



## SOCIETY FOR AMERICAN ARCHAEOLOGY

### Implementation of Revised NAGPRA Regulations Fact Sheet

#### **Overall/Introduction**

- [Final rule](#) for the implementation of the Native American Graves Protection and Repatriation Act (NAGPRA) was published on Wednesday, December 13, 2023, and goes into effect January 12, 2024
- The revision provides a systematic process for returning Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony to lineal descendants, Indian Tribes, and Native Hawaiian Organizations in museum and federal collections and from federal and tribal lands
- The regulation is clearly delineated in four subparts to address (1) general information, (2) protection of human remains or cultural items on federal or tribal lands, (3) repatriation of human remains or cultural items by museums or federal agencies, and (4) review committee
- Rule emphasizes deference to the Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian Organizations
- Regulation advocates for the protection of sensitive information from disclosure to the general public. Be aware of state public records laws, and be mindful of documentation processes during consultation
- Document removes culturally unidentifiable process of bringing a request for disposition to the review committee and, by extension, removes rights for non-federally recognized tribes

#### **Subpart A—General**

##### Section 10.1 Introduction

- Requires deference to the Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian Organizations
- Requires action by institutions that receive federal funds (museums), federal agencies, Indian Tribes on tribal lands, and the State of Hawaii Department of Hawaiian Home Lands (DHHL)
- Applies to all museums, federal agencies, and the DHHL with regard to disposition and repatriation of NAGPRA human remains and cultural items
- Requires museums, federal agencies, and the DHHL to adhere to a standard “Duty of Care” to care for, safeguard, and preserve human remains and cultural items as determined through consultation with lineal descendants, Indian Tribes, or Native Hawaiian Organizations
  - Pertains to appropriate storage, treatment, or handling of human remains and cultural items

- Incorporates and accommodates Native American traditional knowledge in the storage, treatment, or handling of human remains and cultural items
- Requires institutions to obtain free, prior, and informed consent prior to allowing any exhibition of, access to, or research on human remains or cultural items
- Defines research to include, but not be limited to, any study, analysis, examination, or other means of acquiring or preserving information about human remains or cultural items
- Requires delivery of certain written documents by museums, federal agencies, and the DHHL
- Requires deadlines for specific actions by museums, federal agencies, and the DHHL
- Irrevocably waives a lineal descendant's, Indian Tribe's, and Native Hawaiian Organization's right to make a claim or a request for repatriation of human remains or cultural items once written statements for transfer/reinterment or repatriation is sent to the Manager, National NAGPRA Program

## Section 10.2 Definitions

- Added 15 new definitions (Ahupua'a, Appropriate Official, ARPA, ARPA Indian Lands, ARPA Public Lands, Assistant Secretary, Consultation, Cultural Items, Custody, Holding or Collection, Indian Tribe, Native American Traditional Knowledge, Right of Possession, Tribal Lands of a Native Hawaiian Organization, United States)
- Definitions of note:
  - Consultation: Provides a definition for consultation to mean the exchange of information, open discussion, and joint, good faith deliberations to seek, discuss, and consider the views of all parties; strive for consensus, agreement, or mutually acceptable alternatives; and enable meaningful consideration of Native American traditional knowledge
  - Cultural Affiliation: Makes clear that cultural affiliation can be made based on both a clear (based on information available) and reasonable (based on geographical location or acquisition history) connection of shared group identity
  - Custody: Clarifies that custody means having an obligation to care for an object or item but not a sufficient interest to constitute possession or control
  - Discovery: Applies to federal and tribal lands after November 16, 1990, regarding the intentional or inadvertent action *without* a written authorization
  - Excavation: Applies to federal and tribal lands after November 16, 1990, regarding the intentional or inadvertent action *with* a written authorization
  - Holding or Collection: Clarifies that a museum or federal agency is required to report on holdings or collections that may contain NAGPRA human remains and cultural items. Of particular note is the accumulation of one or more items for forensic purposes as well as for temporary purposes such as exhibition
  - Human Remains: Expands definition of human remains. Of particular note is the identification of objects that incorporate human remains as human remains. The exception are those objects incorporating human remains that are identified as a funerary, sacred, or cultural patrimony objects
  - Native American Traditional Knowledge: Native American traditional knowledge is to be considered expert opinion. It is the knowledge, philosophies, beliefs, traditions, skills, and practices that are developed, embedded, and often

safeguarded by or confidential to individual Native Americans, Indian Tribes, or the Native Hawaiian community

