

**THE LONG JOURNEY HOME: ADVANCING THE
NATIVE AMERICAN GRAVES PROTECTION AND
REPATRIATION ACT'S PROMISE AFTER 30
YEARS OF PRACTICE**

HEARING

BEFORE THE

**COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE**

ONE HUNDRED SEVENTEENTH CONGRESS

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CONTENTS

	Page
Hearing held on February 2, 2022	1
Statement of Senator Cantwell	34
Statement of Senator Cortez Masto	33
Statement of Senator Murkowski	2
Statement of Senator Schatz	1

WITNESSES

Beasley, Joy, Associate Director, Cultural Resources, Partnerships, and Science, National Park Service, U.S. Department of the Interior	4
Prepared statement	5
Grussing, Valerie, Ph.D., Executive Director, National Association of Tribal Historic Preservation Officers	21
Prepared statement	22
Lindsey, Carmen “Hulu”, Chair, Office of Hawaiian Affairs	15
Prepared statement	16
Ortiz, Dr. Anna Maria, Director, Natural Resources and Environment, U.S. Government Accountability Office	7
Prepared statement	8
Worl, Rosita, Ph.D., President, Sealaska Heritage Institute	27
Prepared statement	29

APPENDIX

Association on American Indian Affairs, prepared statement	45
Chavarria, Hon. J. Michael, Governor, Santa Clara Pueblo, prepared statement	52
Dawley, Martina, Tribal Historic Preservation Officer, Hualapai Tribe, prepared statement	60
Friend, Hon. Billy, Chief, Wyandotte Nation, prepared statement	58
Mitchell, Mark, Chairman, All Pueblo Council of Governors, prepared statement	43
Pasqual, Theresa, Tribal Historic Preservation Officer, Pueblo of Acoma, prepared statement	43
Response to written questions submitted by Hon. John Hoeven to Joy Beasley	79
Response to written questions submitted by Hon. Ben Ray Lujan to:	
Joy Beasley	83
Valerie Grussing, Ph.D.	72
Dr. Anna Maria Ortiz	67
Rosita Worl, Ph.D.	76
Response to written questions submitted by Hon. Brian Schatz to:	
Joy Beasley	80
Valerie Grussing, Ph.D.	70
Carmen Hulu Lindsey	62
Dr. Anna Maria Ortiz	66
Salt River Pima-Maricopa Indian Community, prepared statement	54
Society for American Archaeology, prepared statement	49

**THE LONG JOURNEY HOME: ADVANCING THE
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30 YEARS OF PRACTICE**

WEDNESDAY, FEBRUARY 2, 2022

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 2:30 p.m. in room 628, Dirksen Senate Office Building, Hon. Brian Schatz, Chairman of the Committee, presiding.

**OPENING STATEMENT OF HON. BRIAN SCHATZ,
U.S. SENATOR FROM HAWAII**

The CHAIRMAN. Good afternoon. Welcome to the committee's oversight hearing entitled The Long Journey Home: Advancing the Native American Graves Protection and Repatriation Act Promise After 30 Years of Practice.

We are at a critical moment of reckoning with this Country's shameful past Federal policies that have failed Native peoples. As the committee well knows, there are numerous examples of these failures. The mistreatment and unjust removal of Native American ancestral remains from their resting places is just one of them.

For decades, the Native American Graves Protection and Repatriation Act of 1990 or NAGPRA has helped to heal the pain felt by generations through return and repatriation of these remains to their Native communities. NAGPRA's promise of ancestral homecoming has taken on a deeper meaning recently after the grim discovery of mass graves of Native children at government-run boarding schools in Canada, reopening old wounds and forcing the U.S. to face its own troubled legacy of Native boarding schools.

As the Department of the Interior undertakes its Federal Indian boarding school initiative to examine this legacy, it is my hope that as a Nation we are truly on the path toward reconciliation and healing. Repatriating ancestral remains and cultural items is difficult and often painful work. Recognizing the significance of this work to Native communities, I would like to turn the floor over to Nápua Greig, to provide us with an opening to help us set the tone for this important discussion.

Ms. Greig?

Ms. GREIG. [Greeting in Native tongue.] I send you warmest regards from Hawaii, and more specifically the island of Maui. Our

iwi, our bones are sacred, because in those iwi are the mana, the energy, the power, the very essence of a person long after their passing. And here on Maui lies the final resting place of perhaps the highest-ranking line of chiefs, the [phrase in Native tongue] line. Today, I present to you a mookuauhau, a genealogy of the [phrase in Native tongue] line of chiefs, which begins at [phrase in Native tongue], the sacred burial cave here at Iao.

[Traditional Opening in Native language.]

The CHAIRMAN. Thank you so much, Nápua.

NAGPRA became law on November 16th, 1990. For the first time, there was a process for Native communities to return their ancestral remains and cultural items back to their homelands from the shelves of museums and other repositories.

But when Congress was contemplating NAGPRA, the Congressional Budget Office estimated that it would take 10 years to complete this work. Now, more than 30 years later, over 200,000 ancestral remains and approximately 2.5 million associated funerary items have been identified. But only about 42 percent of ancestral remains and 70 percent of cultural remains have been repatriated.

So while progress is certainly being made, the journey continues for tens of thousands of ancestors and millions of cultural items to find their way home. The promise of NAGPRA continues.

Before I turn to Vice Chair Murkowski, I would like to extend my sincere welcome and aloha to Chair Hulu Lindsey of the Office of Hawaiian Affairs, and to our entire panel of witnesses today. I look forward to your testimony and our discussion.

Vice Chair Murkowski?

**STATEMENT OF HON. LISA MURKOWSKI,
U.S. SENATOR FROM ALASKA**

Senator MURKOWSKI. Chairman Schatz, gunalchéesh. We appreciate your holding this very, very important oversight hearing today.

As you mentioned, it was back in 1990 that Congress passed NAGPRA to establish a legal framework for the identification and the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony of Indian tribes and Native Hawaiian organizations.

As the Association of American Indian Affairs states in a letter to Interior, they say “With NAGPRA, Congress announced that continued possession of the deceased bodies of our ancestors and their burial belongings, sacred objects, and objects of cultural patrimony was legally and morally unsupportable.” NAGPRA recognizes that human remains of any ancestry must at all times be treated with dignity and with respect.

It is time, it is past time, that this Committee exercises its oversight role to ensure that the tools Congress has given Federal agencies under the law are being used to safeguard tribal communities from being locked out of decisions involving their own people, their sacred sites.

You have referenced the connection with the very deeply troubling reports of children’s remains that are being identified at former Native American boarding school sites. While the protections afforded in NAGPRA may not be applicable in every instance,

I do hope that this committee can have a discussion on how NAGPRA's already existing Federal framework may be one of the many Federal tools that we can choose to apply in order to correct a harmful period in Federal Indian policy.

In Alaska, NAGPRA has played an important role in helping to repatriate human remains and funerary objects. Since NAGPRA's enactment, tribal communities and institutions in Alaska have been awarded over \$6.9 million in Federal funds. These funds helped facilitate 155 consultation, documentation, and repatriation projects. The real-life impact of this Federal investment means that from 70 museums and Federal agencies located across the Country, 1,843 Native American individuals were repatriated and returned home to their Alaska Native communities.

But there is much more to be done. The work is not finished. There are still 406 Alaska Native individuals who remain housed in 26 museums or Federal agencies pending consultation and notification prior to repatriation. So I would hope to hear today from our Federal witnesses about the status of those pending repatriations.

And we absolutely need to be doing better across the Country. According to the Interior Department's own statistics, only 21 percent of museums subject to NAGPRA have repatriated all of the Native American human remains under their control.

So I am looking forward to hearing about the Administration's objectives for any proposed changes to NAGPRA's implementing regulations and how this Committee can help ensure the success of this very important program. As part of any updates to the law, I expect the Administration to consider the unique structure associated with Alaska's tribal communities.

I want to welcome all of our panelists today, but particularly my friend, Dr. Rosita Worl, President of Sealaska Heritage Institute. Dr. Worl is a highly respected and accomplished academic, researcher, and topologist, author, as they say, she does it all. She received her Ph.D. and her MS in anthropology from Harvard University. She has a BA from Alaska Methodist University. She also holds an honorary Doctor of Science from the University of Alaska Anchorage. She has served on the NAGPRA review committee for 13 years now, from 2000 to 2013, including a term as chair of the review committee.

So she is deeply, deeply steeped in this, as she is on so many issues, most notably the preservation of Native languages, and seeks to encourage me daily in reminding me of my responsibility to help share with the preservation of those languages.

As Aanshawát'k'i to you, Dr. Worl, know that I give you my sincere appreciation, and thank you. Thank you for being here.

The CHAIRMAN. Thank you, Vice Chair Murkowski.

It gives me pleasure to introduce the remaining witnesses. First, we will have Joy Beasley, the Associate Director of Cultural Resources, Partnerships, and Science at the National Park Service. Then Dr. Anna Maria Ortiz, Director of Natural Resources and Environment, USGAO. Then Carmen Hulu Lindsey, Chair of the Office of Hawaiian Affairs. And Dr. Valerie Grussing, Executive Director of the National Tribal Historic Preservation Officers Association.

Ms. Beasley, please proceed with your testimony.

**STATEMENT OF JOY BEASLEY, ASSOCIATE DIRECTOR,
CULTURAL RESOURCES, PARTNERSHIPS, AND SCIENCE,
NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE
INTERIOR**

Ms. BEASLEY. Chairman Schatz, Ranking Member Murkowski and members of the Committee, my name is Joy Beasley, and I am the Associate Director for Cultural Resources, Partnerships, and Science for the National Park Service.

Before I offer my oral statement, I just want to very quickly wish Senator Luján a swift recovery.

Thank you for the opportunity to appear before you today to present the Department of the Interior's views on implementation of the Native American Graves Protection and Repatriation Act of 1990, known as NAGPRA. NAGPRA recognized that human remains of any ancestry must at all times be treated with dignity and respect. For over 30 years, NAGPRA has required the respectful return of Native American ancestors and cultural items to lineal descendants, Indian tribes and Native Hawaiian organizations.

Implementation of NAGPRA is assigned to the Secretary of the Interior. Since 1990, the national NAGPRA program has been based in the National Park Service. The Secretary of the Interior has delegated NAGPRA responsibilities to the National Park Service, including publishing notices in the Federal Register, administering grants to tribes and museums, receiving and recording inventory and summaries, and investigating failures to comply.

Since 1990, the National Park Service has published almost 4,000 notices allowing for the repatriation of over 84,000 Native American ancestral remains and over 1.5 million funerary objects. Since 1994, we have awarded nearly \$54 million in grant funds to museums, Indian tribes, and Native Hawaiian organizations for consultation and repatriation. We have undertaken investigations that have resulted in many thousands of dollars in penalties.

We also provide technical assistance to Indian tribes, Native Hawaiian organizations, museums and Federal agencies involved in repatriation or disposition. We provide direct training to over 2,000 participants annually, and we respond to thousands of individual inquiries by phone or email.

The national NAGPRA program manager also serves as the designated Federal official for the NAGPRA review committee, a Federal advisory committee. The committee provides an annual report to Congress outlining progress made and any barriers encountered in implementing NAGPRA.

The most recent report for 2020 and 2021 was finalized by the advisory committee at the end of November. The Department is preparing it for transmittal to Congress.

While there have been many successes in implementing NAGPRA, the Department is aware that more work needs to be done. Since the passage of NAGPRA in 1990, less than half of the Native American ancestral remains in collections have been repatriated to their traditional caretakers. Over 117,000 Native American individuals are still in museum and Federal agency collections, and 94 percent of those have not been culturally affiliated

with any present-day Indian tribe or Native Hawaiian organization.

Even in Alaska and Hawaii, where connections between ancestral remains and present-day people are well established, over 400 ancestors taken from Alaska and over 100 iwi kupuna taken from Hawaii are still in museum collections.

The Department is also aware that some collections subject to NAGPRA remain unreported. Many Federal agencies are still trying to locate extensive collections in non-Federal repositories and museums are continuing to discover unknown or unreported collections that are subject to NAGPRA that should be returned to their traditional caretakers

The Department is also aware that substantive updates to the NAGPRA regulations are long overdue. We recently prepared a draft proposed rule and invited consultation with Indian tribe and Native Hawaiian organizations to discuss the proposal. The goal of the revisions is to simplify and improve the regulatory process for repatriation by streamlining existing regulatory requirements, shifting excessively burdensome and complicated procedures, and clarifying timelines.

The Department is currently working on incorporating the input we received during consultation, and expects to publish a proposed rule for public comment in early 2022. In the revised regulations, the Department is committed to emphasizing deference to Native American customs, traditions, and traditional knowledge wherever possible throughout the repatriation process.

Chairman Schatz, Ranking Member Murkowski, and members of the committee, thank you for the opportunity to present the Department's views in NAGPRA implementation. I would be pleased to answer any questions you have.

[The prepared statement of Ms. Beasley follows:]

PREPARED STATEMENT OF JOY BEASLEY, ASSOCIATE DIRECTOR, CULTURAL RESOURCES, PARTNERSHIPS, AND SCIENCE, NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR

Chairman Schatz, Ranking Member Murkowski, and members of the Committee, my name is Joy Beasley and I serve as the Associate Director for Cultural Resources, Partnerships and Science in the National Park Service at the United States Department of the Interior (Department). Thank you for the opportunity to appear before you today to present the Department's views on the implementation of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). For over 30 years, NAGPRA has required the respectful return of Native American ancestors and cultural items to lineal descendants, Indian Tribes, and Native Hawaiian organizations. Under NAGPRA, ancestral remains and cultural items are subject to repatriation by a museum or Federal agency or protection on Federal or Tribal land. NAGPRA recognized that human remains of any ancestry must at all times be treated with dignity and respect. NAGPRA provides for the resolution of rights to long-separated ancestors and objects to Indian Tribes and Native Hawaiian organizations.

Implementation of NAGPRA is assigned to the Secretary of the Interior. Since 1990, the National NAGPRA Program has been based in the National Park Service. The Secretary of the Interior has delegated the following eight responsibilities to the Director of the National Park Service, who in turn delegated them to the Associate Director for Cultural Resources Partnerships and Science:

- Publish notices in the Federal Register for museums and Federal agencies to provide due process to Indian Tribes and Native Hawaiian organizations. We have published almost 4,000 notices, allowing for the repatriation of over 84,000 Native American ancestral remains and over 1.5 million funerary objects.

- Maintain and share data on NAGPRA compliance. We maintain publicly available databases to ensure transparency of information related to repatriation and disposition. Data is provided in more user-friendly reports and data visualizations to assist Indian Tribes and Native Hawaiian organizations in making requests.
- Make Federal grant awards to museums, Indian Tribes, and Native Hawaiian organizations for consultation and repatriation under NAGPRA. The Department acknowledges and appreciates the recent work of the Congress to increase grant funds to museums, Indian Tribes, and Native Hawaiian organizations. Since 1994, nearly \$54 million in grant funds have been awarded. However, we continue to receive more applications that meet the funding criteria than we can support in a given fiscal year.
- Investigate civil penalty allegations and assess fines on museums that fail to comply with NAGPRA provisions. In total, we have investigated 53 entities and found 20 museums have failed to comply with NAGPRA. We have collected nearly \$60,000 in penalties. The National Park Service recently hired a full-time investigator for the Program dedicated to conducting these investigations.
- Provide staff support to the Native American Graves Protection and Repatriation Review Committee, a Federal Advisory Committee. The Committee provides an annual report to Congress outlining progress made and any barriers that may have been encountered in implementing NAGPRA. The most recent report, covering 2020–2021, was finalized by the Advisory Committee at the end of November of 2021. The Department is preparing the report for transmittal to Congress in early 2022.
- Provide technical assistance for discoveries and excavations on Federal and Tribal lands. To date, Federal agencies have reported 214 notices of dispositions from Federal lands.
- Draft and promulgate implementing regulations. The Department recently completed consultation with Indian Tribes and Native Hawaiian organizations on possible revisions to the NAGPRA regulations.
- Provide technical assistance to any party involved in repatriation or disposition. Training is provided to upwards of 2,000 participants annually, although we are reaching even larger audiences with remote video conferencing. The National NAGPRA Program responds to thousands of individual inquiries by phone or email annually.

While there have been many successes in implementing NAGPRA as mentioned in the bullets above, the Department is aware that more work under NAGPRA needs to be done. Since the passage of NAGPRA in 1990, less than half of the Native American ancestral remains in collections have been repatriated to their traditional caretakers. Over 117,576 Native American individuals are still in museum and Federal agency collections and 94 percent of those have not been culturally affiliated with any present-day Indian Tribe or Native Hawaiian organization. Even in Alaska and Hawai'i, where connections between ancestral remains and present-day people are well established, over 400 ancestors taken from Alaska and over 100 iwi kupuna taken from Hawai'i are still in museum collections. The Department is also aware that some collections subject to NAGPRA remain unreported. Many Federal agencies are still trying to locate extensive collections in non-Federal repositories in order to complete the NAGPRA compliance process. Likewise, museums are continuing to discover collections subject to NAGPRA that were unknown or unreported that should be returned to their traditional caretakers.

In addition, the Department is aware that changes to the NAGPRA regulations are long overdue.

Regulations

Since 2010, the Department has received repeated requests for substantive updates to the NAGPRA regulations. Based on community input and previous consultations, the Department prepared a draft proposed rule and, in July 2021, invited consultation with Indian Tribes and Native Hawaiian organizations to discuss the proposal. The Department held 4 consultation sessions and received 71 written comments from Indian Tribes and Native Hawaiian organizations.

The goal of any revised regulations, as discussed during the consultation sessions, is to simplify and improve the regulatory process for repatriation; advance the Administration's goals; and streamline existing regulatory requirements by simplifying excessively burdensome and complicated requirements, and clarifying timelines. For example, proposed revisions to the regulations could require museums and Federal agencies to update inventories of ancestral remains and move the regulatory process

forward, without first requiring a request from Indian Tribes or Native Hawaiian organizations.

In addition, the proposed revisions to the regulations could require museums that have custody of a collection to report the collection to the appropriate Federal agency or to the manager of the National NAGPRA Program. This will allow for greater awareness and transparency of collections that are subject to NAGPRA and its repatriation provisions.

The Department is currently working on incorporating the input it received during consultation with Indian Tribes and Native Hawaiian organizations and expects to publish a proposed rule for public comment in early 2022. The Department is committed to emphasizing in the revised regulations deference to the customs, traditions, and Native American traditional knowledge whenever possible in the repatriation process.

Chairman Schatz, Ranking Member Murkowski, and members of the Committee, thank you for the opportunity to present the Department's views on NAGPRA implementation. I would be pleased to answer any questions that you may have.

The CHAIRMAN. Thank you, Director Beasley.
Dr. Anna Maria Ortiz, please proceed.

STATEMENT OF DR. ANNA MARIA ORTIZ, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Dr. ORTIZ. Mr. Chairman, Senator Murkowski, and members of the Committee, thank you for having me here today.

Before I begin, I would also like to extend GAO's wishes for Senator Luján's recovery.

During creation and expansion of the United States, the Federal Government forcibly relocated countless Native Americans from their homelands, separating them from the bodies of their ancestors and from sacred objects central to their cultures. Over time, as archaeologists, developers and others unearthed objects from indigenous cultures throughout the United States, human remains, funerary items, and other objects sacred to American Indians, Alaska Natives and Native Hawaiians were disturbed, destroyed, stolen, or relocated to museums or private collections.

The Native American Graves Protection and Repatriation Act of 1990, NAGPRA, was an important step in addressing the hurtful and destructive impact of our Country's development. In its broadest sense, NAGPRA aims to promote greater understanding between Federal agencies, museums, Indian tribes, including Alaska Native villages, and Native Hawaiian organizations. Specifically, NAGPRA obligates museums and agencies to identify the Native American human remains and certain cultural resources in their holdings, and to work to establish their cultural affiliation as the first step in the process to help return these items to their traditional keepers.

NAGPRA also requires that Federal agencies consult with appropriate tribes and Native Hawaiian organizations prior to excavating Federal or tribal lands and upon any inadvertent discoveries. Lastly, NAGPRA criminalizes the sale, purchase, and use for profit of any cultural items obtained knowingly in violation of the Act.

My testimony today reviews major provisions of NAGPRA and some of the progress that Federal agencies have made since the GAO last reviewed its implementation in 2010. For example, as a result of agencies' implementation of GAO's recommendations, Con-

gress and the public can now access national data on museum inventories and specific items available for repatriation.

My testimony also highlights recent GAO findings on issues central to NAGPRA's implementation. First and foremost is the need for effective Federal consultation with tribes. Museums and agencies that fail to consult effectively may have difficulty establishing the tribal affiliation of sacred items or repatriating culturally unidentifiable items to interested tribes and Native Hawaiian organizations.

GAO also found that Federal agencies encounter challenges in trying to protect Native American cultural resources on Federal and tribal lands, such as resource constraints and competing agency priorities. Further, agency progress in implementing GAO's recommendations from recent reports may help counter looting and trafficking of Native American cultural resources and could help with the repatriation of more than 116,000 remains of ancestors still held in museum and agency collections.

In the 30 years since NAGPRA's enactment, we have grown to appreciate the challenges Federal agencies have faced in implementing the law as well as the importance of implementing it effectively. NAGPRA embodies the unique relationship the United States has with Native Americans. Its consultation requirements underscore the political sovereignty of tribal cultures that predate our nation's. Its legal provisions to protect Native American cultural resources are consistent with the United States trust responsibility.

Finally, in requiring repatriation of human remains, sacred objects, and objects of cultural patrimony to descendants and culturally affiliated tribes and Native Hawaiian organizations, NAGPRA seeks to redress a small portion of the many wrongs that Federal policies have caused over time.

This concludes my oral statement. I welcome any questions you may have.

[The prepared statement of Ms. Ortiz follows:]

PREPARED STATEMENT OF DR. ANNA MARIA ORTIZ, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Chairman Schatz, Vice Chairman Murkowski, and Members of the Committee:

Thank you for the opportunity to discuss examples from our prior reports regarding the Native American Graves Protection and Repatriation Act (NAGPRA).¹ Federal agencies and museums have acquired Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony over hundreds of years. When NAGPRA was enacted on November 16, 1990, it was estimated that federal agencies and museums had tens of thousands of such items in their historical collections.

NAGPRA reflects the unique relationship between the federal government and Indian tribes and Native Hawaiian organizations.² Among other things, NAGPRA requires federal agencies and museums to return certain Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony unless

¹Pub. L. No. 101-601, 104 Stat. 3048-58 (1990) (codified as amended at 25 U.S.C. §§ 3001-3013); 18 U.S.C. § 1170. The implementing regulations for the act are at 43 C.F.R. pt. 10.

²25 U.S.C. § 3010. As Congress outlined in the Indian Trust Asset Reform Act, "through treaties, statutes, and historical relations with Indian tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indians." Pub. L. No. 114-178, § 101(3) (2016) (codified at 25 U.S.C. § 5601(3)). The act also notes that historic federal-tribal relations and understandings have benefited the people of the United States for centuries and established "enduring and enforceable [federal obligations to which the national honor has been committed." Pub. L. No. 114-178, § 101(5) (2016) (codified at 25 U.S.C. § 5601(5)).

the museum or federal agency can provide that it has a right of possession to the objects.³ A Senate committee report that preceded the final version of NAGPRA and informed the drafting of the act stated that human remains “must at all times be treated with dignity and respect,” and that the legislation would encourage a continuing dialogue between museums and Indian tribes and Native Hawaiian organizations and will promote a greater understanding between the groups.⁴

Some federal agencies, such as the Department of the Interior’s (Interior) National Park Service, acquired their collections of Native American cultural items through archeological excavations intended to advance scientific knowledge and preserve cultural items. Others, such as the U.S. Army Corps of Engineers and the Tennessee Valley Authority, have made discoveries when pursuing construction projects that are part of their missions. In addition, according to federal agency officials and representatives of tribal associations that we interviewed, Native American cultural items have a long history of being stolen from federal and tribal lands and added to private or institutional collections or sold for profit. This practice may involve disturbing or destroying graves, ceremonial sites, and archeological sites that have historical, cultural, and scientific importance.

In several previously issued reports, we found that federal agencies could improve the implementation of NAGPRA, better protect Native American cultural items, and take additional actions to facilitate consultation with tribes on infrastructure projects, which may affect tribes’ cultural resources, such as sacred sites and burial sites.⁵

This testimony provides information on (1) federal agencies’ efforts to implement NAGPRA over the last 30 years; and (2) challenges related to the implementation and enforcement of NAGPRA, such as those identified in our prior reports and expressed by Indian tribes and Native American advocacy organizations. This testimony is based on reports that we issued from July 2010 through March 2021. These reports examined NAGPRA and other federal laws related to protecting Native American cultural items, as well as issues related to federal consultation with Indian tribes. This testimony also includes information about the consultation requirements under NAGPRA.

In conducting our previously issued work, we reviewed relevant federal laws, regulations, and policies; reviewed agency documentation; reviewed oral and written comments that tribes submitted to several federal agencies regarding NAGPRA implementation; and interviewed tribal and federal officials. More detailed information on our objectives, scope and methodology for that work can be found in the issued reports.

To update information on federal progress since our reports were issued, we reviewed the status of recommendations we made and examined federal reports with information on NAGPRA implementation. We also reviewed comments from tribal representatives on Interior’s draft proposed revisions to NAGPRA regulations.

We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

³25 U.S.C. § 3005(c). Right of possession means possession obtained with the voluntary consent of an individual or group that had authority of alienation. 25 U.S.C. § 3001(13). The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless that would result in a Fifth Amendment taking by the United States.

⁴S. Rep. No. 101–473, at 4 (1990).

⁵GAO, Native American Cultural Resources: Improved Information Could Enhance Agencies’ Efforts to Analyze and Respond to Risks of Theft and Damage, GAO–21–110 (Washington, D.C.: Mar. 4, 2021); Native American Issues: Examples of Certain Federal Requirements That Apply to Cultural Resources and Factors That Impact Tribal Consultation, GAO–20–466T (Washington, D.C.: Feb. 26, 2020); Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects, GAO–19–22 (Washington, D.C.: Mar. 20, 2019); Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions, GAO–18–537 (Washington, D.C.: Aug. 6, 2018); and Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act, GAO–10–768 (Washington, D.C.: July 28, 2010).

Background

NAGPRA requires federal agencies and museums⁶ to (1) identify the Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony in their possession;⁷ (2) try to determine whether remains and objects or artifacts in their possession have a cultural affiliation with a present-day Indian tribe or Native Hawaiian organization;⁸ and (3) generally repatriate any culturally affiliated items to the applicable Indian tribe(s) or Native Hawaiian organization(s) under the terms and conditions prescribed in the act.⁹ NAGPRA applies to Native American cultural items, which the law defines as human remains, funerary objects, sacred objects, and objects of cultural patrimony.¹⁰ Native American is defined as meaning of, or relating to, a tribe, people, or culture that is indigenous to the United States.¹¹

NAGPRA and its implementing regulations contain provisions governing Native American cultural items controlled or possessed by federal agencies and museums, intentional excavations and inadvertent discovery of Native American cultural items on federal¹² or tribal land,¹³ and a criminal prohibition. Table 1 summarizes these provisions.

⁶Museum means any institution or state or local government agency (including institutions of higher learning) that receives federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution and or any other federal agency. 25 U.S.C. § 3001(8).

⁷Native American means of, or relating to, a tribe, people, or culture that is indigenous to the United States. 25 U.S.C. § 3001(9).

⁸"Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act) 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). "Native Hawaiian organization" means any organization which (1) serves and represents the interests of Native Hawaiians, (2) has as a primary and stated purpose the provision of services to Native Hawaiians, and (3) has expertise in Native Hawaiian affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei. 25 U.S.C. § 3001(11).

⁹NAGPRA requires repatriation to lineal descendants under certain circumstances, for example when a direct lineal descendant of an individual who owned a sacred object requests repatriation. In this report, we refer to repatriation of culturally affiliated human remains and objects to Indian tribes and Native Hawaiian organizations but intend that reference to include lineal descendants when applicable.

¹⁰25 U.S.C. § 3001(3). Funerary objects include associated funerary objects and unassociated funerary objects. Associated funerary objects are objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated objects are presently in the possession or control of a federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects. 25 U.S.C. § 3001(3)(A). Unassociated funerary objects are objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with the individual human remains either at the time of death or later, where the remains are not in the possession or control of the federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe. 25 U.S.C. § 3001(3)(B).

¹¹25 U.S.C. § 3001(9).

¹²Federal land is any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971. 25 U.S.C. § 3001(5).

¹³Tribal land is all lands within the boundaries of any Indian reservation; all dependent Indian communities; and 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).

Table 1: Summary of Provisions in the Native American Graves Protection and Repatriation Act (NAGPRA) and Its Implementing Regulations

Type of provision	Summary
Collections	NAGPRA requires federal agencies and museums—defined as any institution or state or local government agency that receives federal funds—in possession of, or control over, Native American cultural items to identify those items; try to determine if a cultural affiliation exists with a present-day Indian tribe or Native Hawaiian organization; and generally repatriate the culturally affiliated items to the applicable tribe or organization under the terms and conditions specified in the act. For human remains that federal agencies and museums cannot culturally affiliate, NAGPRA regulations require museums and federal agencies to consult with tribes or Native Hawaiian organizations that request the return of the remains and with federally recognized tribe and Native Hawaiian organizations from whose tribal or aboriginal lands the remains were removed before offering to transfer control of the remains.
Intentional excavation	NAGPRA prohibits the intentional removal from, or excavation of, Native American cultural items from federal or tribal lands unless a permit has been issued, the appropriate Indian tribe or Native Hawaiian organization has been consulted with, and the tribe or organization consents to excavation or removal of the items from tribal land. NAGPRA regulations establish requirements for these consultations.
Inadvertent discovery	Since its enactment, NAGPRA has required any persons who know, or has reason to know, that they have discovered Native American cultural items on federal or tribal lands to notify the federal land management agency responsible for the land or the appropriate Indian tribe or Native Hawaiian organization, respectively.(a) NAGPRA regulations establish requirements for federal agencies to consult with Indian tribes and Native Hawaiian organizations regarding these discoveries. If the discovery occurred in connection with an ongoing activity, such as construction, mining, or logging, the NAGPRA regulations require the activity in the area of the discovery to cease.
Criminal	NAGPRA prohibits the sale, purchase, use for profit, or transport for sale or profit of (1) Native American human remains without the right of possession(b) as provided in the act and (2) any Native American cultural items obtained in violation of the act. The act imposes criminal penalties for knowingly violating this prohibition.

Source: 25 U.S.C. §§ 3001–3013; 18 U.S.C. § 1170; 43 C.F.R. pt. 10. I GAO–22–105685

(a) For federal land selected by but not yet conveyed to Alaska Native Corporations and groups, notification must be provided to both the federal land management agency and the appropriate corporation or group. 25 U.S.C. § 3002(d)(1).

(b) Right of possession means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains. 25 U.S.C. § 3001(13).

The National NAGPRA Program, within Interior’s National Park Service, facilitates the government-wide implementation of NAGPRA. All federal agencies with collections, federal land, or both (including the Department of the Interior’s Bureau of Indian Affairs and the Department of Agriculture’s Forest Service) are also responsible for implementing NAGPRA. The Department of Justice is responsible for enforcement of NAGPRA’s criminal provision, and the Secretary of the Interior has

authority to assess civil penalties against a museum for failure to comply with NAGPRA.¹⁴

In addition, Executive Order 13175, issued in November 2000, calls for federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.¹⁵ To implement Executive Order 13175, some agencies have developed agency-specific policies and procedures for tribal consultation.¹⁶ More recently, in a January 2021 Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, the President directed every executive department and agency to develop a detailed plan of actions to implement the policies and directives of Executive Order 13175, after consulting with tribal nations and tribal officials.¹⁷ Since then, 80 agencies and offices have hosted tribal consultation sessions to discuss their consultation policies and practices and they issued action plans to improve these efforts, including the Office of Management and Budget, which had not previously consulted with tribes on its activities.

Federal Agencies Have Made Progress Implementing NAGPRA

In July 2010, we reported on the status of NAGPRA implementation, including federal agencies' compliance with NAGPRA's requirements for their historical collections; actions taken by the National NAGPRA Program to fulfill its responsibilities under the law; and federal agencies' reporting of their repatriation of Native American human remains and objects.¹⁸ At that time, we found that (1) federal agencies had not yet fully complied with all of the requirements of NAGPRA; (2) the National NAGPRA Program had taken several actions to implement the act's requirements, but in some cases, had not effectively carried out its responsibilities; and (3) the key agencies had repatriated many NAGPRA items, but repatriation activity had generally not been tracked or reported government-wide.

That report included 14 recommendations aimed at improving NAGPRA implementation, clarifying which entities are eligible under NAGPRA, and providing policymakers with information to assess the overall effectiveness of the act and to provide Indian tribes and Native Hawaiian organizations readily accessible information on items that are available for repatriation, all of which have been implemented. One of these recommendations was that the agencies report their repatriation data to the National NAGPRA Program on a regular basis, and that the National NAGPRA Program make that information readily available to Indian tribes and Native Hawaiian organizations, as well as publish the information in its annual report to Congress.

As a result of the agencies' and the National NAGPRA Program's implementation of this recommendation, annual data on the status of federal agencies' repatriation progress are readily available. For example, according to data from National NAGPRA Program's fiscal year 2020 report, from fiscal year 1990 through fiscal year 2020, 91.5 percent of culturally affiliated human remains have completed the NAGPRA process and over 1.7 million associated funerary objects have been transferred with human remains. In addition, \$52 million in NAGPRA grants have been awarded, including \$1.9 million in fiscal year 2020, which was a \$250,000 increase from fiscal year 2019 grants awarded.¹⁹

¹⁴For example, the Department of Justice may prosecute someone for knowingly transporting a sacred object that was obtained from tribal lands in violation of NAGPRA and the Secretary of the Interior may assess a penalty against a museum for failure to develop an inventory of the human remains and associated funerary objects in its possession or control.

¹⁵Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, § 5(a), 65 Fed. Reg. 67249, 67250 (Nov. 9, 2000). The order defines "policies that have tribal implications" as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

¹⁶We have not reviewed whether agencies' tribal consultation policies apply to their efforts to implement NAGPRA.

