

MATERIAL CONFLICTS BETWEEN NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (“NAGPRA” OR “ACT”) AND PROPOSED REGULATIONS ON CULTURALLY UNIDENTIFIABLE HUMAN REMAINS (“PROPOSED REGULATIONS”)

PUBLIC LAW 101-601, 25 U.S.C. 3001 et seq.

To provide for the protection of Native American graves, and for other purposes.

SECTION 1. SHORT TITLE. This Act may be cited as the "Native American Graves Protection and Repatriation Act".

SEC. 2. DEFINITIONS. For purposes of this Act, the term-

(1) "burial site" ...

(2) "cultural affiliation"

Section 10.2 (e)(2) of the Proposed Regulations adds the new definition “culturally unidentifiable” which includes, “human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendent or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.”

Culturally Unidentifiable Human Remains Must Be Native American. *The Proposed Regulations do not specify that “culturally unidentifiable” human remains also must meet the statutory definition of “Native American”. Museums contain culturally unidentifiable human remains that are not Native American, and the Proposed Regulations exceed the scope of the statute by not limiting the definition of culturally unidentifiable to Native American human remains.*

Culturally Unidentifiable Funerary Objects Are Outside Statute’s Reach. *There is no statutory basis for including associated funerary objects with culturally unidentifiable human remains. Whereas nearly everywhere else in the Act the words “human remains” and “associated funerary objects” are paired, in section 8(c)(5), where the only reference to “culturally unidentifiable” is made, “human remains” stands alone.*

In section 8(c)(5) the Review Committee is charged with: 1) compiling an inventory of culturally unidentifiable human remains, and 2) recommending specific actions for developing a process for disposition of those remains, nothing more. The Act does not authorize or mandate any action with respect to culturally unidentifiable funerary objects. The legislative history for the Act refers only to culturally unidentifiable human remains. The Secretary has no authority to go beyond the clear wording of the Act and Congressional intent.

See also Proposed Section 10.9(e)(6): “...the museum or Federal agency must provide the Manager, National NAGPRA Program...a copy of the list of such culturally unidentifiable remains and any associated funerary objects...”

See also Proposed Section 10.11(c)(5): “A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary of the Interior recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude them.” This “recommendation” inappropriately pressures museums and agencies to divest themselves of objects in their collection that do not have any demonstrated cultural affiliation with NAGPRA claimants. And the requirement to inventory and consult on such objects would impose a tremendous financial burden on museums – literally on the

order of many millions of dollars.

Recommendation: Any definition of "culturally unidentifiable" should include that the remains must be Native American, and all references to culturally unidentifiable associated funerary objects should be removed from the Proposed Regulations.

- (3) "cultural items"
- (4) "Federal agency"
- (5) "Federal lands"
- (6) "Hui Malama I Na Kupuna O Hawai'i Nei"
- (7) "Indian tribe"
- (8) "museum"
- (9) "Native American"
- (10) "Native Hawaiian"
- (11) "Native Hawaiian organization"
- (12) "Office of Hawaiian Affairs"
- (13) "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. 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 the phrase so defined would, as applied in section 7(c), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. 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.

Under Section 10.11 (c)(1) of the Proposed Regulations, a museum or Federal agency must offer to transfer control of culturally unidentifiable human remains to Indian tribes and Native Hawaiian organizations where it is unable to prove that it has right of possession as defined under the existing regulations at §10.10 (a)(2). Section §10.10 (a)(2)) defines right of possession as, "possession obtained with the voluntary consent of an individual or group that had authority of alienation." The Act requires the 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 for right of possession to apply for human remains. This is not possible for culturally unidentifiable human remains. Culturally unidentifiable human remains are so because their individual identity is unknown and they cannot be affiliated with any Indian tribe or Native Hawaiian organization ... so by definition there is no one to provide the required consent.

