



NATURAL SCIENCE COLLECTIONS ALLIANCE

1444 I STREET NW SUITE 200 WASHINGTON, DC 20005 TEL: 202 628 1500 EXT:250 NSCALLIANCE.ORG

June 29, 2011

Mr. David Tarler
Native American Graves Protection and Repatriation Act – National Program Office
National Park Service
1201 Eye Street, NW, 8th Floor
Washington, DC, 20005

Via e-mail: david_tarler@nps.gov

Re: Comments on Discretionary Review of Current NAGPRA Regulations

Dear Mr. Tarler:

The Natural Science Collections Alliance (NSC Alliance) provides the following comments in response to the request for public input on the Discretionary Review of Current NAGPRA Regulations published on the NAGPRA website.

The NSC Alliance is a nonprofit membership association that supports natural science collections, their human resources, the institutions that house them, and their research activities for the benefit of science and society. NSC Alliance members are part of an international community of museums, botanical gardens, herbariums, universities and other institutions that house natural science collections and utilize them in research, exhibitions, academic and informal science education, and outreach activities.

The NAGPRA program has requested input on the following two questions: (1) Based on 15 years of use, do the rules currently codified at 43 C.F.R. Part 10 need any amendments, such as (but not limited to) corrections, clarifications, or refinements?; and (2) If the answer is yes, then how should the rules be amended?

The answer to question one is: Yes.

On May 12, 2010, the NSC Alliance provided written comments in response to the NAGPRA program's proposed Final Rule 1024-AD68, a policy governing the disposition of Culturally Unidentifiable Human Remains. A copy of the NSC Alliance comments is included below. In short, in our comments, the NSC Alliance urged the NAGPRA program to rescind this rule, arguing that it is "manifestly contrary to the requirements of

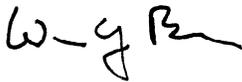
the Native American Graves Protection and Repatriation Act...and patently illegal under any reasonable standard of agency judicial review.”

The NSC Alliance reaffirms the comments in its May 12, 2010, letter and we urge the NAGPRA program to rescind the rule addressed. The current discretionary review offers an outstanding opportunity to take this action. We note that this illegal rule is prejudicial not just to museums but to tribes and Native organizations that may have future, as yet undetermined, legitimate claims or who may wish for the status of remains to be unchanged.

Various NSC Alliance member institutions are likely to submit comments in response to this request. We encourage you to carefully consider these recommendations. Moreover, NSC Alliance would be happy to work with the program office to facilitate increased communication between natural science collections and natural history museums and the NAGPRA program.

Thank you for the opportunity to provide these comments for the record. If NSC Alliance may provide further information or assistance during this or other processes, please contact NSC Alliance Director of Public Policy Robert Gropp at rgropp@aibs.org or me at wycbrown@gmail.com.

Sincerely,

A handwritten signature in black ink, appearing to read 'W-Y Brown', with a stylized flourish at the end.

William Y. Brown
President



NATURAL SCIENCE COLLECTIONS ALLIANCE

1444 I STREET NW SUITE 200 WASHINGTON, DC 20005 TEL: 202 628 1500 EXT:250 NSCALLIANCE.ORG

May 12, 2010

Ms. Sherry Hutt
Manager, National NAGPRA Program
National Park Service
1201 Eye Street, NW., 8th Floor
Washington, DC 20005

In Re: Final Rule 1024-AD68: Native American Graves Protection and Repatriation Act Regulations-- Disposition of Culturally Unidentifiable Human Remains; Final Rule

Dear Ms. Hutt:

The Natural Science Collections Alliance (NSCA) respectfully submits this comment on Final Rule 1024-AD68 (“Rule”). The NSCA membership includes the leading natural history institutions in America that hold hundreds of millions of specimens and artifacts, including animal and plant specimens constituting much of the collected biodiversity heritage of the world. More information on the NSCA is at <http://nscalliance.org/>.

The Rule should be rescinded. It is arbitrary and capricious, manifestly contrary to the requirements of the Native American Graves Protection and Repatriation Act (“NAGPRA” or the “Act”), and patently illegal under any reasonable standard of agency or judicial review.

Section 10.11(c)(1) of the Rule states that: “A museum or Federal agency that is unable to prove that it has right of possession, as defined at Sec. 10.10(a)(2), to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations . . .” NAGPRA allows no such requirement.

Section 7 of the Act includes detailed provisions addressing determination of cultural affiliation and the transfer of human remains to lineal descendents or to Indian tribes and Native Hawaiian organizations (“NHO”) when cultural identity and affiliation has been established. The Act includes standards that a claimant tribe or organization may endeavor to meet in demonstrating cultural affiliation with remains if the initial inventory

by the museum or Federal agency has not determined affiliation. In particular, section 7(a)(4) of the Act states that a tribe or NHO “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.”

