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VIA FEDERAL E-RULEMAKING PORTAL: https://www.regulations.gov

Ms. Melanie O'Brien
Manager NAGPRA Rule Comments
National NAGPRA Program
National Park Service
1849 C Street NW
Washington, D.C. 20240

Re: Comments on Proposed, Updated NAGPRA Regulations

Dear Ms. O'Brien:

These comments regarding the Proposed Rules for 43 C.F.R Part 10 implementing the Native American Graves Protection and Repatriation Act (NAGPRA, or the Act), RIN 1024-AE19, are respectfully submitted by the National Mining Association, the Women's Mining Coalition, and the American Exploration & Mining Association on behalf of its members. The three organizations submit these comments on the rules proposed by the Office Secretary of the Interior (Department) published on October 18, 2022 in the Federal Register. 87 Fed. Reg. 63,202 (Proposed Rules). The Proposed Rules are a wholesale rewrite of the existing regulations at 43 C.F.R. part 10, promulgated on December 4, 1995 (60 Fed. Reg. 62,134, hereafter the 1995 Rules).

Introduction and Statement of Interest

The National Mining Association (NMA) is a national trade association that includes the producers of most of the nation's coal, metals, and industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment, and supplies; and the engineering and consulting firms, financial institutions, and other firms serving the mining industry. The NMA works to ensure America has secure and reliable supply chains, abundant and affordable energy, and the American-sourced materials necessary for U.S. manufacturing,

national security and economic security, all delivered under world-leading environmental, safety and labor standards.

The American Exploration & Mining Association (AEMA) is a 128-year-old, 1,400-member national trade association representing the mineral development and mining industry, with members residing across 46 states, 7 Canadian provinces or territories and 10 other countries. AEMA represents the entire mining life cycle, from exploration to mineral extraction and then to reclamation and closure. More than 80 percent of AEMA's members are small businesses or work directly for small businesses.

The Women' Mining Coalition (WMC) is a 30-year -old grassroots organization with over 200 members nationwide, whose mission is to advocate for today's modern domestic mining industry, which is essential to our Nation. WMC members work in all sectors of the mining industry including hardrock and industrial minerals, coal, energy generation, manufacturing, transportation, and service industries. WMC convenes Washington, D.C. Fly-Ins to give its members an opportunity to meet with members of Congress and their staff, and with federal land management and regulatory agencies to discuss issues of importance to both the hardrock and coal mining sectors. The WMC Advisory Council is made up of industry professionals with extensive experience from all facets of the mining industry. Based on this experience, WMC is well qualified to review the NAGPRA Proposed Rules and to provide these comments.

NMA, AEMA, and WMC (together, the Organizations) members explore for and develop minerals on federal, state, and private lands throughout the U.S. Our members explore for and develop a variety of commodities, including many considered "critical" according to the U.S. Geological Survey (USGS), but all of which are critical to the U.S. economic and national security. American miners continue to play an indispensable role in building and defending our Nation. From foundations to roofs, power plants to wind farms, roads and bridges to communications grids and data storage centers, America's infrastructure begins and ends with minerals and mining.

While most of the provisions in the Proposed Rules apply solely to the relationships among museums and other private institutions, federal agencies and Tribes, Alaska Natives and Native Hawaiian Organizations (NHOs), many of our members' operations are conducted on federal lands pursuant to the Mining Law of 1872 and other statutes, and these operations therefore must comply with the discovery provisions of NAGPRA. NMA, AEMA, and WMC member operations are expressly made subject to certain NAGPRA requirements through their federal permits and authorizations as required under the current 43 C.F.R. §10.4(g), which is proposed to be carried over into the Proposed Rules at §10.4. As such, the Proposed Rules are applicable to, and will impact the Organizations' members.

Summary of Comments and Recommendations

The Organizations support the Secretary's stated goals to "clarify and improve upon the systematic process for the disposition of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony . . . and describe the processes in accessible

language with clear timelines and terms, reduce ambiguity, and improve efficiency in meeting the requirements."[1] The reorganization of the Proposed Rules to more clearly outline the step-by-step provisions for consultation, for discovery, and encouraging agencies to adopt comprehensive agreements and/or plans of action are laudable, may increase the overall effectiveness of consultation and repatriation, and foster greater respect for the traditions and culture of Native peoples of the U.S.

In specific, the Organizations appreciate and support the proposed new mechanism for comprehensive agreements.[2] Such agreements, especially if coordinated with any applicable agreement documents under the National Historic Preservation Act, [3] could provide an even more effective means to protect and repatriate NAGPRA-protected items. They would be in keeping with the Biden Administration's emphasis on early and thorough consultation with Native Nations and benefit such Nations, their citizens, federal agencies, and the public by establishing agreed procedures to comply with NAGPRA appropriate to a specific location and the Native peoples affiliated with such areas.

Given our overall support, the Organizations' comments are limited in nature and focus solely on four discrete areas of the Proposed Rules that, taken together, are likely to adversely affect mining companies working under federal authorizations on federal lands. In brief, the Organizations are concerned that the Proposed Rules go beyond what is allowed under the NAGPRA and existing law in the following areas:

1. The Proposed Rules impermissibly broaden certain statutory definitions of NAGPRA-protected items in a manner inconsistent with Congressional intent and may violate the Archeological Resources Protection Act.
2. The Proposed Rules impermissibly require private parties to notify an unspecified and ambiguous "additional point of contact."
3. The Preamble for the Proposed Rules (Preamble) impermissibly broaden the concept of "final agency action" to include "some circumstances where a federal agency's failure to comply with a regulatory requirement or deadline *may* demonstrate its determination that either the Act or this part is inapplicable."
4. The Proposed Rules impermissibly extend the stop work period after a discovery.

These issues are described more fully below.