The Proposed Regulations' Section-by-Section Analysis states that a museum or Federal agency can obtain right of possession to Native American human remains by several means (72 F.R. 58585). This statement is patently misleading, for while it may be true for culturally affiliated human remains, it cannot be so for culturally unidentifiable human remains.

The drafters of the Proposed Regulations further state there are no significant takings implications as the Proposed Regulations will require the disposition of only those Native American human remains for which the controlling museum or Federal agency cannot prove right of possession (72 F.R. 58586). On the face of it, this would seem to suggest that a museum might be able to retain some culturally

unidentifiable human remains. However, read carefully, this provision is a catch-22: as museums cannot prove right of possession to culturally unidentifiable human remains.

The Act purposely addressed takings concerns by providing an exception for unassociated funerary objects, sacred objects, or objects of cultural patrimony – the definition of “right of possession” was expanded to provide that if it would result in a Fifth Amendment taking, “right of possession” would be as provided under otherwise applicable property law. The Act provides no such exception for human remains and associated funerary objects. Conversely, under the Proposed Regulations, the only exception to the obligation to offer to transfer control of culturally unidentifiable human remains is when the museum or Federal Agency can prove it has the right of possession, but as noted above, it is almost impossible to have right of possession to culturally unidentifiable human remains.

Recommendation: The requirement to offer to transfer control of culturally unidentifiable human remains - where a right of possession is not possible - clearly is a takings. Just as the Proposed Regulations make the disposition of culturally unidentifiable associated funerary objects and disposition to non-federally recognized tribes voluntary, so should it make the disposition of culturally unidentifiable human remains voluntary to avoid takings concerns.

(14) "Secretary"

(15) "tribal land"

SEC 3. OWNERSHIP.

SEC. 4. ILLEGAL TRAFFICKING.

SEC. 5. INVENTORY FOR HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS.

(a) IN GENERAL.--Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

(b) REQUIREMENTS.--(1) The inventories and identifications required under subsection (a) shall be—

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

Cultural Relationship vs. Cultural Affiliation. *Under Proposed Section 10. 11 (b)(2), museums and Federal agency officials would be required to identify and initiate consultation with potential claimants from an ever-expanding list that far exceeds the legislated scope of NAGPRA and the Review Committee's 2000 Recommendations (65 F.R. 36462-36464). The Proposed Regulations add a new a priority structure for determining potential claimants based on: (i) tribal lands, (ii) aboriginal occupation, (iii) cultural relationship to a region, or (iv) cultural relationship based on proximity to the museum.*

“Cultural relationship” has no accepted scientific or legal meaning, and is so vague as to plausibly include any claim of relationship. On the other hand, “cultural affiliation” which is a pivotal definition in the Act, reasonably defines the universe of parties who may assert valid claims to NAGPRA items. Unlike “cultural affiliation,” a “cultural relationship” could apparently be asserted with respect to human

remains with absolutely no demonstrable cultural or biological connection. Thus, the Proposed Regulations facilitate a result expressly unintended by Congress – the final disposition of human remains and associated funerary objects to culturally unaffiliated Indian tribes and Native American groups.

“Region” is particularly problematic because its boundaries can be expanded almost indefinitely – it may be defined as “an area or division, especially part of a country or the world having definable characteristics but not always fixed boundaries” – yet the Proposed Regulations provide no definable characteristics from which to draw such boundaries.

Recommendation: These provisions clearly are beyond the scope of the Act and must be withdrawn.

(B)

(C)

(2)

(c).

(d) NOTIFICATION--(1) **If the cultural affiliation** of any particular Native American human remains or associated funerary objects **is determined** pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

The Proposed Regulations overreach the Act's inventory notice requirement that is tied to a finding of cultural affiliation and add the obligation to describe culturally unidentifiable human remains and associated funerary objects that cannot be culturally affiliated.

Proposed Section 10.9 (e)(2)(v) adds the new requirement that the “notice of inventory completion must describe those human remains, with or without associated funerary objects, that are culturally unidentifiable but that may be transferred under §10.11.”

