
NAGPRA – 2024 Revamped Rule Strengthens Process for Museums and Universities to Heal Prior Inequities and Rebuild Tribal Relationships

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TYPE: LAW BULLETINS

DATE: 02/09/2024

“NAGPRA is an important law that helps us heal from some of the more painful times in our past by empowering Tribes to protect what is sacred to them. These changes to the Department’s NAGPRA regulations are long overdue and will strengthen our ability to enforce the law and help Tribes in the return of ancestors and sacred cultural objects.” – Bryan Newland, Assistant Secretary for Indian Affairs¹

The Native American Graves Protection and Repatriation Act (NAGPRA) is a ground-breaking human rights law passed by Congress in 1990 that requires museums and federally funded institutions to return Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony that have been wrongfully removed from lineal descendants, Indian Tribes and Native Hawaiian Organizations (NHOs).² When it was first enacted, NAGPRA set up an innovative new structure to compel any museum that received federal funding to review all objects that were potentially subject to repatriation and to consult with federally-recognized tribes about the objects.

Over the past 30 years, loopholes, lack of strict deadlines, and other regulatory gaps have hindered the prompt return of items to Indian Tribes. Of the 208,698 Native American human remains reported by museums since 1990, the NAGPRA process is complete for only 48%.³ Of an estimated 2,600,000 Native American associated funerary objects reported by museums since NAGPRA’s enactment, the NAGPRA process is complete for only 71%.⁴ Museums (including universities) that have failed to comply with NAGPRA have faced little to no penalty — as of January 2023, only \$59,111.34 in total fines have been collected by the Department of the Interior for NAGPRA violations.⁵

As a result of lessons learned over the past three decades, the Department of the Interior began a review of the existing regulations, including consultations with Tribal representatives and museums. On Dec. 6, 2023, the Department of the Interior announced a final rule to revise the NAGPRA regulations.⁶ The new

regulations, which became law on Jan. 12, 2024, revamp and clarify the repatriation process and make several other material changes to NAGPRA. Some notable changes include:

- Requiring museums and federal agencies to obtain free, prior, and informed consent from lineal descendants, Tribes, or NHOs before allowing any exhibition of, access to, or research on human remains or cultural items. A museum covered by the regulations should immediately consider whether it has such items on display without clear consent from culturally affiliated Tribes.
- Strengthening the authority and role of Tribes and NHOs in the repatriation process by requiring deference to the Indigenous Knowledge of lineal descendants, Tribes, and NHOs.
- Applying stricter and more precise deadlines for various steps in the consultation and repatriation process in an attempt to more quickly repatriate items.
- Requiring museums and federal agencies to consult and update inventories of human remains and associated funerary objects within five years of the final rule.
- Eliminating the category “culturally unidentifiable human remains” and resetting the requirements for cultural affiliation to better align the regulations with congressional intent.
- Increasing transparency and reporting of holdings or collections and shedding light on collections currently unreported under the existing regulations.⁷

Reaction to the final rule has been positive. Shannon O’Loughlin, a citizen of the Choctaw Nation of Oklahoma and the Chief Executive and Attorney for the Association of American Indian Affairs, said that doing away with the “culturally unidentifiable” category and mandating deference to tribal knowledge is a significant change because it puts “the tribes in the ‘driver’s seat’ . . . deference must be given to tribes and their knowledge, more so than other types of evidence, perhaps. Because tribes are the primary experts of their own cultural heritage.”⁸ O’Loughlin also praised the requirement in the new rule that institutions obtain free, prior, and informed consent from lineal descendants, Tribes, and NHOs before conducting research on human remains and cultural items.⁹ Museums have also commended the new rule because it clarifies the repatriation process, whereas the old rule was at times confusing and difficult to interpret.¹⁰

However, the final rule has limitations. Notably, it only applies to federally recognized tribes. There are approximately 575 federally recognized tribes in the United States and 400 unrecognized tribes;¹¹ there is currently no federally mandated repatriation process for the 400 federally unrecognized Nations. Additionally, the new regulations only apply to human remains that are excavated on federal land; they do not apply to remains that are excavated on state land.¹²

