



**NATIONAL ASSOCIATION  
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January 31, 2023

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U.S. Department of the Interior  
1849 C Street NW  
Washington DC 20240

Post to <https://www.regulations.gov/commenton/NPS-2022-0004-0001> Comments on the proposed rule must be received by 11:59 p.m. EDT on January 31, 2023.

Subject: Native American Graves Protection and Repatriation Act Proposed Rule, RIN: 1024-AE19

Dear Assistant Secretaries Newland and Estenoz and Solicitor Anderson,

The National Association of Tribal Historic Preservation Officers (NATHPO) appreciates the opportunity to comment on the proposed Native American Graves Protection and Repatriation Act (NAGPRA) rule (1024-AE19) issued by the National Park Service.

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.

Our comments follow the outline of the proposed rule, with requested additions and deletions shown with underline or ~~overstrike~~.

***PROTECTING NATIVE PLACES***

## Subpart A—GENERAL

### §10.1 Introduction.

**Subsection 10.1 (a)** states the purpose of the proposed rule. While we support the intent of the proposed text and believe it should be used, we also recommend that the purpose stated here should adhere closely to that articulated by the Congress when they enacted NAGPRA. We recommend making a clear distinction between the purpose stated by Congress and the interpretation of that purpose offered by the Secretary, and recommend bifurcating this section to include a close paraphrase of the language used by the Congress to describe the purpose of the Act<sup>1</sup> in subsection (1) followed by the Department's interpretation of the purpose as subsection (2).

- (a) Purpose. (1) These regulations provide systematic processes to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian, and Native Hawaiian lands; and for Federal agencies and museums receiving federal funds to inventory holdings of such remains and objects and work with appropriate Indian Tribes and Native Hawaiian organizations to reach agreement on repatriation or other disposition of these remains and objects. (2) These regulations provide a systematic process for the disposition and repatriation of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony under the Native American Graves Protection and Repatriation Act (Act) of November 16, 1990. The Act recognized the rights of lineal descendants, Indian Tribes, and Native Hawaiian organizations in Native American human remains or cultural items subject to this part. Consistent with the Act's express language and Congress's intent in enacting the statute, these regulations require museums and Federal agencies to complete timely dispositions and repatriations through consultation and collaboration with lineal descendants, Indian Tribes, and Native Hawaiian organizations. In implementing this systematic process, museums and Federal agencies must defer to the customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations.

Subsection 10.1 (d) of the proposed rule requires museums and Federal agencies to care for, safeguard, and preserve all human remains and other cultural items in their custody, including to the maximum extent possible: consult, collaborate, and obtain consent on the appropriate treatment, care, or handling of human remains or cultural items; incorporate and accommodate customs, traditions, and Native American traditional knowledge in practices or treatments of human remains or cultural items; and limit access to and research on human remains or cultural items. We strongly support inclusion of this subsection.

Subsection 10.1 (h) of the proposed rule highlights that the United States district courts have jurisdiction over any action by any person alleging a violation of the Act, but does not reflect the statute's recognition of the U.S. Court of Federal Claims role in resolving specific matters as reflected at 25 U.S.C. 3001 (13). We request that this section be rewritten as follows:

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<sup>1</sup> H.R. Rept. No. 101-87, at 8 (1990).

(h) **Judicial jurisdiction.** The United States district courts have jurisdiction over any action by any person alleging a violation of the Act, and shall have the authority to issue such orders as may be necessary to enforce its provisions, including but not limited to the collection of civil penalties. The United States Court of Federal Claims has jurisdiction to determine if use of the term “right of possession” in a specific situation will result in a Fifth Amendment taking by the United States, in which event the “right of possession” shall be as provided under otherwise applicable property law.

**§10.2 Definitions for this part.**

Subsection 10.2 “consultation” in the proposed rule defines the term as “a process to seek consensus through the exchange of information, open discussion, and joint deliberations and by incorporating identifications, recommendations, and Native American traditional knowledge, to the maximum extent possible.” We strongly support this change.

NAGPRA defines the term “cultural item” to mean “human remains and” associated funerary objects, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony.<sup>2</sup> Subsection 10.2 “cultural item” specifically excludes human remains from the definition. We agree with the concerns raised by many Tribes objecting to considering human remains as cultural items, but also recognize that changing the statutory definition is a matter for Congress and beyond the Secretary’s regulatory discretion.

Subsection 10.2 “human remains” in the proposed rule defines the term as the “physical remains of the body of a Native American individual.” We recommend that the definition be expanded to include casts, replicas, and digital data derived from a Native American individual. The proposed rule also exempts museums and Federal agencies from including in their inventories human remains or portions of human remains “that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained.” This exemption is inconsistent with the statutory text which requires museums and Federal agencies to include all Native American human remains in their possession or control. Allowing museums and Federal agencies to predetermine if such remains were freely given or naturally shed and not report them in their inventories deprives Indian Tribes and Native Hawaiian organizations with necessary information. Only after all such remains are listed in the inventory should a museum or Federal agency be allowed to prove, on the record, that they were obtained with the voluntary consent of an individual or group with authority to alienate them. We recommend that this exemption be deleted from the definition of human remains. We request that the definition of human remains be revised as follows:

**Human remains means the physical remains of the body of a Native American individual, including casts, replicas, and digital data derived from a Native American individual. This term does not include human remains or portions of human remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained. When human remains are reasonably believed to be comingled with other material (such as soil or faunal remains), the entire admixture may be treated as human remains.**

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<sup>2</sup> 25 U.S.C. § 3001 (3).