Under the Act's Section 5 inventory provisions for human remains and associated funerary objects, the requirement to provide notice to affected Indian tribes and Native Hawaiian organizations is specifically premised on a finding of cultural affiliation. Remains are culturally unidentifiable because a determination of cultural affiliation cannot be made.

Museums have already consulted with and provided notice to Indian tribes and Native Hawaiian organizations during NAGPRA's initial 5-year inventory process. The Proposed Regulations would require museums to initiate a new round of consultations for culturally unidentifiable human remains in their collections, this time with a potentially limitless list of possible claimants.

The purpose of providing notice is to allow potential claimants to determine their interest in the cultural items. This notice is already being provided to Indian tribes and Native Hawaiian organizations. The existing regulations to NAGPRA require museums and Federal agencies to compile a listing of all culturally unidentifiable human remains and associated funerary objects and to provide the list to National NAGPRA (43 C.F.R. 10.9 (d)(2) and (e)(6)), and the Proposed Regulations continue this requirement at §10.9(e)(6). This listing has been published on the Review Committee's Federally-maintained, publicly accessible website for several years. This searchable database includes information on 118, 348 human remains and 846,187 associated funerary objects from 614 museums or Federal agencies (72 F.R. 58584) and provides sufficient notice to all Indian tribes and Native Hawaiian organizations to determine their interest in submitting a claim for culturally unidentifiable human remains.

Recommendation: This new inventory and notice requirement should be deleted as it is overreaching and unworkable. The database established under the existing regulations is sufficient to notify potential claimants, as tribes have made and continue to make claims based on this database.

(2) ...

(3) ...

SEC. 6. SUMMARY FOR UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY. ...

SEC. 7. REPATRIATION.

(a) REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS POSSESSED OR CONTROLLED BY FEDERAL AGENCIES AND MUSEUMS.--

(1) **If**, pursuant to section 5, the **cultural affiliation** of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is **established**, then the Federal agency or museum, **upon the request** of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

Request Must be Required. *The fundamental tenet of NAGPRA is that the requirement to repatriate is premised on a 1) finding of cultural affiliation between the cultural item and a present-day Indian tribe or Native Hawaiian organization and 2) that an affirmative request is made for the return.*

NAGPRA requires a transfer of ownership of cultural items from a museum's collection when a lineal descendant, Native American or Native Hawaiian organization with standing (1) demonstrates a right to the object under the Act, (2) that entity requests repatriation, and (3) the museum can not then demonstrate a "right of possession." If right of possession is demonstrated, ownership remains with the museum.

Both the existence of the right of possession element, and the fact that the Act clearly places the initial burden of proof on tribes, are critical aspects of how the Act balances the interests of Native Americans with the tenets of Constitutional law, property law, etc. with the interests of the public in retaining irreplaceable research material.

However, the Proposed Regulations take a contrary approach. Under Proposed Section 10.11 (c) if a museum or Federal agency is unable to prove that it has right of possession to culturally unidentifiable human remains, it must offer to transfer control of the human remains - absent any request or claim from an Indian tribe or Native Hawaiian organization. This requirement is inconsistent with, and greatly exceeds the scope of, the Act. The requirement to act absent any request directly contradicts State-imposed fiduciary obligations on museum trustees to preserve and protect museum collections for all Americans.

In the Proposed Regulations a museum must prove, in the first instance, its ownership rights in each culturally unidentifiable set of human remains already in its collection. If the museum cannot carry that burden, the regulations would require it to transfer custody, even if a claimant has not demonstrated a statutory right to repatriation. This violates traditional notions of property law as well as reversing the presumptions set forth in the statute.

The real irony is that the required return of culturally unidentifiable human remains under these Proposed Regulations would preclude any later finding of cultural affiliation when scientific advances and continued consultation enable such determinations to be made. The Proposed Regulations would pressure museums to offer to transfer control or be subject to civil penalties, when instead time should be allowed to conduct the necessary consultation and research that would allow the remains to be returned to the proper descendants.

