or Federal agencies from conducting scientific studies of human remains or cultural items but does clearly state that such studies are not authorized by or required to comply with the Act (25 U.S.C. 3003(b)(2)). The Act allows for a scientific study to delay, but not to prevent, repatriation (25 U.S.C. 3005(b)). The Act provides only one exception to expeditious repatriation by proving a “right of possession” (25 U.S.C. 3005(c)). In addition, the Act allows for excavation of human remains or cultural items from Federal or Tribal lands for purposes of a study, but only after consultation (on Federal lands) or consent (on Tribal lands) (25 U.S.C. 3002(c)). As a result, there is some ambiguity in the Act related to scientific study, which has been interpreted to mean that the Act neither authorizes nor prohibits scientific study of human remains or cultural items. In exercising the Secretary’s authority for these regulations, the Department considered both the legislative and regulatory history related to scientific study of human remains or cultural items subject to the Act, as well as related recommendations from the Review Committee who is responsible for monitoring the repatriation process (25 U.S.C. 3006(c)(2)).

The legislative history shows Congress intended for the Act to give lineal descendants, Indian Tribes, and NHOs a more equitable voice in any future scientific study of human remains or cultural items. One central goal of the Act was “to allow for the

development of agreements between Indian [T]ribes and museums which reflect an understanding of the important historic and cultural value of the remains and objects in museums collections” (S. Rpt. 101–473, at 4). The Senate Report provided a model of this kind of agreement where a museum agreed to return human remains to an Indian Tribe for burial, and the Indian Tribe chose to bury the human remains in a specially designed crypt that could be opened periodically to provide access for scientists to continue the study of the human remains. Earlier drafts of the legislation allowed for a request for repatriation to be denied if the requested item was part of a scientific study (H. Rpt. 101–877, at 11). In explaining the substitute amendment that ultimately became the Act, Congress explained the change to only delaying, not denying, repatriation for a scientific study was a means of urging “the scientific community to enter into mutually agreeable situations with culturally affiliated [T]ribes in such matters” (H. Rpt. 101–877, at 15).

As discussed in Comment 7, in describing the compromises in the final legislation, Representative Campbell stated that the Act acknowledges “that many of these items may be of considerable scientific value” and “that repatriation is not the only alternative.” Representative Campbell recommended “agreeable compromises where all interested parties can benefit from access to some of the items” (136 Cong. Rec. 31938). Similarly, in urging the passage of the bill, Senator Inouye stated “[f]or museums and institutions which have consistently ignored the requests of native Americans, this legislation will give native Americans greater ability to negotiate” (136 Cong. Rec. 35678). This sentiment was echoed by Senator Akaka who stated the Act would, among other things, “eliminate the longstanding policy of scientific research on future remains found” (136 Cong. Rec. 35678).

In its final version, the Act used the term “scientific study” twice. First, in describing what documentation may be requested, the Act explicitly and specifically does not require new scientific studies on human remains or associated funerary objects (25 U.S.C. 3003(b)(2), referred to here as “scientific studies are not required”). Second, the Act requires that when a specific scientific study of human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony will result in a major benefit to the United States, a museum or Federal agency may postpone repatriation but

may not deny the request for repatriation (25 U.S.C. 3005(b)), referred to here as “delay for scientific study”).

The regulations as proposed in 1993 and as promulgated in 1995 addressed only the delay for scientific study under the exceptions to repatriation in § 10.10. The regulations included the statutory language on documentation of human remains at § 10.9 but did not include that scientific studies are not required. The 1995 Final Rule made a reference to both scientific study provisions in responding to one comment that repatriation could not occur until a scientific analysis was completed. The Department responded stating:

Section 5 (a) specifies that the geographic and cultural affiliation of human remains and associated funerary objects be determined ‘to the extent possible based on information possessed by the museum of Federal agency.’ No new scientific research is required. Delaying repatriation until new scientific research is completed contradicts the intent of Congress unless that scientific research is considered to be of major benefit to the United States (60 FR 62156).

The 2007 Proposed Rule, Disposition of Culturally Unidentifiable Human Remains, added that scientific studies are not required to the paragraph on documentation of human remains at § 10.9. The 2007 Proposed Rule added text to explain (1) any documentation provided is a public record and (2) a request for documentation cannot be construed as authorizing a new scientific study or other means of acquiring information. These additions were drawn directly from the Review Committee’s recommendations on culturally unidentifiable human remains (discussed below).

In the 2010 Final Rule, Disposition of Culturally Unidentifiable Human Remains, the Department responded to three comments on scientific study specifically. Under General Comments, Comment 3 summarized comments opining that “Congress intended to allow study of ancient, unaffiliated remains.” The Department responded that “The Act does not draw a distinction between ‘ancient’ and more recent remains” and then reiterated that scientific studies are not required (75 FR 12380). Under Section 10.9 Other General Comments, Comment 57 summarized comments that “requested a clear and explicit explanation of how the proposed rule takes into account the potential interests of the public in scientific research and education.” The Department responded that scientific studies are not required (75 FR 12387).

In the 2010 Final Rule, under Section 10.9(e)(5) Additional Documentation, Comment 46 summarized 20 comments

regarding the addition in the proposed regulations that scientific studies are not required. Some comments stated the language would “create a seemingly impossible conundrum, would severely hinder the scientific study of ancient remains, and are ‘an obvious attempt to end-run Congressional intent and a Federal court ruling in the long-fought Kennewick Man case.’” One comment requested language be added to clarify that scientific studies are not prohibited, and another comment requested language be added to allow scientific studies if the consulting parties agree. The largest number of comments requested language stating that human remains must be treated with respect and “should not be subject to any further scientific research or used for teaching purposes.” In response to these comments, the Department simply stated that the language came directly from the Act and reflected Congressional intent (2010 Final Rule at 12386). Since 2010, both provisions on scientific study have been codified in the regulations.

While the existing regulations include both provisions on scientific study, the existing regulations do not provide any mechanisms for ensuring that scientific studies are not required or for administering the delay for scientific study. In the 2021 draft revisions of the regulations prepared for Tribal consultation, the Department introduced a procedure, through the Secretary, to administer the delay for scientific study but did not include any reference that scientific studies are not required. We received a significant number of comments regarding both scientific study provisions during Tribal consultation and from the Review Committee. As a result of this input, the proposed regulations included in the duty of care requirement a limitation on “access to or research on” human remains or cultural items which would provide for implementation as well as enforcement that scientific studies are not required. The proposed regulations also provided procedures to administer the delay for scientific study by both requesting and receiving concurrence of the Secretary as a stay of the repatriation timeline under §§ 10.9 and 10.10.

In preparing these final regulations, we looked at not only the comments we received on the proposed regulations but also to the legislative and regulatory history discussed above and to input from the Review Committee on these issues. As noted above, the addition to the regulations in 2007 that scientific studies are not required was based on a Review Committee recommendation. Notably, the Review Committee’s

recommendation was not to include the statutory language, but to clarify that scientific studies must be agreed to by all parties through consultation. In its 2000 final recommendations on culturally unidentifiable human remains, the Review Committee recommended:

Documentation must occur within the context of the consultation process. Additional study is not prohibited if the parties (Federal agencies, museums, lineal descendants, Indian [T]ribes, and Native Hawaiian organizations) in consultation agree that such study is appropriate (65 FR 36463, June 8, 2000).

Between July 2021 and June 2022, the Review Committee reviewed and discussed the draft regulatory text and, in its final recommendations, developed its own duty of care requirement:

Duty of care. Through meaningful consultation with [T]ribes and Native Hawaiian organizations, Federal agencies, museums, universities, and repositories shall provide standards of care based upon the free, prior, and informed consent of [T]ribes and Native Hawaiian organizations for human remains and cultural items. Museums and Federal agencies have an obligation to adhere to a standard of reasonable care while performing any act that would foreseeably harm any cultural item in their possession or control. This duty includes taking affirmative steps to verify the location and condition of all cultural items in the control of the museum or Federal agency, and consulting with any lineal descendants and any culturally or geographically affiliated Indian [T]ribes or Native Hawaiian organizations to determine the standard of care they consider reasonable (NPS–2002–0004–0003, attachment page 2).

As noted in the document, one Review Committee member objected to the requirement of “consent” by Indian Tribes or NHOs to the standards of curatorial treatment for Native American human remains and other cultural items. The Review Committee member stated “[s]uch a unilaterally-imposed requirement might not be appropriate or reasonable, and in some circumstances might violate existing binding administrative agreements, legal obligations, and/or professional standards of the curating organization” (NPS–2022–0004–0003, attachment page 2, footnote 1).

In preparing the proposed regulations, we adopted the Review Committee’s recommendation to include consultation, collaboration, and consent but, in response to the objecting comment, caveated the requirement with “to the maximum extent possible.” The proposed regulations did not include the Review Committee’s suggested language of “free, prior, and informed consent” and the last sentence

of the Review Committee's recommendation was incorporated directly into Subpart C. In preparing these final regulations, we revisited the Review Committee's recommendations and found we were able to incorporate the concept of "free, prior, and informed consent" by clarifying the provisions in § 10.1 pertaining to duty of care. Paragraph (d)(1) requires consultation, paragraph (d)(2) requires collaboration, and paragraph (d)(3) requires consent. We agree with the Review Committee member and some of the comments on the proposed regulations that curatorial standards and other requirements may limit a museum or Federal agency's ability to incorporate or accommodate requests from lineal descendants, Indian Tribes, or NHOs, and, as discussed in Comment 14, museums and Federal agencies must make a reasonable and good-faith effort to do so. We have limited the requirement to obtain consent only to the exhibition of, access to, or research on human remains and cultural items.

As the purpose of the Act and these regulations is the disposition or repatriation of human remains or cultural items, we find it appropriate that museums and Federal agencies must obtain consent from lineal descendants, Indian Tribes, or NHOs before conducting activities that might physically or spiritually harm human remains or cultural items. For purposes of the duty of care paragraph, the lineal descendants, Indian Tribes, or NHOs are those identified as consulting parties under §§ 10.4(b)(1), 10.9(b)(1), and 10.10(b)(1): Consulting parties are any lineal descendant and any Indian Tribe or NHO with potential cultural affiliation. If a museum or Federal agency cannot identify any consulting parties for specific human remains or cultural items, the duty of care requirement still applies. Until consulting parties are identified, the museum or Federal agency may not be required to consult under paragraph (d)(1) or collaborate under paragraph (d)(2) of § 10.1. Until consulting parties are identified, the museum or Federal agency must not allow any exhibition of, access to, or research on human remains or cultural items as doing so may be subject to a failure to comply with the requirements of these regulations. If a museum or Federal agency wished to conduct a specific scientific study of human remains or cultural items, it could do so by following the requirements for a stay of repatriation under §§ 10.9 or 10.10. After following the requirements of these regulations, nothing would

preclude a museum or Federal agency from exhibiting, allowing access to, or conducting research on collections that are not subject to the Act or, after disposition or repatriation, reaching an agreement with the requesting lineal descendant, Indian Tribe, or NHO.

*16. Comment:* We received four comments requesting the regulations include in § 10.10 the related statutory language from 25 U.S.C. 3003(b)(2) on "scientific study." Another comment questioned if "scientific study" as used in §§ 10.9 and 10.10 equated to a single study that records paleopathology on an individual or a long-term archaeological project at a site that includes many sub-projects that study different bioarcheological and physical anthropological topics.

*DOI Response:* We incorporated the statutory language on "scientific study" into paragraph (d)(3) by adding two sentences to clarify that the term "research" as used here equates to the term "scientific study" in the Act and to emphasize that "research" of any kind is not required by the Act or these regulations. We have defined "research" to mean any study, analysis, examination, or other means of acquiring or preserving information. "Research" includes any activity to generate new or additional information beyond the information that is already available, for example, osteological analysis of human remains, physical inspection or review of collections, examination or segregation of comingled material (such as soil or faunal remains), or rehousing of collections. "Research" is not required to identify the number of individuals or cultural items or to determine cultural affiliation.

For example, if a museum wished to physically examine its collection to identify the number of individuals or associated funerary objects, the museum must first obtain consent from lineal descendants, Indian Tribes, or NHOs. Until that consent is obtained, the museum must rely on the information available (previous inventories, catalog cards, accession records, etc.) to identify consulting parties, conduct consultation, update the inventory, and submit a notice of inventory completion.

If a Federal agency wished to examine an unprocessed collection of archaeological material excavated from Federal land after 1990 to identify if any human remains or cultural items were present, it could do so until human remains or cultural items were identified. At that time, any further examination or inspection of the collection would require obtaining consent from a lineal descendant,

Indian Tribe or NHO. Until that consent is obtained, the Federal agency must rely on the information available (excavation location, field notes, etc.) to identify consulting parties, conduct consultation, and complete the disposition of the human remains or cultural items.

*17. Comment:* We received five comments, including those by the Review Committee, objecting to the inclusion of unassociated funerary objects, sacred objects, or objects of cultural patrimony in the delay for scientific study because it is inconsistent with the Act and adverse to Tribal interests. These comments requested that the stay of repatriation in § 10.9 for "scientific study" be deleted in its entirety (see NPS-2022-0004-0096; NPS-2022-0004-0143; NPS-2022-0004-0151; NPS-2022-0004-0177; and NPS-2022-0004-0183).

*DOI Response:* We believe these comments conflated the two statutory provisions for "scientific study" we outlined in response to Comment 16 ("scientific studies are not required" and "delay for scientific study"). We agree that the Act limits the provision that scientific studies are not required to only human remains and associated funerary objects (25 U.S.C. 3003(b)(2)). Similar language does not appear in the Act for unassociated funerary objects, sacred objects, and cultural patrimony (25 U.S.C. 3004(b)(2)).

We do not agree, however, that extending the provision that scientific studies are not required or the corresponding paragraph at (d)(3) to unassociated funerary objects, sacred objects, or objects of cultural patrimony is adverse to Tribal interests. Rather, we feel this extension accomplishes the request made by many individuals, Indian Tribes, and Native American organizations to prohibit all "research" on human remains as well as any cultural item (see NPS-2022-0004-0107; NPS-2022-0004-0138; NPS-2022-0004-0158; NPS-2022-0004-0161; and NPS-2022-0004-0187). Therefore, paragraph (d)(3) on duty of care that requires consent for exhibition, access, or research applies to human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony.

We understand that the delay for scientific study in both §§ 10.9 and 10.10 is adverse to Tribal interests and may seem to allow or authorize scientific studies. As one comment stated clearly:

Finally, please note our previous statement that we are categorically opposed to any

scientific study of our ancestors, their burial property or any item of our sacred or cultural patrimony and we specifically request that any language allowing any type of scientific study of any NAGPRA-related item be stricken from this rulemaking for the reasons submitted by our Nation, above (NPS–2022–0004–0123).

We cannot remove reference to “scientific study” or research from these regulations. The delay for scientific study applies to all “Native American cultural items,” which are defined in the Act as human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony (25 U.S.C. 3005(b)). As any elimination or restriction of 25 U.S.C. 3005(b) would require an act of Congress, we cannot remove the reference to “scientific study” entirely or make the requested change to remove § 10.9(i)(3). We have, however, strengthened the requirements under duty of care in this final rule to ensure better implementation and enforcement that scientific studies are not required.

18. *Comment:* We received three comments requesting clarification of § 10.1(e) Delivery of written documents. One comment requested an editorial change to the text and the other two comments requested an explanation of proof of receipt. One comment stated that tracking the sending and receipt of written documents was a considerable burden on all parties and would require a significant outlay of resources (NPS–2022–0004–0135).

*DOI Response:* We have made the requested editorial change to paragraph (e)(1) and added “one of the following” to “must be sent by.” Regarding “proof of receipt” for email, many email systems include an option to request a read receipt automatically. While these systems may not constitute legal proof, use of such systems is sufficient for the purposes of these regulations. If an email system does not provide this option, other software or services can provide proof of receipt for little to no cost. However, we do not expect or require additional software or services to meet this requirement. The minimum requirement to satisfy “proof of receipt” would be to request that the recipient acknowledge receipt of the email. If no acknowledgment is received, the sender may follow up with a phone call to ensure the email was received. A call log or note to the file would be sufficient “proof of receipt.”

19. *Comment:* We received four comments suggesting changes to § 10.1(f) Deadlines and timelines. One comment noted that Tribal holidays may not coincide with Federal holidays and should be included. Another

comment requested this paragraph clarify that the **Federal Register** calculates calendar days. One comment questioned how the Manager, National NAGPRA Program, will meet the notice publication deadline if there is a lapse in appropriations. One comment specifically questioned the use of business days in relation to the requirements under § 10.5 and stated that under the Act, “days” means calendar days. By using business days, the total maximum work stoppage under § 10.5 could increase to some 95 calendar days. In enacting the 30-day stop-work period, Congress said “days,” which is commonly understood as calendar days. Similarly, Rule 6(a) of the Federal Rules of Civil Procedure provides that, in computing any time period specified in the Rules, in any local rule or court order, or in any statute that does not specify a method of computing time, when a period is stated in days or a longer unit of time, every day is counted, including intermediate Saturdays, Sundays, and legal holidays. Furthermore, the comment states, except for using three “working days” for the ministerial certification of receipt of a notice of discovery, the Department has always used calendar days as the metric for calculating a period in the existing regulations stated in days or a longer unit.

*DOI Response:* We agree that in the Act, days means calendar days. We appreciate the comment on Tribal holidays, but given the great variation in those dates, we cannot accommodate the request to include or observe Tribal holidays. The purpose of this paragraph is to provide clear instruction on how to calculate dates for the deadlines and timelines in these regulations. Earlier drafts of these regulations used calendar days. We received requests during consultation in 2021 to use business days and to account for a lapse in appropriations. We noted this change would lengthen most deadlines in the regulations but accepted the suggested change in the proposed regulations. We have revised paragraph (f)(1) in § 10.1 to calendar days and included an exception for when a deadline falls on a Saturday, Sunday, or Federal holiday, including a lapse in appropriations.

20. *Comment:* We received seven comments suggesting changes to § 10.1(g) Failure to make a claim or a request. Five comments requested we delete this paragraph because the Act does not provide the Secretary with the authority to include this waiver of rights language in the regulations. These comments state that an Indian Tribe or NHO must never lose its rights to claim

disposition or request repatriation of human remains or cultural items. One comment requested clarification and guidance on the application of this paragraph to the time between sending a repatriation statement and completing physical transfer of human remains or cultural items. One comment requested the regulations require clear and concise written proof of compliance with the notice and consultation requirements prior to any waiver of a right to make a claim or a request.

*DOI Response:* The Secretary’s authority for promulgating these regulations is discussed extensively in the 2010 Final Rule (75 FR 12379) and the 2022 Proposed Rule (87 FR 63207). The purpose of a disposition or repatriation statement is to provide clear and concise written proof that the requirements of the Act have been fulfilled (25 U.S.C. 3002(a) and 3005(a)). With the disposition or repatriation statement, the museum or Federal agency divests itself of any interest in the human remains or cultural items.

We cannot remove this paragraph without jeopardizing the entire disposition or repatriation processes provided by the Act and these regulations. This paragraph has been included in these regulations since the 1993 Proposed Rule (58 FR 31132) and ensures that any claim for disposition or request for repatriation must be considered by a museum or Federal agency prior to disposition, repatriation, transfer, or reinterment of human remains or cultural items. Once disposition, repatriation, transfer, or reinterment occurs, a museum or Federal agency cannot accept a claim or request from another party as the museum or Federal agency no longer has any rights to or interest in the human remains or cultural item. This paragraph provides protection for lineal descendants, Indian Tribes, and NHOs as well as for museums and Federal agencies that once a disposition or repatriation statement is sent, it is not subject to future appeal or challenge.

21. *Comment:* We received four comments suggesting changes to § 10.1(h) Judicial jurisdiction. Three comments requested we include the role of the U.S. Court of Federal Claims in resolving specific matters. One comment asked if this paragraph restricted the role of Tribal courts in any related legal actions.

*DOI Response:* Nothing in the Act or these regulations is intended to abrogate any concurrent Tribal jurisdiction that may exist with respect to alleged violations of similar Tribal laws on Tribal lands. Regarding the U.S. Court of Federal Claims, we disagree with the

suggested change. This paragraph reflects the statutory description of judicial jurisdiction for violations of the Act (25 U.S.C. 3013). It is not intended to address judicial jurisdiction for potential constitutional violations, such as the possibility of a Fifth Amendment taking as described in the Act's definition for "right of possession" (25 U.S.C. 3001(13)). It is unnecessary for these regulations to address the Court of Federal Claims' jurisdiction over Fifth Amendment takings claims, which is well-established and not specific to this Act. Regarding collection of civil penalties, this is already included in § 10.11, specifically in paragraph (m)(2) of these regulations.

22. *Comment:* We received 19 comments suggesting changes to § 10.1(i) Final agency action. Four comments requested clarification as to how to interpret final agency action and confirming that disposition or repatriation determinations are final agency actions. Four comments considered the categories of final agency action to be too narrow as written and recommended adding language to clarify and including examples of determinations that would make this part inapplicable, such as determinations regarding plans of action, excavations, Federal land ownership, and possession or control. On the other hand, one comment described how those categories of final agency action impermissibly broaden the concept. Six comments urged the Department to approve all museum determinations under these regulations or compel museum action, and that such approval or failure to compel should be defined as final agency action. Four comments recommended that the Assistant Secretary's decision not to assess a civil penalty be considered reviewable as final agency action.

*DOI Response:* The Act does not grant the Secretary authority to approve or compel museum determinations, other than by assessing civil penalties for failures to comply. Regarding civil penalties, we have not made changes that would make decisions to assess civil penalties reviewable as final agency action because, first, the Act makes this decision permissive, not required, and second, such decisions are comparable to those in a criminal context (*United States v. Halper*, 490 U.S. 435 (1989)) and generally considered unreviewable under the Administrative Procedure Act in order to preserve prosecutorial discretion (*Heckler v. Cheney*, 470 U.S. 821 (1985)). While we appreciate the remaining recommendations, we believe

that the concerns underlying each are already addressed by the language as it appeared in the proposed regulations. First, the inclusion of any final determination making the Act or this part inapplicable is intentionally broad and inclusive enough to capture the examples and other regulatory actions described in the comments. Second, at the same time, because this determination must be final, because it is on its own terms limited to situations where the information available to the Federal agency has informed the determination that the Act or this part is inapplicable, and because the determination in question is specific to the application of this Act or this part, the category is sufficiently limited in scope so as to ensure consistency with the Administrative Procedure Act. The Department does not consider this language in these regulations to redefine final agency action, but only to clarify its existing application across the entirety of the Act and this part.

In addition, we have added a paragraph (k) to this section on severability. While this rule is intended to create systematic processes for implementing the Act, if a court holds any provision of one part of this rule invalid, it should not impact the other parts of the rule. For example, a decision holding a portion of Subpart B invalid should not impact Subpart C, since they are two separate processes for two different situations. Similarly, a decision holding part of the inventory process invalid should not impact the summary or repatriation processes. Any decision finding any provisions in this rule to be invalid would not impact the remaining provisions, which would remain in force. The intent of this rule is to streamline the processes and increase deference to lineal descendants, Indian Tribes, and NHOs as a whole, but the rule is not an interdependent whole—other provisions of the rule would implement that intent even if a court declared certain provisions invalid.

### C. Section 10.2 Definitions for This Part

23. *Comment:* We received four comments requesting we add new definitions. Three comments requested we define "deference." One comment requested we define "simple itemized list," "lot," and "specific area" for funerary objects.

*DOI Response:* We have not defined "deference" in these regulations. As used in these regulations, this term is intended to ensure meaningful consideration of Native American traditional knowledge of lineal descendants, Indian Tribes, and NHOs

throughout the systematic processes for disposition and repatriation. The term should be understood to have a standard, dictionary definition: "respect and esteem due a superior or an elder; *also* affected or ingratiating regard for another's wishes" (Merriam-Webster definition of "deference" <https://www.merriam-webster.com/dictionary/deference>, accessed 12/1/2023). The requirement for deference is not intended to remove the decision-making responsibility of a museum or Federal agency under the Act or these regulations but is intended to require that a museum or Federal agency recognize that lineal descendants, Indian Tribes, and NHOs are the primary experts on their cultural heritage. We believe the application of deference in these regulations is clear, and we have reinforced its application through changes to paragraphs in § 10.1(a) Purpose and (d) Duty of care and in the definition of "consultation" below.

We do not believe it is necessary to define "simple itemized list," "lot," or "specific area." Each of these terms should be understood to have a standard, dictionary definition, and when a museum or Federal agency is trying to apply them, we note that consultation with lineal descendants, Indian Tribes, or NHOs should inform that decision.

24. *Comment:* We received six comments supporting the definitions in the proposed regulations. These comments appreciated that the definition of "cultural item" (and the definitions of specific kinds of cultural items) included language that recognizes lineal descendants, Indian Tribes, and NHOs are the primary experts on their own cultural heritage. One comment requested these definitions be further strengthened by requiring museums and Federal agencies defer to the determination of the lineal descendant, Indian Tribe, or NHO. Similar comments were repeated in each of the definitions of specific kinds of cultural items.

*DOI Response:* We have retained the language in the definition of "cultural item," "funerary object," "sacred object," and "object of cultural patrimony." We have not added a requirement for deference to the determinations of lineal descendants, Indian Tribes, or NHOs as it would be inconsistent with the Act. Museums and Federal agencies are responsible for making determinations under the Act and these regulations, but must do so after consulting with lineal descendants, Indian Tribes, and NHOs. We have changed the order of the sentences to

reflect the importance of Native American traditional knowledge (which includes customs and traditions) in these definitions. Furthermore, we have strengthened the application of these definitions through changes to paragraphs in § 10.1(a) Purpose and (d) Duty of care and in the definition of “consultation” below.

25. *Comment:* We received 21 comments on the proposed definitions of “acknowledged aboriginal land” and “adjudicated aboriginal land.” Of that total, 13 comments suggested changes to the definitions while eight comments supported both definitions as proposed.

*DOI Response:* Due to the changes to the definition of “cultural affiliation,” we are not finalizing the proposed definitions of aboriginal land in this rule. We believe the changes to cultural affiliation address the concerns expressed by the comments and ensure consultation on and consideration of information about aboriginal occupation in determining cultural affiliation. We have replaced “adjudicated aboriginal land” in the regulatory text with the elements of the definition.

26. *Comment:* We received 21 comments on the definition of “affiliation.” Of that total, 14 comments suggested changes to the definition while seven comments supported it. One comment questioned if the Secretary has the authority to alter a definition in the statute and opposed the generalized and simplistic meaning of “affiliation.” The other comments requested that the definition of “affiliation” be used to define “cultural affiliation.”

*DOI Response:* We agree with the suggestion to add “cultural” before affiliation in this definition. We have clarified this definition by incorporating the Congressional intent of this definition “to ensure that the claimant has a reasonable connection with the materials” (H. Rpt. 101–877, at 14, and S. Rpt. 101–473, at 6). The additional language found in the definition in the Act (traced through time and identifiable earlier group) has been incorporated into the procedure for determining cultural affiliation and the related changes explained in our responses under § 10.3. We included in the definition of cultural affiliation the two ways cultural affiliation may be identified (clearly or reasonably), taken from the language in the Act (25 U.S.C. 3003(d)(2)).

27. *Comment:* We received two comments suggesting changes to the definition of “ahupua’a.”

*DOI Response:* We agree with the comments and have made the suggested changes. We appreciate the feedback

that the definition of ahupua’a includes extra contextual information that is already incorporated in § 10.3. We also note that priority for cultural affiliation is not given to an NHO based on the NHO’s location or cultural practice at the time of their claim or request but rather priority for cultural affiliation is based on the NHO’s relationship to the earlier occupants of the ahupua’a from where the human remains or cultural items were removed or in which they are discovered.

28. *Comment:* We received three comments suggesting changes to the definition of “appropriate official.” One comment suggested that the appropriate official be trained on the time requirements of that job. The other comments wanted the Department to provide a contact list of appropriate officials.

*DOI Response:* The responsible Indian Tribe, NHO, DHHL, or Federal agency is responsible for the training the appropriate official. The National NAGPRA Program maintains contact information on its website at <https://grantsdev.cr.nps.gov/NagpraPublic/Home/Contact> (accessed 12/1/2023). We encourage Indian Tribes, NHOs, Federal agencies, and museums to provide or update contact information on a regular basis. We also point out that the Advisory Council on Historic Preservation keeps an updated list of Federal agency at <https://www.achp.gov/protecting-historic-properties/fpo-list> (accessed 12/1/2023). The National Park Service and the Bureau of Indian Affairs maintain contact information on Tribal Historic Preservation Offices at [https://grantsdev.cr.nps.gov/THPO\\_Review/index.cfm](https://grantsdev.cr.nps.gov/THPO_Review/index.cfm) (accessed 12/1/2023) and Tribal Leaders at <https://www.bia.gov/bia/ois/tribal-leaders-directory/> (accessed 12/1/2023).

29. *Comment:* We received 10 comments suggesting changes to the definitions of “ARPA Indian land” and “ARPA public land.” Most of the comments said that the definitions are inconsistent with the Act and would unduly narrow the application of the Act and these regulations. One comment noted that the definition of “ARPA Indian land” includes the term “individual Indian.” The comment stated that the latter term was undefined in the proposed regulations and suggested that it be replaced with the defined term “lineal descendant.”

*DOI Response:* We have not changed these definitions. These definitions do not change the application of NAGPRA. NAGPRA applies to its fullest extent on “Federal land” or “Tribal land,” as

defined in both the statute and these regulations. Rather, the terms “ARPA Indian land” and “ARPA public land” define which excavations under NAGPRA require a permit issued under ARPA and which do not. Specifically, NAGPRA requires that human remains or cultural items may only be excavated or removed from Federal or Tribal land if, among other requirements, “such items are excavated or removed pursuant to a permit issued under [ARPA] which shall be consistent with [NAGPRA].” 25 U.S.C. 3002(c)(1). Since both NAGPRA and ARPA are intended to protect important cultural resources, they must be construed together. Further, “issued under ARPA” is an adjectival phrase modifying “permit.” Thus, it is not ARPA that “shall be consistent with NAGPRA,” but rather the ARPA permit that must be consistent with NAGPRA. This is supported by the NAGPRA legislative history. The Senate Indian Affairs Committee specifically noted that it “[intended] the notice and permit provisions of this section to be fully consistent with the provisions of [ARPA]” (S. Rpt. 101–473, at 7). Likewise, the House Committee on Interior and Insular Affairs, in discussing the stopping of work for an inadvertent discovery, noted that, “[a]lthough a specific time limit was not added here, the Committee does intend to protect the remains and objects found and does not intend to weaken any provisions of other laws, such as [ARPA], regarding similar situations.” Like the Senate Committee, the House Committee also stated that, “[s]ubsection (c) provides that items covered by this Act can be excavated from Federal or [T]ribal land if proof exists that a permit has been acquired under Section 4 of the [ARPA]” (H. Rpt. 101–877, at 15 and 17).

Therefore, the provisions of ARPA, including the scope of public land and Indian land, are not affected by NAGPRA. So, the terms “ARPA Indian land” and “ARPA public land” are defined in these regulations using the exact same definitions of “Indian land” and “public land” in ARPA, including use of the term “individual Indian,” which is used in ARPA to denote land that is owned by an individual Indian, who may or may not be a “lineal descendant” as defined in NAGPRA. The protection of the scope of both statutes is reflected in these regulations by the requirement that ARPA permits are issued for NAGPRA excavations just as they are for ARPA excavations, keeping the full protections of each statute in place, as Congress intended.

30. *Comment:* We received 39 comments on the definition of “consultation.” Of that total, two comments objected to the definition because “to the maximum extent possible” was a vague and troubling standard. These two comments also objected to the use of consensus and requested it be removed or made a recommendation rather than a requirement because, as one comment stated, “it is not within the ability of museums to seek consensus or mediate potential disagreements among sovereign nations during the consultation process” (NPS–2022–0004–0136). In addition, one comment didn’t object to the definition but requested clarification as to whether “seek consensus” would mean museums and Federal agencies must ensure responses are received from all parties invited to consult.

On the other hand, nine comments supported the definition as proposed while 27 comments supported the definition but suggested changes to strengthen it. Most of these comments suggested changing “seek consensus” to “achieve” or “strive for” consensus, replacing “incorporating” with “deferring to,” replacing “to the maximum extent possible” with “as the Indian Tribe or Native Hawaiian organization understands them,” or removing “to the maximum extent possible.” A few comments suggested adding that consultation is between equal parties or that it must be conducted in good faith. A few comments suggested including a requirement for museum or Federal agency decision-makers to be present at consultation, for consultation to be continual, or to add “transparent” and “formal” to the definition. One comment renewed a request to use the definition of consultation in 36 CFR part 800.

*DOI Response:* Consultation is a critical, central, and continual part of the systematic processes for disposition or repatriation provided by the Act and these regulations. However, neither the Act nor the existing regulations define consultation. Earlier drafts of these regulations drew directly on Congressional report language that “consultation” under NAGPRA means “the open discussion and joint deliberations with respect to potential issues, changes, or actions by all interested parties” (H. Rpt. 101–877, at 16). Specific to the inventory, Congress emphasized the need for “cooperative exchange of information between Indian [T]ribes or Native Hawaiian organizations and museums regarding objects in museum collections” (S. Rpt.

101–473, at 8). In the proposed regulations, we added specific types of information that are exchanged during consultation (identifications, recommendations, and Native American traditional knowledge). We also drew language from other definitions for consultation found in 36 CFR part 800, Executive Order 13175, and draft guidance and language that became the November 2022 White House memorandum on Uniform Standards for Tribal Consultation.

In response to comments that objected to the proposed definition, we have removed “to the maximum extent possible” and clarified the goal of consultation is to strive for consensus, agreement, or mutually agreeable alternatives. We did not and do not intend for “consensus” to imply museums or Federal agencies are required to mediate potential or even actual disagreements among lineal descendants, Indian Tribes, or NHOs. Likewise, “consensus” does not require a museum or Federal agency receive a response from every invited consulting party before it can proceed. The consultation record should include efforts to invite consulting parties. When consultation does not result in consensus, agreement, or mutually agreeable alternatives, the consultation record must describe the concurrence, disagreement, or nonresponse of the consulting parties.

In response to comments that requested strengthening the definition for consultation, we have revised the second half of the sentence to better reflect the goals of consultation. We have added “good faith” to the definition to ensure honest and fair consideration of all points of view and removed it from each of the regulatory steps on consultation. We have expanded the definition to clearly identify the goals of consultation, drawing on other sources suggested by the comments. “Seek, discuss, and consider the views of all parties” comes from language in 36 CFR part 800.16. Although we received several comments requesting we change “seek” to “achieve,” we have used “strive for” which was suggested by some comments and is found in the November 2022 White House memorandum on Uniform Standards for Tribal Consultation. We feel this change better reflects the goal of consultation and is stronger than “seek consensus” but still reflects consensus may not be achieved. We have also added to the goal of consensus “agreement” and “mutually acceptable alternatives.” Although we received several comments requesting we add deference to this

definition, we have instead added that consultation enables consideration of the kinds of information that can be provided by lineal descendants, Indian Tribes, and NHOs. This replaces the more limited list of information in the proposed regulations, and we expect it will provide a more robust and clearer record of information shared by lineal descendants, Indian Tribes, and NHOs during consultation.

In response to all the comments and as noted elsewhere, when consultation does not result in consensus, agreement, or mutually agreeable alternatives, the consultation record must describe the concurrence, disagreement, or nonresponse of the consulting parties. Although a few comments suggested we require in the definition that decision makers attend consultations, we have not included this in these regulations. We believe this requirement may not fit every situation and might end up delaying or eliminating the efficiencies of these regulations. Rather, we note that when consultation does not result in consensus, agreement, or mutually acceptable alternatives, consulting parties may wish to involve decision makers from all parties to see if a resolution can be found.

Lastly, we note that consultation as defined here is different than consultation defined in other contexts, especially consultation between a Federal agency and an Indian Tribe or NHO. For purposes of disposition or repatriation, Federal agencies are required to comply with this definition of consultation as well as any applicable policy on government-to-government/sovereign consultation that would apply in all contexts. For purposes of repatriation, we cannot require museums to conduct the same level of consultation that would be required for a Federal agency. We feel this definition of consultation provides requirements that can be met by both museums and Federal agencies, fills in a missing piece of the Act and the existing regulations, and ensures consultation remains a critical, central, and continual part of the systematic processes for disposition or repatriation.

31. *Comment:* We received 20 comments on the definition of “cultural item.” Of that total, 16 comments suggested changes to the definition while four comments supported it. Four comments stated that changing the definition of cultural item to exclude human remains exceeded the Secretary’s authority. One comment objected to the definition without further request for changes. One comment suggested a grammatical change. One comment suggested

cultural item be broadened to include documents and records (including photographs) associated with human remains or cultural items to ensure repatriation of those documents and records. Six comments requested the definition of cultural items be expanded to require Tribal consultation. The comments pointed out that the definitions in the Act “depend in part on [T]ribal use and cultural significance. 25 U.S.C. 3001(3). Courts have clarified that Indian Tribes play a role in determining whether items possess the requisite cultural significance to meet NAGPRA’s definitions, especially regarding ‘cultural patrimony.’ See *United States v. Tidwell*, 191 F.3d 976, 981 (9th Cir. 1999); *United States v. Corrow*, 119 F.3d 796, 805 (10th Cir. 1997).” (see NPS–2022–0004–0119 for one of the six comments). Three comments objected to the definition as proposed because the required deference to Indian Tribes and NHOs in the regulations and the definitions of cultural items had the potential to create conflict between types of information or among Indian Tribes or NHOs.

*DOI Response:* As we stated in the proposed regulations, use of the phrase “human remains or cultural items” is responsive to requests of Indian Tribes and NHOs. The existing regulations do not define “cultural items” but still use the term to include human remains. This change from “cultural items” to “human remains or cultural items” is only editorial and does not have any impact on the applicability or scope of these regulations. This editorial change is within the Secretary’s authority, as the Department asserted in the 1993 Proposed Rule (58 FR 31122).

We have not made the requested grammatical change (from singular to plural) as it is unnecessary in regulatory definitions. Throughout these final regulations, a singular term includes and applies to several persons, parties, or things. We cannot expand the definition to include documents and records (including photographs) as that would be inconsistent with the Act. We note that requesting documents and records (which could include photographs) is already provided for in §§ 10.9(c)(4) and 10.10(c)(4). Under the Act and these regulations, lineal descendants, Indian Tribes, and NHOs have a right to request records, catalogues, relevant studies, or other pertinent data (25 U.S.C. 3003(b)(2) and 25 U.S.C. 3004(b)(2)), and museums and Federal agencies are required to share that information (25 U.S.C. 3005(d)). As required by the Act, additional information is only provided upon request of an Indian Tribe or NHO, and

we cannot require documents and records be provided by including these in the definition of cultural items. We advise lineal descendants, Indian Tribes, and NHOs to make their requests as broad as possible to ensure all information about cultural items, including digital data, is provided.

Regarding the request to strengthen the definition, we are unable to change “according to” to “as determined by” as it would be inconsistent with the Act. Museums and Federal agencies are responsible for making determinations under the Act and these regulations, but must do so after consulting with lineal descendants, Indian Tribes, and NHOs. We have changed the order of the sentence to reflect the importance of Native American traditional knowledge (which includes customs and traditions) in this definition.

We disagree that the definition is over-broad, a reversal of Congressional intent, or contrary to explicit statements in the Congressional record. Deference to Native American traditional knowledge is necessary to ensure the rights of lineal descendants, Indian Tribes, and NHOs the Act recognizes. The addition of “according to Native American traditional knowledge” in this definition is to ensure meaningful consideration of this information during consultation.

We believe this addition to the various definitions of cultural items will lead to more informed decision-making and help to avoid the lengthy and costly delays in disposition or repatriation. In crafting the definitions of cultural items, Congress clearly intended that the definitions “will vary according to the [T]ribe, village, or Native Hawaiian community” (S. Rpt. 101–473, at 4). Consultation, which is required throughout the Act prior to any determination, is how an Indian Tribe or NHO shares the information needed to identify a cultural item.

*32. Comment:* We received 14 comments on the definition of “custody.” Of that total, nine comments suggested changes to the definition while five comments supported it. Eight comments recommended deleting this definition and replacing it with the concept of possession in the definition of “possession or control.” One comment recommended replacing the term “sufficient interest” with the term “legal authority.”

*DOI Response:* We have not made changes to this definition. We cannot replace this definition with an expanded definition for “possession or control,” as discussed in the response to comments on that definition (see comment 49). Custody without

“possession or control” is a distinct concept from “possession or control” itself. This distinct concept requires definition to implement certain requirements, including a duty of care and certain reporting requirements. Further, we did not replace the term “sufficient interest,” which is a threshold determination that museums and Federal agencies must make. Changing this phrase would presume application of the Act before that determination has been made. As discussed in more detail in the response to comments for the definition of “possession or control,” whether a museum or Federal agency has a sufficient interest in an object or item to establish “possession or control” is a legal determination that must be made on a case-by-case basis.

*33. Comment:* We received two comments requesting changes to the definition of “discovery.” One comment raised a concern that removal of human remains or cultural items from Federal or Tribal lands is either excavation or theft, not a discovery. One comment questioned why the word “inadvertent” is no longer used with the word “discovery.”

*DOI Response:* We understand the concern but cannot make the requested change to eliminate “removing” from the definition of discovery and still ensure that human remains or cultural items are protected on Federal or Indian lands under these regulations. As one comment notes, an intentional removal without a written authorization for an excavation could violate other Federal laws, depending on the circumstances. These regulations do not replace or supplant the other protections available on Federal or Tribal lands. Rather this definition and these regulations provide a process for the disposition of those human remains or cultural items that may be discovered.

The definition of discovery includes both inadvertent and intentional discovery of human remains or cultural items. This ensures that any human remains or cultural items are subject to these regulations, regardless of how they were discovered.

*34. Comment:* We received seven comments requesting clarification of the definition of “Federal lands.” Four comments did not consider the definition to be sufficiently clear or instructive to Federal agencies. One comment noted that the definition should include lands leased by the Federal government. One comment noted that the definition could impact museum collections under Subpart C. One comment noted that the definition should include language to provide for

the protection and disposition of Native American children buried at Indian boarding schools on lands not owned or controlled by the Federal Government, but where the Indian boarding school was operated by or for the U.S. Government.

*DOI Response:* We have not made these changes. Whether a Federal agency's control of the lands on which it conducts its programs or activities is sufficient to apply these regulations depends on the circumstances and scope of that Federal agency's authority, and on the nature of State and local jurisdiction. Because of the wide array of agency-specific authorities that can establish federally controlled lands, the Federal agency officials must make such determinations on a case-by-case basis. In some circumstances, the definition may include lands leased by the Federal agency, depending on the nature of that lease, the Federal agency's statutory authority, and other case-by-case circumstances. The Department cannot instruct Federal agencies any further on their own circumstances or statutory authorities, and recommends Federal agencies consult with their legal counsel in making such determinations. The definition is not applied to museum collections in Subpart C.

Regarding lands on which Native American children were buried at Indian boarding schools, we cannot amend the regulatory definition of "Federal lands" as requested. Congress specifically and explicitly defined Federal lands based on control or ownership, not on receipt of Federal funds (as it did in the definition of a "museum"). Thus, "[w]e have here an instance where the Congress, presumably after due consideration, has indicated by plain language a preference to pursue its stated goals . . . . In such case, neither [a] court nor the agency is free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress" (*Alabama Power Co. v. United States EPA*, 40 F. 3d 450, 456 (D.C. Cir. 1994); *United Keetoowah Band of Cherokee Indians Of Okla. v. United States HUD*, 567 F. 3d 1235, 1243 (10th Cir. Okla. 2009) (same); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress")). However, the Department does encourage the custodians of records from boarding schools not on Federal or Tribal lands, and the current owners of those boarding schools and cemeteries, to fully consult with lineal

descendants, Indian Tribes, and NHOs on identification, disinterment, and repatriation of Native American children. The Department stands ready to assist lineal descendants, Indian Tribes, and NHOs to the fullest extent of its authority.

*35. Comment:* We received two comments suggesting changes to the definition of Federal agency to include the Smithsonian Institution.

*DOI Response:* We cannot make this change. The Act expressly excludes the Smithsonian Institution from the definition of Federal agency.

*36. Comment:* We received 22 comments on the definition of "funerary object." Of that total, 8 comments supported the definition in the proposed regulations while 14 comments requested changes to it. Two comments objected to the definition as being too expansive by replacing "preponderance of the evidence" in the existing regulations with "according to" which the comments believed would create ambiguity and confusion in applying the definition. On the other hand, two comments suggested changing "according to" to be "as determined by" to further strengthen the deference to lineal descendants, Indian Tribes, and NHOs on identification of funerary objects. One comment suggested integrating the definition of funerary object in to two separate definitions for associated and unassociated funerary objects. This same comment raised concerns about the example provided in the proposed regulations. One comment expressed frustration with the use of acronyms for funerary objects which the comment stated are offensive and dismissive.

Six comments provided an extensive argument and requested removing the temporal limitation on human remains related to associated funerary object ("are, or were after November 16, 1990") (see NPS–2022–0004–0119 for one of the six comments). One comment requested clarification of and emphasis on the location of human remains for unassociated funerary objects. One comment objected to the statement that a burial site could ever be "no longer extant."

*DOI Response:* We reemphasize that the proposed revisions to the existing regulations, specifically the removal of "preponderance of the evidence" from the definition of funerary object, is to align the definitions in the regulations with those in the Act. The existing regulations limit the definition of a funerary object by including the statutory language intended to apply only to unassociated funerary objects. In 1995, the Department accepted the

suggestion to combine the definitions of associated funerary objects and unassociated funerary object into a single definition of funerary object and in doing so, attached the statutory language for unassociated funerary object to all funerary objects. In 1995, the Department asserted:

The statutory language makes it clear that only those objects that are associated with individual human remains are considered funerary objects. The distinction between associated and unassociated funerary objects is based on whether the individual human remains are in the possession or control of a museum or Federal agency. (60 FR 62137).

The Department reiterated and clarified this statement in the 2022 Proposed Rule, ". . . determining if the funerary object is associated or unassociated does not require identifying the specific individual with which the object was placed, but rather, only requires identifying the location of the related human remains" (87 FR 63211). The intent of revising this definition is to clarify long-standing confusion over the distinction between associated and unassociated funerary objects and align the definitions with those in the Act. We have retained the single definition for funerary object and the two related definitions of associated or unassociated funerary object as we believe it clarifies the definitions.

It is important to note "individual human remains" as used in the Act means the human remains of an individual or individuals. We have removed "individual" from the definition of funerary object to simplify and clarify the definition. The Act does not require a funerary object be identified to a specific individual. Rather, a group of individuals may be related to a single funerary object and the object may be a funerary object without identifying specifically with which individual the object was placed.

We have retained the phrase "with or near" as we believe it appropriately expands the definition of what may be a funerary object. As noted in the 1995 Final Rule, "[t]he clause was included to accommodate variations in Native American death rites or ceremonies" (60 FR 62138). We have retained the requirement for the object to be "intentionally" placed. As noted in the 1995 Final Rule, "[t]he term is included to emphasize the intentional nature of death rites or ceremonies. Items that inadvertently came into proximity or contact with human remains are not considered funerary objects" (60 FR 62137). For funerary objects, broad categorical identifications, including everything from a burial site or specific area, may meet the definition of a

funerary object depending on the information available and the results of consultation. As noted in the example in the 2022 Proposed Rule, it may be reasonable to believe an object was placed intentionally in a location because of the human remains even if the object was placed there many centuries after the human remains (87

FR 63211). As one comment suggested, this may result in the funerary object having a different cultural affiliation than the human remains. We have revised the definition of funerary object to ensure, as in the Act, that cultural affiliation is not a required element to meet the definition of a funerary object.