Subsection 10.2 “possession or control” in the proposed rule defines the phrase as “having a sufficient interest in an object or item to independently direct, manage, oversee, or restrict the use of the object or item.” In the Act, when the terms “possession” and “control” are used together they are always linked by “or,” which clearly indicates that Congress considered the terms to have distinct and different meanings. Neither term is defined in the Act, but the common meaning of possession is closer to the new term defined in the proposed rule as “custody.” In the Act, the phrase “possession or control” is only used to define the scope of cultural items to be included in the summaries and inventories provided by museums and Federal agencies to Indian Tribes and Native Hawaiian organizations. Requiring museums and Federal agencies to provide information on all cultural items that they either have in their possession (have in their custody) or control (regardless of who has possession) ensures that Indian Tribes and Native Hawaiian organizations obtain a full range of information on all cultural items that may be repatriated. Importantly, the Act also provides museums and Federal agencies with a mechanism to exempt cultural items from repatriation if they can prove they have “right of possession.” We request revision of the regulation to establish separate definitions of control and possession to read as follows:

**Possession or Control** means having a sufficient interest in an object or item to independently direct, manage, oversee, or restrict the use of the object or item. A museum or Federal agency may have possession or control regardless of whether the object or item is in its physical custody. In general, custody through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.

**Custody Possession** means having an obligation to care for the object or item but not a sufficient interest in the object or item to constitute possession or control. In general, custody possession through a loan, lease, license, bailment, or other similar arrangement is not a sufficient interest to constitute possession or control, which resides with the loaning, leasing, licensing, bailing, or otherwise transferring museum or Federal agency.

Defining the terms in this way is consistent with Congressional intent that they mean different things and ensures Indian Tribes and Native Hawaiian organizations receive the fullest reporting of cultural items that they may be able to repatriate. We note that the proposed rule anticipates this situation by explicitly requiring museums to report collections from Federal lands that are in their possession.

Subpart 10.2 “tribal lands” in the proposed rule defines the term to include: “(1) All lands that are within the exterior boundaries of any Indian reservation; (2) All lands that are dependent Indian communities; and (3) All lands administered by the Department of Hawaiian Home Lands (DHHL) under the Hawaiian Homes Commission Act of 1920 (HHCA, 42 Stat. 108) and Section 4 of the Act to Provide for the Admission of the State of Hawai‘i into the Union (73 Stat. 4), including “available lands” and “Hawaiian home lands.” The preamble goes on to state that: “Comments to the 1995 final rule sought clarification regarding the application of NAGPRA to privately owned lands within the exterior boundaries of an Indian reservation. To address any potential conflict, the final rule codified language stating that the regulations will not apply to Tribal lands to the extent that any particular action authorized or required will result in such a taking of property. A review of the legislative history for the Act shows this concept does not

apply to the statute as enacted and therefore is removed from the definition of Tribal lands.” This is a major change which is inconsistent with the statutory language, long-standing regulatory interpretation, and recent litigation where the Department argued and prevailed a contrary interpretation of nearly identical statutory language.<sup>3</sup> We strongly object to this proposed change and request that the definition be revised to make clear that NAGPRA preempts application of any state or local ordinances regulating the discovery, excavation, or disposition of Native American cultural items within the exterior boundary of any Indian reservation.

We also note that the proposed regulations muddle the critical distinction in the Act between the “reasonable” and “preponderance of the evidence” standards. We request that the proposal be carefully reviewed to adhere to the requirements in the Act.

#### **Subpart B—Protection of Human Remains or Cultural Items on Federal or Tribal Lands** **§10.4 General.**

Section 3 of the Act establishes requirements for the discovery, excavation, or disposition of any Native American cultural items on Federal or Tribal lands, with the latter term defined to include “all lands within the exterior boundaries of any Indian reservation.”<sup>4</sup> Under current regulations, the Bureau of Indian Affairs has jurisdiction over the discovery, excavation, or disposition of any Native American cultural items on private lands within the exterior boundaries of any Indian reservation.<sup>5</sup> The proposed rule seeks to unilaterally transfer responsibilities for complying with these duties on Tribal lands to the Tribes. For permits, licenses, rights-of-way, or other authorizations on tribal lands, subsection 10.4 requires the Tribe, not the Bureau of Indian Affairs, to include provisions requiring persons responsible for the activity to notify the tribe of the discovery of human remains or other cultural items. For discoveries and excavations of Native American human remains and other cultural items on Tribal lands, subsection 10.5 and 10.6 require the Tribe, not the Bureau of Indian Affairs, to comply with the regulatory provisions. The fact that the proposed regulations include provisions and subsection 10.5 (c)(2) and 10.6 (a)(2) in which the Tribe may delegate these responsibilities to the Bureau of Indian Affairs makes it clear that the proposal seeks to unilaterally transfer jurisdiction from the United States to the Tribes by regulation with no consideration statutory authority or the Tribe’s wishes and the economic burden of this unilateral transfer of jurisdiction.