There is no provision in NAGPRA requiring transfer of human remains to tribes or NHOs for which cultural identity and affiliation has not been demonstrated. For authority, the Rule points to NAGPRA’s requirement that museums and Federal agencies inventory and list all human remains in their collections. Yet this requirement is clearly intended to ensure that Indian tribes, NHOs, and others may review information concerning the remains and supplement or contest the conclusions of the museum or Federal agency. It in no way implies an unspecified power to take the items from an institution. To invent such a requirement, as done in the Rule, casts aside the specific process codified in NAGPRA. The Rule also oddly references a NAGPRA bill that would have required the NAGPRA Review Committee to report on unaffiliated cultural items to the Congress and the Secretary of the Interior, and then notes that NAGPRA as enacted provides no reporting by the Review Committee to Congress. The Rule states that this legislative history is somehow supposed to imply that the Secretary of Interior has authority under NAGPRA to require transfer of unidentified cultural remains. In fact, to the extent that the legislative history is relevant, the change no doubt reflects the usual position of any Administration, enforced by the Office of Management and Budget, to avoid creation of advisory committees that report to Congress independently of the Executive Branch.

More broadly, we note that the Rule’s requirement disrespects Native Americans by implicitly treating them as a single kind of person, when they are many, with rich and different cultures, histories and identities. The requirement, if implemented, will force transfer of remains to tribes and NHOs that have no cultural affiliation with them and, once transferred, will foreclose the opportunity for future identification and transfer to lineal descendants of tribes or NHOs for which cultural affiliation may be determined. Furthermore, the Rule’s requirement dissolves the line that NAGPRA has established in balancing the interests of science and public education and the interests of tribes when they differ.

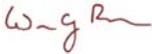
The Rule also puts foursquare a fundamental vulnerability of NAGPRA in respect to its consistency with the Takings Clause of the Fifth Amendment to the United States Constitution. NAGPRA’s provisions and legislative history on this issue are complex and ambiguous, beginning with the definition of “right of possession” in section 2(13) of the Act. The Bishop Museum addressed this issue and concluded that it had right of possession of cultural items which it owned under state law – in its case Hawaii. The Bishop Museum addressed this issue in Interim and Proposed Final Guidance for NAGPRA that it issued on June 30, 2004 (Attachment 1) and published on its Web page for comment. Bishop Museum issued Final Guidance for NAGPRA on October 7, 2004, and endorsed the treatment it had proposed for right of possession (Attachment 2).

The NSCA agrees with the Bishop Museum analysis in Attachments 1 and 2 and

endorses the conclusion of that analysis that the “right of possession” turns on whether or not a museum owns the item under state law. We commend the analysis to the Interior Department and request that this conclusion be endorsed by the Department.

The Bishop Museum guidance did not address right of possession for human remains. NAGPRA does not prescribe right of possession as a basis for not transferring human remains from a museum or Federal agencies, and transfer of human remains were not the subject of dispute for the Bishop Museum when these guidance were issued. Nevertheless, the Takings Clause of the United States Constitution cannot properly be applied to cover property that is a cultural item and not cover property that is a human remain. That said, by issuing the Rule, the Interior Department has changed the wisdom and equity of giving priority to transfer of human remains. If they are to be given to lineal descendants or culturally affiliated tribes or NHOs, few would disagree. However, if they are to be given to a tribe or NHO that is not culturally affiliated with them – when the transfer may foreclose future transfer to a subsequently identified descendant or culturally affiliated claimant – then many, including the NSCA and its members, may not see wisdom or equity, and see instead that a Taking has occurred. By extending the reach of NAGPRA beyond what the Congress has authorized, the Interior Department is inviting a judicial challenge that may well rend an important statute unnecessarily.

Sincerely yours,



William Y. Brown, Ph.D.
President, NSC Alliance

Attachment 1: Bishop Museum Interim and Proposed NAGPRA Guidance
Attachment 2: Bishop Museum Final NAGPRA Guidance

Attachment 1

Bishop Museum
Interim and Proposed Final Guidance
Native American Graves Protection and Repatriation Act
June 30, 2004

“I remember when I started working at Bishop Museum and the old Hawaiians came and brought their grandchildren. They saw the wooden images, feather capes, kapa, and much more. They wept with joy to see that some things remained from the old days, and they thanked the ali‘i for having kept them. They had great aloha for Pauahi’s legacy.”

Patience Namaka Bacon, Bishop Museum staff since 1939.

Bishop Museum opened to the public on June 22, 1891. The Museum had been founded in the name of the ali‘i High Chiefess Pauahi Bishop and included her collections and those of Princess Ruth Ke‘eliko-lani and Queen Emma. Lili‘uokalani was Queen when the Museum opened and was its first official visitor. A reporter attending the event wrote: “Many aged Hawaiians recognized among the large collection idols which their ancestors revered with fear and awe. The god of Kamehameha I, and a god of rain attracted a large share of their attention.” [1]

More than a century later, Bishop Museum remains steward of these treasures. Ku-ka-‘ilimoku, Kamehameha’s war god, still looks fiercely on those who stand before it, and some tremble. This past year, when the Pleiades rose and Makahiki began, the wooden image of Lono was dressed as in days gone by and turned in the Museum vestibule as the trade winds filled its kapa sails. This wooden image is the last of its kind: none other remains from the days when the ancestors lived the old ways. Bishop Museum keeps the old for those who live now and who will live later.