[1] 87 Fed. Reg. 63,202.
[2] Proposed Rule §10.4(c), 87 Fed. Reg. 63,242.
[3] 54 U.S.C. §§100101 *et seq.*

Specific Comments on Proposed Rules

Comment 1: The Proposed Rules impermissibly broaden the interpretation of the defined term "sacred object", which will greatly increase instances of discovery on public lands in contravention of Congressional intent and the Archaeological Resources Protection Act.

The Act defines "sacred objects" to be "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."[4] This definition was used nearly verbatim in the 1995 rules, with the addition of the following clarification:[5] "While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual, these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony."[6] The Proposed Rules would change this definition to read: "Sacred object means an object that is a specific ceremonial object needed by a traditional religious leader for the practice of traditional Native American religion by present-day adherents, according to a lineal descendant, Indian tribe, or Native Hawaiian organization based on customs, traditions, or Native American traditional knowledge. While many items might be imbued with sacredness in a culture, this term is specifically limited to objects needed for the observance or renewal of Native American religious ceremonies."[7]

The Organizations are concerned that the proposed expanded regulatory definition of sacred object may result in unintended consequences and is contrary to the explicit Congressional intent when NAGPRA was enacted. The legislative history of NAGPRA emphasizes that both chambers of Congress thoughtfully contemplated the definition of sacred objects, and intended the term to mean objects that are needed for ceremonies, not only those that are currently being practiced but objects needed to renew ceremonies that may have been interrupted for any number of reasons.[8] Further:

> "The Committee received comments regarding the ambiguity surrounding the term "sacred," in particular when that term is used in reference to Native American religious practices. There has been concern expressed that any object could be imbued with sacredness in the eyes of a Native American, from an ancient pottery shard to an arrowhead. The Committee does not intend this result. The term sacred object is an object *that was devoted to a traditional religious ceremony or ritual when possessed by a Native American and which has religious significance or function in the continued observance or renewal of such ceremony*. The Committee intends that a sacred object *must not only have been used in a Native American religious ceremony but that the object must also have religious significance*. The Committee recognizes that an object such as an altar candle may

[4] NAGPRA §3001(3)(C).
[5] This clarification adopts almost verbatim a portion of the legislative history cited in footnote 8 below.
[6] Current 43 C.F.R. §10.2(d)(3).
[7] Proposed 25 C.F.R. §10.2, 87 Fed .Reg. 63,240.
[8] H.R. 101-877 at 14.

> have a secular function and still be employed in a religious ceremony. The substitute amendment requires that the primary purpose of the object is that the object *must be used* in a Native American religious ceremony in order to fall within the protections afforded by the bill.[9]

Neither the statutory language nor the current rule are ambiguous, and the Congressional language makes clear that not every Native American artifact fits the definition of sacred object. Rather it must have been used in, or needed to revive, a specific function of religious practice. The new definition in the Proposed Rule changes that meaning which the Organizations' members have relied upon for decades for regulatory certainty since the 1995 Rules. But the Department, in its responses to comments during tribal consultation, and in the Preamble, purports to interpret this new definition in a manner that eliminates the narrow intent and meaning of this term in the Act.

Notwithstanding unambiguous Congressional intent, the Department stated: "We have also clarified that a sacred object is not 'used,' but may only be needed, in religious ceremonies, which could include interring the object."[10] The Department repeated this interpretation in the Preamble, stating that a traditional Native American religious practice "could include the need to ritually inter the object."[11]

Adhering to Congressional intent and the statutory definition of sacred objects is important for two reasons. First, in our members' experience, some Native Nations have asserted that any material evidence of pre-contact culture is sacred to them. If, as required in the Proposed Rules, a federal agency will "defer to the customs, traditions, and Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations",[12] the Department's interpretive gloss will likely lead to a federal agency deferring, without regard to the Act, to an assertion that any number of objects not actually used or needed for ceremonies or religious practice are "sacred objects" and then invoke the requirements of the Act and implementing regulations.

Defining away the decades-long understanding that NAGPRA-protected sacred objects must be needed for use in religious practices and ceremonies impermissibly subverts Congress' clear intent to narrowly define sacred objects. This is especially important given the requirement under NAGPRA for a person that discovers a "Native American cultural item" on federal land to stop work near the discovery and notify the federal agency. If the term "sacred object" (which is included in the Act's definition of "cultural item") can include anything that a Tribe or lineal descendant feels it needs, even if only to reinter, then the discovery and stop work requirements could apply to almost anything on federal lands.

For example, at some of our members' mining operations, local Tribes have deemed lithic material to be sacred and assert protection under NAGPRA. Given the Proposed Rules' emphasis

[9] S.R. 101-473 at 5 (emphasis added).
[10] *See* Response to Tribal Consultation Comments at 19.
[11] Preamble at 87 Fed. Reg. 63,215.
[12] Proposed §10.1(a), 87 Fed. Reg. 63,237.

on deference to Native American traditional knowledge as to the importance of NAGPRA cultural items, will the BLM now require notification and work stoppage every time a lithic scatter is encountered? Or during Class III inventories? Currently it is very rare to have a NAGPRA discovery due to baseline studies and consultation during the permitting process that would identify NAGPRA protected objects ahead of time. Merely changing the interpretation of sacred object to mean anything a Native Nation or lineal descendant asserts would greatly increase the number of NAGPRA discoveries for many activities, including mining, on public lands. If an agency were to extend deference and interpret as sacred objects lithic material, toolstone and/or any number of artifacts left behind by Native ancestors, there could be multiple NAPGRA discoveries, and attendant stop work orders,[13] on one mine site, each in various stages of consultation, excavation, and repatriation. Changing instances of a NAGPRA discovery from a rarity to routine would make permitted activities on federal lands unworkable.