In addition, the proposed regulations completely ignore the implications of this unilateral transfer of jurisdiction to the Tribes, as it applies to private lands located within the exterior boundaries of Indian reservations.

Recent litigation involving the State of Oklahoma and the Department of the Interior provides some clarification of the implications of this proposal. On July 9, 2020, the Supreme Court issued its decision in *McGirt v. Oklahoma* which held in part that the Muscogee Reservation was never disestablished by Congress and, thus, constitutes “Indian country” under 18 U.S.C. § 1151(a).<sup>6</sup> A little over nine months later, the Office of Surface Mining Reclamation and

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<sup>3</sup> See *Oklahoma v. U.S. Dep’t of Interior*, No. CIV-21-805-F, \_\_\_ F. Supp. 3d \_\_\_, 2022 WL 16838032, at \*5-8 (W.D. Okla. Nov. 9, 2022).

<sup>4</sup> 25 U.S.C. § 3001 (15).

<sup>5</sup> 43 CFR § 10.3 (b)(1); 25 CFR § 262.

<sup>6</sup> *Oklahoma v. McGirt*, 140 S. Ct. 2452 (2020).

Enforcement (OSMRE), a part of the Department of the Interior, published a notice in the Federal Register to inform the public of the effects of *McGirt* on the jurisdiction of the Surface Mining Control and Reclamation Act (SMCRA) within the exterior borders of the Muscogee (Creek) Reservation.<sup>7</sup> The SMCRA defines jurisdiction of “Indian lands” with language similar to that used to define Tribal lands in NAGPRA -- “all lands within the exterior boundaries of any Indian reservation.”<sup>8</sup> The State of Oklahoma’s challenge of the OSMRE action was dismissed by the United States District Court for the Western District of Oklahoma on November 9, 2022, which found that the SMCRA preempts application of Oklahoma state laws regulating surface coal mining and reclamation activities within the exterior boundaries of the Creek Reservation; and the SMCRA and its implementing regulations designate OSMRE as the exclusive regulatory authority over surface mining and reclamation activities within the exterior boundaries of the Creek Reservation in the absence of an approved Tribal regulatory program.<sup>9</sup>

To date, the Bureau of Indian Affairs has not published a notice in the Federal Register to inform the public of the effects of *McGirt* on the jurisdiction of NAGPRA within the exterior borders of the Muscogee Reservation, or any other reservation. Instead, through this proposed rule the Department seeks to divest itself of whatever that jurisdiction is and transfer it unilaterally to the Tribes. We are greatly disappointed that while the Department strongly asserts Federal jurisdiction over mining on private lands within the exterior boundary of Indian reservations, it is by this proposal abandoning its responsibility to protect Native American burial sites and other cultural items disturbed by those activities. We strongly object to this approach and request that before any transfer of jurisdiction is attempted, the Bureau of Indian Affairs fulfill its trust responsibility to publish a notice in the Federal Register indicating that NAGPRA preempts application of any state or local ordinances regulating the discovery, excavation, or disposition of Native American cultural items within the exterior boundary of any Indian reservation, and that NAGPRA and its implementing regulations designate BIA as the exclusive regulatory authority over the discovery, excavation, and disposition of Native American cultural items within the exterior boundaries of any Indian reservation. Only after this necessary step is taken should transfer of that jurisdiction to the Tribes be contemplated.

#### **§10.5 Discovery.**

Table 1 to § 10.5 lists the appropriate official to report a discovery on various types of Federal or Tribal lands. The table states that for “Federal lands in Alaska selected but not yet conveyed to Alaska Native Corporations or groups” the appropriate official is the representative of the Bureau of Land Management, and the additional point of contact is the “Alaska Native Corporation or group.” The Alaska Native Claims Settlement Act defines “Native group” as “any tribe, band, clan, village, community, or village association of Natives in Alaska composed of less than twenty-five Natives, who comprise a majority of the residents of the locality.”<sup>10</sup> However, the term is functionally obsolete with the U.S.’s recognition of all tribes in Alaska. We

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<sup>7</sup> Loss of State Jurisdiction to Administer the Surface Mining Control and Reclamation Act of 1977 Within the Exterior Boundaries of the Muscogee (Creek) Nation Reservation in the State of Oklahoma, 86 Fed. Reg. 26,941 (May 18, 2021).

<sup>8</sup> “Indian lands means all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation, notwithstanding the issuance of any patent, and including rights-of-way, and all lands including mineral interests held in trust for or supervised by an Indian tribe.” 30 U.S.C. § 1291(9).

<sup>9</sup> *Oklahoma*, 2022 WL 16838032, at \*5-8.

<sup>10</sup> 16 U.S.C. § 1602 (d).

request the term be deleted here. In Alaska, roughly sixty percent of the land in the state is owned or controlled by the Federal Government. Additionally, almost no lands in Alaska qualify as “Tribal Lands” despite 229 Indian Tribes being located within the state. Accordingly, we request that the NPS include the appropriate Indian Tribe or Tribes as additional points of contact. Secondly, identification of the Bureau of Land Management as the “Federal agency with primary management authority” for all Federal lands in Alaska selected but not yet conveyed to Alaska Native Corporations is an error. While most selected but not yet conveyed lands are BLM lands, not all are. The Forest Service manages large tracts of land that have been selected by Alaska Native Corporations but not yet conveyed. The U.S. Fish and Wildlife Service may also manage small tracts of land that were selected but not yet conveyed. We request that this second cell be changed to read “Federal agency with primary management authority.”