- Receives Federal Funds: Additional ways in which a “museum” receives federal financial assistance has been updated and includes cooperative agreement; use of federal facilities, property, or services; or other arrangement involving the transfer of anything of value for a public purpose. Of note is that cultural resource management firms, who were not subject to NAGPRA before but who received federal COVID-19 economic relief funding (i.e., Paycheck Protection Program [PPP]) loans, are now subject to NAGPRA compliance for any holding or collection in their custody that contains Native American human remains and NAGPRA cultural items

### Section 10.3 Determining Cultural Affiliation

- Cultural affiliation is based on a reasonable connection determined by available information including information provided by an Indian Tribe or Native Hawaiian Organization
- Confirms that cultural affiliation
  - Does not require exhaustive studies or additional research
  - Does not require continuity through time
  - Is not precluded solely because of reasonable gaps in the information available
- A museum, federal agency, or the DHHL must undertake three steps to determine cultural affiliation: (1) collect information, (2) identify required criteria, and (3) make a determination of cultural affiliation
- Items of note include
  - The 10 types of information are the same, and one or more are equally relevant
  - Native American traditional knowledge is considered other relevant information or expert opinion
  - A lack of any type of information does not preclude a determination of cultural affiliation. One type of information may be used when no other relevant information is available including geographic location or acquisition history
  - Cultural affiliation may be with more than one Indian Tribe or Native Hawaiian Organization
  - Requests from two or more lineal descendants, Indian Tribes, or Native Hawaiian Organizations that agree to work together is considered one claim
  - For competing claims or requests, a preponderance of evidence should be considered to determine a stronger relationship of shared group identity in the priority order provided

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

### Section 10.4 General

- Law applies to Indian Tribes, Native Hawaiian Organizations, federal agencies, and the DHHL with responsibility to federal or tribal lands
- Any permit, license, lease, right-of-way, or other authorization issued for an activity on federal or tribal lands must include a requirement to comply with NAGPRA Subpart B
- New requirements for reporting, authorization, and disposition

- The federal agency or DHHL is required to have a plan of action for discoveries and excavations of human remains or cultural items made in consultation with lineal descendants, Indian Tribes, or Native Hawaiian Organizations
- A plan of action may be included in a broader Comprehensive Agreement for all land management activities created in consultation with lineal descendants, Indian Tribes, or Native Hawaiian Organizations
- The federal agency or DHHL is required to prepare a record of consultation
- The federal agency is required to publish a notice of intended disposition and complete disposition

#### Section 10.5 Discovery

- Report, response, documentation, and disposition requirements and deadlines
  - Report immediately on discovery, secure human remains and cultural items, cease activity
  - Provide written documentation no later than 24 hours
  - Respond no later than three days from receiving written documentation
  - Approve and sign a plan of action in consultation no later than 30 days from the written documentation
  - Certify when activity may resume no later than 30 days from receiving the written documentation
- Indian Tribes may delegate responsibility for discoveries on tribal lands to the Bureau of Indian Affairs or the federal agency with primary management authority
- The DHHL has responsibility on tribal lands of a Native Hawaiian Organization unless a Native Hawaiian Organization agrees to be responsible for discoveries on its tribal land

#### Section 10.6 Excavation

- Permits, written authorization, and plan of action are required for the excavation of human remains and cultural items on federal or tribal lands

