



NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

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February 11, 2015

Re: Docket No. 1024-AE17

Stanley C. Bond,  
Departmental Consulting Archeologist  
National Park Service  
1201 Eye Street NW, 7th Floor (2275)  
Washington, DC 20005

Dear Mr. Bond:

The National Association of Tribal Historic Preservation Officers (NATHPO) is a not-for-profit membership association of federally-recognized tribal government officials who are committed to preserving tribal cultures and practices. Tribal Historic Preservation Officers (THPOs) perform a variety of duties for their respective tribal governments in the field of cultural preservation. NATHPO submits the following comments to the National Park Service (NPS) on RIN No. 1024-AE17, Proposed Rule, Curation of Federally-Owned and Administered Archeological Collections.

The NPS proposed rule includes both general revisions to the existing rule as a whole and specific additions to establish definitions, standards, and procedures to dispose of particular material remains that are determined to be of insufficient archaeological interest (36 CFR 79). Our comments focus on the preamble and the proposed regulatory provisions, with our recommended additions to the text underlined and deleted text ~~overstruck~~.

**Preamble:**

In explaining the concept of federally administered archaeological collections, the NPS uses the example of collections from Indian lands made pursuant to provisions of the Archaeological Resources Protection Act (ARPA). The NPS correctly points out that while these collections are “administered” by the United States, ownership remains with the respective tribe or individual owner and the proposed rulemaking includes various steps to ensure that no disposition is implemented without the consent of the respective tribe or Indian owner. The same issues arise regarding archaeological collections taken from Indian land prior to 1979 or from lands selected by but not yet conveyed to an Alaska Native village or regional corporation from which the Indian, tribe, or corporation remains the owner pursuant to Treaty, statute, and the Common Law. The proposed rule would impose a restriction on alienating material remains returned to their rightful Indian and tribal owners. We expect that a similar situation applies to archaeological collections obtained from non-federal lands that are likewise administered by the United States through the terms of an agreement, contract, or permit; however no similar consent provision has been included. [79 Fed Reg 68643] Despite the obvious Takings implications, the NPS proposed rule does not include language directing the federal agency to perform a takings implication assessment as required by Executive Order 12630.

**Recommendation:** We strongly recommend that the NPS perform a takings implication assessment as required by Executive Order 12630.

**Authority Citation for Part 79 [79 Fed Reg 68644]:**

The proposed rule indicates that the authority to regulate the curation of Federally-owned and administered archaeological collections continues to be derived from 16 U.S.C. 470aa–mm, 16 U.S.C. 470 et seq. These particular citations are very broad and should be strengthened by indicating the specific Congressional authorization for rulemaking. The specific sections in these two statutes that authorize rulemaking are section 101(a)(7)(A) of the National Historic Preservation Act (16 U.S.C. 470a, now 54 U.S.C. 302107(1)) and section 5 of the Archaeological Resources Protection Act (16 U.S.C. 470dd). Also, on December 19, 2014, Pub. L. No. 113-287 codified the National Historic Preservation Act as Title 54 U.S. Code and renumbered the sections.

**Recommendation:** Revise the citation to more accurately reflect Congress’ specific authorization for 36 CFR 79:

“AUTHORITY: ~~16 U.S.C. 470aa–mm~~16 U.S.C. 470dd, 16 U.S.C. 470 et seq54 U.S.C. 302107(1).”

**Section 79.12 Determining which particular material remains are eligible for disposal [79 Fed Reg 68644-68645]**

NATHPO’s comments address the following five sections (section in parentheses):

- (a) Which material remains are eligible for disposal?
- (b) Which material remains may not be disposed of?
- (c) Who may propose the disposal of particular material remains?
- (d) Who is responsible for the disposal of particular material remains?
- (e) When are particular material remains considered to be of insufficient archaeological interest?

Subsection 79.12(a) details which material remains are proposed for possible disposal. Though not objecting to the possible disposition of archaeological resources, as defined in 16 U.S.C. 470bb(1), or other resources excavated and removed under the Reservoir Salvage Act (16 U.S.C. 469–469c), we strongly object to the inclusion of resources excavated and removed under the Antiquities Act (16 U.S.C. 431–433). The latter proposed provision is inconsistent with other regulations currently in force regarding resources excavated and removed under the Antiquities Act (16 U.S.C. 431-433). 43 CFR 3.17 states in relevant part that “No such collection shall be removed from such public museum without the written authority of the Secretary of the Smithsonian Institution...” Since no change to the requirements of 43 CFR 3.17 has been proposed here, we recommend deletion of any reference to material remains excavated and removed under the Antiquities Act (16 U.S.C. 431-433) throughout.