Despite these limitations, there is a sense of optimism that the amended regulations remedy many of NAGPRA’s historic shortcomings. They come at a time when museums and universities have increasingly been in the spotlight for the speed of their NAGPRA repatriations — notably, Harvard University’s Peabody Museum of Archaeology and Ethnology and the University of California, Berkeley, among others, have been criticized for their failure to comply with NAGPRA.¹³ “Things have changed. The law has changed, and the

public is calling out institutions around the world for their failure to return Indigenous bodies and sensitive cultural and religious items stolen in the name of science, conquest, and war,” said O’Loughlin.¹⁴

Recommendations for museums that may have objects subject to NAGPRA include:

- Redefining goals and values to center on the wants and needs of Indian Tribes and Native Hawaiian Organizations;
- Building genuine and transparent relationships with Indian Tribes;
- Removing items from display, circulation, and research prior to and during the consultation process;
- Considering an outside audit of collections to assess whether any items have not been properly subject to NAGPRA consultations;
- Accommodating the cultural and religious protocols of those visiting for consultation;
- Conferring with all other institutional departments that may contain collections, including, but not limited to, a university’s library, biology/anatomy departments, president’s office, art history department, etc.

One of the pitfalls that has plagued many institutions is that limited funding and resources often make them hesitant to engage legal counsel to assist with NAGPRA compliance. As a result, this burden often falls to museum professionals and university staff who, while experts in their respective fields, often aren’t trained in legal compliance. Given that NAGPRA is a federal statute that requires complex legal interpretation and has potential civil penalties, and the historic widespread lack of compliance, institutions are encouraged to obtain legal counsel whenever possible to assist in NAGPRA repatriation efforts.

By redefining goals and values to prioritize the return of ancestors and objects to Native Nations, and engaging legal counsel to assist in interpreting and implementing the new NAGPRA rule, universities and museums alike can move towards rebuilding relationships with Tribal Nations and healing from past human rights abuses.

¹ *Interior Department Announces Final Rule for Implementation of the Native American Graves Protection and Repatriation Act*, U.S. Dep’t of the Interior (Dec. 6, 2023), <https://www.doi.gov/pressreleases/interior-department-announces-final-rule-implementation-native-american-graves>.

² 43 CFR § 10.1(a).

³ *Native American Priorities: Protection and Repatriation of Human Remains and Other Cultural Items*, U.S. Government Accountability Office, (Oct. 10, 2023), <https://www.gao.gov/products/gao-24-106870>.

⁴ *Id.*

⁵ Logan Jaffe, et al., *The Repatriation Project: America’s Biggest Museums Fail to Return Native American Human Remains*, ProPublica, (Jan. 11, 2023, 5 a.m. EST), <https://www.propublica.org/article/repatriation-nagpra-museums-human-remains>.

⁶ *Interior Department Announces Final Rule for Implementation of the Native American Graves Protection*

and Repatriation Act, U.S. Dep't of the Interior, (Dec. 6, 2023), <https://www.doi.gov/pressreleases/interior-department-announces-final-rule-implementation-native-american-graves>.

⁷*Id.*

⁸Nancy Eve Cohen, *New federal rules for repatriation of Native ancestors, objects from museums expected in 2024*, New England Public Media, (Dec. 13, 2023), <https://www.wbur.org/news/2023/12/13/native-remains-repatriation-new-rules-nagpra>.

⁹*Id.*

¹⁰*Id.*

¹¹Natalie Fertig, *Who gets to be American Indian?*, Politico, (Aug. 23, 2022, 3:05 p.m. EST), <https://www.politico.com/newsletters/the-recast/2022/08/23/american-indian-recognition-chinook-lumbee-00053331#:~:text=But%20many%20of%20the%20tribes,only%20one%20pot%20of%20money>.

¹²Nancy Eve Cohen, *New federal rules for repatriation of Native ancestors, objects from museums expected in 2024*, New England Public Media, (Dec. 13, 2023), <https://www.wbur.org/news/2023/12/13/native-remains-repatriation-new-rules-nagpra>.

¹³Logan Jaffe, et al., *The Repatriation Project: America's Biggest Museums Fail to Return Native American Human Remains*, ProPublica, (Jan. 11, 2023, 5 a.m. EST), <https://www.propublica.org/article/repatriation-nagpra-museums-human-remains>.

¹⁴The Assoc. on Am. Indian Affairs, *Building a New Fire: Native Leaders Gather to Drive Repatriation Efforts Forward*, Native News Online, (Oct. 4, 2023), <https://nativenewsonline.net/sponsored-content/building-a-new-fire-native-leaders-gather-to-drive-repatriation-efforts-forward>.

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