Another material issue the Department should consider is that the impermissible broadening of the term "sacred object" could create a conflict with the Archeological Resources Protection Act (ARPA),[14] which provides that archaeological resources removed or excavated from federal lands must be curated in a federally-approved curation facility.[15] While some Native Nations have facilities that qualify under federal standards, most do not. In addition, the ARPA requires curation and preservation of archaeological resources and does not allow their re-interment. Given that most, if not all, pre-contact Native American artifacts located on federal lands are protected under ARPA, ARPA would prohibit their repatriation to a Tribe except into a federally-approved curation facility. The final rules must revert to Congressional intent and express statutory language.

Comment 2: The Proposed Rule impermissibly requires private parties to notify an unspecified and ambiguous "additional point of contact" (proposed 10.5(a) and 10.5(b)).

The Proposed Rules, in both sections 10.5(a) and 10.5(b), require private parties on federal lands to notify not only the federal land manager, but an unspecified "additional point of contact." This additional point of contact is described in Table 1 to §10.5 to be "any Indian Tribe or Native Hawaiian organization with potential affiliation, if known." The Act is unambiguous that notification of a discovery on federal lands is limited to the federal land managing agency, and notice to Tribes and NHOs is limited to tribal lands:

> Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization **with respect to tribal lands**, if known or readily ascertainable, and, in the case of lands that have

[13] This is especially problematic given the Proposed Rules' almost threefold extension of the stop work period. *See* Comment 4 below.
[14] 16 U.S.C. §§470aa-470mm.
[15] *See* 43 C.F.R. Part 7; 36 C.F.R. Part 79.

> been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. §1601 et seq.], the appropriate corporation or group.[16]

The statutory language provides no discretion or latitude for the Department to expand upon the notification requirements for private parties operating solely on federal lands. The Department cannot, through mere regulations, amend the statute to impose further burdens on private parties.

There is a good policy reason for Congress to have established different notification requirements for federal lands and tribal lands. This is because there are publicly-available maps that identify federal and tribal lands and the information needed to identify the proper agency to notify based on land status is readily available. But information as to what Tribes are "culturally affiliated" with federal lands is not so readily available. That is why it makes sense for notification requirements on federal lands is appropriate, but notification to "additional contacts" for Tribes is not.

Federal agencies have unique expertise through their duties to Indian tribes and are best placed to identify the Tribes with cultural affiliation to federal lands. The general public will have no idea what portion of federal lands might have "potential affiliation" with a Tribe or NHO. The Proposed Rules themselves list more than 10 different, and not reasonably ascertainable, pieces of information that the Department itself would use to determine cultural or geographical affiliation: (i) Anthropological; (ii) Archaeological; (iii) Biological; (iv) Folkloric; (v) Geographical; (vi) Historical; (vii) Kinship; (viii) Linguistic; (ix) Oral Traditional; or (x) Other relevant information.[17]

There are other ancillary land definitions in the Proposed Rules that would also need to be evaluated by a party trying to identify the required "additional point of contact." The other potentially culturally affiliated lands in the Proposed Rules[18] are even more complicated:

> "Acknowledged aboriginal land" – which is defined by reference to: a treaty sent to Congress for ratification (but not necessarily ratified); Congressional Acts (but not necessarily codified); Executive Orders; a treaty between a Tribe and a foreign power *prior to the formation of the United States*; another Federal document *or foreign government document* that reasonably shows aboriginal occupation; *intertribal treaties and bilateral accords*.[19]

[16] 25 U.S.C. §3002(d)(1)(emphasis added).
[17] Proposed §10.3(a).
[18] Commenters do not challenge any such definitions as it is acknowledged they are likely useful and appropriate for the main purposes of NAGPRA – determining cultural affiliation for the purposes of identification, inventory, and repatriation. But they are wholly unworkable in the discovery notification context the Proposed Rules impose on private persons.
[19] Proposed Rules at §10.2.

> "Adjudicated aboriginal land" – which mean land the Indian Claims Commission has recognized in a final judgment. [20]

Much of this information is not publicly available and not readily accessible. It is not reasonable nor appropriate to foist this federal obligation onto private parties. Further, the Department cannot create legal liability for unwitting private persons that, as demonstrated above, can have no way of knowing what Tribes or NHOs should be notified. Adding the caveat "if known", does not help, especially in light of the Department's responses to tribal comments on an earlier draft of the Proposed Rules. For example, the following provides a disturbing example of how the Department anticipates how it will enforce the "if known" caveat:

> [I]n those cases where that information is readily available, the person should report to those Indian Tribes or NHOs. For example, a discovery in a National Park unit by a visitor should be reported to both the Federal staff at the National Park unit, but also the relevant Indian Tribe or NHO *that is likely to be identified in interpretive materials within the National Park.*[21]

That a member of the public visiting a national park is deemed to have constructive knowledge just because somewhere within the park an interpretive sign "is likely" to identify a local Indian Tribe is completely unreasonable and further demonstrates the arbitrariness and unreasonableness of this attempted amendment of the Act through the Proposed Rules. There is no question that the Department cannot impose Tribal and NHO notification for federal lands on private parties and this requirement must be removed from the Proposed Rules.

Alternatively, the Organizations would have no objection to the Department establishing a mechanism for "persons" discovering NAGPRA-protected items to *voluntarily* agree to notify a *specifically defined and provided set of additional contacts*, and some of our members do so on a regular basis. For example, some NMA, WMC, and AEMA members have entered into voluntary agreements, whether directly with Tribes, or through or in NHPA and NAGPRA discovery protocols contained in historic properties treatment plans and agreement documents under the NHPA. There is also an opportunity, through the "Comprehensive Agreement" process in the Proposed Rules, for federal land permittees to voluntarily agree to notify a defined set of "additional points of contact."