¹⁷Presidential Memorandum, Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 29, 2021). Agencies also obtained feedback from tribes on federal consultation efforts in response to a 2009 presidential memorandum. Presidential Memorandum on Tribal Consultation, 2009 Daily Comp. Pres. Docs. 887 (Nov. 5, 2009).

¹⁸GAO-10-768.

¹⁹NAGPRA authorizes the Secretary of the Interior to award two types of grants: (1) grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting them in the repatriation of Native American cultural items and (2) grants to museums for the purpose of assisting the museums in developing inventories and summaries of Native American cultural items in their possession or control. 25 U.S.C. § 3008.

According to the National NAGPRA Program's fiscal year 2020 report, however, more work is needed, particularly with respect to the human remains of more than 116,000 Native American individuals still in collections, of which 95 percent have not been culturally affiliated with any present-day Indian tribe or Native Hawaiian organization. The report notes that cultural affiliation studies and in-depth consultations could resolve the rights to many of these individuals. In addition, since fiscal year 1990, the program has collected \$59,111 in civil penalties for failures to comply with NAGPRA.

Challenges Remain with NAGPRA

Although there has been progress in the implementation of NAGPRA since its enactment 30 years ago, concerns expressed by tribes and tribal organizations and our past work indicate that several challenges remain. These issues include challenges with consulting with tribes and tribal organizations, better protecting cultural items, and addressing challenges in the limited scope of the law and enforcement.

Challenges with Implementing Consultation Requirements under NAGPRA

Tribes and tribal organizations have expressed concerns about how some federal agencies are implementing consultation requirements under NAGPRA. In August 2021, Interior held consultation sessions with tribes, tribal organizations, and Native Hawaiian organizations to obtain their input on its draft proposed revisions to the NAGPRA regulations. Interior noted in its August 2021 consultation report that the draft proposed revised regulations are designed to, among other things, streamline and improve its regulatory process for repatriating cultural items to Native Americans and Native Hawaiian organizations. Interior also noted in the consultation report that it plans to review the comments it received.

In written comments on Interior's draft proposal, in September 2021, the Association on American Indian Affairs said a single round of consultation is insufficient to meaningfully incorporate tribal and Native Hawaiian organization views because the reformation needed is so comprehensive and so different from the draft proposed revisions. In August 2021, several tribes also provided comments to Interior on how its draft proposed regulations could facilitate meaningful consultations and lead to respectful repatriation. For example,

- One tribal official commented that the current definition of consultation in Interior's draft proposed regulations is insufficient and prefers the definitions of consultation used in the regulations to implement section 106 of the National Historic Preservation Act because it includes seeking, discussing, and coming to an agreement.²⁰
- A leader of a Native Hawaiian organization said that the revisions to the regulations should recognize that Native Hawaiians are the experts of their lands.

NAGPRA regulations also prohibit intentional excavation of Native American cultural items from federal lands without, among other things, consultation with the appropriate Indian tribe or Native Hawaiian organization. In addition, NAGPRA regulations require consultation with Indian tribes or Native Hawaiian organizations when Native American cultural items are inadvertently discovered on federal lands.²¹ According to the National Congress of American Indians, federal consultation with tribes can help to minimize potential negative effects of federal infrastructure projects on tribes' natural resources and cultural items, which may include cultural items subject to NAGPRA. In 2020, we reported that effective consultation is

²⁰The regulations implementing section 106 of the National Historic Preservation Act define consultation to mean the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. 36 C.F.R. § 800.16(f). Under section 106 of the National Historic Preservation Act and its implementing regulations, federal agencies are to take into account the effects of their undertakings on historic properties through consultation between agency officials, Indian tribes, and others. Pub. L. No. 89-665, § 106, 80 Stat. 915, 917 (1966) (codified as amended at 54 U.S.C. § 306108); 36 C.F.R. pt. 800.

²¹Specifically, federal land management agencies are required to consult with (1) Indian tribes on whose aboriginal lands the planned activity will occur or where the inadvertent discovery has been made; (2) Indian tribes and Native Hawaiian organizations that are, or are likely to be, culturally affiliated with the Native American cultural items; and (3) Indian tribes and Native Hawaiian organizations that have a demonstrated cultural relationship with the cultural items. 43 C.F.R. § 10.4(d)(1)(iv). Agencies must initiate this consultation as soon as possible but no later than 3 working days after receipt of written confirmation of the inadvertent discovery of the items by the person who made the discovery. If the inadvertent discovery occurred in connection with an on-going activity on federal or tribal lands, the person who makes the discovery must stop the activity in the area of the inadvertent discovery and make a reasonable effort to protect the Native American cultural items inadvertently discovered. 43 C.F.R. § 10.4(c).

a key tenet of the government-to-government relationship the United States has with Indian tribes, which is based on tribal sovereignty.²² We also noted that failure to consult, or to consult effectively, sows mistrust; risks exposing the United States to costly litigation; and may result in irrevocable damage to Native American cultural items.

In a 2019 report and 2020 testimony about federal agencies' consultations with Indian tribes for federal infrastructure projects and sacred objects, we reported that several key factors hamper effective tribal consultations.²³ These key factors included agencies initiating consultation late in project development stages and not respecting tribal sovereignty or the government-to-government relationship between federally recognized tribes and the federal government. In addition, we also reported that federal agencies faced challenges in obtaining and maintaining accurate contact information for tribes, which is needed to notify tribes of consultation opportunities. To address these issues, in March 2019, we made one matter for congressional consideration and 22 recommendations including that federal agencies take steps to improve their tribal consultation process. As of January 2022, we had closed 11 of the 22 recommendations as implemented and 11 remain open.

Challenges with Better Protecting Cultural Items

Some Native American cultural items have a direct cultural link to modern-day Native American communities who live or whose ancestors lived on the lands. While cultural and religious practices vary, tribes may consider some items at these sites to be sacred or have other profound significance. They consider the theft or damage of these items to be detrimental to the preservation of their culture and traditions.

NAGPRA prohibits the theft and damage of Native American cultural items, such as sacred objects, on federal and tribal lands. Federal agencies also help protect these items by attempting to prevent theft and damage and by investigating such crimes. In 2021, we reported that seven federal agencies have taken a variety of approaches to help prevent and detect the theft and damage of Native American cultural items on federal and tribal lands that may contain such items.²⁴ These agencies' approaches included conducting public awareness programs, installing physical protection measures and monitoring sites with electronic surveillance equipment.

However, resource constraints and limitations with data to support decision-making hamper some federal agencies' efforts to prevent, investigate, and prosecute incidents of theft and damage to Native American cultural items. In March 2021, we made seven recommendations that each agency take steps to identify and obtain information to enhance their ability to analyze and respond to risks to Native American cultural items. As of January 2022, these seven recommendations remained open.

Challenges with NAGPRA's Scope and Enforcement

Limitations in the prohibitions on theft and trafficking of Native American cultural items pose another challenge to protecting Native American cultural items. We reported in 2018 that although several federal laws address the theft and trafficking of Native American cultural items, these laws are limited in scope and only apply to the theft or trafficking of certain items.²⁵ In August 2018, we made 12 recommendations, three to each of the four agencies, including a recommendation that the agencies assess the U.S. legal framework governing the export, theft, and trafficking of Native American cultural items. The agencies generally agreed with our recommendations.²⁶ As of January 2022, we had closed two of the 12 recommendations as implemented and 10 remain open.

For example, the criminal prohibition in NAGPRA applies only to Native American cultural items obtained in violation of the act. This criminal prohibition would apply to a person selling a sacred object that was obtained from federal land after NAGPRA's enactment without meeting the requirements for intentional excavation but would not apply to a person selling sacred objects they excavated from their privately owned land, even if that land is located within a tribe's ancestral homelands.

Moreover, in situations where the theft or trafficking of an item falls within the scope of NAGPRA, agency and tribal officials said it can be challenging to provide sufficient evidence to prove the violation in court. For example, to prove a NAGPRA violation, there must be evidence that the item in question was removed from federal or tribal land and was taken after NAGPRA was enacted. Further, as we re-

²² GAO-20-466T.

²³ GAO-19-22 and GAO-20-466T.

²⁴ GAO-21-110.

²⁵ GAO-18-537.

²⁶ The Department of Justice disagreed with the recommendation to assess the U.S. legal framework. We believe this recommendation is still valid, as discussed in the report.

ported in 2021,²⁷ according to an FBI official, it can be less burdensome to prove a violation of the Bald and Golden Eagle Protection Act, than to prove a violation of NAGPRA when a Native American cultural item includes bald eagle feathers.²⁸

In a recent consultation with Interior on draft proposed revisions of NAGPRA regulations, one tribal official noted that the NAGPRA regulations do not require a permit for intentional excavation of private lands within the boundaries of an Indian reservation even though those are tribal lands subject to NAGPRA. Another tribal official noted that it does not apply when private collectors hold objects that would be subject to repatriation under NAGPRA if they were held by museums or federal agencies.

In conclusion, during the 30 years since the passage of NAGPRA, federal agencies have made some progress in addressing the act's requirements, including repatriating over 1.7 million associated funerary objects with human remains, according to the National NAGPRA Program's fiscal year 2020 annual report. However, as we have previously reported and as tribes and tribal organizations have noted, agencies continue to face challenges in implementing and enforcing NAGPRA.

Such challenges point to the value of further examining how NAGPRA is being implemented, including efforts to consult with tribes and Native Hawaiian organizations, better protect cultural items, and address challenges with the law's scope and enforcement. Overall, NAGPRA was a significant step forward in recognizing the dignity of Native American people and supporting tribes' political sovereignty. However, while agencies have made progress in repatriating remains to culturally affiliated tribes, human remains of more than 116,000 individuals are still in federal possession and have not yet been culturally linked to a present day tribe or Native Hawaiian organization. By implementing open recommendations from our prior work, federal agencies will continue to make progress in their efforts to improve tribal consultations and protect Native American cultural items.

Chairman Schatz, Vice Chairman Murkowski, and Members of the Committee, this completes my prepared statement. I would be pleased to respond to any questions that you may have at this time.

The CHAIRMAN. Thank you very much.

Next, we are pleased to welcome, from Hawaii, Carmen Hulu Lindsey, the Chair of the Office of Hawaiian Affairs.

STATEMENT OF CARMEN "HULU" LINDSEY, CHAIR, OFFICE OF HAWAIIAN AFFAIRS

Ms. LINDSEY. Mahalo, Chair. I would also like to wish Senator Luján a speedy recovery.

[Greeting in Native tongue], much aloha to Chair Schatz, to Vice Chair Murkowski, and to the members of the Senate Committee on Indian Affairs. My name is Carmen Hulu Lindsey, and I am the elected trustee from the island of Maui and the Chairperson of the Board of Trustees for the Office of Hawaiian Affairs.

Our mission is to better the conditions of Native Hawaiians. I am here today to speak about the role the Native American Graves Protection and Repatriation Act, NAGPRA, has had on Native Hawaiians. Iwi, our bones, and their care and protection holds an elevated status in our Hawaiian culture, as they have for thousands of years.

Iwi, our most cherished possession, the late Mary Kawena Pukui, a cultural icon and renowned Hawaiian scholar, has taught us the importance. We identify each other by literally the bone. Not only do the iwi possess the spiritual power and essence of the individual, they are also our direct connection to our ancestors for communication and guidance. For we do not bury our dead, we kanu,

²⁷ GAO-21-110.

²⁸ 16 U.S.C. § 668(a). The Bald and Golden Eagle Protection Act prohibits, among other things, possession of eagle feathers unless allowed by permit.

or plant them back into the earth from whence they came, to continue to nourish, heal, and guide future generations.

This critical cycle has been disrupted due to the mass interment and desecration of our ancestors, especially in the last century of unfettered development in our island home. When NAGPRA was enacted in 1990, here in Hawaii, the State of Hawaii passed human rights legislation to provide for the care, management and protection of unmarked burial sites in the islands, of which there are tens of thousands primarily comprised of our Native Hawaiian ancestors.

This legislation prompted by the deliberate and intentional excavation of the resting places of our ancestors after which they would not only sit in boxes on museum shelves, but would also be sent all over the world for collection and study. Just over 30 years ago, the mass excavation of the sacred remains of over 1,110 men, women, children, and infants out of their final resting place occurred at Honokahua on my island home of Maui, to build a large hotel resort. At the same time, hundreds of remains were being disinterred at another large resort in another area of Maui. Public outcry led to changes in our laws.

While we continue to address ongoing disinterment and the desecration of our ancestral burial sites in the islands, it was NAGPRA which allowed Native Hawaiians to bring thousands of our ancestors home to be respectfully venerated and ceremoniously reburied. Ten years after the passage of NAGPRA, almost 4,000 of our Native Hawaiian ancestors were repatriated out of our local museum on Oahu only. Thousands more iwi were also repatriated from museums and institutions across the United States and internationally by using NAGPRA as a model.

NAGPRA is living proof of what may be accomplished when individuals and organizations build a bridge founded on mutual respect and our shared humanity. Native Hawaiians are humbled and grateful to be of service to our beloved ancestors, knowing that but for them, we simply would not exist.

In the increasingly contentious times now present in our world and in the greater story of humanity, caring for our ancestors guides, strengthens, and teaches us the enduring value of aloha, which embodies the concepts of love, compassion, and forgiveness. [Phrase in Native tongue.] No task is too big when done together by all.

OHA wants to help, and we offer the Committee our written suggestions for future NAGPRA amendments. We stand ready to assist as this august Senate Committee may require.

Ola na iwi, the bones live. Mahalo for this opportunity to testify. [The prepared statement of Ms. Lindsey follows:]

PREPARED STATEMENT OF CARMEN "HULU" LINDSEY, CHAIR, OFFICE OF HAWAIIAN AFFAIRS

Aloha e Chairman Schatz, Vice Chairman Murkowski, and the Members of the U.S. Senate Committee on Indian Affairs.

Mahalo nui loa (Thank you very much) for inviting me to testify on behalf of the Office of Hawaiian Affairs (OHA) and our beneficiaries—the Native Hawaiian community. Over the years, this Committee has consistently been comprised of dedicated, intuitive individuals that collectively and sincerely examine problems unique to the Native American, Native Hawaiian, and Alaskan Native peoples. Most impor-

tantly, you have listened and proposed legislation to overcome these identified problems. OHA again recognizes Chairman Schatz for your work on behalf of our families in Hawai'i. Your work here empowers the Native community to continue exercising true self-determination in all aspects of our lives.

One of the many ways that we seek and claim such self-determination is through the return and reburial of our Native ancestors who were unjustly disinterred and taken away to institutions and facilities—both here at home, and abroad all over the world. The Native American Graves Protection and Repatriation Act (NAGPRA) established in 1990 solidified the ability for Native peoples to make these claims in the U.S. and work towards healing past injustices that violated the sanctity of the grave. The road to NAGPRA was a difficult one, but an important battle for human rights. Mahalo to this Committee for walking this road with us.

Background on OHA and its standing to represent Native Hawaiians

Established by our State's Constitution,¹ the Office of Hawaiian Affairs is a semi-autonomous State agency that was created after a Constitutional Convention in 1978 for the betterment of Native Hawaiians. Guided by a board of nine publicly elected trustees, all of whom are currently Native Hawaiian, OHA fulfills its mandate through advocacy, research, community engagement, land management, and the funding of community programs.

Much like occurrences in the Continental U.S. during the latter half of the 20th century, Hawaiians too were pushing back against rapid development out of a sense of survival to preserve cultural sites, burials, and resources as economic stimulus packages that followed the Great Depression and World War II were being pushed as part of political agendas and to feed a rapidly growing American population. Further, increased militarization contributed to desecrations as thousands of Hawaiian burials were exposed during the 1940s and beyond, with the development of the Marine Corps Base on the Mōkapu peninsula. Sadly, to this day, these iwi kūpuna (ancestral Hawaiian remains) have not been laid to rest; yet, remain closer than ever to a final rest due to the unending love and tireless work of their descendants.

Notably, the latter half of the 1970s is looked at by some as a "Hawaiian Renaissance" or "Reawakening". In Hawai'i, displaced farmers (i.e., Kalama Valley Farmers, Waiahole-Waikane Farmers) and cultural practitioners found a sense of unity in their struggles as Hawai'i was rapidly changing in the 1970s with continued urban expansion. With the success of environmental protest in the 1960s, social and cultural activists were following suit in the 1970s all across America and other parts of the globe (e.g., New Zealand, Australia). In some ways, the creation of OHA was one of the crowning achievements of this era in Hawai'i as OHA has since been around to effectively advocate for Native Hawaiian rights and resources. This is especially true at the federal level. OHA is specifically enumerated within NAGPRA because of its expertise in Hawaiian affairs and repatriation.

As NAGPRA was coming to be, laws were changing in Hawai'i as iwi kūpuna were consistently being desecrated during development projects for hotels, resorts, and condominiums—many of which were located along the shoreline and sandy dunes, where many generations of Hawaiians chose to bury their dead. We must not forget that in 1986, over 1,100 of our iwi kūpuna consisting of men, women, children and infants, were systematically disinterred in Honokahua, Maui, during the construction of the Ritz Carleton hotel at Kapalua. As the number of exposed iwi continued to climb, it was only through public outcry, and ultimately executive action, via former Governor John Waihe'e, that the project was halted. Ultimately, the resort was moved inland in avoidance of the massive burial ground and a burial preserve was established via an agreement document with OHA and Hui Alanui 'o Makena in 1988.

Furthermore, the situation at Honokahua further prompted the creation of Hui Mālama I Na Kupuna 'o Hawai'i Nei, another key Native Hawaiian organization (NHO) specifically mentioned in NAGPRA and the National Museum of the American Indian Act. Additionally, OHA established a Native Hawaiian Historic Preservation Task Force in 1989 that led to the recommendation for the State to create five Island Burial Councils (IBC) to oversee the disposition of Hawaiian burials. Honokahua was the genesis of Act 306 in 1990 which amended our historic preservation law (Chapter 6E, Hawai'i Revised Statutes), and which established both the IBCs and State Historic Preservation Division procedures for the care, management and protection of unmarked burial sites in the islands regardless of ethnicity. These tools have been invaluable for the protection of iwi kūpuna, yet much work remains.

¹HAW. CONST., art. XII, § 5 (1978).

Collaborative NAGPRA Work and Successes Over the Last 30 Years

Over the years since the very beginnings of NAGPRA, the Office of Hawaiian Affairs has participated in domestic and international repatriations in partnership with other NHOs, families, and beneficiaries. In many cases, beneficiaries bring information to OHA about filing a repatriation claim and OHA assists them through the process to provide the necessary resources to carry it out. For decades, OHA partnered with Hui Malama I Na Kūpuna, the only other NHO specifically called out in NAGPRA with OHA, as well as other NHOs, including various IBCs as claimants. Together, we were able to successfully repatriate thousands of iwi kūpuna from all across the world in over 120 repatriation efforts, and here at home in the islands as well. While Hui Mālama is now dissolved, OHA still works closely with community members who are former members and identified as traditional religious leaders.

In the 1990s, OHA worked with NHOs to assist in the successful repatriation of thousands of remains, not only from institutions on the Continent, but right here at home with the Bishop Museum. An estimated 3,000 individuals from Marine Corps Base Hawai'i development work at Mokapu were held at the Bishop Museum for over 50 years. The museum's island of O'ahu Collection alone contained over 1,000 individuals collected over a span of almost 90 years. When disagreements arose during these early years of NAGPRA, OHA was there to assist fellow Native Hawaiians with taking disputes to the NAGPRA Review Committee for consideration. For a time, Native Hawaiian cases were the most heard by the Review Committee.

Some of our most recent successes alongside community leaders include the repatriation of ancestral remains from Berkeley and Case Western Reserve University in early October. Notably, this effort also saw the return of a lei niho palaoa (whale tooth necklace suspended with human hair) from the Cleveland Museum of Natural History. At present, a team of dedicated Native Hawaiians working closely with OHA are enroute to Germany and Austria to recover ancestral remains on OHA's behalf. While international efforts are not covered under NAGPRA, institutions abroad often choose to follow our domestic repatriation process and increasingly are requiring that repatriations be coordinated with U.S. Embassies located in that particular country. Thus, the wisdom of NAGPRA and the expertise of the U.S. Department of Interior extends far beyond our national borders, thus enabling the return of our iwi kupuna from across the globe.

It is these kinds of partnerships that make repatriations work. Repatriation work can be costly and very technical at times. OHA serves Native Hawaiians by taking action in these situations and providing much needed education. As part of the interactive repatriation process, OHA has provided informational presentations about NAGPRA to potential claimants by explaining the process and their role in it. In 2018, OHA's Compliance team flew to Kona to provide a series of PowerPoint presentations and workshops to the families of Honaunau to repatriate an ancestral effigy taken from the Hale o Keawe (a chiefly mausoleum) in 1825 that now resides in the Chicago Field Museum. Unfortunately, the Chicago Field Museum has challenged the families' interpretation of the effigy as being funerary in nature and Hale o Keawe as constituting a burial site.

While it may be possible for these individuals and NHOs to apply for NAGPRA grants on their own, some of these individuals work two jobs and don't have the technical expertise to submit a competitive grant. In this regard, OHA's assumption of the repatriation related costs (inclusive of travel, reburial fees, paperwork) lessens the financial burden to these Native Hawaiian claimants. OHA serves as a mentor and guide while also empowering these families and NHOs with the knowledge and expertise to advocate for themselves and share what they have learned. As a result, a community network and coalition of family members is now able to take on the responsibility of culling through museum holdings in search of their ancestral remains. It is heartening to see these Native Hawaiians well informed and able to effectively advocate on their own for the return of their Native Hawaiian ancestors.

Priorities for NAGPRA Improvement

Despite the many successes and improvements NAGPRA has enabled in the care and return of our Native Hawaiian ancestors, we know there will be challenges ahead. In an effort to improve an already seminal and vital NAGPRA statute, we offer the following amendments to: 1) the definition of a NHO; 2) the composition of the NAGPRA Review Committee; 3) the protection of confidential information disclosed as part of the NAGPRA process; and, 4) the extension of certain NAGPRA requirements to collections on loan. A fifth and final suggestion is made regarding improvements to statutes that go beyond NAGPRA—1) lowering the mens rea for

NAGPRA trafficking crimes, and 2) creating a framework insulating private individuals from criminal liability when they voluntarily return NAGPRA objects and Native American human remains.

1. Definition of a NHO (25 USC § 3001)

The definition of NHO should be updated to require that NHOs consist of Native Hawaiians in substantive policymaking decisions. This change would further ensure better consistency across federal laws and policies affecting Native Hawaiians. The current NAGPRA statute definition does not require that a NHO actually consist of Native Hawaiians in decisionmaking roles despite the familial importance of repatriation to Native Hawaiians. In contrast, the NHO definition within the Native Hawaiian Education Act (25 USC § 7511) does in fact require Native Hawaiians to be in policymaking positions. NAGPRA merely requires that a NHO have a mission to serve Native Hawaiians.

The current language has historically been contentious and previously presented as problematic in testimony to the Committee in 2004.² In the past, a museum receiving federal funds with a stated mission to serve Native Hawaiians believed they could qualify as a NHO to claim human remains and funerary objects under their own control. Allowing this would have presented a clear conflict of interest and undermined the intent of NAGPRA. Fortunately, this museum withdrew their attempts to qualify as a NHO after further consideration and public objection. To eliminate this problem, we suggest the definition include a requirement that a NHO consist of Native Hawaiians in substantive policymaking positions within the organization in the way that NHO is defined in other federal laws and policies.

2. Composition of the NAGPRA Review Committee (25 U.S.C. § 3006)

Current statute requires that the NAGPRA Review Committee consist of seven members, two of which must be traditional Indian religious leaders. OHA questions why this language only requires two traditional Indian religious leaders on the Review Committee with no mention of an explicit requirement for a traditional Native Hawaiian or Alaskan Native religious leader. The existing definition of a traditional religious leader does not subdivide Native Hawaiian and Tribal leaders into separate categories and there is no rational reason why Native Hawaiian religious leaders should be treated any differently than Tribal religious leaders when it comes to their ability to serve on the Review Committee. Native Hawaiian religious leaders need parity with Tribal religious leaders when it comes to the composition of the Review Committee. While OHA does not believe the original intent of the language was meant to be exclusionary, OHA has received recent complaints that traditional Hawaiian religious leaders have been deliberately excluded from being on the Review Committee. OHA is concerned that Native Hawaiian religious leaders may have been unfairly excluded from serving on the Review Committee in the past. OHA believes these concerns merit amendments to the existing statute to include a Native Hawaiian religious leader as part of the three religious leaders designated to serve on the Review Committee, especially since many of our most ardent and knowledgeable NAGPRA advocates are Native Hawaiian religious leaders—much in the way that Indian and Alaskan religious leaders are involved in NAGPRA claims.

3. Protection of Confidential Information Disclosed as Part of the NAGPRA Process

As part of the NAGPRA process, often times sensitive genealogical or burial location information must be disclosed by potential claimants as part of the process. In a recent claim with the Chicago Field Museum, families from Honaunau provided entire genealogies from each member of their NHO to show a lineal connection to the great Hawai'i Island Chief Keawe. In other cases, recorded or notated consultations may possibly discuss reburial locations. OHA is concerned that this kind of sensitive information disclosed as part of the NAGPRA process may not be protected if a request for such information is made pursuant to the Freedom of Information Act (FOIA). To eliminate intrusion into our sacred genealogies and places of our Native claimants, an exemption is needed within NAGPRA to protect this kind of sensitive information from being subject to FOIA requests.

4. Extension of Certain NAGPRA Requirements to Collections on Loan

With NAGPRA having been in force for over 30 years, one would think that museums holding ancestral remains would by now have posted all inventories required by law. However, OHA has observed situations where collections on long-term loan have been forgotten or overlooked by a Federal agency or museum that is actually

²See December 8, 2004, Oversight Hearing before the Committee on Indian Affairs, 108th Congress, to receive testimony on the application of the Native American Graves Protection and Repatriation Act in the State of Hawai'i.

in control of the human remains; thus, resulting in a situation where the agency or museum in actual control was not aware that they should comply with NAGPRA. In the last 3 years, OHA has experienced this problem with 2 institutions in Ohio and 1 in California. Fortunately, these institutions were able to expedite the repatriations once learning that they held our ancestors, without having to resort to lengthy NAGPRA penalty processes.

OHA believes that a museum holding a loaned collection from either a Federal agency or museum has an ethical responsibility to report non-compliance with NAGPRA or at least to notify the Federal agency that retains control of the human remains about NAGPRA requirements. To reduce gaps in NAGPRA compliance, OHA recommends including statutory language requiring museums that hold collections on loan to report NAGPRA non-compliance or at least to advise the Federal agency or museum retaining control that they must comply with NAGPRA's inventory requirements.

5. *Beyond NAGPRA: 1) Lowering the Mens Rea for NAGPRA Trafficking Crimes; and, 2) Creating a Framework Insulating Private Individuals from Criminal Liability When they Voluntarily Return NAGPRA Objects and Native American Human Remains*

Despite existing criminal enforcement mechanisms within 18 USC § 1170 pertaining to the trafficking of NAGPRA objects and Native American human remains, OHA still sees Hawaiian ancestral remains, funerary objects, and sacred objects being sold at auction within the U.S. by unscrupulous collectors that disregard our humanity. OHA frequently receives alerts from the Association of American Indian Affairs about the online sale of NAGPRA objects and Native American human remains. Most recently, a seller attempted to sell a Native Hawaiian fishhook allegedly made of human bone in an April 2020 online auction. Fortunately, we were able to reclaim that fishhook with help from the Association of American Indian Affairs, Federal Bureau of Investigation, and the Bureau of Indian Affairs.

The fact that these online sales are still ongoing suggests that traffickers of Native human remains and NAGPRA protected objects are either not deterred by existing criminal enforcement statutes or completely naive to the crimes they are committing. The claim of naivete by some offenders has further allowed them to avoid prosecution as the mens rea under 18 USC § 1170 only requires that offenders knowingly commit a crime.

Further, within the last decade, OHA has responded to several inquiries from families on the mainland that discovered they are in possession of ancestral Hawaiian remains. NAGPRA does not currently cover ancestral remains that are in private possession, nor is there any guidance or amnesty from NAGPRA trafficking laws afforded to these individuals. OHA believes that many private individuals in this situation would want to do the right thing and return ancestors that are discovered in their possession, yet are fearful they may be prosecuted if they do so.

While OHA is aware that private possession and criminal penalties for trafficking NAGPRA objects are beyond the scope of NAGPRA, we do acknowledge that Chair Schatz and Vice Chair Murkowski were co-sponsors of the yet-to-be-enacted Safeguard Tribal Objects of Patrimony (STOP) Act in 2020. We commend this action and hope that the provisions within the STOP Act become law. OHA supports the intent of the STOP Act as it would increase the maximum penalties under 18 USC § 1170, would require an export certification system for cultural objects, and would create a framework for the voluntary return of NAGPRA objects by private parties.

These provisions would discourage online sales of NAGPRA objects and would encourage private individuals to voluntarily return human remains in their possession. However, the mens rea requirement under 18 USC § 1170 is problematic because a seller is required to know their actions are illegal in order for criminal liability to attach. We recommend that these mens rea requirements be reviewed and amended so as to more effectively deter illegal trafficking.

Closing Remarks

In closing, the repatriation of our ancestors is part of a healing process and a humanitarian matter at its core. Even after retrievals are complete, healing continues as reburials are coordinated and ceremonially conducted by Native Hawaiian claimants. As famed Hawaiian scholar Mary Kawena Pukui has stated, iwi are our most cherished possession. We must never lose sight of this and continue to persevere.

I wish to express my appreciation and gratitude to both the Chairman and the Vice Chairman for taking on this responsibility. It has been an honor to have had this opportunity to address you and your Committee members. OHA's very capable and knowledgeable staff and I stand ready to assist you in accomplishing this most important work, both now and in the future.

A hui hou. Until we meet again.

Senator MURKOWSKI. [Presiding.] Mahalo, Ms. Lindsey.
Now we will turn to Dr. Valerie Grussing.

**STATEMENT OF VALERIE GRUSSING, PH.D., EXECUTIVE
DIRECTOR, NATIONAL ASSOCIATION OF TRIBAL HISTORIC
PRESERVATION OFFICERS**

Dr. GRUSSING. Mr. Chairman, Madam Vice Chair and members of the Committee, thank you for this opportunity. We are also keeping Senator Luján in our thoughts, and sending him well wishes for a full recovery.

My name is Valerie Grussing, and I have the honor of serving as the Executive Director of the National Association of Tribal Historic Preservation Officers, NATHPO. I am here today with our Repatriation Advisor, Dr. Timothy McKeown, who is also available to respond to questions.

We are speaking today from Silver Spring, Maryland, a D.C. suburb, and the ancestral homeland of the Piscataway and [Native tribe name] peoples. As a descendant of European colonizers, I am especially grateful and humbled for the opportunity to participate here, and to do this work.

When we are talking about healing the soul wound of our Nation's First Peoples, we have a responsibility to support and elevate Native voices, and demanding basic human rights. When some of us aren't whole, none of us are whole. I have heard some of our members say that they try to walk into a room like their ancestors sent them. I am doing that today from my own perspective, and I humbly offer a heartfelt apology for the systematic injustices and atrocities inflicted upon Native peoples, whether or not my own direct ancestors personally had a hand. I think this is important to say and it is important to hear in processes of reconciliation.

I offer the rest of my testimony in honor and service of those who are not present to tell their stories, those living, and those who have walked on, as well as those yet to come, and with the hope that we are in a time of lasting transformational change.

NATHPO is the only national organization devoted to supporting tribal historic preservation officers, THPOs. These tribal government officials protect culturally important places and revitalize the connections to cultural heritage that sustain the health and vitality of Native peoples. The repatriation of Native ancestors and objects of cultural patrimony is critically important to THPOs, who are frequently also the NAGPRA representative for their tribe.

After more than three decades of NAGPRA, we again consider amendments to strengthen Indian tribes' and Native Hawaiian organizations' ability to protect gravesites and reclaim their ancestors and objects, all basic human rights that somehow, we are still fighting for. NATHPO has been deeply involved in these efforts, including our report in 2008 together with the Makah Tribe on Federal compliance with NAGPRA, and how to improve the process. GAO produced a report on this in 2010, and on the Smithsonian's repatriation efforts in 2011. And my and our Chairman's predecessors testified before the House Natural Resources Committee in 2009, and before this Committee in 2011.

Unfortunately, the recommendations and report findings remain relevant today. We submit our report for the record as a resource to support this Administration's commitment to upholding the trust responsibility to tribes. We also submitted comments in response to DOI's boarding school initiative and draft proposed changes to the NAGPRA regulations, which we will submit for the record. We would like to specifically thank Secretary Haaland and the Assistant Secretaries for ensuring that tribes are consulted as part of these initiatives.

In our written testimony, we provide data on the implementation of NAGPRA's three sets of provisions. The law has not been ineffective, but has a long way to go. We recommend changes to definitions. We ask the Committee to establish and fund an interagency task force to stop illegal trafficking of human remains and cultural items. And we ask the Senate to pass the STOP Act.

We support re delegating program activities to the Office of the Assistant Secretary for Indian Affairs, as proposed in the 2020 Haaland bill to amend NAGPRA. We also request that the Committee ask GAO to conduct three evaluations of Federal agency compliance of enforcement, investigations, and penalties, and of the NAGPRA grants program.

Finally, it is my duty to talk about funding. THPOs receive dedicated Federal funding that covers an average of one staff member. And they are not allowed to use that for their NAGPRA duties. NAGPRA funding is even more limited, and is awarded competitively on a project basis.

A system that makes tribes compete for limited funding for the most sacred and foundational, restorative work is re-traumatizing. The time is now for the Federal Government to fulfill its promises, to fund and enforce agencies' consultation requirements, and to fund tribes so that they have a seat at the table complete with the meal and utensils.

Thank you again for this opportunity. We commend the Committee for its intent to empower tribes in protecting Native places, gravesites, and reclaiming their ancestors.

[The prepared statement of Ms. Grussing follows:]

PREPARED STATEMENT OF VALERIE GRUSSING, PH.D., EXECUTIVE DIRECTOR,
NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

Good morning, Mr. Chairman and Members of the Committee. My name is Valerie Grussing, Ph.D., and I have the honor of serving as the Executive Director of the National Association of Tribal Historic Preservation Officers (NATHPO). I am here today with NATHPO's Repatriation Advisor, C. Timothy McKeown, Ph.D., who has compiled some of the data presented in my testimony and will be available if needed to respond to technical questions. We thank you for the opportunity to testify as part of this oversight hearing.