Table 3 compares the definition of “funerary object” from the Act, the existing regulations, and this final rule and indicates the changes to the definition in the Act by underline (additions), strikethrough (removals), and moved text (brackets).

**Table 3: Comparison of “funerary object” definition.**

Act 25 U.S.C. 3001(3)(A) - (B)	...as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later...
Existing §10.2(d)(2)	...as part of the death rite or ceremony of a culture, are reasonably believed to have been placed <u>intentionally</u> [at the time of death or later] with or near individual human remains.
Final §10.2 Funerary object	...reasonably believed to have been placed <u>intentionally with or near</u> <del>individual</del> human remains. <u>A funerary object is any object connected, either at the time of death or later, as part of the to a [death rite or ceremony of a] Native American culture according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization.</u>

Regarding the request to strengthen the definition, we are unable to change “according to” to “as determined by” as it would be inconsistent with the Act. Museums and Federal agencies are responsible for making determinations under the Act and these regulations, but must do so after consulting with lineal descendants, Indian Tribes, and NHOs. We have changed the order of the sentence to reflect the importance of Native American traditional knowledge (which includes customs and traditions) in this definition.

We disagree that the definition is over-broad, a reversal of Congressional intent, or contrary to explicit statements in the Congressional record. Deference to Native American traditional knowledge is necessary to ensure the rights of lineal descendants, Indian Tribes, and NHOs the Act recognizes. The addition of “according to Native American traditional knowledge” in this definition is to ensure meaningful consideration of this information during consultation.

We believe this addition to the various definitions of cultural items will lead to more informed decision-making and help to avoid the lengthy and costly delays in disposition or repatriation. In crafting the definitions of cultural items, Congress clearly intended that the definitions “will vary according to the [T]ribe, village, or Native Hawaiian

community” (S. Rpt. 101–473, at 4). Consultation, which is required throughout the Act prior to any determination, is how an Indian Tribe or NHO shares the information needed to identify a cultural item.

In response to the extensive comments on the definition of “associated funerary object,” we appreciate and share the concern regarding the inappropriate and inaccurate misreading of NAGPRA. We clearly and affirmatively state that the Act and these regulations apply to any museum or Federal agency that has possession or control of Native American human remains or cultural items. Identification of where or when the human remains or cultural items were removed may impact which entity has possession or control, but where or when the human remains or cultural items were removed does not impact the identification of human remains or cultural items for purposes of these definitions.

We have revised the definition as requested to remove the date and avoid possible misunderstanding. The Act requires that for a funerary object to be an associated funerary object, the related human remains must be “presently” in the possession or control of a museum or Federal agency, but the Act does not require the human remains to be in the possession or control of the

same museum or Federal agency as the associated funerary object. The 1995 Final Rule clarified that when another museum or Federal agency has possession or control of the related human remains, the related funerary objects are still “associated funerary objects” (60 FR 62138). By using “presently” in the Act, Congress intended to distinguish associated funerary objects from unassociated funerary objects based on the location of the related human remains. Where human remains and funerary objects were removed from a burial site and when the location of those human remains is known, the funerary objects are associated funerary objects. Even if the human remains were removed with the funerary objects and the human remains are properly repatriated and reburied, the associated funerary objects do not lose their status as associated funerary objects. Associated funerary objects are still associated to the human remains as long as the location of the human remains is known.

Regarding the other comments, we reiterate that when the location of human remains related to a funerary object is unknown, the funerary objects are unassociated funerary objects but are still funerary objects subject to the Act and these regulations. Additional information about unassociated funerary objects is necessary to satisfy the

definition and meet the criteria for disposition or repatriation of the unassociated funerary objects. For example, an object that was intentionally placed with or near human remains and is connected to a death rite or ceremony of a Native American culture meets the definition of a funerary object. If the location of the related human remains is unknown, the funerary object meets the definition of unassociated funerary object. If cultural affiliation of the unassociated funerary object is reasonably identified by the geographical location where the unassociated funerary object was removed, the unassociated funerary object may satisfy the criteria for repatriation, provided the museum or Federal agency cannot prove it has a right of possession to the unassociated funerary object.

We understand the comment that in some Native American traditions a burial site never ceases to exist, we have retained the option for an unassociated funerary object to be identified when in a specific area, such as a flood plain or a shore line, the burial site is no longer extant. Lastly, we appreciate and will strive to no longer use acronyms for associated funerary objects or unassociated funerary objects that may be offensive. We encourage all parties to discuss appropriate terminology during consultation to recognize and reflect the significance of human remains and cultural items to lineal descendants, Indian Tribes, and NHOs.

*37. Comment:* We received two comments on the definition of “holding or collection,” both supporting the definition as proposed.

*DOI Response:* These regulations retain this definition to assist all parties with identifying the application of the Act and these regulations.

*38. Comment:* We received 37 comments requesting changes to the definition of “human remains.” One comment objected to considering human remains incorporated into a cultural item as the cultural item and not human remains. One comment requested adding that soil associated with burials and likely containing human remains be accounted for in this definition. Two comments requested we remove the sentence on comingled material (such as soil or faunal remains) being treated as human remains while one comment supported it.

One comment letter stated in five separate comments that animal remains should be included in the definition of human remains or cultural items and a Review Committee comment agreed. These comments requested animal burials be included separately and

distinctly from cultural items because these animals are imbued with the same spirit as human remains and, therefore, require the same treatment under the Act and these regulations. An additional comment suggested the Department look at incorporating protections for ceremonial animal interments.

Of the total number of comments, 13 comments requested we expand the definition of human remains to include casts, 3-D scans, and all other digital data. Some of these comments also suggested expanding the definition to include any information or samples taken from an individual, including pictures, biological samples, isotope readings, soft tissue, and any other biological remnants. Some of these comments requested we add that any data collected directly relating to a Native American individual should also be considered human remains. A few of these comments requested that we require museums and Federal agencies to provide references to all casts of human remains, any replicas from 3-D scans, and all other digital data produced from human remains or cultural items and require consultation on the proper treatment of those references. The comments also requested we add that “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.” Separately, one comment suggested the definition of human remains be broadened to include documents and records associated with human remains or cultural items to ensure repatriation of those documents and records.

In addition, 12 comments requested we delete from the definition the sentence that excludes from the definition any human remains or portions of human remains that are determined to have been freely given or naturally shed.

*DOI Response:* We understand there is a wide variety of opinions on how human remains that are incorporated into a cultural item might be identified. The Department sought input on this issue in the 1993 Proposed Rule and retained the language in the 1995 Final Rule as it was “recommended by the Review Committee to preclude the destruction of items that might be culturally affiliated with one Indian Tribe that incorporated human remains culturally affiliated with another Indian

Tribe.” The 1995 Final Rule also noted that “[d]etermination of the proper disposition of such human remains must necessarily be made on a case-by-case basis” (60 FR 62137). In the 2022 Proposed Rule, we included these two ways human remains may be incorporated into an object or item to ensure, as Congress intended, that human remains of any ancestry be treated with respect, and any Native American human remains must be made available for disposition or repatriation. We decline to make the requested change.

Regarding an admixture of comingled materials, the Act requires identification of all human remains in a holding or collection, including human remains reasonably believed to be comingled with other material (such as soil or faunal remains). Museums and Federal agencies are required to identify these comingled materials in its itemized list and during consultation should evaluate if the entire admixture can be treated as human remains. If it is not possible to treat the admixture as human remains, the record of consultation should include the effort to identify a mutually agreeable alternative, which may include additional handling, with consent of the lineal descendant, Indian Tribe, or NHO, to separate the human remains from other materials. We are aware that comingled materials are a significant issue for many Indian Tribes, NHOs, museums, and Federal agencies. The intent of this addition to the definition is to ensure these kinds of collections are included on an itemized list and made available to lineal descendants, Indian Tribes, and NHOs during consultation and for repatriation.

The term “human remains” appears in the definition section of the Act even though it is an undefined term. We have defined “human” using the commonly understood meaning of the word, *i.e.*, a member of the species *homo sapiens*. For this reason, we cannot make the requested change to include animal burials as a separate and distinct category of human remains as that would be inconsistent with the Act. We note, too, that purposefully buried remains that do not include human remains are not included in the definition of human remains. Other kinds of burials and remains that are not human remains should be carefully considered, through consultation, as cultural items. For example, animal burials that are not related to the burial of human remains and, therefore, are not funerary objects, may be needed by traditional Native American religious leaders for the practice of traditional religions and may be sacred objects.

We cannot expand the definition of human remains to include casts, 3-D scans, or other digital data, documents, or records as that would be inconsistent with the Act. We note that the right to request documents and records, which could include casts, 3-D scans, photographs, digital data, or other information, is already provided for in §§ 10.9(c)(4) and 10.10(c)(4). Under the Act and these regulations, lineal descendants, Indian Tribes, and NHOs have a right to request records, catalogues, relevant studies, or other pertinent data (25 U.S.C. 3003(b)(2) and 25 U.S.C. 3004(b)(2)), and museums and Federal agencies are required to share that information (25 U.S.C. 3005(d)). We advise lineal descendants, Indian Tribes, and NHOs to make their requests as broad as possible to ensure all information about human remains, including digital data, is provided. In addition, we cannot make the requested addition to prohibit the sale or exchange of casts, replicas, or digital data of human remains as that would be inconsistent with the Act.

We have always interpreted biological samples (including DNA), soft tissue, and any other biological remnants to be within the definition of human remains and subject to the Act and these regulations. The definition of human remains is purposefully broad to ensure that ANY physical remains of the body of a Native American individual are included (with the one exception discussed below). In the 1993 Proposed Rule, the Department included an example clause in the definition of human remains as “including, but not limited to bones, teeth, hair, ashes, or mummified or otherwise preserved soft tissues of a person of Native American ancestry” (58 FR 31126). In the 1995 Final Rule, the Department considered comments requesting the definition of human remains exclude isolated teeth, finger bones, cut finger nails, coprolites, blood residues, and tissue samples taken by coroners. In response, the Department stated:

The Act makes no distinction between fully-articulated [sic] burials and isolated bones and teeth. Additional text has been added excluding “naturally shed” human remains from consideration under the Act. This exclusion does not include any human remains for which there is evidence of purposeful disposal or deposition. The exemplary clause has been deleted (60 FR 62137).

Identification of human remains for the purposes of the Act and these regulations requires a case-by-case assessment, in consultation with lineal descendants, Indian Tribes, and NHOs. Recent examples have demonstrated

that the example clause from the 1993 Proposed Rule is beneficial in identifying human remains subject to the Act and these regulations, especially when it comes to hair samples taken from living individuals, coprolites, blood residues, tissue samples, and DNA extractions. The definition of human remains is intentionally broad and contains only one exception (discussed below). The definition does not include a requirement for the human remains to be from an archeological context, of a certain age, or from a deceased person. The definition does not exclude human anatomical collections used by medical schools for training or teaching collections. Again, the definition of human remains is purposefully broad to ensure that ANY physical remains of the body of a Native American individual are included (with the one exception discussed below).

We appreciate the comments requesting removal of the sentence that excludes human remains that were freely given or naturally shed. We agree with the comments of the Review Committee that state: “[a]llowing museums and Federal agencies to predetermine if such remains were freely given or naturally shed and not report them in their inventories deprives Indian [T]ribes and Native Hawaiian organizations with necessary information” (see NPS–2022–0004–0096). However, we disagree that a museum or Federal agency should be required to complete an inventory for human remains that were obtained with full knowledge and consent of the individual or next of kin. In the 1995 Final Rule, one comment requested clarification if human remains included blood sold or given to a blood bank by a Native American individual (60 FR 62137). In the 2010 Final Rule, two comments recommended excluding human anatomical collections used by medical schools for training from the definition of human remains. In response, the Department stated, “[t]hough not excluded from the inventory provisions, medical schools that receive Federal funds would not be required to repatriate Native American human remains obtained with the voluntary consent of an individual or group that had authority of alienation” (75 FR 12393).

We have revised the sentence in the definition to require a higher standard of information for human remains that are excluded from the Act and these regulations. We agree with the Review Committee that a museum or Federal agency must be able to prove the original acquisition of Native American

human remains was obtained with the full knowledge and consent of the individual, next of kin, or the official governing body of the appropriate Indian Tribe or NHO (see “right of possession” 25 U.S.C. 3001(13)). In the Act, Congress acknowledged that a right of possession is qualified with respect to human remains and associated funerary objects. Congress did not provide for a museum or Federal agency to assert a right of possession to human remains and associated funerary objects identified in an inventory. This approach is consistent with Congress’ intent to distinguish human remains and associated funerary objects from cultural items as quasi-property. Applicable common law in the United States generally accepts that human remains and associated burial items cannot be “owned” in the same manner as conventional property. The Act follows the common law by distinguishing between the quasi-property attributes of Native American human remains and associated funerary objects and the property attributes of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony.

In line with applicable common law in the United States, Congress stated that the original acquisition of Native American human remains which were exhumed, removed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate Indian Tribe or NHO is deemed to give right of possession to those human remains. Therefore, these regulations cannot require a museum or Federal agency to complete an inventory or repatriate Native American human remains where the museum or Federal agency can show it has a right of possession.

For example, when any individual, regardless of ancestry, dies, local or State law dictates certain actions by law enforcement, medical examiners, and other local or State officials. Local or State law generally requires consent by the next of kin prior to any other action by the local or State authorities. When the deceased individual is Native American and when no next of kin is ascertainable, the local or State authorities may be required to treat the individual as human remains under the Act and these regulations, unless the local or State authorities obtain the full knowledge and consent of the official governing body of the appropriate Indian Tribe or NHO. Coroners, medical examiners, and other local or State agencies should consider their requirements under the Act and these

regulations for any Native American human remains.

The Department interprets “full knowledge and consent” considering the history of Indian country and recognizes that “full knowledge and consent” does not include “consent” given under duress or because of bribery, blackmail, fraud, misrepresentation, or duplicity on the part of the recipient. As such, consent in this definition must be shown to have been fully free, prior, and informed consent.

39. *Comment:* We received 24 comments suggesting changes to the definition of “Indian Tribe.” Several of the comments relied on the decision which held, based on the definition of “group” in the 1992 regulations at 25 CFR part 83, an Indian group without Federal recognition was an “Indian Tribe” for purposes of NAGPRA (*Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234 (D.Vt., 1992), *aff’d per curiam*, 900 F.2d 729 (2nd Cir. 1993)). Some comments also disagreed with the addition of a reference to the List Act in this definition, arguing that the definition of Indian Tribe under NAGPRA is different than the standard for inclusion on the list published under the List Act. Many of those comments requested we reiterate the statutory definition verbatim. A few comments adamantly opposed any changes to the definition of Indian Tribe beyond federally recognized Indian Tribes.

*DOI Response:* NAGPRA defines “Indian [T]ribe” as “any [T]ribe, 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” (25 U.S.C. 3001(7) (emphasis added)). This definition was based on the definition in the Indian Self-Determination and Education Assistance Act (ISDEAA), which defines “Indian [T]ribe” as “any Indian [T]ribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [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” (25 U.S.C. 5304(e) (emphasis added)). Finally, the List Act requires that the Secretary “publish in the **Federal Register** a list of all Indian

[T]ribes which the Secretary recognizes to be *eligible for the special programs and services provided by the United States to Indians because of their status as Indians*” (25 U.S.C. 5131(a) (emphasis added)).

The Supreme Court of the United States recently ruled that the ISDEAA definition referred only to federally recognized Tribes and Alaska Native Corporations (*Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434 (2021)). The only difference between the ISDEAA definition and the NAGPRA definition is Congress’s intentional deletion of Alaska Native Corporations (see Statement of Representative Bill Richardson, 136 Cong. Rec. 36815). Therefore, under the Supreme Court’s reasoning on ISDEAA, the NAGPRA definition only applies to federally recognized Indian Tribes. Because Congress also used the same language “eligible for the special programs and services” in both NAGPRA and the List Act, the list of federally recognized Tribes is the list of Indian Tribes for the purposes of NAGPRA.

The *Abenaki* decision is not persuasive. First, the decision not only precedes the List Act, but also solely relies on a definition that no longer appears in the 25 CFR part 83 regulations. Second, the decision focuses on that definition while ignoring the rest of the NAGPRA definition concerning recognition of eligibility for services. Finally, it is a Tribal-specific analysis that has not been followed by any other court. In contrast, the list of federally recognized Tribes under the List Act is based on the current recognition regulations in part 83, which are specifically designed “for the Department to use to determine whether a petitioner is an Indian [T]ribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 CFR 83.2. The plain language congruence of the ISDEAA definition, the NAGPRA definition, and the purpose and foundation of the list under the List Act, as confirmed by the *Yellen* decision, are more persuasive than the *Abenaki* case, and fully support the definition in these regulations. The definition in these regulations has not been changed. The Department believes it is important to codify this definition and clarify any continuing misinterpretation or misunderstanding.

Throughout these final regulations, the term “Indian Tribe” is used in the singular form, but it is expected that multiple Indian Tribes may meet the criteria under this part for disposition or repatriation of the same human remains

or cultural items. Any Indian Tribe with cultural affiliation may submit a claim for disposition or a request for repatriation. Two or more Indian Tribes may agree to joint disposition or joint repatriation of human remains or cultural items. Claims or requests for joint disposition or joint repatriation should be considered a single claim or request and not competing claims or requests.

40. *Comment:* We received three comments on the definition of “inventory.” Of that total, two comments suggested changes to the definition while one comment supported it as proposed. The supportive comment felt the revision was an excellent clarification and would streamline the inventory and overcome a barrier to repatriation. One comment adamantly opposed revision of the existing regulatory definition, specifically the removal of an “item-by-item description” requirement. One comment asked if the definition meant that (1) an inventory is not complete unless it is informed by consultation and (2) an initial itemized list could not be submitted to National NAGPRA if consultation had not occurred.

*DOI Response:* We decline to make changes to the definition. Our intent is to clarify and simplify what an inventory must include both in the definition and in the § 10.10. We are aware that the existing regulatory definition and related text have been a barrier to expeditious repatriation. On the other hand, we know that a lack of transparency and accuracy in inventories is also a barrier to repatriation.

The Act defines an inventory as “a simple itemized list that summarizes the information called for by this section” (25 U.S.C. 3003(e)). The information called for in an inventory is information to identify (1) “each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition” (25 U.S.C. 3003(d)(2)(A)); and (2) “the geographical and cultural affiliation of such item[s]” (25 U.S.C. 3003(a)). An inventory only pertains to human remains and associated funerary objects (25 U.S.C. 3003(a)). The inventory is also defined by what is not an inventory; namely, a summary, which is “in lieu of an object-by-object inventory” (25 U.S.C. 3004(b)(1)(A)) and pertains to “unassociated funerary objects, sacred objects, or objects of cultural patrimony” (25 U.S.C. 3004(a)).

The existing regulations provide a short definition for an inventory: “the item-by-item description of human remains and associated funerary

objects,” but also provide a more detailed list of what an inventory must include in § 10.9. As noted in the 1995 Final Rule, the difference between a summary and an inventory “reflects not only their subject matter, but also their detail (brief overview vs. item-by-item list), and place within the process. Summaries represent an initial exchange of information prior to consultation while inventories are documents completed in consultation with Indian [T]ribe officials and representing a decision by the museum official or Federal agency official about the cultural affiliation of human remains and associated funerary objects” (60 FR 62140).

We are keenly aware of the preference of many, if not most, Indian Tribes and NHOs to have all human remains and associated funerary objects identified in order to repatriate them together. In reviewing the comments, the goal of both the supporting comment and the opposed comment is the same: allow lineal descendants, Indian Tribes, and NHOs to dictate the level of documentation or collections review required for an inventory. We agree, and changes to § 10.1(d) Duty of care are specifically meant to achieve this goal. The final regulations require a museum or Federal agency to obtain free, prior, and informed consent prior to any exhibition of, access to, or research on human remains or cultural items.

In response to the questions asked, an inventory is not complete until a museum or Federal agency initiates consultation with lineal descendants, Indian Tribes, and NHOs and consults with any consulting party that wishes to do so. Only completed inventories that contain the names of consulting parties or those invited to consult should be submitted to the National NAGPRA Program. If there is no response to the invitation to consult, the museum or Federal agency must still complete or update the inventory by the required deadlines.

*41. Comment:* We received eight comments on the definition of “lineal descendant.” Of that total, four comments suggested changes to the definition while four comments supported it as proposed. One comment stated common-law system of descent is not clear and the regulations should revert to the existing language. One comment requested a grammatical change and one comment asked what “known individual” means. One comment requested clarification if a museum or Federal agency must confirm the identity of a lineal descendant with an Indian Tribe with cultural affiliation or if the presence of

a lineal descendant meant consultation with an Indian Tribe was not required.

*DOI Response:* The existing regulations refer to the “common law system of descent” and “known Native American individual” in the definition for lineal descendant. The regulatory text adds “This standard requires that the earlier person be identified as an individual whose descendants can be traced.” The common law system of descent means the customary practice of tracing ancestry to a person’s parents, grandparents, great-grandparents, and so on. It does not indicate any kind of precedent is set by previous repatriations. There is a requirement for the deceased individual to be known, but that does not mean a named individual is the only way a person could be known. Rather, it indicates that the deceased individual must be identified in some way to trace ancestry between that individual and the living individual. We have removed the limiting gendered language from the definition as requested by one comment.

Both the existing regulations and this final rule require museums and Federal agencies to initiate consultation with both lineal descendants and Indian Tribes or NHOs with potential cultural affiliation and to provide the names of all identified consulting parties. The existing regulations require a museum or Federal agency convey information to both a lineal descendant, if known, and to the Indian Tribe or NHO with cultural affiliation, when the inventory results in a determination that the human remains are of an identifiable individual. In the proposed regulations and this final rule, this requirement is a part of the information shared and requested during the consultation process. We cannot require a museum or Federal agency to verify the identity of a lineal descendant with an Indian Tribe or NHO. The statute gives lineal descendants priority over Indian Tribes or NHOs. Establishing a system in which verification of lineal descendants is through Indian [T]ribes or NHOs could be detrimental to the rights of lineal descendants, particularly those that are not members of an Indian [T]ribe or NHO. Given the diversity of ways in which a lineal descendant may be traced, we cannot require certain types of documentation or evidence needed to establish lineal descent. Museums and Federal agencies must determine if a request from a lineal descendant provides sufficient information and respond to the request accordingly.

Throughout these final regulations, the term “lineal descendant” is used in

the singular form, but it is expected that multiple lineal descendants may meet the criteria under this part for disposition or repatriation of the same human remains, funerary objects, or sacred objects. Any lineal descendant may submit a claim for disposition or a request for repatriation for human remains, funerary objects, or sacred objects. Two or more lineal descendants may agree to joint disposition or joint repatriation of human remains, funerary objects, or sacred objects. Claims or requests for joint disposition or joint repatriation should be considered a single claim or request and not competing claims or requests.

*42. Comment:* We received one comment suggesting a review of the involvement of non-profits in museum funding and a change to the definition of “museum” that would replace “institution of higher learning” with “all educational institutions.”

*DOI Response:* The requested review is outside of the scope of this regulatory action. We have not made the requested change because this part of the definition comes directly from the Act, which is already sufficiently inclusive of all educational institutions that have possession or control of human remains or cultural items and receive Federal funds.

*43. Comment:* We received four comments suggesting changes to the definition of “Native American.” Two comments expressed concern over the inclusion in this definition of Indian groups without Federal recognition. One comment requested we require consultation with Indian Tribes or NHOs prior to any determination that human remains or cultural items are Native American. One comment expressed concern that, as written, this definition might exclude cross-border indigenous peoples or cultures who are indigenous to the United States but also to Canada, Mexico, or Russia.

*DOI Response:* We do not intend to include Indian groups without Federal recognition in the definition of Tribe (as noted elsewhere in the definition of Indian Tribe). In determining whether human remains or cultural items are Native American, we cannot require consultation prior to compiling a summary of cultural items or an itemized list of human remains and associated funerary objects under Subpart C, but we can and do require consultation prior to any determination of cultural affiliation or decision on a request for repatriation. When compiling a summary of cultural items or an itemized list of human remains and associated funerary objects, a museum or Federal agency should

include any potential Native American human remains or cultural items to allow for further consultation.

The Act limits the definition of Native American to the United States, and we cannot remove that geographical descriptor. We believe the added definitions for “people” and “culture” includes those who are indigenous to locations near present day geographical borders. Any pre-contact Tribe, people, or culture would be included in this definition. Native Hawaiians are included in this definition as a “people,” to clarify an ambiguity left by Congress.

*44. Comment:* We received 12 comments on the definition of “Native American traditional knowledge.” Of that total, six comments suggested changes to the definition while six comments supported it. Two comments opposed the definition, and both requested it be revised or removed because it was unclear and complex, and one comment felt it would lead to poor decision-making or other pitfalls. One of these comments was concerned that this definition, along with the required deference, would give equal or greater weight to this type of information than to scientific and historical information and, when identifying cultural items, Native American traditional knowledge might be used as the only type of information instead of scientific or historical evidence. One comment was neutral and asked how the term changed the current cultural affiliation process. Three comments supported the definition as proposed but suggested changes to strengthen it. One comment requested we add language to the variety of information listed while another comment requested we include a reference to § 10.3. One comment provided an extensive discussion and specific changes to the definition to include Indian Tribes, expert opinion, and confidentiality.

*DOI Response:* We disagree that the definition is unclear, vague, or overly broad or that this definition is novel or unique to these regulations. The concept of “Native American traditional knowledge” has been used broadly among Federal agencies in the context of land management and the use of natural or cultural resources, although the specific terms used might vary. More recently, the White House Council on Environmental Quality and the Office of Science and Technology Policy released government-wide guidance and an implementation memorandum for Federal agencies on recognizing and including Indigenous knowledge in Federal research, policy, and decision

making (<https://www.whitehouse.gov/ceq/news-updates/2022/12/01/white-house-releases-first-of-a-kind-indigenous-knowledge-guidance-for-federal-agencies/>, accessed 12/1/2023). Most certainly, this is not a new concept to lineal descendants, Indian Tribes, or NHOs and any difficulty understanding this definition could be resolved through adequate consultation. We believe this term will lead to more informed decision-making and help to avoid the lengthy and sometimes costly delays in disposition or repatriation. Under the Act and these regulations, all information available is equally relevant to determining cultural affiliation, and our intent in defining this type of information is to ensure that Native American traditional knowledge is considered alongside scientific and historical information. In response to the question asked, this is not different than decision-making for cultural affiliation under the existing regulations or the Act itself. Although it may not have been identified as such, Congress intended for Native American traditional knowledge to be considered when determining cultural affiliation or identifying cultural items. The definitions of funerary objects, sacred objects, and objects of cultural patrimony all rely on information that may only be available to or shared by lineal descendants, Indian Tribes, or NHOs. Consultation, which is required throughout the Act prior to any determination, is how an Indian Tribe or NHO shares the information needed to identify a cultural item. In cases where there is no other information, Native American traditional knowledge alone may identify a cultural item.

In response to the other comments, we have added linguistics to the variety of named information, but stress that this list is not exhaustive. We have added a final sentence to reiterate the statement in § 10.3 that Native American traditional knowledge is expert opinion. We have added Indian Tribes, the Native Hawaiian Community, and confidentiality to the definition, although in slightly different places than was suggested.

*45. Comment:* We received 11 comments suggesting changes to the definition of “Native Hawaiian organization.” Most of the comments requested revisions to paragraph (3)(i) identifying some NHOs. One comment expressed concern that changes to this definition would result in a broad range of NHOs who meet the criteria and impact the Native Hawaiian objects that are subject to the regulations.

*DOI Response:* The definition reflects the language in the Act, which is

binding unless stricken, modified, or contravened by other Federal law. The definition in the Act may be modified if it is no longer relevant when certain referenced terms, conditions, or entities cease to exist. The Act includes the Office of Hawaiian Affairs as a “Native Hawaiian organization,” and the definition in these regulations remains unchanged. Other concerns about NHOs are addressed by the definition as well as the prioritization of cultural affiliation under § 10.3. The omission of Hui Malama I Na Kupuna O Hawai'i Nei from the definition of a “Native Hawaiian organization” is due to the group’s dissolution rather than any judgment as to its or any successors’ status as NHOs. The incorporation of “Native Hawaiian” into the definition of a “Native Hawaiian organization,” and the use of the term “indigenous people” rather than “aboriginal people,” clarifies what constitutes an NHO and their relevance to these regulations (2022 Proposed Rule, 87 FR 63213).

This definition and these regulations are consistent with the government-to-sovereign relationship between the United States government and the Native Hawaiian Community. If the Native Hawaiian Community decides to change its relationship with the United States government to that of a government-to-government relationship, the Department may review and update the current policy and procedures.

Throughout these final regulations, the term “Native Hawaiian organization” is used in the singular form, but it is expected that multiple NHOs may meet the criteria under this part for disposition or repatriation of the same human remains or cultural items. Any NHO with cultural affiliation may submit a claim for disposition or a request for repatriation. Two or more NHOs may agree to joint disposition or joint repatriation of human remains or cultural items. Claims or requests for joint disposition or joint repatriation should be considered a single claim or request and not competing claims or requests.

*46. Comment:* We received six comments suggesting changes to the definition of “object of cultural patrimony.” One comment requested we remove from the definition the provision that the object must have been considered inalienable by the group at the time the object was separated from the group as it seems unnecessary. One comment questioned the use of “Native American group” in the definition. One comment suggested changing “according to” to be “as determined by” to further strengthen the deference to lineal descendants, Indian Tribes, and

NHOs on identification of objects of cultural patrimony. One comment requested an expansion of this definition to include intellectual property like songs, recordings, and photos as well as digital files. Another comment asked if this definition included documents and photos and, if not, then how the regulations support the return of such objects. One comment objected to the definition as over-broad, a reversal of Congressional intent, and contrary to explicit statements in the Congressional record at the time of the Act's passage.

*DOI Response:* We do not have the discretion to revise the definition as suggested by these first two comments as both are a part of the definition in the Act. The term "group" or "sub-group" used in this definition and elsewhere in these regulations should be understood to have a standard, dictionary definition: "a number of individuals assembled together or having some unifying relationship" (<https://www.merriam-webster.com/dictionary/group>, accessed 12/1/2023). We cannot expand the definition to include intellectual property, digital files, other documents, or records as that would be inconsistent with the Act. We note that requesting documents and records (which could include recordings, photos, or digital files) is already provided for in §§ 10.9(c)(4) and 10.10(c)(4). Under the Act and these regulations, lineal descendants, Indian Tribes, and NHOs have a right to request records, catalogues, relevant studies, or other pertinent data (25 U.S.C. 3003(b)(2) and 25 U.S.C. 3004(b)(2)), and museums and Federal agencies are required to share that information (25 U.S.C. 3005(d)). As required by the Act, additional information is only provided upon request of a lineal descendant, Indian Tribe, or NHO, and we cannot require documents and records be provided by including these in the definition of objects of cultural patrimony. We advise lineal descendants, Indian Tribes, and NHOs to make their requests as broad as possible to ensure all information about objects of cultural patrimony, including digital data, is provided.

Regarding the request to strengthen the definition, we are unable to change "according to" to "as determined by" as it would be inconsistent with the Act. Museums and Federal agencies are responsible for making determinations under the Act and these regulations, but must do so after consulting with lineal descendants, Indian Tribes, and NHOs. We have changed the order of the sentence to reflect the importance of Native American traditional knowledge

(which includes customs and traditions) in this definition.

We disagree that the definition as proposed is over-broad, a reversal of Congressional intent, or contrary to explicit statements in the Congressional record. We agree with the concerned comment that when NAGPRA was passed, Congress made clear that not all objects could be deemed "sacred" or "cultural patrimony." The definition of object of cultural patrimony in these regulations is consistent with the Act and the legislative history. An object of cultural patrimony must not only be an object owned by the collective whole, but must be of ongoing historical, traditional, or cultural importance, as indicated by the Senate (S. Rpt. 101-473, at 5).

Deference to Native American traditional knowledge is necessary to ensure the rights of lineal descendants, Indian Tribes, and NHOs the Act recognizes. The addition of "according to Native American traditional knowledge" in this definition is to ensure meaningful consideration of this information during consultation.

We believe this addition to the various definitions of cultural items will lead to more informed decision-making and help to avoid the lengthy and costly delays in disposition or repatriation. In crafting the definitions of cultural items, Congress clearly intended that the definitions "will vary according to the [T]ribe, village, or Native Hawaiian community" (S. Rpt. 101-473, at 4). Consultation, which is required throughout the Act prior to any determination, is how an Indian Tribe or NHO shares the information needed to identify a cultural item.

*47. Comment:* We received two comments suggesting changes to the definition of "ohana." Both comments requested a revision of the definition to reflect that an 'ohana may be comprised of lineal descendants.

*DOI Response:* We appreciate the suggested change and acknowledge the limitations of the proposed definition. We have revised the definition accordingly.

*48. Comment:* We received one comment suggesting changes to the definition of person to include "spiritual entity personhood" and clarification that this is different from "appropriate official."

*DOI Response:* While the word "person" is used in a few definitions and instances, the definition is intended to ensure the requirements under § 10.5 Discovery are completed and to give clear meaning to the phrase in the Act and these regulations: "Any person who knows or has reason to know. . . ."

Certain actions are required by any individual, partnership, corporation, trust, institution, association, or any other private entity, or any representative, official, employee, agent, department, or instrumentality of the United States Government or of any Indian Tribe or NHO, or of any State or subdivision of a State when a discovery of human remains or cultural items on Federal or Tribal lands occurs. These actions are separate from the required actions of an "appropriate official" for that same discovery. It is possible that a person who makes a discovery on Federal or Tribal land may also be the representative authorized by a delegation of authority within an Indian Tribe, NHO, Federal agency, or Department of Hawaiian Home Lands (DHHL) to be responsible for human remains or cultural items on Federal or Tribal lands. In those instances, the same individual may be performing the required actions of the person and the appropriate official. Considering the use of this definition, we decline to include "spiritual entity personhood."

*49. Comment:* We received 44 comments on the definition of "possession or control." Of that total, 40 comments suggested changes to the definition while four comments supported it. A total of 17 comments expressed concerns with museum and Federal agency compliance. Six comments supported using a single definition for the term possession or control while five comments proposed splitting the definition into two definitions. Five comments proposed replacing the definition of custody with the concept of possession. A total of 13 comments recommended expanding the definition to include museums that only have an obligation to care for human remains or cultural items, for example, a museum that received a loan of human remains or cultural items from another museum. One comment recommended replacing the phrase "a sufficient interest in an object or item to independently direct, manage, oversee, or restrict the use of the object or item" with "an interest in human remains or cultural items, such that the museum or Federal agency has been providing care, direction, management, oversight, or restrictions regarding the use of the human remains or cultural item." Two comments recommended replacing the phrase "sufficient interest" with "legal responsibility" or "legal authority." One comment requested that we clarify the meaning of sufficient interest to address confusion over whether a museum with mere custody by a loan, lease, license, or bailment, has possession or control.

One comment was concerned that the definition as written would permit museums that have received loans of human remains or cultural items from other museums to make determinations regarding repatriations of the loaning museum's collection. Six comments were concerned with museums making unilateral determinations regarding possession or control of human remains or cultural items. Nine comments expressed concerns that museums and Federal agencies use the existing definitions as a loophole to avoid compliance with the Act. One comment expressed concern that the proposed regulations no longer include a statement that "Federal agencies must ensure that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution."

*DOI Response:* We have not made changes to this definition, other than to replace physical custody with physical location to avoid any confusion. We received one more comment in support of the use of a single definition than we did recommending that the definition be split in two. Congress used these two words as a single term throughout the Act, except for "right of possession." And, given the overwhelming support for the single definition during consultation in 2021, we have not made any other changes to this definition from the proposed rule. Further, we did not change the terms "sufficient interest" or "independently direct" which are threshold determinations for museums and Federal agencies to make and changing these phrases as suggested would presume application of the Act before that determination has been made. Whether a museum or Federal agency has a sufficient interest in human remains or cultural items to establish possession or control is a legal determination that must be made on a case-by-case basis. However, when a museum with custody of human remains or cultural items cannot identify any person, institution, State or local government agency, or Federal agency with possession or control, the museum should presume it has possession or control of the human remains or cultural items for purposes of repatriation under the Act and these regulations. When a Federal agency cannot determine if human remains or cultural items came into its possession or control before or after November 16, 1990, or cannot identify the type of land the human remains or cultural items were removed from, the Federal agency should presume it has possession or

control of the human remains or cultural items for purposes of repatriation under the Act and these regulations. This determination is a jurisdictional requirement for application of the Act and these regulations to the human remains or cultural items that may be subject to repatriation by the appropriate museum or Federal agency.

While we acknowledge the continued interest in expanding the scope of the definition to include entities that merely have custody, we cannot make the requested change. In some cases, expanding the scope of the definition would make multiple entities concurrently responsible for fulfilling the inventory, summary, and repatriation process. Such an interpretation is inconsistent with the framework and legislative history of the Act. Congress provided no indication that such an expansive interpretation was its intent, and various features of the Act, including civil penalties, right of possession, and museum obligations, presume that a single museum or Federal agency would be responsible for compliance with the inventory, summary, and repatriation provisions. The phrase "possession or control" as used in the Act connotes a singular interest in human remains or cultural items. Since 1993, these regulations have defined the two elements of the phrase only to differentiate between physical location of the human remains or cultural items (1993 Proposed Rule, 58 FR 31127). In the Act, having possession or control means a museum or Federal agency has an interest in human remains or cultural items, or, in other words, it may make determinations about human remains or cultural items without having to request permission from some other entity or person. This interest is present regardless of the physical location of the human remains or cultural items. For a similar example, a person has the same interest in property that is in the person's home as in property that same person keeps in an offsite storage unit. The person can make determinations about the property in the storage unit without having to request permission from the storage facility. Regardless of the physical location of the property, the person's interest in the property is the same whether it is in their home or in the custody of the storage facility.

Several comments expressed concerns that collections loaned to other institutions would fall outside the scope of the Act and these regulations. We reiterate that this is not the case. Even where a collection is loaned to another institution, the loaning entity is still

required to comply with all the requirements of the Act and these regulations. Under these regulations, if the entity that holds the loaned collection meets the definition of a museum, it would also have to comply with certain requirements for the loaned collection and any other human remains or cultural items in its custody, including a duty of care and reporting obligations. We acknowledge that the underlying intent of this request is to ensure repatriation of all human remains or cultural items subject to the Act and that it is related to the concerns expressed regarding compliance by museums and Federal agencies. We have made other revisions to address these issues by requiring museums and Federal agencies to share information and increase efforts to complete inventories, summaries, and repatriation of human remains and cultural items, even when they are in the custody of other entities.

*50. Comment:* We received 16 comments on the definition of "receives Federal funds." Of that total, 15 comments suggested changes to the definition while one comment supported it. Four comments recommended revising the phrase "institution or agency of a State or local government" to "institution or State or local government agency." Two comments considered the definition to be overbroad or an overreach of Federal authority. One comment expressed constitutional concerns with the impacts of this definition on private property. One comment suggested making the definition of receives Federal funds apply to museums that only received funds prior to November 16, 1990. Four comments sought clarification on whether funds received via specific Federal programs constitute Federal funds under the Act and these regulations.

*DOI Response:* We have made the requested change to ensure consistency between the definitions of museum and receives Federal funds. We do not consider this definition to be overly broad or an overreach of Federal authority. The regulations reflect statutory intent as well as a robust area of law surrounding the receipt of Federal funds. We do not consider this definition to unconstitutionally interfere with private property rights. The Act itself restricts activities that would violate the Fifth Amendment's protection of property rights, though such situations are rare. We do believe that applying this definition to the receipt of Federal funds prior to the passage of the Act raises constitutional concerns. Generally, the Fifth

Amendment requires us to disfavor retroactive interpretation of Federal statutes, unless expressly provided for by Congress. Congress did not provide such an express instruction here. Regarding the nature of funds received through specific Federal programs, a case-by-case determination as to the nature of such funds is outside the scope of this regulatory action. We recommend seeking technical assistance from the National NAGPRA Program on specific Federal programs.

*51. Comment:* We received 27 comments on the definitions of “disposition” or “repatriation.” Of that total, 11 comments requested we add physical transfer to the definition. Similarly, two comments requested we add “the desired outcome” has occurred, as confirmed by the lineal descendant, Indian Tribe, or NHO. The comments noted “[s]uch an outcome can include, but is not limited to, transfer of possession, reburial, traditional use, loan agreements, etc.” One comment recommended including “and completes the physical transfer” at the end of the definitions. Four comments requested changes to “control or ownership” in the definitions. Alternatives suggested are “has the right to repatriate human remains or cultural items” or “has right of possession” or “has possession or control” of the human remains or cultural items. Four comments requested we replace “control or ownership” with “now has control as a result of disposition or repatriation.” One comment suggested adding “relinquishes control” and include legal transfer in the definition. Three comments requested we define “disposition statement” and “repatriation statement.” One comment questioned why disposition is defined and used if repatriation encompasses all transfers.

*DOI Response:* We have not made the requested change to include physical transfer in the definitions of disposition or repatriation and have responded in more detail in Comment 67. We have accepted, in part, the suggested change to “repatriation” and use “relinquish possession or control.” We have retained “ownership or control” in the definition of disposition, as it is used in the Act, and ensured throughout that the order of the words in that phrase are consistently applied.

There is no definition in the Act for either disposition or repatriation. The existing regulations use the single term “disposition” to mean “transfer of control” which does not necessarily equate to physical transfer in any, or all, of the situations where the term applies. This definition was added in 2007 to

clarify the different procedures in the regulations that effectuate the same result: transfer of control over human remains or cultural items by a museum or Federal agency under the regulations (2007 Final Rule, 75 FR 58585 and 58588). The existing definition does not clarify if “transfer of control” means legal transfer of control or physical transfer of control or both. In practice and as we advise, legal transfer of control often occurs prior to physical transfer of control, as physical transfer often requires extensive planning for transportation, scheduling, and funding.

We sought to clarify this in the draft revisions for consultation in 2021 where we provided two separate terms: “disposition” and “repatriation” and neither term included physical transfer. We received significant feedback objecting to the implication that museums and Federal agencies have a legal interest in human remains or cultural items which is conveyed or transferred by disposition or repatriation, as the Act does not recognize museums or Federal agencies have a lawful interest other than “right of possession.” We revised the definitions of “disposition” and “repatriation” to remove any implication of a legal interest being transferred.

These regulations provide definitions for “disposition” and “repatriation,” and we do not believe it is necessary to also define the related statement because these statements are fully explained in the regulatory text.

*52. Comment:* We received 11 comments suggesting changes to the definition of “right of possession.” One comment objected to the concept of a right of possession as to any human remains, funerary objects, or objects of cultural patrimony. Two comments objected to the inclusion of funerary objects, particularly unassociated funerary objects, in the definition. One comment objected to the inclusion of objects of cultural patrimony in the definition. Six comments recommended removing the term possession or control from the definition and adding language found in the explanation of the proposed regulations. One comment recommended describing right of possession as possession or control, ownership, or holding legal title. One comment noted that determinations of right of possession must incorporate deference to Native American traditional knowledge. One comment asked for clarification on how fully free, prior, and informed consent is proven.

*DOI Response:* We cannot make the requested changes. The definition is drawn directly from the Act itself,

which provides for a right of possession and applies it in some manner to human remains, funerary objects, sacred objects, and objects of cultural patrimony. Moreover, we cannot delete or alter the express meaning provided by Congress.

We have not removed the term possession or control because doing so could cause confusion that might prevent cultural items to which a museum or Federal agency asserts a right of possession from appearing on summaries. Even where a museum or Federal agency asserts a right of possession, it must still comply with the requirements of the Act and these regulations for cultural items which are in its possession or control. We have not made ownership or legal title a requirement because doing so would be circular and presume the result that an analysis of right of possession seeks to determine. As this definition intentionally hews closely to the Act, we have not added any clarifying language from the proposed regulations. Instead, we reiterate here that a right of possession does not include, for example, consent given under duress or because of bribery, blackmail, fraud, misrepresentation, or duplicity on the part of the recipient. Voluntary consent may be shown by evidence that consent was fully free, prior, and informed, though those elements are not listed in the definition itself. The type and extent of such evidence will vary from case to case.

While we agree that determinations of right of possession must consider Native American traditional knowledge, we have not added that requirement to the definition. In other places, we have emphasized the need for deference to Native American traditional knowledge to ensure the rights of lineal descendants, Indian Tribes, and NHOs the Act recognizes. The addition of “according to Native American traditional knowledge” in other definitions is to ensure meaningful consideration of this information during consultation. Consultation, which is required throughout the Act prior to any determination, is how an Indian Tribe or NHO shares the information needed to identify a cultural item.

*53. Comment:* We received 11 comments requesting changes to the definition of “sacred object.” Two comments requested the addition of family spiritual practices to accommodate a broader definition of traditional Native American religions. One comment requested we replace “according to” with “as determined by” to strengthen the definition. Three comments objected to the definition as

it adhered too closely to the definition in the Act and the existing regulations and is too limiting by requiring the object be needed, the adherents be present-day, or the practice be for observance or renewal. One comment asked why the definition has been revised at all from the existing regulations and requested it be reverted to the definition in the Act. One comment objected to the definition as over-broad, a reversal of Congressional intent, and contrary to explicit statements in the Congressional record at the time of the Act's passage.

One extensive comment stated that the proposed regulations impermissibly broaden the definition, contravenes Congressional intent, and could create a conflict with the Archaeological Resources Protection Act (ARPA). According to the comment, the proposed definition, coupled with explanatory language in the proposed regulations, means that if a lineal descendant, Indian Tribe, or NHO wants an object, or a category of objects, then that object or object category is, by definition, a sacred object. By contrast, Congress stated that a sacred object is an object that was devoted to a traditional religious ceremony or ritual when possessed by a Native American and must be used in the present-day in a Native American religious ceremony. Furthermore, according to the comment, the impermissible broadening of the term to include items that Congress did not intend to be considered sacred objects could conflict with ARPA because most Native American items removed from Federal lands are archeological; non-NAGPRA archeological resources removed from Federal lands under ARPA must be curated consistent with Federal curation regulations; and those curation regulations do not allow transfer or reinterment of those archeological resources.

*DOI Response:* We do not believe this definition should include a separate category of "spiritual practice" because the language in the Act of "traditional Native American religion" is broad enough to encompass the examples in the comment. We are unable to change "according to" to "as determined by" as it would be inconsistent with the Act. Museums and Federal agencies are responsible for making determinations under the Act and these regulations, but must do so after consulting with lineal descendants, Indian Tribes, and NHOs. We have changed the order of the sentence to reflect the importance of Native American traditional knowledge (which includes customs and traditions) in this definition. We are unable to

broaden the definition as requested by some comments as those phrases (needed and present-day) are the required elements of the definition in the Act. "Observance or renewal" were incorporated into the definitions in the 1993 Proposed Rule to incorporate language from the House and Senate Committee reports relating to the Act (58 FR 31122 and 58 FR 31126; 1995 Final Rule, 60 FR 62138). We have revised the definition in the existing regulations to clarify the definition by removing the examples and simplifying the sentence structure while retaining the required elements of the definition from the Act and the legislative history.

We disagree that the definition as proposed is over-broad, a reversal of Congressional intent, contrary to explicit statements in the Congressional record, or in conflict with ARPA. We disagree that under the definition, any object, or category of objects, that is imbued with sacredness by a lineal descendant, Indian Tribe, or NHO, without anything more, would satisfy the definition. All the elements explicitly stated in the definition must be satisfied for an object to be identified as a sacred object. The elements of the definition require that an object be:

- A specific ceremonial object,
- Needed by a traditional religious leader,
- For present-day adherents to practice traditional Native American religion.