Recommendation: Any required disposition of culturally unidentifiable human remains should only be precipitated upon a valid request.

(2) ...

(3) ...

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5, or the summary pursuant to section 6, 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, or other relevant information or expert opinion.

(5) ...

(b) **SCIENTIFIC STUDY.**--If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

(c) **STANDARD OF REPATRIATION.**--If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) **SHARING OF INFORMATION BY FEDERAL AGENCIES AND MUSEUMS.**--

(e) **COMPETING CLAIMS.**--Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

Under NAGPRA, the requirement to repatriate is limited by exceptions made for scientific study and competing claims (25 U.S.C. 3005 §7). No such exceptions are made for culturally unidentifiable human

remains. In contrast, the Proposed Regulations require the museum to use a "first come, first served" approach to rid itself of remains at the earliest possible time. The Proposed Regulations would deny the museum its statutorily-granted discretion to retain the items while appropriate claimants are determined.

Recommendation: Any obligation to provide for the disposition of culturally unidentifiable human remains should include the exceptions for scientific study or competing claims as provided in the Act.

(f) MUSEUM OBLIGATION.--Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

SEC. 8. REVIEW COMMITTEE.

(a) ESTABLISHMENT

(b) MEMBERSHIP

(c) RESPONSIBILITIES.--...

(1) ...

(2) ...

(3) ...

(4) ...

(5) 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;

Statute Does Not Limit Disposition To Transfer of Control. Proposed Section 10.2 (g)(5) provides a definition of "disposition" that is limited to the "transfer of control over Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony by a museum or Federal agency." The Act uses but does not define the term "disposition." Disposition, in its common, ordinary and broad meaning, refers to a final settlement or determination. It can, but need not, include the transfer of control of an object. Indeed, the Act uses the term "repatriation" when speaking specifically to the transfer of custody of items from a museum or agency to a claimant.

Proposed Section 10.2(g)(5) creates a definition that dramatically changes the balance of the law by equating disposition with repatriation and requiring a transfer of control.

Congress clearly intended any final determination regarding culturally unidentifiable human remains to include more than only "transfer of control." As NAGPRA expressly provides, "Nothing in this Act shall be construed to -- limit the authority of any Federal agency or museum to -- enter into any other agreement ... as to the disposition of, or control over, items covered by this Act" (25 U.S.C. 3009 (1)(B)(emphasis added)). Congress clearly intended "disposition" to include a broad range of options, as stated in the House Report: "This Act allows for the repatriation of culturally affiliated items as well as any other agreement for disposition or caretaking which may be mutually agreed upon by involved parties" (House Report 101-877, at 9), and the Senate Report: "The Committee recognizes that Indian tribes and museums may agree to a mutually acceptable alternative to repatriation. The Committee intends that this process will facilitate the negotiation of agreements as to appropriate disposition of objects and remains in museum collections." (Senate Report 101-473, at 8). Congress intended for tribes and museums to work together to mutually determine the appropriate disposition of items covered under the Act, yet the Proposed Regulations inappropriately would preempt any possibility for the parties to negotiate such agreements.

A transfer of control is not the only means of accomplishing a disposition of human remains. The statute does not limit the meaning, and the regulations should not do so. Disposition can include repatriation, institutional curation (with or without transfer of control), reinterment, and other potential options.

Recommendation: Any definition of "disposition" should follow the broader meaning Congress intended - a final determination that includes as possibilities repatriation, control, continued interment, or other caretaking agreements.

