

SAA Comments on Draft NAGPRA Regulations (NPS Draft 3 dated 4/21/92)
May 31, 1992

10.01 (d)***

The phrase starting "whenever" is not justifiable under the act. It assumes a policy that is not stated by the act that seems to preclude research excavation of funerary contexts even for unaffiliated remains or where the affiliated tribe consented to the excavation. There is no legal warrant for it in the act.

10.01 (e)

"establish" should be "establishing"

10.03

The second sentence, starting with "Such...": This is unnecessary and just muddles things.

The last sentence, starting with "In the event": There is a grammatical problem with "lands which," which seems to refer to lands not items. This sentence raises a substantive issue that is not clarified elsewhere in the regulations. Under what circumstances can an agency transfer ownership?

10.04 (a)

Rewrite this to avoid using "impacted by," for example use "have an impact on."

10.04 (a) (04)

The proposed definition of "museum" from the act, dodges several issues that must immediately be clarified.

What does "receives Federal funds" mean? It would be reasonable to include all institutions that have received any Federal funds since the enactment of the bill (11/16/90); and all institutions that have received Federal curation grants (IMS, NSF Systematic Collections, NEH) within the last X years.

What about the future receipt of Federal funds? The act is mute on this. From a legal standpoint, there is no alternative but to say that a museum that has not received Federal funds in the past (however that is decided above) must comply with the deadlines in the act to get them. That is, if they accept Federal funds now, they are bound to do the summary by 11/16/93 and the inventory by 11/15/95. If they didn't take Federal funds until 1996, then they would have to have completed the summary before accepting the funds and either have completed the inventory or received an extension from the Secretary.

For purposes of the act, the "museum" is not the repository in which the cultural items reside, it is the institution that owns or controls the objects. For materials from Federal land, the Federal agency must be responsible for the summary, inventory, and repatriation of these collections. I would argue that repositories to fulfill these obligations but that the Federal agency may contract or otherwise make agreements with the repositories to satisfy all or part of their responsibilities.

Is there any reasonable exception in cases in which the Federal government has paid for curation services in which it could claim to have essentially already paid for the inventory or whatever?

What happens for Indian lands? Is the BIA or the tribe responsible for the inventory? Presumably it should be the BIA, but this should be clarified.

Note: These issues are extremely important because museums must be dealing with these issues today. Clearly, there won't even be final regulations by the time the summaries are due.

10.04 (a) (10)

In the definition of Native American representative, is "governing body" sufficiently well defined?

10.04 (a) (11)

How is recognition by the group to be determined?

10.04 (b)

"Cultural Items" is defined in the act, but the way this is worded, it ends up not being specifically defined in the regulations. Since the other terms are repeated, it should be too.

10.04 (b) (01)

Does the definition of human remains include fecal material/intestinal contents and dental calculus? The definition does not specify such materials. Since these are not technically speaking soft tissues, I assume that there are not covered under the definition.

10.04 (b) (02) (i) and (iii)

The term "reasonably believed" based on archaeological data is used here and elsewhere the regulations. This term needs to be defined "reasonably demonstrated based on available evidence." Also, providing an example of an artifact "reasonably believed to have been made exclusively for burial purposes" would help clarify the meaning of this.

10.04 (b) (05)

Wampum belts are not a good example, since some of them are cultural patrimony and some of them are not. It is confusing to use them as an example in a document that is going to be used by people who will not be familiar with the ethnographic details of this specific case.

10.04 (b) (06) and (7)

In both cases should be "human remains or objects," not just "objects." People resent calling human remains "objects."

10.04 (c) (03)

The phrase "having been used exclusively and occupied by some Indian tribe" does not appear in NAGPRA. Unless the land claims legislation stipulates this, it might be taken to unnecessarily narrow the definition. In any event, the definition in the act, rather than this rephrasing, seems sufficient.

10.04 (d) (02)

Change "remains and associated" to "remains or associated." One could conceivably claim one but not the other. Also this definition need modification along the lines suggested for cultural affiliation, below.

10.04 (d) (03)

In the regulations, the usage on cultural affiliation slides from a relationship between tribes and earlier groups, as it is defined in the act to a relationship between tribes and remains or objects. If this usage is to persist in the regulations (which usage is perfectly clear), the definition for cultural affiliation must be extended. It should say something to the effect that cultural affiliation between a modern tribe and human remains or associated or unassociated funerary objects means that there is cultural affiliation between the tribe and the earlier group of which the deceased individual represented by the remains or with whom the objects were buried was a member.

Cultural affiliation between a modern tribe and items of cultural patrimony means that there is cultural affiliation between the modern tribe and the earlier group which collectively owned the object at the time it was alienated from traditional ownership.