We also disagree that an object to be interred cannot be a sacred object. A specific object may be deemed to be a sacred object if, based on Native American traditional knowledge, in the past, the object was ceremonially interred as a traditional Native American religious practice, the object was subsequently disinterred, and today, it is needed by a traditional Native American religious leader to renew the ceremonial interment of the specific object by present-day adherents.

We agree with the comment that when NAGPRA was passed, Congress made clear that not all objects could be deemed "sacred" or "cultural patrimony." However, this comment reinforces the need for deference to Native American traditional knowledge to ensure the rights of lineal descendants, Indian Tribes, and NHOs the Act recognizes. The addition of "according to Native American traditional knowledge" in this definition is to ensure meaningful consideration of this information during consultation.

We believe this addition to the various definitions of cultural items will lead to more informed decision-making

and help to avoid the lengthy and costly delays in disposition or repatriation. In crafting the definitions of cultural items, Congress clearly intended that the definitions "will vary according to the [T]ribe, village, or Native Hawaiian community" (S. Rpt. 101-473, at 4). Consultation, which is required throughout the Act prior to any determination, is how an Indian Tribe or NHO shares the information needed to identify a cultural item. As we noted in the 1995 Final Rule, "[i]dentification of specific sacred objects or objects of cultural patrimony must be done in consultation with Indian [T]ribe representatives, [NHOs,] and traditional religious leaders since few, if any, museums or Federal agencies have the necessary personnel to make such identifications" (60 FR 62148).

54. *Comment:* We received one comment suggesting changes to the definition of "summary" to include associated funerary objects.

*DOI Response:* We cannot add associated funerary objects to a summary as that would be inconsistent with the Act. An inventory pertains to human remains and associated funerary objects (25 U.S.C. 3003(a)), while a summary pertains to "unassociated funerary objects, sacred objects, or objects of cultural patrimony" (25 U.S.C. 3004(a)).

55. *Comment:* We received five comments suggesting changes to the definition of "traditional religious leader." All five comments requested broadening the definition so as not to limit it to individuals who are responsible or who hold a leadership role. A broader definition will allow Indian Tribes or NHOs to identify traditional religious leaders. One comment requested we update the words used in the term itself, as they are unnecessary, condescending, and outdated.

*DOI Response:* As noted in the comments, this definition is not in the Act but the term is used in the Act in the definition of sacred object, the consultation requirements for inventories and summaries, and the composition of the Review Committee. In the proposed regulations, we intended to place the authority for identifying a traditional religious leader in the hands of an Indian Tribe or NHO. We understand the term may be offensive but given its use in the Act we cannot change the term itself. We can, and have, modified the definition to ensure a lineal descendant, as well as an Indian Tribe or NHO, can identify any individual that the lineal descendant, Indian Tribe, or NHO feels is the appropriate individual to serve in this

role. This addition of lineal descendant aligns with statements made by the Department in the 1995 Final Rule regarding the role of “a member of an Indian Tribe” in the existing definition of a traditional religious leader (see 60 FR 62138, 60 FR 62151, and 60 FR 62155).

56. *Comment:* We received seven comments suggesting changes to the definition of “Tribal lands.” Some of the comments objected to the deletion in the proposed regulations of a sentence concerning application of the Fifth Amendment to the Constitution to private land, reasoning that the Department was proposing to exclude private land within the exterior boundaries of a reservation from the application of the Act and these regulations. Another comment was concerned that the definition does not include Tribal trust lands outside reservation boundaries. Other comments suggested the addition of an amendment to the regulatory definition, incorporating our clarification in the preamble to the proposed regulations that, under Supreme Court precedent, the boundaries of Tribal trust land constituted an informal reservation.

*DOI Response:* The Act defines “Tribal land” as “(1) All lands that are within the exterior boundaries of any Indian reservation; (2) All lands that are dependent Indian communities; and (3) All lands administered by the Department of Hawaiian Home Lands (DHHL) under the Hawaiian Homes Commission Act of 1920 (HHCA, 42 Stat. 108) and Section 4 of the Act to Provide for the Admission of the State of Hawai‘i into the Union (73 Stat. 4), including ‘available lands’ and ‘Hawaiian home lands’” (25 U.S.C. 3001(15)). We decline to add Tribal trust land to the common statutory definition in the regulations because of the possibility of unforeseen consequences for Tribal jurisdiction. We do, however, agree with the comments that the plain language of the definition includes private land within the exterior boundaries of the reservation (*McGirt v. Oklahoma*, 140 S. Ct. 659 (2019)). We also agree that Tribal trust land outside the exterior boundaries of a formal reservation would, under the proposed regulations and these regulations, be considered an “informal reservation,” still qualifying as Tribal land for purposes of NAGPRA (*Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991)).

57. *Comment:* We received three comments requesting clarification to the definition of “United States.” All three comments wanted to understand how

the Act and the regulations apply in the U.S. territories.

*DOI Response:* The Act and these regulations only apply to the 50 states and the District of Columbia. Unlike other statutes referenced by one of the comments, the Act does not provide a definition of the United States that includes its territories and possessions. Any change to this limitation would require Congressional action.

#### *D. Section 10.3 Cultural and Geographical Affiliation*

58. *Comment:* We received 27 comments on § 10.3, generally. Of that total, most comments generally supported the elimination of the term “culturally unidentifiable.” A few comments specifically objected to the removal of “culturally unidentifiable” and the use of “Native American traditional knowledge” and “geographical affiliation” because of concerns that this would expand the scope of what must be repatriated. Three comments requested more direct participation by Indian Tribes and NHOs in determining cultural and geographical affiliation and one comment requested that the Secretary determine cultural and geographical affiliation.

*DOI Response:* These regulations do not use the term “culturally unidentifiable.” Because Congress anticipated that not all human remains could be determined to have cultural affiliation, Congress required that the Review Committee develop specific actions for the disposition of any human remains with no cultural affiliation and thereby ensured that all Native American human remains would be subject to the Act. For more on the development of these regulations, see 2007 Proposed Rule (72 FR 58582) and 2010 Final Rule (75 FR 12378). The inclusion of Native American traditional knowledge as a type of information that can identify cultural affiliation is consistent with Congressional intent and ensures the stated purpose of these regulations for deference to lineal descendants, Indian Tribes, and NHOs in determinations of cultural affiliation. Other revisions to this section, based on specific comments, are explained below.

In response to the noted objections, we disagree with their limited characterization of the scope of what must be repatriated. To forego the use of geographical information and Native American traditional knowledge to limit the number of human remains or cultural items that may be subject to repatriation is inconsistent with the Act, which only provides three exceptions to

the requirement for expeditious repatriation (see 25 U.S.C. 3005).

59. *Comment:* We received 11 comments generally on the paragraph in the proposed regulations under § 10.3 on Information for cultural affiliation (in the final regulations, this is renumbered § 10.3(a) and retitled Step 1: Collect information available.). Most comments supported the changes to the types of information, and a few comments requested additional changes to types of information.

*DOI Response:* We cannot make the requested changes to prioritize the types of information or assign them relative values (1995 Final Rule, 60 FR 62156). We have repeated the exact types of information used for cultural affiliation as provided by Congress in alphabetical order and added Native American traditional knowledge to call out this newly defined type of expert opinion.

60. *Comment:* We received 23 comments on the paragraph in the proposed regulations under § 10.3 on Cultural affiliation (in the final regulations, this is incorporated into the introductory paragraph of § 10.3). The comments objected to the use of “preponderance of the evidence” rather than “reasonable” in this paragraph. Most of these comments referenced the language of the Act, specifically the difference between “reasonably” and “reasonable belief” at 25 U.S.C. 3001(2), 3002(a)(2)(C), 3003(d)(2)(C), on the one hand, and “preponderance of the evidence” at 25 U.S.C. 3001(3)(B), 3002(a)(2)(C)(2), 3005(a)(4). One comment asked what “reasonable” means.

*DOI Response:* We have replaced “a preponderance of the evidence” with “reasonable.” As stated in the proposed regulations, the Department reiterates that “a preponderance of the evidence” is a similar standard to a “reasonableness” requirement and both standards require a “more likely than not” assessment (87 FR 63216). However, we agree with the comments that these terms have different connotations and that “preponderance of the evidence” has been misused and misapplied in determining cultural affiliation. We agree with the comments that the Act envisioned a simple and collaborative procedure to determine cultural affiliation through consultation with Indian Tribes and NHOs. Only when a museum or Federal agency was unable to determine cultural affiliation would an Indian Tribe or NHO need to demonstrate cultural affiliation through a preponderance of the evidence. As this section of the regulations describes the initial procedure for determining cultural affiliation, we have revised it to

only reflect the requirement to reasonably determine cultural affiliation. In response to one comment, “reasonable” means both the procedure to make a determination and the determination itself are “in accordance with reason,” “not extreme or excessive,” and “moderate, fair” (<https://www.merriam-webster.com/dictionary/reasonable>, accessed 12/1/2023).

61. *Comment:* We received 41 comments on the paragraph in the proposed regulations under § 10.3 titled Geographical affiliation (in the final regulations, this is removed). Of that total, two comments objected to broadening affiliation to include geography alone. One comment appreciated the more inclusive term but was concerned about making connections only based on geography. One comment requested that archaeological and historical knowledge, especially of disruptions of indigenous territories, be included as key pieces of evidence for establishing geographical affiliation. Six comments supported the paragraph as proposed.

A total of 33 comments requested the paragraph be removed in its entirety, although these comments were supportive of clarifying that cultural affiliation could be based on geography alone. Some comments were concerned that geographical affiliation would leave out Tribal knowledge and oral history. One comment was concerned that as proposed, “geographical affiliation” would disenfranchise Indian Tribes under certain circumstances and provides fewer options than are currently available by restricting evidence of geographical affiliation. Most of the comments expressly requested that geographical affiliation be incorporated into cultural affiliation. As proposed, the comments expressed concern that geographical affiliation would not simplify repatriation but bring new complications and loopholes to the process. The comments requested the final regulations should develop an efficient and less burdensome procedure and provide that, in the absence of other evidence, cultural affiliation need only include one type of information that reasonably points to a shared relationship between an Indian Tribe and an identifiable earlier group.

*DOI Response:* We have removed the paragraph proposed at § 10.3 titled Geographical affiliation. We have made related changes to other paragraphs in § 10.3 and renamed the entire section. We have revised the text in the final regulations to reflect a step-by-step procedure for determining cultural affiliation. We have required in the step-

by-step processes for disposition under § 10.7 or repatriation under §§ 10.9 and 10.10 that when cultural affiliation is not determined, the museum or Federal agency must briefly describe the information considered under § 10.3(a) and the criteria identified under § 10.3(b) to explain how the determination was made. We have made clear in the definition of cultural affiliation, this section, and the step-by-step processes for disposition or repatriation that cultural affiliation must be identified either clearly by the information available or reasonably by the geographic origin or acquisition history of the human remains or cultural items.

The intent of these revisions is to realign the geographic analysis, applied previously to culturally unidentifiable human remains in the existing regulations, as part of the cultural affiliation process. The same methods, analyses, sources, and evidence may inform cultural affiliation determinations based on geographical information as have been used in the past and as discussed in the proposed rule. We agree with the voluminous comments that described museum and Federal agency practices as overly expansive in designating human remains and associated funerary objects as culturally unidentifiable. We believe in most cases, sufficient information on geographic origin and acquisition history exists and can be used to either clearly or reasonably identify Indian Tribes or NHOs with cultural affiliation.

62. *Comment:* We received four comments supporting the paragraph in the proposed regulations under § 10.3 titled Multiple affiliations (in the final regulations, this is renumbered § 10.3(d) and retitled Joint disposition or repatriation). Many other comments suggested changing the title of the paragraph to Joint disposition or repatriation.

*DOI Response:* We have accepted and adopted the suggested change in the title of this paragraph.

63. *Comment:* We received 19 comments suggesting changes to the paragraph in the proposed regulations under § 10.3 titled Closest affiliation (in the final regulations, this is renumbered § 10.3(e) and retitled Competing claims or requests). One comment objected to museums and Federal agencies making determinations on the closest affiliation. One comment objected to the priority order for NHOs as it was too complex and may result in a family or small organization having a priority over the Office of Native Hawaiian Affairs. Two comments asked if the enumerated list reflected a priority and if two Indian

Tribes or NHOs might both be in a single category. One comment requested guidance on how closest affiliation would be determined if one Tribe’s claim is based on geographic information and another Tribe’s claim is based on cultural practices. One comment requested it be clear that museums and Federal agencies must determine the Indian Tribe with the closest cultural affiliation and continually notify that Indian Tribe, regardless of who might make a claim or a request. Several comments requested the regulations be revised to bring all the priority orders together into one provision and provided specific redline changes to the proposed text.

*DOI Response:* We cannot change who is responsible for making determinations on the closest cultural affiliation when, and only when, there are competing claims or requests. This is required by the Act at 25 U.S.C. 3002(a) and 3005(e). Museums and Federal agencies are responsible for making determinations under the Act and these regulations, but must do so after consulting with lineal descendants, Indian Tribes, and NHOs. Based on consultation with the Native Hawaiian Community, it was our intention to give priority to a family or small organization over the Office of Native Hawaiian Affairs when, and only when, there are competing claims or requests. The enumerated lists are intended to identify a priority order, and it is possible that two Indian Tribes or NHOs might have the same priority. The priority order distinguishes between different kinds of cultural affiliation and places affiliation based on geographic information alone below other kinds of cultural affiliation. There is no obligation for a museum or Federal agency to determine the Indian Tribe or NHO with the closest cultural affiliation unless and until there are competing claims or requests. All Indian Tribes or NHOs with cultural affiliation have an opportunity to make claims or requests prior to a disposition or repatriation statement.

To avoid repetition and to clarify when closest cultural affiliation must be determined, we have combined paragraph (c)(2) in § 10.3 in the proposed regulations titled Competing claims or requests with paragraph (d) titled Closest affiliation to create a new paragraph § 10.3(e) Competing claims or requests. In conjunction with the changes to § 10.3 described above, we have added the standard of “preponderance of the evidence” to this paragraph on completing claims or requests. We cannot accept the suggestion to bring the priority orders

together in this paragraph because the priority order established in the Act for Federal or Tribal lands (25 U.S.C. 3002) is broader than the priority order for the “closest cultural affiliation” identified here. Where appropriate, we have referred to this paragraph in §§ 10.7, 10.9, and 10.10.

#### *E. Subparts B and C*

64. *Comment:* We received 53 comments on the regulatory steps for consultation (Initiate consultation and Consult with requesting parties) in §§ 10.4, 10.9, and 10.10. Three comments supported the requirement for museums and Federal agencies to initiate consultation in these paragraphs. The largest number of comments (15) requested we remove the requirement for consulting parties to submit a written request to consult. In addition, 11 comments requested that the invitation to consult include a clear statement that sensitive information will not be requested, but if shared, the consultation record will be protected from disclosure “to any person for any reason.” Five comments requested changes to the two terms “consulting parties” and “requesting parties” while one comment requested adding to the list of “consulting parties.” Five comments requested deference to Indian Tribes or NHOs on the timelines for consultation and one comment requested deference to documentation submitted by Indian Tribes or NHOs during consultation. Four comments requested changes to ensure consultation is not cutoff with publication of a notice. Three comments questioned the use of good-faith effort in these paragraphs. Two comments questioned how consultation can proceed where consensus cannot be reached. Two comments recommended adding an upfront fee payment for initiating consultation, like the Federal Communications Commission. One comment stated that consultation is not streamlined or simplified in these regulations.

*DOI Response:* We have removed the requirement for a consulting party to submit a written request to consult and, consequently, the cutoff for requests to consult before publication of a notice. Correspondingly, we have removed the requirement for a response to the request to consult within 10 days. As noted in the proposed rule, the written request to consult was a necessary precursor to require a museum or Federal agency to respond by a certain date. While a written request to consult is no longer a requirement, we would recommend a consulting party submit a written request to consult to ensure

there is a clear record in case the museum or Federal agency does not respond.

As noted in Comment 5, we cannot dictate how a museum or Federal agency requests or records sensitive information it receives during consultation. We can, and have, specifically limited the information needed to comply with these regulations, and we encourage lineal descendants, Indian Tribes, and NHOs to request that museums and Federal agencies ensure that information of a particularly sensitive nature is not made available to the public, pursuant to otherwise applicable law. Since 1995, the Department has recommended that museum or Federal officials ensure that sensitive information does not become part of the public record by not collecting, or writing down, such information in the first place (1995 Final Rule, 60 FR 62154). We recommend that in a response to an invitation to consult, lineal descendants, Indian Tribes, and NHOs stipulate their requirements for protecting sensitive information shared during consultation, such as prohibiting any audio or video recording of consultation, requiring use of a specific note-taker or transcriptionist, or conducting consultation in a separate facility with limited attendance.

We have made clarifying edits to the paragraphs in §§ 10.4, 10.9, and 10.10, including the requested change from “requesting parties” to “consulting parties” throughout. We note that consulting parties are those with potential cultural affiliation, but this should not impact the role of removed and aboriginal land Indian Tribes as consulting parties. Based on geographical information, removed and aboriginal land Indian Tribes are those with potential cultural affiliation. We have not added a requirement for payment of an upfront fee in the initiation of consultation. We recommend that in a response to an invitation to consult, lineal descendants, Indian Tribes, and NHOs stipulate their requirements for conducting consultation, including any required financial support.

In response to other comments, we have made changes to the paragraphs in §§ 10.4, 10.9, and 10.10 to correspond to changes in the definition of consultation which directly addresses comments on deference, good-faith, and reaching consensus. We have changed recommendations to preferences on the timeline and method for consultation, but we cannot require deference in this instance because the timeline may be

dictated by other requirements in the regulatory processes.

65. *Comment:* We received 20 comments on the regulatory steps for submitting a notice for publication and for receiving and considering a claim for disposition or a request for repatriation in §§ 10.7, 10.9, and 10.10. Four comments supported the timeline for the National NAGPRA Program to approve or return a notice submission but requested that a timeline be added requiring museums, Federal agencies, or DHHL to submit a revised notice. Five comments requested clarification on the statements in §§ 10.7 and 10.10 that any claim or request received no later than 30 days after publication of a notice must be considered, noting that the preceding sentence in both sections seemed contradictory since any claim or request must be received before a disposition or repatriation statement is sent. One comment requested grammatical edits to clarify the criteria for a claim for disposition or request for repatriation. Seven comments in one submission repeatedly objected to the 30-day timeframe for lineal descendants, Indian Tribes, or NHOs to submit claims or requests following a notice publication in §§ 10.7, 10.9, and 10.10. On the other hand, one comment stated submission of claims or requests should be limited to the 30 days after publication notice and requests received after that date should not be considered. One comment disagreed with the provisions for claims or requests to be received before publication of a notice while another comment felt these provisions would ensure more flexibility for lineal descendants, Indian Tribes, and NHOs.

*DOI Response:* We do not intend to impose deadlines on lineal descendants, Indian Tribes, or NHOs to submit claims for disposition or requests for repatriation. Under these regulations, a notice is required to identify the date (30 days from the date of publication) after which a disposition or repatriation statement may be sent to a claimant or a requestor. We intended to clarify in these provisions that any claim or request submitted during that 30-day period *must* be considered since a disposition or repatriation statement *may* be sent immediately after that date. With the disposition or repatriation statement, the museum or Federal agency divests itself of any interest in the human remains or cultural items and cannot accept or consider a request from any other party.

Therefore, while there is no timeline for lineal descendants, Indian Tribes, and NHOs to act, a failure to do so before a disposition or repatriation

statement is sent is an irrevocable waiver of any right to make a claim or a request (see § 10.1(g) and Comment 20). For example, once a notice of any kind publishes in the **Federal Register**, there is a 30-day period for any party to make a claim for disposition or a request for repatriation. On day 31, if a disposition or repatriation statement is sent to a claimant or requestor, any additional claims or requests will not be considered.

We have added a timeline (14 days or two weeks) for a museum or Federal agency to resubmit a notice that is returned to them under §§ 10.7, 10.9, or 10.10. We have adjusted the timeline (from 15 days to 21 days) for the National NAGPRA Program to accept or return a notice. This change is related to the change in § 10.1(f) from business days to calendar days and does not change the overall timeline (3 weeks). We have removed the sentence stating that any claim or request received no later than 30 days after publication of a notice must be considered. While accurate, we understand the confusion this sentence causes, especially considering the objections to the 30-day deadline. We have made grammatical changes to the criteria to ensure clarity.

We have not made changes to the date of a claim or request received before publication of a notice (same date the notice was published). We agree that this provides flexibility for lineal descendants, Indian Tribes, and NHOs. In addition, we feel this provides the opportunity for lineal descendants, Indian Tribes, and NHOs to dictate the timeline, as much as they can, after publication of a notice of any kind. For example, in a claim for disposition or a request for repatriation, the lineal descendant, Indian Tribe, or NHO could request that the disposition or repatriation statement be sent on day 31 after publication of any kind. If any competing claims or requests are received during the 30-day period, this request could not be accommodated. If no competing claims or requests are received, nothing in these regulations would prevent the disposition or repatriation statement from being sent on day 31. In addition to competing claims or requests, other factors outside of these regulations, such as legal review of the statement or deaccession policies, may require additional time before sending the disposition or repatriation statement.

If no competing claims or requests are received, 31 days is the minimum amount of time between any kind of notice publication and sending a disposition or repatriation statement. Under §§ 10.7 and 10.10, the maximum

amount of time between notice publication and sending a disposition or repatriation statement depends on when a claim for disposition or request for repatriation is received. No later than 90 days after responding to a claim for disposition or a request for repatriation, a disposition or repatriation statement must be sent.

*66. Comment:* We received 22 comments on the regulatory steps for disposition or repatriation under §§ 10.7, 10.9, or 10.10. Of that total, 13 comments requested that the regulations require documentation or notification of physical transfer after a disposition or repatriation statement is sent. Four comments made a similar request for documentation of the discretionary physical transfer or reinterment of human remains or cultural items under §§ 10.7 or 10.10 specifically so, in the future, Indian Tribes or NHOs with cultural affiliation would be able to request the return of those human remains or cultural items. Three comments requested disposition or repatriation statements be published in the **Federal Register** specifically to further support the reviewability of disposition or repatriation statements by Federal agencies. On the other hand, one comment requested a “paper transfer” procedure be developed or explained for Indian Tribes or NHOs who do not have access to a curation facility or other means to physically and honorably receive human remains or cultural items. One comment requested clarification as to what kinds of agreements might be entered into after a disposition or repatriation statement is sent. An additional 14 comments made a similar request to include physical transfer in the definitions of “disposition” or “repatriation” (see Comment 51).

*DOI Response:* We have not made the requested changes related to physical transfers or reinterments for several reasons. We have made changes to the definition of repatriation and to what is required after a disposition or repatriation statement is sent.

First, there is a need to balance the requests for additional documentation and notification with the protection of sensitive information. Any document submitted to the National NAGPRA Program is generally subject to release under the Freedom of Information Act. Requiring documentation of physical transfers or reinterments to be submitted to the National NAGPRA Program or published in the **Federal Register** comes with added risks of disclosure of sensitive information. As we advise museums and Federal agencies, the best way to prevent sensitive information

from being released is to not write it down in the first place.

Second, as discussed in the response to comments on the definitions in Comment 51, it is difficult for these regulations to require physical transfer either as a part of or after the regulatory processes for disposition or repatriation. The term physical transfer is used in these regulations to provide for an action that, as desired by a Tribe or NHO, may occur, but is not required to occur, after sending a disposition or repatriation statement. While we only received one comment indicating this, we know that many lineal descendants, Indian Tribes, and NHOs prefer to not complete physical transfer immediately or at all. Therefore, as in the proposed regulations, we have retained a separation between the disposition or repatriation statements and physical transfer, and we have not attached any requirements for reporting on physical transfer in these regulations. Documentation of physical transfer is required but is not sent to the National NAGPRA Program or published in the **Federal Register**.

Third, the Act does not provide for or require the involvement of the Secretary in the physical transfer or in any other procedure after publication of a notice. The proposed regulations provided, and these regulations retain, a new requirement for the Secretary to receive copies of disposition or repatriation statements. This new requirement is based on the 2010 Government Accountability Office report on the implementation of the Act, and the Department will retain these documents with the other compliance documents in the disposition or repatriation processes. However, we do not believe the Department should collect any additional documentation on the physical transfers or publish these disposition or repatriation statements. We affirm our response to consultation in 2021 that publication in the **Federal Register** would be costly, inefficient, and of little relative value. The purpose of publishing a notice under the Act and these regulations is to allow additional parties to come forward. Disposition or repatriation statements are the final step in regulatory processes and recognize the rights of a lineal descendant, Indian Tribe, or NHO in the human remains or cultural items. These statements cannot be challenged or revoked. Publication of those statements might lead to confusion about which type of publication is appealable. Although not incorporated into the regulatory text, the National NAGPRA Program will record information on disposition or repatriation statements it receives from

both museums and Federal agencies and will provide that information in its databases or upon request.

The Act provides very little instruction for this significant and important part of the processes. The section of the Act titled “Repatriation” (25 U.S.C. 3005) focuses on the circumstances under which human remains or cultural items must be “expeditiously returned” after a request from a lineal descendant, Indian Tribe, or NHO. The Act requires that the return of human remains or cultural items be “in consultation with the requesting lineal descendant or [T]ribe or organization to determine the place and manner of delivery of such items” (25 U.S.C. 3005(a)(3)). Congressional reports state that after a notice, a museum or Federal agency must “make arrangements to return such items if the appropriate [T]ribe made a request” (H. Rpt. 101–877, at 11) and must allow for “mutually acceptable alternative[s] to repatriation” (S. Rpt. 101–473, at 8).

The existing regulations refer to “transfer custody” of human remains or cultural items from Federal land. For holdings or collections of human remains or cultural items with cultural affiliation, only “repatriation” is used, as in consultation must occur on the place and manner of the repatriation and the content and recipients of all repatriations must be permanently documented. Under the 2010 regulations, “transfer control” is used repeatedly to describe the process for culturally unidentifiable human remains.

We sought to clarify this in the draft revisions for consultation in 2021 where we provided two separate terms: “disposition” and “repatriation” and neither term included physical transfer. Transfer and physical transfer were used elsewhere after disposition or repatriation statements. In 2021, we did not receive any related comments on physical transfer. In the proposed regulations, we did not address the separation of disposition or repatriation from physical transfer and retained the procedures for physical transfer that, as desired by a Tribe or NHO, may occur, but are not required to occur, after disposition or repatriation (2022 Proposed Rule, 87 FR 63246, 87 FR 63250, and 87 FR 63255).

We appreciate and understand the significance of physical transfer or other desired outcomes for lineal descendants, Indian Tribes, and NHOs after museums and Federal agencies complete the regulatory processes by sending a disposition or repatriation statement. We do not intend these regulations to indicate that completion

of the regulatory processes is the end goal for lineal descendants, Indian Tribes, NHOs, museums, or Federal agencies. We know that for many lineal descendants, Indian Tribes, and NHOs, this work is not finished until their ancestors and other relatives are home or at rest. For many museums and Federal agencies, this work is not finished until the holding or collection is in the hands of its rightful caretakers.

However, we also know that the desired outcome of the disposition or repatriation processes vary greatly among lineal descendants, Indian Tribes, and NHOs. If or when physical transfer occurs depends on many factors, including spiritual, cultural, or religious observances, which cannot and should not be dictated by a regulatory process. It is, therefore, difficult for these regulations to require physical transfer either as a part of or after the regulatory processes. In response to the request for clarification on agreements after disposition or repatriation, any kind of agreement could occur after a disposition or repatriation statement is sent. We provided this language from the Act to ensure it was clear that once a lineal descendant, Indian Tribe, or NHO holds all rights and interests in the human remains or cultural items, what comes next is not in any way dictated by these regulations. We have removed “the care or custody” to ensure there is no implied limitation on such an agreement. Examples of agreements after disposition or repatriation include curation agreements, agreements to reinter human remains or cultural items, or agreements to analyze human remains or cultural items. The terms of the agreement, however, are at the discretion of the lineal descendant, Indian Tribe, or NHO.

*67. Comment:* We received 20 comments on the regulatory steps for or after disposition or repatriation statements in §§ 10.7, 10.9, and 10.10. Two comments related to the requirements for consultation on the care, custody, and physical transfer of human remains or cultural items. One comment requested that we add that museums or Federal agencies cannot dictate care, custody, or physical transfer before or after a disposition or repatriation statement is sent. One comment recommended based on experience that consultation on care, custody, or physical transfer only occur after a disposition or repatriation statement is sent. One comment requested that the regulations require museums and Federal agencies to pay for care and physical transfer of human remains or cultural items. The other

comments suggested the following language changes:

- Replace physical “transfer” with physical “repatriation;”
- Replace “requestors” with “claimants;”
- Replace “most appropriate claimant/requestor” with “closest cultural affiliation claimants” and cite to § 10.3 of this part;
- Replace disposition or repatriation “statements” with “documents;”
- Replace “care, custody” with “the appropriate duty of care, custody;” and
- Replace “delivery” with “escort” to be sensitive to the nature of human remains and cultural items.

*DOI Response:* We have made the requested changes to require a museum or Federal agency to consult with a requestor on custody and physical transfer after a disposition or repatriation statement is sent. Nothing under the Act or these regulations allow a museum or Federal agency to dictate any action after a disposition or repatriation statement is sent. Regardless of the disposition or repatriation statement, a museum or Federal agency is obligated to exercise a duty of care for human remains or cultural items in its custody or in its possession or control under § 10.1(d) and to defer to lineal descendants, Indian Tribes, and NHOs. We cannot require museums or Federal agencies pay for care or physical transfer.

We have not changed “physical transfer” for reasons explained in Comment 66 on the intentional difference between disposition or repatriation and physical transfer. We have not changed “requestor” to “claimants.” We have intentionally used the terms “claim” and “claimant” to refer to the disposition process in Subpart B and “request” and “requestor” to refer to the repatriation process in Subpart C. We cannot make the requested change from “most appropriate claimant/requestor” because while the Indian Tribe or NHO with the closest cultural affiliation under § 10.3 is one possible most appropriate claimant/requestor, competing claims for disposition or repatriation might involve lineal descendants or other Indian Tribes with a priority for disposition. We have not changed statements to documents. Statements are used in limited instances in these regulations and indicate a specific kind of document. Document is used more broadly.

We have removed “care” in any use outside of the duty of care. We have revised the documentation of physical transfer to not require any specific information. While physical transfer

must be documented, it is up to the lineal descendant, Indian Tribe, or NHO to dictate what the documentation should contain to ensure protection of sensitive information.

#### F. Section 10.4 General

68. *Comment:* We received seven comments requesting changes to Subpart B-Protection of human remains or cultural items on Federal or Tribal lands. Six of these comments requested that the regulations acknowledge the application of the Act to human remains or cultural items removed from Federal or Tribal lands that are subject to the disposition and trafficking provisions of the Act. The comments request a procedure by which Indian Tribes can report human remains and cultural items obtained in violation of the Act and send a clear signal to third parties that it is a crime to sell human remains or cultural items under NAGPRA and other statutes, such as the Archaeological Resources Protection Act (ARPA). The comments specifically request that references to human remains and cultural items “on” Federal or Tribal lands be expanded to human remains or cultural items “located on or removed from” such lands. One comment requested stronger requirements in the regulations to protect Tribal cultural heritage and sacred sites from theft or damage on Federal lands.

*DOI Response:* We cannot add the requested procedures to these regulations. We agree that the criminal provisions of the Act (18 U.S.C. 1170(a) and (b)) apply to human remains or cultural items as defined in the Act and these regulations. The Secretary and the Department do not have jurisdiction for implementing those provisions of the Act and cannot add them to these regulations. Any human remains or cultural items located on or removed from Federal or Tribal lands after November 16, 1990, are subject to these regulations under Subpart B. If human remains or cultural items are obtained illegally from Federal or Tribal lands, the processes described in these regulations do not apply until the human remains or cultural items are recovered by Federal law enforcement agents and any criminal procedures have concluded. The title of Subpart B highlights the procedures in §§ 10.4, 10.5, and 10.6 that provide protection to human remains or cultural items that are *located on* Federal or Tribal land. The disposition procedures in § 10.7 apply to any human remains or cultural items that are *removed from* Federal or Tribal land. We do not believe changing “on” to “located on or removed from”

will have any impact on the application of these regulations. We are unable to add any requirements to these regulations that exceed the requirements provided in the Act for protection of human remains or cultural items on Federal or Tribal land.

69. *Comment:* We received 15 comments on § 10.4, generally. Of that total, 14 comments suggested changes to the section while one comment supported it as proposed. Ten comments requested a separate and simplified procedure for boarding school cemeteries on Federal lands, such as (1) consult, (2) develop a plan of action, and (3) disinter, with no requirement for an ARPA permit. One comment objected to the revisions and found the text confusing and unclear. One comment stated that these regulations should not require actions by Indian Tribes on Tribal lands. One comment suggested removing this section entirely and relying on the provisions of the National Historic Preservation Act (NHPA) because “[t]here is no need for a plan of action independent of that already stipulated for historic preservation requirements in the NHPA” (see NPS–2022–0004–0116). One comment requested a procedure for Indian Tribes to make requests for a plan of action or comprehensive agreement, to report non-compliance of Federal agencies, and to file suit under the Administrative Procedures Act.

*DOI Response:* We cannot make the requested change for boarding school cemeteries. As stated in the proposed regulations, the Act does not require a Federal agency to engage in an excavation of possible burial sites (*Geronimo v. Obama*, 725 F. Supp. 2d 182, 187, n. 4 (D.D.C. 2010)). However, the excavation provisions of the Act and these regulations apply to the human remains and cultural items disinterred from cemeteries on Federal or Tribal lands (2022 Proposed Rule, 87 FR 63205). The suggested simplified procedure is already provided for in these regulations. Any Indian Tribe or NHO may request the excavation of a burial site on Federal lands and, if the Federal agency agrees, a plan of action, including consultation with lineal descendants, Indian Tribes, or NHOs, is required. These regulations cannot require that a Federal agency agree to excavate a burial site nor can we unilaterally state an ARPA permit is not required for excavations at boarding school cemeteries. However, we believe these regulations provide a streamlined procedure for excavations of boarding school cemeteries through consultation and a plan of action, and the Department encourages any Federal

agency that manages boarding schools and cemeteries on Federal lands to consult with lineal descendants, Indian Tribes, and NHOs on identification, disinterment, and repatriation of Native American children. The Department stands ready to assist Federal agencies, Indian Tribes, and NHOs to the fullest extent of its authority.

We have made changes to the first paragraph in this section to clarify the responsibilities under this section and this Subpart. We cannot remove the requirement for Indian Tribes to take actions on Tribal lands as these actions are required by the Act itself. We cannot delete this section and rely on provisions in the NHPA because the scope of the Act and these regulations can be greater than the NHPA requirements. However, we encourage Federal agencies to consider coordinating requirements under these regulations with any other required consultation and planning efforts for their planned activities on Federal lands. Nothing in these regulations would prevent an Indian Tribe from requesting a plan of action or comprehensive agreement from a Federal agency, and these regulations require a plan of action for any discovery or excavation on Federal lands. Federal agencies are required to comply with these regulations for any human remains or cultural items on Federal lands. Federal law provides ways to allege that a Federal agency has failed to comply with the requirements of the Act or the regulations (or any other Federal law or regulations). The most broadly applicable way to allege that a Federal agency has failed to comply is to send an allegation to the head of the appropriate Federal agency or to the Federal agency’s Office of the Inspector General. If the alleged failure to comply is a final agency action (see § 10.1(i)), the failure to comply could also be the subject of a lawsuit under the Administrative Procedure Act (5 U.S.C. 704).

70. *Comment:* We received eight comments on § 10.4(a) requiring designation of an appropriate official. One comment supported the change, noting that it would increase transparency. One comment suggested designation of appropriate officials be reported to the Manager, National NAGPRA Program. Two comments requested a training requirement be added for Federal agency employees. Four comments questioned whether the Bureau of Indian Affairs (BIA) should designate the appropriate official for Tribal lands in Alaska and the continental United States rather than an Indian Tribe. Two of these comments

stated that because the BIA is currently responsible for discovery, excavation, and disposition on Tribal lands in Alaska and the continental United States, this change would require the BIA to notify all private landowners within the exterior boundaries of reservations that authority on those lands has changed from the BIA to the relevant Indian Tribe. The other two comments strongly objected to this change and requested that “. . . NAGPRA and its implementing regulations designate BIA as the exclusive regulatory authority over the discovery, excavation, and disposition of Native American cultural items within the exterior boundaries of any Indian reservation. Only after this necessary step is taken should transfer of that jurisdiction to the Tribes be contemplated” (see NPS–2022–0004–0151).

*DOI Response:* We decline to make the requested changes. Each Indian Tribe, Federal agency, or DHHL may designate appropriate officials in any way that best suits its organizational structure. For some Federal agencies, like the National Park Service, the appropriate officials may be the Superintendent of each park unit. The National NAGPRA Program cannot and should not track or record those designations. Each Federal agency is also responsible for ensuring the appropriate official receives the necessary training.

We disagree that the Act, the existing regulations, or the other cited regulations designate that the BIA is responsible for discovery, excavation, and disposition on Tribal lands in Alaska and the continental United States. In the Act, Congress specifically required that a person discovering human remains and cultural items notify “*the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian [T]ribe or Native Hawaiian organization with respect to [T]ribal lands*” 25 U.S.C. 3002(d)(1) (emphasis added). Nowhere does the Act mention the Bureau of Indian Affairs. We agree that Indian Tribes have discretion under the existing regulations in responding to a discovery on Tribal lands and that, also under the existing regulations, the BIA is responsible for issuing an ARPA permit on private lands that are also Tribal lands. Neither the existing regulations nor the Secretary assign the BIA responsibility for consultation, obtaining consent, or disposition of human remains or cultural items on

Tribal lands. As the proposed regulations stated, the clarification of the appropriate official for Tribal lands is to improve consistency with the Act by requiring certain actions by Indian Tribes, NHOs, and DHHL on Tribal lands. We note that other comments discussed below were supportive of Indian Tribes managing and making decisions regarding discoveries or excavations on their Tribal lands under §§ 10.5 and 10.6 of this part (see NPS–2022–0004–0119, as one example).

Furthermore, the BIA does not have a record or list of private landowners within the exterior boundaries of a reservation, and the Federal Government has no obligation, besides those instituted by Congress in the Administrative Procedure Act, to inform the public of changes in laws or regulations.

*71. Comment:* We received 27 comments on § 10.4(b) Plan of action. Of that total, 21 comments suggested changes to the paragraph while six comments supported it as proposed. Four comments requested a statement that plans of action and comprehensive agreements are not required on Tribal lands. Seven comments suggested changes to the likelihood of a discovery or excavation to include deference to Indian Tribes or NHOs. One comment requested that a plan of action be required before a discovery occurs. Several comments requested specific changes to requirements of a plan of action in paragraph (b)(3) of this section. One comment requested clarification on how a plan of action accommodates immediate reburial of human remains or cultural items. One comment objected to leaving or relocating human remains or cultural items without adequate protection or security. Two comments requested leaving or relocating human remains or cultural items be required in all cases. One comment requested archaeological recording and analysis be added back into the plan of action. One comment requested adding identification of human remains or cultural items to the plan of action. Three comments requested Indian Tribes and NHOs be required to sign the plan of action.

*DOI Response:* We have clarified that when a Federal agency or DHHL is responsible for a discovery or excavation on Federal or Tribal lands, a plan of action is required. A plan of action is not required for a discovery or excavation on Tribal lands when the Indian Tribe or NHO has responsibility. We hope this clarifies that when an Indian Tribe delegates its responsibility for a discovery or excavation on Tribal lands to the BIA or another Federal

agency, the BIA or Federal agency must approve and sign a plan of action. In Hawai‘i, DHHL must approve and sign a plan of action on Tribal lands unless a NHO agrees to be responsible for discoveries or excavations on the Tribal lands of an NHO. In that case, a plan of action is not required on Tribal lands of an NHO.

We have added the phrase “in consultation with Indian Tribes and Native Hawaiian organizations” to the likelihood of a discovery or excavation for a planned activity. We cannot strengthen this requirement further because Federal agencies and DHHL may have certain obligations under land management authorities to allow planned activities even when an Indian Tribe or NHO objects. However, Federal agencies and DHHL also have consultation responsibilities for land management activities that should inform when a planned activity is likely to result in a discovery or excavation subject to these regulations. We cannot require a general plan of action be developed by all Federal agencies and DHHL in case of discovery, but we agree with the comment that a plan of action is a useful tool to ensure efficiency and effectiveness in responding to a discovery. We believe that the requirement for a plan of action after a discovery will encourage Federal agencies and DHHL to develop these plans.

The comments requesting changes to the content of a plan of action demonstrate the diversity of opinions on protecting and caring for human remains or cultural items on Federal or Tribal lands. Because of this diversity of opinion, we have not made the requested changes to the minimum requirements for a plan of action to ensure flexibility. The requirements for a plan of action must be broad and allow for modification to specific circumstances and preferences of consulting parties. These are minimum requirements for a plan of action and any consulting party can request additional elements be added to a plan of action during consultation. For example, a plan of action might indicate that the consulting parties prefer protection of human remains or cultural items in situ or by relocating them in a nearby location. Alternately, a plan of action might require the immediate removal of human remains or cultural items to a secure, protected facility. In other cases, a plan of action might instruct the appropriate official to take no action upon the discovery of human remains or cultural items to allow for natural exposure or erosion.

We cannot require a plan of action be signed by Indian Tribes or NHOs, but an Indian Tribe or NHO can request to sign a plan of action. The appropriate official must approve and sign the plan of action by the deadlines required under §§ 10.5 and 10.6 and identify disposition by the deadlines required under § 10.7 with or without receiving a response to the invitation to consult. These regulations do not and cannot require a lineal descendant, Indian Tribe, or NHO to respond to the invitation to consult.

72. *Comment:* We received 14 comments on § 10.4(c) Comprehensive agreement. Two comments supported the paragraph as proposed while 12 comments suggested changes to it. Most of the comments requested more detail or additional requirements be added to this paragraph. Some comments requested a requirement for comprehensive agreements to be renewed on a regular basis. A few comments requested Tribal policy should be substituted for a comprehensive agreement if applicable. One comment asked if Indian Tribes could execute comprehensive agreements with other Indian Tribes. One comment stated comprehensive agreements should not be promoted by these regulations because a well-crafted plan of action works better than a comprehensive agreement.

*DOI Response:* The diversity of opinion on what a comprehensive agreement should contain is precisely why we decline to make any changes to this paragraph. The comprehensive agreement, like the plan of action, is necessarily broad and includes only the minimum requirements. As the comprehensive agreement is at the discretion of the parties involved, these regulations should not dictate the content or nature of the agreement. Comprehensive agreements should contain whatever terms or requirements the parties wish it to contain beyond the minimum requirements of a plan of action.

### G. Section 10.5 Discovery

73. *Comment:* We received three comments on § 10.5 Discovery, generally. One comment supported the section as proposed and two comments requested clarification on identifying if discovered human remains or cultural items are Native American.

*DOI Response:* We have not made any changes. Consistent with the Act, this section applies only in the case where a person knows or has reason to know that the human remains are Native American. Whether a person knows or has reason to know that the human

remains are Native American is case sensitive. We note that even where a person does not know or have reason to know that the human remains are Native American, other laws addressing the discovery of human remains likely will apply, particularly for forensic purposes. In such cases, the appropriate official would identify whether the human remains are Native American and, if Native American, would notify the appropriate Indian Tribes or NHOs of the discovery. As noted in the 1995 Final Rule the drafter considered any requirement for requiring the complete professional identification of inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony prior to notification of the responsible Federal or Indian Tribe officials to be “officials inconsistent with the statutory language and the legislative history. (60 FR 62143)

74. *Comment:* We received six comments on Table 1 to § 10.5(a): Report a discovery on Federal or Tribal lands. Three comments requested changes to the last row of the table related to certain Federal lands in Alaska and seem to reference earlier drafts of these regulations rather than the proposed regulations. One comment requested that Indian Tribes be identified as the appropriate official for Federal, State, county, or private lands near Tribal lands.

*DOI Response:* We cannot make the requested change to make Indian Tribes the appropriate official for Federal lands, but we note that any Indian Tribe with potential cultural affiliation is the additional point of contact on Federal lands. This subpart only applies to discoveries on Federal or Tribal lands. Discoveries on State, county, or private lands are subject to the laws of the State or county.

We previously revised Table 1 to § 10.5(a) based on similar input we received during consultation in 2021. We used the exact language from the Act to describe the additional point of contact for Federal lands in Alaska selected but not yet conveyed under the Alaska Native Claims Settlement Act (ANCSA). For all other Federal lands in Alaska, the Indian Tribe with potential cultural affiliation should be notified and an Alaska Native Corporation organized under ANCSA is only notified when the Federal land has been selected but not yet conveyed. Based on the comments, we have removed “or group” from the table as that term is functionally obsolete following the recognition of Indian Tribes in Alaska.

75. *Comment:* We received four comments in one submission stated that

the proposed regulations impermissibly require private parties to notify an ambiguous “additional point of contact” of a discovery of Native American human remains or cultural items on Federal lands. The additional point of contact is “any Indian Tribe or Native Hawaiian organization with potential cultural affiliation to the human remains or cultural items, if known.” According to the comment, the Act is unambiguous that notification of a discovery on Federal lands is limited to the Federal land managing agency.

*DOI Response:* We have not made a change. During consultation in 2021, we received comments requesting the addition of Indian Tribes and NHOs as additional points of contact for reporting a discovery on Federal lands. We disagree with the comment that this provision is impermissible and ambiguous. While the Act is the primary authority for the issuance of regulations implementing and interpreting the Act’s provisions, Congress authorized the Secretary to make such regulations for carrying into effect the various provisions of any act relating to Indian affairs (25 U.S.C. 9). As the Act is Indian law (*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000)), the Secretary may promulgate this provision under the broad authority to supervise and manage Indian affairs given by Congress (*United States v. Eberhardt*, 789 F. 2d 1354, 1360 (9th Cir. 1986)). The additional point of contact language is not ambiguous. Not only does this notification requirement only apply to a discoverer who knows of an Indian Tribe or NHO with potential cultural affiliation, but the reporting requirement also only applies to a discoverer who knows, or has reason to know, that Native American human remains or cultural items have been discovered. Whether a person knows or has reason to know that the human remains or cultural items are subject to these regulations is case sensitive. In cases involving a planned activity on Federal lands, a person performing the activity will have reason to know that discovered human remains or cultural items are subject to these regulations and most likely also will know of an Indian Tribe or NHO with potential cultural affiliation based on the required plan of action.

76. *Comment:* We received five comments on § 10.5(a) Report any discovery. Of that total, three comments suggested changes to the paragraph while two comments supported it. Two comments requested requiring telephone notification while one

comment asked if an email qualifies as written documentation of the discovery.

*DOI Response:* We have added a requirement for in-person or telephone notification to the first sentence requiring immediate reporting of the discovery. Written documentation of the discovery is required to attach the rest of the timelines in this section. As explained elsewhere and in § 10.1(e) of this part, written documents may be sent by email, with proof of receipt, or by other methods of delivery.

*77. Comment:* We received nine comments suggesting changes to § 10.5(b) Cease any nearby activity. Most of these comments requested changes to align this paragraph with the preceding paragraph and not impose any unintentional limits on the kind of activity that must be ceased upon a discovery.

*DOI Response:* We have revised this paragraph to follow and refer to the preceding paragraph. We have removed the introductory sentence, which is already included in § 10.4 of this part, so as not to unintentionally limit the kinds of activities that must be ceased upon a discovery. As suggested by one comment, we have added that the written documentation of the discovery also include any potential threats to the discovery.

