Society for American Archaeology Statement on Department of Interior Proposed Rule For the Disposition of Culturally Unidentifiable Human Remains and Funerary Objects[1]

November 10, 2007

On October 16, 2007 the US Department of the Interior (DOI) proposed regulations for the Native American Graves Protection and Repatriation Act (NAGPRA) regarding the disposition of culturally unidentifiable human remains that, if finalized, will destroy the highly productive compromise that was reached when the NAGPRA passed in 1990. That act represents a careful balance of multiple perspectives regarding human remains and objects. The SAA opposes these regulations because 1) the DOI does not have the authority to issue them, 2) they are impractical because they do not allocate implementation funding, 3) the regulations do not conform with the principles of agreement laid out by the NAGPRA Review Committee and 4) the regulations could lead to results antithetical to the intent of the law and 5) the regulations assert control over material not covered in the law.

Senator McCain, one of the law's principal sponsors, noted during Senate consideration of the NAGPRA bill (10/26/1990):

> "I believe this legislation effectively balances the interest of Native Americans in the rightful and respectful return of their ancestors with the interest of our Nation's museums in maintaining our rich cultural heritage, the heritage of all American peoples. Above all, I believe this legislation establishes a process that provides the dignity and respect that our Nation's first citizens deserve."

These are complex issues. The regulations must be, as the NAGPRA Review Committee's 1999 Notice of Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains states, "Respectful," "Equitable," "Doable," and "Enforceable."[2] This will require the collaboration of Native Americans, archaeologists, and museums. The Society for American Archaeology believes that it is within the mission of the society to take a leading role in coordinating this effort.

NAGPRA rightly provides that museums, universities, federal agencies and other institutions that have received federal funding must transfer their control over human remains, funerary objects, sacred objects, and objects of cultural patrimony to federally-recognized Indian tribes that have a cultural affiliation—a demonstrated cultural or biological relationship with the human remains or objects. SAA led the scientific community in working with national Native American organizations in crafting the compromise language of the Act; SAA supported its passage; and SAA continues to unconditionally endorse the repatriation provisions laid out in the act.

As the provisions of NAGPRA have been carried out over the last 17 years, tribes, museums, and federal agencies have developed relationships of trust and mutual understanding of the law that allow routine repatriation to culturally affiliated groups. The proposed rule effectively dismisses those hard-earned accomplishments and forecloses the possibility for the repatriation process to proceed in a manner that honors all that has been accomplished. Thousands of human remains have already been repatriated to culturally affiliated tribes and, absent this rule, there is the potential to affiliate many thousands more through continued research and consultation.

The rule proposed by the DOI effectively eliminates any semblance of balance in the law. It constitutes no less than a rewriting of the act by regulatory fiat. The proposed regulations have the potential for abuse by groups that have very little connection to any sort of legitimate Indian identity. The relationship between remains that are currently not culturally identifiable and existing tribes needs to be carefully considered

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[1] *Federal Register* 72 (199): 58582-58590.

[2] *Federal Register* 64(145):41136

through consultation between institutions and tribes. The concerned parties should not be forced to work with groups that have a weak claim to Indian identity. This is in fact the DOI's position on NAGPRA, as stated in 2005 Senate committee testimony:

> "The Ninth Circuit concluded that congressional intent was 'to give American Indians control over the remains of their genetic and cultural forbearers, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture.' We believe that NAGPRA should protect the sensibilities of currently existing tribes, cultures, and people while balancing the need to learn about past cultures and customs. In the situation where remains are not significantly related to any existing tribe, people, or culture they should be available for appropriate scientific analysis."[3]

The proposed rule contradicts the position DOI advocated in its 2005 testimony. SAA believes that the proposed rule is not only disastrous from the standpoint of the scientific community but is contrary, on its face, to the law it purports to implement.

The proposed rule relates specifically to what are called "culturally unidentifiable human remains." These are human remains that currently lack a demonstrable relationship to any modern federally-recognized tribe. The proposed rule covers all culturally unidentifiable human remains held in the collections of all of the nation's museums, universities, and federal agencies, notably including human remains that are many thousands of years old. The proposed rule is not restricted to Native American human remains and would apparently extend even to non-Native American medical specimens or forensic evidence.

The issue of how to address the claims from non-federally recognized Native American groups is a challenging one, but should not be ignored. Native Americans, in their majority, do not belong to federally recognized entities. Legitimate non-federally recognized Native American populations suffered the same injustices as federally recognized populations in their past (more so, because they still lack Federal recognition). Working with non-federally recognized Native American groups could lead to identification of the cultural affiliation of previously culturally unidentifiable human remains, regardless of whether this results in repatriation under NAGPRA. It is important to restrict consultation and repatriation to groups that have a demonstrable Native American identity and museums and institutions should not be compelled to make assessments of the "Indianness" of these groups.

