

Response to Tribal Consultation on revisions to 43 CFR Part 10  
Native American Graves Protection and Repatriation Act Regulations  
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Note: Subpart, Section, and Paragraph titles correspond to draft text for consultation. References outside of the section titles to specific sections and paragraphs are to the existing regulations only. For consistency, this document refers to 1) the existing regulations, 2) the draft text for consultation, and 3) the proposed revisions.

## **Overview of regulatory changes**

in response to consultation with Indian Tribes and NHOs as noted in the Preamble text

### **Section 10.1 Introduction**

In response to consultation with Indian Tribes and NHOs, the Department proposes the purpose paragraph (see proposed §10.1(a)) give full effect to recognize and ensure deference to the rights of lineal descendants, Indian Tribes, and NHOs, as provided under the Act.

In response to consultation with Indian Tribes and NHOs, the Department proposes new regulatory provisions to address accountability by museums and Federal agencies and to require a duty of care for human remains and cultural items (see proposed §10.1(c) and (d), respectively).

### **Section 10.2 Definitions for this part**

#### **“Affiliation”**

In response to consultation with Indian Tribes and NHOs, we have combined cultural and geographical affiliation into this definition and the section on affiliation.

#### **“Consultation”**

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that consultation seek consensus and incorporate identifications, recommendations, and Native American traditional knowledge, to the maximum extent possible.

#### **“Cultural item”**

In response to consultation with Indian Tribes and NHOs, the Department proposes to revise the definition of “cultural item” to exclude human remains.

#### **“Funerary object”**

In response to consultation with Indian Tribes and NHOs, the Department proposes to add to the definition (and to all specific definitions of cultural items) that identification of a funerary object is according to a lineal descendant, Indian Tribe, or NHO based on customs, traditions, or Native American traditional knowledge.

#### **“Holding or collection”**

In response to consultation with Indian Tribes and NHOs, we have refrained from using offensive purposes listed in some of these sources such as “enjoyment” or “personal benefit.”

#### **“Inventory”**

In response to consultation with Indian Tribes and NHOs, the Department is aware that the existing regulatory definition has been a barrier to expeditious repatriation as it requires an “item-by-item description.”

#### **“Native American traditional knowledge”**

In response to consultation with Indian Tribes and NHOs, this definition is a variation on what was suggested by a specific Indian Tribe, but this term is rooted in the larger concept of indigenous ways of knowing.

#### **“Object of cultural patrimony”**

In response to consultation with Indian Tribes and NHOs and a specific suggestion from an Indian Tribe, the Department also proposes to add a sentence to recognize that a caretaker may have been entrusted with responsibility for an object and may have even conferred that responsibility on another caretaker, but the object can still be an object of cultural patrimony. In addition, the Department proposes

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to add to the definition (and to all specific definitions of cultural items) that identification of an object of cultural patrimony is according to a lineal descendant, Indian Tribe, or NHO based on customs, traditions, or Native American traditional knowledge.

### “Possession or control”

In response to consultation with Indian Tribes and NHOs, the Department proposes to replace the two separate terms in the existing regulations “possession” and “control” into one term, as used in the Act, “possession or control.”

### “Sacred object”

In response to consultation with Indian Tribes and NHOs, the Department proposes to revise that a sacred object is, in the words of the Act, “needed” for a traditional Native American religious practice. In addition, the Department proposes to add to the definition (and to all specific definitions of cultural items) that identification of a sacred object is according to a lineal descendant, Indian Tribe, or NHO based on customs, traditions, or Native American traditional knowledge.

### “Traditional religious leader”

The Department proposes to revise the term “traditional religious leader” in response to consultation with Indian Tribes and NHOs.

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

In response to consultation with Indian Tribes and NHOs, the Department emphasizes that “a preponderance of the evidence” is a similar standard to a “reasonableness” requirement, both of which are common legal concepts. In both standards, a “more likely than not” assessment is required, such that the reasonableness requirement for tracing cultural affiliation is satisfied by a preponderance of the evidence establishing cultural affiliation. While cultural affiliation requires a simple preponderance of the evidence given the information available, geographical affiliation only requires that the information be available. The proposed revision states (in response to consultation with Indian Tribes and NHOs) that the information used to identify geographical affiliation may provide information sufficient to also establish cultural affiliation.

## **Section 10.4 General**

The Department proposes to revise the title of Subpart B (in response to consultation with Indian Tribes and NHOs) to better reflect the intent of Congress for this section of the Act (25 U.S.C. 3002). On all Federal lands in the United States or on some Tribal lands in Hawai‘i, the Department proposes (in response to consultation with Indian Tribes and NHOs) to move the existing regulatory requirement for a plan of action to the beginning of the subpart. In addition, the Department proposes to require that consultation seek consensus, to the maximum extent possible, on the plan of action. In response to consultation with Indian Tribes and NHOs and based on the experience of Federal agencies with these requirements since 1990, the Department is aware of a preference by some Indian Tribes for allowing natural exposure or erosion of human remains or cultural items to continue, without covering or removing human remains or cultural items. In those cases, a plan of action may indicate that requesting parties prefer the appropriate official take no action upon the discovery of human remains or cultural items that are naturally exposed. The plan of action should also indicate what the appropriate official will do if the human remains or cultural items cannot be left in place. If disposition under §10.7 is required because the human remains or cultural items could not be left in place, the claimants (after notice publication and claim, if required) may determine the care, custody, or physical transfer of the human remains or cultural items, including returning them to a safe location to continue a natural process.

## **Section 10.5 Discovery**

## **Section 10.6 Excavation**

## Subpart A—GENERAL

On all Federal lands in the United States or on Tribal lands in Hawai‘i, the Department proposes (in response to consultation with Indian Tribes and NHOs) to revise the existing notification and consultation requirements for discoveries under §10.4(d)(iii) and (iv) and excavation under §10.3(c)(1) by requiring a plan of action. Although the Act does not require consultation on a discovery, the Department proposes to require that the appropriate official, in consultation with Indian Tribes or NHOs, prepare, approve, and sign a plan of action within 33 days of a discovery. The Act does require consultation with the appropriate Indian Tribe or NHO prior to permitting an excavation, and the Department proposes to require that the appropriate official, in consultation with Indian Tribes and NHOs, prepare, approve, and sign a plan of action prior to authorizing an excavation as proof of consultation.

### **Section 10.7 Disposition**

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that disposition occur as soon as possible, but no later than one year, after the discovery or excavation of human remains or cultural items on Federal or Tribal lands.

### **Section 10.8 General**

The Department proposes to revise the title of Subpart C (in response to consultation with Indian Tribes and NHOs) to better reflect the intent of Congress for these sections of the Act (25 U.S.C. 3003-3005).

### **Section 10.4 General**

### **Section 10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony**

### **Section 10.10 Repatriation of Human Remains and Associated Funerary Objects**

Require that Consultation Seek Consensus

In response to consultation with Indian Tribes and NHOs, the Department proposes to require that consultation seek consensus, to the maximum extent possible. In addition, a record of consultation must include the effort made to seek consensus or describe efforts to identify a mutually agreeable alternative. For any determination considered during the consultation process, the consultation record must note the concurrence, disagreement, or nonresponse of the consulting parties. These requirements are used throughout the proposed regulations whenever consultation with requesting parties is required.

### **Section 10.11 Civil Penalties**

Calculation of Base Penalty Amount

In response to consultation with Indian Tribes and NHOs, the Department proposes to include an additional factor for increasing the penalty amount based on ceremonial or cultural value of the human remains or cultural items involved, as identified by any aggrieved lineal descendant, Indian Tribe, or NHO.

### **Section 10.12 Review Committee**

Deadline for Publishing Findings or Recommendations.

In response to consultation with Indian Tribes and NHOs, the Department proposes to add a requirement that recommendations made by the Review Committee will be published in the Federal Register within 90 days of the making the finding or recommendation.

## Subpart A—GENERAL

**COMMENT:** We received one comment requesting that throughout the text, references to Indian Tribes and NHOs should come before museums and Federal agencies.

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**RESPONSE:** We have reviewed the text and ensured that any such reference reflects this request.

**§ 10.1 Introduction.**

**COMMENT:** We received one comment requesting we add a paragraph to this section on the accountability of museums and Federal agencies for complying with these regulations.

**RESPONSE:** In response to this comment, we have added a new paragraph on accountability to highlight this issue. The draft text for consultation also included substantive changes to the regulatory process in order to hold museums and Federal agencies accountable, including deadlines and timelines and expanding how a museum might be subject to a civil penalty. We have retained or clarified these changes in the proposed revisions.

*(a) Purpose.*

**COMMENT:** We received 19 comments on the Purpose paragraph, most supporting the change from the existing regulations. One comment requested we retain the existing regulatory language on determining rights.

**RESPONSE:** To ensure the purpose and intent of these regulations is clear, we have added sentences to the purpose paragraph to recognize and ensure deference to the rights of lineal descendants, Indian Tribes, and NHOs under these regulations.

*(b) Applicability.*

**COMMENT:** We received one comment requesting revisions to the Applicability paragraph to include excavations and looting on private land.

**RESPONSE:** Private land that is not Federal or Tribal lands is expressly excluded from the discovery and excavation provisions of the Act (25 U.S.C. §3002) and Subpart B of this part. We cannot add the requested language to Subpart B of these revisions. Human remains or cultural items removed from private land that are under the possession or control of any institution or State or local government agency (including any institution of higher learning) that receives Federal funds are subject to repatriation under Subpart C of this part.

*(c) Duty of care.*

**COMMENT:** We received 39 comments on the new regulatory provision for a duty of care. While the draft text required Federal agencies to care for and manage human remains and cultural items in a manner consistent with but not pursuant to 36 CFR part 79, we understand this reference has caused confusion and concern.

**RESPONSE:** We have removed the reference, although Federal agencies must still care for and manage collections that are covered by the provisions of 36 CFR part 79. We have revised this paragraph to first require the most basic standard of care for human remains and cultural items. The additional sentence in duty of care further recognizes and ensures deference to the rights of lineal descendants, Indian Tribes, and NHOs.

*(d) Delivery of written documents.*

**COMMENT:** We received 10 comments on the new paragraph on delivery of written documents. The majority of the comments supported this paragraph, including providing for the use of email for

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transmittal of documents. Two comments suggested that the revisions ensure the delivery of email in the same way that hard copies are delivered. Another comment objected to the use of email for formal correspondence and transmittal of documents.

**RESPONSE:** We agree that the delivery of email should have the same requirement as hard copies, and we have added a requirement to email for proof of receipt.

*(e) Deadlines and timelines.*

**COMMENT:** We received four comments on the new Deadlines and timelines, only one of which requested a change that timelines be measured in business days.

**RESPONSE:** We have accepted the suggested change from calendar days to business days and included language to account for Federal holidays or a lapse in appropriations. We note this will lengthen most deadlines in the regulations.

*(f) Failure to make a claim or a request.*

**COMMENT:** We received two comments supporting the paragraph on failure to make a claim or request.

**RESPONSE:** The proposed revisions include this paragraph.

*(g) Judicial jurisdiction.*

**COMMENT:** We received two comments supporting the paragraph on judicial jurisdiction which includes the statutory language that the United States District Courts have jurisdiction over any action alleging a NAGPRA violation (25 U.S.C. §3013). One comment asked that we include a statement regarding concurrent Tribal court jurisdiction.

**RESPONSE:** The comment is correct that Congress did not say that the jurisdiction of United States District Courts precluded concurrent jurisdiction of Tribal courts. In fact, Congress specifically said that “[n]othing in this chapter shall be construed to deny or otherwise affect access to any court” (25 U.S.C. §3009(3)). As such, we have noted in the preamble that 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.

*(h) Final agency action.*

**COMMENT:** We received 21 comments suggesting we add a requirement to the paragraph on final agency action for the Manager, National NAGPRA Program, to publish disposition or repatriation determinations (submitted as statements) by Federal agencies in the Federal Register or on a website to provide notification that a final agency action has occurred. We received 17 comments on other issues with the paragraph on final agency action suggesting that more than three defined actions should be included in this section and requesting regulatory deadlines for those actions.

**RESPONSE:** The proposed revisions do not incorporate a requirement to publish Federal agencies’ disposition or repatriation determinations in the Federal Register. Publication in the Federal Register would be costly and inefficient and might lead to confusion about which type of notice is appealable. Furthermore, it would be unbalanced to only provide information on Federal agency determinations and not those of museums, as both are required to submit repatriation statements. Although not incorporated into the regulatory text, we have noted in the preamble for those regulatory steps that, to the extent practical, the National NAGPRA Program will record information on disposition or repatriation

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statements from both museums and Federal agencies and will provide that information upon request. In response to other comments, we have clarified and added deadlines to certain processes in the regulatory text to ensure appropriate application of final agency action. It would be redundant to add every regulatory action by a Federal agency subject to a deadline to this section. We have added language to the preamble explaining the broad scope of the first described final agency action to clarify its application throughout the proposed revisions.

### *(i) Information collection.*

**COMMENT:** We received two comments supporting the paragraph on information collection.

**RESPONSE:** The proposed revisions include this paragraph.

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**COMMENT:** We received 14 comments supporting and applauding the reorganization of defined terms in alphabetical order.

**RESPONSE:** In conformance with the Federal Register Document Drafting Handbook, we have also removed the subject paragraph designations.

### *Acknowledged aboriginal land*

**COMMENT:** We received 51 comments on the new terms to replace “aboriginal land” and “aboriginal occupation” which are not defined in the existing regulations but are used in the existing regulations in Subpart B (§10.6) and Subpart C (§10.11). Several comments appreciated the new definition of “acknowledged aboriginal land” that clarifies “aboriginal land” in the existing regulations in Subpart C (§10.11(b) and (c)). Some comments recommended that “acknowledged aboriginal land” be used not just in Subpart C, but also in Subpart B, either combined with the definition of “adjudicated aboriginal land,” or instead of that definition. Some comments suggested further clarifying language, including addition of other sources or changes to the listed sources. Other comments suggested changing the burden of proof from “clear and convincing” to a “reasonable basis,” consistent with other portions of NAGPRA and the regulations. For “acknowledged aboriginal land,” 21 comments suggested changing the first source, “treaty sent by the President to the United States Senate for ratification,” to an earlier stage in the treaty-making process, while another comment suggested that it be deleted, since only a ratified treaty is final and authoritative.

**RESPONSE:** We created the definitions of “adjudicated aboriginal land” and “acknowledged aboriginal land” to distinguish the criteria for a determination of “aboriginal land” under Subpart B and the Act (25 U.S.C. 3002(a)), on the one hand, and under Subpart C on the other. Congress did not use “aboriginal land” in any other section so the Secretary has greater flexibility in further defining “aboriginal land” for use in Subpart C and geographical affiliation. Therefore, we have defined “acknowledged aboriginal land” for use in geographical affiliation under Subpart C. We proposed this source to capture the draft treaties that the Senate never ratified, since the object here is not to authoritatively determine treaty rights, but just where the Tribe was at the time of the treaty negotiations. Any earlier document in the treaty-making process may qualify as “another Federal document or foreign government document” under the fifth source. Several comments suggested that the definition include intertribal agreements as another source for “acknowledged aboriginal land.” Since, consistent with the other sources, this is also a recognition by a government of an Indian Tribe’s aboriginal occupation, we have added this additional source of intertribal treaties, diplomatic agreements, and bilateral accords between and among Indian Tribes. Finally, we agree with the comments that the same reasonableness standard as in other provisions

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of the regulations should apply to sources for acknowledged aboriginal land, and have revised the definition accordingly.

### *Adjudicated aboriginal land*

**COMMENT:** We received 51 comments on the new terms to replace “aboriginal land” and “aboriginal occupation” which are not defined in the existing regulations but are used in the existing regulations in Subpart B (§10.6) and Subpart C (§10.11). Several comments appreciated the new definition of “acknowledged aboriginal land” that clarifies “aboriginal land” in the existing regulation in Subpart C (§10.11(b) and (c)). Some comments recommended that “acknowledged aboriginal land” be used not just in Subpart C, but also in Subpart B, either combined with the definition of “adjudicated aboriginal land,” or instead of that definition.

**RESPONSE:** We created the definitions of “adjudicated aboriginal land” and “acknowledged aboriginal land” to distinguish the criteria for a determination of “aboriginal land” under Subpart B and the Act (25 U.S.C. 3002(a)), on the one hand, and under Subpart C on the other. In the Act, Congress defined “the aboriginal land of some Indian tribe” as “Federal land that is recognized by a final judgement of the Indian Claims Commission or the United States Court of Claims,” and we have used that to define “adjudicated aboriginal land.” We can neither add to this definition nor ignore it, so the comments requesting a change to the application or definition of adjudicated aboriginal land cannot be adopted. Congress did not use “aboriginal land” in any other section of the Act, so the Secretary has greater flexibility in further defining “aboriginal land” for use in Subpart C and geographical affiliation.

### *Ahupua‘a (singular and plural)*

**COMMENT:** We received one comment requesting removal of the definition for “ahupua‘a” because, by focusing on a specific ahupua‘a, we ignore the fact that the interests of a Native Hawaiian or NHO may extend beyond the ahupua‘a in which the Native Hawaiian or NHO resides at the time of their claim.

**RESPONSE:** No priority is given to an NHO or its members who reside at the time of their claim in the ahupua‘a where the human remains or cultural items were removed. Instead, priority is based upon a claim of affiliation with the earlier occupants of the ahupua‘a. We are retaining the definition for “ahupua‘a” and have revised the use of this term in the new section on Cultural and Geographical Affiliation, specifically as it relates to the NHO with the closest affiliation.

### *Consultation*

**COMMENT:** We received 55 comments on the proposed definition of “consultation,” which was drawn from the language provided by Congress H. Rep. 101-877 (Oct. 15, 1990), at 16. Nearly all comments appreciated the addition of a definition for consultation, and several comments supported the definition as drafted. Some comments suggested the definition should align with definitions found in 36 CFR part 800, Executive Order 13175, or the U.N. Declaration on the Rights of Indigenous People (UNDRIP). Some comments requested the definition make clear consultation is more than a procedural step and that consultation must be a meaningful, responsive, and accountable process.

**RESPONSE:** In response to these comments, we have added to the definition specific language suggested in one comment, but responsive to several comments, on including Indian Tribes and NHOs. To clarify the purpose of consultation, some language from 36 CFR part 800 has been incorporated in the revised definition. We did not change the definition to include “free, prior, and informed consent” from the UNDRIP for two reasons. First, in NAGPRA, Congress uses both “consultation” and “consent” (sometimes in the same sentence. See, e.g., 25 U.S.C. § 3002(c)(2) differing requirements for excavations on Federal or Tribal land). Thus, the intention of Congress is that those two terms mean different things.



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Second, such a change would deviate from the position of the United States on the recommended requirement. As noted in the Announcement of U.S. Support for the UNDRIP, “the United States understands [free, prior, and informed consent] to call for a process of meaningful consultations with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.” See, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, at <https://2009-2017.state.gov/documents/organization/154782.pdf> (last visited October 29, 2021). To further address comments received on the definition of “consultation” and to make the regulatory process for consultation more meaningful, responsive and accountable, we have added a new subparagraph to the regulatory steps titled “Consult with requesting parties.” As a part of consultation, museums and Federal agencies must make a record of consultation that explains, if applicable, why any requests or recommendations made during consultation could not be accommodated as well as why consensus or agreement on an action could not be achieved.

### *Control*

**COMMENT:** We received 45 comments requesting that the defined term “control” be replaced with the statutory term “possession or control.” We received 23 comments requesting that we remove the requirement of a “legal interest” from the definition, as the Act does not recognize a lawful museum or Federal agency interest other than the “right of possession.” We received 14 comments proposing that both the transferor and recipient under a loan or repository agreement should be jointly and severally liable for compliance with NAGPRA’s inventory, summary, and repatriation obligations, which corresponded to 16 comments requesting the removal of the new term custody to focus on redefining possession. We received 16 comments noting that Federal agencies should not be permitted to use poor record keeping of loan and repository agreements to evade NAGPRA compliance.