Cultural affiliation between a modern tribe and a sacred object means there is cultural affiliation between the modern tribe and the earlier group who members or members owned the object in question at the time it was alienated from traditional ownership. Doing this only makes explicit what is intended and simplifies things later in the regulations.

The criteria museums are expected to use in the "identifiable earlier group" needs to be elaborated upon in the regulations. Perhaps this could be done through examples that illustrate how specific earlier groups can be differentiated from other groups. For example, evidence of specific types of shell beads or basketry might be used to differentiate several different groups that occupied the same area from each other.

10.04 (e) (04)

change "and/or" to "or"

10.04 (e) (05)

This is extremely awkward to read.

10.04 (e) (07)

Substitute: "inadvertent discovery" means the unanticipated encounter of Native American cultural items. Human remains is redundant since cultural items includes them.

Its not clear to me how the state of knowledge about the site affects this. I could see the argument that actions on Federal lands should take into account known sites and therefore any disturbance of that site would be somehow intentional. While I don't object to that argument, if that's what is going on it should be clear.

Insert "or" between 'encounter' and 'detection.'

10.04 (e) (08)

Change "discovered" to "made an inadvertent discovery of."

10.04 (e) (09)

Delete the comma after undertaking and change "identifies" to "specifies." Delete "specific" which is misleading here or change "specific" to "specific types of."

10.04 (e) (12)

Either this has to be changed, or you need to change the way the term disposition is used throughout the rest of the regulations. It is clear in the Act, dispositions that did not relinquishing control were envisaged. For example, the House Report states that "This Act allows for the repatriation of culturally affiliated items as well as any other agreement for disposition or caretaking which may be mutually agreed upon by involved parties."

In other words, agreements may be worked out in which the status quo is maintained and agencies retain control of cultural items.

Also delete "following their treatment." Disposition applies in other parts of the act where treatment is not involved.

Additional Definitions

This phrase "potentially affiliated or "potential affiliation" comes up repeatedly. I think the latter should just be defined in 10.4 something like "a judgment that the immediately available information suggests a reasonable possibility that cultural affiliation might be established given further evidence or investigation."

A definitions are also needed for "geographical origin" and "substantial compliance."

10.05 (a)

Add "the" after "identify" to make the construction parallel.

10.05 (a)***

If this section stays intact, after actions should be included a phrase like "including summaries, inventory, excavation, treatment or disposition."

10.05 (c)

Change "academic institutions" to "institutions of higher learning" which appears in the Act.

10.05 (c)***

Add after "concerns," the phrase "to provide evidence relating to cultural affiliation or lineal descent and..."

This is an important change since it requires the land managers and museums to make a serious effort to determine cultural affiliation. This needs to be made as strong as possible as it is really the only avenue available to make sure that thoughtful decisions are made. Otherwise, land managers etc. can just turn cultural items over to the first group that shows up instead of following the intent of the law.

This also points to the fact that this section needs a preamble to emphasize the importance of these decisions.

10.05 (d)

Change "define" to "adopt" or "implement"

10.05 (e)

Change the first two and a half lines to "ensure that reasonable and timely opportunities are provided to Indian tribes and Native Hawaiian organizations and traditional religious leaders to learn about..."

10.05 (f)

Its not clear to me how (e) and (f) are distinct. Can the difference be clarified or can they be combined.

10.06

This section lacks overall clarity about at what points exactly what is to be done. It just needs some more careful work. What is done after the summary? What is done during the development of the inventory? What is done at completion of the inventory, and what is required after the inventory? Often it will be impossible to involve all these people "developing" an inventory. This means that potential descendants must be involved before they are identified. Perhaps you could deal with this problem by inserting something like this in this section: "When determinations of cultural affiliation are made during the inventory process, museums shall notify the groups that are determined to be culturally affiliated and begin the consultation process."

This is consistent with the language of the Senate Report: "The Committee intends the inventory and notification process established under this section to provide an opportunity for the museum to provide notice to Indian tribes and Native Hawaiian organizations of culturally affiliated remains and objects identified throughout the process."

10.06 (a) (01)

Delete "applicable" and replace it with "potentially affiliated."

10.06 (a) (01) (iii)

Change to "that are potentially affiliated with the"

10.06 (a) (02)

Change "believed to be" to "potentially."

10.06 (b) (01)

An impossible catch-22 is created by this language. Consultation cannot be done until cultural affiliation is assessed. Therefore, how can people be contacted when cultural affiliation is being investigated "actively"? Also, this is in conflict with notification regulations (p. 20 4 iv) which states that groups should be notified within 6 months of completion of inventory?