Subsection 10.5 (c) of the draft outlines the requirements that the appropriate official must take to respond to a discovery of cultural items on Federal land, including ensuring that a reasonable effort has been made to secure and protect the cultural items and that any ground-disturbing activity in the area of the discovery has stopped. Use of the term “ground-disturbing activity” in this requirement seems to refer to the requirements in § 10.5 (b) which focus on the immediate cessation of intentional ground-disturbing activities such as construction, mining, logging, or agriculture. Left unaddressed is the common situation where the ground-disturbing activity is unintentional, such as natural erosion or wildfires which cannot be stopped solely by regulatory edict. We request that you change the first sentence of this subsection to state: “No later than 5 business days after receiving written documentation of a discovery, the appropriate official must ensure that a reasonable effort has been made to secure and protect the cultural items and that any ground-disturbing activity in the area of the discovery has stopped or, for unintentional ground-disturbances, adequately mitigated so as to prevent additional damage to the cultural item.”

There is also an important requirement in the current regulations that the draft proposal removes. Under the current regulations, the responsible Federal agency official is required to notify any known lineal descendant and likely affiliated Indian Tribes or Native Hawaiian organizations within three working days of receipt of written confirmation of a discovery and to initiate consultation. The draft proposal removes this requirement and allows the appropriate official to take actions regarding the discovered cultural items, including stabilizing or covering them, § 10.5 (c)(1), evaluating the potential need for excavating them, § 10.5 (d), and certifying that the ground-disturbing activity may proceed, § 10.5 (e), with no input from the lineal descendants and affiliated Indian Tribes and Native Hawaiian organizations. We strongly object to the removal of the consultation requirement and request the current regulatory consultation requirement be retained as the first point under § 10.5 (c). We also request that the certification that an activity may resume required at § 10.5 (d) be provided to all consulting parties at the same time it is sent to the person responsible for the ground-disturbing activity. This will provide effective notice to the consulting parties so they may decide whether they wish to challenge the appropriate official’s decision to allow the ground-disturbing activity to proceed. Lastly, the draft proposal removes the requirement that, following consultation, the Federal agency official must complete a written plan of action and execute the actions called for in it. We request that these requirements be added back into the proposal.

### **§10.6 Excavation.**

NAGPRA requires that Native American human remains and cultural items may be removed from “Tribal lands” and “Federal lands” “only if[] . . . such items are excavated or removed pursuant to a permit issued under section 470cc of title 16 [the Archaeological Resources Protection Act (ARPA)] which shall be consistent with this chapter[.]”<sup>11</sup> In Section 10.6 of the proposed rule, the NPS proposed to “clarify” that an ARPA permit is needed to excavate Native American human remains and objects on Tribal and Federal lands *only if* those Tribal and Federal lands are also “Indian lands” and “public lands” as defined under ARPA. In proposing this “clarification,” the NPS acknowledges that ARPA’s definition of “Indian lands” and “public lands” is narrower than NAGPRA’s corresponding definition of “Tribal lands” and “public lands.” To facilitate this “clarification,” the NPS proposes including new defined terms, “ARPA Indian lands” and “ARPA public lands,” neither of which are defined by NAGPRA. NATHPO strenuously objects to the inclusion of these terms and the NPS’s attempt to limit the scope and applicability of NAGPRA. not an acceptable approach to statutory interpretation.

NAGPRA statutorily defines “Tribal lands” as “(A) all lands within the exterior boundaries of any Indian reservation; [and] (B) all defendant Indian communities[.]”<sup>12</sup> The NAGPRA implementing regulations define the term identically.<sup>13</sup> The NPS does not propose redefining the term in this rulemaking. NAGPRA’s definition of “Tribal lands” is broad: “*all lands* within the exterior boundaries of any Indian reservation[]” means *all lands*, including both lands held in trust by the United States for any Indian tribe or individual Indian and Indian-owned *and* non-Indian-owned fee lands. Addressing the nearly identical definition of “Indian lands” used in SMCRA, the Western District of Oklahoma recently affirmed that “*all lands*, including mineral interests, within the exterior boundaries of any Federal Indian reservation[]”<sup>14</sup> means *all lands*, irrespective of ownership.<sup>15</sup> In affirming SMCRA’s definition of “Indian lands,” the court held that the State of Oklahoma’s authority to regulate surface coal mining operations within the exterior boundaries of certain Indian reservation, irrespective of who owned the lands, was preempted by federal law. Applying this same reasoning, NAGPRA’s definition of Tribal lands includes all fee lands located within the exterior boundaries of any Indian reservation. Nothing in NAGPRA’s legislative history suggests Congress intended NAGPRA’s definition of “Tribal lands” to be any less broad than SMCRA’s definition of “Indian lands.” Indeed, this broad reading of the definition of “Indian lands” furthers the very purpose of NAGPRA.

