



**NATHPO**

NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

P.O. Box 19189 • Washington, D.C. 20036-9189 • Phone: (202) 628-8476 • Fax: (202) 628-2241 • [www.nathpo.org](http://www.nathpo.org)

---

Submitted via [www.Regulations.gov](http://www.Regulations.gov)

June 14, 2012

Dr. Sherry Hutt, Manager  
National NAGPRA Program  
National Park Service  
1849 C Street NW (2253)  
Washington, DC 20240

Re: NATHPO Comments on RIN 1024-AD99

Dear Dr. Hutt:

The National Association of Tribal Historic Preservation Officers (NATHPO) is a membership association of federally-recognized tribal government officials who are committed to preserving tribal cultures and practices. Tribal Historic Preservation Officers (THPOs) perform a variety of duties for their respective tribal governments. Most are responsible for implementing the Native American Graves Protection and Repatriation Act (NAGPRA). NATHPO submits the following comments to the Department of the Interior on “43 CFR Part 10, RIN 1024-AD99, Native American Graves Protection and Repatriation Act Regulations.”

We note that while the Federal Register notice states that the proposed revisions are limited to “minor inaccuracies or inconsistencies” for the purpose of “factual accuracy and consistency,” several of the proposals are major changes and others create inconsistencies with the current rule.

Generally, in several places the Department proposes replacing reference to a political appointee, either the Secretary, Assistant Secretary for Fish and Wildlife and Parks, or Director, National Park Service, with a career position much lower in the Department’s hierarchy. NATHPO recommends that responsibilities throughout these regulations should remain with political appointees to ensure these duties are directly supervised at the highest level in the Department.

We also note that in several places the Department proposes removing reference to a physical address and instead directs interested parties to a website. This proposal is problematic for two reasons. First, websites are transitory and past experience with the National Park Service has shown its websites to be at times unreliable due to both address changes and server malfunctions. However, the physical address listed in the current rule has not and is unlikely to change since it is the main building of the Department of the Interior. Second, while access to the Internet is widespread it is not easily or universally accessible, particularly in rural, tribal communities.

We also note that throughout the proposed rulemaking, the drafters use the phrase “remains or objects,” instead of listing the statutory and already regulatory defined terms for, “human remains, funerary objects, sacred objects, and objects of cultural patrimony.” Thus, using the proposed “remains or objects” will create potential ambiguity in that the phrase is not defined in the statute or regulations. The statute defines “cultural items” to include human remains, funerary objects, sacred objects, and objects of cultural patrimony [25 U.S.C. § 3001 (3)]. “Human remains,” “associated funerary objects,” “unassociated funerary objects,” “sacred objects,” and “objects of cultural patrimony” are specifically defined in the current regulations. We recommend that the terms human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony should be used throughout the regulations to ensure factual accuracy and consistency with the current regulations. Furthermore, we recommend that throughout the text, “lineal descendents” should be removed from any requirement, or suggestion, for consultation regarding objects of cultural patrimony.

**Authority.** The Department proposes to amend the authority citation by deleting reference to 25 U.S.C. § 9 and 16 U.S.C. § 470dd, leaving only the citation to 25 U.S.C. § 3001 *et seq.* as the basis for the rule. This is a very significant change, neither a minor inaccuracy nor an inconsistency, and one for which the Department provides no discussion or explanation.

In response to comments on previous rulemaking that assert that the Secretary lacks authority to promulgate regulations for which NAGPRA contains no explicit authorization, the Department argued persuasively that the Secretary has diverse authority to promulgate these regulations [72 Fed. Reg. 13185 (Mar. 11, 2005). 75 Fed. Reg. 12379-12380 (Mar. 15, 2010)]. The Department’s argument rests in part on the express authority at 25 U.S.C. § 9 for the executive branch to promulgate regulations to carry into effect any statute related to Indian affairs. Deleting 25 U.S.C. § 9 from the authorities citation of the NAGPRA regulations undermines the Department’s argument.