The guidance below addresses responsibilities of Bishop Museum under a Federal law concerning responsibilities for Native Hawaiian cultural items. The guidance is a legal analysis. Bishop Museum will honor the law and has prepared this guidance with that objective. However, long before this law, Bishop Museum was conceived and made real by the ali‘i and other people of the Hawaiian Kingdom. We remember and honor the vision and love of Bernice Pauahi Bishop. We believe that her dream and our responsibility has always been, and will remain, to be a bridge to the past so that the living will remember from whence they came.

Guidance

Introduction

This document sets forth interim and proposed final guidance (“Guidance”) of Bishop Museum (or “Museum”) in respect to key provisions of the Native American Graves Protection and Repatriation Act (“NAGPRA” or “Act”), enacted on November 16, 1990. [2] Over the past three centuries, many Native American human remains and funerary

objects have been taken from burial sites and placed in museums or held by federal agencies. NAGPRA provides a mechanism for return of Native American human remains and other cultural objects to Indian tribes (including Alaskan Native Villages) and Native Hawaiian organizations. NAGPRA's repatriation provisions apply to cultural items from federal agencies and museums receiving federal funds. Five categories of cultural items are defined by the Act: human remains, associated funerary objects, unassociated funerary objects, objects of cultural patrimony, and sacred objects. [3] Other items may have enormous cultural significance, but only these five items are covered by the repatriation provisions of the Act.

Since NAGPRA's enactment, Bishop Museum has taken many steps to comply with the Act's requirements, including completing repatriations of human burial remains. This Guidance reflects the Museum's conclusion that it should review key NAGPRA terms and publish public guidance on the Museum's interpretations of these terms and how these interpretations will affect future requests for repatriation. The Guidance addresses in particular Bishop Museum's dual role as a steward of Native Hawaiian culture as well as a museum with repatriation responsibilities defined by the Act.

The Museum welcomes comments from all persons on the Guidance and will consider any comments submitted in writing by September 1, 2004 before issuing final guidance. Comments should be addressed to Malia Baron, Registrar, Bishop Museum, 1525 Bernice Street, Honolulu, Hawai'i 96817.

This Guidance is prospective only. The Museum does not intend to revisit completed repatriations. Furthermore, the Museum does not intend to apply this Guidance in its effort to complete repatriation in the matter of 83 items from the Kawaihae Cave Complex. In that matter, the Museum will continue with the position that it took in testimony before the National Park Service NAGPRA Review Committee on May 10, 2003. In particular, unless directed by a court, the Museum will not assert interpretations of this Guidance which had they been applied previously might have indicated that repatriation was unwarranted.

Tribes and Native Hawaiian Organizations

NAGPRA defines Indian tribes by reference to Bureau of Indian Affairs ("BIA") policy, which provides for general recognition of the tribe by BIA and requires a petitioner to have continuously existed as an Indian tribe since historic times. [4] Native Hawaiian organizations ("NHOs") are, alternatively, defined by NAGPRA to mean –

“any organization which — (A) serves and represents the interests of Native Hawaiians, (B) has as a primary and stated purpose the provision of services to Native Hawaiians, and (C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.” [5]

Unlike the case for Indian tribes, to be an NHO as defined by NAGPRA does not require traditional history or native membership. More than one hundred NHOs have been

recognized by museums and Federal agencies. Two recognized NHOs are agencies of the State of Hawai‘i (OHA and the Department of Hawaiian Homelands or “DHHL”). The federal Hawaiian Homes Commission, predecessor to the current state governing board of the DHHL, was established in 1920. [6] OHA was established in 1978. [7] Most NHOs were incorporated more recently. An NHO simply needs to have purpose, function and expertise as defined in NAGPRA.