**Recommendation:** Revise this subsection as follows:

“(a) Which material remains are eligible for disposal? In order to be eligible for disposal, material remains from collections must be:

- (1) Archaeological resources, as defined in 16 U.S.C. 470bb(1), or other resources excavated and removed under the Reservoir Salvage Act (16 U.S.C. 469–469c) ~~or the Antiquities Act (16 U.S.C. 431–433);~~ and
- (2) Considered to be of insufficient archaeological interest under the criteria in paragraph (e) of this section, based on the definition of “of archaeological interest” in 43 CFR 7.3(a)(1).”

Subsection 79.12(b) proposes to exclude four classes of items from disposition: Native American “cultural items;” human remains; material remains excavated and removed from Indian lands on or before October 31, 1979, and material remains excavated and removed from Indian lands under the Antiquities Act. We have no objection to the exclusion of Native American “cultural items” from this rule; however the three other exclusions are problematic for several reasons. The phrasing of the exemption for human remains implies that such items may not be disposed of under any circumstances. However, non-Native American human remains are typically disposed of through reburial. For example, the remains of 64 non-Native American soldiers and civilian men, women, and children who were

initially buried in New Mexico in the 19th Century were excavated from Federal lands under provisions of the Archaeological Resources Protection Act in 2007, and were reburied in 2009. While we concur that such human remains should not be considered for disposition to museums or other parties outside of respectful reburial or other respective custom, the exception as currently written would seem to preclude the latter disposition. We recommend language indicating that the restriction is limited to the current proposed provisions.

As indicated above, the current proposal regarding disposition of Antiquities Act collections is inconsistent with currently applicable regulations and should be excluded entirely, not just those from Indian lands. Consistent with that recommendation, we similarly recommend that reference to those collections be stricken here as well.

**Recommendation:** Revise 79.12(b) as follows:

“(b) Which material remains may not be disposed of under this part? The following material remains from collections may not be disposed of under this part:

(1) Native American “cultural items” as defined in the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001(3)), since disposition is governed by that Act and its implementing regulations (43 CFR 10); and

(2) Human remains, since disposition to next of kin or affiliated communities is governed by the common law;

~~(3) Material remains excavated and removed from Indian lands on or before October 31, 1979; and~~

~~(4) Material remains excavated and removed from Indian lands under the Antiquities Act (16 U.S.C. 431–433).”~~

#### **Section 79.13 Acceptable methods for disposition of particular material remains [79 Fed Reg 68645-68646]**

Subsection 79.13(b) proposes six methods for the disposition of material remains. NATHPO proposes adding two additional methods, one based on the criteria used in the Native American Graves Protection and Repatriation Act and another based on criteria already included in the part at 36 CFR 79.

**Recommendation:** Revised 79.13(b) as follows:

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(5) Convey to a federally recognized Indian tribe that is culturally affiliated with the material remains.

(6) Convey to a federally recognized Indian tribe that has requested to use the material remains for traditional cultural, educational, and/or religious practices.

~~(57)~~ Transfer within the Federal agency for the purpose of education or interpretation, or convey to a suitable institution to be used for public benefit and education including, but not limited to, local historical societies, university or college departments, and schools.

~~(68)~~ If the Federal Agency Official considers each of these prior methods carefully and is still unable to find an acceptable method of disposition, then destruction may be considered. The Federal Agency Official or their designee must witness and document the destruction, including through photography or video.

#### **79.14 Restrictions on disposition of particular material remains [79 Fed Reg 68646]**

The proposed post-disposition restriction on alienation at 79.14(b) constitutes a Taking of property under the Fifth Amendment of the Constitution as it would apply to material remains excavated and removed from Indian lands and returned to the Indian individual or Indian tribe having rights of ownership over the resources.

**Recommendation:** Revise this subpart as follows:

“(b) Can disposed material remains be regarded as commercial goods? ~~No~~Generally not. Disposed material remains may not be traded, sold, bought, or bartered as commercial goods, except when they are returned to an Indian individual or Indian tribe having rights of ownership over the resources.”

### **79.15 Final determination on disposition of particular material remains [79 Fed Reg 68646-68647]**

The proposed section would establish procedures for making the final determination on disposition of particular material remains.