Equally important, 16 U.S.C. § 470dd of the Archaeological Resources Protection Act of 1979 (ARPA) authorizes the Secretary of the Interior to promulgate regulations regarding the ultimate disposition of objects of antiquity (Antiquities Act of 1906), relics and specimens (Reservoir Salvage Act of 1960, also known as the Archaeological and Historical Preservation Act of 1974), and archaeological resources (ARPA). Related statutes must be read together in a manner giving each affect, and ARPA and NAGPRA are clearly related statutes. NAGPRA and its implementing regulations clearly provide for the ultimate disposition of a subset of the objects of antiquity, relics and specimens, and archaeological resources included under 16 U.S.C. § 470dd, with an important caveat:

*... any exchange or ultimate disposition under such regulation of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands. Following promulgation of regulations under this section, notwithstanding any other provision of law, such regulations shall govern the disposition of archaeological resources removed from public lands and Indian lands pursuant to this Act.*

Since NAGPRA does not expressly amend ARPA, and earlier legislation may not be repealed indirectly without evidence of a particular intention to do so, ARPA and NAGPRA must be read together in a manner giving both affect. The provisions of 16 U.S.C. § 470dd are of critical importance to Indians and Indian tribes and must be retained to safeguard their rights to the ultimate disposition of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony removed from their lands.

The timing of the proposed deletion of 16 U.S.C. § 470dd from the authority citation is particularly troubling in light of ongoing litigation. On December 16, 2011, The Navajo Nation filed a complaint in the Federal Court for the District of Arizona seeking to enjoin the Department from effecting the ultimate disposition of Native American human remains and funerary objects from The Navajo Nation's reservation lands without their consent. The Department's proposal to remove 16 U.S.C. § 470dd from the authority citation was published four months after The Navajo Nation filed suit and nine months after The Navajo Nation initially notified the Department of its intent to file suit. The Department's attempt to remove 16 U.S.C. § 470dd from NAGPRA's authority citation, without explanation, seems specifically intended to undermine The Navajo Nation's legal position that it is the owner of human remains removed from their reservation lands without their consent.

**NATHPO objects to the proposed deletions and recommends that the Department take no further action on this section until *The Navajo Nation v. Salazar* litigation is resolved.**

**10.2 (c)(1) Definition of "the Secretary."** The Department proposes to amend the definition of the Secretary to specifically state that the Secretary may delegate NAGPRA responsibilities, citing as authority Secretarial Order 3261. The Secretary's authority to realign functions within the Department is generally derived from Section 2 of Reorganization Plan No. 3 of 1950 (64 Stat. 1262), and not Secretarial Order 3261 that was signed on May 23, 2005, and expired on May 31, 2007. NATHPO is concerned that the proposed amendment might be interpreted to be a free-standing delegation authority outside of the already existing authorities.

**NATHPO recommends that either the current language be retained or that a stipulation be added that "*Secretary means the Secretary of the Interior or a position designated pursuant to existing authorities.*"**

**10.2 (c)(3) Definition of "Manager, National NAGPRA Program"** The Department proposes to amend the definition of Manager, National NAGPRA Program, replacing the physical address of 1849 C Street NW, Washington, DC, 20240, with a website address.

**NATHPO recommends retaining the 1849 C Street NW address in the regulations.**

**10.4 (d)(iii) Notification regarding inadvertent discovery.** The Department proposes to amend one of the duties that the responsible Federal agency official must complete within three working days of receipt of a written confirmation of notification for an inadvertent discovery on Federal lands. The proposed amendment adds known lineal descendants to Indian tribes or Native Hawaiian organizations likely to be culturally affiliated with the inadvertently discovered human remains, funerary objects, sacred objects, or objects of cultural patrimony. The proposed amendment also replaces the specific list of cultural items with the phrase "remains or objects."

While NATHPO has no objection to requiring the responsible Federal agency official to notify known lineal descendants, we note that the proposed language as written implies that lineal descendants can be culturally affiliated with Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. The statute defines cultural affiliation as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group." [25 U.S.C. § 3001 (2)]. Lineal descendant is a different type of relationship.