*78. Comment:* We received nine comments on § 10.5(c) Respond to a discovery. Of that total, six comments requested changes to text in earlier drafts of these regulations rather than to the proposed regulations. Two comments requested strengthening the requirement to report the discovery to additional points of contact to initiate consultation. One comment requested an explanation of what is required under this paragraph on Tribal lands.

*DOI Response:* We already addressed the concerns expressed by six comments in the proposed regulations. The proposed regulations require the appropriate official to respond to a discovery no later than three days after receiving written documentation. The appropriate official is required to report the discovery to any additional point of contact, which would be any Indian Tribe or NHO with potential cultural affiliation. The proposed regulations require the Federal agency or DHHL prepare and approve a plan of action, which includes consultation, for any discovery. We agree with the two comments that requested a stronger requirement in the paragraph to initiate consultation. We have made changes to paragraph (c)(1)(iii).

To clarify what this paragraph requires on Tribal land, we provide the following example: A film production

company has permission from an Indian Tribe to film on lands within the exterior boundaries of the Indian Tribe's reservation. The written permission from the Indian Tribe requires the production company to immediately report any discovery of human remains or cultural items to the Director of Tribal Cultural Affairs and the Director of the regional BIA office by telephone and in writing by email. During filming, a member of the production company finds objects eroding from a hillside that may be human remains or cultural items. The production company reports the discovery by telephone and email to the Indian Tribe and the BIA, stops all activity around the discovery, secures and protects the objects by covering them, and confirms that no activity will resume in the area until a written certification is issued by the Indian Tribe. No later than three days after receiving the email from the production company, the Director of Tribal Cultural Affairs must make a reasonable effort to secure and protect the objects, verify that any activity in the area has stopped, and notify the Director of the regional BIA office. The Director of Tribal Cultural Affairs must send a written certification to the film production company no later than 30 days after receiving the email from the production company and provide the date (no later than 30 days after the date of the written certification) on which the film production may resume in the area around the discovery. If an excavation is required, the Director of Tribal Cultural Affairs must follow the requirements under § 10.6(a). If the objects are human remains or cultural items and they are removed from the hillside, the Director of Tribal Cultural Affairs must follow the requirements for disposition under § 10.7. If both the BIA and the Indian Tribe consent in writing, the BIA could take responsibility for any of the actions described above related to the discovery, excavation, or disposition.

*79. Comment:* We received five comments requesting clarification of the provisions found in §§ 10.5, 10.6, and 10.7 for a NHO to accept responsibility for discoveries, excavations, and dispositions on Tribal lands of an NHO.

*DOI Response:* To clarify, "Tribal lands of an NHO" does not include lands under a Hawaiian homestead lease, but rather lands that the Hawaiian Homes Commission has determined an NHO is qualified to steward under a lease or license pursuant to the Hawaiian Homes Commission Act. Although Congress affords such opportunity in the Act, an NHO need not accept responsibility for discoveries, excavations, or dispositions if it believes

it is not qualified. As noted in the proposed rule, "[a]ccepting or declining responsibility is an exercise of sovereignty," and "the Department seeks to be respectful of the sovereignty of the Native Hawaiian Community and their right to self-determination" (NPS-2022-0004-0004, pages 17 and 30). The regulations do not prescribe how the Hawaiian Homes Commission implements this provision, recognizing its authorities and responsibilities. The term "Tribal lands of an NHO" reflects the language of "Tribal lands" used in the Act. The Department acknowledges that the United States' government-to-sovereign relationship with the Native Hawaiian Community is different from its government-to-government relationship with Indian Tribes and these provisions reflect those relationships.

*80. Comment:* We received three comments on § 10.5(d) Approve and sign a plan of action. One comment supported the timeline while two comments requested that the appropriate official should seek consensus or agreement, not just merely engage in consultation with, Indian Tribes and NHOs.

*DOI Response:* We appreciate the support for this timeline considering other comments addressed below. Regarding consultation, we note that under these regulations, consultation is defined and includes striving for consensus, agreement, or mutually agreeable alternatives. This is required for consultation under this paragraph and any other place it is used in these regulations.

*81. Comment:* We received 14 comments on § 10.5(e) Certify that an activity may resume requesting that we extend the timeline for resumption of activities or provide more flexibility for the appropriate official to extend the timeline. Some of these comments believe the Act does not require the appropriate official to provide any date on which activity may resume, and, instead, only sets a 30-day floor to stop an activity after a discovery occurs. These comments also requested clarifying edits be made to this paragraph. Several comments on paragraph (c) discussed above requested a copy of the written certification be sent to consulting parties. One comment stated that evaluating the need for and authorization of an excavation of human remains or cultural items must be done in consultation with Indian Tribes or NHOs.

*DOI Response:* We specifically requested input on this paragraph in the proposed rule, and we appreciate the responsive comments. However, we

cannot make the requested change to extend the timeline or build in additional flexibility, as discussed in full in the next comment and response. We can and have made the clarifying edits to this paragraph and added a requirement to send a copy of the certification to the additional points of contact. We note that consultation is required on a plan of action under paragraph (d) of this section, which includes the preference of consulting parties for leaving or relocating human remains or cultural items rather than excavating. A plan of action also requires a timeline and method for evaluating the potential need for an excavation, and we have removed the redundant language in paragraph (e)(3) of this section.

*82. Comment:* We received eight extensive comments from one submission on § 10.5(e) Certify when an activity may resume objecting to the additional time provided in the proposed regulations. According to the comment, the Act unambiguously states that the required certification from the appropriate official to the person responsible for the activity is solely to acknowledge that the responsible official has received written notification of the discovery, and that after 30 days, the activity may resume. The comment cites to Senate Report 101–473 (September 26, 1990) for the proposition that Congress intended the stop-work period to last only 30 days (“After notice has been received the party must cease the activity and make all reasonable efforts to protect the remains or objects before resuming the activity. The activity may resume 30 days after notice has been received. . . . Under this section, Indian [T]ribes or native [sic] Hawaiian organizations would be afforded 30 days in which to make a determination as to the appropriate disposition for these human remains or objects.”). The comment also states that expanding the stop-work period by allowing additional time for the appropriate official to certify receipt of the notification would significantly interrupt and impair activities on Federal lands, and thereby contravene Congressional intent, as expressed in Senate Report 101–473 (“The Committee does not intend this section to act as a bar to the development of Federal or [T]ribal lands on which human remains or objects are found. Nor does the Committee intend this section to significantly interrupt or impair development activities on Federal or [T]ribal lands.”). Additionally, the comment states that it would be arbitrary and unreasonable for

the responsible official to take up to 35 days to certify that written notice of the discovery from the responsible person had been received. Certification is a ministerial task that takes little time to complete, and the existing regulations provide for a maximum of three working days for doing so. Consequently, the comment requests that the Department continue to require the appropriate official certify receipt within three working days of receiving notification of a discovery.

*DOI Response:* The Department believes the provision to build in additional days, if needed, after a discovery is permissible. In the final regulations, we have revised this time to a standard 30 days for clarity. The Act does not provide a timeframe for the appropriate official to certify that written notification of a discovery has been received, nor does the Act address the action to be taken by the appropriate official in responding to the discovery itself. Based on other comments about this timeframe, we find there is some ambiguity in the Act. While the Act is the primary authority for the issuance of regulations implementing and interpreting the Act’s provisions, Congress authorized the Secretary to make such regulations for carrying into effect the various provisions of any act relating to Indian affairs (25 U.S.C. 9). As NAGPRA is Indian law (*Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000)), the Secretary may promulgate this provision under the broad authority to supervise and manage Indian affairs given by Congress (*United States v. Eberhardt*, 789 F. 2d 1354, 1360 (9th Cir. 1986)). Ambiguities in statutes passed for the benefit of Indians are to be construed to the benefit of the Indians (*Bryan v. Itasca County*, 426 U.S. 373 (1976)). Therefore, we have provided in these regulations a maximum of 60 days after written documentation of a discovery before an activity could resume. This timeframe provides 30 days for the appropriate official for a Federal agency or DHHL to evaluate the circumstances of the discovery and, in consultation with Indian Tribes and NHOs, prepare, approve, and sign a plan of action. We have provided that no later than 30 days after receiving documentation of the discovery, the appropriate official for an Indian Tribe, NHO, Federal agency, or DHHL must certify that written notification of the discovery has been received and that a lawful activity may resume on a certain date, but no later than 30 days after the date of the written certification. This timeframe allows the

appropriate official for a Federal agency or DHHL a reasonable amount of time to consult with Indian Tribes and NHOs, evaluate the potential need for an excavation, and carry out the steps in a plan of action. If the appropriate official determines, based on the circumstances, that a shorter timeframe is acceptable, the lawful activity could resume in fewer than 60 days. Moreover, we hope that Federal agencies and DHHL will be encouraged to engage in consultation earlier and develop a plan of action prior to a discovery to allow for a shorter timeframe.

#### H. Section 10.6 Excavation

*83. Comment:* We received 26 comments suggesting changes to § 10.6 Excavation. The comments generally disagreed with our analysis of the relationship between NAGPRA and ARPA, noting that it is inconsistent with the plain language of the Act and would unduly narrow the application of the Act and these regulations. Some comments suggested that, if we did not change the interpretation, we should add a requirement that excavations not on “ARPA Indian land” or “ARPA Public land” must have an equivalent permit from another jurisdiction.

*DOI Response:* Our interpretation does not change the application of the Act. NAGPRA applies to its fullest extent on Tribal land and Federal land, as defined in both the statute and regulations. Rather, we have defined which excavations under the Act require a permit issued under ARPA and which do not. Specifically, the Act requires that human remains or cultural items may only be intentionally excavated or removed from Federal or Tribal land if, among other requirements, “such items are excavated or removed pursuant to a permit issued under [ARPA] which shall be consistent with [NAGPRA].” 25 U.S.C. 3002(c)(1). Since both NAGPRA and ARPA are intended to protect important cultural resources, they must be construed together. Further, “issued under ARPA” is an adjectival phrase modifying “permit.” Thus, it is not ARPA that “shall be consistent with NAGPRA,” but rather the ARPA permit that must be consistent with the Act. This is supported by the legislative history. The Senate Indian Affairs Committee specifically noted that it “[intended] the notice and permit provisions of this section to be fully consistent with the provisions of [ARPA]” (S. Rpt. 101–473, at 7). Likewise, the House Committee on Interior and Insular Affairs, in discussing the stopping of work for an inadvertent discovery, noted, “[a]lthough a specific time limit was not

added here, the Committee does intend to protect the remains and objects found and does not intend to weaken any provisions of other laws, such as [ARPA], regarding similar situations.” Like the Senate Committee, the House Committee also stated, “[s]ubsection (c) provides that items covered by this Act can be excavated from Federal or [T]ribal land if proof exists that a permit has been acquired under Section 4 of the [ARPA]” (H. Rpt. 101–877, at 15 and 17). Therefore, the provisions of ARPA, including the scope of public and Indian land, are not affected by the Act. So, the terms “ARPA Indian land” and “ARPA public land” are defined in these regulations just as “Indian land” and “public land” are defined in ARPA, including use of the term “individual Indian,” which is used in ARPA to denote land that is owned by an individual Indian, who may or may not be a “lineal descendant” as used in the Act and defined in these regulations. The protections provided for in both statutes is reflected in these regulations by the requirement that ARPA permits are issued for NAGPRA excavations just as they are for ARPA excavations, keeping the full protections of each statute in place, as Congress intended. We have added the requested requirement that excavations on Federal or Tribal lands that are not ARPA Indian lands or ARPA Public lands must have an equivalent permit from the relevant Indian Tribe, NHO, or State, if applicable.

*84. Comment:* We received eight comments on § 10.6(a) On Tribal lands. Of that total, one comment suggested a change to the paragraph while seven comments supported it as proposed.

*DOI Response:* We cannot make the requested change to paragraph (a)(2) to replace “consent” with “respond.” Consent in writing from both the Indian Tribe and the Federal agency is required before the responsibility for an excavation is transferred from the Indian Tribe to the Federal agency. This ensures all parties are aware of the transfer and the responsibilities.

*85. Comment:* We received 11 comments on § 10.6(b) On Federal or Tribal lands. Of that total, nine comments suggested changes to the paragraph while two comments supported it. The comments requesting changes all expressed concern about the role of consultation in the preliminary steps by an appropriate official to evaluate the potential need for an excavation.

*DOI Response:* We have removed the sentence in § 10.6 referring to evaluation of the potential need for an excavation. The timeline and method for evaluating

the potential need for an excavation is a required part of a plan of action under § 10.4(b)(3)(vi) of this part. The plan of action is required before an excavation is authorized and requires consultation with lineal descendants, Indian Tribes, and NHOs. We note that consultation on a plan of action also includes the preference of consulting parties for leaving or relocating human remains or cultural items rather than excavating them. We have made other clarifying edits to this paragraph considering comments we received on § 10.4(b) under this part. We have retained the requirement for the written authorization to describe the steps taken to evaluate the potential need for an excavation. We believe this is necessary to document how the plan of action was implemented.

Because an Indian Tribe may delegate its responsibilities for excavations on Tribal lands to a Federal agency, we have added a requirement for the plan of action to include written consent of the appropriate Indian Tribe or NHO. This requirement could be fulfilled by the written consent delegating the responsibilities under paragraph (a)(2) of § 10.6. On Tribal lands of an NHO, DHHL is required to obtain written consent from the appropriate NHO prior to authorizing an excavation.

#### *I. Section 10.7 Disposition*

*86. Comment:* We received nine comments on § 10.7 Disposition, generally. Of that total, three comments suggested requirements for consultation be added to the introductory paragraph for this section while one comment supported the consultation requirements as proposed in § 10.7. One comment requested adding the definition of disposition to the introduction to this section. Two comments objected to the burden this section puts on disposition from boarding school cemeteries on Federal lands. One comment found this entire section confusing and the timelines too long. One comment objected to the appropriate official in this section being anyone other than an Indian Tribe or NHO.

*DOI Response:* We decline to make the requested change to add consultation requirements in the introductory paragraph to § 10.7. This paragraph applies to human remains or cultural items removed from Federal or Tribal lands and as such must include the requirements for the appropriate official for an Indian Tribe on Tribal lands as well as for the Federal agency or DHHL. As discussed elsewhere, we received comments requesting we provide as much flexibility as possible

for Indian Tribes who are responsible for complying with this section on their Tribal lands. As several of the comments noted, the requirements of § 10.7 follow the requirements in §§ 10.5 and 10.6 which require consultation by Federal agencies or DHHL through a plan of action. In addition, as the supporting comment noted, consultation is required throughout § 10.7 by Federal agencies or DHHL.

Disposition is defined in § 10.2 and the definition is used to describe what a disposition statement must include in this section. We have not repeated the definition here. Regarding disposition from boarding school cemeteries on Federal lands, we do not believe this will overly complicate the process. It will require, as the existing regulations do, that when human remains or cultural items are removed from Federal lands, including boarding school cemeteries, a notice must be published to identify the Indian Tribe with priority for disposition. We believe these regulations provide a streamlined procedure for excavations of boarding school cemeteries through consultation, a plan of action, and a notice of intended disposition. The Department encourages any Federal agency that manages boarding schools and cemeteries on Federal lands to consult with lineal descendants, Indian Tribes, and NHOs on identification, disinterment, and repatriation of Native American children as expeditiously as possible. The Department stands ready to assist Federal agencies, Indian Tribes, and NHOs to the fullest extent of its authority.

We appreciate the concern expressed by some comments that as written and when read alone, the proposed regulations state that the appropriate official must determine disposition without consultation. We feel that a simple change from “determine” to “identify” will alleviate this concern. The priority for disposition is established by the Act and all that is required under this section is for the lineal descendant, Indian Tribe, or NHO with priority for disposition be identified and, in some cases, notified. We have also removed the reference to unclaimed human remains or cultural items, as discussed in Comment 91. We cannot make the requested change to the appropriate official in this section.

*87. Comment:* We received 19 comments on § 10.7(a) Priority for disposition. Of that total, seven comments supported this paragraph especially as it relates to boarding school repatriations. One comment requested human remains or cultural items should only be removed from

Federal lands with the permission and partnership of the affected Indian Tribe. Five comments suggested changes to the priority order, specifically for Tribal lands where the Indian Tribe with cultural affiliation is not the Tribal land Indian Tribe. Four comments requested a significant, but grammatical, change from “originated” to “were removed.” One comment requested disposition should only occur if other Indian Tribes or NHOs consent. Other comments requesting changes to § 10.3 Determining cultural affiliation required changes to this paragraph.

*DOI Response:* We reiterate that this paragraph is drawn directly from the Act itself and does not represent a change in any way. We cannot add a requirement to this section to require permission or partnership; see the discussion above on the requirement for a plan of action prior to an excavation or after a discovery. We cannot change the priority order for Indian Tribes with cultural affiliation and Tribal land Indian Tribes. Under the Act, the Indian Tribe from whose Tribal lands the human remains or cultural items were removed has priority over any other Indian Tribe. Likewise, we cannot change the use of aboriginal land in the priority order after cultural affiliation. Any changes to the priority order would require Congressional action. We do want to note here that a final judgment of the Indian Claims Commission or the United States Court of Claims also includes a judgment concerning a settlement as long as that judgment or settlement either explicitly recognizes certain land as the aboriginal land of an Indian Tribe or adopts findings that do so. We have made the requested grammatical change to “originated.”

*88. Comment:* We received 11 comments suggesting changes to paragraph (b) in the proposed regulations under § 10.7 Disposition—To a lineal descendant (removed in the final regulations). All these comments requested we require notices of intended disposition for lineal descendants.

*DOI Response:* We appreciate and agree with the need for transparency in these regulations. However, we reiterate that neither the Act nor the existing regulations require publication of a notice of intended disposition for a lineal descendant. On Federal land, a notice and a claim are only required when no lineal descendant has been ascertained. Considering comments related to disposition on Tribal land below, we do not believe we can extend the requirement for publication of a notice of intended disposition on Tribal land to the appropriate official for an

Indian Tribe. Therefore, we have removed this paragraph entirely and integrated the procedure for disposition to lineal descendants into the two following paragraphs.

*89. Comment:* We received 18 comments on paragraph (c) in the proposed regulations under § 10.7 Disposition—On Tribal lands (in the final regulations, this is renumbered § 10.7(b)). Of that total, 10 comments requested we require notices of intended disposition on Tribal lands. The other eight comments requested we remove the unnecessary burdens placed on Indian Tribes for disposition on Tribal lands. Five submissions contained both requests, which seem inconsistent with each other.

*DOI Response:* We believe that requiring the appropriate official for an Indian Tribe or NHO to submit a notice of intended disposition for publication in the **Federal Register** is an unnecessary burden, and we decline to make this change. We cannot alleviate the entire burden on an Indian Tribe or NHO for the disposition process under this paragraph. As noted above, we have removed the requirement for disposition statement to be sent to a lineal descendant, yet these regulations must provide some procedure for an Indian Tribe or NHO to identify if there is a lineal descendant with priority for disposition, which is a requirement of the Act. The requirements in these regulations remain like those in the proposed regulations. On Tribal lands, an Indian Tribe or NHO must identify the lineal descendant, Indian Tribe, or NHO with priority for disposition and prepare and retain a written disposition statement. The written disposition statement is required because of the priority afforded to lineal descendants under the Act. When a lineal descendant has not been ascertained, an Indian Tribe or NHO must ensure a record is made of the disposition in case a lineal descendant wishes to assert a priority right later.

We believe this is the minimum burden these regulations can place on Indian Tribes or NHOs for human remains or cultural items removed from Tribal lands. We note that an Indian Tribe may delegate its responsibilities for disposition under this paragraph. In complex cases involving multiple potential lineal descendants or Indian Tribes with potential cultural affiliation, an Indian Tribe may prefer to delegate its responsibility to the Bureau of Indian Affairs or another Federal agency. This will alleviate the Indian Tribe of any additional burden and, as a result, require the appropriate official for the Federal agency to inform and consult

with lineal descendants, Indian Tribe, or NHOs; publish a notice of intended disposition in the **Federal Register**; respond to any claims for disposition; resolve any competing claims; and send a disposition statement. We note in response to the comments on paragraph (a) of this section, while we were unable to change the priority order for disposition, this paragraph and the option of delegating responsibility to a Federal agency provide opportunity for an Indian Tribe to include Indian Tribes with cultural affiliation in the disposition from Tribal lands.

*90. Comment:* We received 12 comments on paragraph (d) in the proposed regulations under § 10.7 Disposition—On Federal lands in the United States or on Tribal lands in Hawai‘i (in the final regulations, this is renumbered § 10.7(c) and retitled On Federal or Tribal lands). Five comments in the same submission questioned who is responsible for determinations in this paragraph and suggested the appropriate official should be a representative of an Indian Tribe or NHO in all circumstances. One of these comments stated six months is too long after a discovery or excavation to inform consulting parties in Step 1. Four comments requested adding criminal actions under NAGPRA to the deadline extension in Step 2. Two comments were in favor of requiring notices be published in the **Federal Register** while one comment opposed this change.

*DOI Response:* We have clarified that this paragraph, as in other paragraphs in this subpart, applies when a Federal agency or DHHH has responsibility for disposition of human remains or cultural items removed from Federal or Tribal lands. We have tried to clarify who “the appropriate official” represents at the beginning of each paragraph and with the paragraph headings that identify if the paragraph applies “On Tribal lands” or “On Federal or Tribal lands.” Because this paragraph covers a wide variety of circumstances under which human remains or cultural items are removed from Federal or Tribal lands, a longer timeline is necessary for identifying and informing consulting parties. In most cases, however, this can occur much faster based on the plan of action. We have added a criminal action under NAGPRA to Step 2. We have retained the requirement for publication of notices of intended disposition in the **Federal Register**. We believe the revised regulatory text will prevent the current delays in notice publication.

*91. Comment:* We received 13 comments on paragraph (e) in the proposed regulations under § 10.7

Disposition—Unclaimed human remains or cultural items removed from Federal lands in the United States or from Tribal lands in Hawai'i (in the final regulations, this is renumbered § 10.7(d) and retitled Unclaimed human remains or cultural items removed from Federal or Tribal lands). Five comments emphatically and some repeatedly objected to the concept of unclaimed human remains or cultural items and stated that any human remains or cultural items removed from Federal or Tribal lands can be identified and claimed through effective and meaningful consultation. Two comments objected to the provision for reinterment without Indian Tribes or NHOs making the decision to do so. Two comments objected to the inclusion of Indian groups without Federal recognition in this paragraph. One comment stated the Federal agency or DHHL has an obligation to reach out to Indian Tribes or NHOs before human remains or cultural items become unclaimed. Two comments requested a list of unclaimed cultural items be published on the National NAGPRA Program website. One comment requested a requirement for reinterment to be as close as possible to the original site.

*DOI Response:* We understand the objections raised by many comments to this provision, but we are unable to eliminate this paragraph because it is required by the Act (see 25 U.S.C. 3002(b)). Regulations concerning this part of the Act were proposed in 2013 and finalized in 2015 and contained very similar provisions. There may be circumstances where human remains or cultural items are removed from Federal or Tribal land and one year after publication of a notice of intended disposition, no Indian Tribe or NHO has made a claim for disposition. In other cases, particularly for Federal lands in the Eastern United States, when cultural affiliation cannot be determined and the Federal land is not the aboriginal land of an Indian Tribe as defined in § 10.7(a), the Federal agency may not be able to identify any Indian Tribe or NHO with priority for disposition and the human remains or cultural items may be unclaimed.

We believe the clarification and simplification of the disposition process

for human remains or cultural items on Federal or Tribal lands that precedes this paragraph will address many of the concerns raised by these comments and that only a small number of human remains or cultural items will be unclaimed. To date, a total of 44 individuals and 164 funerary objects have been reported as unclaimed. Since 2015, the National NAGPRA Program has published a list of unclaimed human remains or cultural items from Federal or Tribal lands on its website (<https://www.nps.gov/subjects/nagpra/unclaimed-cultural-items.htm>, accessed 12/1/2023).

We have removed the option to transfer unclaimed human remains or cultural items to Indian groups without Federal recognition but we have retained the option to transfer to an Indian Tribe or NHO or to reinter. At the discretion of the Federal agency or DHHL and after following the requirements of this paragraph, unclaimed human remains or cultural items removed from Federal or Tribal land may be transferred or reinterred. As this is a discretionary action, these regulations cannot dictate where reinterment occurs.

*J. Subpart C*

*92. Comment:* We received 46 comments on the overall timelines in Subpart C. Of that total, 16 comments supported the timelines as proposed. Several of these comments felt the timelines were adequate and clearly explained, especially with tables. Four comments supported the requirements and timeline for updated inventories specifically. Two comments felt the timelines achieved a balance between a sense of urgency to repatriate and the practical limitations of the tasks involved. Two of these comments felt the timelines were too long and found the timelines to be extremely unbalanced and specifically aimed at benefitting museums and Federal agencies rather than lineal descendants, Indian Tribes, and NHOs. One comment felt the timelines provided sufficient opportunity for Indian Tribes and NHOs to submit requests for repatriation.

On the other hand, 30 comments felt the timelines were too short, unrealistic, unworkable, and unachievable. Many of these comments from individuals and

museums believe the timelines do not provide adequate time for consultation or relationship building and will result in overwhelming Indian Tribes and NHOs with requests to consult. Many of the comments from Indian Tribes requested the timelines be based on Tribal priorities. Most of the comments from individuals and museums felt the timelines underestimate the work required for repatriation. One comment stated the changes to the regulations were too complicated to be done quickly. One comment stated the timelines were not based in the real world and provided an example of one Federal agency that needed six months just to acquire a signature on a letter. One comment stated the focus of these timelines on notice publication is misplaced and ignores the other parts of the process.

Some of these comments requested more flexible timelines with no set deadlines. Two comments predicted the tasks involved are more likely to take 20 or 50 years to complete. Suggestions in these comments included removing timelines entirely, doubling all the timelines provided, or retaining the timelines in the existing regulations. Three comments suggested a five-year timeline for updating inventories. One comment suggested changing the timelines to only require initiation of consultation and remove the subsequent timelines.

*DOI Response:* We have extended the deadline for museums and Federal agencies to update inventories of human remains and associated funerary objects from three years to five years after the effective date of these final regulations. We have made other changes to the deadlines in these regulations to account for the change from business days to calendar days discussed elsewhere. We have changed the deadline for a museum or Federal agency to respond to a request for repatriation from 60 days to 90 days for both human remains and associated funerary objects and for cultural items.

Tables 4 and 5 provide an overview of the general timeframes under Subpart C from the longest timeline to the shortest timeline. Table 4 relates to required reporting on holdings or collections and Table 5 relates to responding to requests for repatriation.

TABLE 4—TIMEFRAMES FOR REPORTING ON HOLDINGS OR COLLECTIONS

If a museum or Federal agency . . .	. . . it must . . .	. . . no later than . . .	See
Has human remains and associated funerary objects not published in a notice.	Update an inventory (including consultation) .....	5 years .....	§ 10.10(d)(3).
Receives Federal funds for the first time and has possession or control of human remains and associated funerary objects.	Complete an inventory (including consultation) ....	5 years .....	Table 1 to § 10.10(d)(2).

TABLE 4—TIMEFRAMES FOR REPORTING ON HOLDINGS OR COLLECTIONS—Continued

If a museum or Federal agency . . .	. . . it must . . .	. . . no later than . . .	See
Receives Federal funds for the first time and has cultural items.	Compile and submit a summary	3 years	Table 1 to § 10.9(a)(2).
Acquires or locates human remains and associated funerary objects.	Initiate consultation and complete an inventory	2 years	Table 1 to § 10.10(d)(2).
Has custody of a Federal agency holding or collection (museums only).	Submit a statement to the Federal agency and National NAGPRA.	1 year	§ 10.8(c).
Has custody of a holding or collection and cannot identify an entity with possession or control (museums only).	Submit a statement to National NAGPRA	1 year	§ 10.8(d).
Acquires or locates cultural items	Compile and submit a summary	6 months	Table 1 to § 10.9(a)(2).
Completes or updates an inventory	Submit a notice of inventory completion	6 months	§ 10.10(e).
Receives a statement from a museum with custody of a Federal agency holding or collection (Federal agencies only).	Respond to the museum and National NAGPRA	180 days	§ 10.8(c)(1).
Acquires previously reported human remains or cultural items.	Inform National NAGPRA (and initiate consultation on human remains).	30 days	§ 10.9(a)(3)(i); § 10.10(d)(4)(i).
Compiles a summary	Initiate consultation	30 days	§ 10.9(b).
Identifies new consulting parties	Initiate consultation	30 days	§ 10.9(b)(3); § 10.10(b)(3).

TABLE 5—TIMEFRAMES FOR RESPONDING TO REQUESTS FOR REPATRIATION

If a museum or Federal agency . . .	. . . it must . . .	. . . no later than . . .	See
Receives competing requests for repatriation	Send a written determination	180 days	§ 10.9(h)(4); § 10.10(i)(3).
Receives a request for repatriation	Respond to the request	90 days	§ 10.9(e); § 10.10(g).
Has completed all other steps	Send a repatriation statement	90 days	§ 10.9(g); § 10.10(h).
Agrees to a request for repatriation of cultural items	Submit a notice of intended repatriation	30 days	§ 10.9(f).
Receives competing requests for repatriation	Inform all requestors	14 days	§ 10.9(h)(3); § 10.10(i)(2).
Receives a returned notice	Resubmit a notice	14 days	§ 10.9(f)(3); § 10.10(e)(3).

While we understand the objections to the timelines and the concerns about insufficient staffing and funding, the Secretary, the Assistant Secretary, and the Department are committed to clearing a path to expeditious repatriation as Congress intended. In the 32 years since the passage of the Act, we have seen some of the largest repatriations occur when a museum or Federal agency changed course to invite and defer to the input of lineal descendants, Indian Tribes, and NHOs. By requiring that deference throughout these regulations, we hope more museums and Federal agencies will change course and complete the regulatory requirements for repatriation.

We must stress that most of the timelines and deadlines under these regulations are triggered by a request for repatriation from a lineal descendant, Indian Tribe, or NHO. If a museum or Federal agency is involved in meaningful and effective consultation with lineal descendants, Indian Tribes, and NHOs, pressure to complete repatriation within a set timeframe may be significantly alleviated. The one exception to the request requirement is the timeline for a museum or Federal agency to update an inventory of human remains and associated funerary objects. We further stress that an extension of this deadline may be requested by any museum that has made a good faith effort to update its inventory. We have added to the requirements for an

extension the written agreement of consulting parties to the request. If a museum will need an additional 10 or 20 or even 50 years to complete its inventory, it can only do so by first engaging in meaningful and effective consultation with lineal descendants, Indian Tribes, and NHOs. With these changes to the regulations, we hope to provide a clear path to repatriation where lineal descendants, Indian Tribes, and NHOs, rather than museums and Federal agencies, can define what expeditious repatriation means.

*93. Comment:* We received 21 comments on the requirements in Subpart C for museums and Federal agencies to identify all holdings or collections that may contain human remains or cultural items. Most of these comments requested additional language to require museums and Federal agencies produce transparent information about the full extent of their holdings or collections, whether in their possession or control or custody. These comments requested the regulations eliminate the loophole that allows museums and Federal agencies to avoid disclosing information about their holdings or collections. One comment requested a requirement to identify items that may have been transferred, stolen, sold, or removed from a holding or collection. One comment requested standards and requirements for museums and Federal agencies to engage in some level of effort to identify

holdings or collections subject to the Act and these regulations. One comment appreciated the inclusion of lost or unknown holdings or collections in this subpart but stated that “negligence to care for native material culture is evident time and time again. The very fact that institutions like universities are continuing to discover Native American remains in their possession is absolutely unacceptable.” Several comments stressed the importance of consultation in identifying holdings or collections and suggested consultation should be initiated when a museum or Federal agency has reason to believe that human remains or cultural items are present in a holding or collection. One comment requested clarification on how museums and Federal agencies can be held accountable for conducting a full review of holdings or collections.

On the other hand, a few comments questioned the Department’s authority to require a review of all holdings or collections and that this subpart must be limited to only those holdings or collections that are known to have human remains or cultural items. A few comments provided details on how long it takes identify human remains or cultural items in a holding or collection. One comment stated it takes weeks or months to complete a full review of a holding or collection and if done too quickly, human remains and cultural items will be left behind. One comment stated it takes 10 hours to review a

single, standard box to identify the presence of human remains or cultural items. An additional six to eight hours is needed to document each individual or object in the box, and another 40 hours is needed to produce a final report of the boxes from the same site. The comment also stated a significant amount of space is needed for this kind of review and that can often impair the effort to review a holding or collection.

*DOI Response:* There is no ambiguity in the Act on the requirement for museums and Federal agencies to identify all human remains or cultural items in holdings or collections. The Act requires each museum or Federal agency that “has possession or control over holdings or collections” to identify all Native American human remains or cultural items. The Act required museums and Federal agencies to identify all cultural items within three years and all human remains and associated funerary objects within five years. The Act provided an option for museums to request an extension to identify human remains and associated funerary objects, provided the museum had made a good faith effort to do so.

We agree that the initial step requires producing factual and transparent information about the holdings or collections. While determining possession or control of a holding or collection is a jurisdictional requirement and must be done on a case-by-case basis, the Act and these regulations make clear that the evaluation applies to all holdings or collections. We agree that when a museum or Federal agency has reason to believe human remains or cultural items are present in a holding or collection it must provide information to lineal descendants, Indian Tribes, and NHOs.

We agree the Department does not have authority under the Act to require a museum or Federal agency review holdings or collections that are not subject to the Act. Only holdings or collections, or portions of holdings or collections, that may contain human remains or cultural items are required to be identified. If a museum or Federal agency knows that a certain holding or collection does not contain any human remains or cultural items, the holding or collection would not need to be included in a summary of cultural items or an itemized list of human remains and associated funerary objects. For example, a collection excavated from an historic era ranch that does not contain any Native American objects or items would not need to be included on a summary.

We disagree that the Act and these regulations do not already require a

museum or Federal agency to review all holdings or collections in their possession or control. The Act and these regulations already impose standards and requirements for museums and Federal agencies to make an effort to identify human remains and cultural items. The standard is if a holding or collection may contain human remains or cultural items. The requirement is to comply with this subpart and complete a summary, an inventory, and notices. The mechanisms for ensuring accountability for a failure to comply with this subpart are civil penalties against museums or legal action against Federal agencies. Any museum or Federal agency that fails to identify a holding or collection that contains human remains or cultural items has failed to comply with the Act and these regulations.

Several comments provided examples of human remains or cultural items that were not identified by museums and Federal agencies. In one case, an “archeological collection” was excluded from a summary because the museum assumed it did not contain any cultural items. However, archival information about the person who made the collection clearly identifies the collector removed objects from a funerary context and those objects are likely unassociated funerary objects. In another case, human remains were found during a physical review of a collection after the inventory was completed and a notice published.

Museums and Federal agencies have discretion on which holdings or collections they include in a summary or inventory. When a museum or Federal agency decides to exclude a holding or collection from a summary or inventory, it is deciding that the Act and these regulations are not applicable to that holding or collection. If that holding or collection contains human remains or cultural items, the museum or Federal agency has failed to comply and could be subject to civil penalties or other legal action. Museums and Federal agencies also have discretion on how to evaluate the contents of a holding or collection. A museum or Federal agency can choose to review each box in a holding or collection to determine if it contains human remains or cultural items, but it must do so within the timeframes required by the Act and the regulations. Neither the Act nor the regulations require a physical review of a holding or collection to comply with the summary and inventory requirements.

Under the final regulations, consent from lineal descendants, Indian Tribes, or NHOs is required prior to allowing any research on human remains or

cultural items. We have defined “research” to mean any study, analysis, examination, or other means of acquiring or preserving information. “Research” includes any activity to generate new or additional information beyond the information that is already available, for example, osteological analysis of human remains, physical inspection or review of collections, examination or segregation of comingled material (such as soil or faunal remains), or rehousing of collections.

*94. Comment:* We received 42 comments on specific steps in the repatriation process. Six comments from one submission made repeated requests to require unassociated funerary objects be listed in the inventory so they can be repatriated with the human remains and associated funerary objects. One comment requested testing for hazardous substances be required and two comments requested removal of hazardous substances must be required at the expense of museums and Federal agencies. One comment requested “acquisition” be replaced with “accession” so as not to disrespectfully identify human remains as objects. One comment requested additional information on documentation, analysis, or exhibition be included in a summary or an inventory.

Six comments suggested changes to the steps for consultation. One comment stated identifying consulting parties is a difficult task that requires additional time than what is provided. One comment requested clarification on who identifies new consulting parties. Two comments requested clarification on if the regulations require re-initiation of consultations that are ongoing as of the effective date of these regulations. One comment requested how to proceed when consulting parties do not respond to invitations to consult. One comment requested clarification on the timeline for responding to an invitation to consult and that Indian Tribes and NHOs must be allowed to move at their own pace according to each sovereign’s capacity and resources. Three comments suggested changes to the kinds of information a consulting party can request from a museum or Federal agency, including that accession records be specifically included or the limitations on the use of the information be removed.

Nine comments requested changes to the notices and requests for repatriation under this subpart. Four comments requested lineal descendants not be identified by name, and four comments requested amended notices be required when additional pieces of previously repatriated human remains or cultural

items are found. One comment requested additional information on documentation, analysis, or exhibition be included in a notice. Two comments requested that all Indian Tribes or NHOs with cultural affiliation be notified or consent to a request for repatriation. Two comments suggested requests for repatriation need not be in writing. One comment requested changing the timeline for sending a repatriation statement from the variable 30 to 90 days to 60 days.

Three comments expressed concern about the timelines for competing requests and stays of repatriation. Two comments requested changes to the deadline for evaluating competing requests to either remove the deadline in favor of a deadline agreed upon in consultation or to include a timeline for requestors to submit additional information to support their requests. Two comments on stays of repatriation asked who determines if a court of competent jurisdiction enjoins the repatriation. One comment requested decisions made during a stay of repatriation must be made in consultation with requesting parties.

*DOI Response:* We cannot include unassociated funerary objects in an inventory as that would be inconsistent with the Act. We cannot require testing for or removal of hazardous substances or who should pay for that testing or removal as there is no such requirement in the Act. We can and do require information about hazardous substances be shared, but only when a museum or Federal agency knows about the presence of any potentially hazardous substances. Testing or removal should be a part of consultation on human remains or cultural items, specifically under the duty of care requirements in § 10.1(d). We do not agree that “accession” is less disrespectful than “acquisition” since both are generally applied to property or collections. The use of “accession” could lead to confusion over human remains or cultural items that were not formally accessioned into a holding or collection. The Act uses the word “acquisition,” and we have retained that word in these regulations. We have not required additional information on documentation, analysis, or exhibition be included in a summary or inventory, but that information may be requested by a lineal descendant, Indian Tribe, or NHO and discussed during consultation on the duty of care for human remains or cultural items.

We have not made changes to timeline or requirements for initiating consultation. Depending on the provenience and provenance of the

human remains or cultural items, identifying Indian Tribes or NHOs with potential cultural affiliation is not complex and a museum or Federal agency must make a good faith effort to identify consulting parties within the timeframe provided. There are several resources that can assist museums and Federal agencies with identifying consulting parties, including previously prepared summaries or inventories and published notices. Museums and Federal agencies are responsible for determining if a new consulting party can be identified. When consultation is ongoing as of the effective date of these regulations, there is no requirement to re-initiate consultation, provided the ongoing consultation included all consulting parties.

We do not intend to impose timelines on lineal descendants, Indian Tribes, or NHOs to respond to an invitation to consult and can engage in the repatriation process at their own discretion. However, museums and Federal agencies are required to act under § 10.10 within certain timelines, and those timelines are required even if there is no response from a lineal descendant, Indian Tribe, or NHO to an invitation to consult. A museum or Federal agency must initiate consultation prior to completing or updating an inventory under § 10.10, but if there is no response to the invitation to consult, the museum or Federal agency must complete or update the inventory by the deadlines required under § 10.10(d) and submit a notice of inventory completion under § 10.10(e). As the Department noted in 1995 for the first deadline to complete an inventory if there is no response after repeated attempts to contact Tribal officials by telephone, fax, and mail, the museum or Federal agency official may be required to complete the inventory without consultation to meet the regulatory deadline. The Department suggested museum and Federal agency officials document attempts to contact Tribal officials to demonstrate good faith compliance with these regulations and the Act. (1995 Final Rule, 60 FR 62151).

Although the methods to contact an Indian Tribe or NHO have changed since 1995, this advice continues to be applicable. Museums and Federal agencies must document attempts to contact lineal descendants, Indian Tribes, or NHOs to demonstrate a good-faith effort to consult prior to the deadlines in these regulations.

We have not made changes to the additional information consulting parties can request. The language in the regulations is taken directly from the Act, including the limitations. The

regulations do not prevent a consulting party from requesting any other information not explicitly identified here. We feel accession records are a type of “records.” As noted elsewhere, we advise lineal descendants, Indian Tribes, and NHOs to make their requests as broad as possible to ensure all information about human remains or cultural items is available to them when making a request for repatriation.

We have revised the required content of a notice to simplify the regulatory text, and we have included language to allow for the name of a lineal descendant to be withheld. In response to the comments on amended notices and to coincide with the overall changes in the process for repatriation, we have removed the requirement for amending a notice. After publication of a notice under this subpart, if additional human remains or cultural items are identified that were not previously included in a summary, inventory, or notice, the museum or Federal agency must begin with Step 1 in each process for the newly identified human remains or cultural items to ensure adequate consultation and notification occurs. We have not required additional information on documentation, analysis, or exhibition be included in the notice and feel it is important that these regulations require only the minimum amount of information required in a notice to prevent unnecessary delays or public disclosure of information. If an Indian Tribe or NHO wishes to have additional information included in a notice, it should inform the museum or Federal agency during consultation of this preference. The proposed regulations included requirements for notifying other Indian Tribes or NHOs of a request for repatriation of human remains and associated funerary objects. We have added these same requirements for requests for repatriation of cultural items; both the response to a request and the notice of intended repatriation must be sent to the requestor and any other consulting party. We cannot require museums and Federal agencies obtain consent from other consulting parties to a request for repatriation. Any consulting party may submit an additional, competing request for repatriation before a repatriation statement is sent. We have not removed the requirement for a request for repatriation to be submitted in writing. The existing regulations contain this same requirement, and the Act is clear that a request for repatriation is a requirement, although it does not specify the request be in writing. To require the actions that follow a request

for repatriation be completed by a certain date, the request for repatriation must be in writing. Throughout these regulations, we have provided flexibility in the timeline for sending a repatriation statement (between 30 and 90 days), and we have retained that timeline.

In response to several comments, we reiterate that competing requests for repatriation must occur before a repatriation statement is sent and when a competing request is received, the timeline for a repatriation statement changes. If a competing request for repatriation is received the day before a repatriation statement is sent, the museum or Federal agency must wait to send the repatriation statement and evaluate the competing requests in accordance with the procedures and deadlines for evaluating competing requests for repatriation. One comment remarked that “[g]iven the busy schedules of Tribes and museums, and planning costs associated with repatriation, allowing requests a day before a repatriation statement is scheduled to be submitted would make decisions and obligations between museums and Tribe hollow and a potential point of contention.” This comment is precisely the main reason the regulations require a repatriation statement separate from physical transfer. Scheduling and incurring costs associated with physical transfer should wait until after a repatriation statement is sent, assuring all parties that their decisions and obligations can be upheld. In addition, we recommend a museum or Federal agency send a repatriation statement as early as possible under the regulations to ensure expeditious return. We further recommend that in a request for repatriation, the lineal descendant, Indian Tribe, or NHO request a repatriation statement be sent as early as possible under the regulations. As discussed elsewhere, if no competing requests are received, 31 days is the minimum amount of time between notice publication and sending a repatriation statement.

We decline to remove the timeline for evaluating competing requests. We believe it is important to require museums and Federal agencies to make determinations within a set timeframe, even if that determination is that they cannot determine the most appropriate requestor. This option allows parties to continue consultation but ensures all parties have been informed of the museum or Federal agency’s decision. We have not added a timeline for submission of additional information, but we have included an option for submission of additional information in

the appropriate paragraphs and in § 10.3(e) Competing claims or requests. We note that any request for repatriation must provide information to meet the criteria and that information, along with the record of determining cultural affiliation, should be used to determine the most appropriate requestor. Where competing requests are between Indian Tribes or NHOs with cultural affiliation, the priority order under § 10.3(e) Competing claims or requests, as revised, relies on how the cultural affiliation determination was made (clearly identified or reasonably identified). Any party may seek assistance of a court of competent jurisdiction to resolve a conflict under these regulations. Given the variables in how a stay of repatriation might be resolved, we cannot require consultation after a resolution but we can and do require notification and repatriation within set timeframes.

*95. Comment:* We received 20 comments requesting that the Department create a repository for information related to repatriation under this subpart. Some of these comments requested that the repository include information on Indian Tribes with cultural affiliation to a geographical location. Other comments requested a contact database that is updated every six months. Many of these comments requested a digital repository with detailed information from inventories, summaries, and notices that is accessible only to Indian Tribes and NHOs and is protected from public release under the Freedom of Information Act. Four comments requested the Department publish a list of the museums and Federal agencies with the largest collections of human remains or cultural items.

*DOI Response:* We decline to add any such requirement to the regulations as this is a matter of policy, subject to a wide variety of other laws, regulations, and policy for information technology, protection of personally identifiable information, and special relationships between the United States and Indian Tribes and NHOs. The Department, through the National NAGPRA Program, is responsible for receiving and maintaining many documents related to repatriation, including inventories, summaries, and notices. These documents are not exempt from public disclosure, as discussed under Comment 5, and we are unable to produce the kind of protected database some of the comments requested.

We do, and have for nearly 20 years, provided information about repatriation through the National NAGPRA Program website. After nearly 33 years, one of

the best sources for information about cultural affiliation are the over 4,400 notices that have been published in the **Federal Register**. Fully text searchable beginning in 1994, notices can easily be searched at <https://www.federalregister.gov/> (accessed 12/1/2023). The National NAGPRA Program has and will continue to improve digital maintenance and access to data about repatriation through its website. Since 2020, the National NAGPRA Program has provided real-time data on inventories, summaries, and notices at <https://www.nps.gov/subjects/nagpra/databases.htm> (accessed 12/1/2023). In addition to the databases, since 2019, the National NAGPRA Program has provided annual data in searchable data visualization tools at <https://public.tableau.com/app/profile/nationalnagpra> (accessed 12/1/2023). We are committed to developing useful and innovative tools to share available data securely, safely, and publicly.

*96. Comment:* We received 35 comments on the provisions for a museum or Federal agency to request the Assistant Secretary’s written concurrence that human remains or cultural items are indispensable for completion of a specific scientific study. Most of these comments requested the Assistant Secretary consult with Indian Tribes and NHOs prior to issuing written concurrence or that the request from the museum or Federal agency include written consent from the appropriate Indian Tribe or NHO to the study. A few comments requested this section be removed entirely and the regulations should prohibit any scientific study of human remains or cultural items.

*DOI Response:* We cannot remove the provisions for “scientific study” from these regulations as that would be inconsistent with the Act. “Scientific study” is used twice in the Act itself:

- First, the Act explicitly and specifically does not require new scientific studies on human remains or associated funerary objects to complete an inventory or determine cultural affiliation (25 U.S.C. 3003(b)(2)).

- Second, the Act requires that when a specific scientific study of human remains, associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony will result in a major benefit to the United States, a museum or Federal agency may postpone repatriation but may not deny the request for repatriation (25 U.S.C. 3005(b)).

The first statutory provision only applies to human remains and associated funerary objects (25 U.S.C.