Under ARPA, “Indian lands” is defined as “lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States[.]”<sup>16</sup> As the NPS notes in its proposed rulemaking, this definition is narrower than NAGPRA’s definition of “Tribal lands” as it only includes trust lands and restricted fee allotments.

According to the NPS, this “clarification” is needed because the current regulatory framework could constitute a taking under the Fifth Amendment of the U.S. Constitution. In the NPS’s view,

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<sup>11</sup> 25 U.S.C. § 3002 (c)(1).

<sup>12</sup> 25 U.S.C. § 3001 (15)(A-B).

<sup>13</sup> See 43 C.F.R. § 10.2.

<sup>14</sup> 30 U.S.C. § 1291 (9) (emphasis added).

<sup>15</sup> *Oklahoma*, 2022 WL 16838032, at \*5-8.

<sup>16</sup> 16 U.S.C. § 470bb (4).



while NAGPRA prohibits the excavation of Native American human remains and cultural items on non-Indian fee lands within the boundaries of a reservation without an ARPA permit, ARPA's definition of "Indian lands" does not authorize the Bureau of Indian Affairs (presumably) to issue ARPA permits for excavations on such lands. Accordingly, without the ability to obtain an ARPA permit from the BIA, the landowner is prohibited from undertaking an excavation and developing their land because NAGPRA requires an (unobtainable) ARPA permit to do so. According to the NPS, this could constitute a Fifth Amendment taking. The NPS, however, is incorrect. No taking would occur under the current regulatory framework because the BIA (in this instance) possesses the authority to issue ARPA permits for such excavations.

NAGPRA specifically addresses this precise problem. The excavation of Native American human remains and cultural items from Tribal lands is prohibited unless "such items are excavated or removed pursuant to a permit issued under section 470cc of title 16 *which shall be consistent with this chapter*["]"<sup>17</sup> The "which shall be consistent with this chapter" language, which is seemingly overlooked by the NPS, is critical here. Since NAGPRA was enacted eleven years after ARPA, this provision should be read as modifying or amending ARPA to be consistent with NAGPRA when an agency issues an ARPA permit pursuant to NAGPRA. Read this way, when an agency issues a permit for the excavation of Native American human remains or cultural items pursuant to NAGPRA, it must follow the procedures set forth in ARPA; provided that where any inconsistencies between ARPA's provision and NAGPRA's provisions arise, ARPA's inconsistent provisions must be modified to be consistent with NAGPRA's provisions. Since ARPA's definition of "Indian lands" is inconsistent with NAGPRA's definition of "Tribal lands," for the purposes of issuing ARPA permits pursuant to NAGPRA, the "which shall be consistent with this chapter" language expands the BIA's authority to issue ARPA permits for the excavation of Native American human remains and cultural items on non-Indian fee lands within the boundaries of any Indian reservation. Indeed, the current NAGPRA regulations specifically recognize that the BIA is authorized to issue ARPA permits in this circumstance.<sup>18</sup>

Congress was clearly aware of ARPA's limited definition of "Indian lands" when it enacted NAGPRA and nevertheless chose to define "Tribal lands" to be far more inclusive. Congress's inclusion of the "which shall be consistent with the chapter" language evidences its awareness of this conflict and its intent for ARPA's inconsistent provisions—including its definition of "Indian lands"—to be modified to be consistent with NAGPRA's provisions when issuing permits to excavate Native American human remains and cultural items. The NPS's proposed "clarification" is unlawful as it would restrict NAGPRA's applicability to lands not intended by Congress. Moreover, it would fundamentally undermine the purpose of NAGPRA, which is to protect Native American human remains and cultural items. Accordingly, NATHPO objects to this "clarification," the NPS's attempts to limit the applicability of NAGPRA, and the inclusion of the new ARPA definitions. The NPS's proposed changes to the regulations to restrict NAGPRA's permit requirement for excavations on "Tribal lands" to "ARPA Indian lands" violate NAGPRA, exceed the NPS's rulemaking authority, and are unlawful.

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<sup>17</sup> 25 U.S.C. § 3002 (c)(1) (emphasis added).

<sup>18</sup> 43 C.F.R. § 10.3 (b)(1) ("Regarding private lands within the exterior boundary of and Indian reservation, the Bureau of Indian affairs (BIA) will serve as the issuing agency for permits required under the Act.").

NATHPO is similarly concerned with the NPS's proposal to limit NAGPRA's scope to "public lands" as that term is defined under ARPA, instead of "Federal lands" defined by NAGPRA. NAGPRA defines "Federal lands" as "any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971[.]"<sup>19</sup> ARPA, on the other hand, has defines "public lands" as "(A) lands which are owned and administered by the United States as part of—(i) the national park system, (ii) the national wildlife refuge system, or (iii) the national forest system; and (b) all other lands the fee title to which is held by the United States[.]"<sup>20</sup>