While the Department cannot mandate notifications of discoveries on federal lands to contacts other than federal agencies, the AEMA, WMC, and NMA support a middle ground approach whereby a private party could voluntarily agree to do such notifications, as long as the list of contacts is developed by the federal agency, and the private party has no duty to investigate on its own what Tribes or NHOs have "cultural affiliation" with the subject lands. Should the Department consider this approach, it should provide agencies the flexibility to include such processes and voluntary agreements through any number of instruments, including,

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[20] *Id.*

[21] *See* Response to Tribal Consultation on revisions to 43 C.F.R. Part 10, Native American Graves Protection and Repatriation Act Regulations, updated August 2022 at p. 28 (emphasis added) (hereafter Response to Tribal Consultation Comments).

but not limited to, the proposed comprehensive agreements, a plan of action, or an NHPA agreement document or historic properties treatment plan.

Comment 3: Impermissibly broadening the concept of "final agency action" to include "some circumstances where a federal agency's failure to comply with a regulatory requirement or deadline may demonstrate its determination that either the Act or this part is inapplicable."[22]

The Act, the 1995 Regulation and the Proposed Rules all provide for federal district court jurisdiction over alleged violations of the Act.[23] Courts have found, however, that the jurisdictional provisions of the Act are not a waiver of federal sovereign immunity, and therefore the Administrative Procedure Act (APA)[24] is the proper avenue to bring a NAGPRA claim. The APA in turn, requires that certain requirements be met to bring a claim against the federal government under the APA, namely,

1. That the challenged agency's action be final (APA Section 704);

2. That the scope of a courts remedy is limited to (a) compelling agency action unlawfully withheld or unreasonably delayed and (b) setting aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law; unsupported by substantial evidence; unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court (APA Section 706); and

3. The factual evidence in the appeal is limited to the administrative record (APA Section 706).

Neither the APA nor the Act contain definitions of final agency action, and courts have established a test for the purposes of determining whether an action is "final" for purposes of judicial review under the APA:

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decision making process,—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."[25]

The Department has, by regulation, defined final agency action for the Department in a number of circumstances, for example in 43 CFR Part 7 and 25 CFR Part 2. The Proposed Rules at

[22] Preamble at 87 Fed. Reg. 63,208.
[23] 25 USC § 3013; 43 CFR § 10.11(e) (existing); 43 CFR § 10.1(h).
[24] 5 U.S.C. §§ Ch. 7.
[25] *Bennett v. Spear,* 520 U.S. 154, 177-178 (1997) (internal citations omitted).

Section 10.1(i) establish for the Department what constitutes "final agency action" for purposes of the APA, and thus judicial review, under the Act:

> For purposes of the Administrative Procedure Act [citations omitted], any of the following actions by a Federal agency constitutes a final agency action under this part:
>
> (1) A final determination making the Act or this part inapplicable;
> (2) A final denial of a claim for disposition or a request for repatriation; and
> (3) A final disposition or repatriation determination.

The second two agency decisions appear to be final agency actions under the Supreme Court's test as both appear to appropriately represent a consummation of the agency's decision making process for which rights and obligations have been determined. Our concern is with the Department's first definition of an "action", i.e., "a final determination making the Act or this part inapplicable." Likely addressing the difficulty of a potential plaintiff in establishing a negative, the preamble expands upon this definition by stating:

> Regarding final agency action, ''a final determination making the Act or this part inapplicable'' is intended to be construed broadly across the regulatory process, including some circumstances where a Federal agency's failure to comply with a regulatory requirement or deadline may demonstrate its determination that either the Act or this part is inapplicable.[26]

While the Department discusses the definition of final agency action as being "construed broadly" and "across the regulatory process" when discussing the proposed definition in section 10.1, the only other instances the Department discusses final agency action is in the context of Subpart C of the regulations, which only apply to repatriation of human remains or cultural items.[27] This context makes sense given that section 10.11 establishes an administrative review process for civil penalties assessed to museums under the Act and implementing regulations. Consequently, the Department's focus and evaluation on defining final agency action – as is consistent with much of the Preamble and Proposed Rules – are on actions involving repatriation and whether museums have complied with the Act and the corresponding regulations.

This context is important because it illustrates that the Department has not considered all relevant information and impacts of the proposed regulations. Specifically, there is no evidence in the Preamble that the Department considered how the inclusion of section 10.1(i)(1) would impact Subpart B – Protection of Human Remains or Cultural Items on Federal of Tribal Lands – and judicial review of the requirements set out in sections 10.4 to 10.7. It is unreasonable

[26] 87 Fed. Reg. 63,208.

[27] *See* 87 Fed. Reg. 63,230/1 (discussing the civil penalty provisions of section 10.11, which apply to museums that fail to comply with the Act); *id.* at 63231 (discussing the expectation that museums would exhaust administrative remedies before seeking judication review); *see also id.* at 63208 (Table 2) (cross-referencing existing section 10.15(c), exhaustion of remedies, with proposed section 10.1(i), new section on final agency action).

for the Department to enact such a broad definition without considering the relevant impacts on the whole of the regulation.

Moreover, the Department's statement that the definition of final agency action as being inclusive of "final determination making the Act or this part inapplicable" should be "construed broadly across the regulatory process" is impermissible as such a "broad" and ambiguous construction swallows the whole of the intent of the term "final agency action." NMA, WMC, and AEMA members' interests regarding when an agency action can be challenged involve the agency environmental reviews, permitting decisions and regulatory oversight. Construing 10.1(i)(1) as broadly as the Department suggest in the Preamble has the potential of expanding the number of actions and/or inactions that could be argued to indicate that a Federal agency does not believe NAGPRA applies to a decision before the Department. Taken as broadly as the Preamble asserts, section 10.1.(i)(1) could disrupt the agency review process of federal land uses in any number of ways. This disruption would create uncertainty and delay for not only mining projects, but also for any number of infrastructure projects and other federal land uses, including, but not limited to, critical minerals, transmission, water and other pipelines, reclamation projects, roads, grazing, renewable energy, timber projects, and conservation initiatives, or any other activity on federal land. The preamble opens the door to challenges to the NEPA scoping process and NEPA documents and other regulatory processes based solely on an alleged failure to meet a deadline or adequately consult with a Tribe at any point prior to a Record of Decision. This will increase costs and delays for all infrastructure on federal lands.