3003(b)(2)). Similar language does not appear in the Act for unassociated funerary objects, sacred objects, and cultural patrimony (25 U.S.C. 3004(b)(2)). This is likely due to the difference between a summary and an inventory. As noted in the 1995 Final Rule, the difference between a summary and an inventory “reflects not only their subject matter, but also their detail (brief overview vs. item-by-item list), and place within the process” (60 FR 62140). Since a summary is a brief overview of a holding or collection, there is no need to include the first provision for unassociated funerary objects, sacred objects, and cultural patrimony.

The second statutory provision for “scientific study” applies to all “Native American cultural items,” which are defined in the Act as human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony (25 U.S.C. 3005(b)). The Act refers to this exception in each of the four paragraphs that require expeditious repatriation (25 U.S.C. 3005(a)). As any elimination or restriction of 25 U.S.C. 3005(b) would require an act of Congress, we cannot remove the provisions that allow for “scientific study” entirely. We understand that “scientific study” in both §§ 10.9 and 10.10 is adverse to Tribal interests and may seem to allow or authorize scientific studies. While we cannot remove these statutorily required exceptions to expeditious repatriation, we can limit the implementation of these exceptions through the regulations.

First, we have made changes to § 10.1(d) Duty of care to require museums and Federal agencies obtain consent from lineal descendants, Indian Tribes, or NHOs prior to conducting any research on human remains or cultural items. In that paragraph, we state “research” equates to the term “scientific study” in the Act and means any study, analysis, examination, or other means of acquiring or preserving information. “Research” includes any activity to generate new or additional information beyond the information that is already available, for example, osteological analysis of human remains, physical inspection or review of collections, examination or segregation of comingled material (such as soil or faunal remains), or rehousing of collections. “Research” is not required to identify the number of individuals or cultural items, or to determine cultural affiliation.

Second, the proposed regulations provided procedures to administer the

second statutory provision as a stay of the repatriation timeline under §§ 10.9 and 10.10. A request to exercise this stay of repatriation must be submitted before publication of a notice of intended repatriation or a notice of inventory completion. This means that for human remains and associated funerary objects, a request must be made before the deadline to publish a notice of inventory completion (in the final regulations, this is five years and six months after the effective date of the final regulations). After the notice is published, this exemption cannot be used to delay repatriation. The proposed regulations and these final regulations require the Assistant Secretary’s written concurrence with the request and stipulates the specific requirements for such a request, including explaining the “major benefit” and why the human remains or cultural items are “indispensable.” The request must also state that the study has in place the requisite funding and a completion schedule and completion date.

Third, we agree with the comments that the request must demonstrate consent from lineal descendants, Indian Tribes, or NHOs and that the Assistant Secretary must consult with Indian Tribes or NHOs before concurring with the request. We have added these requirements to the regulations in §§ 10.9 and 10.10.

#### K. Section 10.8 General

97. *Comment:* We received six comments on § 10.8 General. Four comments requested a deadline be imposed for museums and Federal agencies to determine possession or control of holdings or collections. One comment requested “authorized representatives” be replaced with “appropriate official.” One comment requested the regulations prohibit museums and Federal agencies from engaging with NAGPRA consultants or, if consultants are engaged, they be required to comport with the law and the regulations, and any violations be reviewed by the National NAGPRA Program.

*DOI Response:* We have not made any of the requested changes. Museums and Federal agencies have deadlines to determine possession or control of holdings or collections under paragraphs (c) and (d) of this section and through the timelines requiring repatriation under §§ 10.9 and 10.10. The term “appropriate official” applies only to Subpart B and includes Indian Tribes and NHOs. Although this paragraph requires an authorized representative be identified, Subpart C does not use this term but instead makes

the subject of these regulations the museum or Federal agency to reinforce who is responsible for acting under these regulations. We cannot prohibit or require review of NAGPRA consultants in these regulations. A museum or Federal agency may identify any authorized representative it chooses to, but the museum or Federal agency is responsible for the actions of that representative. Any failure to comply with these regulations is a failure of the museum or Federal agency who has responsibility under this subpart.

98. *Comment:* We received two comments on § 10.8(a) Museum holding or collections, in addition to those discussed elsewhere. One comment requested instructions on reporting newly acquired holdings or collection where the museum asserts a right of possession through donation or excavation conducted under State law. One comment requested clear guidelines for museums to determine possession or control.

*DOI Response:* We have not made changes to this paragraph. We believe this paragraph provides clear guidelines for museums to determine possession or control, including for any new holdings or collections or previously lost or unknown holdings or collections. As discussed elsewhere, the Act and these regulations define a right of possession and apply it in some manner to human remains, funerary objects, sacred objects, and objects of cultural patrimony. When a museum or Federal agency asserts a right of possession to cultural items in its holding or collection, the museum or Federal agency must include those cultural items in its summary. When a museum or Federal agency can prove it has a right of possession to human remains, it may exclude those physical remains from its inventory. We note that when human remains and associated funerary objects are excavated from State or private land, requirements under State law may not equate to right of possession and a museum (including a State or local agency) should ensure it can prove it has a right of possession to human remains and associated funerary objects independent of such requirements.

99. *Comment:* We received eight comments requesting clarification on § 10.8(b) Federal agency holding or collection. All the comments questioned why a Federal agency must determine when or where a holding or collection was acquired.

*DOI Response:* We have made clarifying changes to this paragraph. For a holding or collection, a Federal agency must determine if the human remains or

cultural items are subject to disposition under Subpart B or repatriation under Subpart C. To make this determination, the Federal agency must determine when and where the human remains or cultural items were removed. If the human remains or cultural items were removed from Federal or Tribal land after November 16, 1990, the Federal agency must use Subpart B to complete the disposition of those human remains or cultural items. If the human remains or cultural items were removed from Federal lands on or before November 16, 1990, or after that date from an unknown location or from lands that are not Federal or Tribal lands, the Federal agency must use Subpart C to complete the repatriation of those human remains or cultural items.

For example, if a museum has custody of a holding or collection that was excavated from Federal land in 1991, the Federal agency who has responsibility for that Federal land must comply with Subpart B and identify the lineal descendant, Indian Tribe, or NHO that has priority for disposition of the human remains or cultural items by following the requirements of § 10.7. Regardless of how long the human remains or cultural items have been in the custody of the museum, the Federal agency has responsibilities for ensuring the disposition of those human remains or cultural items that were removed from Federal land after November 16, 1990.

A Federal agency cannot apply the summary and inventory requirements in Subpart C to any human remains or cultural items that were removed from Federal or Tribal land after November 16, 1990. Under the Act, those human remains or cultural items are subject to disposition under Subpart B.

*100. Comment:* We received 18 comments on § 10.8(c) Museums with custody of a Federal agency holding or collection. Of the total comments, eight comments were supportive, although most referred to corresponding comments on the definition of “custody.” One supportive comment highlighted the presumptive language when a Federal agency fails to decide within the set timeline. Four comments requested publication of museum statements in the **Federal Register** or otherwise provided to Indian Tribes and NHOs. One comment was supportive but concerned that Federal agencies would be unable to respond within the timeframe while one comment felt the timeframe was too long and should be much shorter. One comment questioned how this would be enforced while one comment was concerned this would make Federal agencies responsible for

holdings or collections they haven’t yet taken responsibility for. One comment requested the statement be more than a statement and align with the requirements for a summary and inventory. One comment questioned the Department’s authority to require statements on non-NAGPRA collections, requested more information on joint possession or control, suggested changing possession or control to ownership or legal title, and posited Federal agencies must first request these statements under 36 CFR 79 rather than through these regulations.

*DOI Response:* We have not made changes to this paragraph. Elsewhere in these regulations, we have addressed the definition of “custody.” We have not changed the deadline for a museum to issue a statement (one year after the effective date of the final regulations) or for a Federal agency to respond (six months or 180 calendar days after receipt of the museum’s statement). Both deadlines are important to ensure resolution to this long-standing barrier to repatriation. We understand and share the concern expressed by one comment that a Federal agency who has not shouldered responsibility for a collection to date will be required to take responsibility for it in the future. We believe that this requirement will result in increased awareness by Federal agencies of their responsibilities for these holdings or collections but also in an opportunity to hold Federal agencies accountable for those holdings or collections. We have not required publication of those statements in the **Federal Register**, but the statements will be added to the records kept by the National NAGPRA Program and will be available upon request. We plan to provide information on the program website, like what we provide for other records.

The Department has authority for both these regulations and for 36 CFR part 79 and the Department recognizes the overlapping nature of these regulations for Federal agency holdings or collections that contain human remains or cultural items. We disagree that the Department does not have authority to require statements of holdings or collections that contain human remains or cultural items. As discussed elsewhere, when a Federal agency holding or collection is known to not contain human remains or cultural items, it is not subject to the Act or these regulations.

*101. Comment:* We received eight comments on § 10.8(d) Museums with custody of other holdings or collections. Five comments generally supported this requirement but suggested it be

broadened to include holdings or collections that are under the control of another entity or when control cannot be identified, except for those under Federal agency control. In addition, these comments requested custody be replaced with possession, consistent with comments on those definitions. Two comments opposed this requirement and thought the deadline was unrealistic. Both comments stated the requirement for a museum to identify legal ownership status of its holdings or collections was onerous and would require significant resources. One of these comments stated the issue was not a lack of information so much as it was too much information that required significant time to analyze and synthesize to decide. One comment specifically opposed any requirement for museums to notify State and local governments of holdings or collections, questioned how this would work with State repatriation laws, and suggested it could result in legal disputes. The comment stated many State and local governments are unaware of NAGPRA and do not have funding or staff to comply with these regulations. The comment questioned how these regulations would apply to criminal investigations and medical examiners who may hold samples of biological materials.

*DOI Response:* We have not made changes to this paragraph. This paragraph requires museums to provide statements describing those holdings or collections for which it cannot identify an entity with possession or control. Where a museum can identify that a person, institution, or State or local government agency has possession or control of the holding or collection, no statement is required. We encourage a museum with custody of a holding or collection that contains human remains or cultural items to notify the entity that has possession or control, but we do not require that notification because doing so would exceed the Secretary’s authority under the Act. The entity that has possession or control of the human remains or cultural items is responsible for complying with these regulations. We understand that many museums do not have clear documentation for holdings or collections, and as one comment stated, museums may be required to undertake a comprehensive review of the legal ownership status to determine if the owner is, indeed, known. This is not only a requirement for purposes of these regulations, but is, in general, a professional and ethical requirement for museums. A central tenant of collections management and

care is documentation of not only the objects in a holding or collection, but of the legal ownership status of those holdings or collections. For holdings or collections that contain human remains or cultural items, a museum must ensure it can identify the legal ownership of the holding or collection or risk a failure to comply with these regulations.

State and local government agencies are included in the definition of museum in the Act and these regulations and where such agencies have possession or control of human remains or cultural items, regardless of their physical location, and those agencies receive Federal funds, they must comply with the requirements for repatriation under this subpart. Any museum, including State or local government agencies, that fail to comply with these requirements are subject to the civil penalty provisions.

As discussed elsewhere, unless local or State authorities obtain the full knowledge and consent of the next of kin or the official governing body of the appropriate Indian Tribe or NHO, coroners, medical examiners, and other local or State agencies should consider their requirements under the Act and these regulations for any Native American human remains, including biological samples.

*102. Comment:* We received six comments on adding a new paragraph to § 10.8 related to making grants to Indian Tribes, NHOs, and museums. In addition to the statutory language on grants, the comments suggested including a limitation on initiation of any new scientific study of human remains and associated funerary objects.

*DOI Response:* We have not added the requested paragraph. We do not see a value in repeating the statutory language regarding grants in these regulations. We have addressed the issues of new scientific studies under § 10.1(d) Duty of care. The Notice of Funding Opportunity for NAGPRA grants provides guidance and limitations on potential use of grant funds and is the best place for any additional requirements to be added.

*L. Section 10.9 Repatriation of Unassociated Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony*

*103. Comment:* We received 11 comments generally on § 10.9 Repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony. Four comments objected to preparation of a summary prior to consultation with lineal descendants, Indian Tribes, or NHOs.

One of these comments suggested reordering the steps so consultation occurs before a summary is developed. Another of these comments suggested changing “Complete a summary” to “Draft a summary” to recognize the need for consultation. On the other hand, seven comments supported the proposed regulations because it was clear that the requirement of a summary as a general description and the following step-by-step procedures were sufficient to ensure consultation prior to any determinations.

*DOI Response:* We have not changed the order of the steps as that would be inconsistent with the Act. We have changed “Complete a summary” to “Compile a summary.” We agree with most of these comments that the proposed regulations are clear that a summary is a general description of a holding or collection and must be followed by consultation with lineal descendants, Indian Tribes, and NHOs. As the step-by-step procedures make clear, determinations related to specific cultural items come after a request for repatriation is received. In its response to the request, a museum or Federal agency must determine if the request meets the required criteria and, if not, must explain why.

*104. Comment:* We received nine comments on § 10.9(a) Step 1—Complete a summary of a holding or collection. Four comments requested that summaries should be published in the **Federal Register** or otherwise shared with Indian Tribes and NHOs by the National NAGPRA Program after they are submitted. One comment requested the summary be expanded to include all Native American objects in a collection. One comment requested a better definition of when a summary is complete because that will trigger other deadlines. One comment stated that when a holding or collection is transferred, the previously prepared summary can only be relied on if it was sufficient in the first place. One comment requested updated summaries be required in these regulations while one comment asked if previously submitted summaries were sufficient and did not require updates.

*DOI Response:* We have not included a requirement for summaries to be published in the **Federal Register** or otherwise shared by the National NAGPRA Program. Museums and Federal agencies must send the summary with an invitation to consult to any lineal descendant and any Indian Tribe or NHO with potential cultural affiliation no later than 30 days after submitting the summary to the National NAGPRA Program. The National

NAGPRA Program retains copies of all summaries it has received since 1990 and will provide them upon request. The National NAGPRA Program maintains an online database that identifies which museums and Federal agencies have submitted summaries and which Indian Tribes or NHOs were invited to consult. We cannot require a summary include all Native American objects in a holding or collection as this would be inconsistent with the Act. These regulations require a summary to include the entire holding or collection which may include cultural items. We note that only holdings or collections, or portions of holdings or collections, that may contain cultural items are required to be identified in a summary.

Table 1 to § 10.9(a)(2) identifies the deadlines for compiling a summary after the effective date of these final regulations for holdings or collections that are newly acquired, previously lost or unknown, or in the possession or control of a museum or Federal agency that receives Federal funds for the first time. Prior to the effective date of these final regulations, summaries must have been submitted by the dates identified in paragraph (a)(3) of this section. When a holding or collection is transferred to a museum or Federal agency, the museum or Federal agency must inform the National NAGPRA Program by submitting the previously compiled summary within 30 days of acquiring the holding or collection. The museum or Federal agency must compile its own summary by the deadline in Table 1 to ensure that the contents of the summary are accurate, include any additional information available, and reflect the newly acquired holding or collection.

Six months is the deadline in the existing regulations for submitting a summary for a newly acquired or previously lost or unknown holding or collection and has been since 2007 (see Future Applicability Final Rule, RIN 1024-AC84 (72 FR 13184, March 21, 2007)). Anytime a museum or Federal agency becomes aware of a holding or collection that may contain cultural items and that has not been submitted in a summary, it must treat the holding or collection as a previously lost or unknown collection and compile a summary within six months of becoming aware of the holding or collection. As discussed in other responses, a museum or Federal agency is responsible for complying with the requirements of this subpart for all holdings or collections in its possession or control that may contain human remains or cultural items.

Updated summaries are not required by the existing regulations or by these

final regulations. As discussed above, there are requirements for a summary to be submitted for newly acquired or previously lost or unknown holdings or collections. Similarly, when a new consulting party is identified, either based on new information or a newly federally recognized Indian Tribe, a museum or Federal agency must send an invitation to consult to the new consulting parties. Because a summary is a general description of a holding or collection, it does not require updates provided the initial summary adequately described the holding or collection. While many museums have submitted updated summaries under the existing regulations, these are better identified as new summaries covering new or previously unreported collections. More detailed information about specific cultural items in a holding or collection is more appropriate for consultation and a notice of intended repatriation and does not require an updated summary.

*105. Comment:* We received nine comments on § 10.9(d) Step 4—Receive and consider a request for repatriation. Seven comments noted that geographical affiliation, as used in the proposed regulations, was not one of the criteria for a request for repatriation. Two comments related to the third criterion for information to support a finding that the museum or Federal agency does not have right of possession. One comment felt this would require significant resources for Indian Tribes and NHOs while the other comment suggested stating that if an object meets the definition of one of the cultural items, the definition alone is sufficient to meet the criteria.

*DOI Response:* Under the Act, there are three criteria for the repatriation of an unassociated funerary object, sacred object, and object of cultural patrimony: the establishment, as appropriate, of lineal descent or cultural affiliation; the establishment of the identity of the object as a cultural item; and the presentation of evidence which, if standing alone before the introduction of evidence to the contrary, could support a finding that the museum or Federal agency did not have a right of possession to the cultural item (25 U.S.C. 3005(a)(2) and (c)). Concerning this last criterion, the lineal descendant, Indian Tribe, or NHO making the request for repatriation is not required to do additional research on the object and can likely use the information provided by the museum or Federal agency about the object to satisfy all three criteria.

For example, a museum has information that a pipe was acquired

and accessioned in 1985 from an individual donor, a doctor, who originally received the pipe in 1965 as a gift. During consultation, a traditional religious leader identified the pipe as a sacred object needed by present-day pipe carriers for a traditional pipe ceremony. By speaking with elders, the traditional religious leader learned that in 1954, the U.S. Government terminated the Indian Tribe of the last Native American to own the pipe. Termination resulted in the Tribe's land base being sold, relocation of the Tribe's people to multiple urban areas throughout the U.S., and the forced suspension of the traditional religious practice associated with the pipe. The Native American owner relocated to the metropolitan area of the museum in 1957 and was unemployed from 1963 until the end of his life in 1966. The terminated Indian Tribe and the Indian Tribe who identified the traditional religious leader have a relationship of shared group identity through their origin stories, inter-marriage, and pipe ceremonies. The historical context surrounding the acquisition of the sacred object by the museum would be evidence to support a finding that, while the Native American owner had the authority to alienate the pipe, this transaction was not made voluntarily or fully freely. Consequently, in making its request for repatriation of this sacred object, the Indian Tribe could state (1) the pipe is a sacred object, (2) the Indian Tribe has cultural affiliation to the pipe based on historical information, kinship, and expert opinion, and (3) the historical information surrounding the acquisition of the sacred object shows that the museum does not have a right of possession to the sacred object.

*106. Comment:* We received seven comments on § 10.9(e) Step 5—Respond to a request for repatriation. One comment stated that any request from a federally recognized Indian Tribe satisfies the criteria for repatriation and no other criteria should be required. Four comments believe the option for a museum or Federal agency to assert a right of possession was either impossible, a loophole, absurd, or intentionally obtuse. One comment stated a museum or Federal agency must show right of possession by a preponderance of the evidence. One comment stated that no museum or Federal agency could have possession or control of an object of cultural patrimony based on the definition of such an object.

*DOI Response:* The criteria identified in paragraph (d) of this section are drawn from the Act itself at 25 U.S.C. 3005(a)(2)—requiring identification of

the specific type of cultural item and cultural affiliation to the requestor and 25 U.S.C. 3005(c)—requiring information regarding right of possession. Right of possession is not intended to be a loophole or intentionally obtuse, but it is a standard that must be applied to requests for repatriation. The legal language of the Act “presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession” has been interpreted here to fit within the steps of receiving and responding to a request for repatriation. As discussed in the previous response, a request must include information to support a finding that the museum or Federal agency does not have right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony.

In response to the information in the request for repatriation, a museum or Federal agency has an opportunity to “overcome such inference and prove that it has a right of possession to the objects.” The standard applied to right of possession is distinct from and in some ways harder to satisfy than preponderance of the evidence. A museum or Federal agency must prove it has a right of possession to refuse to repatriate a cultural item.

A museum or Federal agency may have possession or control of an object of cultural patrimony, as those terms are defined in the Act and these regulations. It is unlikely that a museum or Federal agency will have a right of possession to an object of cultural patrimony, given the definition of that term. Nevertheless, each request for repatriation of an object of cultural patrimony must be evaluated based on the information available.

*107. Comment:* We received one comment on § 10.9(h) Evaluating competing requests for repatriation, objecting to the priority order that includes lineal descendants as it differs from the priority order in the Act at 25 U.S.C. 3002(a).

*DOI Response:* We cannot make the requested change to remove lineal descendants from the priority order for unassociated funerary objects or sacred objects. The referenced priority order applies to human remains or cultural items removed from Federal or Tribal lands under Subpart B of these regulations. For holdings or collections under Subpart C of these regulations, the Act provides for lineal descendants to request sacred objects under 25 U.S.C. 3005(a)(5). By definition, an object of cultural patrimony cannot be connected to a lineal descendant. By

definition, an unassociated funerary object could be connected to a lineal descendant, provided that the related human remains are those of a known individual whose ancestry can be traced. The circumstances under which a lineal descendant can be identified for unassociated funerary objects is limited, but where possible, those lineal descendants have priority when there are competing requests.

For example, in 1880, funerary objects were removed from the marked grave site of a known individual shortly after the individual's death and burial. The human remains were not removed. In 1940, the family of the person who removed the funerary objects from the grave site donated the objects to a local historical society. Accession records and exhibit labels at the historical society identify the individual who was buried with the funerary objects by name. A lineal descendant who can trace ancestry to the known individual requests repatriation of the unassociated funerary objects. After the notice of intended repatriation is published in the **Federal Register**, the Indian Tribe with cultural affiliation also requests repatriation of the funerary objects. Using this paragraph, the historical society determines the lineal descendant is the most appropriate requestor.

#### *M. Section 10.10 Repatriation of Human Remains or Associated Funerary Objects*

*108. Comment:* We received six comments on § 10.10(a) Step 1—Compile an itemized list of any human remains and associated funerary objects. Two comments supported this paragraph as proposed. Two comments requested additional language to require the inclusion of human remains and associated funerary objects that are identified in documentation that cannot be located or are known to have been destroyed. Two comments requested that this paragraph require consultation prior to any analysis and allow Indian Tribes and NHOs to dictate the level of documentation or analysis required to complete the itemized list.

*DOI Response:* We have not made the requested changes. Based on the information available, a museum or Federal agency must determine if human remains or cultural items that are destroyed, deaccessioned, lost, or in any other way removed are under its possession or control and therefore subject to these regulations. As discussed elsewhere, a museum or Federal agency must ensure the itemized list is comprehensive and covers any holding or collection that

may contain human remains and associated funerary objects. We note that an itemized list may be prepared using only documentation identifying human remains and associated funerary objects and there is no requirement to physically locate the human remains and associated funerary objects.

We have not added the requested requirement for consultation to this paragraph but have, nevertheless, provided that lineal descendants, Indian Tribes, and NHOs must consent to any analysis of human remains and associated funerary objects. As provided in this paragraph, museums and Federal agencies must identify the number of individuals in a reasonable manner based on the information available. No additional study or analysis is required to identify the number of individuals. If human remains are present in a holding or collection, the number of individuals is at least one. We have made changes to § 10.1(d) Duty of care to require museums and Federal agencies obtain consent from lineal descendants, Indian Tribes, or NHOs prior to conducting any research on human remains or cultural items. “Research” includes any activity to generate new or additional information beyond the information that is already available, for example, osteological analysis of human remains, physical inspection or review of collections, examination or segregation of comingled material (such as soil or faunal remains), or rehousing of collections. “Research” is not required to identify the number of individuals or cultural items, or to determine cultural affiliation.

*109. Comment:* We received three comments on § 10.10(b) Step 2—Initiate consultation. All three comments requested guidance on how to identify consulting parties for human remains and associated funerary objects with no known geographical location or a broad geographical location such as “Southwestern.” One of these comments recommended that human remains with no geographical location information should be assumed to be from a geographical location near the museum or Federal agency. “For human remains believed to be Native American such as those with no provenance, it makes sense to establish a presumption for return and reburial rather than indefinite curation of these ancestral human remains.” The comment stated broad consultation with all Indian Tribes and NHOs “. . . is an inefficient manner of handling disposition of Native American human remains with no provenance” (NPS–2022–0004–0166). Another comment agreed stating “[s]ending consultation letters to all 574

Tribes and engaging in consultation with respondents would be extremely burdensome for the museum or Federal agency and could impede other repatriation efforts” (NPS–2022–0004–0125).

On the other hand, one comment stated Indian Tribes and NHOs prefer for museums and Federal agencies to consult broadly with all 347 Indian Tribes in the contiguous 48 States, 227 Indian Tribes in Alaska, and all Native Hawaiian organizations. The comment stated “[w]hile only approximately 4% of individuals have no geographic location information, they deserve to be treated with equal respect.” The comment asked for clarification because “inconsistent guidance is provided by the Review Committee, which encourages broad consultation, and the National NAGPRA Program, which encourages making arrangements with the Tribe or Tribes whose aboriginal homeland includes the location of the museum” (NPS–2022–0004–0135).

*DOI Response:* We have not made changes to this paragraph. We want to stress that broad consultation with all 574 Indian Tribes and all NHOs is not a requirement of either the existing regulations or the final regulations. We disagree that the Review Committee and the National NAGPRA Program have provided inconsistent guidance. Both the Review Committee and the National NAGPRA Program support consultation that leads to expeditious repatriation. Both the Review Committee and the National NAGPRA Program advise that broad consultation helps alleviate the potential for competing requests or disagreements. Under the existing regulations and these final regulations, a museum or Federal agency is responsible for identifying consulting parties and initiating consultation based on the information available. Museums and Federal agencies can choose to consult broadly, even if doing so is burdensome and less efficient.

Under these final regulations, there is a specific timeframe for museums and Federal agencies to consult on human remains and associated funerary objects. Yet, it is still up to a museum or Federal agency to identify lineal descendants and Indian Tribes and NHOs with potential cultural affiliation and invite them to consult. For example, based only on acquisition history and the current location of the museum, a museum could decide its preference is to only invite Indian Tribes who currently reside in the county and State where the museum is located. Alternately, a museum could decide to invite all Indian Tribes who previously occupied the State where the museum is

located to participate in consultation. Or a museum could decide to invite all Indian Tribes who reside in the wider geographic region (northeast or southwest, for example) or all 574 Indian Tribes and all NHOs to participate in consultation. Provided the museum is acting in good faith, any of these options are sufficient, but a museum or Federal agency should keep in mind the deadline for completing or updating an inventory and publishing a notice of inventory completion.

*110. Comment:* We received four comments on § 10.10(d) Step 4—Complete an inventory of human remains and associated funerary objects that expressed concern about the determinations that are required in an inventory under paragraph (d)(1)(iii) of this section.

*DOI Response:* We have revised the list of determinations in an inventory under paragraph (d)(1)(iii) to correspond to the changes in § 10.3 Determining cultural affiliation. For each entry in an itemized list, the inventory must include a determination identifying one of the following:

1. A known lineal descendant (whose name may be withheld);

2. The Indian Tribe or Native Hawaiian organization with cultural affiliation that is clearly identified by the information available;

3. The Indian Tribe or Native Hawaiian organization with cultural affiliation that is reasonably identified by the geographical location or acquisition history; or

4. No lineal descendant or any Indian Tribe or Native Hawaiian organization with cultural affiliation can be clearly or reasonably identified.

The two options for identifying cultural affiliation come directly from the Act, which we have also used in defining cultural affiliation and in § 10.3 Determining cultural affiliation. In the Act, cultural affiliation of human remains may be (1) clearly identified or (2) not clearly identified but determined by a reasonable belief given the “circumstances surrounding acquisition” (25 U.S.C. 3003(d)(2)(B) and (C)). Throughout this section of the Act, there is reference to an inventory identifying “geographical and cultural affiliation,” “geographical origin,” “basic facts surrounding acquisition and accession,” “[T]ribal origin,” and “totality of circumstances surrounding acquisition of the remains or objects” (25 U.S.C. 3003). The existing regulations require an inventory to include accession and catalogue entries and information related to the acquisition of each object, including: the name of the person from whom the

object was obtained, if known; the date of acquisition; the place each object was acquired; and the means of acquisition.

The proposed regulations revised this into two separate and simplified requirements under § 10.10(a): (1) the county and State where the human remains and associated funerary objects were removed and (2) the acquisition history (provenance) of the human remains and associated funerary objects. In these final regulations, the requirements under § 10.10(a) are (1) the geographical location (provenience) by county or State where the human remains and associated funerary objects were removed; and (2) the acquisition history (provenance) of the human remains and associated funerary objects. “Acquisition” is not defined in the Act or these regulations and should be understood to have a standard, dictionary definition of “to get as one’s own; to come into possession or control of.” To elaborate and clarify what information the Act requires, we have separated the concept of acquisition into two separate parts: “provenience” and “provenance” which both mean “origin, source.” Provenience also means “the history of ownership of a valued object or work of art or literature” (<https://www.merriam-webster.com/dictionary/acquire>, <https://www.merriam-webster.com/dictionary/provenience>, and <https://www.merriam-webster.com/dictionary/provenance>, accessed 12/1/2023).

Therefore, under § 10.10(a) and (d), a museum or Federal agency must identify both the geographical location (provenience) from which the human remains and associated funerary objects were removed, but also the acquisition history (provenance) of the human remains and associated funerary objects. Even in the small number of cases where geographical location (provenience) of human remains and associated funerary objects is unknown, all human remains and associated funerary objects (as well as other cultural items) will have some kind of acquisition history or provenance. Even when the only information about human remains and associated funerary objects is that they were “found in collections” of a museum, that information is sufficient to identify the Indian Tribes or NHOs with potential cultural affiliation for consultation based solely on the location of or general collection practices of the museum.

*111. Comment:* We received nine other comments on § 10.10(d) Step 4—Complete an inventory of human remains and associated funerary objects. One comment objected to the requirement for updating an inventory

under paragraph (d)(4) of this section as work formerly deemed “complete” will now be “incomplete” and this undermines the goal of improving implementation and compliance with the Act. One comment requested changes to require the Assistant Secretary to monitor the work of museums who requested an extension. Seven comments requested clarification of the requirements when a holding or collection is transferred.

*DOI Response:* We disagree that the requirement to update an inventory undermines the goal of improving implementation and compliance with the Act and these regulations. Just as they were required to do in 1990, museums and Federal agencies must initiate consultation, consult on human remains and associated funerary objects, and make determinations about cultural affiliation. In updating an inventory, the museums or Federal agencies already have a significant amount of information available in the previously prepared and submitted inventories. No additional research or analysis is required by these regulations. To fulfill this requirement, a museum could send its original inventory from 1995 along with the other required information to initiate consultation. In response, a consulting party might identify those human remains and associated funerary objects that it wishes to consult on and assert it has cultural affiliation to the human remains and associated funerary objects.

The Assistant Secretary will decide on any request for an extension to the inventory deadlines and will publish a list of all museums who request an extension in the **Federal Register**. This will provide both the Assistant Secretary and the public with information needed to monitor the progress of museums who have not completed the inventory requirements by the deadline.

We have clarified how a museum or Federal agency may rely on a previously completed or updated inventory after a transfer. The museum or Federal agency must still complete the inventory by the required deadline but only after initiating consultation. The criminal provisions of NAGPRA (18 U.S.C. 1170) clearly prohibit the sale, purchase, use for profit, or transportation for sale or profit of Native American human remains. Any museum or Federal agency that acquires possession or control of human remains must ensure they are not violating those provisions in any transfer of human remains.

*112. Comment:* We received five comments on the requirement to repatriate associated funerary objects

with all human remains, regardless of cultural affiliation. Two of these comments objected to the requirement. One comment stated the Department made a gross oversimplification of the issues raised in a taking of property in adding this requirement and that “[i]t is a blanket grab for objects not previously deemed covered under NAGPRA” (NPS–2022–0004–0188). Another objecting comment believes this change to the existing regulations “. . . is being made without a formal review of its Fifth Amendment takings implications under Executive Order 12630” and will “create an opportunity for lawsuits to overturn these rules—especially now that ‘Chevron deference’ has been significantly weakened. Experience has shown that such litigation is detrimental to the relationships that have been built between museums and Native groups over the past 30 years” (NPS–2022–0004–0172). On the other hand, three comments supported this requirement, although one comment expressed concern over the legal review of this change.

*DOI Response:* We have not made any change to the requirement for associated funerary objects to be repatriated with human remains. We have conducted a thorough, formal review of this requirement and these regulations. Information and analysis related to that review can be found in the 2022 Proposed Rule (87 FR 63226).

*113. Comment:* We received one comment on § 10.10(f) Step 6—Receive and consider a request for repatriation. The comment stated that any request from an Indian Tribe satisfies the criteria for repatriation and no other criteria should be required.

*DOI Response:* In this section for human remains and associated funerary objects, the only criteria for a request for repatriation is that the lineal descendant, Indian Tribe, or NHO is identified in the notice of inventory completion. The lineal descendant, Indian Tribe, or NHO that is identified in a notice of inventory completion is determined in the inventory under § 10.10(d)(1) of this section and as discussed in detail in Comment 110. The procedures in this paragraph are necessary to set up an opportunity for additional requests for repatriation to be made.

This paragraph provides an option for a requestor that is not identified in a notice of inventory completion. The requestor must show, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or NHO with cultural affiliation. A museum or Federal agency may determine in an inventory and a

notice of inventory completion that for certain human remains and associated funerary objects there is no lineal descendant or any Indian Tribe or NHO with cultural affiliation. This paragraph provides that any lineal descendant, Indian Tribe, or NHO can make a request for repatriation of those human remains or cultural items. The museum or Federal agency must respond in writing to the request within 90 days.

*114. Comment:* We received 17 comments on § 10.10(k) Transfer or reinter human remains and associated funerary objects. Of that total, two comments supported this paragraph as proposed. Two comments requested we remove the option for reinterment as museums and Federal agencies should not be authorized to reinter human remains or cultural items. Two comments missed or misunderstood this paragraph and expressed concern that by removing the options under the existing regulations for culturally unidentifiable human remains, these regulations would eradicate a way forward for transfer of human remains without cultural affiliation or that have a relationship of shared group identity to Indian groups without Federal recognition. The Review Committee objected to the option in this paragraph for transfer of human remains to Indian groups without Federal recognition and requested a thorough legal review of this option. The Review Committee and others requested this paragraph include a requirement for the Review Committee and the Secretary to review agreements for transfer or reinterment prior to publication of a notice of intended transfer or reinterment. The Review Committee and one other comment also requested that any notice for reinterment include the specific law allowing for reinterment. Four comments requested that the regulations specifically protect information about any reinterment under this section or under § 10.7 from disclosure or dissemination and that reinterment be as close as possible to the location where the human remains and associated funerary objects were removed.

*DOI Response:* We have revised this paragraph to apply only to human remains and associated funerary objects with no lineal descendant or no Indian Tribe or NHO with cultural affiliation. We believe the clarification and simplification of the cultural affiliation and repatriation processes for human remains and associated funerary objects that precedes this paragraph will address many of the concerns raised by these comments and that this paragraph will apply only to a small number of

human remains and associated funerary objects.

We reiterate that cultural affiliation as defined in the Act only applies to an NHO or an Indian Tribe, which means a federally recognized Indian Tribe. An Indian group without Federal recognition may have a shared group identity to an earlier group, but such an Indian group cannot have a cultural affiliation as defined under the Act or these regulations. As noted elsewhere, Indian groups without Federal recognition, including State recognized tribes, are not completely excluded from the repatriation processes. As is the current practice, Indian groups without Federal recognition can work with federally recognized Indian Tribes as part of a joint request for repatriation.

We have removed the option to transfer unclaimed human remains or cultural items to Indian groups without Federal recognition. This change is in response to the strong objections we received from federally recognized Indian Tribes and discussed in Comment 3. This change also emphasizes and recognizes that the Act reflects the unique relationship between the Federal government and Indian Tribes and NHOs (25 U.S.C. 3010). This change is also based on experience over the last 13 years with repatriation involving Indian groups without Federal recognition.

We have retained the option to transfer to an Indian Tribe or NHO or to reinter. At the discretion of the museum or Federal agency and after following the requirements of this paragraph, human remains and associated funerary objects may be transferred or reinterred. In Texas, for example, conflicts between federally recognized Indian Tribes and Indian groups without Federal recognition have resulted in a preference for reinterment rather than for transfer. In California, State law provides for more involvement of State recognized groups in repatriation and in many cases Indian Tribes have worked jointly with Indian groups without Federal recognition to complete repatriations and reburials. This paragraph provides for any Indian Tribe or NHO to request and receive physical transfer of human remains and associated funerary objects that have no cultural affiliation. We hope that this will allow for even more collaboration between federally recognized Indian Tribes and Indian groups without Federal recognition to achieve repose for these human remains and associated funerary objects.

As reinterment is a discretionary action, these regulations cannot dictate where reinterment occurs. The

regulations do not require identification of the reinterment location and do require sensitive information be protected from disclosure. After a thorough legal and policy review of this paragraph, we have determined neither the Review Committee nor the Secretary must review agreements between the parties prior to publication of a notice of intended transfer or reinterment.

*N. Section 10.11 Civil Penalties*

*115. Comment:* We received 30 comments on § 10.11 Civil penalties. Of that total, 12 comments supported the section as proposed. Nine comments requested the regulations add procedures for investigating a Federal agency's failure to comply with the requirements of the Act. Three comments objected to the revisions to this section and requested we reinstate or identify more limited categories for failure to comply. One comment stated that as proposed, the regulations ensure all museums will fail to comply with the requirements of the Act. Three comments requested clarification if certain actions, like releasing sensitive information, would be a failure to comply. One comment requested clarification if museums with custody of a Federal holding or collection are subject to civil penalties. One comment provided specific suggestions for this section to include (1) a fixed timeline, (2) a transparent procedure for investigations, (3) involvement of an aggrieved party, and (4) options for aggrieved parties to appeal a final decision.

*DOI Response:* We cannot expand this section to include Federal agencies. As noted in the regulations, Federal agencies are not subject to the civil penalty provisions of the Act and any change would be inconsistent with the Act. It is not appropriate for this section to reference or include other Federal laws. The most broadly applicable way to allege that a Federal agency has failed to comply with the Act or these regulations is to send an allegation to the head of the appropriate Federal agency or to the Federal agency's Office of the Inspector General.

We have not revised the broad options for a failure to comply. All the requirements in Subpart C of these regulations can be the subject of a civil penalty. We have provided clear timelines for museums, after the effective date of these final regulations, to ensure they are in compliance with all these requirements. Museums should carefully consider these timelines when exercising the discretion they have on how to complete the required tasks. For example, as discussed elsewhere, a

museum has discretion in how it compiles an itemized list of human remains and associated funerary objects. Whether a specific action, like failing to protect sensitive information, constitutes a failure to comply will depend on the specific circumstances. A museum that has custody of a Federal agency holding or collection is responsible for sending the required statement under § 10.8(c) and a failure to do so could constitute a failure to comply under this section. As discussed in the following responses, this section provides timelines and transparency whenever possible. However, we note that given the nature of investigations and civil penalties, not all tasks can be made public.

We have made edits to this section and the definitions to identify the Assistant Secretary as the individual with delegated authority under this section. We have made additional updates related to the address for the Department's Office of Hearings and Appeals.

*116. Comment:* We received 30 comments on § 10.11(a) File an allegation. Most of these comments (25) requested we remove the requirement for an allegation to include the full name, mailing address, telephone number, and (if available) email address of the person alleging the failure to comply. A few of these comments also requested we reduce the requirements for an allegation to identify and enumerate violations in an allegation or to identify and enumerate the aggrieved parties. One comment requested that allegations be sent to the Department's Office of the Inspector General, rather than the Manager, National NAGPRA Program. Two comments requested the regulations include a procedure for the Department to inspect or investigate museums proactively, rather than depending on allegations. Two comments requested a procedure for Indian Tribes to report when a request to a museum is denied or ignored.

*DOI Response:* We cannot provide for anonymous allegations in these regulations. To ensure the Assistant Secretary can gather necessary information on an allegation, we require that a person alleging the failure to comply identify themselves and provide a method for us to contact them. However, that does not preclude any individual from submitting an anonymous tip regarding a failure to comply. While not an allegation, an anonymous tip could provide information for the Assistant Secretary to investigate and determine if a failure to comply has occurred. We have revised the requirement to only include

contact information (telephone or email) in an allegation. We have revised the requirements to enumerate violations, but we cannot revise the requirement to identify violations. The allegation must contain some information to determine if an investigation is warranted. Again, we note that any individual could submit a tip regarding a failure to comply where the individual has no information to identify a violation.

An allegation may be submitted by an Indian Tribe or NHO when a museum denies or ignores a request, depending on the circumstances. Under these regulations, a museum must respond to a request for repatriation, and, if a museum determines the request does not meet the required criteria, it must provide a detailed explanation and provide an opportunity for the requestor to submit additional information. If a response to a request for repatriation is not sent by the deadline required or if it does provide detailed information, the Indian Tribe or NHO could allege a failure to comply.

Under the Act, the Secretary has discretion for assessing a civil penalty pursuant to the procedures established in these regulations. The Secretary has delegated responsibility for receiving allegations of failure to comply to the Manager, National NAGPRA Program, but the Secretary has delegated responsibility for assessing a civil penalty to the Assistant Secretary. While these regulations do not require the Assistant Secretary inspect or investigate museums proactively, the Assistant Secretary may assess a civil penalty to any museum that fails to comply.

*117. Comment:* We received 12 comments on § 10.11(b) Respond to an allegation. Seven comments supported this paragraph as proposed, specifically the timeline for the Assistant Secretary to respond to an allegation. Four comments requested the regulations clarify what action the Assistant Secretary must take in 90 days. One comment stated that a civil penalty must always be the appropriate remedy to a failure to comply.

*DOI Response:* We have made edits to clarify that no later than 90 days after receiving an allegation, the Assistant Secretary must determine if the allegation meets the requirements and must respond to the person making the allegation. After that, the Assistant Secretary may conduct any investigation that is necessary. We cannot place time constraints on the investigation, but we have ensured that the Assistant Secretary will decide on all allegations that meet the requirements for an allegation. The Assistant Secretary has

reserved the option to determine that a failure to comply is substantiated, but a penalty is not an appropriate remedy.

*118. Comment:* We received nine comments on § 10.11(c) Calculate the penalty amount. Four comments requested an increase in the base penalty amount while two comments requested penalties be calculated on a per day, per violation basis. One comment requested that since no monetary value can be placed on cultural items, the regulations should use civil penalties primarily to facilitate repatriation. One comment requested the regulations not reference the commercial value of human remains or cultural items. One comment requested the regulations make a connection between the options for increasing or decreasing a penalty amount so that the increasing factors can be used to justify denying any of the decreasing factors.

*DOI Response:* We have not increased the base penalty amount or changed the calculation to per day and per violation. We believe the regulations provide sufficient means for the Assistant Secretary to calculate a penalty based on the number of separate violations and the factors for increasing the base amount. Coupled with the broadening of this section to include any failure to comply, we believe civil penalties will be an effective tool to facilitate repatriation. We cannot remove commercial value because that language is in the Act itself and must be a part of these regulations.

*119. Comment:* We received four comments on § 10.11(d) Notify a museum of a failure to comply that requested aggrieved parties be notified as well. We received two comments on § 10.11(e) Respond to a notice of failure to comply that requested aggrieved parties be included in any informal discussion of the failure to comply.

*DOI Response:* We have included a requirement for any lineal descendant, Indian Tribe, or NHO named in a notice of failure to comply to receive a copy of the notice. If an aggrieved party is identified in an allegation or through the investigation of an allegation, that party would be named in the notice of failure to comply and receive a copy of the notice. We cannot require aggrieved parties be included in informal discussions regarding the notice of failure to comply. Prior to assessing a civil penalty, the Assistant Secretary may request information from any party and must consider that information in assessing the civil penalty. After receiving a copy of a notice of failure to comply, any aggrieved party may provide information to the Assistant Secretary related to the failure to

comply, especially if it will inform the penalty assessment.

*120. Comment:* We received two comments related to § 10.11(h) Respond to an assessment and four comments on § 10.11(n) Additional remedies. Two comments requested clarification on where money collected under a civil penalty goes. Four comments requested the Department use other civil penalties authorized under law beyond this section.

*DOI Response:* Any payments for civil penalties are by certified check made payable to the U.S. Treasurer and the funds go to the general account of the U.S. Treasury. The Department reserves the right to pursue other available legal or administrative remedies in the final paragraph of this section.

#### *O. Section 10.12 Review Committee*

*121. Comment:* We received 16 comments on § 10.12 Review Committee. Seven comments requested that the monitoring responsibilities of the Review Committee be added to this section. Four comments requested we expand this section to include other responsibilities or at least caveat the final paragraph to indicate it is not the only action the Review Committee can take. Three comments requested the duty to report to Congress be added to this section. One comment requested the responsibilities for compiling an inventory for certain human remains and recommending specific actions be added to this section, although the comment was clear the term “culturally unidentifiable” should not be used. One comment suggested the Review Committee take on regional cases, like the Review Committee’s finding for Moundville, to assist both Indian Tribes and NHOs and museums and Federal agencies to determine cultural affiliation and publish those decisions.

*DOI Response:* We do not see a reason to simply add the language of the Act to these regulations. The enumerated responsibilities in the Act are still required regardless of their inclusion in the regulations. However, we do agree with many of the comments that providing additional procedures in these regulations for the Review Committee may further the goals of disposition or repatriation. Although some comments provided suggestions for adding language, we decline to add any additional procedures at this time. We commit to working with the Review Committee to develop additional paragraphs for this section of the regulations. Any additions will require additional consultation with Indian Tribes and NHOs as well as public comment.

*122. Comment:* We received four comments on § 10.12(a) Recommendations requesting that we revise 90 days to 30 days. We received four comments discussed above that supported the 90-day timeframe.

*DOI Response:* We decline to make this change. Under the Federal Advisory Committee Act, meeting minutes must be certified 90 days after a public meeting. Using this same time frame for publication of related notices will ensure that the meeting minutes that support the recommendations or findings are also available.

*123. Comment:* We received four comments on § 10.12(b) Nominations. Two comments related to the requirement that two traditional Indian religious leaders be nominated, at the exclusion of a traditional Native Hawaiian religious leader. One comment suggested that the seventh member be appointed from a list developed by only the three members nominated by Indian Tribes, NHOs, and traditional religious leaders. One comment requested clarification on the limitations of national museum or scientific organizations.

*DOI Response:* We cannot make the changes requested to either the first or last category of nominations as doing so would be inconsistent with the Act. When Congress expressly identified traditional Indian religious leaders as being eligible to serve in two of the three specified slots, it excluded traditional Native Hawaiian religious leaders. The Act also specifies that the Secretary choose the seventh member from a list developed and consented to by all the other members. The Act did not provide any requirements beyond “national museum organizations and scientific organizations.” The additional information on these organizations was added in response to the Government Accountability Office report in 2010. “Lesser geographic scope” refers to a scope that is less than national. Similarly, the membership of the organization cannot be limited to one region of the United States.

*124. Comment:* We received three comments on § 10.12(c) Findings of fact or disputes on repatriation. One comment supported the paragraph as proposed. One comment requested grammatical changes. One comment requested we add scientists as affected parties under this paragraph.

*DOI Response:* We decline to make any of the requested changes. The Act specifically limits the parties who may seek facilitation of disputes to lineal descendants, Indian Tribes, NHOs, museums, and Federal agencies. For findings of fact, the request must be

from an affected party and relate to the identity, cultural affiliation, or return of human remains or cultural items. We do not find that scientists alone are affected parties in either circumstance.

### III. Response to Public Engagement and Request for Comments

#### A. Public Engagement

Between October 18, 2022, and January 31, 2023, the Department conducted consultation sessions with Indian Tribes and the Native Hawaiian Community. The Department conducted additional consultation sessions, upon request, with Indian Tribes or the Native Hawaiian Community to ensure sufficient opportunity to engage and comment in advance of this final rule and to respond to the previous requests received for additional consultation sessions. During consultation, the Department requested feedback from Indian Tribes and NHOs on how to further allow Indian Tribes and NHOs flexibility and discretion regarding the regulatory requirements and the new responsibilities under Subpart B and the deadlines under Subpart C.