This proposed rule could result in the transfer of all unaffiliated human remains to tribes or other Native American groups having only a weakly demonstrated relationship to them. In the proposed rule, the transfer of culturally unidentifiable human remains is enabled largely through the mechanism of requiring the disposition of these human remains to tribes claiming a "cultural relationship" to the *region* in which the human remains were found or simply to the region in which the museum is located. Remarkably, this core concept of the rule, "cultural relationship," which has no accepted scientific or legal meaning, is undefined in the rule. In any case this term is so vague as to plausibly include any claim of relationship. Unlike cultural affiliation, a cultural relationship could apparently be asserted with respect to human remains with absolutely no demonstrable cultural or biological connection that are thousands of miles and thousands of years removed from a federally-recognized tribe. Thus, the proposed rule facilitates the very result Congress assiduously sought to avoid, namely, the wholesale transfer of human remains to unrelated groups.

The writing of this proposed rule is not authorized by the language of the Act. It therefore constitutes an illegal and far reaching attempt to amend NAGPRA through regulation, in lieu of Congressional action, and in a direction never intended by Congress. When NAGPRA was debated, Congress heard highly divergent opinions about the appropriate disposition of culturally unidentifiable human remains among the tribes and from scientific and museum organizations. As a consequence, NAGPRA explicitly requested that the federal Review Committee established by the Act provide Congress with recommendations regarding this issue. The

[3] Senate Hearing 109-297. Testimony of Paul Hoffman, Deputy Assistant Secretary for Fish, Wildlife, and Parks.

Review Committee has indeed provided recommendations that recognize the legitimacy of both traditional and scientific interests in these human remains.[4] Nonetheless, because of the absence of connection of the culturally unidentifiable human remains to any modern group, no consensus about what should be done has emerged. In any case, Congress has not found the Review Committee's recommendations sufficiently compelling to act on them or take any other action on this issue.

The proposed rule is written in a manner that imposes requirements for consultation that are so broadly written as to be both impossible to meet and financially ruinous to attempt. Under the proposed rule, the unfunded burden put on the museums, universities, and federal agencies is enormous. Under NAGPRA they have *already* been required to consult with tribes that might be culturally affiliated with the human remains in their collections. They could now be forced, under penalty of law, to consult with an unknown and perhaps unknowable number of tribal officials and religious leaders from tribes having this unspecified "cultural relationship" to a region, including non-federally recognized groups—contrary to the express limitations of the law. Museums are additionally burdened by the requirement that they document the more than 825,000 funerary objects associated with culturally unidentifiable human remains. Completely outside the bounds of NAGPRA, the proposed rule recommends the transfer of all these objects.

We do not yet have well-developed estimates of the total cost of this proposed rule but preliminary estimates are in the hundreds of millions of dollars. It is not known how museums, universities, and federal agencies will bear the costs of implementing these regulations. The provision in the proposed rule that might appear to allow a museum to maintain these human remains in its collection is, in fact, logically impossible to meet. As the proposed rule is written, the only basis for a museum or agency to retain possession of culturally unidentifiable human remains is if it can "prove that it has a right of possession, as defined at §10.10(a)(2)." However, the provision referenced requires a showing that consent was obtained from the next of kin or from a culturally affiliated tribe or Native Hawaiian organization – which, of course, by its own terms excludes all human remains that are culturally unidentifiable. Such a circular provision suggests a conscious effort to eradicate the interests of science while appearing on the surface to offer a vehicle by which some human remains could legally be retained in curation. It represents no more than a transparent attempt by its drafters to avoid the prohibitions on federal takings embodied in the 4th amendment to the Constitution.

According to SAA President Dean Snow:

> "This bizarre and ill-advised proposed rule would irreparably diminish the archaeological record of the entire US and our ability to learn from it. Further, it would inhibit the use of forensics in science and law enforcement. It has the potential to be erroneously cast by the popular press as crystallizing a long-brewing battle between archaeologists and Native Americans when it is, in fact, an unfortunate exercise in regulatory arrogance by the National Park Service that insults the diligent efforts made by all parties endeavoring to implement NAGPRA in a fair, reasonable, and respectful manner. The financial cost of its implementation is staggering. The damage to some of our most cherished institutions and the cost to science and the public, through the loss of knowledge about our human heritage, is incalculable."

[4] *Federal Register* 64(145): 41135.