Bishop Museum clearly meets NAGPRA’s definition of an NHO, and Bishop Museum here recognizes itself to be a Native Hawaiian organization. The Museum’s Articles of Incorporation were amended in 2003 to state that the purposes of the Corporation shall include “as a primary purpose providing services to and in general serving and representing the interests of Native Hawaiians . . .” [8] In fact, for over a century, the Museum has served this purpose and developed enormous expertise in Native Hawaiian affairs through work to preserve cultural objects and to study and tell the stories of Native Hawaiian culture. The core, original collections were comprised of Native Hawaiian items that the ali‘i High Chiefess Pauahi (whose collections included those of Princess Ruth Ke‘eliko-lani) and Queen Emma wished to preserve and exhibit for their people. Pauahi and Emma’s collections were augmented in the Museum’s first decade by the collection of the Hawaiian National Museum (which Bishop Museum replaced). [9] The Museum now cares for over 1,470,000 Hawaiian objects. The Museum’s library and archives are a vast repository of printed and audio-visual materials, including publications and tapes in the Hawaiian language. Thousands of Museum research projects and publications address Native Hawaiian culture. Exhibits and educational programs on Native Hawaiian culture are offered continuously by Native Hawaiians and others on the Museum staff. The Museum’s library and archives are a vast repository of printed and audio-visual materials, including publications and tapes in the Hawaiian language. Thousands of Museum research projects and publications address Native Hawaiian culture. Exhibits and educational programs on Native Hawaiian culture are offered continuously by Native Hawaiians and others on the Museum staff. [10] Over the last five years, nearly 500,000 Native Hawaiians were served through exhibits and educational programs. More than 20 Native Hawaiian organizations and 200 Native Hawaiian individuals benefited directly as participants in Museum cultural programs. Cultural traditions on the verge of disappearance—such as voyaging canoe making, kapa (barkcloth) making, ku‘ialua (martial arts), makaloa (native sedge) weaving, the art of chanting, and protocol—were revived through Bishop Museum programs. Sources over the years have shown that these activities at Bishop Museum have helped to foster great pride in Native Hawaiians in their culture. Since its inception, Bishop Museum has been a steward of Native Hawaiian culture.

Bishop Museum represents the interests of Native Hawaiians by caring for and providing access to 1,470,000 Hawaiian objects of great cultural importance and beauty, including artifacts belonging to the ali‘i and donated by them to the Museum, historical photographs and moving images, Hawaiian language manuscripts, early Hawaiian language publications, and Hawaiian language audio recordings. It represents the interests of Native Hawaiians through its presentation of countless educational programs, exhibits, publications, community events, and individual mentorships aimed at

perpetuating Hawaiian cultural traditions and values. Over the last five years, nearly 500,000 Native Hawaiians were served through exhibits and educational programs. Twenty Native Hawaiian organizations and 200 Native Hawaiian individuals benefited directly as participants in Museum cultural programs. Cultural traditions on the verge of disappearance—such as voyaging canoe making, kapa (barkcloth) making, ku‘ialua (martial arts), makaloa (native sedge) weaving, the art of chanting, and protocol—were revived through Bishop Museum programs. Sources over the years have shown that these activities at Bishop Museum have helped to foster great pride in Native Hawaiians in their culture. Since its inception, Bishop Museum has been charged with the stewardship of Native Hawaiian culture, a responsibility it takes very seriously. .

Cultural Affiliation

NAGPRA defines “cultural affiliation” to mean -- “that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” [11]

NAGPRA provides additional definition to this term by providing that repatriation of items in certain cases is required where a Native Hawaiian organization shows 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.” [12]

Bishop Museum has endeavored to apply these terms to claims for repatriation presented by NHOs. However, the Museum, at times, has not been able to differentiate among claimants in ways that are satisfactory. Applying NAGPRA's definition of "cultural affiliation" to NHOs appears, on its face, to require that they be defined with standards similar to those used in recognizing tribes.

One might conclude from the Act's text that no NHO is culturally affiliated with NAGPRA cultural items from Hawai‘i. This conclusion would note the breaking of the kapu system in 1819 and the rapid metamorphosis of the traditional forms of Hawaiian governance that were maintained through the kapu system into Westernized forms of government and religion. [13] It is difficult to conclude that any existing NHO can be traced to a specific “identifiable earlier group,” other than all Hawaiians existing before traditional practices were discontinued after 1819. Furthermore, the categories of applicable evidence set forth in the Act add little to assist with this challenge. For example, Bishop Museum has in the past found geographical evidence for cultural affiliation of NHOs simply because at least one current-day individual member of an NHO was born on the Hawaiian island from which a cultural item came, or because the NHO has an office on the island. It is a stretch to conclude that this kind of evidence in any way traces the NHO to an identifiable earlier group existing over a century and a half before.

An alternative perspective, however, is to read “shared group identity” broadly. The Museum may conclude that any organization meeting the NHO requirements of purpose, function and expertise in respect to Native Hawaiians has a relationship of shared group identity to the Native Hawaiian people of old (i.e. the “identifiable earlier group”). The evidence for “tracing” this relationship, in this alternative, is evidence of present day engagement in work perpetuating the Native Hawaiian culture generally rather than tracing to tribe-like entities. Pending further comment and review, the Museum adopts this second, inclusive alternative, and concludes that any organization qualifying as an NHO is also culturally affiliated with all Native Hawaiian cultural items.