- (6) ...
- (7) ...
- (8) ...
- (9) ...
- (d)

(e) RECOMMENDATIONS AND REPORT.--The committee shall make the recommendations under paragraph (c)(5) in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

Disregards and Exceeds Review Committee's Recommendations. *While the Proposed Regulations purport to be based on the Review Committee's Recommendations, they do not follow them, and clearly exceed them. For example, the Review Committee's 2000 Recommendations suggest a process whereby "Indian tribes and Native Hawaiian organizations define regions within which the most appropriate solutions for disposition of culturally unidentifiable human remains may be determined." The appropriate parties would "consult together and propose a framework and schedule to develop and implement the most appropriate model for their region" (65 F.R. 36463)(emphasis added). The Review Committee's Recommendations proposed two models for consultation on culturally unidentifiable human remains: one would include the joint recommendations of Federal agencies, museums and claimants, and the second would consider the joint recommendations of regional consortia. The Proposed Regulations turn the Recommendations on its head and instead impose a unilateral burden on museums to define the regions, identify all potential claimants, initiate and manage the consultation/disposition process, all while subject to civil penalties for noncompliance.*

Members of the Review Committee stated that the Proposed Regulations do not conform to and radically depart from the Review Committee's 2000 Recommendations, and formally requested that the Proposed Regulations follow closely their Recommendations (see NAGPRA Review Committee Meeting Minutes, January 8, 2008, attached and available at <http://www.nps.gov/history/nagpra/REVIEW/meetings/RCCMIN036.pdf>

Recommendation: The full weight for dealing with culturally unidentifiable human remains should not fall on museums. A more equitable approach was offered in the Review Committee's Recommendations.

- (f) ACCESS
- (g) DUTIES OF SECRETARY.
- (h) ANNUAL REPORT.
- (i) TERMINATION.

SEC. 9. PENALTY.

(a) PENALTY.--Any museum that fails to comply with the requirements of this Act may be assessed a

civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

Civil Penalties Too Broad and Vague. Section 10.12 (b)(1)(ix) of the Proposed Regulations provides for civil penalties where a museum does not offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession under § 10.11, but as stated above, the very definition and status of culturally unidentifiable human remains precludes museums from proving right of possession to culturally unidentifiable human remains.

Most significantly, civil penalties could be imposed absent any request from an Indian tribe or Native Hawaiian organization for the return of culturally unidentifiable human remains. The affirmative obligation is on museums and Federal agencies to offer to transfer control – no request need be made. While the current regulations provide civil penalties if a museum refuses to repatriate human remains (43 C.F.R §10.12 (b)(v)), this requirement to repatriate is triggered ONLY upon a request being made for the return.

This leaves museums under a continuous risk of penalties if they fail to track down and engage in communication with all groups, recognized and non-recognized, to whom the regulation directs it to offer remains. This represents a startling change from both the statute and other existing law. Under the Proposed Regulations, a museum is presumed not to have a right of possession in its own collections unless it can prove otherwise, and it would be subject to civil penalties for failing to effectively shop around its collections to see if other groups would be willing to take them, even if no group has made a request. The Act, in contrast, requires a claimant to demonstrate its right to cultural items; only by carrying that burden of proof does a claimant have the power under NAGPRA to divest a museum of its otherwise presumed right to items in its collections. The Proposed Regulations are a clear attempt to reverse the Act's presumptions.

Further, as has been discussed above, the Proposed Regulations place the affirmative obligation on museums and Federal agencies to proactively initiate consultation and to offer to transfer control of culturally unidentifiable human remains, but no time frames are provided for compliance; yet museums are subject to civil penalties if they do not comply. Museums had five years to complete the initial NAGPRA inventory process, and the new implementing regulations allow two years to inventory new collections. Yet no applicable time frame for culturally unidentifiable human remains is provided.

Recommendation: The scope of civil penalties should be reduced and brought in line with those provided for under the Act.

(b) AMOUNT OF PENALTY.

(c) ACTIONS TO RECOVER PENLTIES.

(d) SUBPOENAS.

SEC. 10. GRANTS.