NATHPO is the only national organization devoted to supporting Tribal historic preservation programs. Founded in 1998, NATHPO is a 501(c)(3) non-profit membership association of Tribal government officials who implement federal and Tribal preservation laws. NATHPO empowers Tribal preservation leaders protecting culturally important places that perpetuate Native identity, resilience, and cultural endurance. Connections to cultural heritage sustain the health and vitality of Native peoples. NATHPO provides guidance to preservation officials, elected representatives, and the public about national historic preservation legislation, policies, and regulations. NATHPO promotes Tribal sovereignty, develops partnerships, and advocates for Tribes in governmental activities on preservation issues.

Tribal Historic Preservation Officers (THPOs) assume the responsibilities of State Historic Preservation Officers on Tribal lands and advise and work with federal

agencies on the management of Tribal historic properties. THPOs also preserve and rejuvenate the unique cultural traditions, practices, and languages of their Tribal communities. The repatriation of Native ancestors, funerary objects, sacred objects, and objects of cultural patrimony is critically important to our members. NATHPO is very active on repatriation issues, most recently in advocating for THPOs' interests as part of the Department of the Interior's consultation on a draft proposed revision of the NAGPRA regulations and on the Secretary of the Interior's Boarding School Initiative. I would like to specifically thank Secretary of the Interior Debra Haaland, Assistant Secretary for Indian Affairs Bryan Newland, and Assistant Secretary for Fish and Wildlife and Parks Shannon Estenoz for ensuring that Tribes are consulted as part of these initiatives.

The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), along with the repatriation provisions of the National Museum of the American Indian Act of 1989 (NMAI Act), establish Federal requirements for Federal agencies and museums, including the Smithsonian Institution, regarding the repatriation or disposition of Native American human remains and other cultural items to lineal descendants, Indian Tribes, and Native Hawaiian organizations. The NMAI Act was amended in 1996 to bring it more in line with NAGPRA,¹ but NAGPRA itself has never been amended substantively.² It is fitting that after more than three decades of implementing NAGPRA we take this opportunity to assess its effectiveness and consider amendments to enhance Indian Tribes' and Native Hawaiian organizations' ability to protect grave sites and reclaim their ancestors, funerary objects, sacred objects, and objects of cultural patrimony.

NAGPRA includes three separate sets of provisions. The first set governs the protection of Native American graves and the disposition of cultural items excavated or discovered on Federal and Tribal lands after 1990. The second set of provisions requires museums and Federal agencies to prepare summaries and inventories of their collections and, upon request, repatriate cultural items to lineal descendants and culturally affiliated Indian Tribes and Native Hawaiian organizations. The third set of provisions establish criminal penalties for illegal trafficking of Native American human remains and cultural items. I will first address some concerns expressed by tribal governments related to one of the definitions in NAGPRA and then each of these three sets of provisions in turn.

25 U.S.C. § 3001–Definitions

The most problematic definition in the Act is that of “Native American.” NAGPRA defines the term to mean “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” However, in 2004, the United States Court of Appeals for the Ninth Circuit interpreted the term “Native American” to require that human remains and other cultural items “must bear a significant relationship” to a presently existing Tribe, people, or culture to be considered Native American.³ Not only was this incorrect opinion antithetical to the purpose and policy underlying NAGPRA, it necessitated passage of separate legislation to enable reburial of the 9,000-year-old human remains at issue in the case, and it created ambiguity which, in at least one case, has led to an acquittal in a NAGPRA trafficking case.⁴ In order to address this issue, NATHPO recommends that the Congress amends NAGPRA's definition of “Native American” to read as follows:

(9) “Native American” means of, or relating to, a tribe, people, or culture that is or was indigenous to any geographic area that is now located within the boundaries of the United States.

25 U.S.C. § 3002–Ownership

The ownership provisions apply to the discovery, removal, or excavation of Native American cultural items on Federal lands and Tribal lands after 1990. NAGPRA and its implementing regulations require persons who discover Native American human remains or other cultural items on Federal or Tribal lands to immediately stop any ongoing activity and provide immediate telephone notification of the inadvertent discovery, with written confirmation, to the responsible Federal land manager. The Federal land manager then must notify the appropriate Indian Tribes or Native Hawaiian organizations and begin consultation about the disposition of cultural items and complete a plan of action. The activity that resulted in the inadvertent discovery may resume thirty days after certification by the Federal land manager of receipt of the written confirmation of notification, or sooner if a written,

¹ Pub. L. 104–278, § 4, Oct. 9, 1996, 110 Stat. 3355.)

² Pub. L. 102–572, title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516

³ *Bonnichsen v. United States*, 367 F.3d 864, 878 (9th Cir. 2004) (emphasis in original).

⁴ *U.S. v. Deluca*, No. 00 CR 387 (N.D. Ill. Mar. 6, 2002).

binding agreement is executed between the Federal agency and the appropriate Indian Tribes or Native Hawaiian organizations. Discovered human remains or other cultural items may only be removed or excavated after consultation with the appropriate Indian Tribes and Native Hawaiian organizations, or, in the case of Tribal lands, with the consent of the appropriate Indian Tribe or Native Hawaiian organization. The excavation or removal of cultural items must also comply with the requirements of the Archaeological Resources Protection Act (ARPA). NAGPRA provides a detailed priority listing to determine the ownership or control of discovered or excavated Native American human remains and other cultural items based on lineal descent, Tribal land, cultural affiliation, and aboriginal land. To date, only 218 discoveries and excavations of Native American human remains and other cultural items had occurred on Federal lands,⁵ indicating that NAGPRA has been somewhat successful in fulfilling its grave protection mandate.

NAGPRA sets standards for the disposition of human remains and other cultural items discovered on Federal lands that are recognized by a final judgement of the Indian Claims Commission or the United State Court of Federal Claims.⁶ The advisory committee has adopted this standard in its recommendations regarding the disposition of culturally unidentifiable human remains in museum or Federal agency collections, but elaborated on the basis for determining aboriginal lands. The current regulations allow aboriginal lands to also be determined by a treaty, Act of Congress, or Executive Order.⁷ In order to bring the ownership and repatriation provisions in line, we request that the committee amends the provisions of 25 U.S.C. § 3002 (a)(2)(C) to read as follows:

if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgement of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order as the aboriginal land of some Indian Tribe—

The ownership section has proved the most prone to litigation, due in part to the brevity of the statutory provisions as well as the lack of any institutionalized form of alternative dispute resolution. We hear from THPOs that in many cases Federal agency officials are failing to adequately consult with Indian Tribes following inadvertent discoveries and are failing to complete the plans of action required by regulation. To get a better grasp of Federal compliance with NAGPRA's provisions protecting Native American graves and cultural items, we ask the committee to:

request the Government Accountability Office to complete an evaluation of Federal agency compliance with the requirements of 25 U.S.C. § 3002 and its implementing regulations, particularly focusing on consultation, completion of plans of action and comprehensive agreements, publication of notice of intended disposition, and the disposition of so-called “unclaimed” cultural items, and whether establishing a dedicated position to ensure compliance with these provisions at each agency would be beneficial.

25 U.S.C. §§ 3003–3008—Repatriation of Cultural Items in Federal Agency and Museum Collections

The repatriation provisions of NAGPRA require Federal agencies and museums that receive Federal funds to prepare written summaries of cultural items and more detailed inventories of Native American human remains and association funerary objects in their possession or control, consult with Indian Tribes and Native Hawaiian organizations and, upon request, repatriation cultural items. To date, slightly more than 200,000 Native American ancestors have been inventoried, of which museums and Federal agencies have indicated a willingness to repatriate approximately 42 percent.⁸

NAGPRA establishes a seven-person advisory committee with one of its responsibilities being to compile an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommend specific actions for developing a process for disposition of such remains. After long discussions, development of several drafts, and extensive public consulta-

⁵Newspaper Notices, <https://grantsdev.cr.nps.gov/NagpraPublic/Home/NID> (accessed January 27, 2022).

⁶25 U.S.C. § 3002 (a)(2)(c).

⁷43 CFR § 10.11 (c)(1)(ii).

⁸2021 Native American Graves Protection and Repatriation Act. https://public.tableau.com/app/profile/nationalnagpra/viz/2021NativeAmericanGravesProtectionandRepatriationAct/1_Reported (accessed January 30, 2022).

tion, the advisory committee issued its recommendations in 2000.⁹ The advisory committee noted that although the legal standing of funerary objects associated with culturally unidentifiable human remains is not addressed in NAGPRA, the statute does not prohibit their voluntary repatriation by museums or Federal agencies to the extent allowed by Federal law. Regulations implementing the advisory committee's recommendations were promulgated in 2010.¹⁰ The regulations require museums and Federal agencies that cannot prove right of possession to offer to transfer control of culturally unidentifiable human remains to the Indian Tribe or Native Hawaiian organization from whose Tribal land, at the time of the excavation or removal, the human remains were removed, or to the Indian Tribe or Tribes that are recognized as aboriginal to the area from which the human remains were removed. The regulations also recommend that a museum or Federal agency transfer control of funerary objects that are associated with culturally unidentifiable human remains if Federal or State law does not preclude it. NATHPO feels strongly that Native American funerary objects in museum or Federal agency collections should be returned along with Native ancestors with which they were lovingly buried. We request that the committee amend the advisory committee's responsibilities at 25 U.S.C. § 3006 (c) as follows to explicitly authorize a requirement that human remains and associated funerary objects be returned together:

(5) compiling an inventory of culturally unidentifiable human remains and associated funerary objects that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains and objects;

NAGPRA also authorizes the Secretary of the Interior to assess civil penalties on museums that fail to comply with the repatriation provisions of the Act. Information obtained by Dr. McKeown shows that, to date, 21 museums have failed to comply, one twice, and that \$64,646.34 in penalties were assessed. We also know that in 2017 the National Park Service had a backlog of allegations against another 62 museums that had not been investigated and that no failures to comply have been determined since then.

NATHPO is very concerned that civil enforcement of NAGPRA has been carried out without any degree of public scrutiny, that the penalties assessed are typically mitigated or unknown, and that since 2016 it appears to have completely stopped. We ask the committee to:

request the Government Accountability Office to complete an evaluation of the implementation of the civil enforcement provisions of NAGPRA and its implementing regulations, particularly focusing on ensuring that all allegations are adequately investigated in a timely manner, that the full range of penalties are considered, and that the results of these investigations are publicly known.

NAGPRA authorizes the Secretary of the Interior to make grants to Indian Tribes and Native Hawaiian organizations for the purpose of assisting such Tribes and organizations in the repatriation of Native American cultural items, and to museums for the purpose of assisting the museums in conducting the inventories and summaries.¹¹ Grants funding may not be used for the initiation of new scientific studies of Native American human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.¹² In 1990, the Congressional Budget Office estimated that NAGPRA would cost the Federal Government between \$20 and \$50 million.¹³ At the end of FY2020, \$50.02 million in grants had been awarded,¹⁴ yet the remains of over 117,000 Native American ancestors still sit on museum and Federal agency shelves.¹⁵ Funding needs from Tribes exceed the available grant appropriation and the maximum grant cap ensures that progress towards repatriation is piecemeal and slow. Some THPOs

⁹ Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains, 65 Fed. Reg. 36462 (June 8, 2000).

¹⁰ See 43 CFR § 10.11—Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains; Final Rule, 75 Fed. Reg. 12377 (Mar 15, 2010).

¹¹ 25 U.S.C. § 3008.

¹² 25 U.S.C. § 3003 (b)(2).

¹³ Letter from Robert D. Reischauer, director, Congressional Budget Office to Representative Morris Udall (October 15, 1990).

¹⁴ National NAGPRA Program, Fiscal Year 2020 Report.

¹⁵ 2021 Native American Graves Protection and Repatriation Act. https://public.tableau.com/app/profile/nationalnagpra/viz/2021NativeAmericanGravesProtectionandRepatriationAct/1_Reported (accessed January 30, 2022).

have also expressed concern that some museums may be using grant money to acquire and preserve additional scientific information on human remains and associated funerary objects. We ask the committee to:

request the Government Accountability Office to complete an evaluation of the NAGPRA grant program, particularly focusing on how funding has been used in the past, identifying which of those activities can be shown to most directly result in the repatriation of Native American cultural items, and make suggestions as to how the grants may be most effectively used to maximize repatriation.

18 U.S.C. § 1170—Illegal Trafficking in Native American Human Remains and Cultural Items

The criminal provisions of NAGPRA make it a crime to knowingly sell, purchase, use for profit, or transport for sale or profit Native American human remains or cultural items under certain conditions. For human remains, law enforcement must prove beyond a reasonable doubt that the financial incident occurred without the right of possession, meaning that the defendant cannot show that the human remains were obtained with the voluntary consent of an individual or group that had authority of alienation. Proving illegal trafficking of cultural items is more complicated. Law enforcement must prove beyond a reasonable doubt that the financial incident violated NAGPRA, meaning that the cultural items were either removed from Federal or Tribal lands without a permit, or were obtained from a Federal agency or museum that failed to comply with repatriation provisions of NAGPRA. Data obtained by Dr. McKeown from the Department of Justice and the United States Courts¹⁶ indicates that, to date, 125 investigations of illegal trafficking of Native American human remains and cultural items have been opened resulting in 34 convictions.

These data indicate that convictions for trafficking of Native American human remains under 18 U.S.C. 1170 (a) and funerary objects under 18 U.S.C. § 1170 (b) are relatively infrequent but have continued since NAGPRA was enacted. Convictions for trafficking of Native American sacred objects and objects of cultural patrimony under 18 U.S.C. § 1170 (b) are limited to 1993 to 2005, and further all were convicted in the United States District Courts for the Districts of New Mexico, Arizona, and Utah. The single not guilty verdict in 2004 stands out. Several factors seem to be responsible for this pattern. First, 18 U.S.C. § 1170 (b) convictions requiring proof that the cultural items were obtained in violation of NAGPRA are just more difficult. Second, the not guilty verdict in 2004 seems to reflect a chilling effect of the Ninth Circuit's interpretation of the definition of "Native American" in *Bonnichsen*. Third, the localization of convictions for illegal trafficking of Native American sacred objects and objects of cultural patrimony correlates with the activities of the Four Corners Interagency ARPA Task Force in the early 1990s and the continued activities of the law enforcement personnel involved in that project into the early 2000s. Last, during the 2010s, auctions of Native American sacred objects and objects of cultural patrimony appear to have moved outside of the United States, primarily to France.

Addressing this pattern requires a multi-faceted approach. First, we ask the committee to amend the definition of "Native American" as previously shown to provide a uniform and clear standard for the prosecution of trafficking cases. Second, we request the committee to amend 18 U.S.C. § 1170 requiring the government to show beyond a reasonable doubt the trafficked human remains and other cultural items were obtained without right of possession:

(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains or other cultural items of a Native American without the right of possession to those remains or items as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 10 years, or both.

Omit—(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.

¹⁶Data compiled from the Office of the United States Attorneys, National Caseload Data, FY 2021 Data Files, and *Pacer.gov*

Third, we request the committee to establish and fund an interagency investigative effort like the Four Corners ARPA Task Force that will focus specifically on stopping illegal trafficking of Native American human remains and cultural items. Last, we request that the Senate pass the Safeguard Tribal Objects of Cultural Patrimony Act to stop the illegal export of Native American sacred objects and objects of cultural patrimony. Taken together, these five actions will clarify the statutory prohibition, provide the necessary expertise to investigate offenses, and chill the overseas market for Native ancestors and sacred objects.

Administrative Placement of NAGPRA Implementation Responsibilities

In 2020, then-Representative Haaland introduced H.R. 8298 to amend NAGPRA. One of her key proposals was to redelegate enforcement and other activities previously assigned to the National Park Service to the Office of the Assistant Secretary for Indian Affairs instead. NAGPRA is clearly Indian law, not only is it enshrined under Title 25 of the United States Code with oversight by this committee, but Indian Tribes are the obvious and primary beneficiaries. Implementation of NAGPRA should be administered accordingly and not under the rubric of “cultural resources.” We recognize that Secretary Haaland has the authority to implement this redelegate by means of Secretarial Order with follow-up revision of the Departmental Manual. If, for some reason, this change is not implemented in a timely fashion, we request that this committee amend 25 U.S.C. § 3013 as follows:

25 U.S.C. § 3013. Implementation and Enforcement

(a) *The Office of the Assistant Secretary for Indian Affairs shall be the office for implementation and enforcement and other activities delegated by the Secretary.*

(b) The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter.

NMAI Act Judicial Jurisdiction and Enforcement

An additional issue we request you consider is the process for the return of Native American sacred objects and objects of cultural patrimony from the Smithsonian Institution. At least one group of Indian Tribes has unsuccessfully tried to recover such items from the National Museum of Natural History and has exhausted their administrative appeals, despite a unanimous recommendation to repatriate from the Smithsonian’s own repatriation advisory committee. In such a situation under NAGPRA, an Indian Tribe would be able to challenge the failure to repatriate such cultural items to the United States District Courts (25 U.S.C. § 2013). However, the NMAI Act does not include a similar grant of jurisdiction. NATHPO recommends amending the NMAI Act to add the following provision:

20 U.S.C. § 80 q-16. Jurisdiction and Enforcement. The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

We thank you for the opportunity to testify as part of this oversight hearing, and we commend the committee for this opportunity to assess NAGPRA, with intent to enhance Indian Tribes’ and Native Hawaiian organizations’ ability to protect grave sites and reclaim their ancestors, funerary objects, sacred objects, and objects of cultural patrimony.

Senator MURKOWSKI. Thank you, Dr. Grussing.

Now we will turn to Dr. Rosita Worl. Welcome to the Committee, and thank you for making the long travel.

STATEMENT OF ROSITA WORL, Ph.D., PRESIDENT, SEALASKA HERITAGE INSTITUTE

Dr. WORL. Aan, yatgu sáani. Most noble Chair Senator Schatz, and other Committee members, and if I may, including our own Alaska Senator, beloved and respected Senator Murkowski, Aanshawát’i, Lady of the Land, of the Deisheetaan clan, I am honored to have this opportunity to speak to you today.

In honor of my ancestors, and in accordance with our cultural protocols, may I tell you who I am in Tlingit: Lingít x’eináx

Yeidiklats'okw ka Kaaháni ax saayí. Shangukeidí ka Cháak' naa xat sitee. Kawdliyaayí Hít áyá xát. Lukaax.ádi dachxaank áyá xát.

My Tlingit names are Yeidiklats'okw and Kaaháni. I am of the Shankukeidi clan and the Eagle moiety. I am from the House Lowered from the Sun in Klukwan, Alaska. I am a Grandchild of the Lukaax.ádi clan. In English, I am known as Rosita Worl and I serve as president of the Sealaska Heritage Institute. May I thank Senator Murkowski for that wonderful introduction.

I was privileged to serve on the NAGPRA Review Committee for 13 years, from 2000 to 2013, including serving as its Chair. From my own work with NAGPRA and from the multitude of voices I heard from Native Americans across the Country and from Hawaiians during my 12-year tenure, I came to appreciate that NAGPRA is one of the most significant legislative acts in our history.

Congress recognized the significance of cultural property held by museums and other entities. They understood the traumatic harm that had come from the expropriation of our sacred objects and our ancestral human remains from our homelands; and then the need to return them to their original owners and descendants.

First, I would like to go on record as supporting Representative Haaland's proposed legislation, H.R. 8298, to amend NAGPRA, to move the enforcement office to the Bureau of Indian Affairs, to increase civil monetary penalties for failure to follow the processes established by that Act, and to protect confidential information.

Secondly, I would like to offer a series of recommendations for your consideration. First, I would like to have it clarified that Alaska Native Corporations are eligible to participate in the Native American Protections and Repatriation Act. And Madam Vice Chair, I have appended information on that background.

I would also recommend and allow for the reburial of ancestral human remains at the site from which they were taken. Often, we are told to sneak onto Federal lands to rebury our ancestors from the original site from which they were taken. We do not believe that this is appropriate.

Third, we would like to amend NAGPRA to require review committee findings in dispute as mandatory rather than advisory. Tribes go to a great deal of effort and expense to bring the case before the committee, a committee comprised of scientists, museum professionals, and tribal members, without any guarantee that the committee's finding will be acted upon.

Four, a discrete category of funding to support disputes. And then increase NAGPRA funding for tribes and museums. I know that this is a consistent recommendation of the review committee.

Madam Vice Chair, I have also outlined a number of comments on the draft proposed rules. We have reviewed the National Association of Tribal Historic Preservation Office's letter of September 10th, 2021, which I have appended to my testimony. We want to thank, first of all, the Secretaries for their support. We would like to go on record as supporting the tribal officers' position on the draft proposed rules.

However, Madam Vice Chair, we do have a number of recommendations that we would like to submit for your recommendation in our written testimony. So, gunalchéesh.

[The prepared statement of Ms. Worl follows:]

PREPARED STATEMENT OF ROSITA WORL, PH.D., PRESIDENT, SEALASKA HERITAGE
INSTITUTE

Aan yatgu sáani. Most Noble Chair Senator Schatz and other committee members; and if I may, including our own Alaska Senator Murkowski, or as she is known to us, Aanshawát'k'i, Lady of the Land, of the Deisheetaan clan, I am honored to have this opportunity to speak to you today.

In honor of my ancestors, and in accordance with our cultural protocols, may I tell you who I am in Tlingit:

Lingít x'eínáx Yeidiklats'okw ka Kaaháni ax saayi.

Shangukeidi ka Cháak' naa xat sitee.

Kawdliyaayi Hit áyá xát.

Lukaax.ádi dachxaank áyá xát.

My Tlingit names are Yeidiklats'okw and Kaaháni.

I am of the Shankukeidi clan and the Eagle moiety.

I am from the House Lowered from the Sun in Klukwan, Alaska.

I am a Grandchild of the Lukaax.ádi clan.

In English, I am known as Rosita Worl and I serve as president of the Sealaska Heritage Institute.

I was privileged to serve on the NAGPRA Review Committee for 13 years, from 2000 to 2013, including serving as its Chair. From my own work with NAGPRA and from the multitude of voices I heard from Native Americans across the country and from the Hawaiians during my twelve-year tenure, I came to appreciate that NAGPRA is one of the most significant legislative acts in our history. Congress recognized the significance of tangible and intangible cultural property held by Native Americans; the traumatic harm that had come in the expropriation of cultural and sacred objects and ancestral human remains from Native American homelands; and the need to return those sacred objects and ancestral remains to their original owners and descendants.

First, I would like to go on record as supporting Representative Haaland's proposed legislation H.R. 8298: To amend NAGPRA to move the enforcement office to the Bureau of Indian Affairs; to increase the civil monetary penalties for failure to follow the processes established by that Act; and to protect confidential information.

Draft Proposed Rules

We have had the opportunity to review the National Association of Tribal Historic Preservation Officers (NATHPO) letter of September 10, 2021, on the Draft Proposed Rules to Assistant Secretary Indian Affairs Newland and Assistant Secretary Estenoz for Fish and Wildlife and Parks (attached as Appendix B).^{*} We would like to go on record as supporting the NATHPO Officers position on the Draft Proposed Rules. However, we would like to emphasize the following points:

§ 10.5 Discovery

Subsections 10.5 (b) and (c) give the impression that all or most discoveries occur as the result of intentional ground disturbances. These sections must also acknowledge and consider that often discoveries result from unintentional ground disturbances caused by natural forces (storms and floods) and unanticipated outcomes of human activity (for example, cleaning out culverts, or the discovery of illegal and unauthorized excavations of Indian graves). In the early 2000s, a national park in Pennsylvania experienced all of these events that required a response on the part of park officials.

We strongly object to the removal of the requirement by the federal official to notify and initiate consultations with any known lineal descendant and likely culturally affiliated Indian Tribes or Native Hawaiian Organizations within three working days of receipt of a written confirmation of a discovery. The draft proposal authorizes the appropriate official to take specific actions regarding the discovered cultural items, including stabilizing or covering them, evaluating the potential need for further excavation, and certifying that the ground-disturbing activity may proceed with no input from lineal descendants or affiliated tribes. This flies in the face of the purpose of NAGPRA, which is to provide for the meaningful participation of lineal descendants and Indian tribes in the identification and disposition of their cultural items. Timeliness is also crucial; such notification must occur within a tight timeframe because an immediate response is often necessary and appropriate to ensure the protection and respectful treatment of the cultural item(s).

We strongly and respectfully request that the proposed rule reinstate the requirement for a written Plan of Action that has been removed from this section. A Plan

^{*}Appendix A and B have been retained in the Committee files.

of Action, developed in consultation with lineal descendants and Indian Tribes, will specify the appropriate response to a discovery including the best methods and means for stabilizing and protecting cultural items *in situ*, how to treat any items that have been recovered after exposure, what steps will be taken to evaluate the potential need for further excavation, and how the decision will be made to certify, in the case of intentional excavations, that ground-disturbing activities may continue. As written (Subsections 10.5 (c), (d) and (e)), these duties are the responsibility of the appropriate federal official.

We emphasize that the written Plan of Action is a crucial document memorializing a consultation process that must be made part of the discovery procedure for the responsible federal official. In our view, the requirement for a comprehensive agreement (§ 10.4 (b)) is duplicative and could be dropped in favor of highlighting and foregrounding the Plan of Action developed through tribal consultations and in response to specific discovery situations that are or may be encountered. Consultation best practices are that such discussions take place early in the process and that they be comprehensive of situations at hand. There is no reason to have a comprehensive agreement AND a plan of action. In practice, a comprehensive agreement looks like a plan of action.

§ 10.8 General

We concur with all of the NATHPO comments about this section and provide this commentary: The elimination of the words “or possession” in the phrase, “in the possession or control over holdings or collections” of Native American cultural items departs from statutory language and oversimplifies and obscures a problem inherent to the NAGPRA process necessary for the completion of inventories and summaries. It seems that this draft rule attempts to correct this issue by including a definition of “control” which does not succeed in correcting the problem. The issue is that museums and repositories sometimes have collections in their possession that can be traced to other institutions and individuals (such as federal agencies, states, universities, contractors, and others) that deposited them in the holding museum, but do not exercise control over them. This has caused problems during implementation in that the museum or institution in possession of the items claims no responsibility for carrying out the inventory and summary provisions of NAGPRA, while the entity responsible for the deposit claims they are not responsible either. Sometimes the collections have been in the possession of the holding institution so long that which institution has “control” is in doubt. This problem was reported during the first years of NAGPRA implementation and remains at issue. For this reason, we strongly recommend that the draft rule retain the statutory language.

We further point out that subsections § 10.8 (b-d) attempt to resolve this issue for federal agencies but do not provide a solution for collections in other types of museums and repositories, or that cannot be tracked back to a federal agency. The need for § 10.8 (d) Informal conflict resolution indicates that this is a continuing problem. What is to suggest that an informal process will resolve the issue that has not been resolved in 50 years?

Finally, as stated in the NATHPO letter, we also point out that the vague requirement of a “statement” in § 10.8 (c) does not satisfy the statutory requirement for a summary or inventory which should be reported to the affiliated tribes and the National NAGPRA program. We refer you to the NATHPO letter for their comment on this topic.

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

§ 10.10 (c)(3): We request the insertion of these sentences at the end of this paragraph:

”Upon receiving a request to consult regarding human remains and associated funerary objects by an Indian tribe or Native Hawaiian organization, the museum or federal agency must immediately stop any ongoing scientific study of such human remains and associated funerary objects and refrain from authorizing the initiation of new scientific study of such remains or associated funerary objects or other means of acquiring or preserving additional scientific study information from such remains and objects. The continuation of existing scientific study or data collection or the initiation of new studies shall be a topic of consultation with the requesting Indian tribe or Native Hawaiian organization, and the restrictions noted in the previous sentence may be modified with the mutual consent of the consulting parties.”

§ 10.10 (h) requires a museum or federal agency to send a written repatriation statement that conveys control of human remains and associated funerary objects to a requesting lineal descendant, Indian Tribe, or Native Hawaiian organization. Significantly, this requirement includes funerary objects that are associated with human remains which are associated with the requesting party through geographical association. We support this change.

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

§ 10.11 (g) We request that the second sentence of § 10.11 (g) be revised to read: "The daily penalty amount shall not exceed \$1,408 per day for each failure to comply, subject to ."

§ 10.12 Review Committee We support the recommendations of NATHPO.

Recommendations:

I respectfully offer the following recommendations for your consideration:

- 1) Clarify that Alaska Native Corporations are eligible to participate in the Native American Graves Protection and Repatriation Programs (See Appendix A).
- 2) Allow for the reburial of ancestral human remains at the site from where they were taken. Tribal officials have expressed the wish to rebury remains as close as possible to their original resting place rather than remove them to the present location of the tribe. This preference results from the historical situation that many tribes have experienced, that of forced removal from their original homeland. There is a strong belief that a tribe's health and well-being is dependent on how well their ancestors have been treated, and taking remains away from their original homeland is another significant form of displacement and disturbance.
- 3) Amend NAGPRA to require Review Committee Findings in Disputes as mandatory rather than advisory. Museums are not compelled to observe the findings of the Review Committee, which calls into question the effectiveness of these proceedings. Tribes go to a great deal of effort and expense to bring a case before the Committee, without any guarantee that the Committee's Findings will be acted upon. In our experience (two cases), the museums either ignored the Committee's findings or altered them to suit their purposes. This provision (Sec. 8) is useful for authorizing an opportunity for a tribe to present its case to qualified experts, but ultimately the value of the effort is in question.
- 4) Provide a discrete category of funding to support disputes. Disputes are very expensive undertakings that require an outlay of significant financial resources in staff time, preparation of statements by knowledgeable tribal experts, fees for academic experts in a number of fields, lawyer fees, and travel expenses for all participants. Thus, tribes must commit a substantial financial sum to organize, prepare for, and participate in a dispute hearing in the form of time and expertise. This is an unfunded mandate, and while the process may be beneficial for the repatriation process, it places a large burden on tribes that do not have such funding available in their ongoing operational budgets.
- 5) Increase NAGPRA funding for tribes and museums. This issue has been a regular and ongoing concern of tribes and museums since the passage of NAGPRA, and it is a regular recommendation of the NAGPRA Review Committee in their annual reports to Congress. We support the statements of the Committee on behalf of participating tribes and museums, and request that additional funding be provided to support the participating institutions.

Thank you for this opportunity to comment and share our views and recommendations.

Senator MURKOWSKI. Gunalchéesh, Dr. Worl.

Until Chairman Schatz gets back, I will begin the questioning. Dr. Worl, let me begin with you. First, I mentioned in my opening my appreciation for your work, not only in Alaska, but what you have done as the former chair on the NAGPRA review committee for the Department.

As you know very well, implementation of NAGPRA in Alaska can be challenging; it can be different than we see elsewhere in the Country. We have unique tribal government and management

structures that just make it different. We hear in this Committee a lot about how it is different, where you may have multiple entities that play complementary roles in order to determine what the culturally appropriate next steps may be when we are dealing with sacred remains or funerary objects.

You have given a few recommendations already to the Committee. But recognizing that because of Alaska's unique tribal history and the unique aspects, when we were talking about NAGPRA's application to Alaska, you have indicated that ANCs should be eligible. If you can speak to that specifically, and in the ways that tribes, ANCs, and non-profits can work together so that NAGPRA does work for Alaska. Let's go a little Alaska specific, if we may.

Dr. WORL. Thank you, Madam Chair. I will say thank you also for acknowledging that in the last 50 years, Alaska has developed different institutional arrangements than that of our lower 48 brothers and sisters. We have for-profit corporations, we have tribes, over 220 tribes, we also have regional tribal organizations that administer health and housing and other kinds of services to our people.

Native corporations were initially involved in the implementation of NAGPRA. We were eligible for some 20 years. And then I believe it was in 2010 that the GAO did a study and from that study the recommendation came out to that the Park Service should look at our eligibility. Then we were later advised that ANCs and us, like Sealaska Heritage Institute, implementing the social, cultural, educational responsibility of Alaska Native corporations, we were the ones that were implementing NAGPRA.

So for some 20 years, we were very active in repatriation claims. As you know, collectors love Alaska Native material, culture, and a lot of that was collected from all over the world.

So we found, we started to do an inventory of all of our cultural objects in museums. We finally quit when we reached almost 100,000. We were busy with doing repatriation claims, and we were very surprised when we were declared ineligible.

We did a legal review, and we thought that we should have been declared eligible. But unfortunately, that was not the case. In our region, repatriation claims came to all but a stop except for our one regional tribe.

So it has been a loss for us that we have not been able to continue this important work of seeking the returns of our sacred objects and our ancestors.

Senator MURKOWSKI. I want to make sure that we underscore that. Because the role that the ANCs had been playing, as you point out now, for two decades, had really helped facilitate not only the inventory but the ability to work on the repatriation efforts. Then once ANCs are deemed not eligible under this definition or through this read that GAO has provided, and Interior through Parks has adopted, now all of a sudden you have ANCs that are left out of the picture. Now it still means that your tribes can continue the efforts, the non-profits can contribute the efforts for further repatriation.

But you have limited the ability of an overlay of the tribal structure that has helped to facilitate much of the repatriation efforts

to this point in time. So we are actually not only putting on pause but we are not able to move forward because ANCs are now limited in this definitional approach.

Dr. WORL. Right.

Senator MURKOWSKI. Is that correct?

Dr. WORL. That is absolutely correct. But in addition to halting the repatriation process, what was also halted was dealing with the trauma of the removal of our ancestral remains, dealing with the removal of our sacred objects. So we were not able to continue the path that we had been on in terms of our cultural healing from that trauma.

So it had both the administrative, operative kind of things, but it also had an impact on our culture.

Senator MURKOWSKI. Thank you, Dr. Worl.

The CHAIRMAN. [Presiding.] Senator Cortez Masto.

**STATEMENT OF HON. CATHERINE CORTEZ MASTO,
U.S. SENATOR FROM NEVADA**

Senator CORTEZ MASTO. Thank you, Mr. Chairman. I so appreciate the panel discussion today.

In Nevada, we have had a few cases of high profile and costly litigation under NAGPRA. For example, in 2016, the Fallon Shoshone Tribe finally prevailed in a lengthy battle to repatriate remains that were over 10,000 years old, that DNA testing had associated with Native populations.

So Ms. Beasley, let me start with you. One of the challenges that we have seen in Nevada is that there often has to be consultation with the BLM regarding repatriating items that are in university or museum possession. What we are seeing, unfortunately, is there is a lengthy timeframe within which the BLM consultation takes place.