Cultural Affiliation of Bishop Museum

As a Native Hawaiian organization, Bishop Museum is culturally affiliated with all Native Hawaiian cultural items. The Act requires the Museum to review competing repatriation claims of culturally affiliated NHOs and to determine which requesting party is the most appropriate claimant. [14] The Museum may retain items until such time as the requesting parties agree upon the appropriate claimant or the dispute is otherwise resolved under the NAGPRA regulations or by a court. [15]

As noted above, High Chiefess Pauahi and Queen Emma wanted Bishop Museum to be a place for continuing stewardship of Hawaiian cultural heritage. [16] The original collections included objects that came from High Chiefess Pauahi, Queen Emma and Princess Ruth Ke‘eliko-lani. With support from the administrations of King Kala-kaua and Queen Lili‘uokalani, Bishop Museum took over the collections of the Hawaiian National Museum and Bishop Museum became the principal repository for cultural heritage of the Hawaiian Kingdom, including objects incorporating human remains. [17] The stewardship responsibility of Bishop Museum as a repository has continued under successive forms of government unbroken to the present, and is endorsed by current state law. [18] The Museum’s direct descent from the national repository of the Hawaiian Kingdom establishes its close cultural affiliation to cultural items in the collections. The Museum has vigorously carried on the quest for understanding and preservation of Hawaiian culture begun by King Kala-kaua at the Hawaiian National Museum and the Hale Naua- Society. This quest has addressed the elements of cultural affiliation identified in NAGPRA. From its inception, the Museum has collected and studied Hawaiian genealogies, language and folklore, including oral traditions, history, archaeology, and biology as it relates to Hawaiian culture. The Museum’s collections are uniquely comprehensive in that many individual cultural objects can be directly linked to items in the natural history collections, the archives, the oral history collections, the historic image collections. The cultural affiliation of the Museum to these objects is further strengthened by their being associated in the collection records with the expert opinions of well known Native Hawaiian scholars such as Lahilahi Webb and Mary Kawena Pukui. In light of these points, we conclude that Bishop Museum has close cultural affiliation to cultural items as defined by NAGPRA that are in its collections.

We provide the following additional guidance in respect to particular items:

Bishop Museum recognizes the priority of proven lineal descendants in respect to claims for human burial remains and associated funerary objects. This is specified explicitly by NAGPRA for items excavated after enactment of the Act, [19] and the Museum believes that such priority should also be given to repatriation claims. However, it should be noted that the Museum currently does not have possession or control of any Native Hawaiian burial remains or associated funerary objects for which lineal descendants have been ascertained.

The Museum possesses some Native Hawaiian skeletal fragments and is holding other human burial remains temporarily for other NHOs and entities. The Museum will cooperate on an equal basis with other NHOs to secure proper reburial of these fragments, and it will assist other NHOs and entities in the proper handling of human burial remains and associated funerary objects that the Museum currently holds for them.

Bishop Museum has possession and control of objects that incorporate human remains but were generally not considered appropriate for burial in Native Hawaiian culture. These include objects such as containers, drums, bracelets, fishhooks and sashes embedded with teeth; ka-hili or feather staffs with human long bones, and items such as combs and bracelets carved from human bone. Bishop Museum will conserve these objects in its collections and treat them with the great respect and sensitivity that they warrant.

The Museum has possession and control of objects that may have once been buried with human remains and hence may be funerary objects as defined by NAGPRA. Bishop Museum will treat these objects with great respect and sensitivity and will apply applicable provisions of NAGPRA to any requests for repatriation by NHOs, including the Museum itself.

Cultural Patrimony and Sacred Objects

In addition to provisions concerning human remains and funerary objects, NAGPRA sets forth policies for repatriation of objects of "cultural patrimony" and "sacred objects." Hawaiian society has produced many objects of great cultural significance, and many such objects are in Bishop Museum's collections. However, the Museum does not believe that any items of Native Hawaiian society in the collections of Bishop Museum fall within these two categories as defined by the Act.

NAGPRA defines "cultural patrimony" to mean – "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group." [20]

The Senate report accompanying NAGPRA legislation provides some guidance on the definition of cultural patrimony:

The Committee intends this term to refer to only those items that have such great importance to an Indian tribe or to the Native Hawaiian culture that they cannot be conveyed, appropriated or transferred by an individual member. Objects of Native American cultural patrimony would include items such as Zuni War Gods, the Wampum belts of the Iroquois, and other objects of a similar character and significance to the Indian tribe as a whole. Senate Report 101-473, September 26, 1990 ("Senate Report"), page 5.

No objects in the Museum's collections from old Hawai'i appear to meet this definition, if for no other reason than all objects could in appropriate time and circumstances be conveyed, appropriated or transferred by a ruling chief. [21]

NAGPRA defines "sacred objects" to mean – "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." [22]

Virtually all cultural objects of old Hawai'i could be said to have religious significance. A central question, however, is whether these objects – those made before Hawaiian religious practices were modified by Liholiho and Ka'ahumanu in 1819 – are needed for the practice of traditional Hawaiian religion by present day adherents.