**RESPONSE:** In response to these comments, we have revised the defined term to be “possession or control,” consistent with the Act. We agree that the Act did not intend for the term “possession or control” to confer any legal rights upon a Federal agency or museum, but instead act as an element of applicability of the Act’s repatriation provisions. In response to these comments, we have revised the definitions of “possession or control,” “disposition,” and “repatriation,” to better reflect this fact. We also propose numerous related adjustments throughout the proposed revisions when discussing possession or control, a museum or Federal agency’s right of possession, or an Indian tribe or NHO’s control or ownership of human remains or cultural items. We do not believe that the Act intends for the joint and several liability of any parties. Congress provided no indication in the Act or its legislative history that it intended any concurrent application of the Act’s obligations on multiple parties. On the other hand, various features of the Act, including civil penalties, right of possession, and museum obligations, presume that a single museum or Federal agency will be responsible for NAGPRA compliance. We agree with the comments on record keeping and note that other proposed revisions seek to address this issue by directing Federal agencies and museums to share greater information and increase efforts to complete inventories, summaries, and repatriation of human remains and cultural items under loan or repository agreements to other entities.

### *Cultural affiliation or culturally affiliated*

**COMMENT:** We received 62 comments on the definitions in the draft text of “cultural affiliation or culturally affiliated” and “geographical affiliation or geographically affiliated.” A total of 22 comments did not agree with the new proposed term “geographical affiliation” as it seemed to privilege one line of information for cultural affiliation. Most comments appreciated the removal of “culturally unidentifiable,” but would prefer revisions to the cultural affiliation process rather than the creation of a separate process. A few of these comments requested the current definition and process for “culturally unidentifiable human remains” be retained. A total of 19 comments generally agreed with the new proposed term “geographical affiliation” and supported the removal of “culturally unidentifiable,” but half of these

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comments also expressed concerns about how the new definition of “geographical affiliation” would be applied. A total of 21 comments provided no feedback on the proposed definition and requested only a minor grammatical change to these definitions.

**RESPONSE:** In response to these comments, we propose to define as a separate term “affiliation” to better reflect Congressional intent and focus on affiliation for the sole purpose of disposition or repatriation. As noted in many of the comments, identifying “cultural affiliation” has been a significant barrier to disposition and repatriation under the Act, despite the clear intent of Congress that it be used to ensure a reasonable connection between the human remains and cultural items and a present-day Indian Tribe or NHO. Defining “affiliation” in these regulations without the qualifier of “cultural” or “geographical” better aligns with Congressional intent, and addresses concerns raised in comments about implementing geographical affiliation separately from cultural affiliation. In response to these comments, we have combined cultural and geographical affiliation into this section. The definition of “cultural affiliation” from the Act and the existing regulations, the lines of information, and the use of geographic relationships consistent with the existing regulations are all incorporated into the process by which “affiliation” is established in the proposed revisions. Based on input from Indian Tribes and NHOs, we have combined cultural and geographical affiliation into this section.

### *Cultural items*

**COMMENT:** We received 20 comments on the definition of “cultural item.” Many comments requested revisions to this definition and all definitions of cultural items to require consultation and include the authority of Indian Tribes and NHOs in identifying cultural items. Two comments requested removing human remains from cultural items, which has been a frequent comment in past consultations and written comment. Several comments requested changes to the specific terms to remove the word “objects.”

**RESPONSE:** In response, we have added to the definition of cultural item (and to all specific definitions of cultural items) that identification of a cultural item is according to a lineal descendant, an Indian Tribe, or an NHO based on customs, traditions, or Native American traditional knowledge. In the Act, the identification of a cultural item is dependent upon consultation with lineal descendants, Indian Tribes, and NHOs. By adding this phrase to the definition of a cultural item (and all specific definitions), we seek to emphasize that consultation, which is required throughout this part, is how a lineal descendant, Indian Tribe, or NHO shares the information needed to identify a cultural item. We agree the definition of cultural items should not include people as items or objects, although Congress included human remains in defining cultural items at 25 U.S.C. 3001(3): ““cultural items” means human remains and...” We have limited the use of the term “cultural items” whenever possible, and when not possible or practical, we propose in the regulatory text to use the phrase “human remains or cultural items.” Lastly, while we understand and appreciate the cultural objections to the word “object,” we propose to continue to use the specific terms for cultural items as provided in the Act.

### *Custody*

**COMMENT:** We received three comments requesting that NAGPRA’s inventory, summary, and repatriation obligations apply to museums that have physical custody of human remains or cultural items, but do not have the legal interest to constitute possession or control, as currently defined. We received 22 comments proposing we impose inventory and summary obligations on museums with physical custody of Federal agency-controlled collections to complete the inventory and summary obligations on behalf of the Federal agency.

**RESPONSE:** Imposing inventory and summary requirements on Federal agencies or museums with mere physical custody of human remains or cultural items, for example, by expanding the definition of possession or control, is inconsistent with Congress’s use of the terms in the Act’s legislative history,

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could raise constitutional concerns regarding notice and due process, and would create a complex framework of liability where multiple agencies or museums are concurrently liable under separate standards for the independent decisions of others. Congress provided no indication in the Act or its legislative history that such a complex application of the Act was its intent. On the other hand, various features of the Act, including civil penalties, right of possession, and museum obligations, presume that a single museum or Federal agency will be responsible for NAGPRA compliance. We note that other proposed revisions seek to accomplish similar goals by directing Federal agencies and museums to share greater information and increase efforts to complete inventories, summaries, and repatriation of human remains and cultural items under loan or repository agreements to other entities

*Discovered or discovery*

**COMMENT:** We received four comments on the definitions for “discovered” and “excavated.” One comment recommended that “discovery” be replaced by “newly identified,” as someone at some earlier time knew the human remains or cultural items were there, even if more recent people did not. Several comments recommended that the words “unauthorized” and “authorized” be removed from both definitions.

**RESPONSE:** We have retained the term “discovery” as it reflects the statutory language, but we have added qualification to limit the application of this term to Federal and Tribal lands. We appreciate that “authorized” and “unauthorized” might be understood as connoting licit versus illicit activity, and we agree that a discovery might be happenstance and not necessarily relate to an authorized activity. Accordingly, we have modified the definitions of “discovery” and “excavation” to distinguish between an act – discovery – that is not performed through an express authorization from the appropriate official and an act – excavation – which is expressly authorized by these regulations.

*Disposition*

**COMMENT:** We received one comment related to the definitions for “disposition” and “repatriation.” The comment requested we add definitions for “disposition statement,” “repatriation statement,” and “notice of proposed reinterment.”

**RESPONSE:** The proposed revisions do not add definitions for “disposition statement,” “repatriation statement,” and “notice of proposed reinterment” because these terms are fully explained in the regulatory text. We welcome additional comments on the definitions of disposition and repatriation and how they are applied in the final steps of each process. We have made other revisions to the definition of disposition consistent with comments received on lawful control or ownership of human remains and cultural items.

*Excavated or excavation*

**COMMENT:** We received four comments on the definitions for “discovered” and “excavated.” Several comments recommended that the words “unauthorized” and “authorized” be removed from both definitions. One comment recommended “excavation” include reference to systematic exposure, methodic recording, and processing of archeological material by qualified professionals.

**RESPONSE:** We have retained the term “discovery” as it reflects the statutory language, but we have added qualification to limit the application of this term to Federal and Tribal lands. We appreciate that “authorized” and “unauthorized” might be understood as connoting licit versus illicit activity, and we agree that a discovery might be happenstance and not necessarily relate to an authorized activity. Accordingly, we have modified the definitions of “discovery” and “excavation” to distinguish between an act – discovery – that is not performed through an express authorization from the appropriate official and an act – excavation – which is expressly authorized by these regulations. With regard to excavations, we

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feel that the qualifications of any person expressly authorized to excavate human remains or cultural items should be assessed by the appropriate official under this part, based on appropriate laws, regulations, and protocols, and is not an appropriate requirement for these regulations.

### *Federal lands*

**COMMENT:** We received 21 comments on the definition for “Federal lands.” Several comments requested the addition of specific language to provide for protection and disposition of Native American children buried at Indian boarding schools, especially in circumstances where the land is not or was not owned or controlled by the U.S. Government, but the Indian boarding school was operated by or for the U.S. Government. Several comments requested clarifications or changes to “sufficient legal interest.” One comment specifically requested removing the “case-by-case basis” as, according to the comment, several Federal agencies have created program alternatives or agency-wide declarations without consultation in order to avoid responsibility for “Federal lands” that may be subject to the Act and consultation.

**RESPONSE:** Unfortunately, we cannot amend the regulatory definition of “Federal lands” as some comments requested. Congress specifically and explicitly defined Federal lands based on ownership or control, 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). See also, *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 Indian Tribes and NHOs on identification, disinterment, and repatriation of Native American children. The Department stands ready to assist Indian Tribes and NHOs in that process to the fullest extent of its authority.

Regarding other suggested changes to the definition, whether Federal 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 the 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 and, in doing so, should consult with their legal counsel. In response to specific comments on past actions by Federal agency officials, we note that, in general, a Federal agency will only have sufficient legal interest to “control” lands it does not own when it has sufficient statutory jurisdiction with respect to those lands or other form of property interest in the land, such as a lease, easement, or other agreement with terms that have indicia of control. See *Yankton Sioux Tribe v. United States Army Corps of Eng’rs*, 396 F. Supp 2d 1087 (D.S.D. 2005), *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912 (D.C. Cir. 2003) (the Act still applied to lands transferred by the U.S. Army Corps of Engineers to South Dakota pursuant to the Water Resources Development Act due to a specific statutory provision applicable to those transferred lands). In any case, an analysis of whether Federal control of certain lands is sufficient to apply these regulations is required even if the Federal agency has made determinations in other cases under other laws. A Federal agency’s determination that it does not control the lands in question constitutes a final determination making the Act or this part inapplicable and would be subject to review under the paragraph on final agency action.

### *Funerary object*

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**COMMENT:** We received 64 comments on the definitions of “funerary object,” “associated funerary object,” and “unassociated funerary object.” Many comments requested revisions to require consultation and include the authority of Indian Tribes and NHOs in the definition. We received 5 comments containing specific suggestions for revisions to the definition of funerary object. Some comments opposed the phrase “with or near” in the definition.

**RESPONSE:** In response to these comments, we have accepted some of the suggestions and aim to clarify long-standing confusion over the distinction between associated and unassociated funerary objects. 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 preamble to the final regulations, “[t]he clause was included to accommodate variations in Native American death rites or ceremonies” (60 FR 62138, December 4, 1995). Furthermore, throughout the regulatory process what constitutes “with or near” must be identified through consultation. We have added to the definition of funerary object (and to all specific definitions of cultural items) that identification of a funerary object is according to a lineal descendant, Indian Tribe, or NHO based on customs, traditions, or Native American traditional knowledge. For funerary objects, broad categorical identifications, including everything from a burial site or specific area, may meet the definition depending on the available information and the results of consultation.

In the Act, the distinction between associated and unassociated funerary objects is based on the location of related human remains. Under the Act and in the proposed revisions, if human remains of an individual or individuals are identified, the objects are funerary objects, and, depending on the location of the human remains, may be associated funerary objects. It is important to note “individual human remains” as used in the Act means the human remains of an individual or individuals. This does not require an identification of each individual who is associated to each funerary object. Rather, a group of individuals may be related to a single funerary object and the object may be associated without identifying specifically with which individual the object was placed. In response to specific comments on unassociated funerary objects, we have revised the definition to include objects removed from a specific area that was a burial site even if the burial site can no longer be identified.

*Geographical affiliation or geographically affiliated*

**COMMENT:** We received 62 comments on the definitions in the draft text of “cultural affiliation or culturally affiliated” and “geographical affiliation or geographically affiliated.” A total of 22 comments did not agree with the new proposed term “geographical affiliation” as it seemed to privilege one line of information for cultural affiliation. Most comments appreciated the removal of “culturally unidentifiable,” but would prefer revisions to the cultural affiliation process rather than the creation of a separate process. A few of these comments requested the current definition and process for “culturally unidentifiable human remains” be retained. A total of 19 comments generally agreed with the new proposed term “geographical affiliation” and supported the removal of “culturally unidentifiable,” but half of these comments also expressed concerns about how the new definition of “geographical affiliation” would be applied. A total of 21 comments provided no feedback on the proposed definition and requested no change other than a minor grammatical change to these two definitions and others.

**RESPONSE:** In response to these comments, we propose to define as a separate term “affiliation” to better reflect Congressional intent and focus on affiliation for the sole purpose of disposition or repatriation. As noted in many of the comments, identifying “cultural affiliation” has been a significant barrier to disposition and repatriation under the Act, despite the clear intent of Congress that it be used to ensure a reasonable connection between the human remains and cultural items and a present-day Indian Tribe or NHO. Defining “affiliation” in these regulations without the qualifier of “cultural” or “geographical” better aligns with Congressional intent, but addresses concerns raised in comments about implementing geographical affiliation separately from cultural affiliation. In response to these comments, we have combined cultural and geographical affiliation into this section. The definition of “cultural affiliation” from the Act and the existing regulations, the lines of information, and the use of geographic

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relationships consistent with the existing regulation are all incorporated into the process by which “affiliation” is established in the proposed revisions. Based on input from Indian Tribes and NHOs, we have combined cultural and geographical affiliation into this section.

*Holding or collection*

**COMMENT:** We received 24 comments on the new definition for “holding or collection.” One comment objected to offensive items such as “enjoyment” or “personal benefit.” Two comments suggested adding clarifying language of “including, but not limited to.” Most comments suggested removing the definition entirely because something will inevitably have been left out of the list.

**RESPONSE:** The term “holding or collection” is not defined in the Act but it used in the proposed revisions to define the scope of responsibilities for museums and Federal agencies under Subpart C. In particular, it helps provide a scope for museums with a Federal agency holding or collection. We used a variety of sources to create this definition, including dictionary definitions as well as the International Council of Museums’ 2007 definition. We appreciate the identification of offensive terms and have removed them. While the proposed definition lists a wide variety of purposes, use of the word “including” implies that the list is not limited to only these purposes.

*Human remains*

**COMMENT:** We received 33 comments on the definition of “human remains.” Many comments requested revisions to require consultation and include the authority of Indian Tribes and NHOs in the definition, especially in determining if human remains were “freely given or naturally shed.” Other comments requested we remove the exclusion on “freely given or naturally shed.” A few comments requested we add to the definition that human remains decomposed into surrounding soils are human remains. Some comments requested we add that other kinds of burials and remains which are not human should also be treated as human remains.

**RESPONSE:** We have retained the exclusion found in the existing regulations for human remains that are “freely given or naturally shed,” and have added a sentence to ensure if human remains are present in an admixture, they are treated as human remains. This would include human remains that are comingled with faunal remains or soil samples. However, other purposefully buried remains that do not include human remains are not included in the definition of human remains. Other kinds of burials and 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 would be considered sacred objects.

*(2) Human remains incorporated*

**COMMENT:** We received several comments requesting restoration of the existing language in the regulations that limit an assessment of objects that incorporate human remains only “[f]or purposes of determining cultural affiliation.” Some comments requested additional language or revised language to better address Indian Tribe and NHO understandings of human remains. One comment expressed concerns that the draft text negates the importance of some Native American cultural practices by identifying objects or items that incorporate human remains as human remains. For example, a flute made from a human bone that is not a funerary object, a sacred object, or an object of cultural patrimony may not have been considered human remains by the person, people, or culture that created it. In fact, in creating the flute, the human remains may have been intentionally transformed. The person, people, or culture that created the flute also placed great religious significance on the intentional burial of human remains and would not have considered the flute to have that significance. The comment suggested the

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draft text definition of human remains “in essence is a continual erasure, extermination, of tribal and Native Hawaiian culture. In implementing this definition, the U.S. government continues to colonize and appropriate the indigenous cultures of the United States to its benefit.”

**RESPONSE:** We have retained the draft text on the two ways human remains may be incorporated into an object or item without restoring the limiting language of the existing regulations based on cultural affiliation. For purposes of this definition, Congress clearly intended that human remains of any ancestry should be treated with respect, and therefore, through consultation, any Native American human remains must be made available to be requested for repatriation. For example, a scalp shirt with human remains that is not identified through consultation to be a funerary object, a sacred object, or an object of cultural patrimony would be considered human remains and subject to the inventory and repatriation requirements. Human remains that are incorporated into a funerary object, sacred object, or object of cultural patrimony would not be treated as human remains, but as the cultural item and subject to the summary and repatriation requirements.

We agree with the comment noting that in the past the U.S. government directed policies and actions for the erasure and extermination of Native peoples and cultures. On the other hand, we also acknowledge that the Act and these regulations are intended as a means to undo some part of the colonization and appropriation of Native American cultures that has historically benefitted museums and Federal agencies that hold human remains and cultural items. By including a broad scope of Native American human remains in a holding or collection under the obligations of the Act and these regulations, we aim to assist in restoring the rights of Indian Tribes and NHOs and to ensure their rights to request repatriation of any human remains. If, based on consultation, Indian Tribes or NHOs do not want to request those human remains incorporated into objects or items because of cultural practices or knowledge, they are not obligated to do so. However, Congressional intent makes clear that museums and Federal agencies are obligated to identify and consult on all Native American human remains. We disagree that an assessment by a museum or Federal agency under NAGPRA for purposes of repatriation could change the identity or understanding of an object by Indian Tribes or NHOs. While these definitions may never perfectly capture the cultural practices and beliefs of every Indian Tribe and NHO, they are still intended to instruct museums and Federal agencies to broadly make available for repatriation as many parts of a collection as possible.

*Indian Tribe*

**COMMENT:** We received 20 comments on the definition of “Indian Tribe.” Multiple comments stated that non-federally recognized Indian groups, especially State-recognized tribes, are eligible for certain “special programs and services provided by the United States to Indians because of their status as Indians,” even though they are not included on the list prepared by the BIA under the Federally Recognized Indian Tribe List Act of 1994 (List Act) (25 U.S.C. § 5131). These comments requested that the reference to the List Act in the proposed definition of “Indian Tribe” should be deleted. On the other hand, some comments supported the use of the List Act, stating that Congress intended NAGPRA to apply only to federally recognized Indian Tribes and NHOs. Other comments noted the provisions in both the current and draft regulations that allow for repatriation or disposition to non-federally recognized Indian groups, and requested a definition or standard for such groups to meet.

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

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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 tribes 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. 36,815 (1990)). 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.

Non-federally recognized Indian groups, including State-recognized tribes, are not completely excluded from the NAGPRA process, however. As is the current practice, they can work with federally recognized Indian Tribes on a claim or a request as part of a joint claim or joint request. The Department does not have a definition for non-federally recognized Indian groups, but understands from comments that the State of California may be engaged in such an effort. We look forward to the results of this effort for further consideration in these regulations.

*Inventory*

**COMMENT:** We received a few comments supporting and applauding the revised definition of inventory.

**RESPONSE:** This paragraph is included in the proposed revisions.

*Lineal descendant*

**COMMENT:** We received 16 comments on the definition of “lineal descendant.” All the comments recommended that the word “admixture” in the phrase “admixture of human remains and associated funerary objects” be replaced by the word “comingled.”

**RESPONSE:** We agree that the word “comingled” eliminates any ambiguity, and we have made the recommended change.

*Museum*

**COMMENT:** We received two comments on the definition of “museum.” One comment requested we include specific language on private and non-profit museums. Another comment requested the Smithsonian Institution not be excluded from NAGPRA.

**RESPONSE:** We cannot make the changes requested in either comment. The definition of “museum” in the Act limits the definition for these regulations to institutions or state or local government agencies that receive federal funds. The Act expressly excludes the Smithsonian Institution, which is subject to separate repatriation laws. For related comments, see also comments and responses on the definition for “receives Federal funds.”

*Native American*



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**COMMENT:** We received 41 comments on the definition for “Native American.” Most of the comments appreciated the clarification of the statutory definition, but raised concerns about including an Indian group that is not federally recognized in the definition of “tribe.” Other comments requested removal of the reference to genetic information. Several comments only raised grammatical concerns.

**RESPONSE:** We agree that Congress only refers to federally recognized Indian Tribes in the Act (as noted above for the definition of “Indian Tribe”), so we have removed the reference to other, non-federally recognized Indian groups in defining “Tribe.” This change also addresses the grammatical concerns. Any pre-contact Indian group (or an Indian Tribe before its recognition) that is relevant for a determination of whether human remains or cultural items are Native American would be included in this definition as a “people” or a “culture.” Native Hawaiians are included in this definition as a “people,” to clarify an ambiguity left by Congress. We have removed the draft text reference to genetic information.

*Native American traditional knowledge – New*

**COMMENT:** We received several comments on incorporating “Native American traditional knowledge” or a similar definition for use in defining consultation as well as application in the regulatory text.

**RESPONSE:** We have adopted one suggested definition in the proposed revisions and welcome additional input on both the content of the definition and its application.