SEC. 11. SAVINGS PROVISIONS. Nothing in this Act shall be construed to--

(1) limit the authority of any Federal agency or museum to--

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;

Interferes With Disposition Rights Outside NAGPRA. Section 10.11 (c)(3) of the Proposed Regulations allows a museum or Federal agency to transfer control of culturally unidentifiable human remains to a non-Federally recognized Indian group (only upon recommendation of the Secretary or authorized representative), and if no Indian tribe or Native Hawaiian organization on the Proposed Regulation's priority list agrees to accept control – when in fact, a non-Federally recognized Indian group might have the strongest claim to the human remains.

Many human remains are classified as culturally unidentifiable because they are affiliated with non-Federally recognized Indian groups, which are outside the scope of NAGPRA. Under the Proposed Regulations, the claim of an Indian tribe or Native Hawaiian group with any sort of "cultural relationship to the region from which the human remains and associated funerary objects were removed" would surpass the claim of a non-Federally recognized Indian group with a direct affiliation to the remains. This would certainly remove culturally unidentifiable human remains from museum and Federal agency collections, but it could return them to Indian tribes or Native Hawaiian groups with no cultural affiliation to them, rather than to Native American groups with a direct affiliation. As the court noted in *Bonnichsen v. United States*, Congress's purpose is served by requiring the return to modern day American Indians of human remains that bear some significant relationship to them." (367 F.3d 864 (9th Cir. 2004)). Further, the requirement to obtain the consent of all possibly related Indian tribes and Native Hawaiian, as well as the recommendation of the Secretary clearly are beyond the scope of the Act and pose an administrative nightmare for museums and Federal agencies.

Recommendation: Voluntary guidelines should be developed for museums that undertake returns of culturally unidentifiable human remains to non-Federally recognized groups, but such guidelines should allow claims to be awarded equitably, based on the closest determination of cultural affiliation. If a museum is legally authorized to make deaccession decisions, such decisions should not require the prior recommendation of the Secretary, particularly when the Secretary has no authority over non-Federally recognized Indian groups.

- (2) delay actions on repatriation requests that are pending on the date of enactment of this Act;
- (3) deny or otherwise affect access to any court;
- (4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or
- (5) limit the application of any State or Federal law pertaining to theft or stolen property.

SEC. 12. SPECIAL RELATIONSHIP BETWEEN FEDERAL GOVERNMENT AND INDIAN TRIBES.

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

Exceeds Statute's Limited Applicability to Federally Recognized Groups. Section 10.11 (b)(3)(ii) of the Proposed Regulations requires museums and Federal agency officials to provide to all Indian tribes and Native Hawaiian organizations consulted a list of any non-Federally recognized Indian groups that are known to have a relationship of shared group identity with the culturally unidentifiable human remains and associated funerary objects. The Proposed Regulations have no basis for requiring museums or Federal agencies to provide Indian tribes or Native Hawaiian organizations lists of non-Federally recognized Indian groups. NAGPRA is specifically limited to Indian tribes and Native Hawaiian organizations (as defined in the Act) and it does not to establish a precedent with respect to any other individual, organization or foreign government.

Further, the Proposed Regulations provide museums no guidance to determine what is a legitimate non-Federally recognized Indian group, nor what makes such a group "known." Museums should not be placed in the position of having to make these determinations themselves. They do not have the expertise to judge the legitimacy of every group that claims to be a tribe or Indian group. Museum trustees would potentially be liable for breach of fiduciary duty if they guessed wrong according to a later court proceeding.

Recommendation: Unless Congress specifically provides otherwise, any inclusion of non-Federally recognized Indian groups into the repatriation process must be purely voluntary.

SEC. 13. REGULATIONS. The Secretary shall promulgate regulations to carry out this Act within 12 months of enactment.