Bishop Museum gives priority to preservation and continuation of Hawaiian culture, including research and education on Hawaiian religion practices. We note, however, that the objects of Hawaiian antiquity used in ritual were made new with regularity, and the power which the Hawaiians found in objects old and new was imbued through the complex and demanding rituals of the kapu system. [23] The objects of antiquity are rare and priceless but other objects may be used in any present day religious practices.

Right of Possession

Irrespective of the matters addressed above in this Guidance, NAGPRA does not require repatriation of unassociated funerary objects, objects of cultural patrimony, or sacred objects if a museum has "right of possession." For Bishop Museum, this provision is relevant to NAGPRA review of any funerary objects in the Museum's collections that are not associated with human remains in the Museum's collections.

Under NAGPRA, the initial burden rests with an NHO to present evidence which, if standing alone, would support a finding that the Museum does not have a right of possession to the objects. [24] If the NHO cannot meet this burden, then Bishop Museum may retain the objects. If the NHO is able to meet this burden, the burden then shifts to Bishop Museum to present evidence to the contrary proving that it does have a right of possession as defined by the Act. [25] If Bishop Museum meets this burden, it may retain the objects. If not, then the Museum must proceed with repatriation unless, as might be

the case for the cultural item in question, no NHO is more closely culturally affiliated with the item than is the Museum itself. As has been its practice, the Museum will continue to share information that it has which bears upon the issues of right of possession and cultural affiliation.

NAGPRA defines "right of possession" to mean –

“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) [of the Act] 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.” [26]

The term is somewhat complexly defined. The Senate and House reports on the bills giving rise to NAGPRA provide same guidance. The House report states – "The definition of ‘right of possession’ in section 2(13) of the bill was amended to include language providing that nothing in the paragraph is intended to affect the application of relevant State law to the right of ownership of unassociated funerary objects, sacred objects or objects of cultural patrimony. The language was adopted to meet the concerns of the Justice Department about the possibility of a 5th amendment taking of the private property of museums through the application of the terms of the Act." House Report 101-877, October 15, 1990 (“House Report”) at page 15.

The Senate Report provides more lengthy but consistent comments on the definition (reprinted below). [27] The Senate Report expresses concern that cultural items have sometimes been stolen from tribes and then ended up in museums, or have been illegally removed from Indian burial sites on Federal and tribal lands and sold. The report continues, stating that “[r]eview of the right of possession to a given object is very similar to the transfer of title to other forms of property. The Committee intends this section to operate in a manner that is consistent with general property law i.e., an individual may only acquire the title to property that is held by the transferor.” The Senate Report, unlike the House Report, does not specifically reference concerns about 5th Amendment takings, but the bill that the report accompanies, S. 1980, includes the provision on takings that was enacted in NAGPRA.

In light of the statutory and report language discussed above, Bishop Museum concludes that it has right of possession of unassociated funerary objects in its collections (and, if

they existed, of objects of cultural patrimony and sacred objects) if the Museum is the owner under Hawai'i State law. [28]

If an NHO seeks repatriation of an unassociated funerary object and believes that it is the owner under Hawai'i State law, the NHO must present evidence to the Museum which, if standing alone, would support a finding that the Museum not the owner. The Museum will then respond as provided by the procedures in the Act described above. [29]

Summary

This Guidance reaches the following fundamental interim and proposed final conclusions:

1. Bishop Museum qualifies as a Native Hawaiian organization ("NHO") as defined by section 2(11) of NAGPRA.
2. All organizations qualifying as NHOs are also culturally affiliated with Native Hawaiian cultural items as defined by NAGPRA. However the degree of affiliation may vary. In light of its purpose and history as the primary repository of Hawaiian antiquities for safekeeping and cultural access, including in particular the involvement of High Chiefess Pauahi, Queen Emma and other ali'i in its establishment, Bishop Museum has close cultural affiliation to cultural items in its collections.
3. Although Hawaiian culture has produced many items of great cultural and religious value, the Museum holds no objects of cultural patrimony or sacred objects as these terms are defined by section 2(3)(C) and (D) of the Act. To meet the statutory definition, objects of cultural patrimony must have been considered inalienable by any individual, including ruling kings, at the time of alienation. Sacred objects under NAGPRA must be needed by traditional religious leaders for the practice of traditional Native American religions by their present day adherents. Past and present acts and practices do not support the conclusion that any Hawaiian cultural items meet these definitions.
4. Bishop Museum has right of possession of unassociated funerary objects in its collection if the Museum is the owner under Hawai'i State law. NAGPRA provides a procedure for assertions concerning right of possession and responses by the Museum.

This Guidance was approved by the Board of Directors of Bishop Museum on May 27, 2004.