*Native Hawaiian organization*

**COMMENT:** We received five comments on the definition for “Native Hawaiian organization.” One comment suggested that by including NHOs registered with the Department as entities to be consulted on NAGPRA actions, the revised language would exclude unregistered NHOs. Instead, the comment poses that the definition states it “shall include, but is not be[sic] limited to, the Office of Hawaiian Affairs.”

**RESPONSE:** The Department seeks to be respectful of the sovereignty of the Native Hawaiian Community and their right to self-determination. As such, it is the policy of the Department not to require all NHOs to register with the Department and to encourage agencies to reach out to NHOs beyond those registered with the Department that are likely to have an interest in the project being undertaken. Consistent with this policy, the proposed revisions do not exclude unlisted NHOs but rather states that the definition of NHOs “includes but is not limited to” listed NHOs and the State of Hawai‘i Office of Hawaiian Affairs. NHOs must have a means to ensure Federal agencies are able to identify, contact, and consult with them on issues involving Native Hawaiian rights, resources, or lands. It is, in part, for this purpose that the Department developed the Native Hawaiian Organization (NHO) List and the Homestead and Beneficiary Associations (HBA) List. Registration on these lists require that the NHOs certify that they meet the definition of an NHO provided in the Act. We infer that a HBA meets the third requirement in the definition of an NHO under NAGPRA - “have expertise in Native Hawaiian affairs” - due to their engagement under the Hawaiian Homes Commission Act and within their membership and communities, and require HBAs provide an affirmative statement signed by their governing body that they want to receive notices from the Federal government and be placed on the list(s). These registrations must also be renewed by the NHO at least every five years and an NHO may request to add or remove their organization from the list(s) at any time.

Concealing the means for NHOs to identify themselves to be consulted about NAGPRA and other actions could be seen as an attempt to make the NHO and HBA lists exclusionary and curb the sovereignty of the Native Hawaiian Community. The former Executive Director for the now dissolved Hui Malama I Na Kupuna O Hawai‘i Nei, listed as an NHO in the Act and the existing regulations, commented about the reason for their dissolution: “[O]ur Kumu [teacher] did not view us as the solution, but the means to reawaken our people to their own humanity and their own of caring for iwi kupuna and

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that she was satisfied that has happened, and the fact that there are so many NHOs involved now in NAGPRA, it's proof positive that has happened. So I'm glad that definition is being changed." The fact that we have NHOs continuing to register to be consulted is evidence of that change. To emphasize the importance of the familial or kinship relationship to the earlier group connected to the human remains or cultural items in establishing a priority order for dispositions or competing requests for repatriation, we have included in the proposed revisions a definition of 'ohana and will include 'ohana in the definition of NHO to clarify that an 'ohana can be an NHO.

*Object of cultural patrimony*

**COMMENT:** We received 26 comments on the definition of an object of cultural patrimony. Many comments requested revisions to require consultation and include the authority of Indian Tribes and NHOs in the definition. Some comments requested revisions to the word "object" or "patrimony" or for an expansion of the definition to include intangible cultural property. One comment provided a specific example on a barrier to repatriation of objects of cultural patrimony when objects are passed down to successive stewards or caretakers but only for the benefit of the entire community.

**RESPONSE:** In response to comments, we have added to the definition of an object of cultural patrimony (and to all specific definitions of cultural items) that identification of an object of cultural patrimony is according to a lineal descendant, an Indian Tribe, or an NHO based on customs, traditions, or Native American traditional knowledge. We have also added a sentence that recognizes an individual caretaker may have responsibility for an object and may have even conferred that responsibility on someone else, but the object may still be an object of cultural patrimony. We have retained the words "object" and "patrimony" as used in the Act as well as the Act's limitation of the definition to objects of tangible, physical property. While some intangible property may be of central importance to a Native American tribe or group, the physical object itself may not meet the definition for purposes of NAGPRA. For example, a song may be of central importance to a Tribe or group, but a physical object (a tape recording of the song) created by an ethnographer may not meet the definition. Determinations on whether intangible property is also an object of cultural patrimony would depend on consultation and the available information.

*Receives Federal funds*

**COMMENT:** We received 25 comments on the definition of "receives Federal funds." Most of the comments support the revised definition. Three comments recommended changes if this definition applied to Subpart B or land ownership.

**RESPONSE:** This term does not apply to Subpart B. The term "receives Federal funds" defines one of two criteria for determining whether an institution or State or local government agency (including an institution of higher learning) is a "museum" under the Act and these regulations. Thus, this term is not applicable to land or Subpart B. In response to comments, we have added clarifying language to the definition and explained the expanded definition in the preamble to the proposed revisions.

*Repatriation or repatriate*

**COMMENT:** We received one comment related to the definitions for "disposition" and "repatriation." The comment requested we add definitions for "disposition statement," "repatriation statement," and "notice of proposed reinterment."

**RESPONSE:** The proposed revisions do not incorporate the requested definitions as they are fully explained in the regulatory text. We welcome additional comments on the definitions of disposition and repatriation and how they are applied in the final steps of each process. We have made other revisions to

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the definition of disposition and repatriation consistent with comments received on lawful control or ownership of human remains and cultural items.

*Right of possession*

**COMMENT:** We received six comments suggesting changes to the definition of “right of possession.” Some comments said that the definition should not apply to objects of cultural patrimony or human remains because, by definition, they cannot be alienated. Other comments stated that the references in the definition to “voluntary consent” and “full knowledge and consent” must be interpreted in light of “the coercive nature” of historical conveyance of human remains and cultural items.

**RESPONSE:** The regulatory definition of “right of possession” is based closely on the definition in the Act (25 U.S.C. § 3001(13)). Congress included both objects of cultural patrimony and human remains in that definition, as well as “voluntary consent” and “full knowledge and consent.” 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). See also, *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”). We cannot therefore remove types of items from this definition or change the threshold for consent. We do, however, interpret “voluntary consent” and “full knowledge and consent” in light of the history of Indian country, and recognize that “voluntary consent” and “full knowledge and consent” does not include “consent” given under duress or as a result of bribery, blackmail, fraud, misrepresentation or duplicity on the part of the recipient. Such consent in this definition should rather have been fully free, prior, and informed consent.

*Sacred object*

**COMMENT:** We received 24 comments on the definition of a sacred object. Many comments requested revisions to require consultation and include the authority of Indian Tribes and NHOs in the definition. Some comments requested revisions or an expansion of the definition.

**RESPONSE:** In response to comments, we have added to the definition of a sacred object (and to all specific definitions of cultural items) that identification of a sacred object is according to a lineal descendant, an Indian Tribe, or an NHO based on customs, traditions, or Native American traditional knowledge. We have also clarified that a sacred object is not “used,” but may only be needed, in religious ceremonies, which could include interring the object.

*Set of human remains*

**COMMENT:** We received 34 comments on the new definition for “set of human remains.” Almost all of the comments requested we remove the term as it is overly clinical and may appear to require scientific documentation. A few comments approved of the definition as it might resolve long-standing issues over what is required for an inventory of human remains. Those comments also requested we add clarification on identifying comingled human remains. One comment suggested we use “individual” rather than “set of” to ensure the regulations recognize the personhood and humanity of human remains. Some comments suggested instead “remains of an individual of Native American ancestry” or “ancestral Native American human remains.” One comment noted, the Act does not “require documentation of each element of an individual in order to complete an Inventory. Nor, do the Regulations require that any pathologies be identified and described. That would constitute new scientific studies.”

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**RESPONSE:** We are aware of many instances where repatriation has been delayed for months, years, and even decades while museums or Federal agencies identify each set of human remains in a holding or collection. We feel this barrier to repatriation is due, in part, to a misinterpretation and misunderstanding of the existing regulations. Since 1995, the regulations have required an inventory include:

“...a description of each set of human remains or associated funerary object, including dimensions, materials, and, if appropriate, photographic documentation, and the antiquity of such human remains or associated funerary objects, if known” (§10.9(c)(3)).

And a notice must identify:

“...each particular set of human remains or each associated funerary object and the circumstances surrounding its acquisition” (§10.9(e)(2)(ii)).

The existing regulations provide no other clarification on what each set of human remains means. Both the 1993 proposed regulations and the 1995 final rule included as an appendix an example of a notice of inventory completion. Although the two examples differ, they both describe the human remains as a number of individuals, and, in 1995, prefaced by the phrase “at least.” The preamble to the 1995 final rule explained why this level of detail was required:

“The drafters feel that careful, detailed consideration of all human remains and associated funerary objects is critical to carry out the statutory requirements. Basic descriptive information is necessary to ensure accountability and that the human remains and associated funerary objects conform to the statutory definitions” (60 FR 62151-62152, December 4, 1995).

Many museums and Federal agencies have interpreted the regulations to require a detailed physical analysis to determine the minimum number of individuals represented by human remains in a holding or collection. The minimum number of individuals (also known as MNI) is a scientific method used to determine the fewest possible number of people or animals in a skeletal assemblage.

In contrast to this common practice by museums and Federal agencies, the Act only requires museums and Federal agencies to “compile an inventory” of human remains and associated funerary objects. The inventory is defined in the Act as “a simple itemized list that summarizes” the information “possessed by such museum or Federal agency.” Upon completion of an inventory, museums and Federal agencies must publish a notice “which identifies each Native American human remains...” The existing regulations reiterate the requirements of the Act and continually and repeatedly limit the requirements for an inventory and notice to available information or existing records.

In the draft text, we defined “set of human remains” to clarify the regulatory steps for an inventory. In particular, the draft text used the “number of sets of human remains” in an inventory and a notice, and required a determination be made “for each set of human remains and associated funerary objects...” We acknowledge and understand that some might find this term offensive. We are concerned that the suggested terms do not solve the problem of how to identify, as required by the Act, “each Native American human remains.” We concur with other comments and feel the current practice of establishing a minimum number of individuals constitutes a new scientific study that is not required by the Act or the regulations (although it is also not prohibited by the Act or regulations).

The statutory language of “each Native American human remains” is grammatically awkward but does require an identification, based on available information, of separate human remains in a notice of inventory completion. We agree with the suggestion to use “individual” and feel that, in conjunction with the definition of human remains, “individual” is a more appropriate term. The Department proposes that human remains means “the physical remains of the body of a Native American individual,” and that an inventory means “a simple itemized list of human remains and associated funerary objects...” We have removed the definition of “set of human remains” and have replaced it in the regulatory text with “individual human remains.” We proposed to require the “number of individual human remains and associated funerary objects” in an inventory and notice. We propose to include the following requirement in both places: “The number of individual human remains must be determined in a reasonable manner based on the available information. No additional study or analysis is required to determine the number of individual human remains. If human remains are present in a holding or collection, the number of

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individuals is at least one.” We also propose to require determinations be made “for human remains and associated funerary objects...”

*Traditional religious leader*

**COMMENT:** We received 20 comments on the definition for “traditional religious leader.” Several comments requested the addition of the phrase at the end of the definition: “as understood and defined by the Indian Tribe, NHO or Indian group or its traditional religious leadership.” A few comments requested changes to the words used in term or the definition, such as “spiritual” rather than “religious.” Two comments requested additional clarification that, for Review Committee nominations, no other official or entity (including the Secretary of the Interior, Designated Federal Officer or other Federal government representative) has the right to deny or question the traditional religious leader to “verify” that designation.

**RESPONSE:** In response to these comments, we have clarified who may recognize a person as a traditional religious leader as an Indian Tribe or NHO. We also made one change to the words in the definition (replace “duties” with “ceremonies”) but have not made any changes to the words in the term itself, as that is a term provided in the Act. With regard to the Review Committee nominations, the application of this term is explained in our response to other comments.

*Tribal lands*

**COMMENT:** We received five comments on the definition of “Tribal lands.” One comment objected to the deletion of language in the existing regulations “...including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States.” Other comments noted that they were also interested in off-reservation lands subject to treaty rights, acknowledged aboriginal land, and off-reservation sacred sites.

**RESPONSE:** The Act defines “Tribal lands” as “all lands within the exterior boundaries of any Indian reservation, [and] (B) all dependent Indian communities” 25 U.S.C. § 3001(15). We deleted the language in the existing regulations on allotments because “all land within the exterior boundaries of any Indian reservation” automatically includes allotments within those boundaries. The concern for allotments outside of formal reservations is addressed in two ways. First, we have proposed that “Federal lands” includes allotments outside reservation boundaries. Furthermore, the term “reservation” has no fixed meaning in Federal law, and must be interpreted generously to benefit the Indians. See *Bryan v. Itasca County*, 426 U.S. 373, 376 (1976) (ambiguities in statutes passed for the benefit of Indians must be resolved in favor of the Indians). In this case, that means interpreting the term “reservation” to include tribal trust lands. See, *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991) (tribal trust land “qualifies as a reservation for tribal immunity purposes.”). With respect to other off-reservation lands, Congress specifically chose to use a definition of “tribal land” based on the “Indian country” definition of 18 U.S.C. § 1151. We are not aware of any case law interpreting either of those definitions to broadly include off-reservation lands subject to treaty rights, acknowledged aboriginal land, or off-reservation sacred sites.

*Tribal lands controlled by an NHO*

**COMMENT:** We received seven written comments and several oral comments on the definitions of “Tribal lands controlled by an NHO” and “Tribal lands controlled by the DHHL.” Several comments raised concerns that including a definition of Tribal lands controlled by an NHO would diminish the authority of the Hawaiian Homes Commission (HHC) and could potentially cause consternation amongst HBAs not prepared to carry out NAGPRA responsibilities. Other comments supported defining of lands

### § 10.3 Cultural Affiliation.

controlled by an NHO but raised concerns that the definitions of those lands are not sufficiently broad and might diminish the Tribal lands in Hawai‘i upon which NAGPRA applies.

**RESPONSE:** The Act defines “Tribal lands” in Hawai‘i as “any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86–3” 25 U.S.C. § 3001(15). In the draft text, we delineated two sub-categories of the Tribal lands in Hawai‘i to effectuate Congress’ first priority placement of ownership or control of Native Hawaiian human remains and associated funerary objects not claimed by a lineal descendant, or in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony, in the “[NHO] on whose tribal lands such objects or remains were discovered” See 25 U.S.C. section 3002(a)(2)(A). Thus, Congress referenced a sub-category of Tribal lands in Hawai‘i, specifically those Tribal lands for which an NHO exercises some level of responsibility or stewardship. We looked to the Hawaiian Homes Commission Act (HHCA) for provisions under which an NHO exercises some level of stewardship of Tribal lands in Hawai‘i and identified provisions under which “organization[s] and associations owned or controlled by native Hawaiians” may exercise responsibility under a lease authorized by the HHC and issued by the DHHL, and “organizations formed and controlled by native Hawaiians” may exercise responsibility under a license authorized by the HHC and issued by the DHHL. See HHCA sections 204(a)(2), paragraph 2, and 207(c), respectively. We have removed the two definitions in the draft text and included one definition for Tribal lands of an NHO. We welcome suggestions on how to refine the definition and its application in the proposed revisions. We believe this definition and its application effectuate the existing statutory language. Agreeing to responsibility for Tribal lands is an exercise of sovereignty. Thus, the proposed revisions expressly provide that an NHO must agree in writing to exercise responsibility for implementing NAGPRA for discoveries on its Tribal lands and in the absence of such agreement, the responsibility for implementing NAGPRA continues to reside with DHHL. Furthermore, if an NHO declines to exercise its first priority ownership or control of human remains and associated funerary objects not claimed by a lineal descendant and other cultural items, the next priority is an NHO which has the closest cultural affiliation and states a claim.

The Department is mindful of the shared statutory responsibility it has with the State for Tribal lands in Hawai‘i and agrees with the State that some NHOs may not currently have the capacity to exercise all responsibilities under NAGPRA. The State, being responsible for the day-to-day administration of the Trust, retains the authority for providing leases and licenses of Tribal lands to NHOs, thus deciding which lands may be placed under the stewardship of an NHO, which NHOs may be responsible for those lands, and the terms under which the NHO may be responsible for those lands. As such, the definition of Tribal lands of an NHO, to effectuate Congress’ statutory language, does not diminish the authority of the State (including its HHC) under the HHCA, and to the extent that the statutory language may have such effect, Congress retained the authority to amend the HHCA. See HHCA section 223.

### § 10.3 Cultural Affiliation.

**COMMENT:** We received 33 comments on the proposed section on cultural affiliation. Most of these comments provide examples of how the current process for establishing cultural affiliation prevents disposition and repatriation. As noted in several comments, the vast majority of human remains listed in inventories do not identify cultural affiliation. Some of these comments requested an alternative process be developed to further simplify identification of cultural affiliation. Specifically, the relevant comment, written by AAIA but appended or directly quoted by 21 others, requested:

“...that the Secretary and the Review Committee, under its authorities pursuant to § 3006(c)(3), oversee a process by which Tribes and NHOs provide a request for repatriation of their Ancestors and associated funerary objects on the CUI inventories.... The repatriation obligation, therefore

### § 10.3 Cultural Affiliation.

must come from the Secretary, based on recommendations from the Review Committee. The Tribe would simply show a preponderance of evidence and the Ancestors and associated funerary objects would then be expeditiously repatriated.”

**RESPONSE:** The Act requires museums and Federal agencies to identify “the geographical and cultural affiliation” of Native American human remains and associated funerary objects. Under the existing regulations, repatriation is required only for human remains and objects with cultural affiliation, although a process based on geography for Indian tribes or NHOs to request “culturally unidentifiable” human remains has been in place since 2010. The draft text proposed a new, proactive requirement for repatriation of human remains and objects with geographical affiliation in place of the existing request process. We estimate that 90-95% of the human remains reported under NAGPRA have a geographical affiliation and could be available for repatriation within 3 years of a final rule. We agree with the comments that, under the Act as cited, the Review Committee is charged with making a finding related to cultural affiliation or the return of human remains and funerary objects upon the request of an affected party. In addition, the Review Committee is charged with compiling an inventory of culturally unidentifiable human remains and recommending the disposition of such remains. However, we also note that any recommendation, finding, report, or other action of the Review Committee is advisory only and not binding on any person.

Many of the comments recommending we develop a new approach have assumed that the Secretary or Review Committee may somehow bind museums and Federal agencies to their determinations, forcing them to engage in the NAGPRA process. However this authority does not exist. First, other than reviewing requests for extensions and publishing notices, the Act provides only an advisory role for the Secretary in its inventory or repatriation provisions. Moreover, the Act is clear that museums and Federal agencies should consult with Indian tribes and NHOs and make the necessary determinations to proceed to repatriation. Seizing that role from museums and Federal agencies would be inconsistent with the consultative process that Congress clearly intended. Thus, the Secretary’s role in the repatriation process is limited to an advisory capacity. Second, the NAGPRA Review Committee is similarly limited to an advisory role. Any recommendation, finding, report, or other action of the Review Committee must be advisory only and is not binding on any person. The Review Committee’s nature under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. limits its ability to bind private parties by its findings or determinations. In fact, FACA expressly states that “the function of advisory committees should be advisory only.” *Id.* at Section 2(6).

While the comments suggest a simple process where “the Tribe would simply show a preponderance of evidence and the Ancestors and associated funerary objects would then be expeditiously repatriated,” we do not see how such a process could work, given that neither the Secretary nor the Review Committee can do more than make a recommendation to a museum or Federal agency regarding repatriation. The comments suggest a process that could happen currently under the existing regulations. We considered how such a process might work to respond to comments, but we did so considering the legal limitations on the Secretary and the Review Committee. In the end, we feel a new process involving the Review Committee or the Secretary would not produce a different result than the existing regulations. In fact, it would just create more of a bureaucratic process by including the Review Committee and the Secretary and we are concerned that such a process would actually increase the burden on Indian Tribes to present information first to the Review Committee and then to the museum or Federal agency. The imposition of the Department (as both the Secretary and the Review Committee) into the repatriation process also seems paternalistic and intrusive rather than helpful or expeditious.

*Throughout this part, cultural affiliation is used to ensure*

**COMMENT:** We received 84 comments specifically related to the four proposed paragraphs in the section on cultural affiliation. Most comments focused on clarifying that one type of information was sufficient for finding cultural affiliation. Some comments requested prioritizing the list of information or

### § 10.3 Cultural Affiliation.

giving more weight to certain lines of information. Several comments suggested adopting language from the California statute on deference to traditional Native American knowledge as expert opinion. Fourteen comments requested we strike the information and criteria paragraphs entirely, citing to the language in the Act (25 U.S.C. 3005(a)(4)). Some comments requested we define “preponderance of the evidence,” “simple,” and “reasonable.” Fourteen comments requested we strike “preponderance of the evidence,” citing to the language in the Act “by a reasonable belief”(25 U.S.C. 3003(d)(2)(C)). We received many supportive comments on the addition of multiple cultural affiliations and closest cultural affiliation. Some comments questioned who would be making determinations using those paragraphs.