Statute Does Not Authorize Regulations On This Matter. *According to the Proposed Regulations' "Section-by-Section Analysis, section 10.11 (a) fulfills the Secretary's responsibility to promulgate regulations under sections 8(c)(5) and 13 of the Act regarding the process for the disposition of culturally unidentifiable human remains. Yet, while NAGPRA's section 13 does mandate the Secretary to promulgate regulations to carry out the Act, this mandate does not extend to the statute's charge to the Review Committee to make recommendations on a process for the disposition of culturally unidentifiable human remains.*

The Secretary of Interior's authority to promulgate regulations to implement NAGPRA does not extend to culturally unidentifiable human remains. That authority rests with Congress alone unless Congress clearly delegates the authority. The only language in NAGPRA that addresses the disposition of culturally unidentifiable human remains is the charge to the Review Committee to: (i) compile an inventory of culturally unidentifiable human remains in the possession and control of museums and Federal agencies; and to (ii) recommend specific actions for developing a process for disposition of such remains (25 U.S.C. 3006(c)(5)). These clearly are instructions for the Review Committee to make recommendations to Congress for possible future legislative action. The House Report on NAGPRA indicated as much, stating, "The Committee looks forward to the Review Committees [sic] recommendations in this area" (H.R. Rep. No. 101-877, at 16). The Review Committee provided its final recommendations to Congress in 2000, but Congress has not chosen to act upon them. (See the February 7, 2002 letter from legal counsel for the Society for American Archaeology to the National NAGPRA Program and the United States Department of the Interior regarding the Secretary's lack of authority to promulgate regulations on culturally unidentifiable human remains, attached and available at: <http://www.saa.org/repatriation/StearnsLetter.pdf>).

Recommendation: The Secretary has wrongly conflated i) Congress's charge to the Review Committee to recommend actions for a process regarding culturally unidentifiable human remains, with ii) its charge to the Secretary to promulgate regulations to carry out the Act, into, iii) authority to promulgate regulations on culturally unidentifiable human remains. Yet this authority clearly does not exist, and these Proposed Regulations should be withdrawn.

SEC. 14. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated such sums as may be necessary to carry out this Act.

Economic Impact Requires OMB Review. *While the Proposed Regulations claim the economic impact on museums will be minimal, in fact, it could be huge. Interior has estimated that the necessary exchange*

of information between a museum and an Indian tribe will average 20 hours, and that another 6 hours of labor will be required for notification to the Secretary, publication, etc. However, we believe that the Secretary's estimates are insufficient, unsupported, and further, they do not include any allowance for multiple claimants, disputes, hearings before the Review Committee, etc.

Further, we note that the Secretary's estimates speak only to the notification process – and do not speak to the time intensive and difficult process of analyzing the complex and often incomplete records relating to provenance, tribal migrations, etc., that will be necessary to comply with the consultation mandates set forth in the Proposed Regulations. In fact, the Proposed Regulations seem to assume that that research is absolutely necessary – and specifically require it – but then seem to deny that the work will have any cost basis for the museums and Federal agencies that have the obligation to satisfy the requirement.

We also note the overall financial impact of compliance with these Proposed Regulations. Using the numbers of culturally unidentifiable human remains (118,348) and potentially associated funerary objects (846,187) as specified in the Proposed Regulations (for a total of 964,535 items), and assuming an average time commitment of 50 hours for each item covered, overall compliance with the Proposed Regulations by all museums and Federal agencies will require approximately 48 million hours of work. If the total hours required were only the 26 hypothesized by the Proposed Regulations, then the time commitment would be only about half of that number, or roughly 25 million hours of work.

Considered another way: The Proposed Regulations clearly assert that the financial impact of the Proposed Regulations will be less than \$100 million. For that to be true, even if the true labor requirement is only 26 hours per item, then museums will have to perform the required work by paying staff approximately \$3.99 per hour – and that is before any other costs are considered. If, instead, the current federal minimum wage were to be paid (\$5.85), the true compliance costs would be (at 26 hours per item) more than \$146 million, or (at 50 hours per item) more than \$282 million – again, not taking into account any additional costs.

Recommendation: The Proposed Regulations will have an impact of more than \$100 million or more on the economy and qualify as a significant rule and should be reviewed by the Office of Management and Budget under Executive Order 12866.

SEC. 15. ENFORCEMENT. ...

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