William Y. Brown
President & Chief Executive Officer
Bishop Museum

Attachment 2**BISHOP MUSEUM
FINAL GUIDANCE
NATIVE AMERICAN GRAVES PROTECTION AND
REPATRIATION ACT****October 7, 2004**

On June 30, 2004, Bishop Museum ("Museum") issued an "Interim and Proposed Final Guidance" to clarify and enhance transparency of steps taken by the Museum to Implement the Native American Graves Protection and Repatriation Act ("NAGPRA" or "Act"). The Interim and Proposed Final Guidance ("Proposed Guidance") was posted on the Museum's website and mailed to recognized Native Hawaiian Organizations ("NHOs") and a diverse group of additional interested parties. The Proposed Guidance requested comments until September 1, 2004, and stated that any comments submitted to the Museum Registrar would be carefully considered by the Museum in developing the Final Guidance presented here (hereafter "Final Guidance").

Twenty-seven written comments were submitted to the Museum Registrar. One comment was submitted in the form of a petition signed by 361 individuals, and several comments were submitted by the same individuals or groups. The principal issues raised by the comments, as well as comments from governmental officials, are discussed below by topic and include discussion of the Museum's responses to the issues.

Following review of issues raised in comments, the Final Guidance summarizes operational provisions of the guidance, drawing from the Proposed Guidance as revised based on points raised in the comments and reflections of the Museum board and staff. The Final Guidance does not restate the analyses provided in the Proposed Guidance, but rather amends and supplements those analyses. Both the Proposed Guidance, which is incorporated here by reference, and the Final Guidance will be maintained on the Museum's website.

Native Hawaiian Organizations

Most comments received address the status of Bishop Museum as an NHO under NAGPRA. Ten comments support recognition of the Museum as an NHO, and 15 comments (including the petition referenced above) opposed such recognition. Comments in support of recognition reference the role of *ali'i* in the Museum's establishment, and other points. Comments opposing recognition question whether the Museum meets the definition of an NHO under NAGPRA and whether the potential for conflict in judging claims and making claims on objects in its collection should preclude claimant status by the Museum under NAGPRA. The Museum acknowledges concerns over potential conflicts, and has determined not to recognize itself in this Final Guidance to be a Native Hawaiian Organization for purposes of making claims under NAGPRA. This determination in no way means that the Museum is not committed as a primary purpose to serving and representing the interests of Native Hawaiians or to incorporating Native

Hawaiians in its governance, staff and programs. Furthermore, this determination does not comment on the Museum's current or future status as a Native Hawaiian entity under laws other than NAGPRA.

Cultural Affiliation

Some have taken issue with the conclusion of the Proposed Guidance that all NHOs are to some degree culturally affiliated with Hawaiian NAGPRA cultural items insofar as all NHOs may be said to have affiliation with any objects of old Hawaii. The Proposed Guidance would focus inquiry on the degree or closeness of affiliation to objects among NHOs. This position was prompted by the difficulty in finding clear lines for determining whether cultural affiliation does or does not exist. Nevertheless, the Museum appreciates that NAGPRA may be read to require a determination more closely linked to the provisions of NAGPRA defining cultural affiliation. In light of these points, the Museum has reconsidered and does not conclude in this Final Guidance that all NHOs are also culturally affiliated with any Hawaiian NAGPRA cultural item. Instead, the Museum will review such affiliation on a case-by-case basis in the immediate future. The Museum may at some point develop additional guidelines on this point to facilitate review of claims. The Museum's own cultural affiliation with items in its collection as asserted in the Proposed Guidance is moot in light of the Museum's determination not to recognize itself to be an NHO for purposes of claims under NAGPRA.

The Proposed Guidance sets forth additional specific directions concerning priority of lineal descendants, skeletal fragments and loaned human remains, objects incorporating human remains, and potential funerary objects. With the exception of the Museum's potential role as a claimant, no comments addressed these provisions. The Museum believes that these directions are well founded, and they are incorporated in the operational provisions summarized below, with revisions addressing the revised treatment of the Museum.

Sacred Objects and Objects of Cultural Patrimony

A few comments took issue with the Proposed Guidance in concluding that the Museum does not have objects in its collections that are within the NAGPRA definitions for "sacred objects" and objects of "cultural patrimony."

As noted in the Proposed Guidance, the Museum has many objects in its collection of inestimable cultural significance. The Museum agrees with comments that make this point and also agrees with comments that stress the importance of Native Hawaiian access to these objects. The Museum's current exhibits and programs provide access to many cultural objects, and we will work with Native Hawaiians and others to enhance access to objects and to strengthen programs for Native Hawaiian involvement with them consistent with security and resources.

However, none of the comments offers information contrary to the fundamental premises in the Proposed Guidance's conclusion that the Museum holds no objects falling within these two categories as defined by NAGPRA.

As discussed in detail in the Proposed Guidance, an object of "cultural patrimony" is defined by NAGPRA to mean:

"an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group."

In particular, this definition means that an object of cultural patrimony could not have been owned or given away by an individual, including the king of old Hawai'i who ruled over the area where the object was located. We do not believe that any such object exists in the Museum's collection.

