



USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically
To [regulations.gov](https://www.regulations.gov)*

January 31, 2023

Shannon Estenoz
Principal Deputy Assistant Secretary for Fish and Wildlife and Parks
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

RE: USET SPF Comments on Proposed Revisions to NAGPRA Regulations, Docket ID No. NPS-2022-0004-0001

Dear Principal Deputy Assistant Secretary Estenoz,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the proposed rule to revise the Native American Graves Protection and Repatriation Act (NAGPRA) regulations. NAGPRA was enacted by Congress in November 1990 to establish a process for Tribal Nations to protect and bring home our ancestors, our funerary sacred items, and items of sacred and cultural importance that were stolen from our people or otherwise illegitimately obtained. USET SPF has participated in DOI NAGPRA Tribal consultations and Listening Sessions held throughout 2021, 2022, and 2023, which were held to revisit proposed revisions to the NAGPRA regulations that were initiated under the Trump Administration. While we defer to our partners with greater NAGPRA expertise for granular level comments on the proposed revisions to NAGPRA—due to their highly technical nature—our comments will focus on recommendations regarding consultation language throughout the regulations, support for revisions to Comprehensive Agreements, and recommendations on increased civil penalties for NAGPRA violations.

USET Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.¹ USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

^[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe—Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Because there is Strength in Unity

The current repatriation process is broken and the inefficient compliance and enforcement mechanisms currently in place only undermine our abilities to bring our ancestors and sacred items home to their rightful places. We appreciate DOI's continued efforts to engage with Tribal Nations on revising NAGPRA's regulations to address these issues, especially since USET SPF has previously expressed concerns about the adoption of the proposed revisions initiated under the Trump Administration. The current proposed revisions are long overdue, and we support DOI's efforts to revise these regulations to streamline requirements for federal agencies and federally funded museums to identify ancestors and sacred, cultural items in inventory and begin the repatriation process to Tribal Nations. These actions will empower Tribal Nations to bring home our ancestors, their funerary items, and items of cultural significance back to their rightful place.

Language Regarding Tribal Consultation Requirements Should Be Referenced Throughout the NAGPRA Regulations

On September 30, 2021, USET SPF submitted comments on the previous proposed revisions to NAGPRA, which were first offered under the Trump Administration. We stressed the need for renewed consultation efforts from DOI and appreciate that the Department has further revised the regulations based on input received from Tribal Nations and Tribal organizations. For the first time *consultation* has been defined in the NAGPRA regulations under Sec. 10.2 – *Definitions* and included under Sec. 10.1(a) in the *Purpose* statement of the regulations. While USET SPF supports the *consultation* language included in Sec. 10.2 regarding the incorporation of Indigenous knowledge, we propose making the edits indicated below to strengthen this definition—

“Consultation means a process to seek consensus **with Indian tribes** through the exchange of information, open discussion, and joint deliberations and by all interested parties incorporating identifications, recommendations, and Native American traditional knowledge, **to the maximum extent possible.**”

We believe that the addition of this language to the ‘consultation definition’ will direct federal agencies, federally funded museums, and institutions of higher learning to seek consensus from Tribal Nations instead of these entities solely determining the outcome of the consultation process. Additionally, we strongly recommend the removal of “to the maximum extent possible” as this language does not conform with the purpose of NAGPRA. Furthermore, we recommend that all mentions of ‘consultation’ throughout the regulations should also include references to the term under Sec. 10.2 – ‘Definitions’. This will ensure that all staff from federal agencies, museums, and institutions of higher learning are aware of this new definition when referring to different sections of the regulations.

Support for Language Requiring Consultation with Tribal Nations on Comprehensive Agreements

One of the issues USET SPF raised in our comments submitted in September 2021 included recommendations to refine the Comprehensive Agreements language under Sec. 10.4. We raised concerns that these Agreements must first be signed by an official of a federal agency before being provided to “all consulting parties”, which included Tribal governments. We are pleased that the proposed revisions now include language stating that these Agreements must, “be developed in consultation with any Indian tribe...” under Sec. 10.4(c)(1). We believe that the addition of this recognizes Tribal sovereignty and provides opportunities for Tribal Nations to review any binding Agreement prior to it being officially signed and issued by a federal agency and its officials. This will ensure that the development of these Agreements provide Tribal Nations with a transparent agency land management plan and would further support us in protecting our ancestors and sacred items.