We received several comments related to these specific requests and have responded to them directly elsewhere in this document (see Comments 4, 30, 64, 65, 80, 85, 92, 94, 105, and 111). Other comments from Indian Tribes provided additional input on these specific requests, and we have incorporated any suggestions, to the extent possible, to provide Indian Tribes and NHOs with flexibility and discretion in these regulatory requirements. One comment provided specific and direct feedback related to these specific requests, and we are providing a summary of that comment and a direct response here as an illustrative example.

In the comment, the Indian Tribe expressed concerns about the timelines for updating inventories, specifically, and the potential for the burden of consultation to be placed on Indian Tribes. The Indian Tribe requested that the regulations provide options for Indian Tribes to determine if or when they wished to consult and to delay consultation as needed. The Indian Tribe felt that some of the regulatory procedures were streamlined and simplified but did not feel that consultation was any more efficient than the existing regulations. The Indian Tribe believed the proposed regulations stressed consultation and repatriation requests at the end of the inventory, rather than at the beginning, and requested that the regulations be revised to stress the requirement for consultation at the beginning of the

process. The Indian Tribe also asked to extend the deadline for the updated inventory and that the regulations make clear that a request for an extension of the deadline is an option. The Indian Tribe stated, “At issue is not the regulatory process, but the fact that the majority of museums do not know what they have in their collections. Any attempts to project a budget or timeframe for resources needed tend to be woefully inadequate. Museums also seem unwilling to review their collection boxes physically or lack the expertise to review osteological material” (NPS–2022–0004–0185). The Indian Tribe provided an example of a recent consultation that resulted in the identification of an additional 19 sites and 500 funerary objects during a cursory review. The Indian Tribe expressed a concern echoed in many comments from all constituents that the new deadlines would result in ancestors being left behind and a general lack of due diligence on the part of museums and Federal agencies.

As discussed elsewhere in this document, we do not intend to impose requirements on lineal descendants, Indian Tribes, or NHOs to respond to invitations to consult or to submit requests for repatriation. Those are actions that lineal descendants, Indian Tribes, and NHOs may choose to take, but are not required. However, museums and Federal agencies are required to act within certain timelines, and those timelines are required even if there is no response from a lineal descendant, Indian Tribe, or NHO to an invitation to consult. In § 10.10, a museum or Federal agency must initiate consultation prior to completing or updating an inventory, but if there is no response to the invitation to consult, the museum or Federal agency must complete or update the inventory by the deadlines required under § 10.10(d) and submit a notice of inventory completion under § 10.10(e). We stress that an extension of this deadline may be requested by any museum that has made a good faith effort to update its inventory. We have added to the requirements for an extension the written agreement of consulting parties to the request. If a museum will need additional time to complete its inventory, it can only do so by first engaging in meaningful and effective consultation with lineal descendants, Indian Tribes, and NHOs. With these changes to the regulations, we hope to provide a clear path to repatriation where lineal descendants, Indian Tribes, and NHOs, rather than museums or

Federal agencies, define what “expeditious” repatriation means.

Regarding due diligence and the potential for human remains or cultural items to be left behind, we note that the Act and these regulations impose standards and requirements for museums and Federal agencies to make an effort to identify human remains and cultural items. Any museum or Federal agency that fails to identify a holding or collection that contains human remains or cultural items has failed to comply with the Act and these regulations. It is therefore advantageous for a museum or Federal agency to be broadly inclusive of collections, especially those that might contain human remains.

The Department proactively engaged with a subset of affected entities, including Indian Tribes, NHOs, museums, and Federal agencies, to understand if the regulatory revisions could impact these entities’ capacity and resources. The Department requested feedback from Indian Tribes, NHOs, museums, and Federal agencies on how to ensure the step-by-step process for repatriation is streamlined and simplified by the regulatory revisions under Subpart C. In preparing the proposed regulations, the Department was not aware of any capacity and resource limitations that would prevent these entities from completing the new requirement to update inventories, submit requests to consult, engage in consultation, and publish notices following the effective date of a final rule.

As discussed elsewhere in this document, but especially in Comment 4, we received substantial and specific feedback on the impact to capacity and resources under these regulations. We have addressed many of these comments in the revised Cost-Benefit and Regulatory Flexibility Threshold Analyses for the final regulations. We have incorporated any suggestions, to the extent possible, to ensure the step-by-step process for repatriation is streamlined and simplified under Subpart C. The same submission from an Indian Tribe provided specific and direct feedback related to this specific request as well, and we are providing a summary of that comment and a direct response here as an illustrative example.

The Indian Tribe stated its staff would be overwhelmed by requests to consult and requested that the regulations make clear that, after receiving an invitation to consult from a museum or Federal agency, Indian Tribes should be allowed to move at their own pace according to each sovereign’s capacity and resources. The Indian Tribe stated that it currently consults or has consulted with 347

entities on NAGPRA collections, and every year that number increases. The Indian Tribe explained that, depending on size, scope, and context of the collection, some consultations require mere hours while others require years of sustained work. The Indian Tribe believes there is no way to truly calculate the costs or to accurately forecast if there will be sufficient opportunity to submit requests and engage in meaningful consultation. The Indian Tribe explained that, based on experience, review of collections is often necessary as museums fail to accurately identify funerary objects and other cultural items. The Indian Tribe requested that the regulations allow flexibility, to be guided by considerations and consultations with Indian Tribes.

Throughout these regulations, we require museums and Federal agencies to defer to the Native American traditional knowledge of lineal descendants, Indian Tribes, and NHOs. We have required museums and Federal agencies to not only consult but also obtain consent prior to allowing exhibition of, access to, or research on Native American human remains or cultural items. We have reiterated the requirements of the Act for museums and Federal agencies to rely on the information available (previous inventories, catalog cards, accession records, etc.) to identify consulting parties, conduct consultation, determine cultural affiliation, update the inventory, and submit a notice of inventory completion. Any museum or Federal agency that fails to identify a holding or collection that contains human remains or cultural items has failed to comply with the Act and these regulations. It is therefore advantageous for a museum or Federal agency to be broadly inclusive of collections, especially those that might contain funerary objects or other cultural items.

#### *B. Requests for Comments*

In addition to the public engagement and outreach discussed above, the Department solicited comment from the public on the entirety of the proposed rule. The Department received comments from the public on the cost-benefit and regulatory flexibility analyses, including the conclusions about the expected costs of complying with the rule. In particular, the Department requested responses to the following questions about the proposed regulations (labeled a through g):

a. For each regulatory requirement, does the estimated time per response seem reasonable? If not, what range of time per response would be more

reasonable for a specific regulatory requirement?

As noted elsewhere in this document, we received several comments that provided input or alternative estimates for specific tasks. Two comments stated the rate used to calculate costs should be increased to \$100 to \$120 per hour. A few comments provided estimated costs to Indian Tribes and NHOs of \$17.2 million per year. This estimate was developed using grant awards from 2011 to 2021 to estimate the average cost for a notice of inventory completion (\$14,416 per notice). After calculating an estimated cost for museums and Federal agencies to comply with the regulations, the estimate calculated the costs for Indian Tribes and NHOs by applying the percentage of funding awarded in grants from 2011–2021 to museums (58%) and Indian Tribes or NHOs (42%) to estimate a total burden for the regulations at \$91.4 million over 30 months or \$36.6 million per year (NPS–2022–004–0174).

One museum provided a variety of estimates based on current project budgets which ranged from \$200,000 to \$500,000 per project per year for one museum. The comment estimated the burden for the single museum at 19,000 hours per year (\$1.273 million per year per museum assuming an hourly rate of \$67/hour). When applied to all 407 museums that will be required to update inventories under these regulations, that amounts to the highest estimate of \$518.1 million per year for museums alone, although the comment noted that not all museums will require the same number of hours (NPS–2022–004–0125).

One individual detailed the hours involved in one part of a two-part project over 15 months. While a total estimated cost was not provided, elsewhere the comment suggested at minimum \$100 to \$120 an hour should be used in dollar estimates. Using the lower hourly figure and the rough number of hours provided, the estimate for the first phase of the project is \$123,000 over 15 months or \$98,400 per year. When applied to all 407 museums that will be required to update inventories under these regulations, it equals an estimated \$40 million per year for museums. The comment noted that these estimates do not include the hours involved in preparation of the original inventory of human remains and associated funerary objects completed in the early 1990s (NPS–2022–004–0135).

Each of these estimates uses a different method to estimate the costs for repatriation of human remains and associated funerary objects, but we do not feel they accurately estimate the costs of compliance with either the

existing regulations or this regulatory action. We believe that any estimate based on current practice or past grant awards is inherently flawed and does not account for the specific objective of this regulatory action to simplify and improve the systematic processes within specific timeframes. We agree that our estimates do not reflect the actual amount of time some museums and Federal agencies currently spend on compliance with these regulations. We strongly disagree, however, that our estimates do not reflect what is required by these regulations. In the 33 years since the passage of the Act, each museum or Federal agency has approached the requirements of these regulations in different ways, and, as a result, there is a wide variation in how much time and money is spent to comply with these regulations. As one of the goals for this regulatory action is to improve efficiency and consistency in meeting these requirements, this will necessarily mean a difference between the estimated costs and current practices.

b. For Subpart B, is the estimated number of annual discoveries on Federal or Tribal lands reasonable? We used the average number of notices on Federal lands over the last three years, but we have no data on the number of discoveries on Tribal lands to inform this estimate.

Our initial estimate relied on an average of 11 notices of intended disposition submitted by Federal agencies in the three years (FY2019 = 13, FY2020 = 9, and FY2021 = 10). In the most recent year, seven notices were submitted (FY2022). We received input from Federal agencies that the estimate is low, likely because of underreporting. Federal agencies provided higher estimates for the number of annual discoveries and the time per response which are incorporated into the revised Cost-Benefit and Regulatory Flexibility Threshold Analyses for the final regulations. The number of discoveries and excavations on Tribal lands remains unknown.

For example, in estimating the number of responses to a discovery on Federal lands, we relied on input from Federal agencies and increased the estimated number from 11 responses to 60 responses each year. One Federal agency with a large land area reported an average of 20 discoveries per year, leaving most stabilized in place and not excavated or removed, and thus not listed in notices of intended disposition. Another Federal agency with a smaller land area reported an average of 5 discoveries per year. This change to the number of responses for one regulatory

requirement impact others that build off this number. For example, we estimate that the number of Federal agencies conducting consultation is 50% of the discoveries on Federal lands.

Federal agencies also provided estimates on the time per response for each regulatory requirement. For

responding to a discovery, they estimated it spanned from 8 hours to 40 hours. Given that a response is required within 3 days, we feel the maximum amount of time may not exceed 30 hours (one person for 8 hours for 3 days plus one person for 6 hours total). We estimate the time per response ranges

from 10 hours to 30 hours, depending on the size and complexity of the discovery, for a median of 20 hours. As Table 6 below shows, changes to both the number of responses and to the time per response resulted in a significant increase to our estimated costs under Subpart B.

TABLE 6—CHANGES TO ESTIMATED COSTS IN SUBPART B

Estimate	Number of responses	Annual hours	Annual costs
2022 Proposed Regulations * .....	65	465.5	\$29,738
2023 Final Regulations * .....	318	6,599.5	473,568
Change .....	+253	+6,134	+443,830

\* See the Appendix to the two Cost-Benefit and Regulatory Flexibility Threshold Analyses for detailed information on each regulatory requirement and the method for creating this estimate.

c. For Subpart C, is the estimated number of museums and Federal agencies required to update inventory data under the proposed regulations reasonable? We assume fewer inventory records will require less time to update. We assume museums previously prepared and submitted inventories in accordance with the existing regulations and an update to that inventory requires less time than submission of a new inventory. We estimate the time per response will range from less than one hour to 100 hours, depending on the size and complexity of the update, for a median of 50.25 hours.

As discussed elsewhere in this document, we received several comments on our estimated costs in Subpart C. One of these comments noted that a previously prepared inventory did not reduce the necessary time, as previous inventories are generally “woefully inadequate.” Two comments stated that the estimates should not rely on responses from the last three years to estimate costs due to the pandemic. We received consistent feedback that the estimate is low and does not reflect real costs. Some comments provided alternative estimates on the time per response which we incorporated into our estimate or explained why we were unable to incorporate the suggestion.

Despite the concerns that the pandemic has resulted in fewer submissions, the available information does not support this, and in fact, we have had more submissions in the last two years than in any previous year. Our estimate relies on the average number of submissions by museums and Federal agencies over the last four or five years or calculates an estimate based on those submissions (NPS, National NAGPRA Program Annual Reports, <https://www.nps.gov/subjects/nagpra/reports.htm>, accessed 12/1/2023).

Specifically for the number of museums and Federal agencies required to update an inventory, we estimate 407 museums and 122 Federal agencies will be required to update inventories within five years after promulgation of a final rule. The final regulatory action will allow for inventory updates to be combined by geographic location or other defining features. We have revised the estimated number of updated inventories based on comments.

As the size of collections vary greatly, we analyzed previously reported inventory data to estimate the number of updated inventories as both a high estimate (by inventory records) and a low estimate (by geographic location). We calculated a high estimate using the number of inventory records, according to the original inventory submission and previous updates, and for every 10

inventory records, we estimate one updated inventory will be required. We calculated a low estimate using the number of unique geographical States from which the human remains were removed, according to the original inventory submission and previous updates, and for each State represented, we estimated one updated inventory will be required. We calculated a median value for each estimate and divided the total number of updated inventories by five years for an estimated number of annually updated inventories in each estimate.

While we modified our estimate for the number of updated inventories between the baseline conditions and the final regulatory action, we did not change the time required for each response. Federal agencies provided estimates on the time per response that spanned from 50 hours to 218 hours, but some of those estimates included time for preparing a notice which is calculated separately. In response to comments, we increased the estimated time per response to range from 5 hours to 200 hours, depending on the size and complexity of the update, for a median of 102.5 hours. As Table 7 below shows, this resulted in a smaller change to the baseline costs estimate in the number of responses, but much larger changes in the number of hours and costs.

TABLE 7—CHANGES TO ESTIMATED COSTS IN SUBPART C

Estimate	Number of responses	Annual hours	Annual costs
2022 Baseline: Proposed Regulations * .....	1,218	36,750.25	\$2,361,014
2023 Baseline: Final Regulations * .....	1,232	73,475.50	4,916,458
Change .....	+14	+36,725.25	+2,555,444

\* See the Appendix to the two Cost-Benefit and Regulatory Flexibility Threshold Analyses for detailed information on each regulatory requirement and the method for creating this estimate.

In other cases, we relied on other available data to calculate an estimated number of responses. In estimating the responses to a request for repatriation, we relied on the number of notices as the two requirements have a direct connection. We estimate requests for repatriation are 80% of the total number of notices of inventory completion (which precede a request) and 100% of the notice of intended repatriation (which follow a request). Depending on the regulatory framework (baseline conditions under the existing regulations or under the final regulatory action), the same calculation applies but

results in a different number of estimated responses. In the final regulatory action, museums and Federal agencies have specific options for responding to a request and responses should be based on information available in previously prepared summaries, inventories, and notices. Federal agencies provided estimates on the time per response that spanned from 8 hours to 25 hours. One comment requested the timeframe for responding to a request for repatriation be increased to a minimum of one year. We disagree with this suggestion and have not adopted it. Throughout the

final regulatory action, a response to a request for repatriation is required within 90 days of receiving the request, or at maximum, 480 hours for one full time employee (12 weeks × 40 hours per week). We find this maximum estimate to be an extreme circumstance for an action based only on available information and with set options for a response. We estimate the time per response will range from 4 hours to 150 hours, depending on the complexity of the request, for a median of 77 hours. Table 8 shows the change in our estimate from the 2022 Proposed Rule to the final regulations.

TABLE 8—CHANGES TO ESTIMATED COSTS IN SUBPART C

Estimate	Number of responses	Annual hours	Annual costs
2022 Regulatory Action years 1–3: Proposed Regulations *	2,962	46,262.25	\$2,971,955
2023 Regulatory Action years 1–5: Final Regulations *	3,086	172,360.50	11,536,684
Change	+124	+126,098.25	+8,564,729

\* See the Appendix to the two Cost-Benefit and Regulatory Flexibility Threshold Analyses for detailed information on each regulatory requirement and the method for creating this estimate.

d. For Subpart C, many museums and Federal agencies update inventories at their own discretion, going beyond what is required by the Act and the existing regulations, which only requires use of “information possessed by such museum or Federal agency” (25 U.S.C. 3003(a)). Given the potential expense of more extensive studies not required by the Act or the revised regulations, how should the Department account for these costs in this rulemaking? We also request public data about the potential costs of updating inventories under the revised regulations.

We did not receive specific comments on how to account for costs that go beyond what is required by the Act. A few comments stated they did not understand this question as museums and Federal agencies only do the minimum required by the Act and these regulations. As discussed elsewhere in this document, we received several estimates on the costs of updating inventories, but these estimates were, with two exceptions, not based on actual expenses incurred.

The Society for American Archaeology (SAA) estimated annual costs to museums and Federal agencies of \$250 million for repatriation of human remains and funerary objects. This estimate is based on the current museum completion rate of 21%, the amount of funding awarded through grants (\$50 million since 1994), and a multiplying factor of 10, representing additional funds provided by museums, Federal agencies, and Indian Tribes

outside of grant funds ([https://documents.saa.org/container/docs/default-source/doc-governmentaffairs/final\\_scia\\_testimony\\_02162022.pdf?sfvrsn=63d7c331\\_2](https://documents.saa.org/container/docs/default-source/doc-governmentaffairs/final_scia_testimony_02162022.pdf?sfvrsn=63d7c331_2), accessed 12/1/2023).

One museum estimated annual costs to museums and Federal agencies of more than \$117 million for repatriation of human remains and funerary objects. This estimate is based on the costs incurred by the museum over the past 20 years to repatriate 3,490 items multiplied by the total number of human remains and associated funerary objects currently pending repatriation (Field Museum of Natural History (FMNH) Background062722 available at <https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1024-AE19&meetingId=139323&acronym=1024-DOI/NPS>, accessed 12/1/2023).

One comment from an individual estimated annual costs to museums and Federal agencies of nearly \$20 million for repatriation of human remains and funerary objects. This estimate is based on a detailed analysis of grants awarded to museums since 2011 and the resulting number of notices published by those museums. The estimate then applies an average cost per notice to the number of human remains pending notification under the existing regulations. The shorter timeframe in this estimate (30 months) is based on the proposed regulatory action requiring notice publication within two years and six months after promulgation of final

regulations (<https://www.regulations.gov/comment/NPS-2022-0004-0174>, accessed 12/1/2023). Given the enormous variation in these estimates and past estimates related to these regulations, we have continued to employ the method used in the initial estimate but revised the number of responses and time per response based on comments. We believe we have accounted for all actions that are required under the existing regulations to calculate the baseline conditions and under these final regulations to estimate the future costs. Table 9 shows a summary of other annual estimates for inventories.

TABLE 9—OTHER ANNUAL ESTIMATES FOR INVENTORIES

Estimated costs	Reference
\$524,380	2010 Final Rule (75 FR 12402).
2,971,955	2022 Proposed Rule Analysis (see NPS–2022–0004–0002).
5,300,000	1993 Proposed Rule (58 FR 31124).
6,000,000	1990 H. Rpt. 101–877, at 22.
11,536,684	2023 Final Rule Analysis.
19,400,000	NPS–2022–0004–0174.
25,000,000	NPS–2022–0004–0131.
40,048,800	NPS–2022–0004–0135.
117,000,000	NPS–2022–0004–0136.
250,000,000	SAA (cited above).
518,111,000	NPS–2022–0004–0125.

e. For Subpart C, is the estimated number of museums required to report on Federal holdings or collections reasonable? We estimate the number of museums required to submit statements is 5% of all museums that previously

submitted information under the existing regulations.

We only received specific input from Federal agencies on this estimate. A few stated the estimate was too low or unreasonable but did not offer any alternative estimates or related data. One Federal agency stated it has more than 150 non-federal repositories. Another Federal agency stated only 10% of the 170 identified non-federal repositories have submitted inventory and summary information. Another Federal agency stated only a small percentage of the 175 non-federal repositories have been reviewed and the estimate doesn't anticipate identification of new non-federal repositories. One Federal agency stated it knows of only 13 non-federal repositories with unresolved collections

and that the 5% estimate seemed reasonable. Another Federal agency stated it believes there are 24 non-federal repositories holding its collections.

We estimate the number of museums (n=140) required to submit statements is 10% of all museums (n=1,388, rounded up) that previously submitted information under the existing regulations. A statement is a simple written document describing a holding or collection. These statements are required no later than one year after the effective date of the final rule, but we have annualized the cost over five years for purposes of this estimate so as not to compound the costs in calculating the total costs over five years.

We estimated the time per response for both museums to generate the statement and Federal agencies to

respond to statements. We note that some comments estimated museums would need multiple staff members working full-time for the entire year to complete these statements. We disagree with this estimate and have not adopted it. We estimate the time per response for museums will range from 10 hours to 500 hours, depending on the size and complexity of a collection, for a median of 255 hours. Federal agencies provided estimates on the time per response that spanned from 8 hours to 30 hours. We estimate the time per response will range from 8 hours to 30 hours, depending on the size and complexity of a collection, for a median of 19 hours. Table 10 shows the estimated costs for statements of Federal agency holdings or collections to both museums and Federal agencies.

TABLE 10—CHANGES TO ESTIMATED COSTS FOR STATEMENTS OF FEDERAL AGENCY HOLDINGS OR COLLECTIONS

Estimate	Number of responses	Annual hours	Annual costs
2022 Regulatory Action: Proposed Regulations * .....	140	735	\$47,232
Museums .....	70	367.5	23,616
Federal agencies .....	70	367.5	23,616
2023 Regulatory Action: Final Regulations * .....	280	38,360	5,570,504
Museums .....	140	35,700	2,392,257
Federal agencies .....	140	2,660	178,247
Change .....	+140	+37,625	+5,523,272

\* See the Appendix to the two Cost-Benefit and Regulatory Flexibility Threshold Analyses for detailed information on each regulatory requirement and the method for creating this estimate.

f. Is the estimated number of competing claims for disposition or competing requests for repatriation reasonable?

We received specific input from Federal agencies on this estimate, and most stated it seemed reasonable or that they did not have experience or data related to it. One Federal agency believed the estimate is too low given the changes to the regulations, especially as it relates to Tribal land of an NHO where they anticipate an increase in competing claims or requests to occur. One Federal agency estimated that 20% of discoveries result in competing claims on Federal lands. On Federal lands, Federal agencies provided estimates on the time per response that spanned from 25 hours to 40 hours. Federal agencies provided estimates on the time per response that spanned from 25 hours to 80 hours. One comment from a museum stated evaluating competing requests and resolving stays of repatriation required significantly more time, estimating between 100 and 1,000 hours, especially when considering the involvement of legal departments, executives, and board members in those tasks.

When a competing claim or request is received, the timeline for a disposition or repatriation statement changes, but we believe it is important to require museums and Federal agencies to decide on competing claims or requests within a set timeframe (six months or 180 calendar days after informing the claimants or requestors of the competing claims or requests). Under Subpart C, one option for a museum or Federal agency is to determine a most appropriate requestor cannot be determined. This option would allow parties to continue consultation but ensure all parties have been informed of the museum or Federal agency's decision in a timely manner or to seek assistance of a court of competent jurisdiction to resolve a conflict under these regulations. The information needed to evaluate competing requests is submitted by requestors and evaluated against the criteria in the regulations. Where competing requests are between Indian Tribes or NHOs with cultural affiliation, the priority order under § 10.3(e), as revised, relies on how the cultural affiliation determination was made (clearly identified or reasonably identified). We

intended for these final regulations to provide adequate guidance and procedures for museums and Federal agencies to follow in determining the most appropriate requestor, and as a result, lessen the burden and expense of those determinations. We estimate the time per response ranges from 25 hours to 100 hours, depending on the size and complexity of the competing claims, for a median of 62.5 hours.

Under Subpart B, the information needed to evaluate competing claims is submitted by claimants and evaluated against the priority of custody. However, Federal agencies must identify the most appropriate claimant or claimants. While this is not a new requirement, we do expect, as one Federal agency stated, the added procedures in these final regulations for resolving competing claims on Federal lands will likely increase the time per response from baseline conditions. Given that competing claims follow notification and consultation, we estimate the time per response ranges 40 hours to 500 hours for a median of 270 hours.

g. Using data on implementation since 2012, we estimate it will take an

additional 26 years to complete consultation and notification for all 117,000 Native American human remains currently pending in the existing regulatory framework. Is this 26-year time horizon reasonable? Will the proposed regulatory requirements result in a change in consultation activities per year, and if so, how should the Department account for the change in costs to Indian Tribes or NHOs for engaging in consultation?

We did not receive specific feedback on the estimate under the existing regulatory framework. We did receive many comments on the timelines under Subpart C in general (see Comment 92 and 93). Most comments felt the two-year timeline in the proposed regulations was too short, unrealistic, unworkable, and unachievable. Two comments predicted it would take 20 or 50 years to complete consultation and

notification for all Native American human remains. Most comments on the timelines expressed concerns about insufficient staffing and funding to complete the work of repatriation.

As discussed elsewhere in this document, we have changed the deadline for museums and Federal agencies to update inventories of human remains and associated funerary objects to five years after the effective date of these final regulations. We have also revised our estimate for the timeline under the existing regulations. In Fiscal Year 2022, the largest number of human remains in the history of the Act and these regulations completed the regulatory process. As of August 2023, we expect Fiscal Year 2023 to surpass the previous year. We therefore adjusted our estimate in the Cost-Benefit and Regulatory Flexibility Threshold Analyses for these final regulations.

Using data on implementation since 2012, the Department estimates it will take an additional 20 years to complete consultation and notification for all approximately 108,000 Native American human remains currently pending in the existing regulatory framework. Over the last 11 years, the average number of human remains completing the existing regulatory process for repatriation per year is 5,460 individual sets of Native American human remains (NPS, National NAGPRA Program Annual Reports, <https://www.nps.gov/subjects/nagpra/reports.htm>, accessed 12/1/2023). As Table 11 shows, the number of human remains completing the existing regulatory process varies from year to year, depending on the decision-making of museums and Federal agencies on repatriation.

TABLE 11—NATIVE AMERICAN HUMAN REMAINS

Fiscal year	Total published in notices	Annual change
2012	43,525	3,220
2013	45,975	2,450
2014	48,588	2,613
2015	51,558	2,970
2016	56,336	4,778
2017	63,885	7,549
2018	67,077	3,192
2019	79,093	12,016
2020	83,076	3,983
2021	84,677	1,601
2022	100,370	15,693

Regarding the costs for lineal descendants, Indian Tribes, and NHOs to participate in consultation, we have added an estimate to the Cost-Benefit and Regulatory Flexibility Threshold Analyses for these final regulations. In the existing regulations, consultation is required throughout the regulatory processes in both Subpart B and C for any decision-making action by a Federal agency or museum. However, the existing regulations do not require any Indian Tribe or NHO to participate in such consultation. Choosing to participate in consultation is an act of sovereignty and these regulations, either existing or revised, do not require any Indian Tribe or NHO to consult. Our initial estimates did not include the costs to lineal descendants, Indian Tribes, or NHOs to participate in consultation as the variables of this estimate are too great and dependent on many factors. For example, one Tribal official stated publicly that under the existing regulations, consultation can require one email exchange or, in the most extreme case, eight years of regular

consultation meetings. As discussed elsewhere in this section, a comment from an Indian Tribe stated consultations can require mere hours while some require years of sustained work. In addition to the varying time required to consult with museums and Federal agencies, the costs for Indian Tribes and NHOs to consult internally with religious leaders or to develop their own procedure and protocol for conducting consultation cannot and should not be estimated by the Federal government. In preparing our initial and revised estimate, we reviewed other regulations for any estimate on the costs to Indian Tribes or NHOs to engage in consultation but were unable to find a relevant example. Our estimate is based on a 1:1 relationship between the number of participants and the number of museums and Federal agencies conducting consultation. We know this is an underestimate and that consultation requires participation by more than one lineal descendant, Indian Tribe, or NHO. However, we have no way to estimate this number. While we

have provided an estimate on the costs to participate in consultation, we maintain we do not have sufficient information to adequately quantify these costs to lineal descendants, Indian Tribes, or NHOs.

*C. Use of Received Feedback*

The Department used all received feedback to inform this final rule and made changes to this final rule based on received feedback.

**IV. Compliance With Other Laws, Executive Orders and Department Policy**

*A. Regulatory Planning and Review (Executive Orders 12866 and 13563 and 14094)*

Executive Order 12866, as amended by Executive Order 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in OMB will review all significant regulatory actions. OIRA has determined that this rule is a significant regulatory action.

Executive Order 14094 amends Executive Order 12866 and reaffirms the

principles of Executive Order 12866 and Executive Order 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and be consistent with Executive Order 12866, Executive Order 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

*B. Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Executive Order 13985)*

This final rule is expected to advance racial equity in agency actions and programs, in accordance with the Executive Order 13985.

*C. Regulatory Flexibility Act*

This rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This certification is based on the cost-benefit and regulatory flexibility analyses found in the report entitled “Benefit-Cost and Regulatory Flexibility

Threshold Analyses: Native American Graves Protection and Repatriation Act Regulations” that may be viewed online at <https://www.regulations.gov>.

The analyses conclude that this final regulatory action will likely generate benefits for museums, Federal agencies, Indian Tribes, and NHOs that are greater than the temporary increase in reporting costs for museums. For all entities, the NPS anticipates a temporary increase of \$6.948 million in annual costs for the first five years under the final regulatory action compared to baseline conditions. Starting year six, NPS anticipates a \$2.978 million benefit in reduced annual costs compared to baseline conditions. This final regulatory action would produce a net benefit when reduced annual costs exceed the total increase in costs from the first five years. We estimate that this would occur after 17 years (for undiscounted costs and benefits), 21 years (for 3% discounting), or 47 years (for 7% discounting). Across the horizon of 50 years, the net savings in costs of the final regulatory action totals \$99.3 million (for undiscounted costs and benefits), \$31.2 million (for 3% discounting), or \$0.4 million (for 7% discounting). Therefore, the results of this cost-benefit analysis indicate that positive net benefits will be generated by implementing the final regulatory action. Given that, NPS concludes that the benefits associated with the final regulatory action justify the associated costs. Further, this final regulatory action is not expected to have an annual economic effect of \$100 million.

Most of the state, local, and private museums required to report under NAGPRA are large not-for-profit enterprises, part of a university or college, or state or local government entities. The Small Business Administration size standard for museums is \$34 million in average annual receipts (see <https://www.sba.gov/document/support-table-size-standards>, accessed 12/1/2023). However, using available information, NPS analyzed the 1,388 museums reporting under NAGPRA and

determined that 419 are classified as state entities, 382 as local government entities, and 587 as private museums. Of the private museums, 141 are classified as universities or colleges, 18 as large urban museums, 42 as large historical societies, 247 as not-for profit museums or organizations that are large or dominant in the field, and the remaining 139 entities would be considered small museums, historical societies, or nature parks. We received 1 comment on the proposed rule from a small entity which was generally supportive of the changes.

Based on this analysis, we estimate that the average annual cost per small entity is \$2,191 under baseline conditions, \$5,844 under the final action in years one through five, and \$916 beginning in year six. For each small entity, this is an increase in years one through five of \$3,653 per year and a decrease beginning in year six of \$1,275 per year compared to baseline conditions. The impact on these small entities aligns with their normal duties of collections management. In an effort to reduce respondent burden, we provide templates and technical assistance to direct inquiries by phone and email. We assist many small entities directly with drafting and completing the notice requirements, which generally fall outside the scope of normal collections management duties. The increase in costs associated with the new requirements is temporary and will not exist after the small entities complete the required inventory updates which is expected to happen within five years of implementation.

We assume the majority of small entities impacted by this rule also have a small number of employees. According to the available data summarized in Table 12 below, smaller firms also have smaller payroll costs. Even in the most extreme scenario (establishments with less than 5 employees) the annual costs of compliance during the first five years of the final regulatory action would be no more than 10% the average entities payroll costs.

TABLE 12—MUSEUMS NAICS 712110: EMPLOYMENT SIZES AND PAYROLL \*

Employment size	Number of establishments	Annual payroll (\$1,000)**	Mean payroll per establishment (\$1,000)
All establishments .....	5,297	\$3,346,074	\$632
Less than 5 employees .....	3,188	194,629	61
5 to 9 employees .....	910	197,668	217
10 to 19 employees .....	551	294,715	535
20 to 49 employees .....	372	507,049	1,363
50 to 99 employees .....	141	468,509	3,323
100 to 249 employees .....	102	772,161	7,570

TABLE 12—MUSEUMS NAICS 712110: EMPLOYMENT SIZES AND PAYROLL \*—Continued

Employment size	Number of establishments	Annual payroll (\$1,000)**	Mean payroll per establishment (\$1,000)
250 to 499 employees .....	27	506,069	18,743
500 to 999 employees .....	5	257,054	51,411

\* 2021 Economic Census Business Survey, <https://data.census.gov/table/CBP2021.CB2100CBP?q=712110:%20Museums>, accessed 12/1/2023.

\*\* Sales data are not available by employment size.

The U.S. Census Bureau has a Quarterly Services Survey that reports on revenues for NAICS 712 “Museums, historical sites, and similar institutions.” For 2022, total revenue (Q1–Q4) was \$21,468 million. Dividing this by 7,062 (the total number of employer firms in the 3-digit NAICS code 712), the mean annual revenue per firm is \$3 million. While we recognize there may be a wide range of revenues at the individual firm level, this data suggest that for the average firm in this category, compliance costs will be small when compared to annual revenue. We do not have data that would allow a more rigorous analysis.

*D. Congressional Review Act (CRA)*

This rule does not meet the criteria set forth in 5 U.S.C. 804(2), the CRA. This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more;
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

*E. Unfunded Mandates Reform Act*

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or Tribal governments, or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

*F. Takings (Executive Order 12630)*

This rule does not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required.

*G. Federalism (Executive Order 13132)*

Under the criteria in Section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism summary impact statement is not required.

*H. Civil Justice Reform (Executive Order 12988)*

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

- (a) Meets the criteria of Section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of Section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

*I. Consultation With Indian Tribes (Executive Order 13175 and Department Policy)*

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department’s consultation policy and under the criteria in Executive Order 13175 and have identified direct Tribal implications. Accordingly, we have developed this final rule after consulting with federally recognized Indian Tribes. In addition, we developed this final rule in consultation with the Native American Graves Protection and Repatriation Review Committee, which includes members nominated by Indian Tribes.

From March to July of 2011, the Department consulted with Indian Tribes and the Review Committee, as well as others, on full revisions to the regulations implementing the Act. In April 2012 (77 FR 12378), the Department published a proposed rule to revise the regulations for accuracy and consistency based on some of those comments. Additional comments on

that proposed rule requested changes that went beyond the scope of accuracy and consistency.

Since 2012, the Department has heard repeatedly from Indian Tribes, NHOs, museums, and Federal agencies on the implementation of the Act through the regulations. From 2012 to 2019 at 21 meetings of the Review Committee, public commenters have highlighted concerns with the regulations or challenges in implementing its procedures. The Review Committee has heard frequently that the regulations themselves pose barriers to successful and expedient repatriation.

As a result of previous consultation, public comment, and input from the Review Committee, the Department developed a draft text of regulatory revisions and on July 8, 2021, invited Indian Tribes to consult on the draft text. Along with the draft text, the Department provided a summary of the 2011 consultation with Indian Tribes and how the draft text was responsive to that input. The Department hosted virtual consultation sessions with Indian Tribes on August 9, 13, and 16, 2021. In addition, the Department accepted written input until September 30, 2021. In total, we received 71 individual comment letters, which when combined with oral comments from consultation sessions, yielded over 700 specific comments on sections of the draft text. The Department reviewed each comment provided during consultation and in writing and, wherever possible, adjusted the proposed regulations to address them. In a separate document available in the docket for the proposed rule, the Department provided a summary of each comment and specific detailed responses.

During the comment period on the proposed rule, the Department scheduled Review Committee meetings, Tribal consultation sessions, Native Hawaiian consultation sessions, and public listening sessions. Review Committee meetings were held virtually on January 5 and 10, 2023, from 2 p.m. to 6 p.m. ET. Tribal consultation sessions were held virtually on

December 15, 2022, from 3 p.m. to 5 p.m. EST, and December 19, 2022, from 1 p.m. to 4 p.m. EST, and in person on January 12, 2023, from 10 a.m. to 1 p.m. MST in Phoenix, Arizona. Native Hawaiian consultation sessions were held virtually on January 9, 2023, from 9 a.m. to 11 a.m. HST and on January 10, 2023, from 6 p.m. to 8 p.m. HST.

At all sessions, the Department provided a short overview of the proposed regulation, highlighted the major changes, and provided an opportunity for questions. The Department provided additional resources related to the proposed regulations on the National NAGPRA Program website. Review Committee meetings, Tribal Consultation sessions, and Native Hawaiian Consultation sessions were recorded and transcribed to ensure a record of all comments were available to the Department in preparing the final rule. All of the oral comments received during the meetings and consultation sessions were repeated in the written comments submitted by the Review Committee and Indian Tribes and are summarized in this document.

*J. Paperwork Reduction Act (PRA) (44 U.S.C. 3501 et seq.)*

1. Overview

The Paperwork Reduction Act (PRA) provides that an agency may not conduct or sponsor, and a person is not required to respond to, a “collection of information,” unless it displays a currently valid OMB control number. Collections of information include any request or requirement that persons obtain, maintain, retain, or report

information to an agency, or disclose information to a third party or to the public (44 U.S.C. 3502(3) and 5 CFR 1320.3(c)). These final regulations contain existing and new information collection requirements that are subject to review by OMB under the PRA. OMB previously reviewed and approved information collection related to 43 CFR part 10 and assigned the following OMB control number 1024–0144 (expires 4/30/2025).

The information collection activities in these final regulations are described below along with estimates of the annual burdens. These activities, along with annual burden estimates, do not include activities that are considered usual and customary industry practices. Included in the burden estimates are the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each component of the proposed information collection requirements.

The Department of the Interior requests comment on any aspect of this information collection, including:

- 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;
- b. The accuracy of the estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;
- c. Ways to enhance the quality, utility, and clarity of the information to be collected; and

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.

2. Summary of Information Collection Requirements

*Title of Collection:* Native American Graves Protection and Repatriation Regulations.

*OMB Control Number:* 1024–0144.

*Form Number:* None.

*Type of Review:* Revision of a currently approved collection.

*Respondents/Affected Public:* Any person, any affected party, lineal descendants, Indian Tribes, Native Hawaiian organizations, and State and local governments, universities, and museums, that receive Federal funds and have possession or control of Native American human remains and cultural items.

*Respondent’s Obligation:* Mandatory, voluntary, and required to obtain or retain a benefit.

*Frequency of Collection:* On occasion.

*Total Estimated Number of Annual Responses:* 3,008.

*Estimated Completion Time per Response:* Varies from 1 hour to 270 hours depending on respondent and/or activity.

*Total Estimated Number of Annual Burden Hours:* 161,195.

*Total Estimated Annual Non Hour Burden Cost:* None.

Subpart	Information collections	Respondents
Subpart A—General .....	0	None.
Subpart B—Protection of Human Remains or Cultural Items on Federal or Tribal Lands .....	1	Any person
	6	Indian Tribes or NHOs.
Subpart C—Repatriation of Human Remains or Cultural Items by Museums or Federal Agencies ...	1	Any person.
	2	Lineal descendants.
	2	Indian Tribes/NHOs.
	14	Museums.
Subpart D—Review Committee .....	1	Any affected party.

Subpart A—General does not contain any information collection requirements subject to the PRA. References to written documents in this Subpart refer to the specific information collection requirements in the three subparts below.

Subpart B—Protection of Human Remains or Cultural Items on Federal or Tribal Lands contains seven information collection requirements subject to the PRA. On Federal or Tribal lands, any person who knows or has reason to

know of the discovery of human remains or cultural items must provide specified information to third parties. On Federal lands, an Indian Tribe or NHO may participate in consultation or submit a claim for disposition by disclosing specified information to third parties. On Tribal lands, an Indian Tribe or NHO must maintain specified records related to discoveries, excavations, and dispositions.

Subpart C—Repatriation of Human Remains or Cultural Items by Museums

or Federal Agencies contains 19 information collection requirements subject to the PRA. State and local governments, universities, and museums that receive Federal funds and have possession or control of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony must submit information to the Federal government, maintain specified records, and disclose specified information to third parties. Lineal descendants, Indian Tribes, or

NHOs may participate in consultation and submit a request for repatriation by disclosing specified information to third parties. Any person alleging a failure to comply may voluntarily submit

information to the Federal government. Museums may respond to a civil penalty action by submitting information to the Federal government.

Subpart D—Review Committee contains one information collection requirements subject to the PRA. Any affected party may voluntarily submit information to the Federal government.

Information collection requirement	Final regulations
<b>New information collection requirements in Subpart B</b>	
Participate in consultation .....	§ 10.4(b)(2).
Report a discovery on Federal or Tribal lands .....	§ 10.5(a)–(b).
Respond to a discovery .....	§ 10.5(c)(1) and § 10.5(e).
Consent to an excavation .....	§ 10.6(a).
Submit a claim for disposition .....	§ 10.7(c)(3).
Delegate or accept responsibility on Tribal land .....	§ 10.5(c); § 10.6(a); § 10.7(b).
Complete a disposition statement .....	§ 10.7(b).
<b>Currently approved information collections requirements in Subpart C</b>	
New Summary/Inventory .....	§ 10.9(a) and § 10.10(d).
Updated Inventory Data .....	§ 10.10(d).
Notices for publication in the <b>Federal Register</b> .....	§ 10.9(f) and § 10.10(e).
Updated Summary Data .....	Removed.
Notify Tribes and Request Information .....	Removed.
Response to requests for information .....	Removed.
<b>New information collection requirements in Subpart C</b>	
Conduct consultation .....	§ 10.9(c) and § 10.10(c)
Participate in consultation .....	§ 10.9(c) and § 10.10(c).
Submit a request for repatriation .....	§ 10.9(d) and § 10.10(f).
Document physical transfer .....	§ 10.9(g) and § 10.10(h).
File an allegation of failure to comply .....	§ 10.11(a).
Respond to a civil penalty action .....	§ 10.11(e), (h), (i), and (k).
Submit statements describing holdings or collection .....	§ 10.8(c)–(d).
Make a record of consultation .....	§ 10.9(c)(3) and § 10.10(c)(3).
Respond to a request for repatriation .....	§ 10.9(e) and § 10.10(g).
Send a repatriation statement .....	§ 10.9(g) and § 10.10(h).
Evaluate competing requests and resolve stays of repatriation .....	§ 10.9(h)–(i); § 10.10(i)–(j).
Transfer or reinter human remains and associated funerary objects .....	§ 10.10(k).
<b>New information collection requirements in Subpart D</b>	
Request assistance of the Review Committee .....	§ 10.12(c).

3. Information That Is Not an Information Collection Subject to the PRA

Lineal descendants, Indian Tribes, and Native Hawaiian organizations may take certain actions that are not information collections subject to the PRA. Requesting to consult is an acknowledgement that entails no burden other than that necessary to identify the respondent, the date, the respondent’s address, and the nature of the consultation.

Federal agencies and the Department of Hawaiian Home Lands (DHHL) must take certain actions that are not information collections subject to the PRA. The Hawaiian Homes Commission Act, 1920 (HHCA), 42 Stat. 108, is a cooperative federalism statute, a compound of interdependent Federal and State law that establishes a Federal law framework but also provides for

implementation through State law (see 81 FR 29777 and 29787, May 13, 2016, 43 CFR 47 and 48, Land Exchange Procedures and Procedures to Amend the Hawaiian Homes Commission Act, 1920). These written documents are required by employees of the Federal government or DHHL when acting within the scope of their employment.

Indian Tribes, Native Hawaiian organizations, traditional religious leaders, national museum organizations, and national scientific organizations may take certain actions that are not information collections subject to the PRA. These actions are generally solicited through a notice in the **Federal Register**, impact fewer than ten persons, and occur less often than annually.

4. Burden Estimates

The Department has identified 27 information collections in the final

regulations. In total, we estimate that we will receive, annually, 3,008 responses totaling 161,195 annual hour burden. We estimate the annual dollar value is \$10,786,570 (rounded). We estimate the frequency of response for each of the information collections is once per year, but the number of respondents may not be the same as the number of responses, depending on the type of information collected. In our estimate, we have only used the number of responses to simplify our estimate and remain consistent across the types of information collected. For some information collections, the time per response varies widely because of differences in activity, size, and complexity.

## 5. Written Comments or Additional Information

Written comments and suggestions on the information collection requirements should be submitted by the date specified above in **DATES** to <https://www.reginfo.gov/public/do/PRAMain>. Find this information collection by selecting “Currently under Review—Open for Public Comments” or by using the search function. Please provide a copy of your comments to the NPS Information Collection Clearance Officer (ADIR–ICCO), 13461 Sunrise Valley Drive, (MS–242) Reston, VA 20191 (mail); or [phadrea\\_ponds@nps.gov](mailto:phadrea_ponds@nps.gov) (email). Please include OMB Control Number 1024–0144 in the subject line of your comments.

To request additional information about this ICR, contact Melanie O’Brien, Manager, National NAGPRA Program by email at [melanie\\_o'brien@nps.gov](mailto:melanie_o'brien@nps.gov), or by telephone at (202) 354–2204. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. You may also view the ICR at <https://www.reginfo.gov/public/do/PRAMain>.

### K. National Environmental Policy Act (NEPA)

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required because the rule is covered by a categorical exclusion under 43 CFR 46.210(i): “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.” We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under the National Environmental Policy Act.

### L. Effects on the Energy Supply (Executive Order 13211)

This rulemaking is not a significant energy action under the definition in Executive Order 13211; the rule is not likely to have a significant adverse effect

on the supply, distribution, or use of energy, and the rule has not otherwise been designated by the Administrator of OIRA as a significant energy action. A Statement of Energy Effects in not required.

### Drafting Information

This final rule was prepared by staff of the National NAGPRA Program, National Park Service; Office of Regulations and Special Park Uses, National Park Service; Office of Native Hawaiian Relations; Office of Regulatory Affairs & Collaborative Action, Office of the Assistant Secretary—Indian Affairs; Office of the Assistant Secretary for Fish and Wildlife and Parks; and Office of the Solicitor, Division of Parks and Wildlife and Division of Indian Affairs, Department of the Interior. This final rule was prepared in consultation with the Native American Graves Protection and Repatriation Review Committee under the Act (25 U.S.C. 3006(c)(7)).

### List of Subjects in 43 CFR Part 10

Administrative practice and procedure, Alaska, Cemeteries, Citizenship and naturalization, Colleges and universities, Hawaiian Natives, Historic preservation, Human remains, Indians, Indians—claims, Indians—law, Indians—lands, Museums, Penalties, Public lands, Reporting and recordkeeping requirements, Treaties.

■ In consideration of the foregoing, the Department of the Interior revises 43 CFR part 10 to read as follows:

## PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION REGULATIONS

Sec.

### Subpart A—General

- 10.1 Introduction.
- 10.2 Definitions for this part.
- 10.3 Determining cultural affiliation.

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

- 10.4 General.
- 10.5 Discovery.
- 10.6 Excavation.
- 10.7 Disposition.

### Subpart C—Repatriation of Human Remains or Cultural Items By Museums or Federal Agencies

- 10.8 General.
- 10.9 Repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony.
- 10.10 Repatriation of human remains or associated funerary objects.
- 10.11 Civil penalties.

