SAA

SOCIETY FOR AMERICAN ARCHAEOLOGY

December 29, 2013

Dr. Sherry Hutt
Manager, National NAGPRA Program
National Park Service
1201 Eye Street NW 8th Floor
Washington, D.C. 20005

Dear Dr. Hutt:

The Society for American Archaeology (SAA) is pleased to take this opportunity to comment on the Department of Interior's proposed rule (RIN 1024-AE00) on the procedures for disposition of unclaimed human remains, funerary objects, or objects of cultural patrimony discovered on Federal lands after November 16, 1990, under Section 3(b) of the Native American Graves Protection and Repatriation Act (NAGPRA).

SAA is an international organization that, since its founding in 1934, has been dedicated to the research about and interpretation and protection of the archaeological heritage of the Americas. With more than 7,000 members, SAA represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 states as well as many other nations around the world.

As you know, we submitted extensive comments on this subject in 2005, and again 2007. In those remarks, SAA indicated that its positions were based upon three guiding perspectives: 1) that the statute represents a balance between the legitimate interests of science and the public, and the legitimate interests of lineal descendants and the Indian tribes and Native Hawaiian organizations recognized in the law; 2) that human remains should be treated with dignity and respect at all times; and 3) that all items excavated and / or removed in accordance with NAGPRA Section 3(c) must be thoroughly documented consistent with scientific standards. In addressing this proposed rule, SAA stands by those principles and the points made previously.

The following are SAA's section-be-section comments on the rule:

§ 10.2 Definitions.

The proposed rule's definition of "unclaimed cultural items" is inaccurate. As we stated in 2007, **"Human remains and cultural items removed from federal lands after NAGPRA's enactment should be subject to regulation as "unclaimed cultural items" under 43 CFR 10.7 only if (i) a claim is statutorily required to vest ownership or control under Section 3(a), (ii) a qualifying claimant is identified, (iii) the qualifying party fails to assert a claim, and (iv) no other qualifying party asserts a claim authorized by the statute."**

We believe that this language still applies. Under the draft regulation's definition, a federal official could, after a set period of time, conceivably decide to dispose of remains for which a claimant cannot be identified. Such an action would, of course, irretrievably truncate the rights of a legitimate claimant whom might be identified in the future. Such a resolution was not envisioned by Congress or anyone else before or since the time of the statute's drafting. Though such a mechanism might be convenient for federal officials, there is nothing in the statute that allows the Department of Interior to place a time limit on others for the making of claims to items covered under NAGPRA. We strongly recommend that the Rule's § 10.2 be modified to reflect the qualifications listed above.

§ 10.7 Disposition of unclaimed cultural items

The process set forth under the proposed rule is deeply flawed in the following ways:

- *Inappropriate expansion of the National NAGPRA Program's oversight*. There is nothing in the statute that allows National NAGPRA to create and maintain an inventory of what covered items have been removed from other agencies' lands after 1990, unclaimed or otherwise. In fact, Section 3(d)(3) of the Act explicitly states when and how other federal agencies can give authority over notification and disposition to Interior, and it's only in cases where a person knows that cultural items have been discovered on federal lands--it does not apply to inadvertent discoveries or planned excavations. This section should be stricken from the proposed rule, and replaced with a recommendation that Federal agencies convey periodic notices to potential recognized tribal or Native Hawaiian claimants of the existence of human remains and other cultural items that they may be entitled to claim. Such notifications could include a summary of the conditions of their discovery and the options available, including taking possession; negotiating a joint curation arrangement; relinquishing their claims; not claiming the items but requesting information should any significant action be contemplated for these remains and items; or doing nothing, in which case their ability to claim the cultural items at a later date is preserved.

- *Violation of tribal rights.* Section 11(1)(A) of NAGPRA states that "*Nothing in this Act shall be construed to limit the authority of any Federal agency or museum to enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act.*" This statement points to Congress' understanding of the need to respect the rights of culturally affiliated tribes, even when or if they choose not to claim remains or other cultural items. The draft

regulations, however, would allow officials to do the exact opposite by physically transferring the remains to unaffiliated groups, or reinterring them, without the permission of the tribe entitled to ownership or control under the statute.

- *Limited options for disposition.* The proposed rule unfairly emphasizes re-interment as a disposition method. In fact, the draft could be read to state that the only options available to an agency official are re-interment on federal land, or transfer to an entity that will reinter. In other words, the draft regulations go out of their way to ignore the fact that Congress expressly envisioned other disposition strategies in addition to re-interment, including cooperative curation agreements. Thus, the proposed rule effectively prohibits such agreements unless the tribe first claims the remains. Without making a claim, however, the tribe would lose all of its rights. This wrong-headed provision would drastically reduce precisely the flexibility afforded to tribes, museums, and agency officials by the Act to address the myriad and often-complex matters arising from disposition questions.

Unfortunately, we see no way to remedy the above-mentioned problems within the framework of the existing proposed rule. SAA urges NPS to abandon the current approach and start over with a new draft rule that avoids the difficulties outlined above, and hews closely to the principles outlined in our 2007 comments, particularly with regard to the definition. In addition, the new draft must contain language requiring that, prior to the taking of any disposition action, officials **first receive express written permission of tribes with custodial rights for any disposition activity that does not involve them.**

We look forward to working with you on this important matter.

Sincerely,

Jeffrey H. Altschul, Ph.D., RPA
President