#### Section 10.7 Disposition

- A priority for disposition to a lineal descendant, Indian Tribe, or Native Hawaiian Organization must be determined as soon as possible but no later than one year after the discovery or excavation of human remains or cultural items from federal or tribal lands
- Priority order listing is provided for federal lands, tribal lands, and tribal lands of a Native Hawaiian Organization
- Requires notification and reporting by certain deadlines
  - Inform consulting lineal descendant, Indian Tribe, or Native Hawaiian Organization of the priority disposition with a written document no later than six months
  - Submit a notice of intended disposition no earlier than 30 days and no later than six months after informing consulting parties with a written document (the submitter will have 14 days to make any corrections needed)
  - Receive, consider, and respond to a claim for disposition no earlier than 30 days or later than 90 days after publication of a notice on intended disposition
  - Send a written disposition statement no later than 90 days after responding to a claim for disposition

- A federal agency or the DHHL must report human remains and cultural items for which it cannot identify a priority disposition as unclaimed annually beginning no later than January 13, 2025
- A federal agency or the DHHL may transfer or reinter after one year, any unclaimed human remains or cultural items, by submitting a notice of proposed transfer or reinterment and transfer or reinter no earlier than 30 days and no later than 90 days after publication of the notice
- **There is a required deadline of January 12, 2024, for federal agencies or the DHHL to inform consulting lineal descendant, Indian Tribe, or Native Hawaiian Organizations of the priority disposition with a written document for those items removed and not completed prior to January 12, 2024**

### **Subpart C—Repatriation of Human Remains or Cultural Items by Museums or Federal Agencies**

#### Section 10.8 General

- Applies to museums and federal agencies that have possession or control of a holding or collection that may contain human remains, funerary objects, sacred objects, or objects of cultural patrimony regardless of its physical location
- Includes new, previously lost, or previously unknown holding or collection
- May require reporting of holding or collection held in custody for which a museum or federal agency does not have possession or control
- Does not apply to collections removed from federal or tribal lands after November 16, 1990. These collections follow 10.7(c)
- Museums are required to report any federal holding or collection in their custody no later than January 13, 2025, to the federal agency and National NAGPRA
- Museums are required to report any holding or collection in their custody but for which they do not have possession or control no later than January 13, 2025, to National NAGPRA

#### Section 10.9 Repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony

- Compile a summary of a collection or holding that may contain human remains or cultural items by the specified deadlines for new holdings or collections, previously lost or unknown holding or collections, or for receiving federal funds for the first time
- Note the presence, if known, of any potentially hazardous substances used in treatment of the holding or collection
- Initiate consultation no later than 30 days after compiling a summary
- Respond to requests to consult, prepare a record of consultation, and provide access to information about a holding or collection
- Receive and consider a request for repatriation and respond no later than 90 days from receipt
- Requests from two or more lineal descendants, Indian Tribes, or Native Hawaiian Organizations that agree to work together is considered one claim
- Submit a notice of intended repatriation to all requestors, consulting parties, and National NAGPRA no later than 30 days after responding to a request for repatriation (the submitter will have 14 days to make any corrections needed)

- Send a written repatriation statement no earlier than 30 days or later than 90 days after publication of the notice of intended repatriation unless a competing claim is made before the statement is sent
- Evaluate competing requests for repatriation by determining the most appropriate requestor using the priority order given and meeting the deadlines provided (written letter to all requestors no later than 14 days, send a written determination no later than 180 days after informing requestors of a competing claim, submit a notice of intended repatriation no later than 30 days after the written determination, send a repatriation statement no earlier than 30 days and no later than 90 days after publication of the notice of intended repatriation)
- Create a process for stay of repatriation to be followed for enjoinder of a court, competing claims for which no determination can be made, or for completion of a scientific study. Note: a stay for completion of a scientific study requires free, prior, and informed consent from lineal descendants, Indian Tribes, and Native Hawaiian Organizations
- Of note is that there are clear guidelines for the types of information that must be reported for each document (summary, record of consultation, written response, notice of intended disposition, repatriation statement, and, where applicable, written determinations)