Is the Administration taking steps to make agencies more responsive? Can you respond to that?

Ms. BEASLEY. Thank you for your question. The Department of the Interior is aware of the inconsistencies with the way that the law is interpreted and applied across the United States, including among Federal agencies. We believe that the proposed regulatory change will go a long way toward clarifying the roles and responsibilities of Federal agencies, as well as clarifying the timelines and the other requirements. So we are certainly aware of the issue and we hope that the proposed regulations will address some of those challenges.

Senator CORTEZ MASTO. Thank you. I appreciate your remarks.

I also know the National Park Service just hired a full-time investigator to enhance oversight and compliance with NAGPRA. Will you commit to working with our Committee in providing members with annual updates on the actions of the new investigator, or if there are challenges or more resources that are needed to make sure we are providing the response that is necessary?

Ms. BEASLEY. As you mentioned, we recently hired the first full-time investigator for the national NAGPRA program. We look forward to continuing the work with the Committee on the implementation of the law.

Senator CORTEZ MASTO. Thank you. I appreciate that.

This is for the panel members. I think it was Dr. Grussing who touched on this. One of the issues that has come up again and again is the lack of funding that has delayed efforts to fully realize NAGPRA goals. At the end of fiscal year 2020, \$50 million in grants had been issued since 1990, yet countless items still need to be repatriated.

So to the panel, realistically, what type of funding commitment would be needed to finally see the goals of this law realized? Is anybody taking a look at that? Could you provide any input to Congress on how we can address that? We will open it up to the panel members, to anybody who wants to weigh in.

Dr. ORTIZ. This is Anna Maria Ortiz. I can speak to some of what happened in the wake of the GAO report in 2010. One of our recommendations was that agencies really figure out what they needed to do to implement the Act properly and develop timelines for doing so.

We heard from agencies the time, including Fish and Wildlife Service, that it would take 28 years and millions of dollars to properly implement the Act, to go through all of their collections. When agencies submitted their timelines, 28 years was, it was much shorter timelines that they told us, yet it was still eight, ten years estimated, and in many cases, agencies estimated that it would cost hundreds of thousands or even millions more than they currently had appropriated to implement the Act effectively.

Senator CORTEZ MASTO. Thank you. I appreciate that. Thank you again for this important discussion. I yield my time.

The CHAIRMAN. Thank you, Senator Cortez Masto. Senator Cantwell?

**STATEMENT OF HON. MARIA CANTWELL,
U.S. SENATOR FROM WASHINGTON**

Senator CANTWELL. Thank you, Mr. Chairman, and thank you for holding this important hearing, and to Vice Chair Murkowski, with 29 federally recognized tribes in the State of Washington, I guarantee you this issue has come up many times. We have had sacred sites impacted and obviously the issues of tribal well-being and sovereignty, just a few years ago, it seems like.

The Ancient One, the remains of the Ancient One were repatriated after several decades of investigation and research, so the different tribes and bands of the Columbia Plateau could lay them to rest. I don't know how many people remember this debate. But clearly, there was even at that moment lots of scientists and lots of differences of opinion about that.

I also recall visiting burial grounds in Port Angeles, Washington, where a major DOT project was going in to build a graving dock, to help with repair of the Hood Canal Bridge. Literally the early stages of that development was the discovery of a 2,000-year-old village, Tse-whit-zen, that literally the construction and the building went on, still went on for months.

The process failed us. The process did not resolve that issue. Maybe ultimately, legal fights would have resolved it. But somehow, we needed a process that would have resolved that instead of continuing the development on this site, once it was discovered we were building on top of a 2,000-year-old village, a major discovery.

So I do want to ask, Dr. Grussing and Ms. Beasley, what other protections, and to Dr. Worl's point about making sure that there is a better process to resolving disputes, not just, oh, maybe we will have a hearing and maybe we won't have a hearing. And I get the framework of these entities that are currently involved.

But these issues, particularly now that we have all sorts of different science involved, are way more complex than the process that we have today. I think that again, we had very major disputes about what we at that time referred to that, now I am saying the Ancient One, but Kennewick Man, and then a lot of dispute, and then this other instance.

Also, we had a problem with one of our dams, so we had to draw down the water. And there were then exposed hundreds of burial sites, all along the Columbia. And how do we protect them, and how do we use this authority to make sure, without identifying where they were.

So I want to ask what specific changes, Ms. Worl, Ms. Beasley, or Ms. Grussing would say that we need to implement that would help us on elevating the discussion and not bypassing it? And what to do to protect the locations from public information if that is so chosen? Whoever wants to start.

Dr. GRUSSING. Dr. Worl, would you like to go first?

Senator CANTWELL. Yes, Dr. Worl, go ahead, and then we will go to our other witnesses.

Dr. WORL. Well, as we know, the disputes are just really lengthy and costly. So I think we really need an assessment and coming up with some measures as how we can better work together on this. And consulting and informing tribal members immediately upon the discovery of any kind of human remains, that must remain in place.

I am concerned that there may be some changes in the resolution, in the procedures that are proposed rules, that may alter that. We need to make sure that the tribes are there right away, and that we have a say in any kind of inadvertent discoveries.

Senator CANTWELL. Yes. And in the Tse-whit-zen case, the only avenue that the Lower S'Klallam had was to basically, well, a lawsuit. We kept saying, this isn't going to end well for either side. So let's figure out a path to figure out what to do here.

Ms. Beasley?

Ms. BEASLEY. Thank you. Again, we believe that the proposed regulation changes will go a long way toward addressing some of the challenges with NAGPRA with regard to streamlining the process, clarifying the rules and responsibilities, removing unnecessarily burdensome procedures, removing offensive language and so forth. We estimate that within a few years of enactment of the proposed rule changes 90 to 95 percent of responsive collections will be able to move through the process.

We certainly would be happy to work with the Committee on technical assistance for any legislative changes that you might propose. I can tell you that some of the things that came up during consultation over the summer regarding the proposed rule that were concerns relate to the definition for Native American in the statute. Certainly concerns about protecting sensitive information, and there are a number of other more minor technical amendments

for legislative history that could be addressed. We would be pleased to work with the Committee.

Senator CANTWELL. Thank you. I am out of time, Mr. Chairman, but if Ms. Grussing either has a quick comment or can submit something for the record, I would so appreciate it.

Dr. GRUSSING. I would take a moment if that is okay. A critical issue here is the recognition of traditional knowledge and oral tradition as a valid form of knowing. I wanted to note that in the case of the Ancient One, the Ninth Circuit actually set really an unfortunate precedent with their choice of some phrasing. We would point to California NAGPRA law as a better approach to recognizing this equally valid form of knowledge to the methods of western science. I think that this outdated colonial approach to disposition of ancestors is also retraumatizing, and we can do better.

Senator CANTWELL. What was the language in that decision that was problematic?

Dr. GRUSSING. Let's see, oral tradition accounts are not specific, reliable, or relevant enough, because they have been inevitably changed and context of transmission, because such traditions include myths that cannot be considered factual, because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins.

Senator CANTWELL. So we should throw out Greek myth, too, or what? Anyway, we should work on this, Mr. Chairman. Some people would say, who does this hearing relate to. There are lots of examples in the State of Washington where a better process would help us. We appreciate this rich culture and the oral traditions. I feel so fortunate to have had some of them. I feel like we should even be doing more.

But anyway, let's work on it, I am happy to work with the Committee as the Committee moves forward. Thank you.

The CHAIRMAN. Thank you very much, Senator Cantwell.

Director Beasley, you testified that a greater percentage of collections have been repatriated to Hawaii and Alaska than have been completed in the lower 48. I don't want to get you in trouble by making you guess, but what accounts for the difference?

Ms. BEASLEY. The variation is largely a result of the relationship between cultural affiliation and geographical association under NAGPRA. So you are correct, 97 percent of collections—

The CHAIRMAN. Say that again in English.

Ms. BEASLEY. Yes, sir. It has to do with the relationship between cultural affiliation and geographical location. So if you consider that in many parts of the lower 48, Indian tribes were forcibly removed from their ancestral homelands to new locations. So they were, as Dr. Worl so eloquently spoke to, effectively taken away from those physical locations. That is not so much the case in Alaska and Hawaii, where those cultural affiliations and geographical connections remain much more intact.

The CHAIRMAN. So that theory would be relatively easy to test, because there are places in the lower 48 where tribes were not geographically displaced, and therefore, they would have a higher rate of repatriation? Is that your experience?

Ms. BEASLEY. I don't know if I could speak to the specifics of that. At this time we can certainly look into that and report back to you. But revisions to the regulations that we are proposing would require museums and Federal agencies to complete the regulatory process, and would require them to consider both cultural and geographical affiliation. Again, within a few years of finalizing the regulations, we would expect that 90 to 95 percent of collections could complete the process. That would certainly be a much better statistic, and more along the lines of what we see in Hawaii and in Alaska.

The CHAIRMAN. Got it. Okay, thank you.

Chair Lindsey, thank you for taking the time. What qualifications do you think a Native Hawaiian organization should have in order to engage in the work under the NAGPRA statute? I don't want to use a legal term here, but who is legitimate in doing this work? How do you attain legitimacy? Is it ancestral knowledge? Is it lineage and genealogy? Is it geographic location? Is it study? Help me to understand how we determine who helps us to implement this law.

Ms. LINDSEY. Thank you, Senator. Under NAGPRA, a Native Hawaiian Organization or an NHO is defined as any organization that serves the interests of Native Hawaiians, and has a primary and stated purpose of provision of services to Native Hawaiians, and has expertise in Native Hawaiian affairs. These NHOs are able to make claims and consult on repatriation matters.

However, this definition does not require that these NHOs actually consist of only Native Hawaiians. This has been problematic in the past, as OHA has witnessed a museum and recreational clubs trying to claim NHO status. As indicated in our written testimony, this could be addressed by amending the NHO definition to require that NHOs have Native Hawaiians in substantive policy making decisions.

The CHAIRMAN. Thank you very much. I would like to work with you, Chair Lindsey, on this. And we will work with our Committee staff as well. The way the statute is written, it invites two people to set up a (c)(3) and represent themselves as representing Native people. And maybe they do. But there has to be a vetting process that has legitimacy both under statutory law but maybe more meaningfully in the culture.

It is a tough thing, because you want to be as expansive and inclusive in a statute as possible. But if it allows two people to claim to have the legitimacy that they may or may not have, it becomes very difficult, especially for the Federal Government, to sort out who is legit and who is not.

It is certainly not my job, and I wouldn't imagine Director Beasley wants that responsibility. But it is something we have to sort out as a community in consultation with Chair Lindsey and others who have a stake and deep knowledge in this area.

Dr. Grussing, tribes are attempting to apply NAGPRA to repatriate human remains found in the cemeteries at Indian boarding schools, including Carlisle Industrial School in Pennsylvania. I am wondering if you can explain how NAGPRA would work in this context.

Dr. GRUSSING. Thank you for that question, Mr. Chairman.

We are so grateful for the light that is being shown on this issue after so long. I actually have my orange on today in solidarity because every child matters.

NATHPO has addressed this question in our comments on the Secretary of the Interior's boarding school initiative. We will submit that for the hearing record.

To summarize, though, the excavation of Native American human remains from any Federal lands requires compliance with NAGPRA. That means the Federal agency must comply with lineal descendants and affiliated Indian tribes before excavation, including a plan of action. The excavation itself must comply with the Archaeological Resources Protection Act. Control of the remains would be as specific in Section 3 of NAGPRA.

Our understanding is that the Carlisle Indian Industrial School is located on Federal land. During the DOI boarding school consultations, we heard extensively from tribes that the Army is claiming exemption from NAGPRA requirements at this site, but we are not aware of any basis for that claim.

The CHAIRMAN. Thank you very much.

Director Beasley, we all know that yesterday, Interior announced the appointment of a full-time civil penalties investigator. Of course, that is good news.

The question is, what is the exact number of allegations related to NAGPRA compliance that NPS has received? Is there a backlog? Given that we haven't had a full-time investigator here, is this in response to an understanding that we are behind the eight ball, or where are we? If you don't know the numbers off the top of your head, you can consider this a formal request to get us a status report on the backlog of complaints or investigations.

Ms. BEASLEY. Thank you, Mr. Chairman. I don't have the exact numbers before me. But we will certainly follow up with you for the record on that matter.

Hiring a full-time civil investigator was a recognition of the importance of that specific role and responsibility that we have. We were also looking ahead to, as we move forward with these proposed regulatory changes, we would anticipate an increase in civil penalty investigations. So it certainly, I think, is evidence of the degree to which we take that role and responsibility very seriously. We will certainly follow up with more specifics about where we are.

The CHAIRMAN. Just to put a fine point on it, there are two ways to do this. They are both legitimate. One is, because it is important, and it is certainly worthy of a full-time person, or of ten, right? That is number one. Number two could be that we are actually sitting on a backlog and we can't even investigate them properly. I am not asking you to give me some number, but is there a backlog?

Ms. BEASLEY. Again, I am not sure I am prepared to answer that question directly and specifically. We will follow up with you after the hearing.

The CHAIRMAN. That is fine. I will let you off the hook here if when you give me your answer for the record, I get a yes or a no to the "is there a backlog" question. Is that fair?

Ms. BEASLEY. Fair enough.

The CHAIRMAN. Thank you.

Vice Chair Murkowski.

Senator MURKOWSKI. Thank you, Mr. Chairman. This has been an important discussion this afternoon. I know that we are in a series of votes, so we are not going to probably have as much input from other colleagues on this. But I would like to think that there is going to be questions that are submitted for the record as well.

Ms. Beasley, I want to ask about some of the things that I mentioned in my opening statement about the situation with regard to these pending actions on the individual remains. I indicated that, this is according to your department, there are still over 400 Native American individuals housed in 26 museums or Federal agencies pending consultation and notification. Can you give me an update on where things stand with pending actions related to the 406 individual remains? What is the update?

Ms. BEASLEY. Yes, ma'am, thank you for your question. The national NAGPRA program has really detailed information on the status, and we would be pleased to follow up with you after the hearing to provide you with that specific information. I can tell you that the National Park Service recently published notices for repatriation of Alaskan ancestors from museums in New Jersey, Michigan, and California.

I would also share that in 2020, we awarded an over \$50,000 grant to the Alutiiq museum in conjunction with the tribal coalition specifically to support research and repatriation requests for the 20 or 30 plus museums across the Country that are holding NAGPRA-eligible Alutiiq ancestors and cultural objects.

Senator MURKOWSKI. So, according, again, to the Department, since NAGPRA was enacted, apparently only 21 percent of museums subject to the Act have resolved all Native American human remains that are under their control. Is it accurate, then, to say that less than one-quarter of all the museums subject to NAGPRA are complying with the law? Or is this an accurate way to interpret what that 21 percent means?

Ms. BEASLEY. That is a great question. As I mentioned in my testimony, and as you note, after plus years, less than half of the Native American ancestors that are in collections have been returned to their traditional caretakers, largely due to identification of those ancestors are culturally unidentifiable. So museums and Federal agencies still wield a significant amount of power in determining what will be repatriated.

We hope that this imbalance can be corrected through the regulatory changes that we are proposing. And we hope that the Congress will support that effort by affirming in the hearing record that the purpose of NAGPRA is repatriation.

Senator MURKOWSKI. Repatriation, and returning their remains with the respect and dignity that should be afforded, absolutely.

One final question for you, Director Beasley. This is what we have heard from the Native village of Chenega. They have written to the Department expressing some concern over some of the changes to NAGPRA that the Park Service is contemplating. They are worried that the effort to update and simplify notice procedures for discovery will result in less participation by impacted tribal communities. I think an overall concern that you are giving greater discretion in the hands of Federal officials to notify a tribe. It goes

to what Dr. Worl was saying there, in terms of being able to be consulted right away.

Has the Department responded to the concerns that have been raised by Chenega specifically?

Ms. BEASLEY. So I want to emphasize that the Department is committed to strengthening, to the maximum extent possible, the requirements for consultation with Indian tribes, Alaska Native villages, and Native Hawaiian organizations on any discovery or excavation on Federal lands. The revisions to the regulations that would streamline the process and make clear what the steps are for Federal agencies and Federal land managers should assist both Indian tribes and Federal agencies through the process.

To answer your question specifically, the Department does plan on publishing direct responses to all the comments that we have received from Indian tribes and Native Hawaiian organizations during consultation, including those that were submitted by Chenega. We hope that Chenega and other Alaska Native villages and corporations and organizations will provide additional feedback and actively participate in consultation once the proposed rule goes to publication.

Senator MURKOWSKI. Can I ask Dr. Worl to comment on that? Because what I am hearing here is that yes, yes, the Native village of Chenega will be consulted, but it will be after a period of time within which, for instance, Park Service, has had, they have been storing the remains or the artifacts.

So I hear what you are saying, but I want to make sure that I hear Dr. Worl correctly too, that the concern is that there is a lag and there is discretion with the agency about when then to bring in the tribe.

Dr. WORL. Thank you, Senator. I would like to refer you to subsections 10.5(b) and (c). These sections give the impression that all or most discoveries occur as a result of intentional ground disturbances. These sections must also acknowledge and consider that often discoveries result from unintentional ground disturbances caused by natural forces, storms, and floods, and unanticipated outcomes of human activity. For example, cleaning out culverts, or the discovery of illegal and unauthorized excavations of Indian graves.

We strongly object to the removal of the requirement by the Federal officials to notify and initiate consultation with any known lineal descendant and likely culturally affiliated Indian tribe or Native Hawaiian organization within three working days of receipt of a written confirmation of discovery. So that is our reading of it, that there is that ambiguity. I think it needs to be clarified, and we need to ensure that there is immediate consultation.

But the section in our opinion gives this other impression.

Senator MURKOWSKI. Thank you for clarifying that, Dr. Worl. I appreciate that.

Mr. Chairman, I have no further questions other than to thank all of the witnesses, and contributions that they have made. Very important. I look forward to further work from the Committee here.

The CHAIRMAN. I am an extraordinarily lucky person, but among the ways in which I am lucky is that as chairman, I get to work

with Lisa Murkowski. It really is a pleasure to work with you and your staff. Thank you very much.

Dr. Ortiz, I am going to have a number of questions for the record for a number of the witnesses. But I will just flag this, because I think it is really important as we consider any legislative work to do on a bipartisan basis. If you will take this for the record, are there any additional aspects of NAGPRA that GAO can help us to address. If you will take that for the record, I would appreciate it.

If there are no more questions for our witnesses, members may also submit follow-up written questions for the record. The hearing record will be open for two weeks. I want to thank all the witnesses for their time and their testimony.

This hearing is adjourned.

[Whereupon, at 3:34 p.m., the hearing was adjourned.]

A P P E N D I X

PREPARED STATEMENT OF MARK MITCHELL, CHAIRMAN, ALL PUEBLO COUNCIL OF GOVERNORS

My name is Mark Mitchell, former Governor of the Pueblo of Tesuque and Chairman of the All Pueblo Council of Governors (APCG). The APCG represents the 20 Pueblo Nations of New Mexico and Texas. Each Pueblo exercises its own Sovereign authority to govern its affairs. The first recorded convening of this council dates back to 1598.

Each generation of Pueblo leaders have utilized this body to collectively take action to address impositions and threats to our cultures, languages, and traditions. Pueblo leadership has identified the inhumane removal of our ancestors and their associated cultural items from their final resting places as acts of violence and crimes against humanity. Pueblo leadership also recognizes that many of our items of cultural patrimony and sacred objects-known to us as living beings-are taken from our communities and trafficked domestically and abroad.

On their behalf, and in the interest of protecting our foremothers and forefathers, cultural ways of life, and present and future generations, I express my appreciation for the Senate Committee on Indian Affairs' Oversight Hearing titled "The Long Journey Home: Advancing the Native American Graves Protection and Repatriation Act's Promise After 30 Years of Practice." It is necessary that the Congress strengthen the Native American Graves Protection and Repatriation Act (NAGPRA).

We look forward to the opportunity to continue to work with the Committee to strengthen this historic and meaningful legislation. One important step in the right direction would be passage of the Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, H.R. 2930 and S. 1471, now before the Senate after House passage. However, we also look forward to partnering with the Committee on designing and advocating for comprehensive NAGPRA amendments to improve its functioning for the benefit of all Tribal Nations.

PREPARED STATEMENT OF THERESA PASQUAL, TRIBAL HISTORIC PRESERVATION OFFICER, PUEBLO OF ACOMA

I. Pueblo Calls on Committee to Pursue NAGPRA Amendments

The Pueblo appreciates the opportunity to present information to the Committee on the important topic of strengthening the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170. The Pueblo has prioritized protecting our tribal cultural heritage items and our sacred places, and through this work we have developed expertise in these areas. Indeed, we have championed the Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, H.R. 2930 and S. 1471, to fill gaps in existing laws that we experience directly.

We have seen firsthand that NAGPRA is an important tool for bringing our ancestors and cultural items home. NAGPRA serves as an example of the federal government taking concrete actions to honor its trust obligations to Tribal Nations in the context of cultural preservation and revitalization.

But we have also seen that NAGPRA has many shortcomings and would benefit from statutory amendments to strengthen and clarify its scope and legal effects. Therefore, we hope that this oversight hearing is the first of many conversations between the Committee, Tribal Nations, and other experts regarding how to strengthen NAGPRA to improve its functioning. We believe these conversations can lead to concrete changes to NAGPRA that will significantly benefit Indian Country.

II. Examples of Needed NAGPRA Amendments

There are many areas in which NAGPRA's statutory language could be strengthened to more fully and robustly protect tribal cultural heritage items. Below we have provided some examples of areas for improvement. However, we encourage the

Committee to engage in further tribal consultation and information gathering to gain a more comprehensive understanding of potential beneficial statutory changes.

Cultural Affiliation

NAGPRA utilizes the phrase “cultural affiliation” in important and potentially gatekeeping ways. “Cultural affiliation” plays a significant role in determining who will receive an ancestor or cultural item upon repatriation from a museum or federal agency, 25 U.S.C. § 3005(a), or upon disposition after removal from federal or tribal lands, 25 U.S.C. § 3002(a)(2). “Cultural affiliation” also shapes how items are identified and how Tribal Nations receive notice of their inclusion in museums’ and federal agencies’ inventories, 25 U.S.C. § 3003, and summaries, 25 U.S.C. § 3004. Importantly, cultural items that museums and federal agencies deem to have a cultural affiliation are subject to NAGPRA’s repatriation process. See 25 U.S.C. § 3005.

One of NAGPRA’s most serious weaknesses is the way a “cultural affiliation” finding or lack thereof can derail a repatriation. Museums and federal agencies use NAGPRA’s language as currently drafted to conclude that a cultural item lacks a cultural affiliation such that the duty to repatriate is not triggered. See 25 U.S.C. § 3005(a). When coupled with NAGPRA’s lack of sufficient oversight regarding such cultural affiliation determinations, this is a major loophole in NAGPRA’s implementation.

One potential solution is strengthening NAGPRA to clarify that a museum or federal agency’s legal obligation to repatriate, 25 U.S.C. § 3005(a), any tribal cultural heritage item is triggered if that item qualifies as a “cultural item” under NAGPRA, 25 U.S.C. § 3001(3), especially in the context of Native American ancestors and their associated funerary objects. Determining which tribal recipient is most closely culturally affiliated for purposes of receiving that cultural item should be a separate question.

Further, decisionmaking authority regarding NAGPRA’s application to a particular item and its repatriation should be placed in the hands of Tribal Nations, the Review Committee, and the Department of the Interior rather than in the hands of museums and federal agencies. Determinations of whether a tribal cultural heritage item is a “Native American” “cultural item” covered by NAGPRA and its “cultural affiliation” should be made based on all available evidence, including Tribal Nations’ expertise. Where museums and federal agencies are permitted any decisionmaking authority, their decisions should be subject to review before the Review Committee, the Department of the Interior, and the courts, and Tribal Nations must be able to initiate such review.

Provenance Requirements

Although NAGPRA prohibits trafficking of ancestors and cultural items, 18 U.S.C. § 1170, these prohibitions only apply to ancestors for whom the offender lacks a right of possession, 18 U.S.C. § 1170(a), and to cultural items obtained in violation of NAGPRA, 18 U.S.C. § 1170(b). In practice, this usually means prosecution is not possible unless the federal government, in conjunction with the Tribal Nation, can demonstrate the cultural item was removed from tribal or federal land after NAGPRA’s 1990 enactment date. See 25 U.S.C. § 3002(a), (c). Thus, without establishing these provenance requirements, an item that has enough cultural significance to qualify as a “cultural item” under NAGPRA, 25 U.S.C. § 3001(3), still cannot be protected from trafficking.¹ NAGPRA’s trafficking prohibitions should apply to all cultural items regardless of the date they were removed or the land from which they were obtained.

Separately, NAGPRA should be amended to make clear that museums’ and federal agencies’ inventory, summary, and repatriation obligations, 25 U.S.C. §§ 3003–05, are not limited by any provenance requirements, as some have wrongly read provenance requirements into those provisions.

Reinterment on Federal Lands

The Pueblo seeks amendments to NAGPRA that direct federal agencies to take possession of ancestors and other cultural items for reinterment at Tribal Nations’ requests. Many Tribal Nations seek reinterment locations that are as close as possible to the location from which an ancestor or cultural item was taken, and public lands are often the best option. However, many federal agencies refuse to accept an-

¹The Archaeological Resources Protection Act (ARPA) has similar provenance issues. See 16 U.S.C. § 470ee(b)(1); see also 16 U.S.C. § 470ee(a), (e). One half-measure to fixing the ARPA provenance issues is adding “tribal law” to amend its provisions stating that ARPA prohibits trafficking of “archaeological resources,” see 16 U.S.C. § 470bb(1), that were removed before ARPA was enacted but in violation of federal or state law in place at the time, 16 U.S.C. § 470ee(b)(2), (c).

cestors and other cultural items for reinterment when they cannot be proven to have come from the boundaries of the particular area of federal lands. NAGPRA should be amended to require such reinterment.

Tribal Nation Funding

The Pueblo recommends additional funding for Tribal Nations and others to more fully implement NAGPRA. While NAGPRA currently authorizes grants to Tribal Nations for the purpose of assisting in repatriations, 25 U.S.C. § 3008(a), funding levels have not been sufficient, and such funds often focus on museum repatriations rather than other aspects of NAGPRA enforcement. For example, additional funding could be used to find solutions to the issue of finding a proper location for reinterment, discussed above, by supporting discussions, planning, mapping, research, and identification of suitable lands.

International Trafficking

The current federal laws often used to protect tribal cultural heritage items from trafficking, including NAGPRA and the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa-470mm, currently leave many tribal cultural heritage items unprotected from export and trafficking abroad. The Pueblos in particular have seen many of our sacred tribal cultural heritage items set for auction overseas and out of our reach, and it is for this reason that the Pueblo has championed the STOP Act. The STOP Act aims to stop the export and facilitate the international repatriation of tribal cultural heritage items already protected under these federal laws. The STOP Act passed the House with bipartisan support in December 2021 and is now before the Senate awaiting passage. A very similar version of the STOP Act passed the Senate in 2020 via unanimous consent. We call on the Committee to secure passage of the bill as soon as possible.

Enforcement

Stricter enforcement of NAGPRA and stricter penalties are necessary to ensure compliance with NAGPRA. The STOP Act would increase NAGPRA trafficking penalties. NAGPRA's provisions authorizing the Secretary of the Interior to assess civil penalties against museums and federal agencies for violations of their NAGPRA obligations should also be strengthened. See 25 U.S.C. § 3007. Further, NAGPRA must provide Tribal Nations with remedies whereby we can ensure enforcement of NAGPRA-as protecting our own tribal cultural heritage items is ultimately our responsibility.

Thank you for the Committee's attention, and we urge you to continue this important work. We hope to continue dialogue with you regarding ways to strengthen NAGPRA.

PREPARED STATEMENT OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS

Dear Chair Schatz and Vice Chair Murkowski,

We are so grateful for your attention to the Native American Graves Protection and Repatriation Act (NAGPRA). While the Association on American Indian Affairs is not a "Tribe" to which the government owes a trust relationship to—and we in no way wish to co-opt this process—the Association feels strongly that our collaborative work with Native Nations and expertise must be shared with you fully. The Association is the oldest non-profit serving Indian Country, and is celebrating our 100 years of service, since 1922! The Association has been a leading organization protecting Sacred Places, and cultural and religious practices since its founding. Regarding NAGPRA and our repatriation efforts, we have devoted significant resources analyzing and evaluating the effectiveness of the Act as well as its regulations, including how the Act can be improved to better reflect Congress' intent.

The Association's work in repatriation and protecting the Sacred is led by our grassroots efforts with Tribal practitioners, museums, academics, lawyers, artists, federal agencies and others on the ground. The Association's Annual Repatriation Conference brings practitioners and specialists together from diverse backgrounds and provides training and technical assistance to Native Nations and institutions. The Association's 7th Annual Repatriation Conference was held virtually over three weeks in November 2021 with 700 participants. This year, the 8th Annual Repatriation Conference will be a hybrid event held October 11, 12 & 13.

The Association also has a Repatriation Working Group, made up of diverse experts involved in repatriation efforts, and a Tribal Partners Working Group, a closed group that provides a safe space to discuss cultural and spiritual, as well as practical issues regarding repatriation and protecting the Sacred. These grassroots groups support the direction of our organization's activities, advocacy and training

regarding NAGPRA, and other matters of domestic and international repatriation, and protection of Sacred Places.

The Association began its review of potential amendments to NAGPRA most recently starting in 2018 with its Repatriation Working Group and other partners. The RWG went line-by-line developing potential amendments that are based in our experience implementing the Act and its regulations. Hand in hand with Tribal and museum practitioners, we have also developed strong positions on revisions to the NAGPRA regulations. Through this work, the Association has developed recommendations about whether the problems with NAGPRA have come from the Act itself, or from the current regulations.

It is clear to us that the biggest problem with NAGPRA compliance comes from the language of the current regulations. The Act continues to be a strong human rights statute—with the main problem that those in control of recommending and developing the regulations that are currently in force created complicated bureaucratic processes that has allowed institutions to get away with 30 years of refusing to repatriate and properly consult with Native Nations (or Tribes) and Native Hawaiian Organizations (NHOs).

We are not providing full details of our recommendations—instead, we are providing a summarized version of these amendments that will hopefully lead to further discussion. Based on the lessons learned over 31 years of NAGPRA, there are four categories of amendments that are needed to align the Act to Congress' intent. First, there are several definitions in 25 U.S.C. § 3001 that require amendment, and a couple other definitions that should be included to improve implementation.

Second, the Act must improve compliance and enforcement, with amendments within the Act and its criminal provisions. Third, the jurisdiction of the Act must be expanded to apply regardless of where stolen and looted Ancestors and cultural items are held or are discovered. Finally, amendments to the Act could be included to support repatriation of children and others that are in marked or unmarked graves of boarding schools and other institutions so that lineal descendants and Native Nations can bring their stolen Ancestors home for reburial.

The following recommendations are summarized for brevity and follow the framework of the Act.

25 USC § 3001—Definitions

“Cultural Items” should be defined as understood by the affiliated Tribe or NHO and not by the museum or federal agency. In other words, the Tribe or NHO understanding of whether an item fits in a particular category should be presumed to be correct as the Tribe or NHO is the primary expert of their own cultural heritage.

“Funerary object” is defined by two separate definitions—one for associated funerary objects and one for unassociated funerary objects. This has caused confusion for institutions with split collections whose funerary objects have been split away from their Ancestors. The definition of unassociated funerary object has also been unworkable for other significant reasons. “Unassociated funerary objects” must be connected to a specific Ancestor or burial site, which has prevented these items from being repatriated. This information is often unknown because of the poor record-keeping of many institutions. However, Tribes understand the types of items that were included in their burials. Unfortunately, graves have been disturbed for the very purpose of removing funerary objects to be sold and exhibited as “art” because these items have been more valuable and easier to traffic than human remains. Tribes and institutions should not have to connect funerary objects to specific Ancestors or known burial sites. All funerary objects should be treated the same, with the Tribe or NHO as the primary expert to categorize the cultural item correctly.

“Indian Tribe.” Native American Ancestors and cultural items have been looted and unconscionably taken over the course of colonial history before there was a class of Tribes referred to as “federally recognized Tribes.” The Act’s definition of “Indian Tribe” has been used inconsistently in the past by regulators, sometimes including state recognized Tribes that are eligible for special programs, and sometimes restricted to federally recognized Tribes alone. The definition should clearly state that this remedial human rights Act applies to federal and state recognized Tribes, as state Tribes are “eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” The Act already applies to lineal descendants and Native Hawaiian organizations, which are not federally recognized Tribes. It is illogical that NAGPRA would not be available as a remedy to state recognized Tribes and Indigenous Peoples who can prove descendency or ownership.

“Native American” should be amended to include “or was”: “means of, or relating to, a tribe, people, or culture that is or was indigenous to the United States.”

This amendment is required because of the faulty reasoning of the Ninth Circuit Court of Appeals in the Kennewick Man case.

“Consultation” is not defined in the Act though it is a main tenet of this work. Given the absolute remedial, restorative purpose of NAGPRA, consultation must be defined differently from other contexts. Consultation, for NAGPRA purposes, must be defined to require obtaining the consent of Tribes or NHOs and that, unless consultation shows otherwise, that the Ancestor and cultural items are viewed with the presumption of Tribal or NHO ownership.¹ Consultation must be more than providing notice, considering that the Act’s language recognizes that the institution must prove it has a “right of possession.” (In other words, the Act’s language presumes repatriation should occur and the only exception is when the institution can prove it has a “right of possession.”)

“Possession or Control” is used throughout the Act but not defined, though the phrase is significant in the declaration of legal responsibilities under the Act.² Whether an institution has possession or control, it is obligated to comply with NAGPRA. “Possession or control” in NAGPRA does not equate to a legal interest, unless the institution can prove that it has a “right of possession” as clearly defined in the Act. This is one of the most important concepts that drives the Act’s successful implementation!

The regulations, as well as guidance provided by different federal agency leadership over time, has defined “control” and “possession” separately, and includes a type of legal interest. To illustrate this, the meaning of “right of possession” used in the Act must be understood. The Act provides a one-and-only exception to repatriation. If an institution can prove a “right of possession” then repatriation shall not occur:

“Right of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. . . The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

25 U.S.C. § 3001(13). Thus, the Act establishes that agencies and museums shall not have any rightful legal interest to Ancestors and cultural items unless they can prove an authoritative transfer from a Tribe or NHO to the institution at the time the item was taken.