Subsection 79.15(a) would require a Federal Agency Official to determine that any material remains proposed for disposition under this part are not Native American “cultural items” as defined in the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001(3)). This determination must necessarily be done in consultation with representatives of the appropriate Indian tribes and Native Hawaiian organizations.

**Recommendation:** Revise the subsection as follows:

“(a) The Federal Agency Official must determine that the material remains are eligible for disposal under the criteria in § 79.12(a), including a written verification that no Native American “cultural items” as defined in the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001(3)) are considered for disposal. For Native American material remains, this determination must be made in consultation with any identified lineal descendants and with representatives of all Indian tribes and Native Hawaiian organizations from whose tribal lands, at the time of the removal, the material remains were removed; or that are culturally affiliated with the material remains; or from whose aboriginal lands the material remains were removed. Aboriginal occupation for purposes of this section may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or by a treaty, Act of Congress, or Executive Order.”

Subsection 79.15(c) would require the Federal Agency Official to establish a collection advisory committee of at least five members to review and make recommendations about proposed dispositions of material remains based on the adequacy of the documentation and the appropriateness of the proposed disposition. The proposed rule allows the Federal Agency Official to include, at his or her discretion, one or more members of a federally recognized Indian tribe regularly consulted by the Federal agency who are elected tribal officers or their designated employees acting in their official capacities. We object to the proposal for two reasons: (1) we believe the collection advisory committee must include at least one tribal representative if the material remains being considered for disposition are Native American; and (2) requiring that the tribal representative is also a member of the tribe places an undue burden on tribal officials' appointment authority.

**Recommendation:** Revise subsection 79.15(c)(3) as follows:

“(3) If the material remains being proposed for disposition are Native American, ~~c~~Committee members ~~may~~must include at least-one ~~or more members~~ representative of a federally recognized Indian tribe regularly consulted by the Federal agency who are elected tribal officers or their designated employees acting in their official capacities.”

Subsection 79.15(e) would require the Federal Agency Official to retain all associated records with a copy of the records given to the recipient of any transferred or conveyed items. For material remains excavated and removed from Indian land, a copy of the original associated records must be given to the Tribal Historic Preservation Officer (or other designated tribal representative) from the tribal land(s) where the particular objects were recovered.

**Recommendation:** Revised the subsection as shown below:

“(e) The Federal Agency Official must retain all associated records in the archeological collection as defined in § 79.4(a)(2) of this part. A copy of the original associated records must be given to the recipient of any transferred or conveyed items subject to the restrictions stipulated in the Archaeological Resources Protection Act (16 U.S.C. 470hh(a)). For material remains excavated and removed from Indian land, a copy of the original associated records must be given to the Tribal Historic Preservation Officer (or other designated tribal representative) from the tribal land(s) where the particular objects were recovered.”

Subsection 79.15(f) would require the Federal Agency Official provide written notification of the proposed disposition. This notification should also be provided to all Indian tribes that are culturally affiliated with the material remains.

**Recommendation:** Revise the subsection as follows:

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**“(7) Indian tribes that are culturally affiliated with the material remains.”**

**79.16 Objecting to a determination of disposition of particular material remains [79 Fed Reg 68647]**

This proposed section would establish a procedure for objecting to a determination of disposition of particular material remains.

Subsection 79.16(d) would require the Federal Agency Official to respond to the Departmental Consultation Archeologist and the request with a final determination, but does not require that the response specifically explain the final determination in light of the requestor’s objection.

**Recommendation:** Revise the subsection as follows:

“(d) The Federal Agency Official must consider the recommendation in making a final determination. Within 60 days of receipt of the recommendation, the Federal Agency Official must respond to the Departmental Consulting Archeologist and the requester with a final determination. The final determination must **explain the rationale of the of the Federal Agency Official's determination and** include any information on administrative appeal rights required by internal agency appeal procedures or a statement that the final determination is a final agency action under the Administrative Procedure Act, as appropriate.”

Subsection 79.16(e) would require the Federal Agency Official to publish a notice of final decision in the Federal Register. This subsection should be revised to make it clear that publication of the notice constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704).

**Recommendation:** Revise the subsection as indicated below:

“(e) The Federal Agency Official must publish notice of the decision on the objection and any amendments made to the original determination of disposition in the Federal Register. **Publication of the notice of the decision constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704).**”

Please feel free to contact me if you have any questions regarding these recommendations.

Sincerely yours,



D. Bambi Kraus  
President