#### Section 10.10 Repatriation of human remains or associated funerary objects

- Compile an itemized list of any human remains and associated funerary objects in a holding or collection
- Note the presence, if known, of any potentially hazardous substances used in treatment of the holding or collection
- Identify and invite consulting parties as soon as possible after compiling the itemized list (note deadlines for identification of new consulting parties or newly recognized tribal entities)
- Respond to requests to consult, prepare a record of consultation, and provide access to information about a holding or collection
- Complete an inventory of human remains and associated funerary objects based on information available and the results of consultation
- Submit inventory to all consulting parties and National NAGPRA with determination of cultural affiliation by the required deadline
  - Two years after acquiring possession or control of human remains or associated funerary objects
  - Two years after locating human remains or associated funerary objects
  - Five years after receiving federal funds for the first time after January 12, 2024
- Initiate consultation, update inventory, and provide the updated inventory to consulting parties and National NAGPRA no later than January 10, 2029, for human remains or associated funerary objects listed in an inventory but not published in a notice of inventory completion prior to January 12, 2024 (existing collections)
- Requests for extension require several pieces of information to be submitted
- Submit a notice of inventory completion to any consulting party and National NAGPRA no later than six months after completing or updating an inventory (the submitter will have 14 days to make any corrections needed)

- Receive and consider a request for repatriation and respond with a written determination no earlier than 30 days after publication of a notice of inventory completion but no later than 90 days after receiving a request for repatriation
- Requests from two or more lineal descendants, Indian Tribes, or Native Hawaiian Organizations that agree to work together are considered one claim
- Submit a repatriation statement to the requestor and National NAGPRA no later than 90 days after responding to a request for repatriation
- Evaluate competing requests for repatriation by determining the most appropriate requestor using the priority order given and meeting the deadlines provided (written letter to all requestors no later than 14 days, send a written determination no later than 180 days after informing requestors of a competing claim, submit a notice of intended repatriation no later than 30 days after the written determination, send a repatriation statement no earlier than 30 days and no later than 90 days after publication of the notice of intended repatriation)
- Create a process for stay of repatriation to be followed for enjoinder of a court, competing claims for which no determination can be made, or for completion of a scientific study. Note: a stay for completion of a scientific study requires free, prior, and informed consent from lineal descendants, Indian Tribes, and Native Hawaiian Organizations
- Allow a museum or federal agency to transfer or reinter human remains and associated funerary objects with no lineal descendant or no Indian Tribe or Native Hawaiian Organization with cultural affiliation after completing the listed steps and publication of a notice of proposed transfer or reinterment. Note: Transfer or reinterment can occur no earlier than 30 days and no later than 90 days after publication of the notice and the sending of a written statement of completion to National NAGPRA
- Note: there are clear guidelines for the types of information that must be reported for each document (itemized list, inventory, record of consultation, written response, notice of intended disposition, repatriation statement, and ,where applicable, written determinations or notice of proposed transfer or reinterment and written statement of completion)

#### Section 10.11 Civil Penalties

- Museums can be assessed a civil penalty for failing to comply with the Act
- Each instance of failure to comply constitutes a separate violation
- Any person may file an allegation of failure to comply
- The Assistant Secretary has 90 days to respond to an allegation
- A base penalty amount of \$7,475 for each substantiated allegation
- If an allegation is substantiated, a museum has the options to accept assessment and pay the penalty or request a hearing within 45 days of notification
- Museums should err on the side of caution especially for summary reporting of holding or collections that “may” contain cultural items
- Multiple approval levels within a museum may impact its ability to meet the new deadlines in the regulations, increasing potential for failure to comply

#### **Subpart D—Review Committee**

##### Section 10.12 Review Committee

- Clarification on what a national museum and scientific organization is (must have nationwide interest and membership and must be organized under the laws of the United States government)
- Clarifies that the review committee cannot consider disputes among lineal descendants, Indian Tribes, and Native Hawaiian Organizations
- Clarifies that the review committee cannot consider disputes among museums and federal agencies