Thus, the Act’s use of the phrase “possession or control” does not and cannot create a legal interest that the Act itself forbids and that the agency or museum has not proven. Institutions justify using Ancestors and cultural items anyway they wish, permitting them to exhibit, research (even with federal monies) and loan Ancestors and cultural items to even international institutions without first fulfilling their NAGPRA responsibilities for repatriation and disposition—though they do not have a “right of possession.” Agencies and museums do not have current legal rights in cultural items without this determination—to the contrary, they have legal duties to comply with NAGPRA and restore rightful ownership to Tribes and NHOs.

We recommend then that “possession or control” be defined together as a single term or phrase—as they appear in the Act—as a type of naked possession or control and treated like a bailment, albeit one unintended by the rightful owners (Tribes and NHOs). In that context, legal rights never transfer from institution to Tribe, but are instead acknowledged and restored, and the entity with temporary and naked “possession or control” has a duty to safeguard and restore items to the proper owners. The NAGPRA process, through consultation, affiliation, notice, and repatriation would then acknowledge (instead of transferring a legal interest that the agency or museum does not have) the Tribe(s) or NHO(s) proper and legal ownership.

¹ Please note that the term “ownership” does not truly define how Tribes and NHOs care for Ancestors, their burial belongings and sacred and cultural patrimony. In fact, the term “ownership” can be offensive to our values. This term is being used in our comments to best translate a western legal concept. Instead of ownership, we would prefer terms such as “rightful caretaker.”

² For example: “Each Federal agency and each museum which has **possession or control** over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory.”, 25 U.S.C. 3003(a) (emphasis added).

25 USC § 3002. Ownership: An opportunity to rectify the return of children from Boarding Schools

The Act allows for the removal of Ancestors and their burial belongings from federal or Tribal lands. This process may also be used to disinter and repatriate children from marked and unmarked burials from past or present Boarding School and other institutional properties. Federal agencies, such as the U.S. Army, have denied that NAGPRA applies to excavate and return children from marked and unmarked boarding school cemeteries.

Rather than following NAGPRA, the U.S. Army chose to use their own internal procedures, applicable to soldiers' graves. Those regulations, adopted without regard to the fiduciary obligations central to NAGPRA and without Tribal consultation, only allow for a lineal descendant to disinter their Ancestor (and not an affiliated Native Nation or NHO), and further burdens the process by requiring affidavits and other information not required by NAGPRA. The Army asserts that the Thorpe v. Borough of Jim Thorpe case from the Third Circuit Court of Appeals prevents the application of NAGPRA to disinter a known grave or cemetery of a Native American (at least in that circuit). The Army's argument is misplaced. The judge in the that case declined to apply the repatriation provisions of NAGPRA, after determining that the city was not a museum—and that the federal nexus was too attenuated to invoke the NAGPRA repatriation remedy. The court did not review the graves protection provisions, section 3002. As an agency of the United States, the Army explicitly bears the federal NAGPRA responsibility. The Army must act with respect to the graves protection provisions intended to address children's marked and unmarked graves located on lands that housed U.S. funded boarding schools. Those graves protections provisions, rather than the repatriation provisions construed in Thorpe, apply to remedy hundreds of years of wrongful takings of Native American children—and to give them a proper burial.

Moreover, to support the excavation and return of children from boarding schools and other institutions, the application of NAGPRA should apply beyond federal and Tribal lands. There are many environmental statutes that apply nationally regardless of ownership of land, such as the Endangered Species Act, the Bald and Golden Eagle Protection Act, the Clean Water Act and the Clean Air Act. The only way to prevent a checkerboarded regulatory scheme and allow for graves protection and repatriation in line with Congress stated priorities in NAGPRA and other laws, is to require the application of NAGPRA to all lands and hands that hold Native burials and cultural heritage.

25 USC § 3003. Inventory for Human Remains and Associated Funerary Objects

Subsection(b)(2) of this provision states that inventories “shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.” As expressed above, an institution must prove it has a “right of possession.” Yet, this permissive omission of outright banning research has given many institutions enough legal room to continue to perform destructive research on Ancestors and cultural items in which they have no “right of possession.” How can an institution perform research on collections that it does not own, and where the “right of possession” has not been determined? The Act should be revised to clearly ban new research unless “right of possession” is established by a burden of proof that is higher than a preponderance of the evidence, or unless, pursuant to 3005(b), items are indispensable for completion of a specific scientific study of major benefit to the United States.

If a Tribe and an institution mutually wish to perform more comprehensive investigations about Ancestors or cultural items, NAGPRA does not prevent that effort, see 25 U.S.C. § 3009, but it most certainly does not require it and should be banned unless an institution has the “right of possession” of the Ancestor.

25 USC § 3004. Summary for Unassociated Funerary Objects, Sacred Objects and Cultural Patrimony

As written, the Act allows the institution to determine whether the objects in its collections are “cultural items” pursuant to the Act. As previously stated, institutions often do not have the expertise to determine this, without consultation with the potentially affiliated Tribe or NHO. However, the language of the Act places the determination of whether an object is a “cultural item” solely in the hands of the institution.

Summaries should require an institution to provide a catalogue or summary of its Native American collection and allow the Tribe or NHO to determine what items

fit which categories, and then proceed with repatriation. After all, a Tribe or NHO has the primary expertise over their own cultural heritage.

25 USC § 3005. Repatriation

This provision of the Act, particularly subsection (a)(4), has caused a majority of problems and has fed into the large numbers of “culturally unidentifiable” inventories. First, this subsection has been used by institutions to demand that Tribes and NHOs prove by a preponderance of the evidence that Ancestors and cultural items are affiliated. However, this section only applies where there is no information to affiliate. Any successful institution or Tribal practitioner will tell you that you only need geographic evidence to establish affiliation under the law.

Institutions have used (a)(4) even where there is enough information to affiliate in order to delay repatriation and burden the Tribe to gather more information—including demands for sacred knowledge that is not required to show affiliation—and even to get the Tribe to perform more research. This provision has been financially, as well as emotionally and spiritually, costly for Tribes and NHOs.

The provision should be clarified to limit inclusion of Ancestors and cultural items on the CUI list only where there is no information available, including geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion, or no Tribe or NHO that seeks to affiliate and repatriate.

25 USC § 3007. Penalty

Subsection (a) should be amended to replace “may” with “shall” in order to improve outcomes that incentivize compliance with the Act. “Any museum that fails to comply with the requirements of this chapter may *shall* be assessed a civil penalty. . . .” Moreover, any penalty assessed should go back into the civil penalty program to fund this investigative work and increase efficient and effective compliance with the Act.

Subsection (b)(1) must also be revised to remove the requirement that penalties be assessed according to the “the archaeological, historical, or commercial value of the item involved.” This has been viewed as offensive by many Native Nations and ignores the cultural and spiritual value and the harm suffered by the Native Nation from the refusal of the institution to comply with the law.

25 USC § 3008. Grants

The language of the Act gives the Secretary authorization to provide grants to Tribes and NHOs for “repatriation,” and grants to museums for completing inventories. The language should more generally allow grants to Tribes, NHOs and museums for all efforts under sections 3003, 3004 and 3005 of the Act. This will support Tribes and museums to collaborate for funding to support these efforts—instead of needlessly creating two different buckets of funding and relegates Tribes to seek funding for only the act of repatriation.

18 USC § 1170 Illegal trafficking in Native American human remains and cultural items

The current version of the Safeguarding Tribal Objects of Patrimony Act before the Senate and House amends the illegal trafficking provision of NAGPRA by increasing penalties for violations of NAGPRA. However, this amendment will not offer the deterrence necessary to stop illegal trafficking. It could, however, provide stronger deterrence against trafficking and improper export if the intent requirement was amended.

Currently, 18 USC § 1170 requires an individual to “know” that the act is illegal: “Whomever knowingly sells. . . .” This intent requirement is difficult to prove, and therefore a higher criminal penalty will not prove a deterrence effect for the trafficking of cultural items. Revising the trafficking provision to include a general level of intent, such as merely an intent to sell (instead of the knowledge that the selling is illegal), as well as no requirement of intent (strict liability), would easily strengthen Congress’ efforts to end trafficking. These lower or no intent crimes could provide misdemeanor or 1–2 year penalties, depending on scope of the crime, and would have a higher deterrence effect on trafficking than merely increasing the penalty amount.

Thank you for this opportunity to provide comments.

PREPARED STATEMENT OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY

The Society for American Archaeology (SAA) appreciates this opportunity to provide the following comments on the current state of the implementation of

NAGPRA. The SAA has long been involved in the issue of repatriation of Native American ancestors and cultural items to lineal descendants and culturally affiliated Indian Tribes and Native Hawaiian organizations. The SAA was one of the leading organizations at the forefront of the drafting and passage of the statute in 1990, and has remained deeply involved in its application and enforcement ever since.

The SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological heritage of the Americas. With nearly 7,000 members, the SAA represents professional and avocational archaeologists, archaeology students in colleges and universities, and archaeologists working at tribal agencies, museums, government agencies, and the private sector. The SAA has members throughout the United States, as well as in many nations around the world.

In general, while substantial progress has been made under NAGPRA, implementation of the law has taken longer than was anticipated at the time of NAGPRA's passage and is proceeding too slowly for many. There is room for improvement in the statute, regulations, and programmatic activities. The repatriation process created by the existing regulations is too complex, takes too much time, and is severely underfunded. Too often, the Department of Interior (DOI) has not followed the statute and its own regulations in formulating and carrying out policy. At times, the voice of the Review Committee (RC) has gone unheard. The operations of the National NAGPRA program are often opaque and appear erratic. Museums and federal agencies face hurdles such as limited budgets and staffing shortages that create backlogs in addressing claims and holding consultations. Too few resources have been dedicated to the tribes and Native Hawaiian organizations and the appropriate reburial places are often unavailable due to current federal land management policy, making it difficult to proceed with the actual repatriation of human remains and cultural items.

An update to the NAGPRA regulations is long overdue. Given that the DOI intends to publish proposed changes to the NAGPRA regulations in the near future, the SAA believes that the most productive approach today is to provide the SCIA with answers to those questions asked by the senators during the hearing upon which the SAA can bring some of its experience to bear, including our view of what needs to change in terms of the statute, regulations, and programmatic activities.

Hearing questions and SAA answers

Question. Sen. Cortez-Masto: The BLM and other agencies require lengthy NAGPRA consultations, is the DOI undertaking any effort to reduce the length of the process?

Answer. Consultation is a complicated process that often requires substantial time. Arbitrary timelines for consultation can prevent the relationship-building and establishment of trust that is necessary for the meaningful consideration of tribal information and perspectives, thereby limiting the potential for successful NAGPRA outcomes. To facilitate effective consultation, SAA recommends that additional funds be offered for NAGPRA consultation grants, that consultation grants be awarded more often than once a year, and that federal agencies devote more resources to their NAGPRA consultations. There are other areas that could help reduce the time to complete the NAGPRA process: hard deadlines for the NNP to process inventories and NICs; databases that provide tribal, museum, and agency NAGPRA contacts; a substantial increase in the funding for the repatriation efforts of tribes, museums, and federal agencies; and increased penalties for noncompliance.

Question. Sen. Cortez-Masto: what funding commitment is needed to meet goal of law?

Answer. While such a number is difficult to estimate, it is clear that the current level of support-for the NNP, for compliance within other federal agencies, and for grants to tribes and museums to carry out repatriation projects-is wholly inadequate. From our calculations, an allocation of \$2.5 billion over the next 10 years is needed for substantial progress in repatriation of human remains and funerary objects. This amount is estimated based on information from the NNP (the current rate of completion for the publication of notices for of human remains and associated funerary objects of 21 percent and the \$50 million awarded to date for NAGPRA grants) multiplied by a factor of 10 (the vast majority of NAGPRA work is funded through museums, agencies, and tribes rather than through NAGPRA grants). Federal agencies should have a specific line item for NAGPRA in their budget to disclose how much they intend to spend to uphold their NAGPRA responsibilities.

Question. Sen. Cantwell: what changes are needed in the law and regulations to ensure a sound process?

Answer. SAA recommended statutory changes to NAGPRA:

- Definition of Native American—change to “of, or relating to, a tribe, people, or culture that is or was indigenous to the United States”
- Enforcement functions (both criminal and civil) delegated to DOJ
- Require federal agencies to provide appropriate (as determined through tribal consultation) lands for reburial on federal lands
- Protection of sensitive information recorded during NAGPRA consultation process (exclusion from FOIA)
- Revise the penalties to include audits of all federal funds received by the museum/organization found to be out of compliance
- Add repatriation to the list of duties that can be assumed by THPO programs, with a concomitant increase in funding to assist with staffing for that work

SAA recommended Regulatory changes to NAGPRA:

- Codify the duties of the National NAGPRA Program
 - SAA recommended departmental changes to facilitate implementation of NAGPRA:
- Programmatic activities:
 - Refocus the efforts of the National NAGPRA Program (NNP) on its core functions: notices, grants, databases, training, technical assistance, and enforcement
 - Require the National NAGPRA Program to maintain databases that will facilitate NAGPRA compliance, such as lists of tribal, museum, and agency NAGPRA officials
 - Create deadlines for the NNP to submit notices to the Federal Register once they are received by the NNP
 - Resume NAGPRA training by NNP staff rather than outsourcing it
 - Ensure that grants are awarded in an equitable manner without preferential treatment based on unwritten criteria. Have at least two opportunities per fiscal year for consultation grant applications to be submitted and reviewed
- Staffing:
 - Create a unit within the office of the Secretary of the Interior to oversee all cultural and historic preservation programs, laws, and compliance effort for tribes, including NAGPRA; if this does not occur, then undertake to adequately staff the NNP, and create a Senior Advisor position within the NNP that is linked to the NPS’ Tribal Relations Office
 - The SAA supports the NNP being housed in the administrative unit within the Department of Interior that is the most efficacious for the Tribal nations and accomplishing the goals of NAGPRA. It encourages the DOI to give weight to the recommendations supplied by the tribes on this specific subject in the fall of 2021 when considering the proper placement of the program

Question. Sen. Schatz—how does NAGPRA apply to boarding schools?

Answer. The SAA commends the DOI for undertaking the Federal Indian Boarding School Initiative and trusts that the DOI will consider this question as part of its review. DOI’s consultation with Tribal nations on this subject will be critical to answering this question, as will additional research into land and facility ownership and funding.

Question. Sen. Schatz—DOI has hired NAGPRA civil investigator; is there a backlog in allegations of non-compliance?

Answer. The SAA believes that there is a backlog of allegations of non-compliance, but the NNP has not provided current information on civil enforcement investigation since its 2017 annual report. At the end of FY17, a total of 115 entities were named in letters alleging a failure to comply. A total of 449 allegations had been investigated for 53 entities, with a total of 32 allegations against 20 entities substantiated. The status of the investigations into the other 62 entities, and the number of allegations involved, has not been reported by the NNP. Between FY18 and FY20, at least two letters alleging non-compliance were received by the NNP; but the number of entities and allegations in those letters has not been made publicly available. The addition of the new civil investigator should help with any backlog.

Question. Sen. Murkowski—only 21 percent of institutions have fully resolved all claims on human remains/items under NAGPRA; is it accurate to say that 79 percent are in non-compliance?

Answer. According to the NNP, approximately 21 percent of the institutions with human remains have published notices for the repatriation or disposition of all of the human remains under their stewardship. The SAA applauds their efforts. The

other 79 percent are museums and agencies that have not published notices for all human remains under their stewardship, but they may meet the basic technical requirements for being in compliance. The SAA understands that very few situations in NAGPRA are clear-cut; without further information on the civil enforcement efforts, we do not know how many museums or agencies are non-compliant. It is also unknown how many entities have never submitted an inventory or summary. NAGPRA is a process and it takes time, resources, and institutional will, support, and prioritization to complete notices for all human remains.

PREPARED STATEMENT OF HON. J. MICHAEL CHAVARRIA, GOVERNOR, SANTA CLARA
PUEBLO

I. Pueblo Calls on Committee to Pursue NAGPRA Amendments

The Pueblo appreciates the opportunity to present information to the Committee on the important topic of strengthening the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170. Protection of our tribal cultural heritage items and our sacred places is a priority to the Pueblo, and we have dedicated significant resources to and gained expertise in these areas as a result.

We have seen firsthand that NAGPRA is an important tool for bringing our ancestors and cultural items home. NAGPRA serves as an example of the federal government taking concrete actions to honor its trust obligations to Tribal Nations in the context of cultural preservation and revitalization.

But we have also seen that NAGPRA has many shortcomings and would benefit from statutory amendments to strengthen and clarify its scope and legal effects. Therefore, we hope that this oversight hearing is the first of many conversations between the Committee, Tribal Nations, and other experts regarding how to strengthen NAGPRA to improve its functioning. We believe these conversations can lead to concrete changes to NAGPRA that will significantly benefit Indian Country.

II. Examples of Needed NAGPRA Amendments

There are many areas in which NAGPRA's statutory language could be strengthened to more fully and robustly protect tribal cultural heritage items. Below we have provided some examples of areas for improvement. However, we encourage the Committee to engage in further tribal consultation and information gathering to gain a more comprehensive understanding of potential beneficial statutory changes.

Cultural Affiliation

NAGPRA utilizes the phrase “cultural affiliation” in important and potentially gatekeeping ways. “Cultural affiliation” plays a significant role in determining who will receive an ancestor or cultural item upon repatriation from a museum or federal agency, 25 U.S.C. § 3005(a), or upon disposition after removal from federal or tribal lands, 25 U.S.C. § 3002(a)(2). “Cultural affiliation” also shapes how items are identified and how Tribal Nations receive notice of their inclusion in museums' and federal agencies' inventories, 25 U.S.C. § 3003, and summaries, 25 U.S.C. § 3004. Importantly, cultural items that museums and federal agencies deem to have a cultural affiliation are subject to NAGPRA's repatriation process. See 25 U.S.C. § 3005.

One of NAGPRA's most serious weaknesses is the way a “cultural affiliation” finding or lack thereof can derail a repatriation. Museums and federal agencies use NAGPRA's language as currently drafted to conclude that a cultural item lacks a cultural affiliation such that the duty to repatriate is not triggered. See 25 U.S.C. § 3005(a). When coupled with NAGPRA's lack of sufficient oversight regarding such cultural affiliation determinations, this is a major loophole in NAGPRA's implementation.

One potential solution is strengthening NAGPRA to clarify that a museum or federal agency's legal obligation to repatriate, 25 U.S.C. § 3005(a), any tribal cultural heritage item is triggered if that item qualifies as a “cultural item” under NAGPRA, 25 U.S.C. § 3001(3), especially in the context of Native American ancestors and their associated funerary objects. Determining which tribal recipient is most closely culturally affiliated for purposes of receiving that cultural item should be a separate question.

Further, decisionmaking authority regarding NAGPRA's application to a particular item and its repatriation should be placed in the hands of Tribal Nations, the Review Committee, and the Department of the Interior rather than in the hands of museums and federal agencies. Determinations of whether a tribal cultural heritage item is a “Native American” “cultural item” covered by NAGPRA and its “cultural affiliation” should be made based on all available evidence, including Tribal

Nations' expertise. Where museums and federal agencies are permitted any decisionmaking authority, their decisions should be subject to review before the Review Committee, the Department of the Interior, and the courts, and Tribal Nations must be able to initiate such review.

Provenance Requirements

Although NAGPRA prohibits trafficking of ancestors and cultural items, 18 U.S.C. § 1170, these prohibitions only apply to ancestors for whom the offender lacks a right of possession, 18 U.S.C. § 1170(a), and to cultural items obtained in violation of NAGPRA, 18 U.S.C. § 1170(b). In practice, this usually means prosecution is not possible unless the federal government, in conjunction with the Tribal Nation, can demonstrate the cultural item was removed from tribal or federal land after NAGPRA's 1990 enactment date. See 25 U.S.C. § 3002(a), (c). Thus, without establishing these provenance requirements, an item that has enough cultural significance to qualify as a "cultural item" under NAGPRA, 25 U.S.C. § 3001(3), still cannot be protected from trafficking.¹ NAGPRA's trafficking prohibitions should apply to all cultural items regardless of the date they were removed or the land from which they were obtained.

Separately, NAGPRA should be amended to make clear that museums' and federal agencies' inventory, summary, and repatriation obligations, 25 U.S.C. §§ 3003-05, are not limited by any provenance requirements, as some have wrongly read provenance requirements into those provisions.

Clearer Prohibitions Against Harming Cultural Items Not Removed

NAGPRA prohibits removal of cultural items from federal and tribal lands without proper permitting, 25 U.S.C. § 3002(c), and cultural items' trafficking, 18 U.S.C. § 1170. But NAGPRA's terms should be strengthened to clarify that harming a cultural item, even if that item is not removed from federal or tribal lands, is a criminal violation of NAGPRA.

More Accountability for Government Agencies Managing Federal Lands

As the Pueblo recently saw, the La Cieneguilla Petroglyphs located on Bureau of Land Management lands were vandalized, and such events are not uncommon. There must be more accountability for government agencies that currently manage the lands on which cultural items are located, and the agencies must be required to ensure proper protection of such lands when they are made open to the public.

Similarly, when cultural items are located on federal lands, government agencies must be required to advise and coordinate closely with Tribal Nations that have a direct connection to the lands. NAGPRA currently requires a person making a discovery on federal lands to notify the relevant federal agency, 25 U.S.C. § 3002(d)(1), and further requires tribal consultation ahead of excavation, 25 U.S.C. § 3002(c)(2), (4). NAGPRA should be amended to require notification to and consultation with a Tribal Nation immediately upon discovery.

International Trafficking

The current federal laws often used to protect tribal cultural heritage items from trafficking, including NAGPRA and the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa-470mm, currently leave many tribal cultural heritage items unprotected from export and trafficking abroad. The Pueblos in particular have seen many of our sacred tribal cultural heritage items set for auction overseas and out of our reach. The Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, H.R. 2930 and S. 1471, aims to stop the export and facilitate the international repatriation of tribal cultural heritage items already protected under these federal laws. The STOP Act passed the House with bipartisan support in December 2021 and is now before the Senate awaiting passage. A very similar version of the STOP Act passed the Senate in 2020 via unanimous consent. We call on the Committee to secure passage of the bill as soon as possible.

Enforcement

Stricter enforcement of NAGPRA is necessary to ensure compliance with NAGPRA. Similarly, stricter penalties are necessary, and sacred places containing NAGPRA cultural items should be treated as World Heritage Sites for purposes of

¹The Archaeological Resources Protection Act (ARPA) has similar provenance issues. See 16 U.S.C. § 470ee(b)(1); see also 16 U.S.C. § 470ee(a), (e). One half-measure to fixing the ARPA provenance issues is adding "tribal law" to amend its provisions stating that ARPA prohibits trafficking of archaeological resources," see 16 U.S.C. § 470bb(1), that were removed before ARPA was enacted but in violation of federal or state law in place at the time, 16 U.S.C. § 470ee(b)(2), (c).

penalty setting. The STOP Act would increase NAGPRA trafficking penalties. NAGPRA's provisions authorizing the Secretary of the Interior to assess civil penalties against museums and federal agencies for violations of their NAGPRA obligations should also be strengthened. *See* 25 U.S.C. § 3007. Further, NAGPRA must provide Tribal Nations with remedies whereby we can ensure its enforcement ourselves because protecting our own tribal cultural heritage items is ultimately our responsibility.

Thank you for the Committee's attention, and we urge you to continue this important work. We hope to continue dialogue with you regarding ways to strengthen NAGPRA.

PREPARED STATEMENT OF THE SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

The Salt River Pima-Maricopa Indian Community (SRPMIC) is located in Central Arizona, on the southern boundary of the Phoenix metropolitan area. SRPMIC is comprised of the O'Odham and Piipaash cultures, which are two different and distinct cultures with unique histories and languages. SRPMIC's aboriginal territory consists of 3.8 million acres of South Central Arizona, as adjudicated in 1970 by the U.S. Indian Claims Commission through Docket 228. The combined adjudicated land claims area of SRPMIC, the Gila River Indian Community, the Ak-Chin Indian Community, and the Tohono O'Odham Nation, otherwise referred to as the Four Southern Tribes of Arizona, are used as the basis for consultation under NAGPRA. However, recent anthropological studies now recognize the aboriginal use area of the O'Odham, Piipaash, and their ancestors existing eastward into present day New Mexico, northward into present day Utah, westward to the Pacific Coast, and southward of the Sierra Occidental into Mexico (where there are still O'Odham villages that are a part of the Tohono O'Odham Nation.)

Introduction

This testimony is drafted in response to the Senate Indian Affairs Committee Oversight Hearing entitled "The Long Journey Home: Advancing the Native American Graves Protection and Repatriation Act's Promise After 30 Years of Practice." SRPMIC is heartened that the Committee is examining both compliance and implementation of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), as well as considering legislative solutions to address some of the statutory issues that have arisen over the last several decades.

The people of the SRPMIC and the Four Southern Tribes of Arizona have deep and binding ties to one another and believe that the health and continued existence of our communities relies on these bonds. We hold the belief that people are more than physical beings, and people do not cease to exist (spiritually) or to have ties to this earth at the time of death, but go on to a new world where they continue in a new form of existence only if their physical remains from this world are allowed to continue the natural progression undisturbed until their return to the earth, when the entire body breaks down and is indistinguishable from the dust. We also believe that all objects placed intentionally with a burial must be kept with the body and become subject to the same disposition of the associated remains. SRPMIC acknowledges the great importance of advancement to an equitable resolution for the many Ancestors currently awaiting disposition and looks forward to the time when all of our people are treated with the respect and dignity that all people deserve.

The main principles of NAGPRA are to provide for the protection of undisturbed burials, and to provide a mechanism for the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony to Native American groups for culturally appropriate disposition. NAGPRA strives to soothe and correct the injustices inflicted on Native peoples that occurred due to the disturbance and destruction of sacred burial places of our ancestors and the wrongful collection of objects that are vital to continuing our traditional way of life.

Implementation of NAGPRA has been a long process, and since 1991, SRPMIC has been successful in repatriating thousands of remains and cultural items. Over the years we have learned much about how NAGPRA works, as well as some of the ways in which it has fallen short. This testimony highlights several suggested fixes to NAGPRA based on the Community's firsthand experience.

Comments and Recommendations

Redefine "right of possession" and "possession or control" to reflect authorized stewardship rather than ownership

SRPMIC asserts that Human remains are not objects and cannot be owned. We strongly believe that the final and best outcome for any remains or objects is for

them to be returned to the Tribe to be reburied at an appropriate, unpublicized location that will be protected in perpetuity.

Currently, NAGPRA allows institutions to completely avoid repatriating NAGPRA remains and items if it can prove a “right of possession.” This “right of possession” is defined in the Act:

“Right of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. . . The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

The non-Native concept of possession is highly offensive to SRPMIC and many other Tribes across the nation. SRPMIC has witnessed and experienced this exception used by agencies and museums to allow them to erroneously assert some level of proper title, thus permitting them to exhibit, research and loan ancestral human remains and cultural items without fulfilling their NAGPRA responsibilities for repatriation. In some cases, we have even seen institutions use this exception to drag out the NAGPRA inventory process and arbitrarily delay repatriation.

For the purposes of NAGPRA, we believe that human remains and other NAGPRA objects that have been transferred in the past should be considered to have been temporarily transferred to an authorized steward for safeguarding until such time as the objects or remains may be restored to the Tribe. While it is not an ideal situation, we acknowledge that in certain circumstances this may be the best option for a Tribe to protect the Ancestors, and all other NAGPRA items.

We believe that the updated concept of possession articulated above would respect the intent of this exception—which is to allow authorized tribal governments to temporarily cede control or custody of objects for their protection—without implying that remains and related objects can ever be owned.

For the reasons above, we also recommend eliminating the term “possession or control” in the act (“Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory.”, 25 U.S.C. 3003(a)). Instead, simply possession is sufficient, as there are no circumstances under which any institution may exert full control over any remains or other NAGPRA objects.

Simplify “cultural affiliation” determination process

“Cultural affiliation” is a fundamental component of NAGPRA and the repatriation process set forth in the Act. Following enactment, agencies and institutions were responsible for compiling inventories and summaries of NAGPRA remains and items, and to the extent possible, identifying the cultural affiliation of each item. Based on this initial inventory, Tribes are able to submit repatriation requests for items and remains that are affiliated with the Tribe.

Unfortunately, due to the size of collections, lack of funding in the Act for institutions to dedicate staff time to the inventory process, and in some cases malicious intent to subvert the purposes of NAGPRA, more than 90 percent of ancestral human remains and cultural items were not positively affiliated with a present-day Tribe, and instead were placed on the “culturally unidentifiable” list. The motives for subverting NAGPRA are clear:

- Museums—especially research institutions—prefer to maintain ancestral human remains and cultural items as unidentifiable based on their own internal policies that allow various forms of research, including research that may lead to the destruction of the remains and items, without consent of Tribes or NHOs.
- Delaying and denying cultural affiliation determinations has allowed museums and institutions to maintain the collections of ancestors and all cultural items to which they hold no “right of possession,” and continue to do so for their academic, economic and other interests at the expense of human and civil rights.

Following this first “phase” of cultural affiliation findings, Tribes, including SRPMIC, have worked with agencies and institutions to positively identify the cultural affiliation for thousands of items through a second phase of NAGPRA grants. Tribal consultation, along with geographical information and information held by the museum or agency, is all that is required to make a determination of cultural affiliation under the law. This determination is not an academic or scientific research project; it is a prescribed regulatory process to remedy the human and civil rights abuses against Tribes and NHOs through restitution. The connection between the Tribe(s) or NHO(s) need only be reasonably shown, does not require evaluation

of all possible forms of evidence, and is not defeated by gaps in the historical record. Thus, the regulations should make it more clear that this is a collaborative process that centers around Tribal consultation, and not merely a weighing of evidence.

SRPMIC has first-hand experience with the flaws of the current regulations. In 2011, SRPMIC and the Gila River Indian Community jointly submitted a NAGPRA repatriation request to the Peabody Harvard Museum which included our cultural affiliation documentation to assist in the identification of relevant remains and NAGPRA items on their “culturally unidentifiable” list. Our cultural affiliation documentation was rejected by Peabody for various and unsubstantiated rationales. However, expert archeologists throughout the southwestern United States agree the NAGPRA items in question came from a known Hohokam archeological site in Maricopa County in Arizona and are affiliated to the Four Southern Tribes of Arizona.

The Peabody Harvard Museum then proceeded to apply for and receive a NAGPRA grant, portions of which were used for the “review of evidence towards a reassessment of cultural affiliation of human remains and funerary objects from southern Arizona.” Although the grant concluded in 2016, we have yet to be contacted by the museum with the results of their analysis. Despite the preponderance of evidence, which has been used to successfully repatriate thousands of NAGPRA items to date, the Museum has still not repatriated these clearly affiliated items.

This is just one example under which many museums have requested NAGPRA dollars intended for the purpose of consultation, finding affiliation, and moving forward with repatriation—only to use the funding to place those Ancestors in a “culturally unidentifiable” inventory, indefinitely evading the appropriate remedy.

Were this second phase of affiliation grants directed to Tribal and NHO efforts to resolve culturally unidentifiable inventory (CUI) lists, NAGPRA funding would have been utilized more effectively and avoided the biases and self-interest of museums and institutions protecting their collections. Moving forward, we recommend that NAGPRA grants be awarded to institutions that, at a minimum, submit applications jointly and in collaboration with Tribes and NHOs.

The Act lays out a simple process for determining cultural affiliation—the current regulations turn that process into an interminable research project that museums and agencies have used to burden Tribes, delay and prevent repatriation, and even continue or, worse, initiate destructive scientific research. The draft regulations proposed recently by the National Park Service are better, but still problematic. We ask that you (1) simplify the process of finding cultural affiliation as outlined by the Act that supports repatriation for those Ancestors and cultural items that have not yet been inventoried or placed in summaries as described above; (2) repatriate the Ancestors and their burial belonging within the CUI inventories without requiring more museum or agency decisionmaking, delay and expense; and (3) place the burden of proof on institutions to prove that items the tribe has claimed affiliation with are in fact unaffiliated.

Redefine and eliminate term “culturally unidentifiable” to “culturally unidentified”

As demonstrated above, the culturally unidentifiable definition has been used repeatedly by agencies and institutions to delay or obstruct compliance with the Act. Additionally, many institutions have gone on to write-off their culturally unidentifiable inventory, even when requesting NAGPRA grant funding. Museums—even well-funded and well-intentioned ones—have admitted that they will not be proactive with their culturally unidentifiable inventories. We believe that the term “culturally unidentifiable” should be replaced with “culturally unidentified.” This preserves the responsibility for institutions and agencies to work with Tribes to eventually repatriate all Ancestors and related objects.

Utilize Secretarial Authority to meaningfully crack down on institutions not in compliance

The regulations must fully acknowledge and empower the authority of the Review Committee and the Secretary to oversee, monitor and achieve compliance with this important human rights legislation. One of the primary complaints against the implementing regulations is that there are “no teeth.” We propose avenues pursuant to the language of the Act and other federal law that will underscore the Secretary’s role to enforce Review Committee findings when the Review Committee has found an alleged violation of NAGPRA.

The Act gives the Secretary of the Interior authority to:

- a. Promulgate regulations that bind museums as well as federal agencies in their responsibilities under NAGPRA (25 U.S.C. 3011);
- b. Carry out the special government to government relationship with Indian Tribes and Native Hawaiian organizations for the benefit of Tribes and NHOs (Id. § 3010);

c. Provide grants to Tribes, NHOs and museums to support repatriation and complete inventories (Id. § 3008);

d. Enforce civil penalties against museums and use its subpoena powers in those efforts (Id. § 3007);

e. Establish a Review Committee that will monitor and review the implementation of the inventory and identification process and repatriation activities, specifically nine separate expressed activities. Some of those activities are:

- ensuring a fair, objective consideration and assessment of all available relevant information and evidence in inventory, summary and repatriation processes;
- upon the request of any affected party, reviewing and making findings related to the identity or cultural affiliation of cultural items, or the return of such items;
- facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;
- compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;
- consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such Tribes or organizations;
- consulting with the Secretary in the development of regulations to carry out this chapter;
- performing such other related functions as the Secretary may assign to the committee; and
- making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated. (Id. § 3006)

In the Federal Advisory Committee Act (FACA), Congress declared that “the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.” 5a U.S.C. § 2(b)(6). Thus, if the Review Committee finds, through its oversight, monitoring, assessment, dispute resolution or other activities that there is an alleged violation of NAGPRA, then the Committee must advise the Secretary to take action. Where the alleged violation is against a museum, the Secretary can proceed through the civil penalty process. Where alleged violations are made against federal agencies, then the Secretary must have both duty and ability to seek compliance from the other agency. If the alleged violation is within the Department of the Interior, then an appropriate administrative solution must be found.

