



January 31, 2023

The Honorable Deb Haaland  
Secretary of the Interior  
U.S. Department of the Interior

**Re: NAGPRA Proposed Rule — RIN # 1024-AE19**

Dear Secretary Haaland,

The Coalition for American Heritage (“Coalition”) appreciates the opportunity to comment on the Department of the Interior’s proposed revisions to the regulations implementing the Native American Graves Protection and Repatriation Act (“NAGPRA”). 87 Fed. Reg. 63202 (October 18, 2022). The Coalition strongly supports the proposed revisions, and our comments here suggest important changes for the Department of Interior (“Department”) to consider as it finalizes these changes.

The Coalition is an advocacy group that protects and advances our nation’s commitment to heritage preservation. Supported primarily by the Society for Historical Archaeology and the American Anthropological Association, the Coalition collectively represents 350,000 cultural resource management professionals, academic archaeologists and anthropologists, and subject matter experts with an interest in the anthropology and archaeology of North America. Many of our members work as faculty at universities and museums that curate collections subject to NAGPRA, work in collaboration with tribal communities on research projects, serve federal government agencies in positions that address NAGPRA issues, or otherwise engage with ethical issues related to Indian Tribes’ interest in repatriating their ancestral remains and the complex legacies of the history of American archaeology.

While NAGPRA was passed just over thirty years ago in 1990 to ensure the repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony to Indian Tribes, too many ancestral remains and associated objects remain in collections despite extensive tribal efforts to repatriate them. The Coalition supports the Department’s efforts to streamline and improve the current NAGPRA regulations to ensure repatriation can occur more quickly.

The Coalition affirms the importance of strengthening timely Tribal consultation on federal and Tribal lands. We are particularly pleased that the proposed regulations require agencies and federal institutions to document and address the requests of Indian Tribes and Native Hawaiian Organizations (NHOs) when human remains or cultural items are discovered on federal or Tribal lands and before these items are further disturbed. Improved clarity about who should be contacted

and the timelines for consultation will ensure greater Tribal input into processes for handling these discoveries, preventing painful conflicts and lengthy project interruptions that can occur if consultation is delayed.

We are pleased that the Department has strengthened the authority of Tribes in the repatriation process, particularly the requirement that museums and federal agencies must defer to the customs, traditions, and traditional knowledge of lineal descendants, Indian Tribes, and NHOs. It is appropriate that museums and federal agencies must incorporate the identifications, recommendations, and traditional knowledge of Tribes to the maximum extent possible. Section B provides helpful clarification regarding how to meet the communication requirements of NAGPRA. The Coalition similarly supports the inclusion of the duty of care requirement. We also commend the Department for conducting a robust Tribal consultation process to inform the proposed rule.

As three decades of missed NAGPRA deadlines attest, regulatory requirements will not necessarily spur action unless accompanied by clear and enforced penalties. We therefore support hiring of the first NAGPRA civil penalties investigator as an essential element of the success of the proposed regulations. The Coalition also supports the removal of limits on NAGPRA violations, the increase in penalties, and the inclusion of mitigation that allows for direct or in-kind payments to Indian Tribes and NHOs.

## **REQUESTS FOR REVISIONS**

We recommend that the Department:

- 1) seek to strengthen the role of consultation in the process of a stay of repatriation;
- 2) clarify geographic affiliation as part of their definition of cultural affiliation; and
- 3) identify means of supporting institutions and Indian Tribes and NHOs as they seek to complete the obligations set out under NAGPRA.

The ethical principles espoused by our key organizational members, the Society for Historical Archaeology and the American Anthropological Association, have requirements related to seeking input and consensus from descendant communities, including Indian Tribes and NHOs. For example, AAA's first ethical principle is Do No Harm, a principle that states that the anthropologist's obligation to 'do no harm' to communities "can supersede the goal of seeking new knowledge and can lead to decisions to not undertake or to discontinue a project." Similarly, ethical principle #3 requires anthropologists to Obtain Informed Consent and Necessary Permissions. This principle applies not only to research on living participants, but also biological and cultural resources, and states that "consultation with groups or communities affected by [biological and cultural resources] research should be an important element of the design of such projects and should continue as work progresses or circumstances change."<sup>1</sup> SHA's ethical principle #5 states that archeologists should consider archaeological sites "to belong to the people

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<sup>1</sup>Principles of Professional Responsibility, AMERICAN ANTHROPOLOGICAL ASSOCIATION (Nov. 1, 2012), <http://ethics.americananthro.org/category/statement/>.