**RESPONSE:** In response, we adopted some of the suggested language and created a definition of Native American traditional knowledge which is identified as expert opinion. We cannot prioritize the lines of information as requested by some of the comments. Congress did not prioritize the lines of information. We have changed the order of the information from the original list in the Act to list the types of information alphabetically. We feel this change aligns with Congressional intent that “a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed.” H.Rep. 101-477 (Oct. 15, 1990), at 14. Similarly, we cannot assign relative weights to the various types of information. While we understand the comments requesting we strike the types of information entirely, we believe it is necessary to give guidance to museums and Federal agencies on how to establish affiliation and to identify cultural and geographical affiliation. We agree with one comment that noted: “Balancing these sources should bring equity into the affiliation process where institutions previously have privileged non-Native sources of information. Our hope is that the affiliation process in consultation will be collaborative with the ultimate goal of repatriation.” In response to consultation with Indian Tribes and NHOs, the Department emphasizes that “a preponderance of the evidence” is a similar standard to a “reasonableness” requirement, both of which are common legal concepts. In both standards, a “more likely than not” assessment is required, such that the reasonableness requirement for tracing cultural affiliation is satisfied by a preponderance of the evidence establishing cultural affiliation. Congressional report language states cultural affiliation “shall be established by a simple preponderance of the evidence,” and we agree with several comments that the addition of simple is helpful. We do not define these common legal terms in these regulations, but we have provided additional guidance on applying the criteria in the regulatory text. We have slightly revised the paragraphs on multiple affiliations and closest affiliation in the proposed revisions. As noted in the draft text and retained in the proposed revisions, a museum or Federal agency may receive competing claims for disposition or competing requests for repatriation of human remains or a cultural item. A museum or Federal agency may be required to determine the Indian Tribe or NHO with the closest affiliation under paragraph (d) of this section.

*(2) The closest culturally affiliated Native Hawaiian organization, in the following order, is:*

**COMMENT:** We received several comments specific to affiliation in Hawai‘i. One comment suggested that by focusing repatriation of human remains or cultural items on NHOs of a specific ahupua‘a, we ignore the fact that the interests of a Native Hawaiian or NHO may extend beyond the ahupua‘a in which the Native Hawaiian or NHO resides at the time of their claim. The same comment also raised the concern that an individual whose human remains and associated funerary objects may be discovered upon certain lands may have had a transient relationship to such lands. Other comments expressed concern that when establishing a priority order for competing claims for dispositions or repatriation, those NHOs with family connections to the cultural items should be first in line behind lineal descendants.

**RESPONSE:** No priority is given to an NHO or its members who reside in the ahupua‘a where the cultural items were removed. Instead, priority is based upon whether an NHO claims affiliation with the earlier occupants of the ahupua‘a. For example, an NHO that resides in the ahupua‘a of Niu who claims affiliation only to the earlier occupants of the Wailupe ahupua‘a where the cultural item was removed, and not to the earlier occupants of any other ahupua‘a would only stand in priority behind lineal



## Subpart B—FEDERAL OR TRIBAL LANDS AFTER NOVEMBER 16, 1990

descendants and an NHO with a familial or kinship relationship to the earlier group connected to the cultural item. To emphasize the importance of the familial or kinship relationship to the earlier group connected to the cultural items in establishing a priority order for dispositions or competing requests for repatriation, we have included in the proposed revisions a definition of ‘ohana and will include ‘ohana in the definition of NHO to clarify that an ‘ohana can be an NHO.

## Subpart B—FEDERAL OR TRIBAL LANDS AFTER NOVEMBER 16, 1990

**COMMENT:** We received 21 comments on the title of Subpart B. One comment requested we retain the current regulation title. Most comments requested we change the title to clarify the purpose of this Subpart and title it “Graves Protection.”

**RESPONSE:** The existing regulations read “Subpart B – Human remains, funerary objects, sacred objects, or objects of cultural patrimony from Federal or Tribal lands.” The draft text reads “Subpart B – Federal or Tribal lands after November 16, 1990.” In the Act, this section is titled “Ownership.” We agree that the main purpose of this section is to ensure, to the maximum extent feasible, the protection of human remains and cultural items on Federal or Tribal lands. We have revised the title, but referred to human remains and cultural items rather than graves as the object of protection.

### *Boarding School Initiative*

**COMMENT:** We received 18 comments on how the NAGPRA process on Federal or Tribal lands might assist Indian Tribes in recovering Native American children who died and were buried at Indian boarding schools. Some comments asserted that the intentional excavation provisions of NAGPRA (25 U.S.C. § 3002(c)) could be used to authorize the disinterment of Native children from these cemeteries on Federal or Tribal lands, and suggested that, for this purpose, the Department expand the statutory definition of “Federal lands” in the regulations to include any former Indian boarding school where any amount of federal funding, government certifications, or permissions were granted, regardless of the current ownership of land.

**RESPONSE:** As discussed in the Secretarial Memorandum establishing the Federal Indian Boarding School Initiative, the Department is committed to “address[ing] the intergenerational impact of Indian Boarding Schools to shed light on the traumas of the past.” The Memorandum identifies the NAGPRA process as a possible method for repatriation of some Native American children. While NAGPRA does not require a Federal agency to engage in an intentional excavation of possible burial sites, (*Geronimo v. Obama*, 725 F. Supp. 2d 182, 187, n. 4 (D.D.C. 2010)), we agree with the comments that the intentional excavation provisions of NAGPRA apply to the human remains and cultural items disinterred from cemeteries on Federal or Tribal lands. Congress did not make any distinction in the Act between excavations from cemeteries and excavations from other burial sites on Federal or Tribal lands. In fact, the definition of “burial site” in the Act (25 U.S.C. § 3001(1)) explicitly refers to both a “natural or prepared physical location.” Furthermore, we agree with some comments that the excavation provisions of NAGPRA do not conflict with the opinion of the United States Court of Appeals for the Third Circuit in *Thorpe v. Borough of Thorpe*, 770 F.3d 255 (3d Cir. 2014), where the Court ruled that the repatriation provisions of NAGPRA (25 U.S.C. § 3005) did not apply to a proposed disinterment and repatriation of human remains. The human remains at issue in that case, while Native American, were not located on Federal or Tribal lands, so the excavation provisions were not at issue, and were therefore not addressed by the Court of Appeals. Thus, on Federal or Tribal lands, any excavation must comply with the Act, including the requirements for consultation with (or consent from) the appropriate Indian Tribe or NHO [25 U.S.C. § 3002(c)] and the order of priority for disposition of human remains [25 U.S.C. § 3002(a)].

Unfortunately, the Department cannot amend the regulatory definition of “Federal lands” as the comments requested. Congress specifically and explicitly defined Federal lands based on ownership or

## § 10.4 General.

control, 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). See also, *United Keetoowah Band of Cherokee Indians of Okla. v. United States HUD*, 567 F.3d 1235, 1243 (10th Cir. 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”). The Department does, however, encourage the custodians of records from boarding schools, whether on Federal or Tribal lands or not, and the current owners of those boarding schools and cemeteries, to fully consult with Indian Tribes and NHOs on identification, disinterment, and repatriation of Native American children. The Department stands ready to assist Indian Tribes and NHOs in that process to the fullest extent of its authority.

### § 10.4 General.

**COMMENT:** We received several comments objecting to the statement in the draft that the regulations would not apply on Tribal lands if the action would result in a taking of property contrary to the Fifth Amendment to the United States Constitution.

**RESPONSE:** While the only mention of the Fifth Amendment reference in the Act is in the definition of “right of possession,” there are letters in committee reports from the Department of Justice opining that the provisions of Section 3, as drafted, might violate the Fifth Amendment. In the existing regulations, the Department based this statement on those letters. Those letters, as noted, were on a draft text in 1990, and stated that the problem could be rectified if Congress made the provision of Section 3 prospective only. The enacted statute did just that, so the Department has proposed to delete the reference to the Fifth Amendment in this language.

#### *(b) Comprehensive agreement*

**COMMENT:** We received 66 comments on comprehensive agreements and plans of action. The majority of comments requested plans of action be reinstated in the proposed revision. Many comments remarked on the utility of a plan of action in responding to discoveries or excavations and promoting consultation and coordination between land managers and Indian Tribes. A few comments requested changes to provide for immediate reburial of human remains or cultural items without any procedural requirements that might delay a reburial. Many comments requested a comprehensive agreement be consented to by requesting parties as well as signed by the Federal agency or DHHL. Several comments requested comprehensive agreements be required for all land managing agencies. A few comments requested tribal preference be incorporated into both the plan of action and comprehensive agreements.

**RESPONSE:** In response, we have reinstated the plan of action but moved it from the middle of the subpart to the beginning. In the existing regulations, §10.5(e) requires Federal agency officials to prepare, approve, and sign a written plan of action after a discovery or before a planned activity that is likely to result in the excavation of human remains or cultural items. The Department proposes to move this requirement to the beginning of the subpart, and provide the requirements, in three separate steps, for consultation and developing a plan of action before a planned activity that might result in a discovery of human remains or cultural items. The Department proposes to remove the current requirements for a plan of action to describe the kinds of objects considered to be cultural items, the specific information used to determine disposition, the archeological recording or analysis planned, and the nature of reports to be prepared.

## § 10.5 Discovery.

### *(c) Coordination with other laws*

**COMMENT:** We received three comments on the coordination with other laws. Two comments recommended renaming this section “Consultation and Coordination with Indian Tribes, Native Hawaiian organizations, or DHHL.” One comment recommended referencing Tribal cultural resource law and Tribal inadvertent discovery plans.

**RESPONSE:** This paragraph addresses Federal agency coordination of its responsibilities under these regulations with its responsibilities under other relevant Federal laws. These other Federal laws do not include Tribal law and plans. Consultation is covered elsewhere. We are amending the title of this section to specify that it addresses Federal agency coordination of its responsibilities under other relevant Federal laws.

### *(d) Appropriate official*

**COMMENT:** We received two comments requesting we expand the scope of “appropriate official” beyond its current use in Subpart B. One comment suggested that NHOs, specifically HBAs, should be responsible for all Tribal lands in Hawai‘i.

**RESPONSE:** Each proposed section under Subpart B employs “appropriate official” to denote the person or persons responsible for completing the regulatory requirements related to discovery, excavation, and disposition. We appreciate the suggestion to create a similar requirement in Subpart C, and in response we have proposed a similar concept in the revision.

Regarding changes to Tribal land in Hawai‘i, this suggestion has some merit, but it overlooks the possibility of competing claims that frequently arise between and among NHOs as well as the role and responsibility of the State as a trustee of the Hawaiian Home Lands Trust. Congress identified a specific circumstance under which an NHO, and not the State, had primacy of responsibility for the Act. However, the State’s primacy of responsibility, specifically acting as the appropriate official is distinct from any claim of ownership or control of Native Hawaiian human remains or cultural items. That rests with the lineal descendants and NHOs. The term appropriate official is used to clearly and explicitly provide that DHHL is responsible for human remains and cultural items discovered on or excavated from Tribal lands in Hawai‘i. As shown in the proposed revisions, the appropriate official for Tribal lands in Hawai‘i is DHHL. An NHO must consent in writing to be responsible for discoveries or excavations on its Tribal lands. Otherwise, the DHHL official is the appropriate official on Tribal lands in Hawai‘i.

## § 10.5 Discovery.

**COMMENT:** We received more than 100 comments on this section of the draft text. Most of the comments were directed at two issues – 1) the lack of a requirement for notification or consultation with Indian Tribes or NHOs when a discovery occurs, as the existing regulations at §10.4 require, and 2) the increased timelines for action by the appropriate official after a discovery. The comments recommend that the requirements of the existing regulations at §10.4 be reinstated, specifically immediate telephone notification and written confirmation by the person who makes the discovery. Some comments referred to the importance of a plan of action in responding to a discovery. Many comments expressed concern over the draft text paragraph on evaluating the potential for an excavation.

**RESPONSE:** The existing regulations at §10.4 require a significant amount of procedure within three working days of a discovery (certify, secure and protect, notify, initiate consultation, excavate, and ensure disposition), but do not require documentation of those procedures. While we appreciate the desire for quick notification and consultation, we do not feel three working days is sufficient time for meaningful consultation or consideration of the preferences of consulting parties. We do see a great value in requiring a plan of action following a discovery, to ensure consultation occurs and appropriate steps are taken to

## § 10.5 Discovery.

secure and protect the discovery. We have incorporated the relevant requirements in the existing regulations at §10.5, together with additional requirements, into a new proposed paragraph that requires Federal agencies and DHHL to complete a plan of action in consultation with appropriate Indian Tribes and NHOs. A plan of action is required before a planned activity that might result in a discovery or after a discovery. To ensure adequate time for consultation, a plan of action must be completed within 33 days of a discovery. Once the plan of action is signed, the appropriate official must certify the activity may resume but can also provide an additional 30 days to allow for securing, protecting, monitoring, or excavation of the discovery.

### *Table 1 to §10.5: Report a discovery of cultural items on Federal or Tribal lands*

**COMMENT:** We received 23 comments on this table. Most of the comments questioned the inclusion of an “Alaska Native Corporation or group” for Federal lands in Alaska that have been selected but not yet conveyed. These same comments identified that some Federal lands in Alaska selected but not yet conveyed may not be under the management authority of the Bureau of Land Management. Many fewer comments identified a concern in the table and suggested a significant change. These comments requested the addition of Indian Tribes and NHOs as a point of contact for Federal lands.

**RESPONSE:** We have revised the table to clearly use the exact language from the Act that refers to “Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 160 et seq]” (25 U.S.C. 3002(d)(1)). We have made the requested change to the Federal land managing agency in this case. While the Act does not require reporting a discovery to anyone other than the Federal agency with primary management authority on Federal lands, we appreciate the comments to add an additional point of contact. We have added Indian Tribes and NHOs, with the caveat “if known.” In some instances, the person making a discovery might have no way of knowing the appropriate Indian Tribe or NHO to notify. However, in those cases where that information is readily available, the person should report to those Indian Tribes or NHOs. For example, a discovery in a National Park unit by a visitor should be reported to both the Federal staff at the National Park unit, but also the relevant Indian Tribe or NHO that is likely identified in interpretive materials within the National Park.

### *Where the discovery is on...*

**COMMENT:** We received one comment suggesting that NHOs, specifically HBAs, should lead NAGPRA related activities on all Tribal lands in Hawai‘i.

**RESPONSE:** While this suggestion has merit in that it would directly place control of Native Hawaiian human remains and NAGPRA cultural objects from Tribal lands in Hawai‘i with members of the Native Hawaiian Community who have cultural affiliation, it overlooks the competing claims that frequently arise between and among NHOs as well as the role and responsibility of the State as a trustee of the Hawaiian Home Lands Trust. Congress identified a specific circumstance under which they provide an NHO, and not the State, primacy of responsibility for the administration of NAGPRA. However, the State’s primacy of responsibility for the administration of NAGPRA, specifically acting as the appropriate official is distinct from any claim of ownership or control of Native Hawaiian human remains or cultural items. That rests with the lineal descendants and NHOs. The term appropriate official is used to clearly and explicitly provide that the State DHHL is responsible for implementing NAGPRA in relation to Native Hawaiian human remains and cultural items discovered on, excavated from, or removed from Tribal lands in Hawai‘i. As shown in the draft, the appropriate official for Tribal lands in Hawai‘i is either the appropriate NHO or State DHHL. An NHO must agree in writing to be responsible for discoveries or excavations on its Tribal lands. Otherwise, the State DHHL official is the appropriate official on Tribal lands in Hawai‘i.

## § 10.6 Excavation.

The Tribal lands in Hawai‘i upon which NAGPRA applies remains the same as provided in the Act. In the draft text, we proposed definitions delineating two sub-categories of the Tribal lands in Hawai‘i to effectuate Congress’ first priority placement of ownership or control of Native Hawaiian human remains and associated funerary objects not claimed by a lineal descendant, unassociated funerary objects, sacred objects, and objects of cultural patrimony in the “[NHO] on whose tribal lands such objects or remains were discovered.” See 25 U.S.C. section 3002(a)(2)(A). Thus, while Congress defined tribal lands in Hawai‘i as “any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3”, Congress also referenced a sub-category of tribal lands, specifically those tribal lands for which an NHO exercises some level of responsibility or stewardship. The Department looked to the Hawaiian Homes Commission Act (HHCA) for provisions under which an NHO exercises some level of responsibility for the Tribal lands in Hawai‘i. The Department identified provisions under which “organization[s] and associations owned or controlled by native Hawaiians” may exercise responsibility under a lease authorized by the HHC and issued by the DHHL and “organizations formed and controlled by native Hawaiians” may exercise responsibility under a license authorized by the HHC and issued by the DHHL. See HHCA sections 204(a)(2), paragraph 2, and 207(c), respectively. Thus, the Department gave those provisions significant consideration in removing the two definitions in the draft text and including one definition for Tribal lands of an NHO and welcomes suggestions to refine them. Removal of a definition delineating the sub-category of Tribal lands of an NHO, as requested by the State, would not effectuate the existing statutory language which can be amended only by Congress.

Agreeing to responsibility is an exercise of sovereignty. Thus, the proposed revisions expressly provide that an NHO must agree in writing to be responsible for implementing NAGPRA for discoveries on its Tribal lands and in the absence of such agreement, the responsibility for implementing NAGPRA continues to reside with DHHL. Furthermore, if an NHO declines to exercise its first priority ownership or control of human remains and associated funerary objects not claimed by a lineal descendant and other cultural items, the next priority is an NHO which has the closest cultural affiliation and states a claim.

The Department is mindful of the shared statutory responsibility it has with the State for Tribal lands in Hawai‘i and agrees with the State that some NHOs may not currently have the capacity to exercise all responsibilities under NAGPRA. The State, being responsible for the day-to-day administration of the Trust, retains the authority for providing leases and licenses of Tribal lands to NHOs, thus deciding which lands may be placed under the stewardship of an NHO, which NHOs may be responsible for those lands, and the terms under which the NHO may be responsible for those lands. As such, the definition of Tribal lands of an NHO, to effectuate Congress’ statutory language, does not diminish the authority of the State (including its HHC) under the HHCA, and to the extent that the statutory language may have such effect, Congress retained the authority to amend the HHCA. See HHCA section 223.

## § 10.6 Excavation.

**COMMENT:** We received several comments concerned with this provision of the draft text stating that an excavation on Federal or Tribal land only requires a permit under the Archaeological Resources Protection Act (ARPA) (16 U.S.C. § 470cc) if it would occur on “Indian land” or “public land” under ARPA (referred to as “ARPA Indian lands” and “ARPA public lands” in the draft text), subject to the exemptions in the ARPA Uniform Regulations. Comments were worried that this would narrow the application of NAGPRA, since the land area subject to ARPA’s definitions is narrower than “Tribal land” and “Federal land” under NAGPRA. Comments also asserted that “Congress clearly directs that the provisions of ARPA must be interpreted from 1990 onward to apply to all Federal and Indian lands in a manner consistent with NAGPRA.”

**RESPONSE:** NAGPRA 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

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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. 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. Rep. 101-473 (Sept. 26, 1990), 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.” Similar to 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 tribal land if proof exists that a permit has been acquired under Section 4 of the [ARPA].” H. Rep. 101-877 (Oct. 15, 1990), at 15 and 17. Thus, the provisions of ARPA, including the scope of public and Indian land, are not affected by NAGPRA. This is reflected in the draft text 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.

*When an excavation of cultural items from Federal or Tribal lands may be needed,*

**COMMENT:** We received 11 comments on this section of the draft text. Most of the comments were directed at two issues – 1) the requirements for consultation with Indian Tribes or NHOs, and 2) the timelines and process for action by the appropriate official to authorize an excavation. Some comments referred to the importance of a plan of action in authorizing an excavation.

**RESPONSE:** We see a great value in requiring a plan of action prior to authorizing an excavation, to ensure consultation occurs and appropriate steps are taken to secure and protect any human remains or cultural items. We have incorporated the relevant requirements in the existing regulations at §10.5, together with additional requirements, into a new proposed paragraph that requires Federal agencies and DHHL to complete a plan of action in consultation with appropriate Indian Tribes and NHOs. A plan of action is required before a planned activity, including an excavation, that might result in a discovery.