**NATHPO recommends that the section be rewritten as follows:**

***10.4 (d)(iii) Notify any known lineal descendants, any Indian tribes or Native Hawaiian organizations likely to be culturally affiliated with the cultural items, the Indian tribe or Native Hawaiian organization that aboriginally occupied the area in which the cultural items were discovered inadvertently, and any other Indian tribe or Native Hawaiian organization known to have a cultural relationship to the cultural items. This notification must be by telephone with written confirmation and must include information about the kinds of remains or objects, their condition, and the circumstances of their discovery;***

**10.5 (b)(1)(i) Initiation of consultation as part of an intentional excavation or inadvertent discovery.**

The Department proposes to limit the Federal agency official's consultation requirement with lineal descendants to those situations involving human remains and associated funerary objects instead of situations involving the full range of cultural items as currently written. The Department explains that this proposal is consistent with the statutory ownership requirements at 25 U.S.C. § 3002 (a). NATHPO acknowledges that the statute explicitly and automatically vests ownership or control of human remains and associated funerary objects which are excavated or discovered on Federal or tribal lands after November 16, 1990, with the lineal descendant, and that the disposition of unassociated funerary objects, sacred objects, or objects of cultural patrimony is directed to Indian tribes or Native Hawaiian organizations. However, we recognize that this provision may result in a Fifth Amendment taking by the United States of unassociated funerary objects and individually owned sacred objects. This issue would not arise in the case of objects of cultural patrimony since they are communally owned by definition.

**NATHPO recommends retaining the requirement to consult with lineal descendants following the intentional excavation or inadvertent discovery of unassociated funerary objects and sacred objects in order to fully address issues that may result in a Fifth Amendment taking by the United States of unassociated funerary objects and individually owned sacred objects.**

**10.6 (a)(2) Priority of custody.** The Department proposes to amend the priority of custody provisions by removing the stipulation allowing disposition of cultural items to an Indian tribe or Native Hawaiian organization if a lineal descendant fails to make a claim. The Department also replaces reference to specific kinds of cultural items with "remains or objects."

NATHPO acknowledges that the statute explicitly and automatically vests ownership or control of human remains and associated funerary objects that are excavated or discovered on Federal or tribal lands after November 16, 1990, with the lineal descendant, and that no claim is required. However, situations may arise in which a lineal descendant declines to exercise the right of ownership or control. Regulatory provisions should be included to allow for disposition to Indian tribes or Native Hawaiian organizations in such situations.

NATHPO also recognizes that statutory provision may deprive a lineal descendant of property rights regarding unassociated funerary objects or individually owned sacred objects. These lineal descendants are entitled to just compensation pursuant to the Fifth Amendment to the United States Constitution.

**NATHPO recommends that the section be rewritten as follows:**

***10.6 (a)(2) When a lineal descendant cannot be ascertained, or expressly relinquishes his or her control over Native American human remains or title to or control over an associated funerary object, and with respect to unassociated funerary objects, sacred objects, and objects of cultural patrimony:***

**\*\*\*\*\***

*(iii)(B) If a preponderance of the evidence shows that a different Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains, funerary objects, sacred objects, or objects of cultural patrimony, in the Indian tribe or Native Hawaiian organization that has the strongest demonstrated relationship with the remains or objects.*

\*\*\*\*\*

*(d) If, pursuant to this section, the Federal agency official transfers custody of unassociated funerary objects or sacred objects for which a lineal descendant has been ascertained to an Indian tribe or Native Hawaiian organization, the lineal descendant will be entitled to receive just compensation for the unassociated funerary objects or sacred objects.*

**10.12 (c) How to Notify the Secretary of a Failure to Comply.** The Department proposes to redirect the submission of allegations of failure to comply from the Director, National Park Service, to the Civil Penalties Coordinator, National NAGPRA Program, a position significantly lower in the National Park Service's administrative hierarchy. Elsewhere in the current regulations, the Secretary has delegated authority to assess civil penalties to the Assistant Secretary for Fish and Wildlife and Parks [43 CFR § 10.12 (a)]. The Department also proposes to remove reference to a physical address and instead directs interested parties to a website.