The Department does not have the authority to define what constitutes a final agency action for purposes of judicial review. Indeed, the Supreme Court has ruled that an agency's "failure to act" is only *sometimes* "final agency action" under the APA.[28] "Agency action" means "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act*." 5 U.S.C. § 551(13). The latter category, failure to act, "is properly understood to be limited, as are the other items in § 551(13), to a *discrete* action … that [the agency] is *required* to take."[29] This limitation "protect[s] agencies from undue judicial interference with their lawful discretion, and [avoids] judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve."[30]

The Department's insistence that the definition of "final agency action" be "construed broadly across the regulatory process" cannot subvert the Supreme Court's rule in *Norton.* In other words, "a Federal agency's failure to comply with a regulatory requirement,"[31] is only remediable under the APA if the requirement is a "clearly imposed duty to take some discrete action."[32] Under the Proposed Rules, for example, the Department's decision to—or failure to—invite certain Tribes to consult, lacks "the specificity requisite for agency action" that leaves no

[28] *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61 (2004) ("Failures to act are sometimes remediable under the APA, but not always.").
[29] *Norton*, 542 U.S. at 64 (emphasis in original); *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006) ("A 'failure to regulate' claim must be based upon a clearly imposed duty to take some discrete action.).
[30] *Norton,* 542 U.S. at 68.
[31] 87 Fed. Reg. 63,208/3.
[32] *Matejko*, 468 F.3d at 1110.

discretion in the agency.[33] Moreover, the Proposed Rules leave considerable discretion in the agency to decide whether, based on the "likelihood" of a discovery, a pre-project plan of action is required and which Tribes must be contacted.

The Department cannot, especially through an ambiguous reference in the Preamble, redefine final agency action for purposes of judicial review under the APA.

Comment 4: The Department is Not Permitted to Expand the Stop Work Period

The NAGPRA statute is clear on its face what the "stop work period" is for a discovery. Even if the text of NAGPRA were unclear, the legislative history reveals that this stop work period was discussed and the intent of Congress was not to significantly delay or impair development of federal lands on account of a discovery. The Proposed Rules, however, impermissibly expand the stop work period in two ways, first by allowing an additional 35 days for a federal agency to certify that work can proceed, and second by redefining "day" to mean "business day" rather than the almost 30-year history of calculating the 30-day stop work period using calendar days.

1. <u>The Department Proposes to Impermissibly Extend the Time in Which an Agency Certifies that Notice of a Discovery was Received</u>.

The Proposed Rules more than double the period of days – for a maximum of 65 business days – that nearby activities must remained stopped following a discovery of human remains and/or cultural items.[34] But this proposed extension of the stop-work period is impermissible as the Department's proposal disregards the express permission granted by NAGPRA itself that a halted activity may resume 30 days after notification of the discovery was received by the appropriate agency. Where Congress imposes such a clear direction on when activities may resume, the Department has no authority to expand the time period by regulation.[35] Moreover, the expansion of the stop-work period is contrary to the Department's stated purpose of streamlining the requirements of the NAGPRA regulations.[36]

NAGPRA establishes a straightforward process for how parties carrying out activities on federal land, federal agencies, and Tribes are required to proceed when human remains or cultural items are discovered on federal land.

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[33] *Norton*, 542 U.S. at 68.

[34] *See* Proposed 43 CFR § 10.5(e) (requiring the appropriate official to certify "no later than 35 days after receiving written documentation of a discovery" that an activity may resume "no later than 30 days after the written certification"). Furthermore, under the proposed regulations, the 65-day period would be calculated as 65 business days, as opposed to calendar days, which further expands the potential stop-work period under the regulations. *See* Comment No. 4.2 below.

[35] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Util. Air Regul. Grp. v. E.P.A*., 573 U.S. 302, 326 (2014) ("Agencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always give effect to the unambiguously expressed intent of Congress." (internal quotations omitted)).

[36] 87 Fed. Reg. 63207 (Table 1, section 10.5 discussion; "Reduces and streamlines requirements for discoveries").

> Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the DOI, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands . . . . If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.[37]

Pursuant to the express language of the statute, once a discovery is made on federal land, a party must (1) cease the activity in the area of the discovery, (2) protect the discovered human remains and/or cultural items, and (3) provide written notice to the relevant federal agency of the discovery (and Tribe only if the discovery occurred on tribal lands). In turn, the agency must issue a certification that the notification has been received. The activity may resume 30 days after the certification. The statute does not assert or require that any additional permission be granted by an agency or an authority to resume an activity after 30 days, rather the permission appears to be granted in the statute itself.

The plain language of the Act imposes an obligation for the relevant federal (or tribal) agency to issue a certification following notification of a discovery. The statute states that the certification is solely "that notification has been received." The agency certification is only for the purpose of acknowledging that a party conducting authorized activities on federal law submitted the written notification as required by the Act and the agency has received it.