### Subpart D—Review Committee

- 10.12 Review Committee.

**Authority:** 25 U.S.C. 3001 *et seq.* and 25 U.S.C. 9.

## Subpart A—General

### § 10.1 Introduction.

(a) *Purpose.* The Native American Graves Protection and Repatriation Act (Act) of November 16, 1990, recognizes the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations in Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.

(1) The Act and these regulations provide systematic processes to:

(i) Protect Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony; and

(ii) Restore Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony to lineal descendants, Indian Tribes, and Native Hawaiian organizations.

(2) The Act and these regulations require consultation with lineal descendants, Indian Tribes, and Native Hawaiian organizations.

(3) Consistent with the Act, these regulations require deference to the Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations.

(b) *Applicability.* These regulations pertain to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony.

(1) These regulations require certain actions by:

(i) Any institution or State or local government agency (including any institution of higher learning) within the United States that receives Federal funds and has possession or control of a holding or collection;

(ii) Any Federal agency that has possession or control of a holding or collection or that has responsibilities on Federal or Tribal lands;

(iii) Indian Tribes on Tribal lands in Alaska and the continental United States; and

(iv) The State of Hawai‘i Department of Hawaiian Home Lands (DHHL) on Tribal lands in Hawai‘i.

(2) Lineal descendants, Indian Tribes, and Native Hawaiian organization may, but are not required to, consult, submit claims for disposition, or submit requests for repatriation.

(c) *Accountability.* These regulations are applicable to and binding on all museums, Federal agencies, and DHHL for implementing the systematic processes for disposition and

repatriation of human remains or cultural items under this part.

(d) *Duty of care.* These regulations require a museum, Federal agency, or DHHL to care for, safeguard, and preserve any human remains or cultural items in its custody or in its possession or control. A museum, Federal agency, or DHHL must:

(1) Consult with lineal descendants, Indian Tribes, or Native Hawaiian organizations on the appropriate storage, treatment, or handling of human remains or cultural items;

(2) Make a reasonable and good-faith effort to incorporate and accommodate the Native American traditional knowledge of lineal descendants, Indian Tribes, or Native Hawaiian organizations in the storage, treatment, or handling of human remains or cultural items; and

(3) Obtain free, prior, and informed consent from lineal descendants, Indian Tribes, or Native Hawaiian organizations prior to allowing any exhibition of, access to, or research on human remains or cultural items.

Research includes, but is not limited to, any study, analysis, examination, or other means of acquiring or preserving information about human remains or cultural items. Research of any kind on human remains or cultural items is not required by the Act or these regulations.

(e) *Delivery of written documents.*

These regulations require written documents to be sent, such as requests for repatriation, claims for disposition, invitations to consult, or notices for publication.

(1) Written documents must be sent by one of the following:

- (i) Email, with proof of receipt,
- (ii) Personal delivery with proof of delivery date,
- (iii) Private delivery service with proof of date sent, or
- (iv) Certified mail.

(2) Communication to the Manager, National NAGPRA Program, must be sent electronically to [nagpra\\_info@nps.gov](mailto:nagpra_info@nps.gov). If electronic submission is not possible, physical delivery may be sent to 1849 C Street NW, Mail Stop 7360, Washington, DC 20240. If either of these addresses change, a notice with the new address must be published in the **Federal Register** no later than 7 days after the change.

(f) *Deadlines.* These regulations require certain actions be taken by a specific date. Unless stated otherwise in these regulations:

(1) Days mean calendar days. If a deadline falls on a Saturday, Sunday, or Federal holiday, the action is deemed timely if taken no later than the next calendar day that is not a Saturday,

Sunday, or Federal holiday. For purposes of this part, Federal holidays include any days during which the Federal government is closed because of a Federal holiday, lapse in appropriations, or other reasons.

(2) Written documents are deemed timely based on the date sent, not the date received.

(3) Parties sending or receiving written documents under these regulations must document the date sent or date received, as appropriate, when these regulations require those parties to act based on the date sent or date received.

(g) *Failure to make a claim or a request.* Failure to make a claim for disposition or a request for repatriation before disposition, repatriation, transfer, or reinterment of human remains or cultural items under this part is deemed an irrevocable waiver of any right to make a claim or a request for the human remains or cultural items once disposition, repatriation, transfer, or reinterment of the human remains or cultural items has occurred.

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

(i) *Final agency action.* For purposes of the Administrative Procedure Act (5 U.S.C. 704), any of the following actions by a Federal agency constitutes a final agency action under this part:

- (1) A final determination making the Act or this part inapplicable;
- (2) A final denial of a claim for disposition or a request for repatriation; and
- (3) A final disposition or repatriation determination.

(j) *Information collection.* The information collection requirements contained in this part have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned control number 1024–0144. A Federal agency may not conduct or sponsor, and you are not required to respond to, the collection of information under this part unless the Federal agency provides a currently valid OMB control number.

(k) *Severability.* If a court holds any provisions of the regulations in this part or their applicability to any person or circumstances invalid, the remainder of the regulations and their applicability to other people or circumstances are intended to continue to operate to the fullest possible extent.

#### § 10.2 Definitions for this part.

*Act* means the Native American Graves Protection and Repatriation Act.

*Ahupua'a* (singular and plural) means a traditional land division in Hawai'i usually extending from the uplands to the sea.

*Appropriate official* means any representative authorized by a delegation of authority within an Indian Tribe, Native Hawaiian organization, Federal agency, or Department of Hawaiian Home Lands (DHHL) that has responsibility for human remains or cultural items on Federal or Tribal lands.

*ARPA* means the Archaeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa–mm) and the relevant Federal agency regulations implementing that statute.

*ARPA Indian lands* means lands of Indian Tribes, or individual Indians, which are either held in trust by the United States Government or subject to a restriction against alienation imposed by the United States Government, except for any subsurface interests in lands not owned or controlled by an Indian Tribe or an individual Indian.

*ARPA Public lands* means lands owned and administered by the United States Government as part of:

- (1) The national park system;
- (2) The national wildlife refuge system;
- (3) The national forest system; and
- (4) All other lands the fee title to which is held by the United States Government, other than lands on the Outer Continental Shelf and lands which are under the jurisdiction of the Smithsonian Institution.

*Assistant Secretary* means the official of the Department of the Interior designated by the Secretary of the Interior as responsible for exercising the Secretary of the Interior's authority under the Act.

*Consultation or consult* means the exchange of information, open discussion, and joint deliberations made between all parties in good-faith and in order to:

- (1) Seek, discuss, and consider the views of all parties;
- (2) Strive for consensus, agreement, or mutually acceptable alternatives; and
- (3) Enable meaningful consideration of the Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations.

*Cultural affiliation* means there is a reasonable connection between human remains or cultural items and an Indian Tribe or Native Hawaiian organization based on a relationship of shared group identity. Cultural affiliation may be identified clearly by the information available or reasonably by the geographical location or acquisition

history of the human remains or cultural items.

*Cultural items* means a funerary object, sacred object, or object of cultural patrimony according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization.

*Custody* 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 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.

*Discovery* means exposing, finding, or removing human remains or cultural items whether intentionally or inadvertently on Federal or Tribal lands without a written authorization for an excavation under § 10.6 of this part.

*Disposition* means an appropriate official recognizes a lineal descendant, Indian Tribe, or Native Hawaiian organization has ownership or control of human remains or cultural items removed from Federal or Tribal lands.

*Excavation* means intentionally exposing, finding, or removing human remains or cultural items on Federal or Tribal lands with a written authorization under § 10.6 of this part.

*Federal agency* means any department, agency, or instrumentality of the United States Government. This term does not include the Smithsonian Institution.

*Federal lands* means any lands other than Tribal lands that are controlled or owned by the United States Government. For purposes of this definition, control refers to lands not owned by the United States Government, but in which the United States Government has a sufficient legal interest to permit it to apply these regulations without abrogating a person's existing legal rights. Whether the United States Government has a sufficient legal interest to control lands it does not own is a legal determination that a Federal agency must make on a case-by-case basis. Federal lands include:

(1) Any lands selected by, but not yet conveyed to, an Alaska Native Corporation organized under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*);

(2) Any lands other than Tribal lands that are held by the United States Government in trust for an individual Indian or lands owned by an individual Indian and subject to a restriction on

alienation by the United States Government; and

(3) Any lands subject to a statutory restriction, lease, easement, agreement, or similar arrangement containing terms that grant to the United States Government indicia of control over those lands.

*Funerary object* means any object reasonably believed to have been placed intentionally with or near human remains. A funerary object is any object connected, either at the time of death or later, to a death rite or ceremony of a Native American culture according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization. This term does not include any object returned or distributed to living persons according to traditional custom after a death rite or ceremony. Funerary objects are either associated funerary objects or unassociated funerary objects.

(1) *Associated funerary object* means any funerary object related to human remains that were removed and the location of the human remains is known. Any object made exclusively for burial purposes or to contain human remains is always an associated funerary object regardless of the physical location or existence of any related human remains.

(2) *Unassociated funerary object* means any funerary object that is not an associated funerary object and is identified by a preponderance of the evidence as one or more of the following:

(i) Related to human remains but the human remains were not removed, or the location of the human remains is unknown,

(ii) Related to specific individuals or families,

(iii) Removed from a specific burial site of an individual or individuals with cultural affiliation to an Indian Tribe or Native Hawaiian organization, or

(iv) Removed from a specific area where a burial site of an individual or individuals with cultural affiliation to an Indian Tribe or Native Hawaiian organization is known to have existed, but the burial site is no longer extant.

*Holding or collection* means an accumulation of one or more objects, items, or human remains for any temporary or permanent purpose, including:

(1) Academic interest;

(2) Accession;

(3) Catalog;

(4) Comparison;

(5) Conservation;

(6) Education;

(7) Examination;

(8) Exhibition;

(9) Forensic purposes;

(10) Interpretation;

(11) Preservation;

(12) Public benefit;

(13) Research;

(14) Scientific interest; or

(15) Study.

*Human remains* means any physical part of the body of a Native American individual. This term does not include human remains to which a museum or Federal agency can prove it has a right of possession.

(1) Human remains reasonably believed to be comingled with other materials (such as soil or faunal remains) may be treated as human remains.

(2) Human remains incorporated into a funerary object, sacred object, or object of cultural patrimony are considered part of the cultural items rather than human remains.

(3) 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.

*Indian Tribe* means 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.*)), recognized as eligible for the special programs and services provided by the United States Government to Indians because of their status as Indians by its inclusion on the list of recognized Indian Tribes published by the Secretary of the Interior under the Act of November 2, 1994 (25 U.S.C. 5131).

*Inventory* means a simple itemized list of any human remains and associated funerary objects in a holding or collection that incorporates the results of consultation and makes determinations about cultural affiliation.

*Lineal descendant* means:

(1) A living person tracing ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to a known individual whose human remains, funerary objects, or sacred objects are subject to this part; or

(2) A living person tracing ancestry, either by means of traditional Native American kinship systems, or by the common-law system of descent, to all the known individuals represented by comingled human remains (example: the human remains of two individuals have been comingled, and a living person can trace ancestry directly to both of the deceased individuals).

*Manager, National NAGPRA Program*, means the official of the Department of the Interior designated by the Secretary of the Interior as responsible for administration of the Act and this part.

*Museum* means any institution or State or local government agency (including any institution of higher learning) that has possession or control of human remains or cultural items and receives Federal funds. The term does not include the Smithsonian Institution.

*Native American* means of, or relating to, a Tribe, people, or culture that is indigenous to the United States. To be considered Native American under this part, human remains or cultural items must bear some relationship to a Tribe, people, or culture indigenous to the United States.

(1) A Tribe is an Indian Tribe.

(2) A people comprise the entire body of persons who constitute a community, Tribe, nation, or other group by virtue of a common culture, history, religion, language, race, ethnicity, or similar feature. The Native Hawaiian Community is a “people.”

(3) A culture comprises the characteristic features of everyday existence shared by people in a place or time.

*Native American traditional knowledge* means knowledge, philosophies, beliefs, traditions, skills, and practices that are developed, embedded, and often safeguarded by or confidential to individual Native Americans, Indian Tribes, or the Native Hawaiian Community. Native American traditional knowledge contextualizes relationships between and among people, the places they inhabit, and the broader world around them, covering a wide variety of information, including, but not limited to, cultural, ecological, linguistic, religious, scientific, societal, spiritual, and technical knowledge. Native American traditional knowledge may be, but is not required to be, developed, sustained, and passed through time, often forming part of a cultural or spiritual identity. Native American traditional knowledge is expert opinion.

*Native Hawaiian organization* means any organization that:

(1) Serves and represents the interests of Native Hawaiians, who are descendants of the indigenous people who, before 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai‘i;

(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) The Office of Hawaiian Affairs established by the constitution of the State of Hawai‘i;

(ii) Native Hawaiian organizations (including ‘ohana) who are registered with the Secretary of the Interior’s Office of Native Hawaiian Relations; and

(iii) Hawaiian Homes Commission Act (HHCA) Beneficiary Associations and Homestead Associations as defined under 43 CFR 47.10.

*Object of cultural patrimony* means an object that has ongoing historical, traditional, or cultural importance central to a Native American group, including any constituent sub-group (such as a band, clan, lineage, ceremonial society, or other subdivision), according to the Native American traditional knowledge of an Indian Tribe or Native Hawaiian organization. An object of cultural patrimony may have been entrusted to a caretaker, along with the authority to confer that responsibility to another caretaker. The object must be reasonably identified as being of such importance central to the group that it:

(1) Cannot or could not be alienated, appropriated, or conveyed by any person, including its caretaker, regardless of whether the person is a member of the group, and

(2) Must have been considered inalienable by the group at the time the object was separated from the group.

*‘Ohana* (singular and plural) means a group of people who are not asserting that they are lineal descendants but comprise a Native Hawaiian organization whose members have a familial or kinship relationship with each other.

*Person* means:

(1) An individual, partnership, corporation, trust, institution, association, or any other private entity; or

(2) Any representative, official, employee, agent, department, or instrumentality of the United States Government or of any Indian Tribe or Native Hawaiian organization, or of any State or subdivision of a State.

*Possession or 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 the physical location of the object or item. 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.

*Receives Federal funds* means an institution or State or local government agency (including an institution of higher learning) directly or indirectly receives Federal financial assistance after November 16, 1990, including any grant; cooperative agreement; loan; contract; use of Federal facilities, property, or services; or other arrangement involving the transfer of anything of value for a public purpose authorized by a law of the United States Government. This term includes Federal financial assistance provided for any purpose that is received by a larger entity of which the institution or agency is a part. For example, if an institution or agency is a part of a State or local government or a private university, and the State or local government or private university receives Federal financial assistance for any purpose, then the institution or agency receives Federal funds for the purpose of these regulations. This term does not include procurement of property or services by and for the direct benefit or use of the United States Government or Federal payments that are compensatory.

*Repatriation* means a museum or Federal agency relinquishes possession or control of human remains or cultural items in a holding or collection to a lineal descendant, Indian Tribe, or Native Hawaiian organization.

*Review Committee* means the advisory committee established under the Act.

*Right of possession* means possession or control obtained with the voluntary consent of a person or group that had authority of alienation. Right of possession is given through the original acquisition of:

(1) An unassociated funerary object, a sacred object, or an object of cultural patrimony from an Indian Tribe or Native Hawaiian organization with the voluntary consent of a person or group with authority to alienate the object; or

(2) Human remains or associated funerary objects which were exhumed, removed, or otherwise obtained with full knowledge and consent of the next of kin or, when no next of kin is ascertainable, the official governing body of the appropriate Indian Tribe or Native Hawaiian organization.

*Sacred object* means a specific ceremonial object needed by a traditional religious leader for present-day adherents to practice traditional Native American religion, according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization. While many items might be imbued with sacredness in a culture, this term is specifically limited to an object needed for the observance or

renewal of a Native American religious ceremony.

*Summary* means a written description of a holding or collection that may contain an unassociated funerary object, sacred object, or object of cultural patrimony.

*Traditional religious leader* means a person needed to practice traditional Native American religion, according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization.

*Tribal lands* means:

(1) All lands that are within the exterior boundaries of any Indian reservation;

(2) All lands that are dependent Indian communities; and

(3) All lands administered by the Department of Hawaiian Home Lands (DHHL) under the Hawaiian Homes Commission Act of 1920 (HHCA, 42 Stat. 108) and Section 4 of the Act to Provide for the Admission of the State of Hawai'i into the Union (73 Stat. 4), including "available lands" and "Hawaiian home lands."

*Tribal lands of an NHO* means Tribal lands in Hawai'i that are under the stewardship of a Native Hawaiian organization through a lease or license issued under HHCA section 204(a)(2), second paragraph, second proviso, or section 207(c)(1)(B).

*Unclaimed human remains or cultural items* means human remains or cultural items removed from Federal or Tribal lands whose disposition has not occurred under this part.

*United States* means the 50 States and the District of Columbia.

### § 10.3 Determining cultural affiliation.

Throughout this part, cultural affiliation ensures that disposition or repatriation of human remains or cultural items is based on a reasonable connection with an Indian Tribe or Native Hawaiian organization. Cultural affiliation must be determined by the information available, including information provided by an Indian Tribe or Native Hawaiian organization. Cultural affiliation does not require exhaustive studies, additional research, or continuity through time. Cultural affiliation is not precluded solely because of reasonable gaps in the information available.

(a) *Step 1: Collect information available.* A museum, Federal agency, or DHHL must collect information it holds about human remains or cultural items, including, but not limited to, records, catalogues, relevant studies, and other pertinent data. Additional information

may be provided by an Indian Tribe or Native Hawaiian organization.

(1) One or more of the following equally relevant types of information about human remains or cultural items may be available:

(i) Anthropological;

(ii) Archaeological;

(iii) Biological;

(iv) Folkloric;

(v) Geographical;

(vi) Historical;

(vii) Kinship;

(viii) Linguistic;

(ix) Oral Traditional; or

(x) Other relevant information or expert opinion, including Native American traditional knowledge.

(2) A lack of any type of information does not preclude a determination of cultural affiliation. One type of information may be used to determine cultural affiliation when no other relevant information is available.

(b) *Step 2: Identify the required criteria.* Using the information available, including information provided by an Indian Tribe or Native Hawaiian organization, a museum, Federal agency, or DHHL must identify the three criteria for cultural affiliation.

(1) Each of the following criteria must be identified in the information available:

(i) One or more earlier groups connected to the human remains or cultural items;

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

(iii) A relationship of shared group identity between the earlier group and the Indian Tribe or Native Hawaiian organization that can be reasonably traced through time.

(2) One type of information may be sufficient to reasonably identify the required criteria when no other relevant information is available. For example, geographical information about human remains or cultural items may identify:

(i) The earlier groups of people connected to a geographical location;

(ii) The Indian Tribe or Native Hawaiian organization connected to a geographical location; and

(iii) A relationship of shared group identity between the two traced through time.

(c) *Step 3: Make a determination of cultural affiliation.* A museum, Federal agency, or DHHL must make a written record of its determination of cultural affiliation that briefly describes the information available under paragraph (a) of this section and the criteria identified under paragraph (b) of this section.

(1) The determination must be one of the following:

(i) Cultural affiliation is identified clearly by the information available,

(ii) Cultural affiliation is identified reasonably by the geographical location or acquisition history, or

(iii) Cultural affiliation cannot be clearly or reasonably identified.

(2) Cultural affiliation of human remains or cultural items may be with more than one Indian Tribe or Native Hawaiian organization. For example, an identifiable earlier group may have a relationship to more than one Indian Tribe or Native Hawaiian organization, or two or more earlier groups may be connected to human remains or cultural items and a relationship may be reasonably traced to two or more Indian Tribes or Native Hawaiian organizations that do not themselves have a shared group identity. In Hawai'i, two or more Native Hawaiian organizations may be part of the same Native Hawaiian Community, but may have distinct beliefs, protocols, and other cultural practices passed down through different familial, cultural, and geographical lineages.

(d) *Joint disposition or repatriation.*

When a museum, Federal agency, or DHHL determines cultural affiliation of human remains or cultural items with two or more Indian Tribes or Native Hawaiian organizations, any Indian Tribe or Native Hawaiian organization with cultural affiliation may submit a claim for disposition or a request for repatriation. Any Indian Tribe or Native Hawaiian organization with cultural affiliation may agree to joint disposition or joint repatriation of the human remains or cultural items. Claims or requests for joint disposition or joint repatriation of human remains or cultural items are considered a single claim or request and not competing claims or requests. A single claim or request may be on behalf of multiple Indian Tribes or Native Hawaiian organizations. Disposition or repatriation statements required under this part must identify all joint claimants or requestors.

(e) *Competing claims or requests.*

When there are competing claims for disposition or competing requests for repatriation of human remains or cultural items, a museum, Federal agency, or DHHL must determine the Indian Tribe or Native Hawaiian organization with the closest cultural affiliation. In support of a competing claim or request, each claimant or requestor may provide information to show by a preponderance of the evidence that it has a stronger relationship of shared group identity to the human remains or cultural items.

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

- (i) The Indian Tribe whose cultural affiliation is clearly identified by the information available.
- (ii) The Indian Tribe whose cultural affiliation is reasonably identified by the geographical location and acquisition history of the human remains or cultural items.
- (iii) The Indian Tribe whose cultural affiliation is reasonably identified by only the geographical location of the human remains or cultural items.
- (iv) The Indian Tribe whose cultural affiliation is reasonably identified by only the acquisition history of the human remains or cultural items.

(2) The Native Hawaiian organization with the closest cultural affiliation, in the following order, is:

- (i) The 'ohana that can trace an unbroken connection of named individuals to one or more of the human remains or cultural items, but not necessarily to all the human remains or cultural items from a specific site.
- (ii) The 'ohana that can trace a relationship to the ahupua'a where the human remains or cultural items were removed and a direct kinship to one or more of the human remains or cultural items, but not necessarily an unbroken connection of named individuals.
- (iii) The Native Hawaiian organization with cultural affiliation only to the

earlier occupants of the ahupua'a where the human remains or cultural items were removed, and not to the earlier occupants of any other ahupua'a.

- (iv) The Native Hawaiian organization with cultural affiliation to either:
  - (A) The earlier occupants of the ahupua'a where the human remains or cultural items were removed, as well as to the earlier occupants of other ahupua'a on the same island, but not to the earlier occupants of all ahupua'a on that island, or to the earlier occupants of any other island of the Hawaiian archipelago; or
  - (B) The earlier occupants of another island who accessed the ahupua'a where the human remains or cultural items were removed for traditional or customary practices and were buried there.
- (v) The Native Hawaiian organization with cultural affiliation to the earlier occupants of all ahupua'a on the island where the human remains or cultural items were removed, but not to the earlier occupants of any other island of the Hawaiian archipelago.
- (vi) The Native Hawaiian organization with cultural affiliation to the earlier occupants of more than one island in the Hawaiian archipelago that has been in continuous existence from a date prior to 1893.
- (vii) Any other Native Hawaiian organization with cultural affiliation.

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

**§ 10.4 General.**

Each Indian Tribe, Native Hawaiian organization, Federal agency, and the State of Hawai'i Department of Hawaiian Home Lands (DHHL) that has responsibility for Federal or Tribal lands must comply with the requirements of this subpart. Any permit, license, lease, right-of-way, or other authorization issued for an activity on Federal or Tribal lands must include a requirement to report any discovery of human remains or cultural items under § 10.5 of this part. Prior to any excavation of human remains or cultural items on Federal or Tribal lands, a written authorization is required under § 10.6 of this part. When human remains or cultural items are removed from Federal or Tribal lands, a disposition statement is required under § 10.7 of this part.

(a) *Appropriate official.* To ensure compliance with the Act, the Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL that has responsibility for Federal or Tribal lands must designate one or more appropriate officials to carry out the requirements of this subpart, as shown in table 1 of this paragraph (a).

TABLE 1 TO § 10.4(a)—APPROPRIATE OFFICIAL

For human remains or cultural items on . . .	the appropriate official is a representative for the . . .
Federal lands in the United States .....	Federal agency with primary management authority.
Tribal lands in Alaska and the continental United States .....	Indian Tribe.
Tribal lands in Hawai'i .....	DHHL.
Tribal lands of an NHO .....	DHHL or a Native Hawaiian organization that has agreed in writing to be responsible for its Tribal lands.

(b) *Plan of action.* When a Federal agency or DHHL has responsibility for a discovery or excavation on Federal or Tribal lands, a plan of action is required. A plan of action is not required when an Indian Tribe or Native Hawaiian organization has responsibility for a discovery or excavation on Tribal lands. The Federal agency or DHHL must prepare a plan of action before any planned activity that is likely to result in a discovery or excavation of human remains or cultural items. The likelihood of a discovery or excavation must be based on previous studies, discoveries, or excavations in the general proximity of the planned activity and in consultation with the lineal descendant, Indian Tribe, or Native Hawaiian organization. If not

part of a planned activity, a plan of action is required after a discovery of human remains or cultural items. After consultation with the lineal descendant, Indian Tribe, or Native Hawaiian organization, the Federal agency or DHHL must approve and sign a plan of action.

(1) *Step 1—Initiate consultation.* Before a planned activity or after a discovery, the Federal agency or DHHL must identify consulting parties and invite the parties to consult.

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

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

(A) A description of the planned activity or discovery and its

geographical location by county and State;

(B) The names of all consulting parties; and

(C) A proposed timeline and method for consultation.

(2) *Step 2—Consult on the plan of action.* The Federal agency or DHHL must respond to any consulting party, regardless of whether the party has received an invitation to consult. Consultation on the plan of action may continue until the Federal agency or DHHL sends a disposition statement to a claimant under § 10.7(c)(5) of this subpart.

(i) In response to a consulting party, the Federal agency or DHHL must ask for the following information, if not already provided:

(A) Preferences on the proposed timeline and method for consultation; and

(B) The name, phone number, email address, or mailing address for any authorized representative, traditional religious leader, and known lineal descendant who may participate in consultation.

(ii) Consultation must address the content of the plan of action under paragraph (b)(3) of this section.

(iii) The Federal agency or DHHL must prepare a record of consultation that describes the concurrence, disagreement, or nonresponse of the consulting parties to the content of the plan of action.

(3) *Step 3—Approve and sign the plan of action.* Before a planned activity or after a discovery, the Federal agency or DHHL must approve and sign a plan of action and must provide a copy to all consulting parties. At a minimum, the written plan of action must include:

(i) A description of the planned activity or discovery and its geographical location by county and State;

(ii) A list of all consulting parties under paragraph (b)(1) of this section;

(iii) A record of consultation under paragraph (b)(2) of this section;

(iv) The preference of consulting parties for:

(A) Stabilizing, securing, and covering human remains or cultural items in situ, or

(B) Protecting, securing, and relocating human remains or cultural items, if removed;

(v) The duty of care under § 10.1(d) for any human remains or cultural items; and

(vi) The timeline and method for:  
(A) Informing all consulting parties of a discovery;

(B) Evaluating the potential need for an excavation; and

(C) Completing disposition, to include publication of a notice of intended disposition, under § 10.7 of this part.

(c) *Comprehensive agreement.* A Federal agency or DHHL may develop a written comprehensive agreement for all land managing activities on Federal or Tribal lands, or portions thereof, under its responsibility. The written comprehensive agreement must:

(1) Be developed in consultation with the lineal descendant, Indian Tribe, or Native Hawaiian organization identified under paragraph (b)(1) of this section;

(2) Include, at minimum, a plan of action under paragraph (b)(3) of this section;

(3) Be consented to by a majority of consulting parties under paragraph (b)(2) of this section. Evidence of consent means the authorized representative's signature on the agreement or by official correspondence to the Federal agency or DHHL; and

(4) Be signed by the Federal agency or DHHL.

(d) *Federal agency coordination with other laws.* To manage compliance with the Act, a Federal agency may coordinate its responsibility under this subpart with its responsibilities under other relevant Federal laws. Compliance with this subpart does not relieve a Federal agency of the responsibility for compliance with the National Historic Preservation Act (54 U.S.C. 306108, commonly known as Section 106) or the Archeological and Historic Preservation Act (54 U.S.C. 312501–312508).

**§ 10.5 Discovery.**

When a discovery of human remains or cultural items on Federal or Tribal lands occurs, any person who knows or has reason to know of the discovery must inform the appropriate official for the Indian Tribe, Native Hawaiian organization, Federal agency, or DHHL and the additional point of contact. The appropriate official must respond to a discovery and, if applicable, certify when an activity may resume.

(a) *Report any discovery.* Any person who knows or has reason to know of a discovery of human remains or cultural items on Federal or Tribal lands must:

(1) Immediately report the discovery in person or by telephone to the appropriate official and any additional point of contact shown in table 1 of this paragraph (a).

TABLE 1 TO § 10.5(a)(1)—REPORT A DISCOVERY ON FEDERAL OR TRIBAL LANDS

Where the discovery is on . . .	the appropriate official is the representative for the . . .	and the additional point of contact is the . . .
Federal lands in the United States* .....	Federal agency with primary management authority.	Any Indian Tribe or Native Hawaiian organization with potential cultural affiliation, if known.
Tribal lands in Alaska and the continental United States.	Indian Tribe .....	Bureau of Indian Affairs or the Federal agency with primary management authority, if any.
Tribal lands in Hawai'i .....	DHHL .....	Any Native Hawaiian organization with potential cultural affiliation, if known.
* Federal lands in Alaska selected but not yet conveyed under the Alaska Native Claims Settlement Act (ANCSA, 43 U.S.C. 1601).	Bureau of Land Management or Federal agency with primary management authority.	Alaska Native Corporation organized under ANCSA.

(2) Make a reasonable effort to secure and protect the human remains or cultural items, including, as appropriate, stabilizing or covering the human remains or cultural items; and

(3) No later than 24 hours after the discovery, send written documentation of the discovery to the appropriate official and the additional point of contact shown in Table 1 to paragraph (a)(1) of this section stating:

(i) The geographical location by county and State;

(ii) The contents of the discovery; and

(iii) The steps taken to secure and protect the human remains or cultural items.

(b) *Cease any nearby activity.* If a discovery is related to an activity (including but not limited to construction, mining, logging, or agriculture), the person responsible for the activity must:

(1) Immediately stop any activity that could threaten the discovery;

(2) Report the discovery according to paragraph (a) of this section; and

(3) In the written documentation of the discovery required under paragraph (a)(3) of this section include:

(i) The related activity and any potential threats to the discovery; and  
(ii) Confirmation that all activity around the discovery has stopped and must not resume until the date in a written certification issued under paragraph (e) of this section.

(c) *Respond to a discovery.* No later than three days after receiving written documentation of a discovery, the appropriate official must respond to a

discovery. The appropriate official must comply with the requirements of this section immediately upon learning of the discovery even if the discovery has not been properly reported.

(1) The appropriate official must make a reasonable effort to:

- (i) Secure and protect the human remains or cultural items;
- (ii) Verify that any activity around the discovery has stopped; and
- (iii) Notify the additional point of contact shown in table 1 to paragraph (a)(1) of this section.

(2) On Tribal lands in Alaska and the continental United States, the Indian Tribe may delegate its responsibility for the discovery to the Bureau of Indian Affairs or the Federal agency with primary management authority. If both the Federal agency and the Indian Tribe consent in writing, the Bureau of Indian Affairs or the Federal agency with primary management authority is responsible for completing the requirements in paragraphs (d) and (e) of this section.

(3) On Tribal lands of an NHO, the Native Hawaiian organization may agree in writing to be responsible for discoveries on its Tribal lands and then must respond to any discovery under this paragraph. If the Native Hawaiian organization has not agreed in writing to be responsible for discoveries, DHHL is responsible for completing the requirements in paragraph (d) and (e) of this section for any discoveries on those Tribal lands of an NHO.

(d) *Approve and sign a plan of action.* When a Federal agency or DHHL has responsibility for a discovery on Federal or Tribal lands, a plan of action is required. A plan of action is not required when an Indian Tribe or Native Hawaiian organization has responsibility for a discovery on Tribal lands. The Federal agency or DHHL must carry out the plan of action for any human remains or cultural items that are removed.

(1) No later than 30 days after receiving written documentation of a discovery, the Federal agency or DHHL, in consultation with the lineal descendant, Indian Tribe, or Native Hawaiian organization, must approve and sign a plan of action under § 10.4(b).

(2) This requirement does not apply if, before receiving written documentation of the discovery, the Federal agency or DHHL signed:

- (i) A plan of action under § 10.4(b); or
- (ii) A comprehensive agreement under § 10.4(c).

(e) *Certify when an activity may resume.* No later than 30 days after receiving written documentation of a

discovery, the appropriate official must send a written certification if the discovery is related to an activity (including but not limited to construction, mining, logging, or agriculture). Written certification must be sent to the person responsible for the activity and the additional point of contact shown in table 1 to paragraph (a)(1) of this section. The written certification must provide:

(1) A copy of the signed plan of action or comprehensive agreement with redaction of any confidential or sensitive information;

(2) Instructions for protecting, securing, stabilizing, or covering the human remains or cultural items, if appropriate; and

(3) The date (no later than 30 days after the date of the written certification) on which lawful activity may resume around the discovery.

#### § 10.6 Excavation.

When an excavation of human remains or cultural items on Federal or Tribal lands is needed, the appropriate official must comply with this section when authorizing the excavation. A permit under Section 4 of ARPA (16 U.S.C. 470cc) is required when the excavation is on Federal or Tribal lands that are also ARPA Indian lands or ARPA Public lands, and there is no applicable permit exception or exemption under the ARPA uniform regulations at 18 CFR part 1312, 32 CFR part 229, 36 CFR part 296, or 43 CFR part 7. When the excavation is on Federal or Tribal lands that are not ARPA Indian lands or ARPA Public lands, an equivalent permit from the relevant jurisdiction is required, if applicable.

(a) *On Tribal lands.* Before an excavation of human remains or cultural items may occur, the Indian Tribe or Native Hawaiian organization must consent in writing by providing a written authorization for the excavation.

(1) At minimum, the written authorization must document:

(i) The reasonable steps taken to evaluate the potential need for an excavation of human remains or cultural items; and

(ii) Any permit that the Indian Tribe or Native Hawaiian organization legally requires.

(2) On Tribal lands in Alaska and the continental United States, the Indian Tribe may delegate its responsibility for authorizing the excavation to the Bureau of Indian Affairs or the Federal agency with primary management authority. If both the Federal agency and the Indian Tribe consent in writing, the Bureau of Indian Affairs or the Federal agency

with primary management authority is responsible for completing the requirements in paragraph (b) of this section.

(3) On Tribal lands of an NHO, the Native Hawaiian organization may agree in writing to be responsible for excavations on its Tribal lands and then must provide written authorizations under this paragraph. If the Native Hawaiian organization has not agreed in writing to be responsible for excavations, DHHL is responsible for completing the requirements in paragraph (b) of this section for any excavations on those Tribal lands of an NHO.

(b) *On Federal or Tribal lands.* When a Federal agency or DHHL has responsibility for an excavation on Federal or Tribal lands, a plan of action and a written authorization are required. When an Indian Tribe or Native Hawaiian organization has responsibility for an excavation on Tribal lands, no plan of action is required and the Indian Tribe or Native Hawaiian organization must comply with paragraph (a) of this section.

(1) *Approve and sign a plan of action.* Prior to authorizing an excavation, the Federal agency or DHHL, in consultation with the lineal descendant, Indian Tribe, or Native Hawaiian organization, must approve and sign a plan of action under § 10.4(b). The Federal agency or DHHL must carry out the plan of action for any human remains or cultural items that are excavated and removed.

(i) This requirement does not apply if, prior to authorizing the excavation, the Federal agency or DHHL signed:

- (A) A plan of action under § 10.4(b);

or

- (B) A comprehensive agreement under § 10.4(c).

(ii) For an excavation on Tribal lands, the plan of action must include written consent to the excavation by the appropriate Indian Tribe or Native Hawaiian organization.

(2) *Authorize an excavation.* At minimum, the written authorization must include:

(i) A copy of the signed plan of action or comprehensive agreement with redaction of any confidential or sensitive information,

(ii) The reasonable steps taken to evaluate the potential need for an excavation of human remains or cultural items, and

(iii) Any permit that the Federal agency or DHHL legally requires.

#### § 10.7 Disposition.

When human remains or cultural items are removed from Federal or

Tribal lands, as soon as possible (but no later than one year) after the discovery or excavation of the human remains or cultural items, the appropriate official must identify the lineal descendant, Indian Tribe, or Native Hawaiian organization that has priority for disposition of human remains or cultural items using this section.

(a) *Priority for disposition.* The disposition of human remains or cultural items removed from Federal or Tribal lands must be in the following priority order:

(1) The known lineal descendant, if any, for human remains or associated funerary objects;

(2) The Indian Tribe or Native Hawaiian organization from whose Tribal lands the human remains or cultural items were removed;

(3) The Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to the priority order at § 10.3(e) of this part;

(4) On Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian Tribe, the Indian Tribe with the strongest relationship to the human remains or cultural items, which is:

(i) The Indian Tribe recognized as aboriginally occupying the geographical location where the human remains or cultural items were removed; or

(ii) A different Indian Tribe who shows by a preponderance of the evidence a stronger relationship to the human remains or cultural items; or

(5) Any Indian Tribe or Native Hawaiian organization that requests transfer of the human remains or cultural items as unclaimed under paragraph (d) of this section.

(b) *On Tribal lands.* The Indian Tribe or Native Hawaiian organization from whose Tribal lands the human remains or cultural items were removed must identify the lineal descendant, Indian Tribe, or Native Hawaiian organization with priority for disposition under paragraph (a) of this section.

(1) The Indian Tribe or Native Hawaiian organization must complete and retain a written disposition statement to recognize:

(i) A lineal descendant (whose name may be withheld) has ownership or control of the human remains or associated funerary objects removed from Tribal lands; or

(ii) A lineal descendant could not be ascertained, and the Indian Tribe or Native Hawaiian organization has ownership or control of the human remains or cultural items removed from Tribal lands.

(2) On Tribal lands in Alaska and the continental United States, the Indian Tribe may delegate its responsibility for disposition of human remains or cultural items to the Bureau of Indian Affairs or the Federal agency with primary management authority. If both the Federal agency and the Indian Tribe consent in writing, the Bureau of Indian Affairs or the Federal agency with primary management authority is responsible for completing the requirements in paragraph (c) of this section.

(3) On Tribal lands of an NHO, the Native Hawaiian organization may agree in writing to be responsible for disposition of human remains or cultural items from its Tribal lands and then must provide written disposition statements under this paragraph. If the Native Hawaiian organization has not agreed in writing to be responsible for dispositions, DHHL is responsible for completing the requirements in paragraph (c) of this section for any dispositions from those Tribal lands of an NHO.

(4) After completing a disposition statement, nothing in the Act or this part:

(i) Limits the authority of an Indian Tribe or Native Hawaiian organization to enter into any agreement with the lineal descendant or another Indian Tribe or Native Hawaiian organization concerning the human remains or cultural items;

(ii) Limits any procedural or substantive right which may otherwise be secured to the lineal descendant, Indian Tribe, or Native Hawaiian organization; or

(iii) Prevents the governing body of an Indian Tribe or Native Hawaiian organization from expressly relinquishing its ownership or control of human remains, funerary objects, or sacred objects.

(c) *On Federal or Tribal lands.* When a Federal agency or DHHL has responsibility for disposition of human remains or cultural items from Federal or Tribal lands, the Federal agency or DHHL must inform and notify the lineal descendant, Indian Tribe, or Native Hawaiian organization with priority for disposition under paragraph (a) of this section.

(1) *Step 1—Inform consulting parties.* As soon as possible but no later than six months after removal of human remains or cultural items from Federal or Tribal lands, the Federal agency or DHHL must send a written document informing all consulting parties listed in the plan of action under § 10.4(b)(3) of this part. Consultation on disposition of human remains or cultural items may continue

until the Federal agency or DHHL sends a disposition statement to a claimant under paragraph (c)(5) of this section.

(i) The written document must include:

(A) A description of the human remains or cultural items, including the date and geographical location by county and State of removal; and

(B) The lineal descendant (whose name may be withheld), Indian Tribe, or Native Hawaiian organization identified as having priority for disposition of the human remains or cultural items.

(ii) For human remains or cultural items removed from Federal or Tribal lands whose disposition is not complete prior to January 12, 2024, the Federal agency or DHHL must:

(A) Identify the lineal descendant, Indian Tribe, or Native Hawaiian organization with priority for disposition under paragraph (a) of this section; and

(B) No later than July 12, 2024, send a written document under paragraph (c)(1)(i) of this section.

(iii) If the Federal agency or DHHL cannot identify any lineal descendant, Indian Tribe, or Native Hawaiian organization with priority for disposition of human remains or cultural items, the Federal agency or DHHL must report the human remains or cultural items as unclaimed under paragraph (d) of this section.

(2) *Step 2—Submit a notice of intended disposition.* No earlier than 30 days and no later than six months after informing consulting parties, the Federal agency or DHHL must submit a notice of intended disposition. If the human remains or cultural items are evidence in an ongoing civil or criminal action under ARPA or a criminal action under NAGPRA, the deadline for the notice is extended until the conclusion of the ARPA or NAGPRA case.

(i) A notice of intended disposition must be sent to any consulting parties and to the Manager, National NAGPRA Program, for publication in the **Federal Register**.

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

(A) An abstract of the information in the written document under paragraph (c)(1)(i) of this section;

(B) The name, phone number, email address, and mailing address of the appropriate official for the Federal agency or DHHL who is responsible for receiving claims for disposition;

(C) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the Federal agency or DHHL may send a disposition statement to a claimant; and

(D) The date (to be calculated by the **Federal Register** one year from the date of publication) on which the human remains or cultural items become unclaimed human remains or cultural items if no claim for disposition is received from a lineal descendant, Indian Tribe, or Native Hawaiian organization.

(iii) No later than 21 days after receiving a notice of intended disposition, the Manager, National NAGPRA Program, must:

(A) Approve for publication in the **Federal Register** any submission that conforms to the requirements under paragraph (c)(2)(ii) of this section; or

(B) Return to the Federal agency or DHHL any submission that does not conform to the requirements under paragraph (c)(2)(ii) of this section. No later than 14 days after the submission is returned, the Federal agency or DHHL must resubmit the notice of intended disposition.

(3) *Step 3—Receive and consider a claim for disposition.* After publication of a notice of intended disposition in the **Federal Register**, any lineal descendant, Indian Tribe, or Native Hawaiian organization may submit to the appropriate official for the Federal agency or DHHL a written claim for disposition of human remains or cultural items.

(i) A claim for disposition of human remains or cultural items must be received by the Federal agency or DHHL before a disposition statement for the human remains or cultural items is sent to a claimant under paragraph (c)(5) of this section or the transfer or reinterment of the human remains or cultural items under paragraph (d)(4) of this section. A claim for disposition received by the Federal agency or DHHL before the publication of the notice of intended disposition is dated the same date the notice was published.

(ii) Claims from two or more lineal descendants, Indian Tribes, or Native Hawaiian organizations who agree to joint disposition of the human remains or cultural items are considered a single claim and not competing claims.

(iii) A claim for disposition must satisfy one of the following criteria:

(A) The claimant is identified in the notice of intended disposition with priority for disposition; or

(B) The claimant is not identified in the notice of intended disposition, but the claim for disposition shows that the claimant is a lineal descendant, Indian Tribe, or Native Hawaiian organization with priority for disposition under paragraph (a) of this section.

(iv) One year after publishing a notice of intended disposition under paragraph

(c)(2) of this section, if no lineal descendant, Indian Tribe, or Native Hawaiian organization has submitted a claim for disposition, the Federal agency or DHHL must report the human remains or cultural items as unclaimed under paragraph (d) of this section.

(4) *Step 4—Respond to a claim for disposition.* No earlier than 30 days after publication of a notice of intended disposition but no later than 90 days after receiving a claim for disposition, the Federal agency or DHHL must send a written response to the claimant with a copy to any other party identified in the notice of intended disposition with priority for disposition.

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

(A) The claim meets the criteria under paragraph (c)(3) of this section. The Federal agency or DHHL must send a disposition statement to the claimant under paragraph (c)(5) of this section, unless the Federal agency or DHHL receives additional, competing claims for disposition of human remains or cultural items.

(B) The claim does not meet the criteria under paragraph (c)(3) of this section. The Federal agency or DHHL must provide a detailed explanation why the claim does not meet the criteria and an opportunity for the claimant to provide additional information to meet the criteria.

(C) The Federal agency or DHHL has received competing claims for disposition of the human remains or cultural items that meet the criteria and must determine the most appropriate claimant using the procedures and deadlines under paragraph (c)(4)(ii) of this section.

(ii) At any time before sending a disposition statement for human remains or cultural items under paragraph (c)(5) of this section, the Federal agency or DHHL may receive additional, competing claims for disposition of the human remains or cultural items that meet the criteria under paragraph (c)(3) of this section. The Federal agency or DHHL must determine the most appropriate claimant using the priority for disposition under paragraph (a) of this section and the following procedures and deadlines:

(A) No later than 14 days after receiving a competing claim, the Federal agency or DHHL must send a written letter to each claimant identifying all claimants and the date each claim was received. In response, the claimants may provide additional information to show by a preponderance of the evidence that

the claimant has a stronger relationship to the human remains or cultural items.

(B) No later than 180 days after informing the claimants of competing claims, the Federal agency or DHHL must send a written determination to each claimant identifying the most appropriate claimant(s).

(C) No earlier than 30 days but no later than 90 days after sending a determination of the most appropriate claimant(s), the Federal agency or DHHL must send a disposition statement to the most appropriate claimant(s) under paragraph (c)(5) of this section.

(5) *Step 5—Disposition of the human remains or cultural items.* No later than 90 days after responding to a claim for disposition that meets the criteria, the Federal agency or DHHL must send a written disposition statement to the claimant(s) and a copy to the Manager, National NAGPRA Program. A disposition statement must recognize the claimant(s) has ownership or control of the human remains or cultural items. In the case of joint claims for disposition, a disposition statement must identify and be sent to all claimants.

(i) After sending a disposition statement, the Federal agency or DHHL must:

(A) Consult with the claimant(s) on custody and physical transfer;

(B) Document any physical transfer; and

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

(ii) After a disposition statement is sent, nothing in the Act or this part:

(A) Limits the authority of the Federal agency or DHHL to enter into any agreement with the lineal descendant, Indian Tribe, or Native Hawaiian organization concerning the human remains or cultural items;

(B) Limits any procedural or substantive right which may otherwise be secured to the lineal descendant, Indian Tribe, or Native Hawaiian organization; or

(C) Prevents the governing body of an Indian Tribe or Native Hawaiian organization from expressly relinquishing its ownership or control of human remains, funerary objects, or sacred objects.

(d) *Unclaimed human remains or cultural items removed from Federal or Tribal lands.* When a Federal agency or DHHL has custody of unclaimed human remains or cultural items, the Federal agency or DHHL must report the human remains or cultural items.

(1) *Step 1—Submit a list of unclaimed human remains or cultural items.* No

later than January 13, 2025, the Federal agency or DHHL must submit to the Manager, National NAGPRA Program, a list of any unclaimed human remains or cultural items in its custody. The Federal agency or DHHL must submit updates to its list of unclaimed human remains or cultural items by December 31 each year.

(i) Human remains or cultural items are unclaimed when:

(A) One year after publishing a notice of intended disposition under paragraph (c)(2) of this section, no lineal descendant, Indian Tribe, or Native Hawaiian organization submits a written claim for disposition; or

(B) One year after discovery or excavation of the human remains or cultural items, the Federal agency or DHHL did not identify any lineal descendant, Indian Tribe, or Native Hawaiian organization with priority for disposition under paragraph (a) of this section.

