



**NATIONAL ASSOCIATION
OF TRIBAL HISTORIC
PRESERVATION OFFICERS**

P.O. BOX 19189
WASHINGTON, D.C. 20036-9189
(202) 628-8476
INFO@NATHPO.ORG
WWW.NATHPO.ORG

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Office of Information and Regulatory Affairs
Office of Management and Budget
Washington, DC 20500

RE: Native American Graves Protection and Repatriation Regulations, Beneficial Ownership Information Reports, Docket Number 1024-AE19, OMB Control Number 1024-0282, 88 Fed. Reg. 86452 (Dec. 13, 2023)

Dear Sir or Madam:

On December 13, 2023, the Department of the Interior (Department) issued a final rule (Final Rule) that requires Indian Tribes to assume duties regarding the protection of Native American human remains and other cultural items on Tribal lands and requires museums and Federal agencies to prepare summaries and inventories and repatriate Native American human remains and other cultural items in their possession or control. In conjunction with its issuance of the Final Rule, the Department is seeking approval by the Office of Management and Budget of revised information collection burden estimates under the Paperwork Reduction Act. We focus our comments on the question of accuracy of the estimate of the burden for this collection of information, including the validity of the methodology and assumptions used.

The National Association of Tribal Historic Preservation Officers (NATHPO) appreciates the opportunity to comment on the burdens and estimates in the Department's revised cost-benefit and regulatory flexibility threshold analysis¹ and the summary of that information provided for its Paperwork Reduction Act submission.² NATHPO is a national non-profit membership association of Tribal government officials committed to protecting culturally important places that perpetuate Native identity, resilience, and cultural endurance. Connections to cultural heritage sustain the health and vitality of Native peoples. NATHPO supports Tribes in protecting their important places and resources, whether they are manmade or naturally occurring in the landscape. The repatriation of Native ancestors, funerary objects, sacred objects, and objects of cultural patrimony is of critical importance to our members.

Summary of Comments

NATHPO supports the idea of revising the regulations implementing the Native American Graves Protection and Repatriation Act (NAGPRA). In reviewing the Department's revised cost-benefit and regulatory flexibility threshold analysis and the summary of that information provided for its Paperwork Reduction Act submission, however, we note that while the estimated burden was increased over that

¹ National Park Service, Cost-Benefit and Regulatory Flexibility Threshold Analysis: Native American Graves Protection and Repatriation Act Final Regulations (Dec. 2023).

² Supporting Statement A for Paperwork Reduction Act Submission: Native American Graves Protection and Repatriation Regulations, 43 CFR 10, OMB Control Number 1024-0144 (no date).

provided with the proposed rule in 2022,³ they continue to drastically underestimate the hourly and non-hourly burden of the final rule. We have identified several areas where costs were either significantly underestimated, or not included at all.

Estimate the actual burden of consultation using readily available data.

The new regulations define consultation broadly as the exchange of information, open discussion, and joint deliberations made between all parties in good faith to: consider the views of all parties; strive for consensus, agreement, or mutually acceptable alternatives; and enable meaningful consideration of Native American traditional knowledge. However, the cost-benefit analysis systematically and drastically underestimates the hourly and non-hourly burden of conducting consultation. First, the estimate is based on a 1:1 relationship between the number of participants and the number of museums and Federal agencies conducting consultation. The Department acknowledges that this underestimates the number of individuals involved. Second, the estimate completely omits non-hourly costs of consultation, specifically the costs of travel and meetings. Third, the estimate completely omits the costs to museums, Federal agencies, and Tribes to consult and/or obtain consent regarding the new duty of care provision at §10.1 (d).

A lack of information is repeatedly used by the Department as the rationalization for not accurately estimating consultation costs. This claim rings false in light of the National Park Service's administration of a grant program since 1994 focused specifically on funding museum and Tribal consultation. Each proposal provides detailed estimates by the submitting museum or Tribe of the number of people involved in consultation as well as the related travel and meeting costs. Each proposal was reviewed, approved, and monitored by the National Park Service. NATHPO requests that the Department revise the cost-benefit analysis and the Paperwork Reduction Act submission to prepare a meaningful estimate based on data provided in funded NAGPRA grants, including the average number of people involved in consultation and the average non-hourly costs for consultation travel and meetings.

We have heard claims that consultation under the new rule will be significantly different than under the current regulations. This may have been true for the provisions outlined in the proposed rule which focus on determining geographic affiliation based on a specific set of government records. However, the new regulations eliminate these provisions and instead require reconsideration of cultural affiliation much as it has been since 1990. Consultation grant awards provide a detailed basis for estimating the consultation burden under the new regulations.

§10.1 (d). Estimate the burden to consult or obtain consent for the duty of care requirement.