Yet in both the Preamble and the Proposed Rules, the Department has attempted to re-write the certification requirement to allow for 35 additional days for a host of regulatory activities that are unrelated to certifying that notification has been received. For example, the Preamble states:

> The Department proposes to build in an additional 35 days, if needed, for consultation with Indian Tribes and NHOs, evaluation of the discovery, and to carry out a plan of action. . . . The Act requires that an activity may resume 30 days after the appropriate official certifies that notification of a discovery was received. The legislative history clearly indicates that reporting a discovery is not meant to be an impediment to resuming a lawful activity on Federal or Tribal land. However, the Department proposes to allow an additional 35 days in the time by separating the requirements for responding to a discovery within 3 days from the requirement for certifying that an activity may resume within 30 days. This would

[37] 25 U.S.C § 3002(d)(1) (emphasis added).

> allow a maximum of 65 business days (35 business days to certify and 30 business days later to resume the activity) after the discovery on Federal or Tribal land before an activity could resume.[38]

The Department correctly acknowledges that NAGPRA establishes than an activity may resume 30 days after the relevant agency "certifies that notification of a discovery was received," which is required by the text of section 3002(d). But the Department fails to apply the statute's limitation on the purpose of the certification to the remainder of its analysis. All of the other regulatory actions that the Department identified in the preamble – i.e., consultation with the Tribes, evaluation of the discovery, carrying out a plan of action, and directing when an activity may resume – are all activities that Congress did not include as factors or elements of the certification process. Expanding the certification beyond acknowledgement that notification has been received is arbitrary, in conflict with the plain words of the statute and contrary to almost 30 years of practice.

In addition, the Proposed Rules completely change the Act's stated purpose of the notification. The Proposed Rules imply that activity may not resume until an agency certifies the activity may resume. The Act did not give that authority to federal agencies. The current rule plainly acknowledges when an activity may resume and does not assert that it may not resume until receipt of agency permission or acknowledgement that an activity may resume:

> (2) *Resumption of activity*. The activity that resulted in the inadvertent discovery may resume thirty (30) days after *certification* by the notified Federal agency of *receipt* of the written confirmation of notification of inadvertent discovery if the resumption of the activity is otherwise lawful. . . .[39]

In response to comments on the 1995 rule, the Department expressly acknowledged the limitations on its ability to extend the time period for work cessation:

> The Act requires that the *thirty (30)-day cessation of the activity begin*s with the Federal agency official *certifying receipt of notification* from the inadvertent discoverer of the human remains, funerary objects, sacred objects, or objects of cultural patrimony. As a result, *any additional time* provided the Federal agency official to contact the appropriate Indian tribe official *is time taken away* from the consultation process. In recognition of the inherent notification difficulties, the drafters have modified the initial notification requirements to require the person making the inadvertent discovery to provide immediate telephone notification with written confirmation to the Federal official. Certification of the notification by the Federal official and the required notification of the Indian tribe official occurs upon receipt of the written confirmation, thus providing the Federal agency official with some additional time between the telephone call and receipt of the written notice

[38] 87 Fed. Reg. 63,219/2-3 (internal citations omitted and emphasis added).
[39] 25 C.F.R. §10.4(d)(2).

> to identify the appropriate Indian tribe officials. The one (1) day notification deadline has been extended to three (3) working days.[40]

What was impermissible in 1995 remains impermissible in 2023. The Department simply is not free to add additional requirements, and grant itself additional authority, that would prevent the resumption of activity 30 days after written notice of a discovery.

Nevertheless, notwithstanding almost 30 years of practice and a common understanding of the discovery process, the Proposed Rules have established elaborate new procedures for a discovery. Instead of *certifying* receipt of a notification after 3 days, now an agency must now *respond* after receipt of notification thus:

1. Take steps to secure the discovered items;[41]
2. Verify that activity has ceased;[42]
3. Report to any additional point of contact;[43] and
4. Adopt a plan of action.[44]

The Department then gives itself 35 days to issue a certification,[45] not that *notification has been received*, but rather certifying that *the activity can resume* 30 days after the certification. In just this section the Department has expanded the statutory timeframes and granted itself the authority to control resumption of activity already permitted under the statute.

We are sympathetic to the regulatory burden that the Act imposes on both the Federal agencies and Tribes to proceed expeditiously upon receiving written notification of the discovery of human remains or cultural items. But Congress made an affirmative choice that the stop-work period is to last a maximum of 30 days following the certification that notification has been received by the relevant agency. Indeed, the legislative history – as the Department cited in the preamble to the proposed revisions to NAGPRA Regulations[46] – shows that the selection of the 30-day period was deliberate and that Congress intended the stop-work period to last only 30 days following notification.

> After notice has been received the party must cease the activity and make all reasonable efforts to protect the remains or objects before resuming the activity. The activity may resume 30 days after notice has been received."[47]

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[40] 60 Fed. Reg. 62144 (emphasis added).
[41] Proposed §10.5(c).
[42] *Id.*
[43] *Id*.
[44] Proposed §10.5(d).
[45] "No later than 35 days after received written documentation of a discovery, the appropriate official must send a written certification to the person responsible for the activity that the activity may resume." Proposed Rule § 10.5(e).
[46] 87 Fed. Reg 63,219/2.
[47] Senate Report 101-473, September 26, 1990, p. 6 (emphasis added). The deliberate selection of a limited, 30-day period is further evident when the Senate Report and final version of the Act are compared to House version of the legislation and accompanying report. The House version of the legislation did not include a specific time period in which the stop-work period would last. Instead, the House proposed that the "activity may resume after a

If Congress wanted an agency to have the discretion to permit or deny resumption of activity, it could, and would, have said so.

The legislative history goes on to explain that Congress intended a limited stop-work period as a balance that Congress selected between providing Tribes and individuals with a right to intervene following a discovery of human remains or cultural items and avoiding unnecessary interruptions in development activities on federal land.