The Secretary must be empowered to seek resolution of interagency disputes. NAGPRA expressly delegates NAGPRA authority to the Secretary of the Interior, but outside agencies have been reluctant to comply, and have even asserted the authority to make their own rules contrary to NAGPRA. To further advance the benefits of reforming the NAGPRA process, we recommend the creation of an Executive Order that clarifies the fiduciary duty applicable to all agencies of the United States, as specified in statutory delegation of authority to the Interior Secretary to implement the Act, and the concomitant obligation of all federal agencies to comply with the Secretary’s implementing regulations.

Ban the use and reference of remains & objects during NAGPRA proceeding process

One of the primary motives for agencies and institutions to drag out the NAGPRA process is to allow for the continued display, use, and research of human remains and other NAGPRA items. While many of the solutions listed above would resolve the primary ways in which agencies and institutions have avoided or delayed compliance with NAGPRA, it is possible that other loopholes may be found and exploited by bad actors.

We recommend the Act be amended to explicitly ban the use of display of, study of, and reference to Native American remains and NAGPRA items. This will immediately end the persistent human rights violations current ongoing. Furthermore, it will incentivize agencies and institutions to finally fully comply with NAGPRA in order to empty inventory space that is now unable to be used.

Require institutions to provide records of past stewardship of NAGPRA items to affiliated tribes

NAGPRA specifically deals with items currently in inventory, but as we work towards a post-NAGPRA future, we recommend requiring institutions to provide records of transfer for NAGPRA items no longer in their inventories. For example, an item transferred to private storage or collection in 1985 would be effectively lost under NAGPRA, but records of those transfer could be used for Tribes to go after the private collection.

Require agency staff training on NAGPRA compliance

While NPS is responsible for implementation of NAGPRA and has the largest number of NAGPRA items on its lands, other federal agencies and departments, most notably the Bureau of Land Management and the U.S. Army Corps of Engineers, regularly interact with the law and are required to comply with NAGPRA. However, currently, agency staff are unable to attend NAGPRA training sessions held by NPS. Additionally, federal personnel are not eligible for scholarships to these NAGPRA related events due to their government status. Federal Agencies are underrepresented at these trainings, conferences and workshops.

We recommend that the Congress review and allocate funding for NAGPRA related projects in federal agency budgets to include NAGPRA training and dedicated NAGPRA Federal personnel to conduct compliance work. Additionally, we recommend that DOI Office of the Secretary and Federal Agency review current travel restrictions on NAGPRA related trainings, conference and workshops.

NAGPRA compliance is woefully underfunded

Funding for NAGPRA compliance is a significant contributor to many of the delays and challenges in identifying cultural affiliation. Additionally, federal agencies are not allowed to apply for NAGPRA grants therefore making it impossible to adequately perform their compliance under NAGPRA.

We recommend that DOI, GAO, or another appropriate entity undertake a study, in consultation with Tribes, on the funding required to satisfy the goals of NAGPRA and submit this report to Congress for consideration and funding.

PREPARED STATEMENT OF HON. BILLY FRIEND, CHIEF, WYANDOTTE NATION

I. Nation Calls on Committee to Pursue NAGPRA Amendments

The Nation appreciates the opportunity to present information to the Committee on the important topic of strengthening the Native American Graves Protection and Repatriation Act (NAGPRA). 25 U.S.C. § 3001–3013. 18U.S.C. § 1170. We have seen first hand that NAGPRA is an important tool for bringing our ancestors and cultural items home. NAGPRA serves as an example of the federal government taking concrete actions to honor its trust obligations to Tribal Nations in the context of cultural preservation and revitalization.

However, we have also seen that NAGPRA has many shortcomings and could benefit from statutory amendments to strengthen and clarify its scope and legal effects. Even for NAGPRA provisions that Tribal Nations believe are black and white, museums, federal agencies, and others introduce ambiguity that muddies NAGPRA's implementation. Therefore, we hope that this oversight hearing is the first of many conversations between the Committee, Tribal Nations, and other experts regarding how to strengthen NAGPRA to improve its functioning. We believe these conversations can lead to concrete changes to NAGPRA that will significantly benefit Indian Country.

II. Examples of Needed NAGPRA Amendments

There are many areas in which NAGPRA's statutory language could be strengthened to more fully and robustly protect tribal cultural heritage items. Below we have provided some examples of areas for improvement. However, we encourage the Committee to engage in further tribal consultation and information gathering to gain a more comprehensive understanding of potential beneficial statutory changes.

Cultural Affiliation

NAGPRA utilizes the phrase "cultural affiliation" in important and potentially gatekeeping ways. "Cultural affiliation" plays a significant role in determining who will receive an ancestor or cultural item upon repatriation from a museum or federal agency, 25 U.S.C. § 3005(a), or upon disposition after removal from federal or tribal lands, 25 U.S.C. § 3002(a)(2). "Cultural affiliation" also shapes how items are identified and how Tribal Nations receive notice of their inclusion in museums' and federal agencies' inventories, 25 U.S.C. § 3003, and summaries, 25 U.S.C. § 3004.

Importantly, cultural items that museums and federal agencies deem to have a cultural affiliation are subject to NAGPRA's repatriation process. *See* 25 U.S.C. § 3005.

One of NAGPRA's most serious weaknesses is the way a "cultural affiliation" finding or lack thereof can derail a repatriation. Museums and federal agencies use NAGPRA's language as currently drafted to conclude that a cultural item lacks a cultural affiliation such that the duty to repatriate is not triggered. *See* 25 U.S.C. § 3005(a). When coupled with NAGPRA's lack of sufficient oversight regarding such cultural affiliation determinations, this is a major loophole in NAGPRA's implementation.

One potential solution is strengthening NAGPRA to clarify that a museum's or federal agency's legal obligation to repatriate, 25 U.S.C. § 3005(a), any tribal cultural heritage item is triggered if that item qualifies as a "cultural item" under NAGPRA, 25 U.S.C. § 3001(3), especially in the context of Native American ancestors and their associated funerary objects. Determining which tribal recipient is most closely culturally affiliated for purposes of receiving that cultural item should be a separate question.

Provenance Requirements

Although NAGPRA prohibits trafficking of ancestors and cultural items, 18 U.S.C. § 1170, these prohibitions only apply to ancestors for whom the offender lacks a right of possession, 18 U.S.C. § 1170(a), and to cultural items obtained in violation of NAGPRA, 18 U.S.C. § 1170(b). In practice, this usually means prosecution is not possible unless the federal government, in conjunction with the Tribal Nation, can demonstrate the cultural item was removed from tribal or federal land after NAGPRA's 1990 enactment date. *See* 25 U.S.C. § 3002(a), (c). Thus, without establishing these provenance requirements, an item that has enough cultural significance to qualify as a "cultural item" under NAGPRA, 25 U.S.C. § 3001(3), still cannot be protected from trafficking.¹ NAGPRA's trafficking prohibitions should apply to all cultural items regardless of the date they were removed or the land from which they were obtained.

International Trafficking

The current federal laws often used to protect tribal cultural heritage items from trafficking, including NAGPRA and the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa-470mm, currently leave many tribal cultural heritage items unprotected from export and trafficking abroad. The Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, H.R. 2930 and S. 1471, aims to stop the export and facilitate the international repatriation of tribal cultural heritage items already protected under these federal laws. The STOP Act passed the House with bipartisan support in December 2021 and is now before the Senate awaiting passage. A very similar version of the STOP Act passed the Senate in 2020 via unanimous consent. We call on the Committee to secure passage of the bill as soon as possible.

Sensitive Information

Successful implementation of NAGPRA requires Tribal Nations to share extremely sensitive information with federal agencies, where federal agencies are subject to disclosure requirements under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NAGPRA must be amended to exempt from FOIA disclosure information submitted to federal agencies by Tribal Nations as part of any NAGPRA process. The STOP Act contains a similar FOIA exemption for information Tribal Nations submit pursuant to the Act.

¹The Archaeological Resources Protection Act (ARPA) has similar provenance issues. *See* 16 U.S.C. § 470ee(b)(1); *see also* 16 U.S.C. § 470ee(a), (e). One half-measure to fixing the ARPA provenance issues is adding "tribal law" to amend its provisions stating that ARPA prohibits trafficking of "archaeological resources," *see* 16 U.S.C. § 470bb(1), that were removed before ARPA was enacted but in violation of federal or state law in place at the time, 16 U.S.C. § 470ee(b)(2), (c). Further, decisionmaking authority regarding NAGPRA's application to a particular item and its repatriation should be placed in the hands of Tribal Nations, the Review Committee, and the Department of the Interior rather than in the hands of museums and federal agencies. Determinations of whether a tribal cultural heritage item is a "Native American" "cultural item" covered by NAGPRA and its "cultural affiliation" should be made based on all available evidence, including Tribal Nations' expertise. Where museums and federal agencies are permitted any decisionmaking authority, their decisions should be subject to review before the Review Committee, the Department of the Interior, and the courts, and Tribal Nations must be able to initiate such review. Separately, NAGPRA should be amended to make clear that museums' and federal agencies' inventory, summary, and repatriation obligations, 25 U.S.C. §§ 3003-05, are not limited by any provenance requirements, as some have wrongly read provenance requirements into those provisions.

Enforcement

Stricter enforcement of NAGPRA and stricter penalties are necessary to ensure compliance with NAGPRA. The STOP Act would increase NAGPRA trafficking penalties. NAGPRA's provisions authorizing the Secretary of the Interior to assess civil penalties against museums and federal agencies for violations of their NAGPRA obligations should also be strengthened. *See* 25 U.S.C. § 3007. Further, NAGPRA must provide Tribal Nations with remedies whereby we can ensure its enforcement ourselves—because protecting our own tribal cultural heritage items is ultimately our responsibility.

Thank you for the Committee's attention, and we urge you to continue this important work. We hope to continue dialogue with you regarding ways to strengthen NAGPRA.

PREPARED STATEMENT OF MARTINA DAWLEY, TRIBAL HISTORIC PRESERVATION
OFFICER, HUALAPAI TRIBE

I. Tribe Calls on Committee to Pursue NAGPRA Amendments

The Tribe appreciates the opportunity to present information to the Committee on the important topic of strengthening the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013, 18 U.S.C. § 1170. We have seen firsthand that NAGPRA is an important tool for bringing our ancestors and cultural items home. NAGPRA serves as an example of the federal government taking concrete actions to honor its trust obligations to Tribal Nations in the context of cultural preservation and revitalization.

However, we have also seen that NAGPRA has many shortcomings and would benefit from statutory amendments to strengthen and clarify its scope and legal effects. NAGPRA implementation continues to be plagued by deeply rooted paternalism, where museums play a gatekeeping and decisionmaking role in which they view themselves as the proper owners and caretakers of tribal cultural heritage items. Tribal Nations have the knowledge and expertise to make repatriation decisions, and our cultural heritage items rightfully belong to us under NAGPRA as well as tribal law. It is time NAGPRA be amended to correct the imbalance in which museums have acted as ultimate authorities in NAGPRA enforcement. Tribal Nations must be the ultimate decision makers.

Therefore, we hope that this oversight hearing is the first of many conversations between the Committee, Tribal Nations, and other experts regarding how to strengthen NAGPRA to improve its functioning. We believe these conversations can lead to concrete changes to NAGPRA that will significantly benefit Indian Country.

II. Examples of Needed NAGPRA Amendments

There are many areas in which NAGPRA's statutory language could be strengthened to more fully and robustly protect tribal cultural heritage items. Below we have provided some examples of areas for improvement. However, we encourage the Committee to engage in further tribal consultation and information gathering to gain a more comprehensive understanding of potential beneficial statutory changes.

Cultural Affiliation

NAGPRA utilizes the phrase “cultural affiliation” in important and potentially gatekeeping ways. “Cultural affiliation” plays a significant role in determining who will receive an ancestor or cultural item upon repatriation from a museum or federal agency, 25 U.S.C. § 3005(a), or upon disposition after removal from federal or tribal lands, 25 U.S.C. § 3002(a)(2). “Cultural affiliation” also shapes how items are identified and how Tribal Nations receive notice of their inclusion in museums' and federal agencies' inventories, 25 U.S.C. § 3003, and summaries, 25 U.S.C. § 3004. Importantly, cultural items that museums and federal agencies deem to have a cultural affiliation are subject to NAGPRA's repatriation process. *See* 25 U.S.C. § 3005.

One of NAGPRA's most serious weaknesses is the way a “cultural affiliation” finding or lack thereof can derail a repatriation. Museums and federal agencies use NAGPRA's language as currently drafted to conclude that a cultural item lacks a cultural affiliation such that the duty to repatriate is not triggered. *See* 25 U.S.C. § 3005(a). When coupled with NAGPRA's lack of sufficient oversight regarding such cultural affiliation determinations, this is a major loophole in NAGPRA's implementation.

One potential solution is strengthening NAGPRA to clarify that a museum or federal agency's legal obligation to repatriate, 25 U.S.C. § 3005(a), any tribal cultural heritage item is triggered if that item qualifies as a “cultural item” under NAGPRA, 25 U.S.C. § 3001(3), especially in the context of Native American ancestors and their

associated funerary objects. Determining which tribal recipient is most closely culturally affiliated for purposes of receiving that cultural item should be a separate question.

Further, decisionmaking authority regarding NAGPRA's application to a particular item and its repatriation should be placed in the hands of Tribal Nations, the Review Committee, and the Department of the Interior rather than in the hands of museums and federal agencies. Determinations of whether a tribal cultural heritage item is a "Native American" "cultural item" covered by NAGPRA and its "cultural affiliation" should be made based on all available evidence, including Tribal Nations' expertise. Where museums and federal agencies are permitted any decisionmaking authority, their decisions should be subject to review before the Review Committee, the Department of the Interior, and the courts, and Tribal Nations must be able to initiate such review.

Provenance Requirements

Although NAGPRA prohibits trafficking of ancestors and cultural items, 18 U.S.C. § 1170, these prohibitions only apply to ancestors for whom the offender lacks a right of possession, 18 U.S.C. § 1170(a), and to cultural items obtained in violation of NAGPRA, 18 U.S.C. § 1170(b). In practice, this usually means prosecution is not possible unless the federal government, in conjunction with the Tribal Nation, can demonstrate the cultural item was removed from tribal or federal land after NAGPRA's 1990 enactment date. See 25 U.S.C. § 3002(a), (c). Thus, without establishing these provenance requirements, an item that has enough cultural significance to qualify as a "cultural item" under NAGPRA, 25 U.S.C. § 3001(3), still cannot be protected from trafficking.¹ NAGPRA's trafficking prohibitions should apply to all cultural items regardless of the date they were removed or the land from which they were obtained.

Separately, NAGPRA should be amended to make clear that museums' and federal agencies' inventory, summary, and repatriation obligations, 25 U.S.C. §§ 3003–05, are not limited by any provenance requirements, as some have wrongly read provenance requirements into those provisions.

Delays Due to Research

NAGPRA creates an exemption from the requirement to expeditiously repatriate cultural items to requesting Tribal Nations if the cultural items are indispensable for completion of a specific scientific study that benefits the United States. 25 U.S.C. § 3005(b). This provision must be removed. Repatriation of cultural items and ancestors is of utmost importance, and such repatriation should not be delayed due to research.

Requirement to Immediately Comply with NAGPRA

NAGPRA requires museums and federal agencies with possession or control over holdings or collections containing cultural items to consult with Tribal Nations on inventories and summaries, 25 U.S.C. §§ 3003(b)(1)(A), 3004(b)(1)(B), and to repatriate such cultural items when certain requirements are met, 25 U.S.C. § 3005. Yet, many museums do not immediately comply with these NAGPRA requirements while they process newly arrived items, sometimes conducting research on such items, including ancestors, while the accession process takes place. NAGPRA must be amended to require immediate compliance. Similarly, NAGPRA must be amended to require immediate compliance for any item containing human remains—even when those remains are contained in other objects.

Reinterment on Federal Lands

The Tribe seeks amendments to NAGPRA that direct federal agencies to take possession of ancestors and other cultural items for reinterment at Tribal Nations' requests. Many Tribal Nations seek reinterment locations that are as close as possible to the location from which an ancestor or cultural item was taken, and public lands are often the best option. However, many federal agencies refuse to accept ancestors and other cultural items for reinterment when they cannot be proven to have come from the boundaries of the particular area of federal lands. Instead, items that should be immediately reinterred are stored offsite. NAGPRA should be amended to require such reinterment.

¹The Archaeological Resources Protection Act (ARPA) has similar provenance issues. See 16 U.S.C. § 470ee(b)(1); see also 16 U.S.C. § 470ee(a), (e). One half-measure to fixing the ARPA provenance issues is adding "tribal law" to amend its provisions stating that ARPA prohibits trafficking of "archaeological resources," see 16 U.S.C. § 470bb(1), that were removed before ARPA was enacted but in violation of federal or state law in place at the time, 16 U.S.C. § 470ee(b)(2), (c).

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The federal laws often used to protect tribal cultural heritage items from trafficking, including NAGPRA and the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §§ 470aa-470mm, currently leave many tribal cultural heritage items unprotected from export and trafficking abroad. The Safeguard Tribal Objects of Patrimony (STOP) Act of 2021, H.R. 2930 and S. 1471, aims to stop the export and facilitate the international repatriation of tribal cultural heritage items already protected under these federal laws. The STOP Act passed the House with bipartisan support in December 2021 and is now before the Senate awaiting passage. A very similar version of the STOP Act passed the Senate in 2020 via unanimous consent. We call on the Committee to secure passage of the bill as soon as possible.

Enforcement

Stricter enforcement of NAGPRA and stricter penalties are necessary to ensure compliance with NAGPRA. The STOP Act would increase NAGPRA trafficking penalties. NAGPRA's provisions authorizing the Secretary of the Interior to assess civil penalties against museums and federal agencies for violations of their NAGPRA obligations should also be strengthened. See 25 U.S.C. § 3007. Further, NAGPRA must provide Tribal Nations with remedies whereby we can ensure enforcement of NAGPRA—as protecting our own tribal cultural heritage items is ultimately our responsibility.

Thank you for the Committee's attention, and we urge you to continue this important work. We hope to continue dialogue with you regarding ways to strengthen NAGPRA.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO
CARMEN HULU LINDSEY

Question 1. Are there specific aspects of NAGPRA that make it challenging for the Native Hawaiian community to implement?

Answer. OHA has identified four major challenges for Native Hawaiians when making repatriation claims under the Native American Graves Protection and Repatriation Act (NAGPRA): funding, lack of respect for Native Hawaiian oral traditions and spiritual evidence, the ability of Native Hawaiian religious leaders to serve on the NAGPRA review committee, and the definition of a Native Hawaiian organization (NHO). The issues regarding Native Hawaiian religious leaders serving on the NAGPRA review committee and definition of NHO was previously cited as points of concern in my written testimony; but, elaborated upon further here with suggested amendment language.

(a) Funding

Given that many Natives Hawaiians today live in the remote island chain of Hawai'i, funding for repatriation has historically been a challenge as long-distance travel is needed to recover our ancestors and to meaningfully consult. Even with advances in modern technology that has allowed consultations to occur in a virtual setting, there is still no replacement for face-to-face meetings. Further, it is not culturally preferred to simply ship our iwi kupuna (ancestral Hawaiian human remains) home.

In the past, OHA supported our beneficiaries through either direct (i.e., airfare, lodging, ground transport, education, third-party researchers, reburial materials) or indirect costs (i.e., staff time, education workshops). In other cases and more recent instances, private donations and grants have been sought to facilitate repatriation returns. In more difficult claims, it has further been necessary to hire third party experts to assist in rebutting museum interpretations that cast doubt on where iwi kupuna came from or question ancestry through the use of archaic craniometric methods. Even after the iwi kupuna are returned home, costs can still be incurred by OHA or beneficiaries to pay for burial materials (i.e., muslin, lauhala baskets) and the construction of reburial vaults.

In terms of indirect costs, OHA dedicates numerous staff from all across the organization for repatriation purposes. While repatriation claims are primarily handled through our Compliance Enforcement advocates, OHA has further utilized research, legal, and neighbor island community resources staff. OHA has even provided educational workshops on NAGPRA compliance to better assist families with making claims or help them understand the process when partnering with OHA on one. On the low end, an easy NAGPRA claim could take as much as 58 hours of staff time, while a more difficult case could take up to 450 hours or more of staff time.

Notably, OHA has been the primary point of contact for international repatriations as many countries will not repatriate to private individuals or NHOs without State or Federal support. As OHA is specifically called out in NAGPRA for having expertise in Native Hawaiian affairs¹ and the recognized State agency to represent the lawful interest of Native Hawaiian in the State of Hawai'i constitution,² other countries have looked to OHA when repatriation claims are filed and often request to know what the repatriation process would be like if it were handled in the United States. Fortunately, U.S. Embassies have assisted OHA in these endeavors through letters of support that acknowledge OHA's standing as an NHO under NAGPRA. Thus, while NAGPRA does not apply internationally, it has nevertheless been a useful tool to facilitate international returns. Again, these repatriation costs (which are often much higher for international claims) have been absorbed by OHA and Native Hawaiian beneficiaries over the years.

(b) Lack of Respect for Native Hawaiian Oral Traditions and Spiritual Evidence

Still to this day, OHA experiences problems with oral histories or spiritual information being challenged in favor of academic or historical documentation. This more so seems to be a greater problem when claiming moepu (funerary objects) and sacred objects. Statistically, the return of iwi kupuna has out-numbered the return of sacred objects and moepu. This is in part due to the fact that the taking of human remains is widely indefensible in a post-colonial academic arena, whereas interpretive arguments can still be brought forth by institutions in opposition to the repatriation of cultural objects. OHA still encounters problems when it comes to these sacred objects and moepu as use of these objects have been questioned by museum professionals who argue for utilitarian function over ceremonial ones.

For example, the families of Honaunau in partnership with OHA has a standing NAGPRA claim for a funerary effigy of the Hawai'i Island Chief Keawe with the Chicago Field Museum. Per the families of Honaunau, this ki'i (wooden figure) was placed above the bones of Chief Keawe for deification purposes and made in the likeness of Keawe for his descendants to remember him by. However, these oral traditions have constantly been questioned by museum staff at the Chicago Field Museum since academic sources have never documented the sacred deification rituals or the use of the ki'i as an effigy of Keawe. The rebuttals from the Chicago Field Museum have deeply hurt the Honaunau families that have a kuleana (responsibility) to care for their ancestral remains and respective moepu. Essentially, this prolonged debate is delaying much needed healing.

While the Chicago Field Museum case may very well eventually be taken to the NAGPRA Review Committee, it is unfortunate to have to resort to such appeals. All native peoples and their sacred oral traditions should be respected in the way that museum staff respect these academic sources. In other repatriation claims where there is limited provenance information, Native Hawaiians have utilized gifted kaula (or seers) to provide insightful information; yet, these spiritual identification methods are typically dismissed by museum professionals out of a lack of respect and understanding.

Notably, the first NAGPRA appeal was brought to the NAGPRA Review Committee by the NHO Hui Malama I Na Kupuna 'o Hawai'i Nei (hereinafter Hui Malama) in 1993 as the Phoebe Hearst Museum at California Berkely agreed to only repatriate 3 out of 5 iwi kupuna labeled as being from Hawai'i due to a lack of historical evidence for all 5. Hui Malama argued within their written testimony that the identity of the human remains in question could be identified through ceremony. The NAGPRA Review Committee did in fact accept Hui Malama's written testimony and recommended repatriation of 1 of the iwi kupuna based on the spiritual evidence provided, but further required physical examination of the other iwi kupuna. The physical examination results did later find that the iwi kupuna was of Hawaiian ethnicity as was first argued through the provided spiritual ceremony.

Oral traditions and spiritual knowledge thus need parity with academic sources and examination methods within NAGPRA. OHA believes that addressing this will allow for a greater number of moepu and sacred objects to be returned back home to Hawai'i, and limit the questioning of iwi kupuna that are claimed.

(c) Ability of Native Hawaiian Religious Leaders to Serve on the NAGPRA Review Committee

Within the existing statutory language of 25 U.S.C. § 3006, the NAGPRA Review Committee is to consist of seven members, two of which must be traditional Indian

¹ 25 USC § 3001(11)(c)

² HAW. CONST., art. XII, § 5 (1978).

religious leaders. This Review Committee is meant to monitor and review the implementation of the inventory and identification process and repatriation activities. While OHA does not believe the original intent of the language was meant to be exclusionary, OHA has received recent complaints that traditional Hawaiian religious leaders were deliberately being excluded from consideration as one of these traditional religious leaders. It is unclear to OHA how long this practice has extended into past review committee selection processes.

In the early years of NAGPRA, Native Hawaiian cases were the most heard by the Review Committee. OHA was there to assist and observe Native Hawaiians taking repatriation related disputes as far as they needed to go to resolve disagreements with museums and Federal institutions. Given the level of detail presented during these committee reviews, having a Native Hawaiian traditional religious leader on the NAGPRA Review Committee may have expedited some cases and provided a better understanding of Native Hawaiian concerns. While the number of Native Hawaiian cases to the NAGPRA Review Committee has greatly diminished in recent times, OHA is aware of a few other claims that may need to proceed through such an appeal process.

(d) Definition of an NHO

25 USC § 3001 does not currently require that an NHO actually consist of Native Hawaiians. The current language has historically been contentious and previously presented as problematic in testimony to the Committee in 2004.³ In the past, a museum receiving federal funds and recreational clubs with a stated mission to serve Native Hawaiians believed they could qualify as a NHO to claim human remains and funerary objects. Allowing a museum to become an NHO to claim cultural objects they held would have presented a clear conflict of interest and undermined the intent of NAGPRA.

Additionally, the definition of an NHO is notably inconsistent across Federal statutes and policies. At times, institutions have looked to the NHO list within the Secretary's Office of Native Hawaiian Relations for NHOs to consult with for NAGPRA purposes. OHA notes that this list is a self-authenticating, self-identifying, and self-certifying list created as a means to enable federal agencies to have the names and addresses of potential Hawaiian organizations who they could send a general notice to on a wide array of Federal matters. This list was not specifically created for NAGPRA related responsibilities and there was no review by the Office of Native Hawaiian Relations to determine whether the information conveyed to them was accurate or truthful, or whether the entities who volunteered their names and contact information had any cultural expertise, experience, capacity, interest, or demonstrated discretion with regards to the handling of or the involvement with Hawaiian human remains and cultural items. Yet, these NHOs can still be identified to consult on NAGPRA.

Granted, an inappropriate NHO may be weeded out through determining cultural affiliation or lineal descent of a NAGPRA claim; however, NAGPRA currently allows the Federal entity or museum to assess an NHO's cultural affiliation. Historically, Hawaiian claims have mostly been through cultural affiliation as cultural affiliation is less stringent than proving lineal descent. Federal institutions and museums thus tend to be liberal in allowing NHOs to claim cultural affiliation status. As a result, you may have NHOs making claims inappropriately or causing disagreements with legitimate claimants.

Question 2. What could be improved to make the statute more responsive to Native Hawaiian concerns?

(a) Funding

Answer. While NAGPRA grants are available to OHA, OHA is cautious about applying as not to compete with other NHOs or families that are in greater need than we are. Given OHA's unique constitutional mandate to represent Native Hawaiians and the demonstrated work that we've done on NAGPRA over the last 30 years, a direct authorization of appropriations to OHA within 25 USC § 3012, or a specific type of grant that is only eligible to OHA within 25 USC § 3008, would further help our cause and allow for an even more expeditious return of our ancestors. No specific statutory amendments are provided here at this time, but we welcome further discussion on this topic.

³See December 8, 2004, Oversight Hearing before the Committee on Indian Affairs, 108th Congress, to receive testimony on the application of the Native American Graves Protection and Repatriation Act in the State of Hawai'i.

Further, NAGPRA grants could be made available for international repatriation claims that are supported by the U.S. Department of State. 25 USC § 3008 could be amended to read:

“(a) Indian Tribes and Native Hawaiian organizations

The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the *domestic* repatriation of Native American cultural items under NAGPRA, *or abroad when international claims are supported by the U.S. Department of State.*”

(b) Lack of Respect for Native Hawaiian Oral Traditions and Spiritual Evidence

25 USC § 3005(a)(4) currently indicates that cultural affiliation to Native American human remains and funerary objects can be demonstrated through evidence based upon “geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion”. Missing from this list of evidence is “spiritual evidence”.

OHA recommends the following amendments to 25 USC § 3005(a)(4):

“(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to Section 3003 of this title, or the summary pursuant to Section 3004 of this title, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional historical, *spiritual* or other relevant information or expert opinion.”

(c) Ability of Native Hawaiian Religious Leaders to Serve on the NAGPRA Review Committee

OHA believes that Native Hawaiian religious leaders must be provided with the same standing as Tribal religious leaders when it comes to applying for the Review Committee. As such, an amendment to 25 U.S.C. § 3006(b)(1) is needed that would broaden the eligibility to all types of Native American traditional religious leaders instead of just Indian religious leaders.

We recommend the following amendment to 25 U.S.C. § 3006(b)(1):

“(b) Membership

(1) The Committee established under subsection (a) shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 such persons being traditional Indian religious leaders.”

(d) Definition of an NHO

As detailed in OHA’s written testimony, the definition of an NHO should be updated to increase clarity and maintain consistency across federal laws and policies affecting Native Hawaiians. Most importantly, an NHO should be required to consist of Native Hawaiians in substantive policy-making decisions and have some level of demonstrated expertise in Hawaiian burial or cultural matters within the scope of NAGPRA.

With these concerns in mind, we recommend the following definition for NHO within 25 USC § 3001(11):

“(11) ‘Native Hawaiian organization’ means any organization which—

(A) serves the interests of Native Hawaiians;

(B) has Native Hawaiians in substantive and policymaking positions within the organization; and

(C) has expertise in Native Hawaiian affairs and demonstrated discretion with regard to handling Hawaiian burial or cultural matters within the scope of NAGPRA. For the purposes of NAGPRA, the term ‘Native Hawaiian organization’ shall include, but is not be limited to, the Office of Hawaiian Affairs.”

Closing Remarks

Mahalo for this opportunity to provide written responses to the QFR needed to complete the SCIA's hearing record. We look forward to seeing much needed and long-awaited change to this important statute. Please let us know if any further information is needed.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO
DR. ANNA MARIA ORTIZ

Question 1. According to your hearing testimony, consultation is central to carrying out the federal government's responsibility to protect Tribal cultural heritage but consultation practices need to be improved. Would federal agencies benefit from a centralized consultation resource center that provides technical assistance and training to all agencies on best practices, particularly for infrastructure development activities?

Answer. We continue to believe that improved consultation between federal agencies and tribes is important. Although we have not specifically evaluated whether federal agencies would benefit from a centralized consultation resource center, our 2019 report on tribal consultation recommended that the Federal Permitting Improvement Steering Council's (FPISC) Office of the Executive Director work collaboratively with FPISC members to develop a plan to establish a central information system to identify and notify tribes about matters related to infrastructure projects.¹ We stated that the plan should (1) establish well-defined goals for the system, (2) specify FPISC members' roles and responsibilities for establishing and maintaining the system given existing statutory authorities, and (3) identify the resources necessary for developing and maintaining the system. We also recommended that, as a central information system is being established, the office should work collaboratively with FPISC members to consider how they will communicate with and involve tribes to help ensure the accuracy of tribal data in the system.²

In response to these recommendations, in February 2022, the FPISC Office of the Executive Director told us that it was taking actions to improve coordination between the federal government and federally recognized tribes on infrastructure projects, including finalizing an implementation plan by the Department of Housing and Urban Development and the Advisory Council on Historic Preservation to expand the Tribal Directory Assistance Tool. According to the office, enhancements to the tool will provide FPISC members with a single, public database for identifying and notifying tribes on matters related to infrastructure projects and would improve the efficiency of federal agencies. The office further stated that FPISC members will be engaged to ensure that the enhancements meet overall FPISC needs and responsibilities, and help ensure that information in the tool is consistently conveyed from all levels of the federal government.

Question 2. NAGPRA allows for the excavation of ancestral remains pursuant to an Archaeological Resources Protection Act permit in certain cases. Is the permitting process across agencies sufficiently uniform to ensure consistency in the granting of such permits?

Answer. GAO has not analyzed the Archeological Resources Protection Act (ARPA) permitting process across federal agencies to determine whether it is sufficiently uniform to ensure consistency in the granting of such permits.

Question 3. How has inadequate consultation with Tribes and Native Hawaiian organizations impacted NAGPRA implementation?

Answer. As stated in our February 2022 testimony, one of the continuing challenges with implementing NAGPRA is the repatriation of Native American cultural

¹GAO, Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects, GAO-19-22 (Washington, D.C.: Mar. 20, 2019).

²The Federal Permitting Improvement Steering Council (FPISC), which includes agencies that consult with tribes on infrastructure projects, recommended the development of a central federal information system of tribal areas of interest and points of contact for consultation in its fiscal year 2018 best practices. As of November 2018, the FPISC members were: the Advisory Council on Historic Preservation, Council on Environmental Quality, Department of Agriculture, Department of the Army, Department of Commerce, Department of Defense, Department of Energy, Department of Homeland Security, Department of Housing and Urban Development, Department of the Interior, Department of Transportation, Environmental Protection Agency, Federal Energy Regulatory Commission, General Services Administration, Nuclear Regulatory Commission, and Office of Management and Budget. The FPISC was created by statute to make the process for federal approval for certain infrastructure projects more efficient. Pub. L. No. 114-94, div. D, tit. XLI, 129 Stat. 1312, 1741-1762 (2015). The Executive Director is the Chair of the FPISC, who works within the FPISC Office of the Executive Director.

items, such as human remains, still in collections. Of particular note are the more than 116,000 Native American human remains that are still in collections, 95 percent of which have not been determined to be affiliated with any present-day tribe or Native Hawaiian organization, according to the National NAGPRA Program's fiscal year 2020 report.

