



E.O. 12866 Meeting with the
Office of Information and Regulatory Affairs, Office of Management and Budget
November 3, 2023

Representing NATHPO:

- Valerie Grussing, Executive Director, NATHPO
- Wesley Furlong, Senior Staff Attorney, Native American Rights Fund
- C. Timothy McKeown, Repatriation Advisor (pro bono)
- Ted Monson, Government Affairs, NATHPO
- Tamara St. John, Sisseton-Wahpeton Oyate
- Dianne Desrosiers, Tribal Historic Preservation Officer, Sisseton-Wahpeton Oyate

Materials Provided:

- Memo (7-8-1998) from Assistant Secretary for Indian Affairs Kevin Gover to DOI Solicitor regarding Ownership of Archaeological Collections Recovered from Indian Trust Lands Under Permits Issued Pursuant to the Antiquities Act of 1906
- NATHPO Comments on FY 2025 Tribal Budget Consultation (9-29-2023)
- NATHPO Comments on RIN No. 1024-AE17: Proposed Rule, Curation of Federally-Owned and Administered Archeological Collections (2-11-2015)
- Memo from C. Timothy McKeown to DOI regarding RIN No. 1024-AE19: Proposed Rule, 43 CFR 10 NAGPRA (1-31-2023)
- NATHPO Comments on RIN No. 1024-AE19: Proposed Rule, 43 CFR 10 NAGPRA (1-31-2023)
- FY2023 Report to Congress of the Native American Graves Protection and Repatriation Review Committee (marked as draft, approved unanimously by the review committee on November 1, 2023).

NATHPO greatly appreciates the opportunity to participate in this rulemaking and provide additional information to inform OIRA's review. NATHPO is the only national organization devoted to supporting Tribal historic preservation programs. Founded in 1998, NATHPO is a 501(c)(3) non-profit membership association of Tribal government officials who implement federal and Tribal preservation laws. NATHPO empowers Tribal preservation leaders 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.

Below are the four key points we elucidated during our November 3, 2023 meeting, as well as one additional point we did not have time to cover. Please reach out to us at any time for additional information or clarification.

Cost of repatriation to tribes:

- NATHPO reviewed the estimates of the burden for this collection of information provided by the National Park Service and we believe they significantly underestimate the actual costs. The methodology used by the National Park Service identifies many separate information requests,

but then systematically underestimates the amount of time each typically takes. There is no indication of what empirical data was relied upon in coming up with these estimates. The National Park Service's estimates largely exclude the burden on Indian Tribes and Native Hawaiian organizations.

- NATHPO reviewed and adopted by reference the burden estimates Dr. McKeown submitted to the Office of Management and Budget on December 16, 2022. These empirically based estimates were drawn from NAGPRA grant applications submitted by museums and Tribes which were reviewed, approved, and monitored by the Department of the Interior.
- For the proposed repatriation provisions, which require action within a 30-month period, Dr. McKeown estimated:
 - the cost to museums at a minimum of \$48.4 million over 30 months, or approximately \$19.3 million per year. The National Park Service estimated that the annual total cost to all museums would be \$223,304. (Publicly available documents received by the NAGPRA review committee estimate that the proposed rule will cost Indiana University \$3 million per year; University of Kentucky \$296,000 per year; University of Missouri \$187,699 per year; Field Museum \$666,630 per year; U.S. Forest Service \$16 million per year; and the Corps of Engineers \$2.5 million per year).
 - the cost to Tribes at a minimum of \$43 million over 30 months, or approximately \$17.2 million per year. As NATHPO recently explained to OMB Director Young, the proposed rule will require Tribes to engage within 30 months from the effective date of the rule, or permanently lose their rights to reclaim their ancestors. We requested she include \$17.2 million in NAGPRA grant funding for Tribes in the Administration's FY2025 budget.
- Separate estimates provided in the NATHPO comments to the proposed rule estimated that transferring the excavation and discovery responsibilities from the Bureau of Indian Affairs to individual Tribes will cost nearly \$40 million each year for staff only.
- NATHPO is supportive of the overall intent of the proposed rule, but the Administration needs to be honest about the costs and ensure that resources are made available to Tribes, museums, and Federal agencies to ensure its success.
- In its FY2023 Report to Congress, the Native American Graves Protection and Repatriation Review Committee noted the vast disparity between the Department's estimated costs and actual estimates from Tribes and museums and requested that the Congress have the Government Accountability Office research the issue (Barriers to Overcome #2, Recommendations #4A and 4B).