> The Committee intends this section to provide for a process whereby Indian tribes and Native Hawaiian organizations have an opportunity to intervene in development activity on Federal or tribal lands in order to safeguard Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony. Under this section, Indian tribes or native Hawaiian organizations would be afforded 30 days in which to make a determination as to the appropriate disposition for these human remains or objects. The Committee does not intend this section to act as a bar to the development of Federal of tribal lands on which human remains or objects are found. Nor does the Committee intend this section to significantly interrupt or impair development activities on Federal or tribal lands.[48]

The Department's proposed revisions to expand the stop-work period would be a significant interruption and impairment of development activities on Federal land as it extends the stop-work period to, at a minimum, more than double the period of time that activities must remain halted following the discovery of human remains.

It is evident from both the text of the Act and its legislative history that Congress made a deliberate and informed choice that the stop-work period would last 30 days from the time that an agency certified that it received written notice of the discovery of human remains or cultural items. Given the text and background documents, the Department is without authority to impose an additional 35 days for agency certification that written notification was received.

Additionally, it would be arbitrary and unreasonable for the Department to take the position that it may take an agency up to 35 days to certify that notification of a discovery of human remains or cultural items have been received by the agency. The existing regulations provide for a maximum of 3 working days for the relevant agency to certify the receipt of the notification of a discovery.[49] Such a certification is a ministerial task that takes little time to complete; the task simply asks the agency to determine if written notification was received, nothing more. This task certainly does not take 35 days to complete and we believe that 3 days to complete the task is more than reasonable.

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reasonable amount of time and following notification under this subsection." House Report 101-877, October 14, 1990, proposed bill text, Section 3(d); *see id.* p. 15 (stating that the House Committee did not specify a "specific time limit" for the stop-work period). The fact that the Senate version of the Act – with the 30-day limitation on the stop-work period – prevailed is highly demonstrative of Congress' intent to impose a strict limitation on the period of time that activity may remain halted following the discovery of human remains or cultural items.

[48] Senate Report 101-473, September 26, 1990, p. 7.

[49] 43 CFR 10.4(d)(1) (existing).

As such, we request that the Department decline to adopt revisions to the NAGPRA Regulations that extend the stop-work period as currently proposed and continue to implement the Act by requiring federal agencies to certify receipt of a notification of the discovery of human remains or cultural items within 3 working days of the discovery and that the stop-work period shall last no more than 30 days after issuance of the certification. By doing so, the Department would adhere to the plain language of the Act as well as the clear legislative intent that the stop-work period should not significantly impair activities on federal land by lasting more than 30 days.

2. The Department Impermissibly Proposes to Expand the Work-Stop Period by using Business Days as the Metric for Counting the Work-Stop Period

As stated in the preamble, the Department drafted the Proposed Rules so that parties could potentially be required to cease activities near a discovery for a "maximum of 65 business days (35 business days to certify and 30 business days later to resume the activity) after a discovery."[50] The Department further proposes to extend the time periods by proposing that the term "days" be defined under the revised regulations to mean "business days."[51] This is equally as arbitrary and impermissible as adding 35 days to certify the notification.

As explained in the preceding section, in enacting NAGPRA, Congress deliberately and unambiguously imposed a limited 30-day period in which nearby activities must cease following the discovery of human remains or cultural items. The Department may not similarly re-write the limitations imposed by the statute by adopting a counting convention that undermines the limitation Congress imposed.

A hypothetical illustrates how the Department's regulatory revisions are contrary to the Act and Congressional intent. An operator authorized to operate on Federal land discovers NAGPRA cultural items as part of its activities on February 17, 2023.[52] As contemplated by the Act and the Department's regulations, the operator ceases activity, makes efforts to secure and protect the items, and provides immediate and written notification of the discovery to the relevant Federal agency on February 17, 2023. The Proposed Rules allow for 35 business days for the agency to certify that work can resume and then 30 business days before work could actually resume. Under this scenario, the mine operator would be prohibited from conducting already authorized activities near the discovery until May 23, 2023. That is a total of 95 calendar days that the operator would be prohibited from conducting activities following a discovery.

Such an expansion of the work-stop period is plainly contrary to the Act and Congress' intent in enacting a limited, 30-day stop-work period. The Act provides that "the activity may resume after 30 days of such certification."[53] Congress said "days," which is commonly understood as calendar days. For 28 years, the current NAGPRA rules have operated on the

[50] 87 Fed. Reg. 63219/3.
[51] 43 CFR § 10.1(f)(1) (proposed).
[52] We selected the original date that comments were due on the proposed NAGPRA regulations as an illustration of the expansion of time that the Department's proposal to use business days would have on the stop-work period.
[53] 25 U.S.C. § 3002(d); *see also* Senate Report 101-473, September 26, 1990, p. 6 *("*After notice has been received the party must cease the activity and make all reasonable efforts to protect the remains or objects before resuming the activity. ***The activity may resume 30 days after notice has been received***.") (emphasis added).

assumption that "days", other than the 3 "working days" for the ministerial certification of receipt of notice of a discovery, meant calendar days. This practice is in keeping with how the rest of the federal government has interpreted the term "days", when not specifically defined otherwise, as calendar days.

For example, the Department administrative appeal rules only exclude non-business days when the time period is 7 days or less:

> Computation of time for filing and service. Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed from or answered was served or the day of any other event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays, and other nonbusiness days shall be excluded in the computation.[54]

The Interior Board of Land Appeals has consistently interpreted the 30-day deadline to file a notice of appeal, which is jurisdictional, to mean calendar days.[55]

The BIA regulations, while not defining "day", are invariably interpreted to mean calendar day:

> (a) An appellant must file a written notice of appeal in the office of the official whose decision is being appealed. The appellant must also send a copy of the notice of appeal to the official who will decide the appeal and to all known interested parties. The notice of appeal must be filed in the office of the official whose decision is being appealed within 30 days of receipt by the appellant of the notice of administrative action described in § 2.7. A notice of appeal that is filed by mail is considered filed on the date that it is postmarked. The burden of proof of timely filing is on the appellant. No extension of time shall be granted for filing a notice of appeal. Notices of appeal not filed in the specified time shall not be considered, and the decision involved shall be considered final for the Department and effective in accordance with § 2.6(b).[56]

[54] 42 C.F.R. § 4.22(e).