Strengthen Civil Penalties for NAGPRA Violations

Under Sec. 10.11 – ‘Civil Penalties’, we support the addition of language stating that, while this section does not apply to federal agencies, “...a Federal agency’s failure to comply with the requirements of the Act or this part may be subject to other remedies under Federal law.” USET SPF firmly supports that federal agencies should be held accountable to the fullest extent of the law when they are not in compliance with NAGPRA. For too long, Tribal Nations have been burdened with the cumbersome and complicated repatriation process and any violations of NAGPRA compliance should be handled in a timely, efficient, and respectful manner. Additionally, federal agencies must work to ensure that the ancestral remains, funerary items, cultural items, and other possessions of sacred nature are expeditiously repatriated to Tribal Nations. These sacred ancestors and items deserve to be returned home to their rightful place.

USET SPF also recommends that DOI revisit its current penalty amount for noncompliance with NAGPRA, which was [recently set at a base amount](#) of \$8,054 as adjusted under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (P.L. 114-74). The Secretary of the Interior can also assess a daily penalty of \$1,612 per day for failure to comply with NAGPRA. These penalty amounts should be revised to ensure that penalty assessments hold institutions financially accountable for NAGPRA violations—especially those who are repeat offenders. NAGPRA violations by federal agencies and museums and higher institutions funded by federal dollars must be held accountable for noncompliance. For these reasons, USET SPF supports the addition of language in the proposed revisions of the regulations that state—

“Sec. 10.11(c) ‘Civil Penalties’—

(2) The base penalty amount may be increased after considering:

(i) The ceremonial or cultural value of the human remains or cultural items involved, as identified by any aggrieved...Indian Tribe.”

Although it is difficult for us to assess or determine the monetary value of ceremonial items and our ancestors since they are sacred to us, the inclusion of this language means that the aggrieved Tribal Nation(s) have the option of stating this in a formal allegation. We also strongly recommend that the Secretary assess increased penalties for repeat federal agencies and federally funded museums and institutions of higher learning that fail to comply with NAGPRA.

Furthermore, to protect from retaliation and potential workplace harassment, we also recommend that staff from museums and institutions of higher learning have their anonymity protected, unless the alleging party affirmatively states otherwise if an allegation for NAGPRA noncompliance is filed. This will ensure that whistleblowers are protected if they view NAGPRA violations in the workplace. We are also concerned that any allegations of NAGPRA noncompliance are required to be submitted to the Manager of the National NAGPRA Program. The Manager is also responsible for managing millions of dollars in grants awarded directly to museums against which allegations may be made. To resolve this apparent conflict of interest, we request that the regulations establish an online system for individuals to submit anonymous allegations, perhaps administered through the DOI’s Office of the Inspector General. Additionally, we strongly recommend that NAGPRA violations should be published in the Federal Register to inform the public of enforcement actions and penalties. The public and Tribal Nations should be made aware of failures to comply with NAGPRA, especially in the case of repeat offenders.

Conclusion

An essential aspect of the federal trust obligation to Tribal Nations is the duty to assist us in protecting, preserving, and restoring our cultural heritage. Native peoples have endured many injustices as a result of federal policy, including federal actions that sought to terminate Tribal Nations, assimilate Native people,

and to erode our territories and cultures. The theft and desecration of our ancestors, their funerary items, and sacred cultural items is a primary example of the ongoing injustice we face. The federal government has an opportunity to right some of these historic wrongs by developing NAGPRA regulations that empower Tribal Nations to bring our ancestors and sacred items home—where they belong. We appreciate that DOI is examining ways to strengthen these regulations and we look forward to continuing to work with you to ensure that any proposed NAGPRA revisions fully empower Tribal Nations to protect and care for our ancestors and sacred items. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906.

Sincerely,



Kirk Francis
President



Kitcki A. Carroll
Executive Director