*(a) On Tribal lands*

**COMMENT:** We received one comment requesting we remove the provision for Tribal lands controlled by an NHO.

**RESPONSE:** Accepting or declining responsibility is an exercise of sovereignty. Thus, the proposed revisions expressly provide that an NHO must consent in writing to accept responsibility for implementing NAGPRA for discoveries on its tribal lands and in the absence of such consent, the responsibility for implementing NAGPRA continues to reside with DHHL. Furthermore, if an NHO declines to exercise its first priority ownership or control of human remains and associated funerary objects not claimed by a lineal descendant and other NAGPRA objects, the next priority is an NHO which has the closest cultural affiliation and states a claim.

*(b) On Federal lands and on Tribal lands in Hawai‘i*

**COMMENT:** We received 17 comments on the title in this paragraph of the draft text-On Federal lands and on Tribal lands in Hawai‘i. All comments thought this paragraph only applied to lands in Hawai‘i.

**RESPONSE:** We have changed this title to be clear that this paragraph applies to all Federal lands in the United States and to Tribal lands in Hawai‘i. On Tribal lands in Alaska and the continental United States,

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Indian Tribes have responsibilities for authorizing an excavation. In Hawai‘i, however, an NHO only has those same responsibilities if it agrees to them in writing. This is because most Tribal lands in Hawai‘i are administered by the State Department of Hawaiian Home Lands (DHHL) and on Tribal lands in Hawai‘i, DHHL has similar responsibilities for authorizing excavations as a Federal agency does on Federal lands in the United States. We hope this change to the title clarifies this paragraph.

### *(1) Step 1: Initiate consultation*

**COMMENT:** We received 60 comments on the regulatory steps titled “Initiate consultation” in the draft text. In addition, we received related comments on the definition of “consultation.” Some of these comments requested changes to how the draft identified consulting parties. Several comments questioned the requirement for consulting parties to make a request to consult. Many comments requested changes to the limitation on written requests to consult being received prior to the publication of a notice. Some comments requested the definition make clear consultation is more than a procedural step and that consultation must be a meaningful, responsive, and accountable process.

**RESPONSE:** In response, we have made requested changes to the list of consulting parties. We have aligned this with the new definition for “affiliation.” We have removed additional qualifying language that was not necessary. The requirement for a consulting party to submit a written request to consult (which can include email) is necessary to provide documentation of the request and to require a museum or Federal agency to respond by a certain date. Under the existing regulations, some museums and Federal agencies have delayed responding to requests for consultation by requiring a written response from all consulting parties. Under the proposed language, the requirement is for a museum or Federal agency to respond within 14 days to any written request to consult.

### *(2) Step 2: Consult with requesting parties*

**COMMENT:** We received 60 comments on the regulatory steps titled “Consult with requesting parties” in the draft text. In addition, we received related comments on the definition of “consultation.” Some comments requested the definition make clear consultation is more than a procedural step and that consultation must be a meaningful, responsive, and accountable process.

**RESPONSE:** To further address comments received on the definition of “consultation” and to make the regulatory process for consultation more meaningful, responsive and accountable, we have added a new subparagraph to the regulatory steps titled “Consult with requesting parties.” As a part of consultation, museums and Federal agencies must make a record of consultation that explains, if applicable, why any requests or recommendations made during consultation could not be accommodated as well as why consensus or agreement on an action could not be achieved. For any determination considered during the consultation process, the consultation record must note the concurrence, disagreement, or nonresponse of the consulting parties.

### *Protections under FOIA*

**COMMENT:** We received several comments concerned about the addition of language in the draft text noting that museums and Federal agencies should protect sensitive cultural information “to the extent of applicable law.” They noted that the Freedom of Information Act (FOIA), 5 U.S.C. § 552, does not allow Federal agencies to withhold sensitive cultural information from release, and that museums may be subject to similar State laws, which may or may not allow protection of such information. One comment suggested that the Department not publish the draft text until Congress passes an amendment to FOIA to protect cultural information. Other comments suggested that the Department insert language in the regulations that would exempt sensitive cultural information from release under Exemption 3 of FOIA, 5

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U.S.C. § 552(b)(3), or would encourage Federal agencies and museums to keep such information out of their records or only keep it if necessary for decision making.

**RESPONSE:** We appreciate the concerns expressed by the comments; FOIA may not, under current case law, allow Federal agencies to protect sensitive cultural information. Under these regulations, because Indian Tribes and NHOs may provide information to represent their own interests, not those of the Federal agency, neither the government-to-government relationship between Indian Tribes and the United States nor the United States trust responsibility (where trust resources are involved) is likely to authorize withholding documents received from Indian Tribes or NHOs under FOIA Exemption 5 (deliberative process). 5 U.S.C. § 552(b)(5); *Dept. of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001). Furthermore, Exemption 4, which protects some confidential information, applies only to trade secrets and commercial or financial information. 5 U.S.C. § 552(b)(4). Exemption 3, cited by a comment, protects information specifically protected under another statute, which NAGPRA does not, and which these regulations cannot. If the information qualifies for protection under, for example, the National Historic Preservation Act (54 U.S.C. § 307103); the Archaeological Resources Protection Act (16 U.S.C. § 470hh); or the Cultural and Heritage Cooperation Authority under the 2008 Farm Bill (25 U.S.C. § 3056), it may be protected under Exemption 3. We have retained the proposed language in case a document or one or more portions thereof may be withheld by a Federal agency under a FOIA exemption (or by a museum subject to an analogous State law). The Department encourages museums and Federal agencies to take steps, when it is practicable to do so, to avoid receiving in writing and including in its records information that is identified by an Indian Tribe or NHO as culturally sensitive, so that it would not be subject to release. Further, when the submission of at least some sensitive information in writing may be necessary under these regulations, the Department encourages museums and Federal agencies to redact sensitive information or to ask the submitters of the information not to send *more* specific sensitive information than is necessary.

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**COMMENT:** We received 33 comments on the draft text which stated consultation may be required to determine the disposition. All of the comments requested that consultation be required.

**RESPONSE:** The sentence is a general statement about all disposition from Federal or Tribal lands. In some cases, consultation might be required, and in other cases it might not be required. Under the draft text of subpart B, consultation on the proposed disposition of human remains or cultural items discovered or excavated from Federal lands or Tribal lands in Hawai'i is required. The use of the word "may" in the draft text was intended to indicate that because consultation already occurred prior to an excavation, consultation may not be necessary to complete disposition. This was not intended to make consultation voluntary, but rather that it might not be necessary based on previous consultation. In the proposed revisions, we now require a plan of action, which includes consultation, for a discovery or excavation. Part of a plan of action is a plan for disposition. Therefore, we removed the language in the draft text and included consultation as a continuation of the plan of action.

*When a cultural item is removed from Federal or Tribal lands,*

**COMMENT:** We received 21 comments requesting we shorten the deadlines for disposition found in the first paragraph of this section and paragraph (d)(1) of this section.

**RESPONSE:** We agree and have adjusted the timeline to one year. In the introductory paragraph, the proposed revisions provide a one year deadline for the appropriate official to determine, to the extent possible, the lineal descendant, Indian Tribe, or NHO that has priority for disposition of the human remains or cultural items. In the proposed revisions, we provide a six month deadline for the appropriate official to inform consulting parties following a discovery or excavation of human remains or cultural items. As a result, the time frame by which certain human remains or cultural items become unclaimed



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under the draft text of paragraph (e) of this section must be shortened, too. Accordingly, human remains or cultural items will become unclaimed under paragraph (e)(1)(i)(B) of this section when, one year after discovery or excavation of human remains or cultural items, the appropriate official could not reasonably identify any lineal descendant, Indian Tribe, or NHO with priority for disposition under paragraph (a) of this section.

*(a) Priority for disposition*

**COMMENT:** We received 26 comments suggesting that we change the priority order for disposition. Comments suggested that we reverse the priority order to put cultural affiliation before Tribal lands, and to give Indian Tribes with a stronger cultural relationship preference over Indian Tribes whose adjudicated aboriginal land the excavation was on. Some comments also suggested that any Indian Tribes or NHOs affected by discoveries or excavations on acknowledged aboriginal lands, regardless of the Tribe's present location, should be included in the the priority order. Other comments suggested that we require consent for excavations on Tribal lands from aboriginal land Indian Tribes as well as Tribal land Indian Tribes.

**RESPONSE:** As the priority order follows the priority order in the Act, we have not made any changes. Under the Act, the disposition of any human remains or cultural items from Federal lands or Tribal lands after November 16, 1990 must be according to the priority provided by Congress. 25 U.S.C. 3002(a) and (d)(2). Where human remains or cultural items have been removed from the Tribal land of an Indian Tribe, unless a lineal descendant can be ascertained for human remains and associated funerary objects, disposition of all human remains and cultural items is to the Indian Tribe; the priority list ends there. Under the priority order in Section 3002(a)(2)(A), the "appropriate" Indian Tribe or NHO for an excavation on tribal land (assuming that a lineal descendant cannot be ascertained) is "the Indian tribe or NHO on whose tribal land such objects or remains were discovered." Therefore, the only consent required for an excavation or on such lands, under the plain language of the statute, is that of the Tribe or NHO whose tribal land is at issue. The Act requires that ownership or control of Native American human remains and other cultural items from excavations "shall be [to the list in Section 3002(a)] (with priority given in the order listed)." Where the cultural affiliation of human remains or cultural items removed from Federal land cannot be ascertained, the Act identifies two potential claimants next in priority, but only if the land from which the human remains or cultural items were removed is the aboriginal land of some Indian Tribe; otherwise, the human remains or cultural items are unclaimed. Congress also specifically stated that, for purposes of this section of NAGPRA, "aboriginal land" is defined as "Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims," which the draft text refers to as "adjudicated aboriginal land." 25 U.S.C. § 3002(a)(2)(C).

In other words, the Act does not explicitly make room in the priority order for circumstances where the cultural affiliation of human remains or cultural items removed from Federal land cannot be ascertained, and the land from which the human remains or cultural items were removed is the acknowledged aboriginal land of some Indian Tribe. The two identified potential claimants are the Indian Tribe from whose adjudicated aboriginal land the human remains or cultural items were removed and an Indian Tribe that demonstrates a stronger cultural relationship with the human remains or cultural items than the Indian Tribe from whose adjudicated aboriginal land the human remains or cultural items were removed. Contrary to the understanding evidenced in some of the comments, where the Indian Tribe from whose adjudicated aboriginal land the human remains or cultural items were removed and an Indian Tribe that demonstrates a stronger cultural relationship with the human remains or cultural items both claim the human remains or cultural items, disposition is to the latter claimant. 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). See also, *United Keetoowah Band of Cherokee Indians of*

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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”). Since Congress has mandated whose consent is required for an excavation on tribal land and the priority order for ownership or custody of human remains and other cultural items from tribal land and the definition of aboriginal land for those purposes, the Department cannot require another party’s consent, change the order of disposition, or adopt another definition. Since, however, under the proposed revisions, the Tribe or NHO whose Tribal land is at issue would be responsible for any consultation concerning a discovery or excavation, the Secretary encourages the Tribe or NHO to consult with any Tribe or NHO who may have acknowledged aboriginal land affected by such discovery or excavation.

*(b) Disposition of cultural items to a lineal descendant*

**COMMENT:** We received 25 comments recommending that we require the publication of a notice for the disposition of human remains and associated funerary objects to a lineal descendant, an Indian Tribe, or an NHO.

**RESPONSE:** The proposed revisions do not make this recommended change for the following reason. The Act explicitly requires acknowledgement of ownership or control of human remains or cultural items through a notice and a claim when human remains and associated funerary objects have been removed from Federal lands and no lineal descendant has been ascertained, or when unassociated funerary objects, sacred objects, or objects of cultural patrimony have been removed from Federal lands. 25 U.S.C. 3002. In the same section of the Act, this notice and claim requirement is omitted when the human remains or cultural items have a known lineal descendant or have been removed from the Tribal lands of an Indian Tribe or Tribal lands of an NHO. We understand that Congress’s omission of the notice and claim requirement in 25 U.S.C. 3002 was intentional. At the same time, nothing in the Act either limits any procedural or substantive right that may otherwise be secured to individuals or Indian Tribes or NHOs, or denies or otherwise affects access to any court. 25 U.S.C. 3009.

*(c) Disposition of cultural items from Tribal lands*

**COMMENT:** We received one comment recommending that this paragraph provide an exemption to the disposition statement requirement where human remains have been removed as a result of ground disturbing activities carried out by an Indian Tribe on trust or restricted lands located within the exterior boundaries of the Indian Tribe’s reservation. We received one comment requesting we add objects of cultural patrimony to the list of items an Indian Tribe or NHO can expressly relinquish control over.

**RESPONSE:** The proposed revisions do not include the requested exemption on Tribal lands because the statement is still appropriate even when the removal resulted from a Indian Tribe carrying out ground-disturbing activity on its own reservation land. The disposition statement is a record of decision by the appropriate official for the Indian Tribe or NHO that a lineal descendant could not be ascertained (in the case of human remains and associated funerary objects) or that the Indian Tribe has control or ownership of the human remains or cultural items. It is a simple written statement to document the Indian Tribe or NHO carried out its responsibilities under NAGPRA. We cannot add object of cultural patrimony to the list of items that can be relinquished by an Indian Tribe or NHO as it would be contradictory to the definition of an object of cultural patrimony. In the Act, Congress specifically excluded objects of cultural patrimony from the relinquishment provision. 25 USC 3002(e).

*(d) Disposition of cultural items from Federal lands or from Tribal lands controlled by DHHL*

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**COMMENT:** We received one comment stating that, when read together, the timelines in the draft text on informing an Indian Tribe or NHO with priority for disposition, submitting a notice of intended disposition, making a claim for disposition, and responding to a claim for disposition conflict with each other.

**RESPONSE:** In response, we do not detect a conflict among the timelines. As an example, six months (if not earlier) after a discovery or excavation, the appropriate official informs consulting parties on Day 1. No earlier than Day 31, the appropriate official submits a notice of intended disposition to the Manager, National NAGPRA Program. Assuming that on Day 90 the notice is published in the Federal Register, any claim for disposition that was received by the appropriate official before the publication of the notice is dated the same date as the notice (i.e., if the claim was sent between Day 31 and Day 90, it would be dated Day 90). Between Day 90 and Day 120 (30 days after notice publication), the appropriate official must consider any claim. On Day 121, the appropriate official must respond to the claim. Assuming there are no competing claims, as early as Day 121 (but no later 90 days after responding to the claim), the appropriate official must send a disposition statement to the claimant.

*(2) Step 2 – Submit a notice of intended disposition*

**COMMENT:** We received two comments recommending that paragraph (d)(2) of this section reinstate the requirement in the existing regulations that a notice of intended disposition be published in newspapers, rather than in the Federal Register.

**RESPONSE:** The proposed revisions do not require publication in newspapers. The existing regulation at §10.6(c) requires two publications of a notice in area newspapers. During earlier consultation on developing the draft text, comments stated that this requirement had become increasingly burdensome to monitor or implement. In general, changes in newspaper publication since the promulgation of the existing requirement in 1995 have decreased the effectiveness of this requirement. Consequently, the draft text has provided for a single notice to be published by the Manager, National NAGPRA Program in the Federal Register, where notices are published for holdings or collections under subpart C of these revisions.

*(i) A notice of intended disposition must conform*

**COMMENT:** We received one comment recommending a change in the draft text of this section, as well as other similar paragraphs of the draft text, to include the county and state where they were “excavated, discovered, or otherwise removed,” rather than where they “originated.” According to the comment, the use of “originated” is susceptible to ambiguity, as it could mean, in the case of an item that was historically moved in trade, where the item was made and not where it was ultimately used and later excavated, discovered, or otherwise removed.

**RESPONSE:** We have replaced "originated" with "were removed."

*(ii) The Manager, National NAGPRA Program, will:*

**COMMENT:** We received 28 comments requesting we add a deadline for the Manager, National NAGPRA Program, to publish notices of intended disposition in the Federal Register. Some comments suggested adding a deadline (14 days) for the Manager to approve for publication or return a submission. Other comments requested a deadline (30-90 days) after receipt of a notice for publication in the Federal Register.

**RESPONSE:** We appreciate the suggestion to add a deadline for publication of a notice in the Federal Register. There are many factors that go into the timeline required for publication of a notice. First and foremost, a significant amount of time is needed to revise notices when they are not submitted with the

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proper information or in the proper format. We hope that by requiring a notice to conform to the mandatory format of the Federal Register, we can reduce this timeline. For this reason, the draft text and the proposed revisions provide for the Manager, National NAGPRA Program, to either approve for publication or return a submission that does not meet the requirements. Beyond accepting or rejecting the notice for publication, other factors can delay publication. In these revisions, the Department cannot commit to publication within a specific number of days due to these factors. The Department can, however, commit to the Manager, National NAGPRA Program, approving or returning a notice within 15 days (or three weeks).

*(3) Step 3 – Receive and consider a claim for disposition*

**COMMENT:** We received one comment stating that the notice and 30-day waiting period in the draft text to allow for claims is unnecessary. One comment objected to a window of only 30 days from the date of publication of the notice of intended disposition for claims to be received.

**RESPONSE:** The notice and 30-day wait required under the existing regulations have been retained. Under the Act, the disposition of human remains or cultural items removed from Federal lands is subject to notice and a claim. 25 U.S.C. 3002(a)(2). Claims may be received at any time before publication of the notice, and such claims, as well as claims received during the 30-day window running from the date of publication of the notice, must be considered by the appropriate official. The draft text of paragraph (d)(3)(i) of this section makes clear that a claim for disposition received by the appropriate official before the publication of the notice is dated the same date as the notice. Also, a claim is not barred merely because it was submitted after the 30-day window has expired. The draft text of paragraph (d)(1)(iii) of this section, advising the potential claimant that it should submit a claim no later than 30 days after publication of the notice, has been included in order to make clear that, in circumstances where the appropriate official has received a claim that satisfies the criteria under the draft text of paragraph (d)(3)(iii) of this section, disposition could possibly occur as early as Day 31 following publication of the notice.

*(4) Step 4 – Respond to a claim for disposition*

**COMMENT:** We received two comments supporting the draft text of paragraph (d)(4) of this section, which addresses the receipt and consideration by the appropriate Federal agency or DHHL official of a claim for disposition. One comment objected to the requirement that Indian Tribes and NHOs must submit a claim for disposition.

**RESPONSE:** In response, under the Act, where a lineal descendant cannot be ascertained, the disposition of human remains and cultural items excavated or discovered and removed from Federal lands is to an Indian Tribe or NHO that “upon notice, states a claim.” 25 U.S.C. 3002(a)(2)(B) and (C). In other words, there first must be notice and then a claim. Accordingly, under the draft text of paragraph (d)(3) of this section, notice is to be provided through publication in the Federal Register, and claims are to be considered following publication of the notice.

*(5) Step 5 – Disposition of the cultural items*

**COMMENT:** We received two comments recommending that the draft text of paragraph (d)(5) of this section require the disposition of human remains or cultural items to include the physical transfer of the records of the Federal agency or DHHL that are connected to those human remains or cultural items.

**RESPONSE:** The proposed revisions do not include the requested requirement because transfer of Federal agency records that are not themselves cultural items falls outside the scope of the Act. Nothing in the Act, however, limits any procedural or substantive right that may otherwise be secured to the

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transferee lineal descendant, Indian Tribe, or NHO, which right could include any right to request and receive copies of such records.

*(e) Unclaimed cultural items from Federal lands or from Tribal lands controlled by DHHL*

**COMMENT:** We received two comments recommending that human remains or cultural items listed in a notice of intended disposition not ever be considered unclaimed when, one year after the date of publication of the notice under the draft text of paragraph (d)(2) of this section, no Indian Tribe or NHO submits a claim, and that consequently, the draft text of paragraph (d)(2)(i)(F) of this section be removed. We received 17 comments recommending that the draft text of paragraph (e) of this section, which addresses unclaimed human remains and cultural items, should only consider as “unclaimed” those human remains and cultural items that have been included in a notice of intended disposition published in the Federal Register for which a claim has not been made. According to these comments, the appropriate official is required to identify a lineal descendant or the Indian Tribe or NHO with the closest affiliation and include them in a notice. Consequently, those human remains or cultural items not included in a notice of intended disposition should not be defined as “unclaimed,” and the draft text of paragraph (e)(1)(i)(B) of this section should be deleted. We received one comment objecting to characterizing as “unclaimed” human remains and cultural items published in a notice of intended disposition that have not been claimed within one year of publication of the notice in the Federal Register, thereby empowering the appropriate official to deprive the Indian Tribe(s) or NHO(s) listed in the notice of the ability to claim the listed human remains or cultural items.