The new regulations require museums, Federal agencies, and the Department of Hawaiian Homelands to consult with or obtain consent from lineal descendants, Indian Tribes, or Native Hawaiian organizations regarding the appropriate storage, treatment, handling, exhibition of, access to, or research on Native American human remains or other cultural items. This is a new requirement that was not included in the proposed rule. This requirement contrasts with other required consultations: the subject of the

³ National Park Service, Cost-Benefit and Regulatory Flexibility Threshold Analysis: Native American Graves Protection and Repatriation Act Final Regulations (Feb. 2022, updated June-Sept. 2022).

consultation is distinct from that required for preparation of summaries and inventories, determination of cultural affiliation, and repatriation for which some consultation has already occurred; and the listed activities are all ongoing, meaning that this requirement needs to be dealt with immediately outside of the five-year repatriation process defined by the regulations. For that reason, NATHPO requests that the burden of this consultation be estimated separately. Because of the broader focus and the imperative need to resolve ongoing storage, treatment, handling, exhibition of, access to, and research issues in a timely manner, NATHPO feels that the cost of consultation and/or consent for this provision will be equal to, if not more than that estimated for the summary, inventory, and repatriation process.

Regulatory requirement: Duty of Care, 43 CFR 10.1 (d)	Responsible party	Number of responses	Time per response	Annual hours	Hourly rate	Annual costs
Conduct consultation	Museums	154*	105.00	16170.00	\$67.01	\$1,083,552
Conduct consultation	Federal agencies	41*	105.00	4305.00	\$67.01	\$288,478
Participate in consultation	Indian tribes/NHOs	193*	105.00	20265.00	\$67.01	\$1,357,958
Participate in consultation	Lineal descendants	2*	105.00	210.00	\$40.79	\$8,566
Consultation travel costs*	Museums		Non-hour cost			
Consultation travel costs*	Federal agencies		Non-hour cost			
Consultation travel costs*	Indian tribes/NHOs		Non-hour cost			
Consultation travel costs*	Lineal descendants		Non-hour cost			
Meeting costs*	Museums		Non-hour cost			
Meeting costs*	Federal agencies		Non-hour cost			
Meeting costs*	Indian tribes/NHOs		Non-hour cost			
TOTAL		390*				

*Average number of individuals participating in consultation and average travel and meeting costs to be calculated from data derived from funded NAGPRA grants.

§10.4. Estimate the burden to Tribes to ensure that authorizations of activities on Tribal lands include a requirement to report any discovery of human remains or other cultural items to the Tribe.

The current regulations authorize, but do not require Indian Tribes to ensure that authorizations of activities planned on Tribal lands include provisions requiring all removal, excavation, and disposition be carried out according to those regulations.⁴ The new regulations change this authorization to a requirement, meaning that now Tribes must ensure that all permits, licenses, leases, rights-of-way, or other authorizations issued for an activity on Tribal lands include a requirement to report any discovery of human remains or cultural items to the Tribe. To ensure – to make certain – is a high standard. NAGPRA's definition of Tribal land includes all lands within the exterior boundary of a reservation. The shift from an authorization to a requirement means that Tribes are now required to review for legal sufficiency all permits, licenses, leases, rights-of-way, or other authorizations issued for activities on approximately 87,500 square miles of Tribal trust land, plus at least 23,000 square miles of private lands located within the exterior boundaries of reservations in eastern Oklahoma alone and, if the clause is not included, renegotiate the authorization with the permittees. Far more complicated and expensive will be the review of all permits, licenses, leases, rights-of-way, and other authorizations on private lands within the exterior boundary of a reservation which are issued by state, county, and local governments but, pursuant to both the statute and the regulations must include the notification clause. In our comments on the proposed rule, NATHPO requested that the Department initiate notification of relevant state, county, and local authorities of this requirement. While acknowledging the legal requirement, the Department declined to do so, instead imposing this requirement on the Tribes without any additional resources and ignoring the expected costs in the cost-benefit analysis and summary. We urgently request that both documents be revised to honestly evaluate the costs of this requirement.

The Department's cost-benefit analysis completely ignores the burden to Tribes of making certain that all permits, licenses, leases, rights-of-way, or other authorizations issued for activities on over 100,000 square miles of Tribal lands have the required language. The initial review for legal sufficiency will likely take several hours per document by a lawyer at a cost considerably higher than the \$67.01 hourly wage used by the Department for estimating the cost burden on Tribal employees. NATHPO requests that the Department revise the cost-benefit analysis and the Paperwork Reduction Act submission to honestly account for this significant burden to Tribes.

Conclusion

NATHPO supports the revised regulations' implementation of NAGPRA. However, we are deeply concerned that the costs of the proposal seem to have been systematically underestimated. Please consider our recommendations and revise the cost-benefit analysis and Paperwork Reduction Act submission accordingly.

⁴ 43 CFR 10.3 (c)(4). (Dec. 13, 2023).

Sincerely,

A handwritten signature in black ink that reads "Valerie J. Grussing". The signature is written in a cursive style with a large, stylized "V" and "G".

Valerie J. Grussing, PhD
Executive Director

cc:

Phadrea Ponds, NPS Information Collection Clearance Officer (ADIR-ICCO), phadrea_ponds@nps.gov