As also reviewed in the Proposed Guidance, "sacred objects" must be "needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents. "Some have opposed the Museum's interpretation on grounds that traditional Native Hawaiian religious leaders are practicing traditional Native Hawaiian religions in the process of religious revival. However, the Museum's perspective does not rest on this point. The central point of the Proposed Guidance, which the Museum reaffirms, is that the objects of Hawaiian antiquity used in ritual were newly made with regularity, and the power which the Hawaiian found in objects old and new was imbued through the complex rituals of the *kapu* system. The objects of antiquity in the Museum's collection are rare and priceless, and the Museum is committed to programs providing for Native Hawaiians access to and engagement with them. However, the Museum believes that any continuing or reviving traditional Native Hawaiian religious practices do not require use of these objects because the objects needed for these practices were newly made as required in old Hawai'i and can be newly made today.

In adopting these perspectives in the Final Guidance, the Museum does not intend in any way to limit or inhibit claims that an NHO may make for objects that it may consider "sacred objects" or objects of "cultural patrimony" under NAGPRA. The Museum will consider any such claims and consult with any NHO that makes such claims. The primary purpose for setting forth the Museum's perspectives on these terms in this Final Guidance is to clarify the central threshold questions that the Museum believes must be answered if repatriation is to be required and to express a general view on what the answers to those questions are.

Right of Possession

Three comments addressed this issue, but misread the Proposed Guidance. The comments state that the Museum claims that it is the owner of all such objects in its collection. However, the Museum's position is that it has the right of possession of unassociated funerary objects (and sacred objects and objects of cultural patrimony if they were in the

Museum's collection) *if* the Museum is the owner under Hawai'i State law. This interpretation is based on a detailed analysis of NAGPRA and its legislative history presented in the Proposed Guidance. The Museum intends to evaluate right of possession on a case-by-case basis with objective determinations as to ownership pursuant to NAGPRA's procedures.

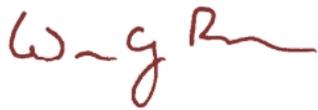
Summary of Key Provisions

1. The Museum acknowledges concerns over conflicts in judging and making claims on objects in its own collection, and has determined not to recognize itself to be a Native Hawaiian Organization that may make claims pursuant to NAGPRA.
2. Bishop Museum will review the existence and degree of NHO claimant cultural affiliation on a case-by-case basis.
3. Bishop Museum recognizes the priority of proven lineal descendants in respect to claims for human burial remains and associated funerary objects. However, it should be noted that the Museum currently does not have possession or control of any Native Hawaiian burial remains or associated funerary objects for which lineal descendants have been ascertained.
4. Bishop Museum possesses some Native Hawaiian skeletal fragments and is holding other human burial remains temporarily for other NHOs and entities. The Museum will work with NHOs to facilitate repatriation of these fragments, and it will assist NHOs and other entities in the proper treatment of any human burial remains and associated funerary objects that the Museum currently holds for them.
5. Bishop Museum has in its collections objects that incorporate human remains but were generally not considered appropriate for burial in Native Hawaiian culture. These include objects such as containers, drums, bracelets, fishhooks and sashes embedded with teeth; kāhili or feather staffs with human long bones, and items such as combs and bracelets carved from human bone. Bishop Museum will conserve these objects in its collections and treat them with the great respect and sensitivity that they warrant.
6. Bishop Museum has possession of objects that may have once been buried with human remains and hence may be funerary objects as defined by NAGPRA. Bishop Museum will treat these objects with great respect and sensitivity and will apply applicable provisions of NAGPRA to any requests for repatriation by NHOs.
7. Although Native Hawaiian culture has produced many items of great cultural and religious value, the Museum believes that it holds no objects of cultural patrimony or sacred objects as these terms are defined by sections 2(3)(C) and (D) of the Act. To meet these definitions, objects of cultural patrimony must have been considered inalienable by any individual, including ruling kings, at the time of alienation, and sacred objects must be needed by traditional religious leaders for the practice of traditional Native American religions by their present day adherents. Past and present

acts and practices do not support the conclusion that any Hawaiian cultural items meet these definitions. However, in adopting these perspectives in the Final Guidance, the Museum does not intend in any way to limit or inhibit claims that an NHO may make for any objects that it may consider "sacred objects" or objects of "cultural patrimony" under NAGPRA. The Museum will consider any such claims and will consult with any NHO that makes such claims. The primary purpose for setting forth the Museum's perspectives on these terms in this Final Guidance is to clarify the central threshold questions that the Museum believes must be answered if repatriation is to be required and to express a general view on what the answers to those questions are.

8. Bishop Museum has right of possession of unassociated funerary objects in its collections (and sacred objects and objects of cultural patrimony if any are in the collections) if the Museum is the owner under Hawai'i State law. NAGPRA provides a procedure for assertions concerning right of possession and responses by the Museum.

This Final Guidance was approved by the Board of Directors of Bishop Museum on October 7, 2004.



William Y. Brown
President & Chief Executive Officer
Bishop Museum