On the surface, these two definitions seem to include substantially the same scope of lands. Despite their similarities, however, in the proposed rulemaking, the NPS states that ARPA's definition of "public lands" is narrower than NAGPRA's definition of "Federal lands." NATHPO is deeply concerned about these statements from the NPS. While on the surface, these definitions are not substantially different, some courts have interpreted "public lands" to exclude lands that have been reserved for specific governmental purposes, such as military reservation, notwithstanding its broad language.<sup>21</sup> NATHPO is concerned that the NPS's statement that ARPA's definition is narrower and the proposed limitation of NAGPRA's permit requirement to "ARPA public lands" is an attempt by the NPS to limit NAGPRA applicability to exclude certain federally-owned or -controlled lands, specifically lands managed and owned by the U.S. Department of Defense. If this is the case, NATHPO strenuously objects to this. Such a limitation—while being unlawful for the reasons described above regarding "Tribal lands" and "Indian lands"—would potentially exclude NAGPRA's applicability from the millions of acres controlled by the DOD and specifically exclude NAGPRA's applicability to the Carlisle Boarding School. These outcomes would not only be unlawful but unacceptable. The NPS's proposed changes to the regulations to restrict NAGPRA's permit requirement for excavations on "Federal lands" to "ARPA public lands" violate NAGPRA, exceed the NPS's rulemaking authority, and are unlawful.

### **§10.7 Disposition.**

We are shocked to see that § 10.7 (b) and § 10.7 (c) of the proposed rule have removed the current requirement for publication of a notice of intended disposition to ensure due process. Identifying all lineal descendants and selecting the most appropriate individual descendant is a notoriously difficult task since, unlike with Indian Tribes, there is no set list equivalent to the list of Federally recognized Tribes from which to begin the search. In determining probate, the Office of Hearings and Appeals relies on a highly trained administrative law judge and public notice at least 21 days prior to any probate proceedings. It is unconscionable that the draft would propose to eliminate the notice of intended disposition when the same type of task for our precious ancestors is being done by a land manager unfamiliar with this complicated process. We request the current notice requirements be retained in § 10.7 (b) and § 10.7 (c).

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<sup>19</sup> 25 U.S.C. § 3001 (5).

<sup>20</sup> 16 U.S.C. § 470bb (3).

<sup>21</sup> See, e.g., *Oklahoma v. Texas*, 258 U.S. 574 (1922).

## **Subpart C—REPATRIATION OF HUMAN REMAINS OR CULTURAL ITEMS BY MUSEUMS OR FEDERAL AGENCIES**

### **§10.8 General.**

Subsection 10.8 (c) proposes a new regulatory requirement that no later than 395 days after the publication of the final rule in the Federal Register, each museum must submit a statement describing Federal agency holdings or collections in its custody to the controlling agency and to the National Park Service. We agree in general with this requirement but request, consistent with our previous recommendation, changing the term “custody” to “possession.”

Subsection 10.8 (d) proposes a new regulatory requirement that no later than 395 days after the publication of the final rule in the Federal Register, each museum must submit a statement to the Manager, National NAGPRA Program describing holdings or collections for which it cannot identify any person, institution, State or local government agency, or Federal agency with possession or control. We agree in general with this requirement but have several requested changes. First, consistent with our previous recommendation, we request changing the term “custody” to “possession.” Second, we request that the statement be broadly construed to include all cultural items in the possession of the museum excepting those controlled by a Federal agency which are already addressed in Subsection 10.9 (c). Third, it is not clear from the subsection as written how the summary advances the identification of human remains and other cultural items that a lineal descendant, Indian Tribe, or Native Hawaiian organization might wish to repatriate. We recommend revising the subsection as follows:

**(d) Museums with ~~custody~~possession of other holdings or collections. No later than [DATE 395 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], each museum that has custody of a holding or collection that contains Native American human remains or cultural items that are in the control another person, institution, State or local government, or and for which it cannot identify any person, institution, State or local government agency, or Federal agency with possession or who has control of the holding or collection, must submit a statement describing that holding or collection to the Manager, National NAGPRA Program. Within 30 days of receipt, the Manager, National NAGPRA Program, must post the summaries on the National NAGPRA Program website.**

One critical element of the Act that applies to the repatriation of cultural items from museum holdings or collections is the availability of Federal grants. Consistent with 25 U.S.C. 3003 (b)(2) and 3008, we request addition of a new subsection as §10.8 (f) to read as follows:

**The Secretary may make grants to Indian Tribes and Native Hawaiian organizations for the purpose of assisting in the repatriation of cultural items, and to museums for the purpose of assisting in conducting the inventories and identification required by this section. Such grants shall not be used for the initiation of new scientific studies of human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.**

We offered a similar request in our September 10, 2021, comments on the draft proposed rule. The Department's response indicates that the Notice of Funding Opportunity for NAGPRA Consultation/Documentation Grants currently allows use of grants authorized under 25 U.S.C. 3008 for scientific study and destructive analysis,<sup>22</sup> in apparently violation of the NAGPRA's clear statutory restriction.

***§10.9 Repatriation of unassociated funerary objects, sacred objects, and objects of cultural patrimony.***

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

***§10.10 Repatriation of human remains and associated funerary objects.***

Subsection 10.10 (b)(3) stipulates that "A written request to consult may be submitted at any time before the publication of a notice of inventory completion under paragraph (e) of this section." The notice of inventory completion ensures that any and all possible consulting parties are aware of an impending repatriation. Using the notice as a cut off for further consultation is certainly at odds with that purpose. We request that the provision be revised to read: "A written request to consult may be submitted at any time before the issuance of a repatriation statement under paragraph (h) of this section."