Unilateral shift of NAGPRA responsibilities from BIA to Tribes:

- Section 3 of the NAGPRA 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."
- 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.
- 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 of the proposed rule would require 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 of the proposed rule would 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 of statutory authority, the Tribe's wishes, and the associated economic burden.
- The Indian Self Determination and Education Assistance Act (PL 93-638) already provides Tribes with a mechanism to negotiate assumption of these duties from the Bureau of Indian Affairs (BIA) with the necessary resources. One of the reasons that most Tribes do not negotiate to assume repatriation duties is that the BIA is inadequately funded.
- The proposed regulatory provision is clearly a ham-handed way of unilaterally dumping the responsibilities on the Tribes without any resources, and circumventing provisions of the Self-Determination Act.
- NATHPO estimates that transferring the excavation and discovery responsibilities from the Bureau of Indian Affairs to individual Tribes will cost nearly \$40 million each year for Tribal staff only.

ARPA and NAGPRA on Indian and Federal lands

- Section 3 (c) of NAGPRA requires that the excavation and removal Native American human remains and cultural items from Federal or Tribal lands proceed 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." Section 2 (5) of NAGPRA defines Federal lands as "any land other than tribal lands which are controlled or owned by the United States..." and Section 2 (15)(A) of NAGPRA defines Tribal lands to include "all lands within the exterior boundaries of any Indian reservation..." 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.
- NAGPRA's current implementing regulations take these statutory requirements on their face. 43 CFR 10.3 (b)(1) requires that excavation or removal of Native American human remains and cultural items from any Federal land and any Tribal land may only proceed following the requirements of ARPA. "Regarding private lands within the exterior boundaries of any Indian reservation, the Bureau of Indian Affairs (BIA) will serve as the issuing agency for any permits required under the Act."
- Section 10.6 of the proposed rule attempts 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 NPS's bizarre statutory interpretation using a provision of general statute from 1979 to limit the scope of a specific and clear direction in NAGPRA from 1990 which states that all ARPA permits issued "shall be consistent with this chapter."
- Regarding NAGPRA's definition of "tribal lands" which includes "all lands within the exterior boundaries of any Indian reservation," the Federal District Court for the Western District of

Oklahoma recently affirmed that a nearly identical definition of “Indian lands” used in Surface Mining Control and Reclamation Act (SMCRA) includes all lands, irrespective of ownership. 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[.]” 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, 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[.]” 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.
- 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.

- 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[.]” ARPA, on the other hand, 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[.]”
- 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.
- 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 Indian Industrial 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.
- In its FY2023 Report to Congress, the Native American Graves Protection and Repatriation Review Committee expressed concern about the reported lack of compliance by federal agencies with the excavation and discovery provisions of NAGPRA and has asked Congress to have the Government Accountability Office research the issue (Recommendation #2B).

Carlisle and the Army:

- NAGPRA’s excavation and discovery provisions (Section 3), apply to all Federal lands.
- The Army has refused to follow these provisions at Carlisle, and perhaps elsewhere.
- The Army’s approach has caused confusion and chaos, including limited consultation with Tribes, no plan of action, no ARPA compliance, no notice of intended disposition.
- The proposed regulations reinforce this approach by removing the required notice of intended disposition of any remains to lineal descendants, a determination which is inherently more complicated than determining cultural affiliation.

- The notice of intended disposition requirement should apply to any Native American human remains removed from any federal lands, and the White House should direct the Secretary of the Army to comply with NAGPRA.
- In its FY2023 report to Congress, the Native American Graves Protection and Repatriation Review Committee identified the Army's lack of compliance with Section 3 of NAGPRA as an obstacle to implementation of the statute and asked the Congress to have the Government Accountability Office to investigate failures to comply with those provisions (Barriers to Overcome #1, Recommendation #2B).

Antiquities Act collections:

- NATHPO is concerned that the proposed regulations largely sidestep the status of collections removed from Federal lands between 1906 and 1978 pursuant to permits issued under the Antiquities Act.
- We are aware the former Assistant Secretary for Indian Affairs Kevin Gover sought legal advice to affirm that antiquities removed from Indian lands during that period were and remain under the control of the respective Indian Tribe.
- We understand that the Department of the Interior, Office of the Solicitor has been working on this legal advice for many years.
- We recommend that this issue should finally be resolved expeditiously, and that legal advice should be incorporated into these regulations.