Stakeholders have suggested that enhanced consultation would help with the repatriation of Native American cultural items. For example, the Association on American Indian Affairs states in its comments on the draft proposed revisions to the NAGPRA regulations that the goal of all consultation and collaboration must be to support a determination that leads to repatriation, especially considering that cultural items (as they are defined) were removed without a right of possession. In addition, the Association on American Indian Affairs and the National Association of Tribal Historic Preservation Officers have called for measures to ensure meaningful consultation in their comments on the draft proposed revisions to the NAGPRA regulations, rather than merely a procedural requirement that must be satisfied.

Our past work has also shown that enhanced consultation and communication can help with the repatriation of Native American cultural items. In 2018, we reported on actions federal agencies have taken in response to Native American tribes' requests for assistance in repatriating cultural items from overseas, including conducting listening sessions and consultations.³ One example we highlighted in that report—the repatriation of the Acoma Shield—depended heavily on the close relationships forged between the Pueblo of Acoma and federal agencies.⁴ We have also reported on the role of consultation in other contexts. For example, in another GAO report, we recommended that agencies, including Interior, establish or update their policies to better communicate their consideration of tribal input during the consultation process with tribes.⁵

Question 4. Has GAO investigated or received a request to investigate any aspect of the Indian boarding school issue?

The legacy of Indian boarding schools has been identified by mental health professionals as a source of intergenerational trauma that reverberates throughout Native communities to this day. GAO has not investigated or received a specific request to investigate any aspect of the Indian boarding school issue. However, we have had conversations with stakeholders about topics for potential investigation stemming from issues related to Native American boarding schools, including student health care concerns and oversight, as well as the effects of federal Indian boarding school policies.

Question 5. Are there additional aspects of NAGPRA that new GAO research could address?

There are several potential areas for future GAO audit work regarding NAGPRA. Examples include the following:

- A status update on federal agencies' implementation of NAGPRA since 2010, including a review of the status of federal agency collections of Native American cultural items housed in non-federal institutions such as universities.
- An examination of challenges faced by Native Hawaiian organizations and Alaska Natives regarding the repatriation of cultural items under NAGPRA.
- An examination of implementation of any revisions to NAGPRA regulations if finalized.
- An examination of Interior's oversight of museum compliance with NAGPRA, including identifying new entities that may be subject to NAGPRA because they received federal financial assistance provided in response to COVID-19.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BEN RAY LUJÁN TO
DR. ANNA MARIA ORTIZ

Question 1. GAO's 2021 report on Native American cultural resources found that federal agencies are not required to track which incidents of theft or damage involve Native American cultural resources. How has this oversight impeded NAGPRA investigations and enforcement?

³ GAO, *Native American Cultural Property: Additional Agency Actions Needed to Assist Tribes with Repatriating Items from Overseas Auctions*, GAO-18-537 (Washington, D.C.: Aug. 6, 2018).

⁴ In 2016, the Pueblo of Acoma sought assistance from Interior, Justice, and State to repatriate a cultural item known as the Acoma Shield, a painted shield made for ceremonial use that the tribe said was stolen in the 1970s. The shield was returned to the tribe in November 2020.

⁵ GAO-19-22.

Answer. In 2021, we reported that federal agencies are not required to track which incidents of theft or damage involve Native American cultural items.¹ According to agency officials from several agencies we interviewed at the time, their law enforcement databases were designed to assist and track investigations broadly, not to readily identify incidents involving the theft or damage of Native American cultural items since there is no requirement to do so.² Agencies primarily use their law enforcement databases to record and manage investigations but may also use them to analyze crime data, assist with staffing decisions, and inform resource allocation and budgeting decisions.

According to officials from six of the seven agencies we reviewed that manage or administer federal and Indian lands, resource constraints and limited data have also hindered their ability to detect and investigate instances of theft and damage to Native American cultural items. Specifically, they noted reductions in the number of law enforcement officers. For example, U. S. Fish and Wildlife Service officials we interviewed said that from fiscal year 2009 to fiscal year 2018, the number of the agency's law enforcement officers decreased from 441 to 231. Agency officials also said that many sites are unknown, and when they receive information about an alleged incident, they do not have sufficient information on the previous conditions of the site to know what items may have been stolen or damaged, or when the incident may have taken place.

We concluded in our report that to effectively analyze and address risks to Native American cultural items, agencies need information to support decisionmaking, such as the location and condition of archeological sites and numbers or trends of incidents of theft and damage. As a result, we recommended that each of the agencies take steps to identify and obtain such information to enhance their ability to analyze and respond to risks to Native American cultural items and ensure that they are prioritizing their constrained resources to mitigate the greatest risks.

Question 2. Has the Bureau communicated that it is taking steps to implement this recommendation since then? Once implemented, how will this recommendation enable the Bureau to better prevent and respond to instances of cultural resource theft and damage on federal lands?

Answer. In November 2021, the Department of the Interior communicated to us that the Bureau of Indian Affairs (BIA) agreed with GAO's findings related to the Archaeological Resources Protection Act of 1979 (ARPA) and Native American Graves Protection and Repatriation Act (NAGPRA). In its response, Interior stated that its Office of Trust Services, Division of Natural Resources, Branch of Environmental and Cultural Resource Management provided fiscal year 2021 funding to each of the 12 Bureau Regional Offices for the continuing placement of a Regional Archaeologist to ensure ARPA and NAGPRA compliance. Regional Archaeologists are tasked with developing and implementing a consistent methodology for targeting BIA's efforts to analyze and address risks to Native American cultural items. They are also tasked with sharing any promising practices with the Departmental Consulting Archeologist. While implementing GAO's recommendation will not address all of the underlying hindrances to protecting cultural items, identifying and obtaining information to enhance its ability to analyze and respond to risks to Native American cultural items could help to ensure it is prioritizing its constrained resources to mitigate the greatest risks.

Question 3. What has changed with respect to NAGPRA implementation since GAO's 2010 report, and what challenges have persisted since GAO's last review?

Answer. During the 30 years since the passage of NAGPRA, federal agencies have made some progress in addressing the act's requirements, including repatriating over 1.7 million associated funerary objects with human remains, according to the National NAGPRA Program's fiscal year 2020 annual report. In addition, as a result of some of our previous recommendations, annual data on the status of federal agencies' repatriation efforts are readily available to Congress and the public.³

However, as we have previously reported, and as tribes and tribal organizations have stated, agencies continue to face challenges in implementing and enforcing

¹GAO, *Native American Cultural Resources: Improved Information Could Enhance Agencies' Efforts to Analyze and Respond to Risks of Theft and Damage*, GAO-21-110 (Washington, D.C.: Mar. 4, 2021).

²The agencies included in our 2021 review were the Department of Agriculture's U.S. Forest Service; the Department of the Interior's Bureau of Indian Affairs, Bureau of Land Management, U.S. Fish and Wildlife Service, and National Park Service; the U.S. Army Corps of Engineers; and the Tennessee Valley Authority.

³GAO, *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act*, GAO-10-768 (Washington, D.C.: July 28, 2010).

NAGPRA. While agencies have made progress in repatriating remains to culturally affiliated tribes, human remains of more than 116,000 individuals are still in collections and have not yet been culturally linked to a present-day tribe or Native Hawaiian organization. In addition, challenges remain with implementing NAGPRA's consultation requirements and addressing limitations in the prohibitions on theft and trafficking of Native American cultural items. Further, the number of entities subject to NAGPRA has potentially grown as a result of federal financial assistance provided in response to the COVID-19 pandemic and we do not yet understand the universe of potentially affected institutions.⁴

Question 4. Why is improving museum and federal agency consultation with Tribes and Native Hawaiian organizations critical to the implementation of NAGPRA, and what are some potential impacts of improved consultation?

Answer. Enhancing agencies' consultation with tribes and Native Hawaiian organizations is important to implementing NAGPRA for several reasons. First, regular and meaningful consultation with tribal officials could help strengthen government-to-government relationships by developing relationships with and enhancing trust between tribes and the United States, which are critical to sensitive issues such as repatriation. Second, in-depth consultation with tribes and Native Hawaiian organizations could help address issues related to the repatriation of the hundreds of thousands of Native American cultural items held by federal agencies and museums in accordance with NAGPRA, would help foster collaborative rather than adversarial interactions, and could potentially reduce the risk of costly litigation. Third, regular and meaningful consultation is important for leveraging the tribal knowledge that is necessary to support efficient and successful repatriations.

Question 5. What statutory and regulatory changes are needed to improve agency and museum compliance?

Answer. GAO has not analyzed NAGPRA and its implementing regulations or Interior's draft proposed revised NAGPRA regulations to determine what changes, if any, may be necessary to improve federal agency and museum compliance. However, we are aware of the National NAGPRA Program's plans to revise NAGPRA regulations and the concerns raised by stakeholder groups, such as the National Association of Tribal Historic Preservation Officers and Association on American Indian Affairs. For example, these stakeholder groups have expressed concerns with the current statutory definition of Native American. They have also expressed concerns about how the process for determining cultural affiliation used by agencies and museums has resulted in more than 90 percent of human remains of ancestors being deemed culturally unidentifiable.

Question 6. What are the key contextual factors Congress should consider as it evaluates potential changes to NAGPRA?

Answer. The significant experience that tribes, agencies, and institutions have gained since enactment of NAGPRA, together with the increased awareness of the importance of protecting and repatriating cultural items to Native American cultures, warrant renewed consideration of aspects related to NAGPRA implementation. In 2018, GAO recommended that relevant federal agencies assess, in consultation with tribes, whether and how amending the U.S. legal framework governing the export, theft, and trafficking of Native American cultural items would facilitate their repatriation from overseas auctions and report their findings to Congress.⁵ Relatedly, in April 2021, the Safeguard Tribal Objects of Patrimony Act of 2021 was introduced in the House and Senate. If enacted, these bills would enhance protections for Native American cultural items, including explicitly prohibiting the export of certain items and increasing the penalties for trafficking such items.

As Congress evaluates potential changes to NAGPRA, contextual factors to consider would include:

- **Annual data from the National NAGPRA Program.** In response to our 2010 report, the National NAGPRA Program began collecting and reporting data on federal agencies' implementation of NAGPRA, including the costs associated with undertaking work borne by tribes, agencies, and institutions that are affected by the case-by-case nature of each repatriation. In its 2018–2019 report to Congress, the NAGPRA Review Committee described the volume of remaining repatriation work as daunting. In addition, it noted that NAGPRA compliance is more costly than originally estimated and also more complex because each repatriation must be addressed on a case-by-case basis.

⁴NAGPRA defines a museum as any institution or state or local government agency, including any institutions of higher learning, that receives federal funds and has possession or control over Native American cultural items.

⁵GAO-18-537.

- **Tribal consultation.** We appreciate the importance and the potential complexity of consultation between agencies and tribes. A 2021 presidential memorandum reaffirmed the policy of federal agency consultation with tribal officials in the development of federal policies that have tribal implications, which strengthens the nation-to-nation relationship between the United States and tribal nations.⁶ In its prior work, GAO has identified agency practices that facilitate effective consultation, as well as a list of leading practices that agencies can use when collaborating with its stakeholders.⁷ Agencies can leverage this knowledge to enhance their consultation and collaboration with tribes, which may facilitate implementation with NAGPRA.
- **Benefits and challenges of technological developments.** Technological developments in the 30 years since NAGPRA was enacted have changed the ways information is obtained, stored, and shared. One potential benefit of technological advancements is the potential to use remote sensing technologies to inventory cultural sites without disrupting them through excavation. However, technological developments can also introduce new challenges. For example, technological changes that have increased the ease with which we can communicate with one another have also created opportunities for the illicit trade of Native American cultural items.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO
VALERIE GRUSSING, PH.D.

Question 1. This Committee previously considered and reported out legislation to amend the definition of “Native American” in NAGPRA to mean “of, or relating to, a tribe, people, or culture that is or was indigenous to the United States.” How would adding “or was” help to ensure the intent of NAGPRA is met?

Answer. Amendments to the definition of “Native American,” similar to that proposed in our written testimony, were previously considered by the Senate in the 108th,¹ 109th,² and 110th³ Congresses. This proposed amendment is intended to address the misinterpretation of the term by the United States Court of Appeals for the Ninth Circuit in *Bonnichsen v. United States* that, focusing on the word “is” in the definition, required that human remains and other cultural items “must bear a significant relationship” to a presently existing Tribe, people, or culture to be considered Native American.⁴ In doing so, the court mistakenly conflated the initial determination that human remains or cultural items are “Native American,” and thus subject to NAGPRA, with the subsequent requirement to identify which present-day lineal descendant, Indian Tribe, or Native Hawaiian organization has a right to claim them. In NAGPRA, Congress clearly anticipated that there would be situations in which no lineal descendant or affiliated Indian Tribe or Native Hawaiian organization could be identified and delegated to the Department of the Interior responsibility for creating separate mechanisms for the disposition of “unclaimed” Native American human remains and cultural items that were excavated or discovered on Federal or Tribal lands,⁵ or “culturally unidentifiable” Native American human remains in the possession or control of a Federal agency or museum.⁶ Our proposed amendment to the definition of “Native American” is meant to separate the Native American determination from the subsequent determinations of affiliation and resolve the ambiguity created by the Ninth Circuit’s incorrect interpretation that continues to have a negative impact on implementation of both the civil and criminal provisions of NAGPRA.

Question 2. Is oral tradition afforded the same weight as other forms of evidence used to establish cultural affiliation under NAGPRA? Even if given the same weight under NAGPRA, is there a practical disparity in how it is used or treated? Are you aware of any instances where Tribes have chosen to forego the use of oral tradition because, in their experience, it is undervalued by museums and federal agencies? How can this be corrected?

⁶Presidential Memorandum, *Tribal Consultation and Strengthening Nation-to-Nation Relationships*, 86 Fed. Reg. 7491 (Jan. 29, 2021).

⁷GAO-19-22.

¹S. 2843, 108th Cong. § 14 (Sept. 23, 2004).

²S. 536, 109th Cong. § 108 (May 12, 2005).

³S. 2087, 110th Cong. § 2 (Sept. 25, 2007).

⁴*Bonnichsen v. United States*, 367 F.3d 864, 878 (9th Cir. 2004).

⁵25 U.S.C. § 3002(b); 43 C.F.R. § 10.7.

⁶25 U.S.C. § 3006(c)(5); 43 C.F.R. § 10.11.

Answer. In determining the cultural affiliation of Native American human remains and funerary objects, the Congress directed museums and Federal agencies to consider a broad range of relevant evidence, including oral tradition.⁷ Regulations implementing NAGPRA have applied this evidentiary standard to the determination of cultural affiliations of all cultural items.⁸

A 2016 study provides insight into how oral tradition evidence has factored into determinations of cultural affiliation.⁹ The study analyzed 1,476 Notices of Inventory Completion published between 1992 and 2013 that determined cultural affiliation for 43,799 human remains and 1,165,838 funerary objects. The study found that 36 percent of the notices considered oral tradition evidence, with Federal agencies considering it 51 percent of the time and museums 31 percent of time. No notices solely relied on oral tradition evidence nor did any use oral tradition to tip the scale toward a finding of cultural affiliation.

Even when considered, oral tradition evidence is often accorded limited value by museums, Federal agencies, and the Courts. In *Bonnichsen v. United States*, the Ninth Circuit wrote that oral tradition accounts are “just not specific enough or reliable enough or relevant enough. . . [b]ecause oral accounts have been inevitably changed in context of transmission, because the traditions include myths that cannot be considered as if factual histories, because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins. . . .”¹⁰

This problem is not just limited to NAGPRA. Tribes note that Federal agencies tend to require a higher burden of proof when nominating historic properties to the National Register for Historic Places and during Section 106 reviews under the National Historic Preservation Act when they are supported by tribal traditional knowledge.

Tribes are often reluctant to allow public scrutiny of their most sensitive oral tradition evidence, particularly that related to religious practices. In one example, after four years of litigation, including the United States Court of Appeals for the Tenth Circuit vacating the United States District Court for the District of New Mexico’s dismissal of its lawsuit,¹¹ a Tribe filed a motion to dismiss the case in part due to concerns for subjecting its traditional religious leaders to cross examination at trial over Tribal oral tradition.¹²

A suggestion for correcting this biased and patriarchal approach is described in our response to your question 3 below.

Question 3. Building on your testimony, how does California’s version of NAGPRA (CalNAGPRA) better incorporate Tribal oral tradition into the repatriation process, and how does it balance the tension the court dealt with in *Bonnichsen v. U.S.*?

Answer. The California Native American Graves Protection and Repatriation Act (CalNAGPRA), initially enacted in 2001, was amended in 2021 in part to address shortcomings of NAGPRA. Whereas NAGPRA does not define “oral tradition,” CalNAGPRA uses a similar term of “tribal traditional knowledge” which it defines as: “knowledge systems embedded and often safeguarded in the traditional culture of California Indian tribes and lineal descendants, including, but not limited to, knowledge about ancestral territories, cultural affiliation, traditional cultural properties and landscapes, culturoscapes, traditional ceremonial and funerary practices, lifeways, customs and traditions, climate, material culture, and subsistence. Tribal traditional knowledge is expert opinion.”¹³ CalNAGPRA then goes on to give tribal traditional knowledge deference by defining “preponderance of the evidence” as “the party’s evidence on a fact indicates that it is more likely than not that the fact is true. Tribal traditional knowledge alone may be sufficient to meet this standard. If there is conflicting evidence, tribal traditional knowledge shall be provided def-

⁷ 25 U.S.C. § 3005(a)(4) (“[S]uch Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.”).

⁸ 43 C.F.R. §§ 10.2(e)(1), 10.14(e).

⁹ Jason Roberts, *Unwinding Non-Native Control over Native America’s Past: A Statistical Analysis of the Decisions to Return Native American Human Remains and Funerary Objects under the Native American Graves Protection and Repatriation Act, 1992–2013*, 38 U. OF HAW. L. REV. 337 (2016).

¹⁰ *Bonnichsen*, 367 F.3d at 881–82.

¹¹ *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996).

¹² Pl.’s Mot. to Dismiss with Prejudice, *Pueblo of San Ildefonso v. Ridlon*, No. 93-cv-01467 (D. N.M. Apr. 30, 1997) (Dkt. No. 70).

¹³ Cal. Health & Safety Code § 8012(p).

erence.”¹⁴ CalNAGPRA provides an explicit definition of the term and makes explicit to Tribes, museums, agencies, and the courts that Tribal traditional knowledge may be used alone as well as being accorded deference in conflicting situations.

Question 4. How does the current definition of “museum” complicate implementation of NAGPRA, particularly as it pertains to repatriation? Are there any other definitions in NAGPRA that present similar challenges?

Answer. In NAGPRA, Congress defined “museum” as “any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.”¹⁵ NATHPO fully supports the statutory language but has major concerns in how the Department of the Interior has interpreted the phrase “possession of, or control over,” both in the current regulations and the draft proposed rule. Neither “possession” nor “control” are defined in NAGPRA, thus the common meaning of the terms should apply. Instead, the current regulations define both simple terms with self-referencing and confusing legalese that requires in both instances “a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations.”¹⁶ The draft proposed regulations double-down on this regulatory sleight of hand by eliminating the term “possession” entirely. NATHPO pointed out in its comments on the draft proposed regulations that this new scheme is inconsistent with the statute’s clear language requiring museums and Federal agencies to provide Indian Tribes and Native Hawaiian organizations with summaries and inventories of cultural items in their “possession or control.” While the proposed scheme would be more convenient for museums and Federal agencies to implement, it will systematically deprive Indian Tribes and Native Hawaiian organizations of information on holdings or collections in a museum or Federal agency’s possession but not in their control. It is also inconsistent with the clear statutory language and Congress’s intent and constitutes an abuse of discretion. We request that the Department of the Interior revise Subpart C of the draft proposed regulations to focus on Native American collections or holdings in the possession or control of museums and Federal agencies, as intended by Congress, define “possession” as it has the term “custody” in the draft proposal, and revise the reporting requirements so that museums and Federal agencies must provide summaries and inventories of all cultural items in their possession or control, as required by NAGPRA.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BEN RAY LUJÁN TO
VALERIE GRUSSING, PH.D.

Question 1. Why is dedicated funding for the Bureau of Indian Affairs for NAGPRA compliance vital to the intent and reach of the law, and how would it improve the Bureau’s prevention of and response to theft and damage of NAGPRA cultural resources, such as those that occurred to petroglyphs in New Mexico?

Answer. NAGPRA establishes three separate sets of responsibilities for federal agencies: compliance, implementation, and enforcement. NATHPO has different administrative and funding recommendations for each.

Compliance. Each Federal agency is required to comply with the repatriation provisions for cultural items in its possession or control,¹ and the ownership provisions for excavations and discoveries on lands under its control.² In a 2010 report focusing on the repatriation provisions, the Government Accountability Office (GAO) documented that one of the primary challenges faced by the eight Federal agencies reviewed (Bureau of Indian Affairs, Bureau of Reclamation, Bureau of Land Management, National Park Service, Fish and Wildlife Service, Army Corps of Engineers, Forest Service, and Tennessee Valley Authority) was a lack of funding and staff only working on NAGPRA compliance for historical collections as a collateral duty.³ NATHPO believes that this situation has not significantly changed in the past twelve years and recommends that Congress consider dedicated funding to enable each Federal agency, including the Bureau of Indian Affairs, to comply with its repatriation responsibilities.

¹⁴ Cal. Health & Safety Code § 8012(k).

¹⁵ 25 U.S.C. § 3001(8).

¹⁶ 43 C.F.R. § 10.2(a)(3)(i), (ii).

¹ 25 U.S.C. §§ 3003–3005.

² 25 U.S.C. § 3002.

³ Gov’t Accountability Office, *Native American Graves Protection and Repatriation Act: After Almost 20 Years, Key Federal Agencies Still Have Not Fully Complied with the Act*, GAO–10–768 at 16 (July 2010).

The GAO has not yet conducted a similar evaluation of Federal agencies' compliance with NAGPRA's ownership provisions. NATHPO hears from Tribal Historic Preservation Officers (THPO) that in many cases Federal agency officials are failing to adequately consult with Indian Tribes following inadvertent discoveries and are failing to complete the plans of action required by regulation. To get a better grasp of Federal compliance with NAGPRA's provisions protecting Native American graves and cultural items, we ask the Committee to request the GAO to complete an evaluation of Federal agency compliance with the ownership provisions of NAGPRA and its implementing regulations, particularly focusing on consultation, completion of plans of action and comprehensive agreements, publication of notice of intended disposition, the disposition of so-called "unclaimed" cultural items, and whether establishing dedicated positions to ensure compliance with these provisions at each agency would be beneficial.

Implementation. Congress assigned responsibility for implementing NAGPRA to the Secretary of the Interior. These duties include providing staff support for the Native American Graves Protection and Repatriation Review Committee (Review Committee); promulgating implementing regulations; publishing notices submitted by museums and Federal agencies in the Federal Register; granting inventory extensions to museums; awarding grants to museums, Indian Tribes, and Native Hawaiian organizations; and assuming responsibility for inadvertent discoveries at the request of another department. The Secretary has retained sole authority to appoint members to the Review Committee. Authority to promulgate regulations, award grants, and grant inventory extensions has been delegated to the Assistant Secretary for Fish and Wildlife and Parks.⁴ The National Park Service has been delegated responsibility for publishing notices in the Federal Register, serving as the designated Federal official to the Review Committee, and providing staff support to the Assistant Secretary for Fish and Wildlife and Parks regarding regulations, grants, and extensions.

NATHPO believes that these implementation duties would be more appropriately assigned to the Office of the Assistant Secretary for Indian Affairs. We believe that there are two primary factors supporting this redelegation: 1) the importance of asserting definitively that the primary beneficiaries of NAGPRA are the lineal descendants, Indian Tribes, and Native Hawaiian organizations seeking the return of their ancestors and cultural items; and 2) the dangers of maintaining the implementation program within a land managing and collection managing bureau which is required to also comply with the statutory provisions. Similar criteria were previously used to establish the Office of the Special Trustee for American Indians, now called the Bureau of Trust Funds Administration, which is currently overseen by the Office of the Assistant Secretary for Indian Affairs.⁵

Enforcement. Enforcement of NAGPRA consists of two functions. First, the Secretary of the Interior is authorized to assess civil penalties on any museum that fails to comply with the repatriation provisions of the law. Authority to investigate allegations of failure to comply and assess civil penalties has been delegated to the Office of the Assistant Secretary for Fish and Wildlife and Parks.⁶ Second, the Attorney General is authorized to file criminal charges against any person who knowingly buys, sells, uses for profit, or transports for sale or profit Native American human remains or cultural items, with investigative authority generally shared between the Federal Bureau of Investigation and various land managing agencies. NATHPO believes that it would be appropriate to centralize the Department of the Interior's investigatory functions for both civil penalties and criminal charges within the Bureau of Indian Affairs Office of Justice Services, with civil penalties being assessed by the Assistant Secretary for Indian Affairs and criminal charges being brought by the Department of Justice. While dedicated funding would be coordinated by the Bureau of Indian Affairs, evidence presented in our written testimony demonstrates the value of having a multi-agency investigatory effort similar to the Four Corners Interagency ARPA taskforce in the early 1990s.

Question 2. If enforcement of NAGPRA was moved to the Bureau, what would be the consequences for NAGPRA's enforcement?

Answer. The limited information provided by the National Park Service indicates that no investigations of allegations for failure to comply have been completed and no civil penalties have been assessed for several years, while information from 2017 indicates there exists a considerable backlog of uninvestigated allegations. Any activity to investigate current and future allegations of failure to comply and to hold museums accountable would be an improvement, and we believe that the Bureau

⁴Dep't of Interior, Departmental Manual, 209 DM 6.8.

⁵Bureau of Trust Funds Admin, <https://www.bia.gov/btfa> (accessed Mar. 10, 2022).

⁶Dep't of Interior, Departmental Manual, 209 DM 6.8.

of Indian Affairs would approach this task focusing on righting the wrongs done to lineal descendants, Indian Tribes, and Native Hawaiian organizations without having to consider the effect of such investigations on other programs providing assistance to the museum community. Regarding enforcement of the criminal provisions, the Bureau of Indian Affairs has the opportunity to serve a coordinating role with the Federal Bureau of Investigation and law enforcement from other land managing agencies to investigate reported violations of 18 U.S.C. § 1170 and refer those cases to the Department of Justice for prosecution.

Question 3. [Will] § 10.5 (c) of the proposed NAGPRA regulations change Tribal and Native Hawaiian Organization notification immediately following the discovery of Native American items or remains?

Answer. In our response to your fifth question below, we present a detailed analysis of the differences in the inadvertent discovery process, including the current requirement for Federal officials to notify and consult immediately following the discovery. Representatives of the National Park Service have consistently justified many of the changes in the draft proposal as an attempt to “simplify the existing regulations.” Removing the notification and consultation requirements clearly shows that such simplification is being done to the detriment of administrative accountability in general, and to the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations in particular.

Question 4. Under § 10.5 (d) of the proposed NAGPRA regulations, why is there no Plan of Action required?

Answer. In our response to your fifth question below, we present a detailed analysis of the differences in the inadvertent discovery process, including the current requirement for Federal officials to prepare a Plan of Action. Representatives of the National Park Service have consistently justified many of the changes in the draft proposal as an attempt to “simplify the existing regulations.” Removing the Plan of Action requirements clearly shows that such simplification is being done to the detriment of administrative accountability in general, and to the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations in particular.

Question 5. What course of action is required when there is an unintentional discovery of cultural items, such as ground disturbances due to 1) a flood or other weather event, 2) ongoing maintenance such as cleaning a culvert, or 3) unauthorized excavation of Native American graves such as carried out by thieves? What action is required under the existing NAGPRA regulations and under the proposed NAGPRA regulations?

Answer. **Immediate Notification.** Any person who discovers Native American cultural items on Federal or Tribal lands must immediately notify the responsible Federal or Tribal official. For discoveries made as part of an ongoing activity, such as your example of cleaning a culvert, the person making the discovery must stop the activity in the area of the discovery and make a reasonable effort to protect the cultural item.⁷ All Federal authorizations to carry out land use activities on Federal lands or Tribal lands, including all leases and permits, must include this requirement.⁸ NATHPO has requested that the Department of the Interior revise its draft proposed rule to explicitly address the common situation where ground-disturbing activity is unintentional, such as your example of a flood or other weather event, or other types of situations like looting which cannot be stopped solely by regulatory edits.

Certification and Consultation. The current regulations require that within three working days of receiving notification of the discovery, the responsible Federal official must certify receipt of the notification, take immediate steps to further secure and protect the discovered cultural item, and notify any known lineal descendant and culturally or geographically affiliated Indian Tribe or Native Hawaiian organization and begin consultation.⁹ The Department of the Interior’s draft proposed regulation would change the three working day deadline to five business days and eliminate entirely the requirement to notify known lineal descendants and culturally affiliated Indian Tribes or Native Hawaiian organizations as soon as the discovery is made.¹⁰ The proposed change would mean that that the Federal official would be allowed to take unilateral and unsupervised actions regarding the discovered cultural items, including stabilizing or covering them,¹¹ evaluating the poten-

⁷ 43 C.F.R. § 10.4(b).

⁸ 43 C.F.R. § 10.4(g).

⁹ 43 C.F.R. § 10.4(d)(1).

¹⁰ Draft proposal § 10.5(c).

¹¹ Draft proposal § 10.5(c)(1).

tial need for excavating them,¹² and certifying that the ground-disturbing activity may proceed,¹³ with no input from the lineal descendants and affiliated Indian Tribes and Native Hawaiian organizations.

NATHPO strongly objects to both of these changes. Three working/business days is sufficient time to enable the Federal official to carry out the required tasks to ensure that the discovered cultural items are protected. Elimination of the consultation requirement is certainly inconsistent with the Secretary's goal of strengthening government-to-government relationships between the Federal government and Indian Tribes, particularly in a situation involving an issue as sensitive as the protection of tribal ancestors and other cultural items where NAGPRA affirms ownership or control in the time.

Plan of Action. The current regulations require that following consultation with lineal descendants and affiliated Indian Tribes and Native Hawaiian organizations, the Federal agency official must prepare, approve, and sign a written plan of action to identify the kinds of objects considered as cultural items, specific information used to determine custody, planned treatment, care and handling of recovered cultural items, planned archeological recording of the cultural items recovered, any kind of analysis planned for each kind of object, any steps to be followed to contact Indian Tribe officials, the kinds of traditional treatment to be afforded the cultural items by Tribal members, the nature of reports to be prepared, and the planned disposition of the cultural items.¹⁴ The Department of the Interior's draft proposal would eliminate this requirement entirely and replace it with a "certification" sent only to the person responsible for the ground disturbing activity affirming that a reasonable effort has been made to secure and protect the cultural items and that all ground-disturbing activity in the area of the discovery has stopped; instructing if further actions are needed to secure, protect, or stabilize the cultural item; proposing a timeline and method for excavation of the cultural items, if applicable; and identifying a date on which lawful ground-disturbing activity may resume in the area of the discovery.¹⁵ The entire process as re-envisioned by the Department of the Interior would be done without consultation or even notification of the lineal descendants or affiliated Indian Tribes.

Ceasing Activity in the Area of the Discovery. In NAGPRA, Congress requires the cessation of activity in the area where a cultural item is discovered from the moment of the actual discovery until a time at least thirty days after the Federal official certifies receipt of notification, after which the activity "may" resume.¹⁶ The current regulations provide an option to shorten the thirty-day period if a written, binding agreement is executed between the Federal agency and the affiliated Indian Tribes or Native Hawaiian organizations which adopts a recovery plan for the excavation or removal of the cultural items.¹⁷ The Department of the Interior's draft proposal slightly extends the cession period by counting business days instead of calendar days, which NATHPO supports, but then changes the discretionary minimum period in the current regulations to a mandatory maximum period—"no later than"—which the Federal agency is seemingly authorized to shorten at will without consultation with the affected lineal descendants, Indian Tribes, and Native Hawaiian organizations.¹⁸ NATHPO strongly objects to this proposed change and believes it conflicts with the clear language of NAGPRA.

Overall, NATHPO is very disappointed in the Department of the Interior's proposed changes to the discovery provisions of the regulations. The primary purpose of NAGPRA is to protect Native American burial sites and the removal of cultural items from Federal, Indian, and Native Hawaiian lands.¹⁹ NATHPO is shocked that the Department of the Interior would now propose to conduct this process without full consultation with the lineal descendants and affiliated Indian Tribes and Native Hawaiian organizations.

Question 6. What is the role of Tribal Historic Preservation Offices in groundbreaking activities off Tribal lands with regards to NAGPRA.

Answer. THPOs are often designated by their Tribe to serve as its official NAGPRA contact. In this role, they respond to notifications from federal agency officials regarding inadvertent discoveries on Federal lands for any cultural items that

¹² Draft proposal § 10.5(d).

¹³ Draft proposal § 10.5(e).

¹⁴ 43 C.F.R. § 10.5(e).

¹⁵ Draft Proposal § 10.5(e).

¹⁶ 25 U.S.C. § 3002(d)(1).

¹⁷ 33 43 C.F.R. § 10.4(d)(2).

¹⁸ Draft Proposal § 10.5(e)(4).

¹⁹ Providing for the Protection of Native American Graves, and for Other Purposes, H. Rpt. 101-877, at 8 (1989).

are either culturally affiliated with their Tribe or were discovered on lands aboriginally occupied by their Tribe. They may negotiate with federal agency officials in the development of comprehensive agreements prior to initiation of any planned excavations that are likely to recover Native American cultural items and may be authorized to sign such agreements on behalf of their Tribe. THPOs often serve as the liaison between Federal agency officials and their Tribe's traditional religious leaders. THPOs are also often authorized to receive Native American cultural items excavated or discovered on federal lands from federal agency officials and to coordinate their appropriate disposition.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BEN RAY LUJÁN TO
ROSITA WORL, PH.D.

Question 1. Dr. Worl, what would enacting the STOP Act mean for expanding the scope, efficacy and intent of NAGPRA?