Subsection 10.10 (c)(4) reiterates the statutory requirement that a museum or Federal agency must, upon request from a consulting party, provide access to records, catalogues, relevant studies, or other pertinent data related to human remains and associated funerary objects without including the statutory restriction at 25 U.S.C. 3003 (b)(2). We request that you insert the following sentence at the end of that paragraph:

**Nothing in these regulations may be construed to be an authorization for the initiation of new scientific studies of human remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.**

We raised this issue in our September 10, 2021, comments on the draft proposed rule and we are incredulous that the Department has again chosen to ignore this statutory restriction. In § 10.10 (d)(6), it is unclear exactly what limitations 18 U.S.C. 1170 (a) places on the requirement in the proposal allowing a museum or Federal agency that acquires human remains or associated funerary objects from another museum or Federal agency to rely upon the latter's inventory for purposes of compliance.

Subsection 10.10 (k) outlines requirements for a museum or Federal agency to voluntarily transfer or reinter human remains and associated funerary objects with no connection to a present-day Indian Tribe or Native Hawaiian organization. Subsection 10.10 (k)(1)(i)(B) expands this option to include voluntary transfers to an Indian group that is not federally recognized but

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<sup>22</sup> Response to Tribal Consultation on revisions to 43 CFR Part 10, Native American Graves Protection and Repatriation Act Regulations, Prepared December 2021, Updated August 2022, at 42.

has a relationship to the human remains and associated funerary objects. We request that such transfers only proceed after public review by the review committee and with the concurrence of the Secretary. Subsection 10.10 (k)(2) lists the required contents of the notice of proposed transfer or reinterment. We request that for reinterments of human remains and associated funerary objects according to applicable laws and policies, the notice specifically identify those laws and policies.

***§10.11 Civil penalties.***

Subsection 10.11 (a)(1) requires that any person filing an allegation include their full name, mailing address, telephone number, and (if available) email address. Individuals in a position to make well founded allegations of failure to comply are often current or former employees of the non-compliant museums and have a well-founded fear of retaliation if their personal information is divulged. Individuals in a position to make well founded allegations of failure to comply may also not be to receive mail, phone calls, or email in a confidential manner that protects them from retaliation. The proposed requirement places more scrutiny on the person making the allegation than on the non-compliant museum and seems to be specifically designed to chill the number of allegations that the Secretary will accept. We request at a minimum that the word “must” in this requirement be replaced with “should.” We are also concerned that the position to which allegations of failure to comply are directed, the Manager, National NAGPRA Program, is also responsible to managing millions of dollars of grants awarded directly to museums against which allegations may be made. To resolve this apparent conflict of interest, we request that the regulations establish an online system for individuals to submit anonymous allegations, perhaps administered through the Department Office of the Inspector General.

Subsection 10.11 (b) requires the Secretary to review all allegations within 90 days of receipt. We strongly support this requirement.

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

Subsection 10.11 (e)(1) allows a museum to seek an informal discussion with the Secretary regarding the determination that it has failed to comply with Act, or of the penalty assessed. Information from the National NAGPRA Program FY2022 Annual Report indicates that this type of discussion often results in the Department waiving the penalty. In order to assure oversight of this process, we request that these informal discussions include representatives of the aggrieved lineal descendant, Indian tribe, or Native Hawaiian organization, and the individual alleging the failure to comply.

## Subpart D—REVIEW COMMITTEE

### **§10.12 Review Committee.**

Subsection 10.12 (a) requires that all findings and recommendations made by the Review Committee will be published in the Federal Register within 90 days of making the finding or recommendations. We recommend that subsection be revised to require publication the Committee's findings and recommendations in the Federal Register within 30 days of making the finding or recommendation.

One issue that is not addressed in the proposed rule relates to the review committee's responsibility to submit an annual report to the Congress on the progress made and any barriers encountered in implementing the Act during the previous year. While the review committee has regularly prepared and approved an annual report, barriers have been encountered in having the National Park Service submit the report to the Congress. The review committee approved its report to Congress for FY 2018 on April 22, 2019, but the National Park Service did not submit it to the Congress until January 2020, nine months later. The Review Committee's Report to Congress for FY2019 was finalized on October 3, 2019, but the Department did not send it to the Congress for 26 months. Similarly, the Committee's combined Report for FY2020 and FY2021 was withheld from the Congress for nearly seven months. In order to make the review committee's reports to the Congress regular and timely, we request adding the following subsection:

**Annual Report to the Congress. The Review Committee shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing the Act section during the previous year. The reporting period shall be the Federal fiscal year from October 1-September 30, and the report shall be submitted to the Congress no later than December 31 of the following fiscal year.**

## Information Collection Requirements

The preamble to the proposed rule asks four specific questions regarding the information collection requirements to which we offer the following comments and suggestions:

***a. Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;***

We believe that the collection of information outlined in the proposed regulation is necessary for the proper performance of the Secretary of the Interior's responsibilities under the Native American Graves Protection and Repatriation Act and that the collection of information will have practical utility.

