



SOCIETY FOR AMERICAN ARCHAEOLOGY

January 6, 2023

Ms. Melanie O'Brien
Manager, National NAGPRA Program
National Park Service
1849 C Street NW, Mail Stop 7360
Washington, DC 20240

RE: RIN 1024-AE19
NPS-2022-0004-0001

Dear Ms. O'Brien:

The Society for American Archaeology (SAA) submits the following comments on the proposed rule making on the regulations implementing the Native American Graves Protection and Repatriation Act (NAGPRA). The SAA fully endorses the intent of the proposed rule—to accelerate the completion of inventories and repatriation efforts—and we remain supportive of improving NAGPRA implementation and compliance. We also appreciate the attempt to better organize and clarify the regulations. Nevertheless, the changes as written would impose impossible burdens on both institutions and tribes, something that the proposal fails to acknowledge or accommodate. Given these realities, the SAA strongly recommends that the Department of the Interior (DOI) modify the proposed rule, under consultation with tribes, museums, and national scientific organizations.

The SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological heritage of the Americas. With more than 5,500 members, the SAA represents professional and avocational archaeologists, archaeology students in colleges and universities, and archaeologists working at tribal agencies, museums, government agencies, and the private sector. The SAA has members throughout the United States, as well as in many nations around the world.

The proposed revisions to the regulations are so considerable and complex that they would essentially transform NAGPRA compliance. Rather than address each alteration in turn, we will discuss the more consequential issues raised by the draft, and why the cumulative impact requires further modifications to the proposed rule changes to ensure that compliance efforts are successful.

1. **Deadlines:** The proposed deadlines are arbitrary, compressed, and significantly underestimate the time and resources involved in every step of the NAGPRA process—from consultation to the preparation of human remains and other cultural items for their

physical return. The new deadlines would require additional work for museums with regard to federal collections and set institutions up for failure, especially given the fact that museums would be juggling multiple requests and inquiries at any given time. At best, the revisions will force agencies and museums to perform rapid and incomplete work. More specifically:

- a. Tribes will be inundated with requests to consult. Similarly, they may have to submit multiple inquiries at the same time. The rushed two-year deadline to update inventories could result in rapid repatriation of human remains and funerary objects to lesser-affiliated tribes while others with closer affiliations, who have to deal with numerous consultation requests, will lose their opportunity to claim ancestral remains more rightfully theirs. This deadline is unworkable, especially without making additional funds available to tribes.
 - b. Institutions should have five years to complete *new* inventory requirements. An alternative would be to allow the tribes and museums, under consultation, to set the deadline.
 - c. Museums need more than 10 days to respond to any inquiry since many, especially the larger museums, potentially may have to respond to multiple inquiries at the same time. Extend the deadline to 30 days to allow overextended staff to complete existing work and to account for such things as vacation, sick time, and parental leave. At the very least, the minimum time requirement for museums should be the same as that for National NAGPRA.
 - d. Museums need more than 60 days to determine if a request satisfies the criteria for repatriation if it must use all information available, including relevant records, catalogs, existing studies, and the results of consultation, *and* get internal administrative approval. Extend this deadline to one year.
2. Assistance: What support can museums, lineal descendants, Indian Tribes, and NHOs expect to receive from the National NAGPRA Program? For museums and federal agencies NAGPRA mandated they had five years after enactment to complete inventories. That was over 25 years ago. For agencies this was an unfunded mandate, so funds had to come out of their annual appropriations. That situation will continue. Will National NAGPRA maintain a functioning contact database? Will National NAGPRA compile information on things such as federal, foreign, or intertribal government documents to help museums determine acknowledged aboriginal land? A central repository for such information would ease the burden on museums, yet neither the DOI nor the National NAGPRA Program have committed to allocating new resources to assist institutions or tribes with the implementation of the proposed requirements. While NAGPRA documentation and repatriation grants are available, these funds are far from assured, and valuable time and resources must be spent in applying for and managing them. In addition, the grants program is not a solution that a wide range of organizations can utilize.
 3. Penalties: As written, the draft rules will place almost every institution in a situation in which National NAGPRA can fine it on multiple counts for something as minor as missing the 10-day deadline to respond to a request to consult. The limited definition of a

“failure to comply” is untenable in light of the drastic deadlines and ambiguous requirements. This is especially problematic given that input from the museum community during the development of the proposed changes, as well as testimony during the recent Senate oversight hearing, made it clear that institutions’ lack of adequate staff and funding will mean difficulty in complying with the new rule. Another question is what will happen to payments of penalties? Will they go to assisting tribes and museums in compliance?

4. Cost of compliance: As mentioned above, the proposed regulations require significant new paperwork in the form of consultation summaries, repatriation statements, and other records that explain museum decisions and actions. Museums must provide these records to relevant tribes and the National NAGPRA Program. Under the statute, it is primarily the NAGPRA Review Committee that monitors NAGPRA compliance, with the National NAGPRA Program in a supporting role. The draft changes seem to contemplate the opposite. Beyond the question of authority, however, these new paperwork requirements are time-consuming and add to an already burdensome process, a reality not reflected in the proposed deadlines. Further, it is not only a matter of paperwork. Extensive consultation and repatriation expenses will be involved. As mentioned above, most institutions do not have enough resources to carry out these mandates. It is also evident that the DOI itself did not take into account the cost of these proposed rules. On page seven of the NPS “Cost-Benefit and Regulatory Flexibility Threshold Analyses: Native American Graves Protection and Repatriation Act Proposed Revisions,” the footnote clearly states that the cost estimates for tribal engagement in the process only take into account requests by tribes to consult. The analyses do not include the rest of the costly and time-consuming process.
5. Retroactivity: The retroactive application of these new requirements is troubling. Work formerly deemed “complete” might now be deemed “incomplete,” based on the application of requirements long after the fact. The requirement that museums redo inventories will necessitate that museums and tribes devote a great deal of time and resources to their completion. The SAA remains supportive of improving NAGPRA implementation and compliance, a goal we share with the DOI, but this provision undermines that mutual objective.
6. Duty of care: The proposed regulations introduce a completely new duty of care provision not supported by statutory language. This section is vague and goes well beyond repatriation by reaching into collections access and management. Best practices such as duty of care are desirable, and while many museums already have duty of care discussions with tribes and NHOs, they do so at their own discretion and with their limitations in mind. Neither the statute nor the legislative history provides the National NAGPRA Program with the authority to direct museums on issues such as collections access and management. There is a better case for the Secretary of the Interior to strongly encourage—rather than require—these practices. The language concerning associated funerary objects under the current 10.11 rule could serve as a model.