**RESPONSE:** The proposed revisions do not incorporate the requested changes as they would be contradictory to the Act. Under the Act, the disposition of human remains and cultural items not claimed shall be in accordance with regulations promulgated by the Secretary. 25 U.S.C. 3002(b). The draft text of paragraphs address this circumstance. The Act foresaw that cultural affiliation might not be ascertained and provided for affiliation based on an adjudicated aboriginal land provenience. 25 U.S.C. 3002(a)(2)(C). Where cultural affiliation cannot be ascertained or where geographical affiliation based on adjudicated aboriginal land provenience does not exist, by default the human remains or cultural items are unclaimed. Until such time as unclaimed human remains or cultural items are transferred or reinterred under the draft text of paragraph (e) of this section, upon receipt of a claim that meets the criteria under the draft text, disposition of the human remains or cultural items would be to the claimant.

*(1) Step 1 – Submit a list of unclaimed cultural items*

**COMMENT:** We received one comment inquiring about the date by which the list of unclaimed human remains and cultural items submitted by the Federal agency or DHHL must be received by the Manager, National NAGPRA Program under the draft text of paragraph (e)(1) of this section. Five additional comments requested we add a requirement for Federal agencies and DHHL to submit a summary of any Native American objects that have not been identified to date as cultural items, including what will be done with these objects, so that Tribes have the opportunity to identify these Native American objects as cultural items.

**RESPONSE:** In response, following an initial deadline for submitting the list (no later than 395 days after the date of publication of the final rule), the Federal agency or DHHL would have to submit updates to its list by December 31 of each year. Under the draft text, written documents are deemed timely based on the date sent, not the date received. We cannot require a Federal agency or DHHL take any action on Native American objects that do not meet the definitions under the Act for human remains or cultural items. During consultation, Indian Tribes and NHOs have an opportunity to identify items that are or are likely to be cultural items. If Native American objects are removed from Federal lands or Tribal lands in Hawai‘i but they do not meet the definition of a cultural item, neither the Act nor these revisions would apply.

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*(2) Step 2 – Agree to transfer or decide to reinter a cultural item*

**COMMENT:** We received one comment objecting to allowing for the transfer of unclaimed human remains and associated funerary objects to a non-federally recognized Indian group that has a relationship to the human remains and associated funerary objects, while 14 comments recommended also allowing for the transfer of unclaimed unassociated funerary objects, sacred objects, and objects of cultural patrimony to a non-federally recognized Indian group that has a relationship to these cultural items.

**RESPONSE:** In response, the Act reflects the unique relationship between the Federal Government and Indian Tribes and NHOs, and should not be construed to establish a precedent with respect to any other individual, organization, or foreign government. 25 U.S.C. 3010. Consequently, neither the Act nor these revisions confer rights on non-federally recognized Indian groups to claim human remains or cultural items that have been removed from Federal lands or Tribal lands in Hawai'i. The draft text of paragraph (e) of this section recognizes that a non-federally recognized Indian group may have a relationship to unclaimed human remains and associated funerary objects, and it is narrowly tailored to allow a non-federally recognized Indian group to request and, at the discretion of the appropriate Federal agency or DHHL official, receive unclaimed human remains and associated funerary objects, but only if the group has a relationship to the human remains and associated funerary objects, and only if no lineal descendant or Indian Tribe or NHO having a priority of claim under the draft text of paragraph (a)(3) or (a)(4) of this section makes a claim prior to the transfer of the human remains and associated funerary objects to the non-federally recognized Indian group.

*(ii) The Manager, National NAGPRA Program, will:*

**COMMENT:** We received 28 comments requesting we add a deadline for the Manager, National NAGPRA Program, to publish notices of intended disposition in the Federal Register. Some comments suggested adding a deadline (14 days) for the Manager to approve for publication or return a submission. Other comments requested a deadline (30-90 days) after receipt of a notice for publication in the Federal Register.

**RESPONSE:** We appreciate the suggestion to add a deadline for publication of a notice in the Federal Register. There are many factors that go into the timeline required for publication of a notice. First and foremost, a significant amount of time is needed to revise notices when they are not submitted with the proper information or in the proper format. We hope that by requiring a notice to conform to the mandatory format of the Federal Register, we can reduce this timeline. For this reason, the draft text and the proposed revisions provide for the Manager, National NAGPRA Program, to either approve for publication or return a submission that does not meet the requirements. Beyond accepting or rejecting the notice for publication, other factors can delay publication. In these revisions, the Department cannot commit to publication within a specific number of days to these factors. The Department can, however, commit to the Manager, National NAGPRA Program, approving or returning a notice within 15 days (or three weeks).

*(iii) After publication of a notice, if the appropriate official receives a claim for disposition*

**COMMENT:** We received two comments recommending an addition to the draft text of paragraph (e)(3)(iii) of this section, according to which the appropriate official who receives a claim for unclaimed human remains or cultural items after publication of a notice of proposed transfer or reinterment must acknowledge receipt of the claim in writing.

**RESPONSE:** We agree and have added this requirement to paragraph (e)(3)(iii).

## Subpart C—MUSEUM OR FEDERAL AGENCY HOLDINGS OR COLLECTIONS

### *Protections under FOIA*

**COMMENT:** We received several comments concerned about the addition of language in the draft text noting that museums and Federal agencies should protect sensitive cultural information “to the extent of applicable law.” They noted that the Freedom of Information Act (FOIA), 5 U.S.C. § 552, does not allow Federal agencies to withhold sensitive cultural information from release, and that museums may be subject to similar State laws, which may or may not allow protection of such information. One comment suggested that the Department not publish the draft text until Congress passes an amendment to FOIA to protect cultural information. Other comments suggested that the Department insert language in the regulations that would exempt sensitive cultural information from release under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), or would encourage Federal agencies and museums to keep such information out of their records or only keep it if necessary for decision making.

**RESPONSE:** We appreciate the concerns expressed by the comments; FOIA may not, under current case law, allow Federal agencies to protect sensitive cultural information. Under these regulations, because Indian Tribes and NHOs may provide information to represent their own interests, not those of the Federal agency, neither the government-to-government relationship between Indian Tribes and the United States nor the United States trust responsibility (where trust resources are involved) is likely to authorize withholding documents received from Indian Tribes or NHOs under FOIA Exemption 5 (deliberative process). 5 U.S.C. § 552(b)(5); *Dept. of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001). Furthermore, Exemption 4, which protects some confidential information, applies only to trade secrets and commercial or financial information. 5 U.S.C. § 552(b)(4). Exemption 3, cited by a comment, protects information specifically protected under another statute, which NAGPRA does not, and which these regulations cannot. If the information qualifies for protection under, for example, the National Historic Preservation Act (54 U.S.C. § 307103); the Archaeological Resources Protection Act (16 U.S.C. § 470hh); or the Cultural and Heritage Cooperation Authority under the 2008 Farm Bill (25 U.S.C. § 3056), it may be protected under Exemption 3. We have retained the proposed language in case a document or one or more portions thereof may be withheld by a Federal agency under a FOIA exemption (or by a museum subject to an analogous State law). The Department encourages museums and Federal agencies to take steps, when it is practicable to do so, to avoid receiving in writing and including in its records information that is identified by an Indian Tribe or NHO as culturally sensitive, so that it would not be subject to release. Further, when the submission of at least some sensitive information in writing may be necessary under these regulations, the Department encourages museums and Federal agencies to redact sensitive information or to ask the submitters of the information not to send *more* specific sensitive information than is necessary.

## Subpart C—MUSEUM OR FEDERAL AGENCY HOLDINGS OR COLLECTIONS

**COMMENT:** We received 23 comments requesting changes to Subpart C in general. We also received four comments supporting the draft text in Subpart C, particularly the timelines and deadlines. Several comments requested additional record keeping be required for summaries and inventories, including publishing summaries and inventories in the Federal Register or requiring annual reporting on efforts to consult and repatriate. Five comments requested the regulations do more to prevent over-documentation or a drawn out process for inventories and summaries that has resulted in extensive delays, often for years, just to resolve one specific site or collection.

**RESPONSE:** We appreciate these comments and agree that more record keeping is needed. While we have not required summaries and inventories to be published in the Federal Register, we have proposed that inventories must be updated and notices of inventory completion be published two and one-half years after the effective date of a final rule. This would ensure more transparency for holdings or collections of human remains and associated funerary objects. For summaries, we feel publishing in the Federal Register would be cost prohibitive and not yield increased transparency. The summaries submitted to the

## § 10.8 General.

National NAGPRA Program are often multiple copies of the same letter or long lists of the letter recipients. We do agree that more information from summaries should be available. The National NAGPRA Program can provide a copy of a summary to any tribe that requests it, but at this point we do not have sufficient data to provide detailed information beyond which tribe should have received the summary. We propose that following the updates and notices required for inventories, the National NAGPRA Program will review summaries and develop a way to share more information either on a public database or in a data-friendly format. For all of Subpart C, the proposed revisions would require museums and Federal agencies submit statements of repatriation to the National NAGPRA Program which will allow for more accountability and annual reporting on repatriation activity.

### *Subpart C—MUSEUM OR FEDERAL AGENCY HOLDINGS OR COLLECTIONS*

**COMMENT:** We received 15 comments on the title of Subpart C. All comments requested we change the title to clarify the purpose of this Subpart and title it “Repatriation.”

**RESPONSE:** The existing regulations read “Subpart C – Human remains, funerary objects, sacred objects, or objects of cultural patrimony in Museums and Federal Collections.” The draft text reads “Subpart B – Museum or Federal Agency Holdings or Collections.” In the Act, the relevant sections are titled “Inventory for human remains and associated funerary objects,” “Summary for unassociated funerary objects, sacred objects, and cultural patrimony,” and “Repatriation.” Similar comments prompted us to propose the title “Subpart B—PROTECTION OF HUMAN REMAINS AND CULTURAL ITEMS ON FEDERAL OR TRIBAL LANDS.” We agree that the main purpose of this section is repatriation. We have revised the title accordingly, but paralleled the structure of Subpart B. Furthermore, we have retitled the sections in Subpart C with Repatriation, rather than Summary or Inventory. While the first few steps of each section relate to the summary and inventory requirements, the entire section is about the steps to repatriation of human remains and cultural items.

## § 10.8 General.

**COMMENT:** We received 5 comments on this section. Two comments requested changes to the regulations that are contrary to provisions of the Act itself. One comment requested we remove the paragraph on museum liability. One comment requested we expand the second paragraph to include items removed from Federal lands after November 16, 1990. One comment requested we remove the word “reinter” from the paragraph on museum liability.

**RESPONSE:** The paragraph on museum liability is a more detailed statement based on the Act (25 USC 3005(f)), and we cannot make the requested change. Regarding items removed from Federal lands after November 16, 1990, the Act clearly requires those items be dispositioned under Subpart B, and we cannot make the requested change. We have addressed the word "reinter" in our response to the last paragraph of this section.

### *Each museum and Federal agency that has control of a holding or collection*

**COMMENT:** We received two comments requesting we add to Subpart C definitions for an “appropriate official”

**RESPONSE:** Under Subpart B, the draft text employs “appropriate official” to denote the person responsible for completing the regulatory requirements related to discovery, excavation, and disposition. We appreciate the suggestion that a similar term should apply to Subpart C. We have incorporated this suggestion in Subpart C using the term "authorized representative" to differentiate it from the "appropriate official" in Subpart B.



§ 10.8 General.

*(a) Museum holding or collection*

**COMMENT:** We received 14 comments proposing that both the transferor and recipient under a loan or repository agreement should be jointly and severally liable for compliance with NAGPRA’s inventory, summary, and repatriation obligations, which corresponded to 16 comments requesting the removal of the new term custody to focus on redefining possession. We received 16 comments noting that Federal agencies should not be permitted to use poor record keeping of loan and repository agreements to evade NAGPRA compliance. We received three comments requesting that NAGPRA’s inventory, summary, and repatriation obligations apply to museums that have physical custody of human remains or cultural items, but do not have the legal interest to constitute possession or control, as currently defined. We received 22 comments proposing we impose inventory and summary obligations on museums with physical custody of Federal agency-controlled collections to complete the inventory and summary obligations on behalf of the Federal agency.

**RESPONSE:** We do not believe that the Act intends for the joint and several liability of any parties. Congress provided no indication in the Act or its legislative history that it intended any concurrent application of the Act’s obligations on multiple parties. Imposing inventory and summary requirements on Federal agencies or museums with mere physical custody of human remains or cultural items, for example, by expanding the definition of possession or control, is inconsistent with Congress’s use of the terms in the Act’s legislative history, could raise constitutional concerns regarding notice and due process, and would create a complicated framework of liability where multiple agencies or museums are concurrently liable under separate standards for the independent decisions of others. Congress provided no indication in the Act or its legislative history that such a complex application of the Act was its intent. On the other hand, various features of the Act, including civil penalties, right of possession, and museum obligations, presume that a single museum or Federal agency will be responsible for NAGPRA compliance. For these reasons, we have not adopted this recommended change in the proposed revisions, however we note that other proposed revisions seek to address this underlying issue by directing Federal agencies and museums to share greater information and increase efforts to complete inventories, summaries, and repatriation of human remains and cultural items under loan or repository agreements to other entities. We also agree with the comments on record keeping and hope these proposed revisions will help address those concerns.

*(c) Museums with a Federal agency holding or collection*

**COMMENT:** We received 25 comments on the new provision in the draft text requiring museums with a Federal agency holding or collection to submit a statement to the Federal agency and the National NAGPRA Program.

**RESPONSE:** The proposed revisions would establish a more robust process surrounding these statements with timelines for Federal agencies to respond, make possession or control acknowledgements regarding the reported holdings or collections, and start the inventory or summary processes with their corresponding deadlines. Also in response to consultation, the proposed revisions would require museums with custody of holdings or collections for which they cannot determine possession or control to report those to National NAGPRA, which can then share the information more broadly to expedite resolution. These approaches require keeping the definition of custody to describe the museums subject to these new requirements.

*(d) Informal conflict resolution*

**COMMENT:** We received 16 comments on requesting we change the title of “informal conflict resolution” as that is not a term in the Act.

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**RESPONSE:** We agree with the comments on the role of the Review Committee in making findings or recommending resolutions for disputes, and we included this paragraph to provide guidance on how affected parties could contest actions on repatriation. Similar to the existing regulations at §10.17(a) Formal and informal resolutions, we felt it was necessary to indicate alternatives to the judicial jurisdiction paragraph and 25 U.S.C. 3013 for bringing an action in U.S. district courts. In response to these comments, we have retitled the paragraph Contesting Actions on Repatriation.

*New Paragraph on Grants*

**COMMENT:** We received 22 comments requesting we add a paragraph to this section on grants provided by the Secretary of the Interior to Indian Tribes, NHOs, and museums. The comments requested adding regulatory language to state that NAGPRA grants “may not be used for the initiation of new scientific studies of human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.”

**RESPONSE:** The Notice of Funding Opportunity for NAGPRA consultation/documentation grants provides clarification and guidance on the potential use of grant funds for scientific study or destructive analysis. Those activities are considered an allowable use of grant funds only for “Projects that clearly show all possibly interested tribes have been consulted and have given their consent to the scientific study and/or the use of destructive analysis; studies must be shown to be integral to resolving cultural affiliation for the purpose of a NAGPRA determination.” NAGPRA grants do not fund testing to determine whether human remains are Native American, nor do they fund scientific studies or destructive analysis on human remains or cultural items without prior consent of the Tribal or NHO project partners. NAGPRA grant applications may be considered incomplete and ineligible for funding if they do not contain letters of support from the project partners. We have not accepted the recommended language because the annual Notice of Funding Opportunity already provides some restrictions and is an authoritative document. In addition, any regulatory exclusion could prevent any scientific studies or other analysis that is requested by Indian tribes and NHOs, which could include testing for contaminants.

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

**COMMENT:** We received 14 comments pointing out that, while the draft text provides a process for “Indian groups” to request repatriation of human remains and funerary objects, there is no similar process for other cultural items. These comments suggested addition of such a process.

**RESPONSE:** The statutory authority for the process in the last paragraph of this section in the draft text is the same as that under which the Department promulgated the regulations for “culturally unidentifiable” human remains in 2010, which originally created a process for transfer of human remains and funerary objects to non-federally recognized Indian groups. That authority does not extend to repatriation of cultural items. Repatriation of unassociated funerary objects, objects of cultural patrimony, and sacred objects is dependent on identifying cultural affiliation of the cultural items with an Indian Tribe or Native Hawaiian organization.

*Each museum and Federal agency that has control of a holding or collection*

**COMMENT:** We received 54 comments on the provision in the draft text requiring that museums and Federal agencies prepare and submit a summary of unassociated funerary objects, sacred objects and objects of cultural patrimony in its holding or collection. Comments pointed out that the summary is prepared before consultation and that Indian Tribes and NHOs are the best parties to determine whether any item in a holding or collection fits a NAGPRA category. Museums and Federal agencies could

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potentially use the draft text requirement to evade preparing a summary, claiming that they do not have such objects when they might.

**RESPONSE:** We have revised the language in both the opening paragraph to repatriation of unassociated funerary object, sacred objects, and objects of cultural patrimony and the paragraph on completing a summary.

*(a) Step 1 – Complete a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony*

**COMMENT:** We received 18 additional comments generally regarding summaries of unassociated funerary objects, sacred objects, and objects of cultural patrimony. One comment supported the revised timelines, especially the 14-day response deadline after receiving consultation requests and the 60-day response deadline after receiving repatriation requests. One comment requested additional requirements for museums and Federal agencies to review their entire collections for possible summary items as Indian Tribes have often borne the burden of reviewing collections for unidentified cultural items, specifically unassociated funerary objects. One comment expressed concern about the timelines for summaries and the delay in sending summaries directly to Indian Tribes. One comment felt the timeline for completing a summary after receiving Federal funds for the first time was too long and should be no more than 60 days. Several comments requested an option for Indian Tribes to disagree with information contained in a summary or notice of intent to repatriate. One comment requested revisions to the requirements for publishing a correction notice. A few comments expressed concerns on the financial burden of repatriations under this section. One comment requested we require more reporting and tracking of the outcomes of requests for repatriation.

**RESPONSE:** The proposed revisions do not make a change to the time frame for summaries. With regard to deadlines for completing an inventory, these were first established in 2007 under the existing regulations at §10.13 Future applicability. We welcome more input on this timeline especially from museums and Federal agencies who have acquired holdings or collections or received Federal funds for the first time since 2007. In response to these comments, we have added to the opening paragraph that a museum or Federal agency must ensure the itemized list is comprehensive and covers all holdings or collections relevant to this section.

*(b) Step 2 – Initiate consultation*

**COMMENT:** We received 60 comments on the regulatory steps titled “Initiate consultation” in the draft text. In addition, we received related comments on the definition of “consultation.” Some of these comments requested changes to how the draft identified consulting parties. Several comments questioned the requirement for consulting parties to make a request to consult. Many comments requested changes to the limitation on written requests to consult being received prior to the publication of a notice. A few comments suggested a shorter time frame for sending an invitation to consult when a new consulting party is identified.

**RESPONSE:** In response, we have made requested changes to the list of consulting parties. We have aligned this with the new definition for “affiliation.” We have removed additional qualifying language that was not necessary. The requirement for a consulting party to submit a written request to consult (which can include email) is necessary to provide documentation of the request and to require a museum or Federal agency to respond by a certain date. Under the existing regulations, some museums and Federal agencies have delayed responding to requests for consultation by requiring a written response from all consulting parties. Under the proposed language, the requirement is for a museum or Federal agency to respond within 14 days to any written request to consult. The written request to consult also ensures better enforcement of this requirement through the civil penalty process.