***b. The accuracy of the estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;***

We have reviewed the estimates of the burden for this collection of information provided by the National Park Service and believe they significantly underestimate the actual costs.<sup>23</sup> The methodology used by the National Park Service identifies many separate information

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<sup>23</sup> National Park Service, Cost-Benefit and Regulatory Flexibility Threshold Analyses: Native American Graves Protection and Repatriation Act Proposed Revisions. February 2022, Updated June-September 2022

requests, but then systematically underestimates the amount of time each typically takes. There is no indication of what data was relied upon in coming up with these estimates. Similarly, the National Park Service's estimate excludes the burden on Indian Tribes and Native Hawaiian organizations. In order to obtain the benefit outlined by NAGPRA, that is the repatriation of their ancestral remains and cultural items, Indian Tribes and Native Hawaiian organizations are compelled by the regulations to obtain, maintain, retain, report, or publicly disclose information to third party museums and Federal agencies. The burden to Indian Tribes and Native Hawaiian organizations must be included.

We have also reviewed the burden estimates prepared by Dr. C. Timothy McKeown which we included in our December 16, 2022 submission to the Office of Management and Budget. Dr. McKeown's estimates, while not breaking the NAGPRA process into individual information requests, uses actual data from grant proposals prepared by museums and Indian Tribes and approved by the National Park Service to estimate the real burden of complying with NAGPRA, and projects those estimates forward given the conditions outlined by the proposed rule. We find his estimates compelling, particularly his estimate that the burden on Indian Tribes and Native Hawaiian organizations to obtain the remains of their ancestors is likely to be at least \$43 million over 30 months, or approximately \$17.2 million per year.

One particular proposal where the costs are ignored is the proposal in Subpart B to unilaterally transfer all responsibility for complying with the excavation and discovery provisions of the Act on Tribal lands from the Bureau of Indian Affairs to each individual Tribe. Under the current regulations, compliance with the excavation and discovery provisions on Tribal lands is assigned to the Bureau of Indian Affairs and is carried out by a network of Federal employees at the GS-12 level or higher at the agency, regional office, and headquarters office. Transferring these responsibilities from the Bureau of Indian Affairs to individual Tribes means that each Tribe will need to have at least one staff person dedicated to these duties, and some large reservations (particularly those with large numbers of private inholdings within the exterior boundaries of their reservations), will need several additional staff to fulfill these new responsibilities. The loaded rate (salary plus benefits) for one mid-range GS-12 is \$115,000 per year, and there are currently 345 Indian Tribes with Tribal trust lands (or eligible to have Tribal trust lands, i.e. not in Alaska) that under the proposal will be unilaterally required to implement the Subpart B requirements. We estimate that the total cost to for tribes implement this proposal will be nearly \$40 million per year, which will likely need to be distributed based in part on the total amount of land within the exterior boundary of each reservation. Please note that this proposed unilateral shift of responsibility is very different than the voluntary shift of responsibilities under the Indian Self-Determination and Education Assistance Act or the National Historic Preservation Act where Tribes may apply to assume Federal responsibilities fully knowing what resources will be made available. We request that the unilateral transfer of these responsibilities from the Bureau of Indian Affairs to the Tribes proposed in Subpart B not be implemented until the necessary funding stream has been established, or the transfer is made voluntary.

***c. Ways to enhance the quality, utility, and clarity of the information to be collected;***

We have provided our recommendations on ways to enhance the quality, utility, and clarity of the specific requirements above. However, we have noticed that in oral presentations, National Park Service officials have consistently downplayed the importance of consultation

and the need for accurate reporting that does not appear be consistent with the text of the proposed rule itself.

- d. How the agency might minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of response.**

Under the proposed rule, all museums and Federal agencies will be required to complete a new or revised inventory of all human remains and associated funerary objects in their possession or control within 30 months of publication of the final rule. One of the most complex tasks required will be determining geographic territory based on an extensive list of government legal documents, including: treaties sent by the President to the United States Senate for ratification; Acts passed by Congress; Executive Orders; treaties between a foreign or colonial government and an Indian Tribe signed before the establishment of the United States Government or prior to the land becoming incorporated in the United States; other Federal documents or foreign government documents providing information that reasonably shows aboriginal occupation; or intertribal treaties, diplomatic agreements, and bilateral accords between and among Indian Tribes. Reviewing and making determinations based on this plethora of legal documents is not the typical job of museum professionals and is best done by legal professionals of the actual parties involved in the agreements. One way to minimize the burden of the collection of information would be for the Department of the Interior, in consultation with Indian Tribes, to prepare a single online source that will identify which Tribes are geographically affiliated with specific locations. The Department of the Interior is the most logical place for this source to be located because of Secretary's responsibility for both implementing NAGPRA and ensuring the government's trust responsibility to Indian Tribes.

NATHPO appreciates the opportunity to work with the Administration to ensure that Tribal voices are heard and considered in the development of regulations, policies, and actions to support American Indian, Alaska Native, and Native Hawaiian cultures, heritage, and practices, including the basic human right of repatriating Native ancestors, funerary objects, sacred objects, and objects of cultural patrimony.

Sincerely,

A handwritten signature in black ink that reads "Valerie J. Grussing". The signature is written in a cursive, flowing style.

Valerie J. Grussing, PhD  
Executive Director