[55] E.g., *Audubon Southwest New Mexico Wild,* 197 IBLA 289 (2021)(appeal untimely when filed November 6, 2020 after service of the decision on appeal on October 2, 2020); *BLM v. Fallini,* 136 IBLA 345 (1996) (BLM appeal of May 31, 1996 ALJ ruling untimely when received by the Board on July 1, 1996).

[56] 25 C.F.R. § 2.9, Notice of Appeal.

The Interior Board of Indian Appeals, without variation, has dismissed appeals as untimely if not postmarked within 30 days of receipt of an appealable decision.[57]

Similarly, the Rule 6 of the Federal Rules of Civil Procedure provide:

Rule 6(a). Computing and Extending Time; Time for Motion Papers

> (a) COMPUTING TIME. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.
>
> (1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:
>
> (A) exclude the day of the event that triggers the period;
>
> (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
>
> (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

The Department recognized that "days", without further definition in a statute, means calendar days when it provided in the existing rules that the 3-day certification period in terms of "working days" but did not similarly describe the stop-work period as being working days.

In sum, the Act is clear that the stop-work period is limited to 30 days, and normal rules of statutory construction (and the civil procedure rules) mean that "Days" under the Act, means calendar days. The Department is not permitted to contravene Congressional intent and triple the stop-work period through arbitrary and unreasonable definitions.

3. Similar to the "additional contact" requirement, a provision to provide for voluntary agreement to provide additional time for the discovery process is worth consideration.

The Organizations are not unsympathetic to the very tight time constraints required by the statute. As noted previously, NAGPRA discoveries on public lands hosting mining operations are relatively uncommon. The Organizations are unaware of any instance of a mining company insisting on resuming activity 30 days after a NAGPRA discovery. Under the existing rules, work stoppages are typically confined to relatively discrete areas and a discovery does not preclude activities elsewhere within a project area. Currently, in most instances a longer work stoppage

[57] *Dailey v. Acting Billings Area Director,* 19 IBIA 271A (1991)(appeal of decision received by appellant on February 12, 1991 untimely when postmarked on March 15, 1991); *American Land Development Corp. v. Acting Phoenix Area Director,* 25 IBIA 120 (1994)(appeal of June 28, 1993 decision dismissed as untimely when notice of appeal sent on September 15, 1993).

period is generally workable and our members are usually inclined to accommodate agencies and Tribes if they need additional time.

As discussed in Comment 1, however, the Proposed Rules impermissibly interpret the new definition of "sacred object" to greatly broaden the types, and therefore the number, of NAGPRA-protected items. This proposed interpretation could mean that there are multiple discoveries at any given project, likely in different stages of assessment because they are unlikely to be "discovered" all at once. Having multiple areas subject to activity cessation, all for different time periods, would be completely unworkable for all involved – agencies, Tribes, federal permittees.

On the other hand, if the nature of sacred object would remain true to the language in the Act and Congressional intent, and not greatly expanded to incorporate objects unarguably not intended to be subject to NAGPRA, the Department could provide a mechanism whereby, pursuant to voluntary agreement with a permittee, a reasonable amount of additional time would be afforded to allow agencies and Tribes to plan for and implement a removal and repatriation process. These could be implemented through a comprehensive agreement, a plan of action, an NHPA agreement document, or other instrument.

Conclusion

Finally, the above-identified changes are arbitrary and capricious because the Department does not adequately explain why changes are needed to long-standing regulatory requirements and policies nor why the existing requirements and policies are inadequate to implement the Act. In addition to the lack of statutory authority, the Department has not identified any inadequacies or difficulties meeting the statutorily-mandated timelines for discovery and the stop work period. The Proposed Rule provides no reasoning for this expansion, other than it would give the appropriate official more time to carry out actions not contemplated by the Act prior to certification of a notification of discovery.

Similarly, the Department has not identified inadequacies in its own notification systems such that it would support expanding the Act's requirements for private parties to notify additional points of contact on federal lands beyond those contacts mandated by the Act. The Department also has not explained how its expanded interpretation of sacred objects to include objects other than those identified by the Act addresses any inadequacies in current usage.

"Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change."[58] An agency must, however,

> at least display awareness that it is changing position and show that there are good reasons for the new policy. In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a

[58] *Encino Motorcars v. Navarro,* 579 U.S. 211, 221 (2016).

> reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy. It follows that an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.[59]

The Department must give adequate reasons for its decisions by examining the relevant data and articulate a satisfactory explanation for the Proposed Rule. The Department has not done so here, at least in regard to the issues raised in these comments.

For the foregoing reasons, the Department should revise the Proposed Rules to conform with the limitations and directives imposed by the Act, as guided by its legislative history. The Department cannot rewrite NAGPRA through the Proposed Rules. The Department should therefore retain the provisions in the current 1995 Rules pertaining to the notification requirements after discovery, the stop work period, and the definition of sacred object. This would include either removing the definition of "day" – or revising the definition to mean calendar day. The Department should further remove the definition of final agency action, and the language in the Preamble that purports to make any interlocutory procedural misstep a final agency action under the APA.

The Organizations thank the Department for its consideration of the comments and recommendations herein, and welcome the opportunity to discuss them, and proposed solutions for the issues we have identified. For any questions regarding the content of these comments, please contact the Organizations at the email address provided through Regulations.gov.

[59] *Id*. at 221-222 (internal citations and quotations omitted).