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The requirement for consulting parties to submit requests to consult prior to publication of a notice is also to ensure the museum or Federal agency moves the process forward by certain deadlines. While many comments noted that notices provide an opportunity for other consulting parties to come forward, notices are also decision documents that identify consulting parties who have requested or are eligible to request repatriation. After publication of a notice, any other party not identified in a notice that wishes to consult should submit a request for repatriation, which will stay the repatriation process. At any time before repatriation, any consulting party, whether they requested to consult or were invited to consult, may make a request for information to facilitate making a claim for disposition or a request for repatriation. To ensure a clear deadline for repatriation, these revisions must ensure there is an end point for making requests to consult on the inventory or summary, but this is not an end point for consultation. Consultation must occur at later steps in the process, especially if, after publication of a notice, there are competing requests for repatriation.

With regard to a time frame for sending an invitation to consult when a new consulting party is identified, the requirements for newly recognized Indian Tribes (six months for a summary or two years for an inventory) were first established in 2007 under the existing regulations at §10.13 Future applicability. We welcome more input on this timeline especially from Indian Tribes who have been recognized since 2007.

### *(c) Step 3 – Consult with requesting parties*

**COMMENT:** We received 60 comments on the regulatory steps titled “Consult with requesting parties” in the draft text. In addition, we received related comments on the definition of “consultation.” Some comments requested the definition make clear consultation is more than a procedural step and that consultation must be a meaningful, responsive, and accountable process.

**RESPONSE:** To further address comments received on the definition of “consultation” and to make the regulatory process for consultation more meaningful, responsive and accountable, we have added a new subparagraph to the regulatory steps titled “Consult with requesting parties.” As a part of consultation, museums and Federal agencies must make a record of consultation that explains, if applicable, why any requests or recommendations made during consultation could not be accommodated as well as why consensus or agreement on an action could not be achieved. For any determination considered during the consultation process, the consultation record must note the concurrence, disagreement, or nonresponse of the consulting parties.

### *(d) Step 4 – Receive and consider a request for repatriation*

**COMMENT:** We received seven comments concerning the requirements for a request for repatriation in the draft text. The comments objected to the requirements to establish that each of the requested cultural items fit the definition of unassociated funerary object, sacred object, and/or object of cultural patrimony and that the museum or Federal agency does not have right of possession to the requested cultural items. We also received five comments asking for clarification why geographically affiliated Tribes and NHOs are treated differently in the summary process of the draft text than in the process for repatriation of human remains and funerary objects. One comment requested revisions to when requests for repatriation could be submitted.

**RESPONSE:** A request for repatriation must contain any information that the Indian Tribe or NHO has concerning how the requested cultural item fits the definitions, since, as several Tribes and NHOs noted, they are the best source of information for what cultural items fit the NAGPRA categories. The statute requires (at 25 U.S.C. 3005(c)) that the request contain “evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the museum or Federal agency did not have the right of possession.” The draft text treats geographically affiliated Tribes and NHOs differently, with respect to repatriation of cultural items in a summary because, unlike human remains and

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funerary objects in an inventory, Congress did not provide for unassociated funerary objects, sacred objects, or objects of cultural patrimony to be geographically affiliated. (Compare 25 U.S.C. § 3003(a) with 25 U.S.C. § 3004(a).)

Based on the comment, we have revised the regulatory text to reflect that a request for repatriation may be submitted at any time after a summary is complete. If a request for repatriation is received by the museum or Federal agency before the deadline for completing a summary, the request is dated the same date as the deadline for completing the summary. The existing regulations provide that a request for repatriation of an unassociated funerary object, sacred object, or object of cultural patrimony could include cultural affiliation established through the summary, consultation, and notification procedures or by presentation of a preponderance of the evidence by a requesting Indian Tribe or NHO. (see existing regulations at §10.10(a)(1)(ii)). If an Indian Tribe or NHO had information to show cultural affiliation, along with the other criteria for repatriation, the Indian Tribe would not necessarily have to consult with the museum or Federal agency prior to requesting repatriation of the cultural item. While the Act is clear that consultation follows the completion of a summary (25 U.S.C. 3004(b)), it is not clear that consultation is required before a request for repatriation, provided the requesting Indian Tribe has the information to show the request satisfies the criteria for repatriation and none of the exceptions apply.

*(e) Step 5 – Respond to a request for repatriation*

**COMMENT:** We received 20 comments regarding the draft text on responding to a request. Comments suggested additional clarifying language concerning how the weight of the evidence provided by the Indian Tribes in a request for repatriation should be evaluated. Additionally, comments requested further explanation as to why geographically affiliated Tribes or NHOs were on different footing regarding their requests for repatriation.

**RESPONSE:** Consistent with the response to comments on receiving requests, the request for repatriation should contain any information that the Indian Tribe or NHO has concerning how the requested cultural item fits the definitions, since, as several Tribes and NHOs noted, they are the best source of information for what cultural items fit the NAGPRA categories. The statute requires (at 25 U.S.C. § 3005(c)) that the request contain “evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the museum or Federal agency did not have the right of possession.” Further, this paragraph is intended to provide accountability in the request for repatriation process. The inclusion of a timeline and framework under which a museum or Federal Agency would need to demonstrate how the object meets one of four different scenarios is intended to relieve the burden on the Tribes and remove the barriers to repatriation while still meeting the statutory authority of NAGPRA.

*(f) Step 6 – Submit a notice of intent to repatriate*

**COMMENT:** We received two comments on the requirements for a notice of intended repatriation. One comment supported identification of the kinds of cultural items and the other comment objected to identification of a lineal descendant by name.

**RESPONSE:** We agree with the requested change to the requirement in a notice to identify by name a lineal descendant. If a lineal descendant needs to be identified in a notice in either Subpart B or Subpart C, the proposed revisions only require identifying a lineal descendant but does not require doing so by name. This change has been made throughout the proposed revisions.

*(1) A notice of intent to repatriate must conform*

**COMMENT:** We received one comment recommending a change to the draft text in this paragraph, as well as the other related paragraphs, to include the county and state where they were “excavated,

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discovered, or otherwise removed,” rather than where they “originated.” According to the comment, the use of “originated” is susceptible to ambiguity, as it could mean, in the case of an item that was historically moved in trade, where the item was made and not where it was ultimately used and later excavated, discovered, or otherwise removed.

**RESPONSE:** We have replaced "originated" with "were removed."

*(2) The Manager, National NAGPRA Program, will*

**COMMENT:** We received 40 comments requesting we add a deadline for the Manager, National NAGPRA Program, to publish notices of intended repatriation in the Federal Register. Some comments suggested adding a deadline (14 days) for the Manager to approve for publication or return a submission. Other comments requested a deadline (30-90 days) after receipt of a notice for publication in the Federal Register.

**RESPONSE:** We appreciate the suggestion to add a deadline for publication of a notice in the Federal Register. There are many factors that go into the timeline required for publication of a notice. First and foremost, a significant amount of time is needed to revise notices when they are not submitted with the proper information or in the proper format. We hope that by requiring a notice to conform to the mandatory format of the Federal Register, we can reduce this timeline. For this reason, the draft text and the proposed revisions provide for the Manager, National NAGPRA Program, to either approve for publication or return a submission that does not meet the requirements. Beyond accepting or rejecting the notice for publication, other factors can delay publication. In these revisions, the Department cannot commit to publication within a specific number of days to these factors. The Department can, however, commit to the Manager, National NAGPRA Program, approving or returning a notice within 15 days (or three weeks).

*Protections under FOIA*

**COMMENT:** We received several comments concerned about the addition of language in the draft text noting that museums and Federal agencies should protect sensitive cultural information “to the extent of applicable law.” They noted that the Freedom of Information Act (FOIA), 5 U.S.C. § 552, does not allow Federal agencies to withhold sensitive cultural information from release, and that museums may be subject to similar State laws, which may or may not allow protection of such information. One comment suggested that the Department not publish the draft text until Congress passes an amendment to FOIA to protect cultural information. Other comments suggested that the Department insert language in the regulations that would exempt sensitive cultural information from release under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), or would encourage Federal agencies and museums to keep such information out of their records or only keep it if necessary for decision making.

**RESPONSE:** We appreciate the concerns expressed by the comments; FOIA may not, under current case law, allow Federal agencies to protect sensitive cultural information. Under these regulations, because Indian Tribes and NHOs may provide information to represent their own interests, not those of the Federal agency, neither the government-to-government relationship between Indian Tribes and the United States nor the United States trust responsibility (where trust resources are involved) is likely to authorize withholding documents received from Indian Tribes or NHOs under FOIA Exemption 5 (deliberative process). 5 U.S.C. § 552(b)(5); *Dept. of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001). Furthermore, Exemption 4, which protects some confidential information, applies only to trade secrets and commercial or financial information. 5 U.S.C. § 552(b)(4). Exemption 3, cited by a comment, protects information specifically protected under another statute, which NAGPRA does not, and which these regulations cannot. If the information qualifies for protection under, for example, the National Historic Preservation Act (54 U.S.C. § 307103); the Archaeological Resources

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Protection Act (16 U.S.C. § 470hh); or the Cultural and Heritage Cooperation Authority under the 2008 Farm Bill (25 U.S.C. § 3056), it may be protected under Exemption 3. We have retained the proposed language in case a document or one or more portions thereof may be withheld by a Federal agency under a FOIA exemption (or by a museum subject to an analogous State law). The Department encourages museums and Federal agencies to take steps, when it is practicable to do so, to avoid receiving in writing and including in its records information that is identified by an Indian Tribe or NHO as culturally sensitive, so that it would not be subject to release. Further, when the submission of at least some sensitive information in writing may be necessary under these regulations, the Department encourages museums and Federal agencies to redact sensitive information or to ask the submitters of the information not to send *more* specific sensitive information than is necessary.

*(g) Step 7 – Repatriate the unassociated funerary object, sacred object, or object of cultural patrimony*

**COMMENT:** We received 14 comments on the purpose of a repatriation statement, especially as it relates to the definition of repatriation and possession or control.

**RESPONSE:** We have revised the definition of repatriation and the text related to a repatriation statement to align with the revised definition and application of possession or control under the proposed revisions. We propose that the repatriation statement must acknowledge and recognize the requestor has control or ownership of the requested human remains or cultural items under Subpart C.

*(h) Evaluating competing requests for repatriation*

**COMMENT:** We received four comments concerning the new process for a museum or Federal agency to resolve competing requests for repatriation. Two of the comments suggested a more active role for the Department or a Review Committee in resolution of competing requests, rather than it being solely the responsibility of the museum or Federal agency.

**RESPONSE:** The statute (25 U.S.C. § 3005(e)) assigns the responsibility for determining competing claims and requests to the museum or Federal agency with no role for the Department or the Review Committee. If Tribes or NHOs have a dispute with a museum or Federal agency over its choice of which Tribe or NHO is the most appropriate claimant, the competing Tribes or NHOs may bring it to the NAGPRA Review Committee under 25 U.S.C. § 3006(c)(4) to facilitate resolution.

*(3) The museum or Federal agency has requested and received the Secretary's concurrence*

**COMMENT:** We received 55 comments on the draft text for this paragraph and the similar paragraph in the next section. Both sections carry out the provision of the Act, whereby the timelines for the repatriation of “cultural items” by Federal agencies and museums may be stayed if they are indispensable for completion of a specific scientific study the outcome of which would be of major benefit to the United States. 25 U.S.C. 3005(b). This paragraph applies to unassociated funerary objects, sacred objects, and objects of cultural patrimony, and the corresponding paragraph in the next section applies to human remains and associated funerary objects. Twenty-two comments recommended that draft text in this section be removed from the proposed revisions because a stay of repatriation for a specific scientific study of major benefit to the United States under the Act only applies with respect to human remains and associated funerary objects, and not to unassociated funerary objects, sacred objects, and objects of cultural patrimony.

**RESPONSE:** In response, the provision in question, at 25 U.S.C. 3005(b), explicitly references “cultural items,” which the Act defines as human remains, associated funerary objects, unassociated funerary

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objects, sacred objects, and objects of cultural patrimony. 25 U.S.C. 3001(3). As any change to the scope of 25 U.S.C. 3005(b) would require an act of Congress, we have not made the recommended change.

*(3) The museum or Federal agency has requested and received the Secretary's concurrence*

**COMMENT:** We received four comments recommending that this paragraph require that the Secretary's concurrence on the written request from a museum or Federal agency be produced in consultation with the affected Indian Tribes and NHOs.

**RESPONSE:** In response, under the existing regulations at §10.10(c)(1), each museum or Federal agency may at any time, at its own discretion, and without notice to any person, invoke a stay of repatriation merely by asserting that the human remains or other cultural items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Moreover, in doing so, the museum or Federal agency is not required to state a deadline for completing the study. The proposed sections address these gaps in the law. While the Secretary is not precluded from consulting with Indian Tribes and Native Hawaiian affected by a request, we have not made such consultation mandatory. The Act gives the Secretary express authority to act alone and extend the time requirements for a museum to complete its inventory upon a finding of a good faith effort on the part of the museum, which must include a plan to carry out the inventory process. 25 U.S.C. 3003(c). Similarly, 25 U.S.C. 3005(b) gives the Secretary implied authority to act alone and extend the time requirements for a museum or Federal agency to repatriate human remains or cultural upon a finding that the human remains or other cultural items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States.

*(3) The museum or Federal agency has requested and received the Secretary's concurrence*

**COMMENT:** We received 17 comments recommending that the scope of the draft text be restricted to studies that were begun prior to November 16, 1990, i.e., prior to the date of the Act. According to these comments, "indispensable for completion of a specific scientific study" means that the study was begun prior to November 16, 1990 but could not be completed by that date.

**RESPONSE:** The proposed revisions do not incorporate this recommendation for the following reasons. The Act and these revisions are prospective and apply, among other things, to human remains and other cultural items in a holding or collection under the control of a Federal agency, or under the control of an institution or state or local government agency (including an institution of higher learning) that receives Federal funds on or after November 16, 1990 (i.e., a museum). The recommendation that 25 U.S.C. 3005(b) apply retroactively runs counter to the prospective applicability of the Act and these revisions. Moreover, as an institution or state or local government agency would not be a "museum" under the Act and these revisions until it received Federal funds for the first time after November 16, 1990, implementing the recommendation would eliminate all museums from the scope of 25 U.S.C. 3005(b) and, thus, would conflict with the Act. We do acknowledge the usefulness of a time frame for requesting and receiving the Secretary's concurrence that the study may proceed and, as a result, stay the deadline for repatriation, and we have provided one.

*(3) The museum or Federal agency has requested and received the Secretary's concurrence*

**COMMENT:** We received five comments recommending that the draft text require that the written request from a museum or Federal agency to the Secretary identify any harm asserted by Indian Tribes associated with the stay of repatriation, justify why the study justifies such harm, and identify appropriate reparations or mitigation of that harm.



§ 10.10 Inventory of human remains and associated funerary objects.

**RESPONSE:** While, potentially, Indian Tribes and NHOs might be harmed in some way by staying a repatriation, both the Act and the proposed revisions have narrowly tailored the circumstances and timeline for a stay. With respect to harm, we do acknowledge that an explanation of any destructive analysis involved in the proposed study should be explicitly required in a request to the Secretary, and we have added this requirement to the proposed sections.

*(3) The museum or Federal agency has requested and received the Secretary's concurrence*

**COMMENT:** We received five comments recommending that the draft text narrowly define “major benefit to the people of the United States.” One comment recommended that the draft text clarify the meaning of “agreed-to date on which the scientific study is to be completed,” as the identity of the party having the authority to agree to this date – the requestor or the Secretary – is unclear.

**RESPONSE:** The proposed revisions do not define “major benefit to the people of the United States” because such determinations necessarily will have to be made on a case-by-case basis, but as the proposed revisions make clear, the requestor would bear the burden of showing that the outcome of the proposed study would be of major benefit to the people of the United States. We have changed the proposed revisions by removing “agreed-to” and clarifying that the “date” is the date on which the Secretary determines in a written concurrence that the scientific study is to be completed.

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

*Each museum and Federal agency that has control of a holding or collection*

**COMMENT:** We received five comments on this section generally, mostly in support of the changes and timelines. One comment found the draft text confusing and out of logical order. Several comments requested adding that associated funerary objects must be repatriated with their human remains.

**RESPONSE:** The proposed revisions do not make changes to the order of the steps, but do attempt to clarify the order through reorganizing some text. Throughout this section, we have included associated funerary objects with human remains. In addition to the revisions in the definition of funerary object, we hope it is clear that associated funerary objects must be repatriated with all human remains.

*(a) Step 1 – Compile an itemized list of human remains and associated funerary objects*

**COMMENT:** We received 23 comments on the requirements for an itemized list of human remains and associated funerary objects. Several comments questioned the draft text requirement to identify the age of the human remains. Other comments requested language to ensure museums and Federal agencies assess all available information and holdings or collections in compiling an itemized list. Five comments requested we add that funerary objects can be associated without identifying relationships to specific individuals in a comingled collection.

**RESPONSE:** We agree and have removed the requirement for including the age of the human remains. In the opening paragraph, we have added that a museum or Federal agency must ensure the itemized list is comprehensive and covers all holdings or collections relevant to this section. In response to many other comments on the term “sets of human remains,” we have revised the first requirement to require museums and Federal agencies determine the number of individuals in a reasonable manner based on the available information. No additional study or analysis is required to determine the number of individuals. If human remains are present in a holding or collection, the number of individuals is at least one. For associated funerary objects, see the definition and example in the proposed revisions and preamble text.

*(b) Step 2 – Initiate consultation*

§ 10.10 Inventory of human remains and associated funerary objects.

**COMMENT:** We received 60 comments on the regulatory steps titled “Initiate consultation” in the draft text. In addition, we received related comments on the definition of “consultation.” Some of these comments requested changes to how the draft identified consulting parties. Several comments questioned the requirement for consulting parties to make a request to consult. Many comments requested changes to the limitation on written requests to consult being received prior to the publication of a notice. A few comments suggested a shorter time frame for sending an invitation to consult when a new consulting party is identified.

**RESPONSE:** In response, we have made requested changes to the list of consulting parties. We have aligned this with the new definition for “affiliation.” We have removed additional qualifying language that was not necessary. The requirement for a consulting party to submit a written request to consult (which can include email) is necessary to provide documentation of the request and to require a museum or Federal agency to respond by a certain date. Under the existing regulations, some museums and Federal agencies have delayed responding to requests for consultation by requiring a written response from all consulting parties. Under the proposed language, the requirement is for a museum or Federal agency to respond within 14 days to any written request to consult. The written request to consult also ensures better enforcement of this requirement through the civil penalty process.

The requirement for consulting parties to submit requests to consult prior to publication of a notice is also to ensure the museum or Federal agency moves the process forward by certain deadlines. While many comments noted that notices provide an opportunity for other consulting parties to come forward, notices are also decision documents that identify consulting parties who have requested or are eligible to request repatriation. After publication of a notice, any other party not identified in a notice that wishes to consult should submit a request for repatriation, which will stay the repatriation process. At any time before repatriation, any consulting party, whether they requested to consult or were invited to consult, may make a request for information to facilitate making a claim for disposition or a request for repatriation. To ensure a clear deadline for repatriation, these revisions must ensure there is an end point for making requests to consult on the inventory or summary, but this is not an end point for consultation. Consultation must occur at later steps in the process, especially if, after publication of a notice, there are competing requests for repatriation.

With regard to time frame for sending an invitation to consult when a new consulting party is identified, the requirements for newly recognized Indian Tribes (six months for a summary or two years for an inventory) were first established in 2007 under the existing regulations at §10.13 Future applicability. We welcome more input on this timeline especially from Indian Tribes who have been recognized since 2007.

*(c) Step 3 – Consult with requesting parties*

**COMMENT:** We received 60 comments on the regulatory steps titled “Consult with requesting parties” in the draft text. In addition, we received related comments on the definition of “consultation.” Some comments requested the definition make clear consultation is more than a procedural step and that consultation must be a meaningful, responsive, and accountable process. Several comments requested we add the statutory language clarifying that a request for additional information is not an authorization for new scientific studies or other means of acquiring or preserving additional scientific information.

**RESPONSE:** To further address comments received on the definition of “consultation” and to make the regulatory process for consultation more meaningful, responsive and accountable, we have added a new subparagraph to the regulatory steps titled “Consult with requesting parties.” As a part of consultation, museums and Federal agencies must make a record of consultation that explains, if applicable, why any requests or recommendations made during consultation could not be accommodated as well as why consensus or agreement on an action could not be achieved. For any determination considered during the consultation process, the consultation record must note the concurrence, disagreement, or nonresponse of the consulting parties. The proposed revisions do not add the statutory language on additional information

§ 10.10 Inventory of human remains and associated funerary objects.

in the regulatory text, but that has no impact on its applicability. Rather, we feel that the focus of the regulatory text should be the consultation process, especially on the appropriate treatment, care, and handling of human remains and associated funerary objects. Any request for additional information, and therefore invoking the statutory language, is upon request of a consulting party and should be limited to determining affiliation and acquisition history of the human remains and associated funerary objects. Indian Tribes and NHOs are encouraged to include the statutory language in any request they make to a museum or Federal agency for additional information.