NATHPO recommends the section be rewritten as follows:

***10.12 (c) How to notify the Secretary of a failure to comply. Any person may file an allegation of failure to comply. Allegations are to be sent to the Assistant Secretary for Fish and Wildlife and Parks, 1849 C Street, NW, Washington, DC, 20240. The allegation must be in writing, and should:***  
***(1) Identify each provision of the Act with which there has been a failure to comply by a museum;***  
***(2) Include facts supporting the allegation;***  
***(3) Include evidence that the museum has possession or control of Native American cultural items;***  
***and***  
***(4) Include evidence that the museum receives Federal funds.***

**10.12 (i)(3) File a petition for relief.** The Department proposes to redirect petitions for relief from the Secretary to the Civil Penalties Coordinator, National NAGPRA Program, a position significantly lower in the Department's administrative hierarchy. The Department also proposes to remove reference to a physical address and instead directs interested parties to a website.

NATHPO recommends the section be rewritten as follows:

***10.12 (i)(3) File a petition for relief. You may file a petition for relief within 45 calendar days of receiving the notice of assessment. A petition for relief is to be sent to the Secretary of the Interior, 1849 C Street, NW, Washington, DC, 20240. Your petition may ask the Secretary not to assess a penalty or to reduce the penalty amount. Your petition must:***  
***(i) Be in writing and signed by an official authorized to sign such documents; and***  
***(ii) Fully explain the legal or factual basis for the requested relief.***

NATHPO concurs with the Department's proposed changes to 10.10 (a)(1)(ii)(B), 10.10 (b)(1)(ii)(B), 10.10 (g), 10.12 (j), 10.12 (j)(6), 10.12 (k)(1), 10.12 (k)(3), 10.13 (c)(2); 10.15 (c)(1); Appendix A; and Appendix B.

Additional comments and recommendations:

**10.8 Summaries.** We understand that some Federal agencies, particularly the California Office of the Bureau of Land Management, have repeatedly refused to provide Indian tribes with summaries of their collections under the assumption, we believe mistaken, that they alone must make a definitive

determination that particular items are unassociated funerary objects, sacred objects, or objects of cultural patrimony prior to preparing and distributing a summary. We also understand that some museums have (mis)interpreted the notification requirement to allow them to provide notification regarding unspecified "cultural items." In an effort to avoid misinterpretation, we recommend a slight change to the notification section of the current regulations, as noted below.

NATHPO recommends 10.8 (a) be revised as follows (underline denotes new text):

*(a) General. This section carries out section 6 of the Act. Under section 6 of the Act, each museum or Federal agency that has possession or control over collections that may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony, must complete a summary of these collections based upon available information held by the museum or Federal agency. The purpose of the summary is to provide information about the collections to lineal descendants and culturally affiliated Indian tribes or Native Hawaiian organizations that may wish to request repatriation of such objects. A Federal agency official or museum official will likely not know whether a particular item is an unassociated funerary object, sacred object, or object of cultural patrimony when the summary is completed. The summary should include all of the Federal agency or museum's archaeological and ethnological collections. The summary serves in lieu of an object-by-object inventory of these collections, although, if an inventory is available, it may be substituted. Federal agencies are responsible for ensuring that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution.*

\*\*\*\*\*

*(d) Consultation. (1) Consulting parties. Museum and Federal agency officials must consult with Indian tribe officials and traditional religious leaders:*

*(i) From whose tribal lands the collection or portion of the collection which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony originated;*

*(ii) That are, or are likely to be, culturally affiliated with the collection or portion of the collection which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony; and*

*(iii) From whose aboriginal lands the collection or portion of the collection which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony originated.*

\*\*\*\*\*

*(f) Notification.*

\*\*\*\*\*

*The notice of intent to repatriate must identify the claimed object(s) as unassociated funerary objects, sacred objects, and/or objects of cultural patrimony, and describe the objects being claimed in sufficient detail so as to enable other individuals, Indian tribes or Native Hawaiian organizations to determine their interest in the claimed objects.*

Thank you very much for the opportunity to comment on this important process. On behalf of NATHPO, we look forward to being kept apprised of your work and timelines. Please do not hesitate to contact me if you have any questions or need additional information.

Sincerely yours,



Reno Keoni Franklin, Chairman