whose ancestors produced them” and states that archaeologists must “always treat descendant communities with respect, inform them of your findings, and try to engage them in your work.”<sup>2</sup>

Based on these bedrock ethical principles, the Coalition requests revisions to the provisions in proposed § 10.9, addressing a stay of repatriation based on the Secretary’s written concurrence that the materials in question are indispensable for completion of a scientific study. First, there are no definitions in this section regarding how the Secretary would evaluate whether the study would have an “outcome of which would be of major benefit to the people of the United States,” nor how such an outcome is defined.<sup>3</sup> Second, the proposed regulations do not provide for consultation with Indian Tribes and NHOs in this process.

We recommend that the Department include a section that requires consultation with culturally affiliated Indian Tribes and NHOs in the development of a stay of repatriation request, including how the museum or federal agency developed consensus “to the maximum extent possible.” Additionally, consultation with affected Indian tribes and NHOs should be incorporated into the Secretary’s determination of what constitutes a “major benefit to the people of the United States.”

The Coalition applauds the Department’s simplification of repatriation criteria and encourages greater clarification of affiliation requirements and language. The Coalition agrees with the proposal to remove the category of “culturally unidentifiable” from the new NAGPRA regulations, as this characterization has been used for far too long to deny repatriation claims.<sup>4</sup> The Coalition also supports the integration of “the concept of repatriation through geographic origin into the overall affiliation and inventory process.”<sup>5</sup>

However, the Coalition respectfully encourages the Department to clarify language related to geographical affiliation throughout the proposed draft. NAGPRA clearly states that geographical and cultural affiliation (25 U.S.C. 3003(a)) are the bases for repatriation and does not give either precedence over the other. The Coalition agrees that geographical affiliation should be sufficient for repatriation; however, the language in the proposed rule creates uncertainty regarding how geographic evidence will be considered compared to other types of evidence of cultural affiliation.

Creating a separate process for determining affiliation on the basis of geography – which is already included as “one or more of the following equally relevant types of information”<sup>6</sup> that may be used to identify cultural affiliation – risks denying repatriation claims of Indian Tribes and NHOs because they cannot prove the clearly preferred “cultural affiliation.” The additional process of geographical affiliation is redundant and may lead institutions to fail to repatriate certain classes of remains. Rather than creating a separate process, we urge the Department to clarify the definition of “cultural affiliation” to emphasize that geographic information is a sufficient basis for repatriation.

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<sup>2</sup>SHA Ethics Toolbox, SOCIETY FOR HISTORICAL ARCHAEOLOGY, <https://sha.org/committees/ethics-committee/> (last visited Jan. 26, 2023).

<sup>3</sup> 87 Fed. Reg. at 63251.

<sup>4</sup> *Id.* at 63206

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 63240.

The Coalition requests that the Department assemble a centralized NAGPRA contact database. Determining cultural affiliation on the basis of geographic territory will require extensive research involving both domestic and foreign treaties, inter-Tribal treaties, and more. NAGPRA claims can be evaluated and dispositions made much more efficiently when all needed parties are at the table when the process begins. We echo the call from the Association on American Indian Affairs and the National Association of Tribal Historic Preservation Officers that the Department and National NAGPRA must develop, in association with Indian Tribes and NHOs, a centralized source for the necessary information for museums and federal agencies to utilize when determining which Native Nations to contact for consultation purposes.

Finally, the Department should consider the additional work that that NAGPRA consultation creates for Indian Tribes, NHOs, and curation facilities, and provide additional support to carry out the new requirements in the proposed regulations. The Coalition recognizes the enormous burden consultation places on Indian Tribes and NHOs. We urge the Department and the National NAGPRA Program to prioritize support to Indian Tribes and NHOs to accomplish meaningful consultation. This support is particularly important given the limitations of newly recognized Tribes and those without land in trust, which are not eligible for tribal historic preservation office funding. In addition, needs-based funding and support for curation facilities may be appropriate to ensure that NAGPRA consultations occur respectfully and smoothly.

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In conclusion, the Coalition recognizes that numerous Indian Tribes and NHOs have submitted comments on these proposed regulations based on their own long histories with NAGPRA and repatriation efforts. We urge the Department to consider these perspectives carefully and fully given the fundamental importance of this issue to Indigenous communities.

Thank you for the opportunity to comment on this proposed rule.

Best regards,



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