*(d) Step 4 – Complete an inventory of human remains and associated funerary objects*

**COMMENT:** We received 49 comments on the step to complete an inventory of human remains and associated funerary objects. Many supported the changes to require museums and Federal agencies update inventories. Some comments requested a shorter time frame than 2 years while others remarked this was a significant effort for museums and Federal agencies to complete in two years. Other comments stressed the need to ensure all holdings or collections were reviewed. Many comments requested the Manager, National NAGPRA Program, publish updated inventories.

**RESPONSE:** The proposed revisions retain the two-year the time frame for updating inventories that was included in the draft because we received both comments suggesting shorter time frames and comments suggesting longer time frames were appropriate. We have added a sentence requiring that an inventory be comprehensive and cover all holdings or collections relevant to this section. The proposed revisions do not add any requirements for publishing updates either in the Federal Register or on a website because, as technology continues to change, we do not want to limit or restrict the options for the Manager, National NAGPRA Program, to share information with relevant parties. To the maximum extent feasible, the Manager, National NAGPRA Program, will provide information on its website or other formats to ensure transparency and access to information.

*Table 1 to §10*

**COMMENT:** We received several comments on the deadlines for completing an inventory. Some felt the timelines were too long while others felt they were impractical.

**RESPONSE:** With regard to deadlines for completing an inventory, these were first established in 2007 under the existing regulations at §10.13 Future applicability. We welcome more input on this timeline especially from museums and Federal agencies who have acquired holdings or collections or received Federal funds for the first time since 2007.

*(4) No later than [760 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], for any set of human remains or associated funerary objects*

**COMMENT:** We received 62 comments on the definitions in the draft text of “culturally affiliation or culturally affiliated” and “geographical affiliation or geographically affiliated.” A total of 22 comments did not agree with the new proposed term “geographical affiliation” as it seemed to privilege one line of information for cultural affiliation. Most comments appreciated the removal of “culturally unidentifiable,” but would prefer revisions to the cultural affiliation process rather than the creation of a separate process. A few of these comments requested the current definition and process for “culturally unidentifiable human remains” be retained. A total of 19 comments generally agreed with the new proposed term “geographical affiliation” and supported the removal of “culturally unidentifiable,” but half of these comments also expressed concerns about how the new definition of “geographical affiliation” would be applied. A total of 21 comments provided no feedback on the proposed definition and requested only a minor grammatical change to these two definitions and others.

§ 10.10 Inventory of human remains and associated funerary objects.

**RESPONSE:** In response to these comments, we propose to define as a separate term “affiliation” to better reflect Congressional intent and focus on the affiliation for the sole purpose of disposition or repatriation. As noted in many of the comments, identifying “cultural affiliation” has been a significant barrier to disposition and repatriation under the Act, despite the clear intent of Congress that it be used to ensure a reasonable connection between the human remains and cultural items and a present-day Indian Tribe or NHO. Defining “affiliation” in these regulations without the qualifier of “cultural” or “geographical” better aligns with Congressional intent, and addresses concerns raised in comments about implementing geographical affiliation separately from cultural affiliation. In response to these comments, we have combined cultural and geographical affiliation into this section. The definition of “cultural affiliation” from the Act and the existing regulations, the lines of information, and the use of geographic relationships consistent with the existing regulations are all incorporated into the process by which “affiliation” is established in the proposed revisions. Based on input from Indian Tribes and NHOs, we have combined cultural and geographical affiliation into this section.

*(5) Any museum may request an extension to complete or update its inventory*

**COMMENT:** We received several comments requesting additions to the process for requesting and receiving an extension.

**RESPONSE:** We appreciate the comments and have added that the Manager, National NAGPRA Program, will publish a list of all museums and Federal agencies that have requested and received an extension from the Secretary.

*(6) After [30 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], when a museum or Federal Agency acquires control*

**COMMENT:** We received several comments asking what limitations 18 U.S.C. 1170 (a) places on a museum or Federal agency acquiring possession or control of human remains from another museum or Federal agency.

**RESPONSE:** 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.

*(e) Step 5 – Submit a notice of inventory completion*

**COMMENT:** We received 27 comments on the requirements for publishing a notice of inventory completion. Several comments felt six months was too long. One comment objected to the requirement that a notice describe the human remains. Other comments requested revisions to the specific requirement for a notice to identify whether cultural affiliation was clearly identifiable or was based on the totality of the circumstances.

**RESPONSE:** Unfortunately, we cannot make any of these requested changes as Congress put these specific requirements into 25 U.S.C. 3003(d). The timeline (six months after completing an inventory), description of human remains (identifies each Native American human remains), and how cultural affiliation was determined (clearly identifiable as to tribal origin or given the totality of circumstances) are all components of the notice required in the Act. While we have tried to clarify and simplify these requirements, we cannot change them.

§ 10.10 Inventory of human remains and associated funerary objects.

*(3) The Manager, National NAGPRA Program, will*

**COMMENT:** We received 38 comments requesting we add a deadline for the Manager, National NAGPRA Program, to publish notices of intended repatriation in the Federal Register. Some comments suggested adding a deadline (14 days) for the Manager to approve for publication or return a submission. Other comments requested a deadline (30-90 days) after receipt of a notice for publication in the Federal Register.

**RESPONSE:** We appreciate the suggestion to add a deadline for publication of a notice in the Federal Register. There are many factors that go into the timeline required for publication of a notice. First and foremost, a significant amount of time is needed to revise notices when they are not submitted with the proper information or in the proper format. We hope that by requiring a notice to conform to the mandatory format of the Federal Register, we can reduce this timeline. For this reason, the draft text and the proposed revisions provide for the Manager, National NAGPRA Program, to either approve for publication or return a submission that does not meet the requirements. Beyond accepting or rejecting the notice for publication, other factors can delay publication. In these revisions, the Department cannot commit to publication within a specific number of days to these factors. The Department can, however, commit to the Manager, National NAGPRA Program, approving or returning a notice within 15 days (or three weeks).

*Protections under FOIA*

**COMMENT:** We received several comments concerned about the addition of language in the draft text noting that museums and Federal agencies should protect sensitive cultural information “to the extent of applicable law.” They noted that the Freedom of Information Act (FOIA), 5 U.S.C. § 552, does not allow Federal agencies to withhold sensitive cultural information from release, and that museums may be subject to similar State laws, which may or may not allow protection of such information. One comment suggested that the Department not publish the draft text until Congress passes an amendment to FOIA to protect cultural information. Other comments suggested that the Department insert language in the regulations that would exempt sensitive cultural information from release under Exemption 3 of FOIA, 5 U.S.C. § 552(b)(3), or would encourage Federal agencies and museums to keep such information out of their records or only keep it if necessary for decision making.

**RESPONSE:** We appreciate the concerns expressed by the comments; FOIA may not, under current case law, allow Federal agencies to protect sensitive cultural information. Under these regulations, because Indian Tribes and NHOs may provide information to represent their own interests, not those of the Federal agency, neither the government-to-government relationship between Indian Tribes and the United States nor the United States trust responsibility (where trust resources are involved) is likely to authorize withholding documents received from Indian Tribes or NHOs under FOIA Exemption 5 (deliberative process). 5 U.S.C. § 552(b)(5); *Dept. of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1 (2001). Furthermore, Exemption 4, which protects some confidential information, applies only to trade secrets and commercial or financial information. 5 U.S.C. § 552(b)(4). Exemption 3, cited by a comment, protects information specifically protected under another statute, which NAGPRA does not, and which these regulations cannot. If the information qualifies for protection under, for example, the National Historic Preservation Act (54 U.S.C. § 307103); the Archaeological Resources Protection Act (16 U.S.C. § 470hh); or the Cultural and Heritage Cooperation Authority under the 2008 Farm Bill (25 U.S.C. § 3056), it may be protected under Exemption 3. We have retained the proposed language in case a document or one or more portions thereof may be withheld by a Federal agency under a FOIA exemption (or by a museum subject to an analogous State law). The Department encourages museums and Federal agencies to take steps, when it is practicable to do so, to avoid receiving in writing and including in its records information that is identified by an Indian Tribe or NHO as culturally sensitive, so that it would not be subject to release. Further, when the submission of at least some sensitive information

§ 10.10 Inventory of human remains and associated funerary objects.

in writing may be necessary under these regulations, the Department encourages museums and Federal agencies to redact sensitive information or to ask the submitters of the information not to send *more* specific sensitive information than is necessary.

*(g) Step 7 – Respond to a request for repatriation*

**COMMENT:** We received 10 comments on responding to a request for repatriation. Most comments requested some form of accountability or dispute resolution in the event the museum or Federal agency rejects the request.

**RESPONSE:** The proposed revisions do not add options to this section for contesting an action by a museum or Federal agency on a request for repatriation for the following reason. This paragraph ensures that Indian Tribes and NHOs receive a clear response from a museum or Federal agency. Multiple options exist for an Indian Tribe or NHO to react to this response, from mediation, to requests to the Review Committee, to legal action, and more. However, we do not wish to imply any limitation on these available options or the act of sovereignty that making such a decision represents. Thus, the Department would not presume to tell Indian Tribes or NHOs what options they can exercise.

*(h) Step 8 – Repatriate the human remains and associated funerary objects*

**COMMENT:** We received 48 comments on the repatriation statement. Several comments objected to the statement as it relates to the definition of repatriation and possession or control. Several comments requested to see the draft preamble and filings related to Executive Order 12360 in order to verify that the Department has thoroughly researched changing its position on repatriation of associated funerary objects.

**RESPONSE:** We have revised the definition of repatriation and the text related to a repatriation statement to align with the revised definition and application of possession or control under the proposed revisions. We propose that the repatriation statement must acknowledge and recognize the requestor has control or ownership of the requested human remains or cultural items under Subpart C. The Department has heard repeatedly from Indian Tribes and NHOs about the voluntary repatriation of associated funerary objects with culturally unidentifiable human remains. The preamble to the proposed revisions provides the reasoning behind the Department's change to now require repatriation of associated funerary objects. During consultation on the draft text, we heard repeatedly from Indian Tribes and NHOs that this was one of the most significant changes in the draft text that would allow for more repatriations and provide the necessary requirements to make their ancestors whole without further delay and trauma caused by separating people from their possessions.

*(i) Evaluating competing requests for repatriation*

**COMMENT:** We received four comments concerning the new process for a museum or Federal agency to resolve competing requests for repatriation. Two comments suggested changes to the priority order for determining who is the most appropriate requestor.

**RESPONSE:** We drafted the priority order in the draft text for determining who is the most appropriate Indian Tribe or NHO with a priority for adjudicated aboriginal land over acknowledged aboriginal land because Congress included adjudicated aboriginal land in the statute, and acknowledged aboriginal land only appears in the regulations.

*(k) Transfer or reinter human remains and associated funerary objects*

**COMMENT:** We received 19 comments concerning this paragraph of the draft text allowing for a museum or Federal agency, at its discretion, to (1) agree to transfer human remains and associated funerary objects with no connection to a present-day Indian Tribe or NHO to an Indian Tribe, NHO, or a

## § 10.11 Civil penalties.

non-federally recognized Indian group (if the group has a relationship to the human remains and objects), or (2) reinter the remains and objects. The comments opposed the transfer or reinterment, suggesting that transfer should be prioritized or that human remains and funerary objects should only be transferred to, or reinterred by, Indian Tribes or NHOs.

**RESPONSE:** This provision is based on the existing regulations at §10.11(c)(2) applicable to “culturally unidentifiable” human remains, and the current practice of the Review Committee concerning those regulations. Under the draft text, this section only applies after consultation with the consulting parties (lineal descendants and Indian Tribes and NHOs), thus recognizing the priority of those parties. The Department has included the possibility for transfer to non-federally recognized Indian groups in the proposed revisions for the same reasons articulated in the preamble to the existing regulations:

As noted in the Review Committee’s 2000 Recommendations, and reflected in the preamble of the proposed regulations, one of the categories of culturally unidentifiable human remains is those remains “for which cultural affiliation could be determined except that the appropriate Indian organization is not federally-recognized as an Indian tribe” (65 FR 36462, 36463 (2000)). In attempting to find a solution for the disposition of this category of human remains, the Secretary considered the overall intent of Congress in section 7 of the Act (25 U.S.C. 3005) to return control of Native American human remains in the possession of museums and Federal agencies to persons or entities with the closest cultural connection to those remains. While a mandate for return of control to Indian groups that are not federally-recognized would be contrary to the terms of NAGPRA and to the government-to-government relationship between the United States and federally-recognized Indian tribes, nothing in the Act prohibits the voluntary transfer of human remains, with or without associated funerary objects, to Indian groups that are not federally-recognized, with appropriate safeguards for the rights of federally-recognized Indian tribes. 75 Fed. Reg. 12396 (March 15, 2010).

As under the existing regulations, reinterment may only occur after consultation with the original consulting parties. The Department notes the suggestion of one of the comments that any notice of reinterment specifically identify the laws and policies that will apply to the reinterment. That information will be included in any template issued by the National NAGPRA Program for such a notice.

## § 10.11 Civil penalties.

**COMMENT:** We received 60 comments on the draft text for civil penalties, most of which supported the changes in the draft text.

**RESPONSE:** We appreciate the comments and hope to continue to address these issues in the final rule.

*Any museum that fails to comply with the requirements of the Act*

**COMMENT:** We received several comments requesting we revise or explain why civil penalties do not apply to Federal agencies.

**RESPONSE:** Only museums are subject to civil penalties under the Act. We have included a further explanation of recourse in the event a Federal agency has failed to comply with the Act and elaborated on this in the preamble.

*(a) File an allegation*

**COMMENT:** We received several comments requesting we provide for anonymous allegations of failure to comply.

## Subpart D—REVIEW COMMITTEE

**RESPONSE:** The proposed revisions do not incorporate this requested change. To reduce the submission of nuisance allegations and to ensure the Secretary can gather necessary information on an allegation, we require a person alleging the failure to comply identify themselves.

### *(b) Respond to an allegation*

**COMMENT:** We received several comments requested a time frame for the Secretary to investigate allegations of failure to comply.

**RESPONSE:** We have added in the proposed revisions a 90-day deadline for assessing an allegation. This does not impose a deadline on conducting the investigation or resolving the allegation. Successful conclusion of an investigation depends upon the discovery of facts assembled from numerous sources of diverse relevancy spanning decades. Therefore, it is detrimental to apply fixed timelines to these investigations. Recently, the National NAGPRA Program hired its first full-time investigator who is empowered to mitigate cooperator concerns by improving any revealed programmatic deficiencies associated with investigation efficacy, accuracy, timeliness, or transparency. Throughout this section, there are fixed timelines in place for museums to respond to a notice of failure to comply, ensuring the process will move forward to resolution once the investigation is complete.

### *(c) Calculate the penalty amount*

**COMMENT:** We received one comment requesting an increase in the base amount used in calculating a penalty. We received several comments on the factors used in increasing the base penalty amount, specifically the use of "commercial value."

**RESPONSE:** In response to these comments, we have revised the options for increasing the base penalty amount to include more input from the aggrieved party or after considering traditional and cultural values of the human remains or cultural items involved. While we cannot remove the factor of "commercial value," we have added as a first factor the ceremonial or cultural value of human remains or cultural items as identified by an aggrieved party. In addition, we solicit comments on the amount of the base penalty for consideration in promulgating the final rule.

### *(d) Notify the museum of an assessment.*

**COMMENT:** We received 21 comments requesting changes to the language on the daily penalty amount. The comments requested changing "for each continuing violation" to "each failure to comply."

**RESPONSE:** Throughout this section, we have used two terms "failure to comply" and "violation" in distinct ways. A "failure to comply" refers to a general non-compliance with the Act or the regulations contained in a specific allegation while a "violation" refers to the number of separate instances of specific non-compliance with the Act or the regulations. The number of "violations" is not usually known when the Secretary receives an allegation of a "failure to comply," but that number is determined over the course of an investigation and assessment. In this paragraph and in paragraph (m), it is more accurate to apply the daily penalty amount to each continuing violation rather than one generalized failure to comply. Therefore, we have not made the requested change.

## Subpart D—REVIEW COMMITTEE

**COMMENT:** We received 50 comments on the Review Committee subpart of the draft text.

**RESPONSE:** We appreciate the comments and hope to continue to address these issues in the final rule.

## § 10.12 Review Committee.



§ 10.12 Review Committee.

**COMMENT:** We received 19 comments requesting the revisions fully acknowledge and empower the authority of the Review Committee and the Secretary to oversee, monitor and achieve compliance with the Act and these regulations. The comments stated one of the primary complaints against the implementing regulations is that there are “no teeth” and requested we add language to the revisions to underscore the Secretary’s role to enforce Review Committee findings when the Review Committee has found an alleged violation of NAGPRA.

**RESPONSE:** The responsibilities and scope of authority of the Review Committee derive from the Act and not the regulations. The Secretary’s authority to oversee, monitor, and achieve compliance with the Act and these regulations is independent of the Review Committee. As the Review Committee is an advisory body governed by the Federal Advisory Committee Act (FACA), the recommendations, findings, and actions of the Review Committee are advisory only, and are not binding on any person. Moreover, these advisory findings and recommendations do not necessarily represent the views of the Secretary of the Interior, the Congress, or a United States district court. Also, while the Act does authorize the Review Committee to make findings related to the identity or cultural affiliation of human remains or cultural items, or their return, it does not authorize the Review Committee to determine whether a museum has failed to comply with the Act, let alone enforce such a determination.

*(a) Recommendations*

**COMMENT:** We received several comments requesting the Review Committee recommendations be more than advisory.

**RESPONSE:** We cannot make the requested changes. The Review Committee is an advisory body governed by the Federal Advisory Committee Act (FACA). Its recommendations, findings, and actions are advisory only, and are not binding on any person. Moreover, these advisory findings and recommendations do not necessarily represent the views of the Secretary of the Interior, the Congress, or a United States district court. We have, however, added the provision that any findings or recommendations made by the Review Committee will be published in the Federal Register within 90 days.

*(b) Nominations*

**COMMENT:** We received 23 comments recommending that Native Hawaiian traditional religious leaders be eligible to serve in the two slots on the Review Committee that, under the Act, are reserved exclusively for traditional Indian religious leaders.

**RESPONSE:** We are unable to make this change. Under section 8(b)(1)(A) of the Act (25 U.S.C. 3006(b)(1)(A)), Congress explicitly identified who is eligible to nominate a person to three specified slots on the Review Committee and who is eligible to serve in two of those slots. Only Indian Tribes, NHOs, and “traditional Native American religious leaders” are eligible to be the nominators, and only “traditional Indian religious leaders” are eligible to serve in two of the three specified slots. “Native American” means of, or relating to, a tribe, people, or culture that is indigenous to the United States. 25 U.S.C. 3001(9). This term includes two constituent groups, Native Hawaiians and Indians. A canon of statutory construction states that when one or more things of a class are expressly mentioned, others of the same class are excluded (*inclusio unius est exclusio alterius*). Applying this canon of construction, we understand that 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.

*(c) Informal conflict resolution*

§ 10.12 Review Committee.

**COMMENT:** We received 15 comments recommending that providing advice to the Secretary on the assessment of a civil penalty should be incorporated into the Review Committee’s responsibilities for reviewing and making findings or facilitating resolution of a dispute. One comment understood the draft text of this paragraph as narrowing the scope of the Review Committee’s responsibilities set out in section 8 of the Act (25 U.S.C. 3006(c)) and objected to this limitation.

**RESPONSE:** Congress did not include among the enumerated responsibilities of the Review Committee advising the Secretary on whether a violation of NAGPRA has occurred and whether a penalty should be assessed. Whether the Secretary decides that this role constitutes a related function of the Review Committee’s responsibilities and assigns this role to the Review Committee would be at the Secretary’s discretion and presumably would occur on a case-by-case basis. These revisions do not – indeed, they cannot – limit the responsibilities explicitly given to the Review Committee by Congress. Where we believed certain responsibilities needed further elaboration, we did so in the draft text. Otherwise, we refrained from repeating verbatim the responsibilities set out in the statutory text.