7. Consensus as a goal of consultation: The law is clear that consultation is for the purposes of identifying items and determining their affiliations. This section introduces a vague standard (“to the maximum extent possible”) that is open to interpretation, including the potential for allegations of noncompliance. As with the duty of care provision, this is another case in which the Secretary of the Interior could encourage a best practices model, rather than include it in the rule as a mandate.
8. Inventory provisions: In recent statements and presentations, the National NAGPRA Program has made it clear that its goal is to have inventories of all human remains and associated funerary objects published in notices. This is a laudable objective. The SAA believes that it is just as important to keep in mind that the goal of the law is repatriation, and publishing notices is just one step in the process that leads to repatriation. The proposed changes, however, give the notices a primacy that seems to draw attention away from the other steps that ensure ancestral remains and cultural items are returned to lineal descendants and tribal communities.
9. Complexity: The proposed regulations and preamble do not offer realistic guidance on complex matters. For example, the section on federal lands has no firm definition. In addition, the DOI proposes to require deference to lineal descendants, Indian Tribes, and NHOs throughout the regulations, but specifically for identification of cultural items. Museums are still required, however, to use all information available (relevant records, catalogs, and existing studies) to determine if a request satisfies the criteria for repatriation. How can museums navigate what may be significant differences between the information presented by lineal descendants, Indian Tribes, and NHOs, and that found in “all information available”?
10. State and local government compliance: As it stands, many repositories have to notify and provide collections information to state and local governments. Will these governments now also have to comply with NAGPRA? If so, how will NAGPRA work with state repatriation laws? CalNAGPRA and NAGPRA, for example, do not overlap exactly. This and similar situations could result in legal disputes. Many state and local governments are unaware of NAGPRA in the first place. Even if they are aware, there is no money or staff available for this activity. How will such compliance be enforced? Also, how will compliance with these draft rules intersect with open criminal investigations, which often require samples of biological materials?
11. Discovery situations: The regulations assume that human remains encountered under a discovery situation on federal lands or lands under federal control are automatically Native American. That is a false assumption. In those situations where a determination cannot be as to whether the remains are Native American, who will make that determination: a bioarchaeologist, a coroner, local police? This needs to be clarified. We also question whether enough thought was given to the potential effects of the change in the resumption of activity deadline from 30 to 60 days; what is the rationale for extending the delay in resumption to 60 days? Extension of the resumption period could negatively impact, for example, a federally sponsored infrastructure project.

12. Lack of tribal consultation: Regarding the review of the draft regulations as posted in the National NAGPRA comments, only 70 comments were received from tribes. Most of the consultation letters went to tribal leaders, not to NAGPRA practitioners within those communities. Tribes had short time frames in which to prepare for consultation between the release of the draft and the first DOI tribal consultation meeting. The lack of feedback from tribal representatives at the December listening session strongly suggests that tribal communities need more time to fully analyze the proposed changes. As the Confederated Tribes of the Colville Reservation stated in 2021, *“There is indeed a need to revise some sections of 43 C.F.R. Part 10 regulations—we have learned a great deal about how the regulations work or do not work since their inception. But, the regulations cannot be revised without further consultation with the affected communities or without consultation with those who do the ‘boots on the ground’ work. Additional tribal review of the proposed final rule would also have to be conducted by tribal legal staff. To that end, the regulations have been in place for 26 years, the CTCR feels there is no urgency to push draft regulations through without thoughtful and mindful consultation. In many instances the present regulations can stand and serve as currently written.”* In fact, there seems to be a presumption that a complete overhaul of the regulations is needed, but we are skeptical that this is the right approach to address what are unquestionably some deficiencies in compliance.

13. Lack of consultation with museums and other institutions: This rule-making process was carried out without sufficient consultation with museums and tribes. When NAGPRA was debated, Congress included the museum and scientific community in discussions to make sure that the law was workable. These rule changes were formulated without considering how (or even if) they were workable for repositories. Given NAGPRA’s legislative history, it is clear that Congressional intent was to ensure that input from both tribes *and* museums would be considered during the drafting rules, not *after* the fact as part of the overall public comment.

In conclusion, the SAA supports any new regulations that would clarify the repatriation process and bring about more efficient compliance by museums and agencies. These proposed rule changes, however, would make it much more difficult for tribes and institutions to build the working relationships under NAGPRA that undergird comprehensive, meaningful, and accurate repatriation. Instead, the overall impact would transform compliance into a rushed, transactional process, which undermines those relationships and the goal of returning human remains and related funerary objects to their appropriate cultural homes.

Sincerely,



Daniel H. Sandweiss, Ph.D., RPA
President