Answer. Expanding the scope, efficacy and intent of NAGPRA by enacting the STOP Act fills a major void in NAGPRA which does not protect cultural heritage objects from export or from trafficking via international auction venues through which hundreds of such items are exchanged among private collectors on a regular basis. Reconnecting Native American communities with their cultural traditions through restoration of the cultural objects made by their ancestors is the greatest benefit of the STOP Act, as it remains under NAGPRA. Currently, the only recourse for an Indian tribe or NHO to prevent the international auction of such items is through persuasion or by arranging for their purchase, both of which are beyond the reach of NAGPRA and outside the realm of the possible for tribes from a practical standpoint. For example, in 2014, with assistance and support from the FBI and the State Dept. and the U.S. Embassy in Paris, SHI attempted to persuade an auction house in Paris to remove a sacred object from an upcoming auction. The auction house refused the request citing French laws that did not prohibit such sales. In a very unusual turnaround, SHI was later contacted by a non-profit organization in Los Angeles and was informed that an unnamed board member, using personal funds, attended the auction and purchased Hopi, Apache and Tlingit items during the auction. This individual then offered to repatriate the Tlingit item to SHI.

This item was a painted side of a bent wood box that was likely 100 years old or older. Due to the age of the object, the repatriation provisions of NAGPRA, Section 7, would not apply. NAGPRA is limited in scope because it only addresses cultural items taken from federal or tribal lands after the passage of the act (1990). The STOP Act includes provisions that would apply to such tangible cultural heritage under Section 8, Voluntary Return. Furthermore, the STOP Act authorizes the President to request agreements from foreign nations to encourage the voluntary return of such items. The STOP Act thus provides mechanisms not available in NAGPRA to facilitate the return of cultural heritage from foreign nations including those that are put up for sale in auctions. Such provisions are significant for SHI because thousands of Tlingit, Haida and Tsimshian items have been removed for collections in European museums starting in the late 1700s, which then became objects of desire by individual collectors giving rise to the intense contemporary interest in auctions of such items in Paris and other European cities.

The STOP Act would significantly enhance the protections of Native American tangible cultural heritage by extending the scope of NAGPRA and ARPA into the arenas of exportation and international exchange of these items which currently have limited regulation under federal law. It would fulfill the promise of NAGPRA to protect and facilitate the return such items that have been unlawfully alienated from Indian tribes and have entered the international arena.

Question 2. Dr. Worl, are current NAGPRA criminal penalties sufficient to stop the trafficking and exportation of cultural patrimony? If not, how would increasing criminal penalties from 5 to 10 years of imprisonment, as the STOP Act does, help to deter illegal trafficking of cultural items and human remains, both domestically and abroad? In addition, right now, the criminal standard requires an individual to “know” they are violating 18 USC 1170, as opposed to “should have known.” Do you recommend changing the criminal standard?

Answer. Existing criminal penalties under NAGPRA for theft and trafficking in Native American cultural items are grossly inadequate to discourage such practices. The frequency to which the 5-year imprisonment penalty has been imposed in actual cases is unknown. In one egregious case of which I am familiar, the trafficking of

Native American human remains and funerary objects resulted in a sentence of only two years.¹

Calling out Native American human remains and cultural items as defined in NAGPRA and ARPA for increased penalties of imprisonment for trafficking and exportation, and ensuring that such penalties are imposed, would constitute a significant response to such cases and contribute substantially to deterring trafficking of these items.

The STOP Act will serve as a powerful deterrent to those who claim ignorance that the objects they wish to export or sell by auction are not highly important historical, cultural and sacred objects to Indian tribes or NHOs. Ignorance of the historical and cultural significance of these items should not be considered a legitimate defense against illegal trafficking and exportation for those who profess knowledge of the value of such items (such as collectors and dealers). By enabling more substantial penalties for offenders and clarifying that the “ignorance defense” is unacceptable, the Act will provide a criminal standard that is commensurate with the offense.

Question 3. Dr. Worl, given that the law specifies civil penalty amounts be entirely determined by regulations, do you feel that the new regulatory changes for civil penalties are sufficient for museum non-compliance?

Answer. Civil penalties for museums of \$7,037 per violation for any failure to comply with NAGPRA is inadequate under present circumstances, more than 30 years after passage of NAGPRA. Thirty (30) years is more than adequate time for museums to have learned the intricacies of NAGPRA and find ways to comply with all provisions in the act. We would suggest a minimum penalty of \$10,000–15,000 for each failure to comply.

There is very limited data available about the incidence of failure to comply on the part of museums. A lack of understanding of the scope of the problem contributes to the perception that a lower penalty may be sufficient to correct the problems. In the FY 2017 National NAGPRA Program Annual Report, allegations of failure to comply with NAGPRA had been received against 115 museums, fewer than half had been investigated, allegations were substantiated against 22 museums and only 11 museums had been assessed a civil penalty (Comments on draft proposed NAGPRA regulations submitted by the National Association of Tribal Historic Preservation Officers (NATHPO), Sept. 10, 2021). According to the NATHPO comments, the National NAGPRA Program has refused to provide subsequent data on the number of allegations or the number of penalties assessed during subsequent years. We can only assume that a substantial number of museums remain out of compliance with NAGPRA. We support a higher penalty for any failure to comply with NAGPRA.

Question 4. Dr. Worl, do the new regulations put enough pressure on museums to expedite the repatriation process and do you trust that Tribal concerns raised during the consultation process for the new regulations will be passed along to the Review Committee?

Answer. Yes, the new regulations put adequate pressure on museums to expedite the repatriation process. However, there is no guarantee that Tribal concerns raised during the consultation process for the new regulations will be passed along to the Review Committee. I do not trust that this will be carried out without some sort of codification in the draft regulations.

Question 5. Dr. Worl, what reforms to NAGPRA are needed to curb the sale of cultural items by auction houses, and how could these reforms be considered in the new draft NAGPRA regulations put forth by the National Park Service?

Answer. This issue is of great concern to tribes across the U.S. Unfortunately, NAGPRA is silent on this topic since it relates to the sale of cultural items in private collections and private ownership. A new law or provision in NAGPRA would be necessary to address this issue. I do not see an avenue in the new draft regulations to address it.

Question 6. Dr. Worl, what are the implications of §10.5(c) of the proposed NAGPRA regulations which changes the process of Tribal and Native Hawaiian Or-

¹In 1999, after a two-year undercover investigation by the National Park Service (NPS) special agents purchased Native American human remains and funerary objects from a store in Island Springs, Virginia. The store owner and his son were convicted of violating the trafficking provisions of NAGPRA for the illegal sale of these remains. They were also convicted of violating ARPA for the illegal sale of archaeological resources and violating the Lacey Act for the illegal sale of endangered/threatened species. In 2002, the store owner was sentenced to two years in jail and fined \$17,575, and two vehicles (including a 2000 Ford Excursion) were seized. (Information Sheet: Human Remains Confiscated in NAGPRA Trafficking Case, NPS Northeast Region, June 29, 2005.)

ganization notification immediately following the discovery of Native American items or remains?

Answer. This has serious implications to the established NAGPRA process which requires that the Federal official notify by telephone the appropriate Indian tribes or NHOs. Furthermore, the official is responsible to initiate consultation on the discovery at this time. While the Federal official is required to take immediate steps to protect and secure any cultural items thus discovered, any such actions will also be part of the consultation that will take place at this time. This procedure ensures that Indian tribes and NHOs are directly involved very early in any Federal response to the discovery.

In contrast, under the proposed regulations there is no similar mandate for early and substantive involvement of tribes or NHOs in the Federal response. The immediate notification of Indian tribes or NHOs after a discovery is not mandated, nor is there a requirement for any consultation at this point in the process. The timing of tribal notification and the scope of communication is at the discretion of the Federal official. As described below (response to Question 8), this might occur up to two weeks or longer after the discovery. The principal responsibility of the Federal official at this point is to ensure that all cultural items are protected and secured, and once this has been accomplished to evaluate whether further excavation will follow. Indian tribes will be notified if there is a Comprehensive Agreement in place, but there is no time constraint about when that might happen except as may exist in the agreement. Tribes will be notified later after the Federal official decides to proceed with excavations.

Question 7. Dr. Worl, under § 10.5(d) of the proposed NAGPRA regulations, why is there no Plan of Action required?

Answer. Under the proposed NAGPRA regulations (§ 10.5(d)), it appears that Plans of Action are dropped and replaced by a streamlined process that incorporates Comprehensive Agreements in lieu of Plans of Action. The Plan of Action is a key document that should not be eliminated because it ensures that there is full and in-depth consultation upon a discovery of cultural item(s) and prior to continuing the excavation or engaging in new excavations, immediately after a discovery has been made. Existing regulations ensure that Indian tribes and NHOs participate in the development of Plans of Action in response to specific discoveries (planned or inadvertent) and provide the means for tribal entities to incorporate the procedures that they consider will result in their cultural items being treated with respect according to their customs and traditions. Plans of Action have the advantage of responding in a very timely manner to instances of discovery. The existing regulations provide detailed and specific guidance to federal officials regarding this document which is prepared in consultation with affiliated tribes or NHOs and is of great benefit to them. Plans of Action are more substantive than comprehensive agreements, address the specific and unique conditions of a planned action or inadvertent discovery, and are greatly preferred as compared to the more generalized comprehensive agreements. In fact, they can supersede Comprehensive Agreements if carried out as described in the existing regulations.

Specifically, please refer to § 10.3(c), Procedures, in existing regulations for detailed specifications including prior written notification by federal officials of Indian tribes or NHOs (including those that are or are likely to be culturally affiliated with cultural items that may be encountered during the activity, or those on whose aboriginal lands the project resides); in-person consultations about the agency's proposed treatment of cultural items that may be exposed; and the completion of a written Plan of Action prior to the start of the activity.

Question 8. Dr. Worl, what course of action is required when there is an unintentional discovery of cultural items, such as ground disturbances due to (1) a flood or other weather event, (2) ongoing maintenance such as cleaning a culvert, or (3) unauthorized excavation of Native American graves such as carried out by thieves? What action is required under the existing NAGPRA regulations and under the proposed NAGPRA regulations?

Answer. Under the existing regulations, all three of these circumstances will be governed by the procedures for inadvertent discoveries on Federal lands (§ 10.4). The person who makes the discovery provides immediate (telephone) notification with written confirmation to the responsible Federal agency official. The Federal official takes immediate steps to further secure and protect the cultural items including stabilization or covering, notifies by telephone the appropriate Indian tribes or NHOs and initiates consultation on the discovery. The official will follow NAGPRA procedures for intentional excavations if it is decided to the cultural items must be removed or excavated.

Under proposed regulations, the person who makes the discovery must immediately report the occurrence to the responsible Federal agency official and send written documentation to the official within three business days. Within five business days after receiving written documentation of the discovery, the Federal official must ensure that a reasonable effort has been made to secure and protect the cultural items. The Federal proceeds to evaluate the need for excavation of the cultural item(s). Excavation may be authorized only after compliance with § 10.6 (Excavation) or § 10.4(b) (Comprehensive Agreement). Under § 10.6 (Excavation), the Federal official may authorize an excavation only after consultation with the appropriate Indian tribes and NHOs. Under § 10.4(b) (Comprehensive Agreement), the official notifies the appropriate Indian tribes and NHOs. The Federal official may authorize an excavation by providing a written authorization.

The consultation provisions in the existing regulations are significantly compromised under the proposed regulations. The proposed regulations do not provide for immediate (telephone) notification and consultation with Indian tribes or NHOs following discovery of a cultural item(s). Instead, the Federal official is notified. The Federal official decides the appropriate treatment of the cultural items following discovery (methods of securing the excavation site and protecting the items) and may proceed without notifying the tribes. The Federal official evaluates the need for excavation of the cultural item(s). The emphasis of the process, as outlined in the draft regulations relating to a Comprehensive Agreement or the consultation following a discovery, is clearly on the process of excavation. If the excavation activity is governed by a Comprehensive Agreement, the Federal official is only required to inform consulting parties of the discovery or excavation.

One of the major strengths of NAGPRA is the emphasis on consultation. In my view, this attribute is significantly compromised by the draft regulations regarding the Federal agency responses to discoveries. The Plan of Action has been removed from the process, which is a major document detailing the response to an inadvertent discovery by a Federal agency developed through consultation and with the participation of Indian tribes or NHOs in the actual response. Plans of Action are developed prior to the start of an activity that may result in a discovery, and as such ensure there is an efficient use of time following a discovery. Under the proposed regulations, if consultations regarding a specific discovery actually take place (which is not guaranteed), these discussions occur after the discovery when there is a time pressure to complete the process within a short time period. This is a poor way to conduct business with Indian tribes and NHOs. It is disrespectful and places a burden on them to comply with the interests of the Federal agency.

The draft regulations reduce the emphasis on a timely notification and response to discoveries on the part of the Federal agency which is unacceptable. The person who makes the discovery has three business days to send written notification to the responsible Federal official, after the receipt of which the official has another five business days to ensure that the discovery has been secured and the ground-disturbing activity has stopped. This means that it could take 2-3 weeks to confirm an inadvertent discovery and to protect and secure the site from which cultural items were removed or exposed. This delay is unacceptable.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN HOEVEN TO
JOY BEASLEY

Question 1. In your role as Associate Director for Cultural Resources Partnerships and Science, what successes have you seen with repatriating Native American human remains and other cultural items?

Answer. As Congress envisioned, repatriations have resulted in a continuing dialogue and mutually beneficial relationship between Indian Tribes and Native Hawaiian organizations and some museums and Federal agencies. All parties have found the benefits of repatriation extend well beyond the transfer of a specific item or collection. Since 1990, the National Park Service has published almost 4,000 notices, allowing for the repatriation of over 84,000 Native American ancestral remains and over 1.5 million funerary objects. Nationwide, over 20 percent of museums and Federal agencies have completed the work to repatriate all of the Native American human remains in their collections. In some states, like North Dakota, Alaska, and Hawaii, a majority of the ancestral remains removed from the state have been repatriated (88 percent in North Dakota; 82 percent in Alaska; and 97 percent in Hawai'i).

Question 2. What challenges still remain?

Answer. Despite a number of success stories, less than half of the Native American ancestors in collections have been returned to their traditional caretakers,

largely due to identification of those ancestors as “culturally unidentifiable.” Over 117,576 Native American individuals are still in museum and Federal agency collections, and 94 percent of those have not been culturally affiliated with any present-day Indian Tribe or Native Hawaiian organization. Under the current regulations, museums and Federal agencies are not required to move the regulatory process forward unless requested by Indian Tribes or Native Hawaiian organizations.

The Department is also aware that some collections subject to NAGPRA remain unreported. Many Federal agencies are still trying to locate extensive collections in non-Federal repositories in order to complete the NAGPRA compliance process. Likewise, museums are continuing to discover previously unknown or unreported collections subject to NAGPRA that should be returned to their traditional caretakers. In addition to repatriation of collections, the current regulations, which are repetitive and at times confusing, have led to inconsistent implementation of NAGPRA by Federal land managers. The Department looks forward to working with stakeholders on revising the current regulations to simplify, improve, and bring more consistency to the regulatory process.

Question 3. Under the proposed revised regulations for NAGPRA, is tribal consultation emphasized as an important part of the repatriation process?

Answer. In the Act and the existing regulations, consultation is at the center of all repatriation activities. The Department, however, has heard repeatedly from Indian Tribes and Native Hawaiian organizations that meaningful consultation is a continual challenge in repatriation efforts. The Department believes changes to the regulations will help make consultation on repatriation more meaningful and robust. The Department has proposed adding to the regulations a definition of consultation. It also proposes to shift the burden of initiating consultation from Indian Tribes and Native Hawaiian organizations to museums and Federal agencies. The Department is committed to emphasizing in the revised regulations deference to Native American customs, traditions, and the traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations, whenever possible in the repatriation process.

Question 4. What is the role of the Tribe when there is an inadvertent discovery or planned excavation of Native American cultural items on federal or tribal lands?

Answer. On all Tribal lands in Alaska and the continental United States, the Act requires certain actions be taken by the appropriate official for the Indian Tribe (including Alaska Native villages) when there is a discovery or excavation of Native American human remains or cultural items.

On all Federal lands in the United States, the Act requires certain actions be taken by the appropriate official for the Federal land managing agency when there is a discovery or excavation of Native American human remains or cultural items. The existing regulations require consultation with the Tribe after a discovery is made. In revising the regulations, the Department is committed to strengthening, to the maximum extent possible, the requirement for consultation with Indian Tribes, Alaskan Native Villages, and Native Hawaiian organizations on any discovery or excavation on Federal lands. The Department will propose, in revising the regulations, a maximum number of days before an activity could resume, allowing the appropriate official time to consult with Indian Tribes and Native Hawaiian organizations.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO
JOY BEASLEY

Question 1. Why does the NAGPRA Review Committee report for 2018–2019 not include specific, complete, and up-to-date numbers related to the status of NAGPRA civil and criminal compliance?

Answer. The NAGPRA Review Committee does not have any responsibilities under the Act, the regulations, or its charter for civil penalties. Therefore, the NAGPRA Review Committee report does not include specific information regarding civil and criminal compliance.

The Secretary of the Interior has the responsibility for assessing penalties. On behalf of the Secretary, the National NAGPRA Program reports annually on the number of allegations received (0 in 2019, 0 in 2020, 1 in 2021) and the amount of funds collected for penalties (\$59,111 since 1990). These statistics are appended to the Review Committee report to Congress (for 2018–2019, see page 10). The National NAGPRA Program is working to develop new reporting methods for civil enforcement activities and expects to provide additional statistical information in the NAGPRA Program Report for FY 2022.

Question 2. To date, how many total allegations of failure to comply with NAGPRA has the National Park Service (NPS) received?

Answer. The National Park Service has received 142 allegations of failure to comply with NAGPRA. Some allegations involve multiple museums and are counted as more than one allegation. In other cases, an allegation against one museum might result in an affirmation, in part, and a determination of no failure, in another part, and those allegations are counted separately. One allegation may result in multiple violations but are still reported here as only one allegation. As a result of how allegations are counted, the figures reported below differ from what has been previously reported by the National Park Service. Previous reports on enforcement counted the number of letters received, the number of entities involved, and the number of violations determined. The National Park Service is developing new reporting methods for enforcement activities based on the number of allegations as described below.

a.1 How many were affirmed?

26 allegations were affirmed.

a.2 Of those affirmed, how many civil penalties have been issued?

15 allegations resulted in a penalty.

4 allegations settled by other means.

7 allegations resulted in a finding that a penalty was not an appropriate remedy.

b. How many were determined not to be a failure?

52 allegations were determined not to be a failure.

c. How many were not investigated?

64 allegations were evaluated but not investigated. See Question 3.

Question 3. Is there a backlog of allegations pending investigation?

Answer. There are currently 17 allegations that have been referred for investigation; 42 allegations that do not require an investigation but that do require further evaluation after an initial determination was made; and 5 allegations that do not require investigation and can be administratively closed.

a. How many allegations are currently pending investigation?

17 allegations are currently pending investigation.

b. What is the date of the oldest allegation still pending investigation?

Chronology of oldest allegation:

1999—Allegation received;

2004—Referred for investigation;

2010—Investigated in part;

2013—Investigated in part.

c. What is the average age of the allegations still pending investigation?

Average age of allegations still pending investigation is 11 years.

d. Where in the administrative process are these allegations still pending investigation?

In order of priority:

1 allegation is actively being investigated;

2 allegations have not been investigated;

4 allegations have been investigated in part;

2 allegations relate to previously resolved cases;

7 allegations relate to already repatriated items;

1 allegation investigation on hold.

Question 4. We understand the NAGPRA Review Committee is currently reviewing the draft proposed rule. Will you share comments made by Tribes, Native Hawaiian Organizations, and their representatives with the Review Committee to ensure it can fulfill its statutory responsibility to advise the Secretary in the development of the regulations? What other steps will you take to ensure robust participation by the Review Committee?

Answer. The Department plans on publishing direct responses to all comments received from Indian Tribes and Native Hawaiian organizations during consultation. This document will include a summary of all comments received while protecting the anonymity of each commentator. Once a proposed rule is published, the Department will conduct additional nation-to-nation consultation with Indian Tribes and Native Hawaiian organizations. In July of 2021, the Secretary (through the Des-

ignated Federal Official) requested that the Review Committee review the draft regulations publicly available and develop written recommendations for consideration. Since then, the Review Committee has scheduled 37 hours of public meetings and has devoted nearly 50 percent of that time to discussing the revised regulations. The Department appreciates the input provided by the Review Committee on the draft regulations.

Question 5. How would moving NAGPRA enforcement to the Bureau of Indian Affairs impact implementation of the law? What other impacts would such a move have?

Answer. Under the Act, the Secretary has the authority to delegate administrative responsibilities for NAGPRA. The Department has identified this as an issue and sought input from Indian Tribes and Native Hawaiian organizations during consultation on the NAGPRA regulations. The Department received 43 comments on the placement of the NAGPRA Program during recent consultation and is still considering how to implement any changes to the current delegations of authority. Enforcement and implementation responsibilities would remain consistent regardless of whether those duties were performed by the National Park Service or the Bureau of Indian Affairs.

Question 6. Does NAGPRA apply to private museums that receive funding through the CARES Act, the American Rescue Plan Act, or other recent Congressional funding bills? If so, how will you ensure these museums comply with NAGPRA, and what role will the new civil penalties investigator play?

Answer. NAGPRA applies to any institution that receives Federal funds and has possession or control of Native American human remains or cultural items. Receipt of Federal funds may be direct or indirect and is determined on a case-by-case basis. The revised regulations propose to include additional information to assist institutions in determining if NAGPRA applies. The goal of increasing enforcement activities is to encourage museums to come into compliance before an allegation is made or an investigation is required.

Question 7. Is Interior looking into application of NAGPRA to Indian boarding school burial sites as part of its Federal Indian Boarding School Initiative? What is the status of the Federal Indian Boarding School Initiative's investigation and report?

Answer. The application of NAGPRA to Indian boarding school burial sites depends largely on where the cemetery is located. NAGPRA applies to intentional excavations on Federal or Tribal land, including cemeteries. Questions about the application of NAGPRA to Indian boarding schools were raised during both NAGPRA and Federal Indian Boarding School Initiative consultations. In revising the NAGPRA regulations, the Department cannot modify the definition of "Federal lands" as provided in the Act, but the Department does encourage the custodians of boarding school burial sites and related records to fully consult with Indian Tribes and NHOs on identification, disinterment, and repatriation of Native American children. The Department stands ready to fully assist Indian Tribes and NHOs in that process to the fullest extent of its authority.

The Federal Indian Boarding School Initiative report, Volume 1, was published on May 11, 2022.

Question 8. During the hearing, you stated that the 2020–2021 NAGPRA Review Committee Report to Congress was finalized at the end of November 2021 and is currently being prepared for transmittal to Congress. Please submit a copy of that report to the Committee at your earliest opportunity for the hearing record. Additionally, Congress did not receive the NAGPRA Review Committee's Report for 2018–2019 until January of 2022. Can you commit the Department to timely submissions of the Review Committee Report to Congress in the future?

Answer. We transmitted the 2020–2021 report in June of this year. Unique circumstances led to the delayed transmission of the 2018–2019 report. On June 28, 2021, the Review Committee requested the National Park Service distribute the FY 2019 report as prepared in October 2019 as a separate report instead of combining it with a FY 2020 report. The 2018–2019 report was transmitted electronically to members of Congress in December 2021.

Question 9. Have NAGPRA consultations been impacted by concerns about the confidentiality of culturally sensitive information, and the lack of protection from disclosure under the Freedom of Information Act? Would adding Freedom of Information Act protections to the statute make repatriation a more efficient and effective process for all parties?

Answer. The Freedom of Information Act (FOIA) does not protect sensitive cultural information on its own. Specific statutes such as Archaeological Resources Protection Act or National Historic Preservation Act include exemptions under FOIA,

but NAGPRA does not. NAGPRA does not require sensitive information to be recorded during consultation, but some museums and Federal agencies record cultural information that might be sensitive with NAGPRA records submitted to the Department. As a result, the Department must release that information when requested under FOIA. The Department will likely propose revisions in the regulations to clarify that submissions should not contain any information that might be sensitive. Furthermore, the current regulations and proposed regulations require museums and Federal agencies to protect sensitive information identified by consulting parties after completing a repatriation.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BEN RAY LUJÁN TO
JOY BEASLEY

Question 1. I am grateful to see that the National Park Service has hired David Barland-Liles as a full-time civil penalties investigator to ensure museums comply with the law. Under the current NAGPRA regulations, there are civil penalties if museums violate any of 9 specific actions. However, under the proposed NAGPRA regulations, civil penalties for museums extend to any violation of NAGPRA. How will Mr. Barland-Liles' civil penalty investigation work change if the proposed NAGPRA regulations are adopted?

Answer. The Department believes changes to the regulations for civil penalties will decrease the burden on the complainant who alleges the failure as well as the investigator who must identify relevant facts. Currently, the civil penalty process requires additional time and resources in the initial phase for the complainant to identify which of the specific 9 ways a museum has failed to comply and the investigator to enumerate violations accordingly. By removing the limitations on how a museum might fail to comply, a broad allegation may lead the investigator to discover facts that show specific failures to comply, which can be enumerated as individual violations.

Question 2. How does the National Park Service investigate allegations of criminal violations?

Answer. The National Park Service does not have jurisdiction over any criminal violations of NAGPRA. Criminal violations are under the jurisdiction of the appropriate land managing agency or the Department of Justice.

Question 3. Given that the National Park Service responds to every NAGPRA inquiry, but its role in enforcing NAGPRA can be limited depending on jurisdiction, how does the National Park Service coordinate with other federal agencies to resolve pending inquiries?

Answer. The National Park Service has long established relationships with relevant programs in the Department of Justice and with land managing agencies. The new full-time investigator for the National NAGPRA Program is tasked with continuing and strengthening those relationships, as well as developing new partnerships, specifically with state and local law enforcement that might also have jurisdiction.

Question 4. I understand that in many instances, the National Park Service does not have the resources to monitor all auction sales and can rely on requests from Tribes and individuals to intercede on their behalf. How does the National Park Service consider or refer NAGPRA requests that do not go through the official process, such as requests to intercede on behalf of a pot or treaty being sold at private auction? To reform the way these requests are handled by the administration, would new legislation amending NAGPRA be necessary? Does the statute need a new mechanism to help facilitate the return of NAGPRA items and remains held by private parties?

Answer. The National Park Service regularly receives information related to auctions of Native American cultural items. Any potential criminal violations are referred to the proper authorities with jurisdiction. When requested by Indian Tribes to assist, the Department provides information on the requirements of NAGPRA and an explanation on how repatriation under NAGPRA works. In several cases, this has proved useful in repatriations that occur voluntarily outside of the requirements of the Act. Additionally, the National Park Service can facilitate connections with museums, Indian Tribes, and Native Hawaiian organizations, which are already involved in repatriations under NAGPRA, who can often assist with private repatriations. Regarding legislative changes, the Department is happy to provide technical assistance.

Question 5. Another concern I have is the lack of oversight over social media sites, like Instagram and TikTok, where human bones are being bought and sold with no

protections to deter potential traffickers of Native American remains. While some sites like Etsy, eBay and Facebook have tried to ban the sale of human remains, these are poorly enforced. I know that the National Park Service has had several referrals such as these and would be interested to hear how it coordinates with other agencies to improve oversight. Given the growing online market for human remains, has there been any thought to how the new draft NAGPRA regulations will handle circumstances like the sale of Native American remains on social media sites? How does the National Park Service currently refer such allegations and work with other federal agencies to investigate? In addition, right now, the criminal standard requires an individual to “know” they are violating 18 USC 1170, as opposed to “should have known.” Do you recommend changing the criminal standard?

Answer. The National Park Service, National NAGPRA Program, does not have jurisdiction over any criminal violations of NAGPRA. Criminal violations are under the jurisdiction of the appropriate land managing agency or the Department of Justice. Criminal activities detected by National NAGPRA Program staff beyond our jurisdiction and authority are referred to the appropriate investigation and interdiction entity on a case-by-case basis. The criminal standard is a burden of proof that requires specific intent and changes to that language would likely impact prosecution of trafficking violations.

Question 6. In consultations last summer, the National Park Service estimated that 90 to 95 percent of human remains recorded under NAGPRA could be geographically affiliated to one or more Tribes, which would make them available to Tribes to request repatriation. I am concerned that current law incentivizes museums and Federal agencies to identify remains as “culturally unidentifiable,” even when a geographical origin is known. This allows the institution to retain possession and places the burden on Tribes to request items, show evidence of removal from their Tribal lands, or prove affiliation by a preponderance of the evidence. These procedures create an unjust balance of powers whereby museums do not have to explain their positions and place a higher burden on Tribes to reclaim what is rightfully theirs. How do the new draft regulations strengthen Tribes’ authority in the repatriation process? Please specify how the new regulations clarify the standard of proof for establishing cultural affiliation, and how the replacement of “culturally unidentifiable” with “geographically affiliated” will expand timely consultation, repatriation of objects and remains, and remove any incentive for museums and Federal agencies to label remains and objects as “culturally unidentifiable”? And how do you anticipate these revised changes to the regulations will play out in New Mexico?

Answer. After over 30 years, less than half of the Native American ancestors in collections have been returned to their traditional caretakers, largely due to identification of those ancestors as “culturally unidentifiable.” Museums and Federal agencies still wield a significant amount of power in determining what will be repatriated. The Department believes this imbalance can be largely corrected with revisions to the regulations.

One of the biggest challenges with NAGPRA are differences of interpretation. For example, cultural affiliation, which the Act identifies simply as a relationship between past and present people, has been a major barrier to effective and efficient repatriation. Specifically, the regulatory changes will shift the burden off Indian Tribes and Native Hawaiian organizations to make requests to consult and require museums and Federal agencies to not only initiate the process for consultation but complete the regulatory steps and make nearly all the ancestors in collections available to Indian Tribes for repatriation.

The revised regulations as being drafted do not impose any new requirements on Indian Tribes, nor do they remove a Tribe’s ability to make requests. Rather, the revisions will likely propose to shift the burden of initiating consultation from the Tribe to the museum. The Department recognizes and will reaffirm in the regulatory process that Tribal sovereignty means there is no requirement for an Indian Tribe or Native Hawaiian organization to act under NAGPRA unless the Tribe or Native Hawaiian organization chooses to do so. After consultation and notice by a museum, the Tribe would respond in its discretion, per usual, but with greater information before committing resources to the matter.

In New Mexico, specifically, about 70 percent of the Native American human remains removed from New Mexico have completed the regulatory process for repatriation. The remaining 30 percent number just over 3,000 individual ancestors still in collections awaiting return to Indian Tribes and Pueblos of New Mexico. Only about 32 percent of those ancestors (976 individuals) are in museums in New Mexico. Another 27 percent (848 individuals) are held by Federal agencies and the remaining 41 percent (1,268 individuals) are held by museums in other states. Revisions to the regulations would mean that museums in other states, as well as Federal agencies and museums in New Mexico, would be required to complete the proc-

ess to repatriate all individuals known to be from the Indian Tribes and Pueblos in New Mexico.

Question 7. During the week of January 17, 2022, the Bureau of Land Management reported vandals sprayed graffiti over the La Cieneguilla Petroglyphs, some 8,000 years old, in Santa Fe County, New Mexico. The All Pueblo Council of Governors, who represent 20 Pueblos in New Mexico and Texas, quickly condemned this desecration and called for the Bureau of Land Management and U.S. Forest Service to investigate and respond to the incident. In addition, just last year, the National Park Service had to investigate damage at the Petroglyph National Monument outside Albuquerque caused by visitors making cairns (mounds of rock) out of rocks from archaeological sites. Despite these continued threats, in 2018 National Park Service officials stated that data on NAGPRA crimes had not been collated since 2011, despite agencies individually collecting this data. In addition, there is no federal requirement that agencies track NAGPRA violations and create a central repository for nationwide data. How is the National Park Service responding to the GAO report on data collection and best practices to improve coordination across agencies and NAGPRA enforcement? What is the status of that response?

Answer. The National Park Service will report best practices related to data collection to help improve protection of Native American archeological resources. This voluntary data collection (the Secretary of the Interior has no legal authority to require data from other federal agencies) will focus on gathering information about Archeological Resources Protection Act (ARPA) violations and will be compiled by the Department Consulting Archeologist (DCA), who also serves as the Bureau Archeologist for the National Park Service. This data collection effort aimed at improving protection of Native American archeological resources will be compiled and distributed by the DCA at the end of FY 2022.

Question 8. The Bureau of Land Management, which manages the lands on which the La Cieneguilla Petroglyphs are located, received a request for Pueblos to be more involved in land management and called for the Bureau to initiate Tribal consultations in light of the damage that occurred to these petroglyphs. There is a lot of variation across federal agencies interpret NAGPRA and engage in coordination and consultation with Tribes and Pueblos. Has the National Park Service engaged in similar collaboration and consultation with Tribes around its land management practices to ensure greater compliance with NAGPRA and data collection? In addition, how has Tribal co-management of federal lands through agency management plans improved NAGPRA enforcement and the management of those lands?

Answer. The National Park Service has the authority to enter into collaborative management agreements with Indian Tribes. These types of agreements are encouraged through Secretary's Order 3342: Identifying Opportunities for Cooperative and Collaborative Partnerships with Federally Recognized Indian Tribes in the Management of Federal Lands and Resources. This Order defines "co-management," as "a situation where there is a specific legal basis that requires the delegation of some aspect of Federal decisionmaking or that makes co-management otherwise legally necessary." Co-management provides opportunities for greater Tribal involvement in land-management decisionmaking. National Park Service managers consult with Indian Tribes and Native Hawaiian organizations to develop comprehensive agreements that address land management activities that could result in excavation or discovery of Native American human remains and cultural items on National Park Service lands. These agreements, which are managed at the local level, establish a process for effectively carrying out the requirements of NAGPRA.

Question 9. As of April 2021, GAO reported that the National Park Service and the Bureau of Indian Affairs had not implemented this recommendation. What steps has National Park Service taken thus far to implement GAO's recommendation and what is the status of those efforts? Once implemented, how will this recommendation enable the National Park Service to better prevent and respond to instances of cultural resource theft and damage on federal lands? GAO recommended in its 2021 report that the Department of the Interior should direct the National Park Service to identify and obtain information to target efforts to protect Native American cultural resources and identify risks.

Answer. The National Park Service is compiling, per the GAO report, "promising practices" to better protect Native American archeological sites. The Bureau Archeologist is working with Law Enforcement to improve data collection to track ARPA and NAGPRA violations. The National Park Service is developing training for law enforcement officers on ARPA that will be promoted across the Department of Inte-

rior. This training provides Law Enforcement officers tools to identify, document, and create prosecutable cases of archeological resource violations.