(ii) A list of unclaimed human remains or cultural items must include:

(A) A description of the human remains or cultural items, including the date and geographical location by county and State of removal;

(B) The names of all consulting parties;

(C) If unclaimed under paragraph (d)(1)(i)(A) of this section, the name of each Indian Tribe or Native Hawaiian organization with priority for disposition under paragraph (a) of this section; and

(D) If unclaimed under paragraph (d)(1)(i)(B) of this section, the information considered under § 10.3(a) of this part and the criteria identified under § 10.3(b) of this part to explain why no Indian Tribe or Native Hawaiian organization with cultural affiliation could be identified.

(2) *Step 2—Agree to transfer or decide to reinter human remains or cultural items.* At the discretion of the Federal agency or DHHL, a Federal agency or DHHL may:

(i) Agree in writing to transfer unclaimed human remains or cultural items to an Indian Tribe or Native Hawaiian organization;

(ii) Decide in writing to reinter unclaimed human remains or cultural items according to applicable laws and policies; or

(iii) At any time before transferring or reinterring human remains or cultural items under paragraph (d)(4) of this section, the Federal agency or DHHL may receive a claim for disposition of the human remains or cultural items and must evaluate whether the claim meets the criteria under paragraph (c)(3) of this section. Any agreement to

transfer or decision to reinter the human remains or cultural items under this paragraph is stayed until the claim for disposition is resolved under paragraph (c) of this section.

(A) If the claim meets the criteria under paragraph (c)(3) of this section and a notice of intended disposition was published under paragraph (c)(2) of this section, the Federal agency or DHHL must respond in writing under paragraph (c)(4) and proceed with disposition under (c)(5) of this section.

(B) If the claim meets the criteria under paragraph (c)(3) of this section but no notice of intended disposition was published, the Federal agency or DHHL must submit a notice of intended disposition under paragraph (c)(2), respond in writing under paragraph (c)(4), and proceed with disposition under (c)(5) of this section.

(C) If the claim does not meet the criteria under paragraph (c)(3) of this section, the Federal agency or DHHL must respond in writing under paragraph (c)(4) and may proceed with transfer or reinterment under paragraph (d)(3) of this section.

(3) *Step 3—Submit a notice of proposed transfer or reinterment.* No later than 30 days after agreeing to transfer or deciding to reinter the human remains or cultural items, the Federal agency or DHHL must submit a notice of proposed transfer or reinterment.

(i) A notice of proposed transfer or reinterment must be sent to any consulting parties and to the Manager, National NAGPRA Program, for publication in the **Federal Register**.

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

(A) An abstract of the information in the list of unclaimed human remains or cultural items under paragraph (d)(1)(ii) of this section;

(B) The Indian Tribe or Native Hawaiian organization requesting transfer of the human remains or cultural items or a statement that the Federal agency or DHHL agrees to reinter the human remains or cultural items;

(C) The name, phone number, email address, and mailing address of the appropriate official for the Federal agency or DHHL who is responsible for receiving claims for disposition; and

(D) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the Federal agency or DHHL may proceed with the transfer or reinterment of the human remains or cultural items.

(iii) No later than 21 days after receiving a notice of proposed transfer or reinterment, the Manager, National NAGPRA Program, must:

(A) Approve for publication in the **Federal Register** any submission that conforms to the requirements under paragraph (d)(3)(ii) of this section; or

(B) Return to the Federal agency or DHHL any submission that does not conform to the requirements under paragraph (d)(3)(ii) of this section. No later than 14 days after the submission is returned, the Federal agency or DHHL must resubmit the notice of proposed transfer or reinterment.

(4) *Step 4—Transfer or reinter the human remains or cultural items.* No earlier than 30 days and no later than 90 days after publication of a notice of proposed transfer or reinterment, the Federal agency or DHHL must transfer or reinter the human remains or cultural items and send a written statement to the Manager, National NAGPRA Program, that the transfer or reinterment is complete.

(i) After transferring or reinterring, the Federal agency or DHHL must:

(A) Document the transfer or reinterment of the human remains or cultural items, and

(B) Protect sensitive information about the human remains or cultural items from disclosure to the general public to the extent consistent with applicable law.

(ii) After transfer or reinterment occurs, nothing in the Act or this part:

(A) Limits the authority of the Federal agency or DHHL to enter into any agreement with the requestor concerning the human remains or cultural items;

(B) Limits any procedural or substantive right which may otherwise be secured to the lineal descendant, Indian Tribe, or Native Hawaiian organization; or

(C) Prevents the governing body of an Indian Tribe or Native Hawaiian organization from expressly relinquishing its ownership or control of human remains, funerary objects, or sacred objects.

### **Subpart C—Repatriation of Human Remains or Cultural Items by Museums or Federal Agencies**

#### **§ 10.8 General.**

Each museum and Federal agency that has possession or control of a holding or collection that may contain human remains, funerary objects, sacred objects, or objects of cultural patrimony must comply with the requirements of this subpart, regardless of the physical location of the holding or collection.

Each museum and Federal agency must identify one or more authorized representatives who are responsible for carrying out the requirements of this subpart.

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

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

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

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

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

(b) *Federal agency holding or collection.* A Federal agency must comply with this subpart for any holding or collection in its possession or control that may contain human remains or cultural items, including a previously lost or previously unknown holding or collection.

(1) A Federal agency must determine, given the relevant information, if a holding or collection:

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

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

(A) An unknown location; or

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

(2) A Federal agency may have custody of a holding or collection that

was removed from Federal or Tribal lands after November 16, 1990, and must comply with § 10.7(c) of this part.

(c) *Museums with custody of a Federal agency holding or collection.* No later than January 13, 2025, each museum that has custody of a Federal agency holding or collection that may contain Native American human remains or cultural items must submit a statement describing that holding or collection to the authorized representatives of the Federal agency most likely to have possession or control and to the Manager, National NAGPRA Program.

(1) No later than 180 days following receipt of a museum's statement, the Federal agency must respond to the museum and the Manager, National NAGPRA Program, with a written acknowledgement of one of the following:

(i) The Federal agency has possession or control of the holding or collection;

(ii) The Federal agency does not have possession or control of the holding or collection; or

(iii) The Federal agency and the museum agree that they have joint possession or control of the holding or collection.

(2) Failure to issue such a determination by the deadline constitutes acknowledgement that the Federal agency has possession or control. The Federal agency is responsible for the requirements of this subpart for any holdings or collections under its possession or control, regardless of the physical location of the holdings or collection.

(d) *Museums with custody of other holdings or collections.* No later than January 13, 2025, each museum that has custody of a holding or collection that may contain Native American human remains or cultural items and for which it cannot identify any person, institution, State or local government agency, or Federal agency with possession or control of the holding or collection, must submit a statement describing that holding or collection to the Manager, National NAGPRA Program.

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

NAGPRA Program, or the Review Committee under § 10.12.

#### **§ 10.9 Repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony.**

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

(a) *Step 1—Compile a summary of a holding or collection.* Based on the information available, a museum or Federal agency must compile a summary describing any holding or collection that may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony. Depending on the scope of the holding or collection, a museum or Federal agency may organize its summary into sections based on geographical area, accession or catalog name or number, or other defining attributes. A museum or Federal agency must ensure the summary is comprehensive and covers any holding or collection relevant to this section.

(1) A summary must include:

(i) The estimated number and a general description of the holding or collection, including any potential cultural items;

(ii) The geographical location (provenience) by county or State where the potential cultural items;

(iii) The acquisition history (provenance) of the potential cultural items;

(iv) Other information relevant for identifying:

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

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

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

(2) After January 12, 2024, a museum or Federal agency must submit a summary to the Manager, National NAGPRA Program, by the deadline in Table 1 of this paragraph (a)(2).

TABLE 1 TO § 10.9(a)(2)—DEADLINES FOR COMPILING A SUMMARY

If a museum or Federal agency . . .	. . . a summary must be submitted . . .
acquires possession or control of unassociated funerary objects, sacred objects, or objects of cultural patrimony.	6 months after acquiring possession or control of the unassociated funerary objects, sacred objects, or objects of cultural patrimony.
locates previously lost or unknown unassociated funerary objects, sacred objects, or objects of cultural patrimony.	6 months after locating the unassociated funerary objects, sacred objects, or objects of cultural patrimony.
receives Federal funds for the first time after January 12, 2024, and has possession or control of unassociated funerary objects, sacred objects, or objects of cultural patrimony.	3 years after receiving Federal funds for the first time after January 12, 2024.

(3) After January 12, 2024, when a holding or collection previously included in a summary is transferred to a museum or Federal agency, the museum or Federal agency acquiring possession or control of the holding or collection may rely on the previously compiled summary.

(i) No later than 30 days after acquiring the holding or collection, the museum or Federal agency must send the previously compiled summary to the Manager, National NAGPRA Program.

(ii) No later than the deadline in Table 1 to paragraph (a)(2) of this section, the museum or Federal agency must compile a summary under paragraph (a)(1) of this section based on the previously compiled summary and additional information available. The museum or Federal agency must submit the summary to the Manager, National NAGPRA Program, and must initiate consultation under paragraph (b) of this section.

(4) Prior to January 12, 2024, a museum or Federal agency must have submitted a summary to the Manager, National NAGPRA Program:

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

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

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

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

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

(b) *Step 2—Initiate consultation.* No later than 30 days after compiling a summary, a museum or Federal agency must identify consulting parties based

on information available and invite the parties to consult.

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

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

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

(ii) The names of all consulting parties; and

(iii) A proposed method for consultation.

(3) When a museum or Federal agency identifies a new consulting party under paragraph (b)(1) of this section, the museum or Federal agency must invite the party to consult. An invitation to consult under paragraph (b)(2) of this section must be sent:

(i) No later than 30 days after identifying a new consulting party based on new information; or

(ii) No later than six months after the addition of a Tribal entity to the list of federally recognized Indian Tribes published in the **Federal Register** pursuant to the Act of November 2, 1994 (25 U.S.C. 5131).

(c) *Step 3—Consult on cultural items.* A museum or Federal agency must respond to any consulting party, regardless of whether the party has received an invitation to consult. Consultation on an unassociated funerary object, sacred object, or object of cultural patrimony may continue until the museum or Federal agency sends a repatriation statement for that object to a requestor under paragraph (g) of this section.

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

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

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

(2) Consultation must address identification of:

(i) Lineal descendants;

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

(iii) The types of objects that might be unassociated funerary objects, sacred objects, or objects of cultural patrimony; and

(iv) The duty of care under § 10.1(d) for unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(3) The museum or Federal agency must prepare a record of consultation that describes the concurrence, disagreement, or nonresponse of the consulting parties to the identifications in paragraph (c)(2) of this section.

(4) At any time before a museum or Federal agency sends a repatriation statement for an unassociated funerary object, sacred object, or object of cultural patrimony to a requestor under paragraph (g) of this section, the museum or Federal agency may receive a request from a consulting party for access to records, catalogues, relevant studies, or other pertinent data related to the holding or collection. A museum or Federal agency must provide access to the additional information in a reasonable manner and for the limited purpose of determining cultural affiliation, including the geographical location or acquisition history, of the unassociated funerary object, sacred object, or object of cultural patrimony.

(d) *Step 4—Receive and consider a request for repatriation.* After a summary is compiled, any lineal descendant, Indian Tribe, or Native Hawaiian organization may submit to the museum or Federal agency a written request for repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony.

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

for compiling a summary in table 1 to paragraph (a)(2) of this section is dated the same date as the deadline for compiling the summary.

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

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

(i) Each unassociated funerary object, sacred object, or object of cultural patrimony being requested meets the definition of an unassociated funerary object, a sacred object, or an object of cultural patrimony;

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

(iii) The request includes information to support a finding that the museum or Federal agency does not have right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony.

(e) *Step 5—Respond to a request for repatriation.* No later than 90 days after receiving a request for repatriation, a museum or Federal agency must send a written response to the requestor with a copy to any other consulting party. Using the information available, including relevant records, catalogs, existing studies, and the results of consultation, a museum or Federal agency must determine if the request for repatriation satisfies the criteria under paragraph (d) of this section. In the written response, the museum or Federal agency must state one of the following:

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

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

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

or Federal agency has a right of possession to the unassociated funerary object, sacred object, or object of cultural patrimony.

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

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

(1) A notice of intended repatriation must be sent to all requestors, any consulting parties, and to the Manager, National NAGPRA Program, for publication in the **Federal Register**.

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

(i) An abstract of the information compiled under paragraph (a) of this section;

(ii) The total number and brief description of the unassociated funerary objects, sacred objects, or objects of cultural patrimony (counted separately or by lot);

(iii) The lineal descendant (whose name may be withheld), Indian Tribe, or Native Hawaiian organization requesting repatriation of the unassociated funerary objects, sacred objects, or objects of cultural patrimony;

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

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

(3) No later than 21 days after receiving a notice of intended repatriation, the Manager, National NAGPRA Program, must:

(i) Approve for publication in the **Federal Register** any submission that conforms to the requirements under paragraph (f)(2) of this section; or

(ii) Return to the museum or Federal agency any submission that does not conform to the requirements under paragraph (f)(2) of this section. No later

than 14 days after the submission is returned, the museum or Federal agency must resubmit the notice of intended repatriation.

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

(g) *Step 7—Repatriation of the unassociated funerary object, sacred object, or object of cultural patrimony.* No earlier than 30 days and no later than 90 days after publication of a notice of intended repatriation, a museum or Federal agency must send a written repatriation statement to the requestor and a copy to the Manager, National NAGPRA Program. In a repatriation statement, a museum or Federal agency must relinquish possession or control of the unassociated funerary object, sacred object, or object of cultural patrimony to the lineal descendant, Indian Tribe, or Native Hawaiian organization. In the case of joint requests for repatriation, a repatriation statement must identify and be sent to all requestors.

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

(i) Consult with the requestor on custody and physical transfer;

(ii) Document any physical transfer; and

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

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

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

must determine the most appropriate requestor using this paragraph.

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

- (i) The lineal descendant, if any; or
- (ii) The Indian Tribe or Native Hawaiian organization with the closest cultural affiliation according to the priority order at § 10.3(e) of this part.

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

(3) No later than 14 days after receiving a competing request, a museum or Federal agency must send a written letter to each requestor identifying all requestors and the date each request was received. In response, the requestors may provide additional information to show by a preponderance of the evidence that the requestor has a stronger relationship of shared group identity to the cultural items.

(4) No later than 180 days after informing the requestors of competing requests, a museum or Federal agency must send a written determination to each requestor and the Manager, National NAGPRA Program. The determination must be one of the following:

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

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

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

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

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

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

(B) No earlier than 30 days and no later than 90 days after sending a determination of the most appropriate requestor, the museum or Federal

agency must send a repatriation statement to the most appropriate requestor under paragraph (g) of this section; or

(iii) The most appropriate requestor cannot be determined, and repatriation is stayed under paragraph (i)(2) of this section. The museum or Federal agency must briefly describe the information considered and explain how the determination was made.

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

(1) A court of competent jurisdiction has enjoined the repatriation. When there is a final resolution of the legal case or controversy in favor of a requestor, the museum or Federal agency must:

(i) No later than 14 days after a resolution, send a written statement of the resolution to each requestor and the Manager, National NAGPRA Program;

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

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

(i) No later than 14 days after a resolution, send a written determination to each requestor and the Manager, National NAGPRA Program;

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

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

(i) To request the Assistant Secretary's concurrence, the museum or Federal agency must send to the Manager,

National NAGPRA Program, a written request of no more than 10 double-spaced pages. The written request must:

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

(B) Describe the specific scientific study, the date on which the study commenced, and how the study is of major benefit to the people of the United States;

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

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

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

(F) Affirm that the study has in place the requisite funding; and

(G) Provide written documentation showing free, prior, and informed consent from lineal descendants, Indian Tribes, or Native Hawaiian organizations to the study.

(ii) In response to the request, the Assistant Secretary must:

(A) Consult with lineal descendants, Indian Tribes, or Native Hawaiian organizations that consented to the study;

(B) Send a written determination of concurrence or denial to the museum or Federal agency with a copy to the consulting parties; and

(C) If the Assistant Secretary concurs, specify in the written determination the date by which the scientific study must be completed.

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

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

#### **§ 10.10 Repatriation of human remains or associated funerary objects.**

Each museum and Federal agency that has possession or control of a holding or collection that may contain human remains or associated funerary objects must follow the steps in this section. The purpose of this section is to provide notice of determinations, following consultation, about human remains or

associated funerary objects to lineal descendants, Indian Tribes, and Native Hawaiian organizations to facilitate repatriation.

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

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

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

(3) The geographical location (provenience) by county or State where the human remains or associated funerary objects were removed;

(4) The acquisition history (provenance) of the human remains or associated funerary objects;

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

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

(b) *Step 2—Initiate consultation.* As soon as possible after compiling an itemized list, a museum or Federal agency must identify consulting parties based on information available and invite the parties to consult.

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

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

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

(ii) The names of all consulting parties; and

(iii) A proposed timeline and method for consultation.

(3) When a museum or Federal agency identifies a new consulting party under paragraph (b)(1) of this section, the museum or Federal agency must invite the party to consult. An invitation to consult under paragraph (b)(2) of this section must be sent:

(i) No later than 30 days after identifying a new consulting party based on new information; or

(ii) No later than two years after the addition of a Tribal entity to the list of federally recognized Indian Tribes published in the **Federal Register** pursuant to the Act of November 2, 1994 (25 U.S.C. 5131).

(c) *Step 3—Consult on human remains or associated funerary objects.*

A museum or Federal agency must respond to any consulting party, regardless of whether the party has received an invitation to consult. Consultation on human remains or associated funerary objects may continue until the museum or Federal agency sends a repatriation statement for those human remains or associated funerary objects to a requestor under paragraph (h) of this section.

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

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

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

(2) Consultation must address identification of:

(i) Lineal descendants;

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

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

(iv) The duty of care under § 10.1(d) for human remains or associated funerary objects.

(3) The museum or Federal agency must prepare a record of consultation that describes the concurrence, disagreement, or nonresponse of the consulting parties to the identifications in paragraph (c)(2) of this section.

(4) At any time before the museum or Federal agency sends a repatriation statement for human remains or associated funerary objects to a requestor under paragraph (h) of this section, a museum or Federal agency

may receive a request from a consulting party for access to records, catalogues, relevant studies, or other pertinent data related to those human remains or associated funerary objects. A museum or Federal agency must provide access to the additional information in a reasonable manner and for the limited purpose of determining cultural affiliation, including the geographical location or acquisition history, of the human remains or associated funerary objects.

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

(1) An inventory must include:

(i) The names of all consulting parties and dates of consultation;

(ii) The information, updated as appropriate, from the itemized list compiled under paragraph (a) of this section;

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

(A) A known lineal descendant (whose name may be withheld);

(B) The Indian Tribe or Native Hawaiian organization with cultural affiliation that is clearly identified by the information available about the human remains or associated funerary objects;

(C) The Indian Tribe or Native Hawaiian organization with cultural affiliation that is reasonably identified by the geographical location or acquisition history of the human remains or associated funerary objects; or

(D) No lineal descendant or any Indian Tribe or Native Hawaiian organization with cultural affiliation can be clearly or reasonably identified. The inventory must briefly describe the information considered under § 10.3(a) of this part and the criteria identified under § 10.3(b) of this part to explain how the determination was made.

(2) After January 12, 2024, a museum or Federal agency must submit an inventory to all consulting parties and the Manager, National NAGPRA Program, by the deadline in table 1 of the paragraph (d)(2).

TABLE 1 TO § 10.10(d)(2)—DEADLINES FOR COMPLETING AN INVENTORY

If a museum or Federal agency . . .	an inventory must be submitted . . .
acquires possession or control of human remains or associated funerary objects.	2 years after acquiring possession or control of human remains or associated funerary objects.
locates previously lost or unknown human remains or associated funerary objects.	2 years after locating the human remains or associated funerary objects.
receives Federal funds for the first time after January 12, 2024, and has possession or control of human remains or associated funerary objects.	5 years after receiving Federal funds for the first time after January 12, 2024.

(3) No later than January 10, 2029, for any human remains or associated funerary objects listed in an inventory but not published in a notice of inventory completion prior to January 12, 2024, a museum or Federal agency must:

- (i) Initiate consultation as described under paragraph (b) of this section;
- (ii) Consult with consulting parties as described under paragraph (c) of this section;
- (iii) Update its inventory under paragraph (d)(1) of this section and ensure the inventory is comprehensive and covers all holdings or collections relevant to this section; and
- (iv) Submit an updated inventory to all consulting parties and the Manager, National NAGPRA Program.

(4) After January 12, 2024, when a holding or collection previously included in an inventory is transferred to a museum or Federal Agency, subject to the limitations in 18 U.S.C. 1170(a), the museum or Federal agency acquiring possession or control of the holding or collection may rely on the previously completed or updated inventory.

(i) No later than 30 days after acquiring the holding or collection, the museum or Federal agency must send the previously completed or updated inventory to initiate consultation under paragraph (b) of this section and notify the Manager, National NAGPRA Program.

(ii) No later than the deadline in Table 1 to paragraph (d)(2) of this section, the museum or Federal agency must complete an inventory under paragraphs (d)(1) and (d)(2) of this section based on the previously completed or updated inventory, additional information available, and the results of consultation.

(5) Any museum may request an extension to complete or update its inventory if it has made a good faith effort but is unable to do so by the appropriate deadline. A request for an extension must be submitted to the Manager, National NAGPRA Program, before the appropriate deadline. The Manager, National NAGPRA Program must publish in the **Federal Register** a

list of any museum who request an extension and the Assistant Secretary's determination on the request. A request for an extension must include:

- (i) Information showing the initiation of consultation;
- (ii) The names of all consulting parties and consent to the extension request from a majority of consulting parties, evidenced by a signed agreement or official correspondence to the museum;
- (iii) The estimated number of human remains and associated funerary objects in the holding or collection; and
- (iv) A written plan for completing or updating the inventory, which includes, at minimum:

- (A) The specific steps required to complete or update the inventory;
- (B) A schedule for completing each step and estimated inventory completion or update date;
- (C) Position titles of the persons responsible for each step in the schedule; and
- (D) A proposal to obtain any requisite funding needed to complete or update the inventory.

(6) Prior to January 12, 2024, a museum or Federal agency must have submitted an inventory to all consulting parties and the Manager, National NAGPRA Program:

- (i) By November 16, 1995, for human remains or associated funerary objects subject to the Act;
- (ii) By April 20, 2009, for human remains or associated funerary objects acquired or located after November 16, 1995;
- (iii) By April 20, 2012, for human remains or associated funerary objects in the possession or control of a museum that received Federal funds for the first time after November 16, 1995;
- (iv) After April 20, 2009, two years after acquiring or locating the human remains or associated funerary objects; or
- (v) After April 20, 2012, five years after receiving Federal funds for the first time after April 20, 2012.

(e) *Step 5—Submit a notice of inventory completion.* No later than six months after completing or updating an

inventory under paragraph (d) of this section, a museum or Federal agency must submit a notice of inventory completion for all human remains or associated funerary objects in the inventory. The museum or Federal agency may include in a single notice any human remains or associated funerary objects having the same determination under paragraph (d)(1)(iii) of this section.

(1) A notice of inventory completion must be sent to any consulting parties and to the Manager, National NAGPRA Program, for publication in the **Federal Register**.

(2) A notice of inventory completion must conform to the mandatory format of the **Federal Register** and include the following for all human remains or associated funerary objects in the notice:

- (i) An abstract of the information compiled under paragraph (d)(1)(ii) of this section;
- (ii) The determination under paragraph (d)(1)(iii) of this section;
- (iii) The total number of individuals and associated funerary objects (counted separately or by lot);
- (iv) The name, phone number, email address, and mailing address for the authorized representative of the museum or Federal agency who is responsible for receiving requests for repatriation; and
- (v) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the museum or Federal agency may send a repatriation statement to a requestor.

(3) No later than 21 days after receiving a notice of inventory completion, the Manager, National NAGPRA Program, must:

- (i) Approve for publication in the **Federal Register** any submission that conforms to the requirements under paragraph (e)(2) of this section; or
- (ii) Return to the museum or Federal agency any submission that does not conform to the requirements under paragraph (e)(2) of this section. No later than 14 days after the submission is returned, the museum or Federal agency must resubmit the notice of inventory completion.

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

(1) A request for repatriation of human remains or associated funerary objects must be received by the museum or Federal agency before the museum or Federal agency sends a repatriation statement for those human remains or associated funerary objects under paragraph (h) of this section. A request for repatriation received by the museum or Federal agency before the publication of the notice of inventory completion is dated the same date the notice was published.

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

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

(i) The requestor is identified in the notice of inventory completion, or

(ii) The requestor is not identified in the notice of inventory completion, and the request shows, by a preponderance of the evidence, that the requestor is a lineal descendant or an Indian Tribe or Native Hawaiian organization with cultural affiliation.

(g) *Step 7—Respond to a request for repatriation.* No earlier than 30 days after publication of a notice of inventory completion but no later than 90 days after receiving a request for repatriation, a museum or Federal agency must send a written response to the requestor with a copy to any other party identified in the notice of inventory completion. Using the information available, including relevant records, catalogs, existing studies, and the results of consultation, a museum or Federal agency must determine if the request satisfies the criteria under paragraph (f) of this section.

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

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

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

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

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

(h) *Step 8—Repatriation of the human remains or associated funerary objects.* No later than 90 days after responding to a request for repatriation that meets the criteria, a museum or Federal agency must send a written repatriation statement to the requestor and a copy to the Manager, National NAGPRA Program. In a repatriation statement, a museum or Federal agency must relinquish possession or control of the human remains or associated funerary objects to a lineal descendant, Indian Tribe, or Native Hawaiian organization. In the case of joint requests for repatriation, a repatriation statement must identify and be sent to all requestors.

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

(i) Consult with the requestor on custody and physical transfer,

(ii) Document any physical transfer, and

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

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

(i) *Evaluating competing requests for repatriation.* At any time before sending a repatriation statement for human remains or associated funerary objects

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

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

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

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

(2) No later than 14 days after receiving a competing request, a museum or Federal agency must send a written letter to each requestor identifying all requestors and the date each request for repatriation was received. In response, requestors may provide additional information to show by a preponderance of the evidence that the requestor has a stronger relationship of shared group identity to the human remains or associated funerary objects.

(3) No later than 180 days after informing the requestors of competing requests, a museum or Federal agency must send a written determination to each requestor and the Manager, National NAGPRA Program. The determination must be one of the following:

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

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

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

(ii) The most appropriate requestor cannot be determined, and repatriation is stayed under paragraph (j)(2) of this section. The museum or Federal agency must briefly describe the information considered and explain how the determination was made.

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

(1) A court of competent jurisdiction has enjoined the repatriation. When there is a final resolution of the legal case or controversy in favor of a requestor, the museum or Federal agency must:

(i) No later than 14 days after a resolution, send a written statement of

the resolution to each requestor and the Manager, National NAGPRA Program;

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

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

(i) No later than 14 days after a resolution, send a written determination to each requestor and the Manager, National NAGPRA Program;

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

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

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

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

(B) Describe the specific scientific study, the date on which the study commenced, and how the study is of major benefit to the people of the United States;

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

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

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

(F) Affirm that the study has in place the requisite funding; and

(G) Provide written documentation showing free, prior, and informed consent from lineal descendants, Indian Tribes, or Native Hawaiian organizations to the study.

(ii) In response to the request, the Assistant Secretary must:

(A) Consult with lineal descendants, Indian Tribes, or Native Hawaiian organizations that consented to the study;

(B) Send a written determination of concurrence or denial to the museum or Federal agency with a copy to the consulting parties; and

(C) If the Assistant Secretary concurs, specify in the written determination the date by which the scientific study must be completed.

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

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

(k) *Transfer or reinter human remains or associated funerary objects.* For human remains or associated funerary objects with no lineal descendant or no Indian Tribe or Native Hawaiian organization with cultural affiliation, a museum or Federal agency, at its discretion, may agree to transfer or decide to reinter the human remains or associated funerary objects. The museum or Federal agency must ensure it has initiated consultation under paragraph (b) of this section before taking any of the following steps.

(1) *Step 1—Agree to transfer or decide to reinter.* A museum or Federal agency may:

(i) Agree in writing to transfer the human remains or associated funerary objects to an Indian Tribe or Native Hawaiian organization;

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

(iii) Receive a request for repatriation of the human remains or associated funerary objects at any time before transfer or reinterment and must evaluate whether the request meets the

criteria under paragraph (f) of this section.

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

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

(2) *Step 2—Submit a notice of proposed transfer or reinterment.* No later than 30 days after agreeing to transfer or deciding to reinter the human remains or associated funerary objects, the museum or Federal agency must submit a notice of proposed transfer or reinterment.

(i) A notice of proposed transfer or reinterment must be sent to all consulting parties and to the Manager, National NAGPRA Program, for publication in the **Federal Register**.

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

(A) An abstract of the information compiled under paragraph (d)(1)(ii) of this section;

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

(C) The determination under paragraph (d)(1)(iii)(D) of this section that no lineal descendant or any Indian Tribe or Native Hawaiian organization with cultural affiliation can be clearly or reasonably identified. The notice must briefly describe the information considered and explain how the determination was made.

(D) The names of all consulting parties identified under paragraph (b) of this section;

(E) The Indian Tribe or Native Hawaiian organization requesting the human remains or associated funerary objects or a statement that the museum or Federal agency agrees to reinter the human remains or associated funerary objects;

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

(G) The date (to be calculated by the **Federal Register** 30 days from the date of publication) after which the museum or Federal agency may proceed with the

transfer or reinterment of the human remains or associated funerary objects.

(iii) No later than 21 days after receiving a notice of proposed transfer or reinterment, the Manager, National NAGPRA Program, must:

(A) Approve for publication in the **Federal Register** any submission that conforms to the requirements under paragraph (k)(2)(ii) of this section; or

(B) Return to the museum or Federal agency any submission that does not conform to the requirements under paragraph (k)(2)(ii) of this section. No later than 14 days after the submission is returned, the museum or Federal agency must resubmit the notice of proposed transfer or reinterment.

(3) *Step 3—Transfer or reinter the human remains or associated funerary objects.* No earlier than 30 days and no later than 90 days after publication of a notice of proposed transfer or reinterment, the museum or Federal agency must transfer or reinter the human remains or associated funerary objects and send a written statement to the Manager, National NAGPRA Program, that the transfer or reinterment is complete.

(i) After transferring or reinterring, the museum or Federal agency must:

(A) Document the transfer or reinterment of the human remains or associated funerary objects, and

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

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

#### § 10.11 Civil penalties.

Any museum that fails to comply with the requirements of the Act or this subpart may be assessed a civil penalty by the Assistant Secretary. This section does not apply to Federal agencies, but a Federal agency's failure to comply with the requirements of the Act or this part may be subject to other remedies under Federal law. Each instance of failure to comply constitutes a separate violation. The Assistant Secretary must serve the museum with a written notice of failure to comply under paragraph (d) of this section or a notice of assessment under paragraph (g) of this section by personal delivery with proof of delivery date, certified mail with return receipt, or private delivery service with proof of delivery date.

(a) *File an allegation.* Any person may file an allegation of failure to comply by sending a written allegation to the

Manager, National NAGPRA Program. Each allegation:

(1) Must include the name and contact information (either a mailing address, telephone number, or email address) of the person alleging the failure to comply;

(2) Must identify the specific provision or provisions of the Act or this subpart that the museum is alleged to have violated;

(3) May enumerate the separate violations alleged, including facts to support the number of separate violations. The number of separate violations is determined by establishing relevant factors such as:

(i) The number of lineal descendants, Indian Tribes, or Native Hawaiian organizations determined to be aggrieved by the failure to comply; or

(ii) The number of individuals or the number of funerary objects, sacred objects, or objects of cultural patrimony involved in the failure to comply;

(4) May include information showing that the museum has possession or control of human remains or cultural items involved in the alleged failure to comply; and

(5) May include information showing that the museum receives Federal funds.

(b) *Respond to an allegation.* No later than 90 days after receiving an allegation, the Assistant Secretary must determine if the allegation meets the requirements of paragraph (a) of this section and respond to the person alleging the failure to comply.

(1) The Assistant Secretary may request any additional relevant information from the person making the allegation, the museum, or other parties. The Assistant Secretary may conduct any investigation that is necessary to determine whether an alleged failure to comply is substantiated. The Assistant Secretary may also investigate appropriate factors for justifying an increase or reduction to any penalty amount that may be calculated.

(2) If the allegation meets the requirements of paragraph (a) of this section, the Assistant Secretary, after reviewing all relevant information, must determine one of the following for each alleged failure to comply:

(i) The alleged failure to comply is substantiated, the number of separate violations is identified, and a civil penalty is an appropriate remedy. The Assistant Secretary must calculate the proposed penalty amount under paragraph (c) of this section and notify the museum under paragraph (d) of this section;

(ii) The alleged failure to comply is substantiated, the number of separate violations is identified, but a civil

penalty is not an appropriate remedy. The Assistant Secretary must notify the museum under paragraph (d) of this section; or

(iii) The alleged failure to comply is unsubstantiated. The Assistant Secretary must send a written determination to the person making the allegation and to the museum.

(c) *Calculate the penalty amount.* If the Assistant Secretary determines under paragraph (b)(2)(i) of this section that a civil penalty is an appropriate remedy for a substantiated failure to comply, the Assistant Secretary must calculate the amount of the penalty in accordance with this paragraph. The penalty for each separate violation must be calculated as follows:

(1) The base penalty amount is \$7,475, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74).

(2) The base penalty amount may be increased after considering:

(i) The ceremonial or cultural value of the human remains or cultural items involved, as identified by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization;

(ii) The archaeological, historical, or commercial value of the human remains or cultural items involved;

(iii) The economic and non-economic damages suffered by any aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization, including expenditures by the aggrieved party to compel the museum to comply with the Act or this subpart;

(iv) The number of prior violations by the museum that have occurred; or

(v) Any other appropriate factor justifying an increase.

(3) The base penalty amount may be reduced if:

(i) The museum comes into compliance;

(ii) The museum agrees to mitigate the violation in the form of an actual or an in-kind payment to an aggrieved lineal descendant, Indian Tribe, or Native Hawaiian organization;

(iii) The penalty constitutes excessive punishment under the circumstances;

(iv) The museum is unable to pay the full penalty and the museum has not previously been found to have failed to comply with the Act or this subpart.

The museum has the burden of proving it is unable to pay by providing verifiable, complete, and accurate financial information to the Assistant Secretary. The Assistant Secretary may request that the museum provide such financial information that is adequate and relevant to evaluate the museum's

financial condition, including the value of the museum's cash and liquid assets; ability to borrow; net worth; liabilities; income tax returns; past, present, and future income; prior and anticipated profits; expected cash flow; and the museum's ability to pay in installments over time. If the museum does not submit the requested financial information, the museum is presumed to have the ability to pay the civil penalty; or

(v) Any other appropriate factor justifies a reduction.

(d) *Notify a museum of a failure to comply.* If the Assistant Secretary determines under paragraph (b)(2)(i) or (b)(2)(ii) of this section that an alleged failure to comply is substantiated, the Assistant Secretary must serve the museum with a written notice of failure to comply and send a copy of the notice to each person alleging the failure to comply and any lineal descendant, Indian Tribe, or Native Hawaiian organization named in the notice of failure to comply. The notice of failure to comply must:

(1) Provide a concise statement of the facts believed to show a failure to comply;

(2) Specifically reference the provisions of the Act and this subpart with which the museum has failed to comply;

(3) Include the proposed penalty amount calculated under paragraph (c) of this section;

(4) Include, where appropriate, any initial proposal to reduce or increase the penalty amount or an explanation of the determination that a penalty is not an appropriate remedy;

(5) Identify the options for responding to the notice of failure to comply under paragraph (e) of this section; and

(6) Inform the museum that the Assistant Secretary may assess a daily penalty amount under paragraph (m)(1) of this section if the failure to comply continues after the date the final administrative decision of the Assistant Secretary takes effect.

(e) *Respond to a notice of failure to comply.* No later than 45 days after receiving a notice of failure to comply, a museum may file a written response to the notice of failure to comply or take no action and await service of a notice of assessment under paragraph (g) of this section. A response which is not timely filed must not be considered. Any written response must be signed by an authorized representative of the museum and must be sent to the Assistant Secretary. In the written response, a museum may:

(1) Seek an informal discussion of the failure to comply;

(2) Request either or both of the following forms of relief, with a full explanation of the legal or factual basis for the requested relief:

(i) That the Assistant Secretary reconsider the determination of a failure to comply, or

(ii) That the Assistant Secretary reduce the proposed penalty amount; or

(3) Accept the determination of a failure to comply and agree in writing, which constitutes an agreement between the Assistant Secretary and the museum, that the museum must:

(i) Pay the proposed penalty amount, if any;

(ii) Complete the mitigation required to reduce the penalty, if offered in the notice; and

(iii) Waive any right to receive notice of assessment under paragraph (g) of this section and to request a hearing under paragraph (i) of this section.

(f) *Assess the civil penalty.* After serving a notice of failure to comply, the Assistant Secretary may assess a civil penalty and must consider all available, relevant information related to the failure to comply, including information timely provided by the museum during any informal discussion or request for relief, furnished by another party, or produced upon the Assistant Secretary's request.

(1) The assessment of a civil penalty is made after the latter of:

(i) The 45-day period for a response has expired and the museum has taken no action;

(ii) Conclusion of informal discussion, if any;

(iii) Review and consideration of a petition for relief, if any; or

(iv) Failure to meet the terms of an agreement established under paragraph (e)(3) of this section.

(2) If a petition for relief or informal discussion warrants a conclusion that no failure to comply has occurred, the Assistant Secretary must send written notification to the museum revoking the notice of failure to comply. No penalty is assessed.

(g) *Notify the museum of an assessment.* If the Assistant Secretary determines to assess a civil penalty, the Assistant Secretary must serve the museum with a notice of assessment. Unless the museum seeks further administrative remedies under this section, the notice of assessment is the final administrative decision of the Assistant Secretary. The notice of assessment must:

(1) Specifically reference the provisions of the Act or this subpart with which the museum has not complied;

(2) Include the final amount of any penalty calculated under paragraph (c)

of this section and the basis for determining the penalty amount;

(3) Include, where appropriate, any increase or reduction to the penalty amount or an explanation of the determination that a penalty is not an appropriate remedy;

(4) Include the daily penalty amount that the Assistant Secretary may assess under paragraph (m)(1) of this section if the failure to comply continues after the date the final administrative decision of the Assistant Secretary takes effect. The daily penalty amount for each continuing violation shall not exceed \$1,496 per day, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114-74);

(5) Identify the options for responding to the notice of assessment under paragraph (h) of this section; and

(6) Notify the museum that it has the right to seek judicial review of the final administrative decision of the Assistant Secretary only if it has exhausted all administrative remedies under this section, as set forth in paragraph (l) of this section.

(h) *Respond to an assessment.* No later than 45 days after receiving a notice of assessment, a museum must do one of the following:

(1) Accept the assessment and pay the penalty amount by means of a certified check made payable to the U.S. Treasurer, Washington, DC, sent to the Assistant Secretary. By paying the penalty amount, the museum waives the right to request a hearing under paragraph (i) of this section.

(2) File a written request for a hearing under paragraph (i) of this section to contest the failure to comply, the penalty assessment, or both. If the museum does not file a written request for a hearing in 45 days, the museum waives the right to request a hearing under paragraph (i) of this section.

(i) *Request a hearing.* The museum may file a written request for a hearing with the Departmental Cases Hearings Division (DCHD), Office of Hearings and Appeals (OHA), U.S. Department of the Interior, at the mailing address specified in the OHA Standing Orders on Contact Information, or by electronic means under the terms specified in the OHA Standing Orders on Electronic Transmission. A copy of the request must be served on the Solicitor of the Department of the Interior at the address specified in the OHA Standing Orders on Contact Information. The Standing Orders are available on the Department of the Interior OHA's website at <https://www.doi.gov/oha>. The request for hearing and any document filed

thereafter with the DCHD under paragraphs (i) or (j) of this section are subject to the rules that govern the method and effective date of filing and service under the subparts applicable to DCHD in 43 CFR part 4. The request for a hearing must:

(1) Include a copy of the notice of failure to comply and the notice of assessment;

(2) State the relief sought by the museum; and

(3) Include the basis for challenging the facts used to determine the failure to comply or the penalty assessment.

(j) *Hearings.* Upon receiving a request for a hearing, DCHD must assign an administrative law judge to the case and promptly give notice of the assignment to the parties. Thereafter, each filing must be addressed to the administrative law judge and a copy served on each opposing party or its counsel.

(1) To the extent they are not inconsistent with this section, the rules in the subparts applicable to DCHD in 43 CFR part 4 apply to the hearing process.

(2) Subject to the provisions of 43 CFR 1.3, a museum may appear by authorized representative or by counsel and may participate fully in the proceedings. If the museum does not appear and the administrative law judge determines that this absence is without good cause, the administrative law judge may, at his or her discretion, determine that the museum has waived the right to a hearing and consents to the making of a decision on the record.

(3) The Department of the Interior counsel is designated by the Office of the Solicitor of the Department of the Interior. No later than 20 days after receipt of its copy of the written request for hearing, Departmental counsel must file with the DCHD an entry of appearance on behalf of the Assistant Secretary and the following:

(i) Any written communications between the Assistant Secretary and the museum during any informal discussions under paragraph (e)(1) of this section;

(ii) Any petition for relief submitted under paragraph (e)(2); and

(iii) Any other information considered by the Assistant Secretary in reaching the decision being challenged.

(4) After Departmental counsel files an entry of appearance with DCHD, the museum must serve each document filed with the administrative law judge on Departmental counsel.

(5) In a hearing on the penalty assessment, the amount of the penalty assessment must be determined in accordance with paragraph (c)(2) of this section and may not be limited to the

amount originally assessed or by any previous reduction, increase, or offer of mitigation.

(6) The administrative law judge has all powers necessary to conduct a fair, orderly, expeditious, and impartial hearing process, and to render a decision, under 5 U.S.C. 554–557 and 25 U.S.C. 3007.

(7) The administrative law judge must render a written decision. The decision must set forth the findings of fact and conclusions of law, and the reasons and basis for them.

(8) The administrative law judge's decision takes effect as the final administrative decision of the Assistant Secretary 31 days from the date of the decision unless the museum files a notice of appeal as described in paragraph (k) of this section.

(k) *Appealing the administrative law judge's decision.* Any party who is adversely affected by the decision of the administrative law judge may appeal the decision by filing a written notice of appeal no later than 30 days after the date of the decision. The notice of appeal must be filed with the Interior Board of Indian Appeals (IBIA), Office of Hearings and Appeals (OHA), U.S. Department of the Interior, at the mailing address specified in the OHA Standing Orders on Contact Information, or by electronic means under the terms specified in the OHA Standing Orders on Electronic Transmission. The Standing Orders are available on the Department of the Interior OHA's website at <https://www.doi.gov/oha>. The notice of appeal must be accompanied by proof of service on the administrative law judge and the opposing party. The notice of appeal and any document filed thereafter with the IBIA are subject to the rules that govern the method and effective date of filing under 43 CFR 4.310.

(1) To the extent they are not inconsistent with this section, the provisions of 43 CFR part 4, subpart D, apply to the appeal process. The appeal board's decision must be in writing and takes effect as the final penalty assessment and the final administrative decision of the Assistant Secretary on the date that the appeal board's decision is rendered, unless otherwise specified in the appeal board's decision.

(2) OHA decisions in proceedings instituted under this section are posted on OHA's website.

(l) *Exhaustion of administrative remedies.* A museum has the right to seek judicial review, under 5 U.S.C. 704, of the final administrative decision of the Assistant Secretary only if it has exhausted all administrative remedies

under this section. No decision, which at the time of its rendition is subject to appeal under this section, shall be considered final so as to constitute agency action subject to judicial review. The decision being appealed shall not be effective during the pendency of the appeal.

(m) *Failure to pay penalty or continuing failure to comply.* (1) If the failure to comply continues after the date the final administrative decision of the Assistant Secretary takes effect, as described in paragraphs (g), (j)(6), or (k)(1) of this section, or after a date identified in an agreement under paragraph (e)(3) of this section, the Assistant Secretary may assess an additional daily penalty amount for each continuing violation not to exceed \$1,496 per day, subject to annual adjustments based on inflation under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Pub. L. 114–74). In determining the daily penalty amount, the Assistant Secretary must consider the factors in paragraph (c)(2) of this section. This penalty starts to accrue on the day after the effective date of the final administrative decision of the Assistant Secretary or on the date identified in an agreement under paragraph (e)(3) of this section.

(2) If the museum fails to pay the penalty, the Attorney General of the United States may institute a civil action to collect the penalty in an appropriate U.S. District Court. In such action, the validity and amount of the penalty are not subject to review by the court.

(n) *Additional remedies.* The assessment of a penalty under this section is not deemed a waiver by the Department of the Interior of the right to pursue other available legal or administrative remedies.

## Subpart D—Review Committee

### § 10.12 Review Committee.

The Review Committee advises the Secretary of the Interior and Congress on matters relating to sections 3003, 3004, and 3005 of the Act and other matters as specified in section 3006 of the Act. The Review Committee is subject to the Federal Advisory Committee Act (FACA, 5 U.S.C. App.).

(a) *Recommendations.* Any recommendation, finding, report, or other action of the Review Committee is advisory only and not binding on any person. Any records and findings made by the Review Committee may be admissible as evidence in actions brought by persons alleging a violation of the Act. Findings and

recommendations made by the Review Committee must be published in the **Federal Register** no later than 90 days after making the finding or recommendation.

(b) *Nominations.* The Review Committee consists of seven members appointed by the Secretary of the Interior.

(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 an Indian Tribe identifies as serving it in the practice of traditional Native American religion.

(2) Three members are appointed from nominations submitted by national museum organizations or national scientific organizations. An organization that is created by, is a part of, and is governed in any way by a parent national museum or scientific organization must submit a nomination through the parent organization. National museum organizations and national scientific organizations are organizations that:

(i) Focus on the interests of museums and science disciplines throughout the United States, as opposed to a lesser geographical scope;

(ii) Offer membership throughout the United States, although such membership need not be exclusive to the United States; and

(iii) Are organized under the laws of the United States Government.

(3) One member is appointed from a list of more than one person developed and consented to by all other appointed members specified in paragraphs (b)(1) and (b)(2) of this section.

(c) *Findings of fact or disputes on repatriation.* The Review Committee may assist any affected party through consideration of findings of fact or disputes related to the inventory, summary, or repatriation provisions of the Act. One or more of the affected parties may request the assistance of the Review Committee or the Secretary of the Interior may direct the Review Committee to consider a finding of fact or dispute. Requests for assistance must be made before repatriation of the human remains or cultural items has occurred.

(1) An affected party is either a:

(i) Museum or Federal agency that has possession or control of the human remains or cultural items; or

(ii) Lineal descendant, or an Indian Tribe or Native Hawaiian organization with potential cultural affiliation to the human remains or cultural items.

(2) The Review Committee may make an advisory finding of fact on questions related to:

(i) The identity of an object as human remains or cultural items;

(ii) The cultural affiliation of human remains or cultural items; or

(iii) The repatriation of human remains or cultural items.

(3) The Review Committee may make an advisory recommendation on disputes between affected parties. To facilitate the resolution of disputes, the Review Committee may:

(i) Consider disputes between an affected party identified in paragraph (c)(1)(i) of this section and an affected party identified in paragraph (c)(1)(ii) of this section;

(ii) Not consider disputes among lineal descendants, Indian Tribes, and Native Hawaiian organizations;

(iii) Not consider disputes among museums and Federal agencies;

(iv) Request information or presentations from any affected party; and

(v) Make advisory recommendations directly to the affected parties or to the Secretary of the Interior.

**Matthew J. Strickler,**

*Deputy Assistant Secretary Exercising the Delegated Authority of the Assistant Secretary for Fish and Wildlife and Parks.*

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