10.06 (c)

Before "Federal agency" insert "As a part of the development and completion of the inventory."

10.06 (c) (01) (i)

"the same" lacks a clear referent.

10.07

The title should probably be changed to something like "Priority of Claims." Much of this does not have to do with right of possession. While NAGPRA defines "right of possession" for human remains and associated funerary objects, it has not effect in the repatriation or excavation sections of the law. It does however have a place in the section making it illegal to buy and sell human remains unless there is right of possession.

10.07 (a) (01)

This should be deleted since it has no effect and may raise all sorts of spurious issues.

10.07 (a) (03)

"closest" here is reasonable but is not anticipated by the act. The assumption of the act (with one exception) is that there is affiliation or not, not degrees of affiliation.

10.07 (c) and (d)

It would be better to have separate sections on establishing cultural affiliation and lineal descent. Some of 10.5 might go in such a section. The remainder of this section is badly muddled and should be rethought from the ground up.

10.07 (d) (02) (i)

Present day "group" does not appear in the legislation. The reference in the definition of cultural affiliation and elsewhere is to a "tribe" or "Native Hawaiian Organization." Through this slip, a nonexistent question is raised.

There are no other groups than tribes or Native Hawaiian Organizations that are relevant.

As far as I can tell (A) is self evident and (B) - (D) are at best mysterious and probably just wrong.

There are, however, two questions:

(1) clearly, sometimes more than one federally tribe will be affiliated with remains. For example, there might be remains that are Sioux or Apache but not identifiable to a specific reservation group. In this case all of the different Sioux or different Apache tribes could be reasonably said to be affiliated.

(2) The second question is whether someone is trying to specify that some group could be a tribe under the definition that is not on the Interior list of Federally recognized tribes. If there is such a claim being made (which was not the intention of those framing the act) it must be dealt with very carefully. The question of what constitutes "federal recognition" obviously has significant legal implications beyond those for NAGPRA.

10.07 (d) (02) (ii)

This is not adequate, but it will take some serious thought to figure this out. Examples should be provided of what is and what is not to be considered cultural affiliation.

Also the grammatical construction of the subsections is wrong.

10.07 (d) (02) (ii) (A)

After "biologically" add "or culturally"

10.07 (d) (02) (ii) (B)

"material culture" is jargon.

10.07 (d) (02) (iii)***

This is bad. First "historical times" is inappropriate. Second, "substantially continual" is not appropriate. The word "continuity" was intentionally avoided in the Act.

10.07 (d) (03)***

This and its subsections go substantially beyond the act. What justification is there for setting up this system of priorities? Clearly,

Museums may wish to or have to make additional studies to establish cultural affiliation. This section is quite unclear on what additional studies are in order.

10.07 (d) (04)

This is much too broad, and does not clearly address either time or content of study as it relates to the act. This section needs to be either deleted or reworded.

10.07 (d) (04) (i)-(v)***

This unacceptable. It is saying no one can study any cultural items in any museum from now till forever except as part of an inventory for establishing affiliation. This needs to be much more clearly thought through and should be sent decisively back to the drawing board.

10.07 (d) (2) (ii) B

Change "distinct patterns of material culture" to "unique patterns of material culture."

10.08 (4) (i)

Line 4, separate the words "the" and "geographical"

(ii) line 3, after 'identification of', delete "the" and change "it's" to "its"

10.08 (a) (02) (i)

Does the term "skeleton" mean absolutely complete. If it does, then 99.9% of skeletons from archaeological sites would be "partial."

Perhaps this should be changed to "primary articulated burial" (in which the whole body was deposited) contrasted with "secondary burial" (in which some subset of the body/skeleton was deposited). With this classification system it wouldn't be necessary decide whether a particular skeleton was "complete" although missing, say, the hands and some ribs, (the rest being clearly articulated) or "incomplete."

The bone-by-bone analysis would be an insurmountable problem in some situations (eg. at Slack Farm there hundreds of disturbed partially represented burials). One alternate way would be to have the inventory consist of establishing the minimum number of individuals represented in the collections. This is about all you could realistically do with a large commingled crematory or ossuary sample. Even for a large ossuary where the bones were relatively complete, complete tabulation is extremely time-consuming and requires the skills of a highly trained osteologist.

The description of human remains, Section 10.8 (2) (i), might be reworded thus:

"A basic description of human remains shall consist of the following:

1) Nature of the remains (eg. articulated skeleton [primary burial], disarticulated skeleton [secondary burial], isolated bone, cremation);

2) Descriptive information:

- a) for individual burials (completeness; age at death; sex)
- b) for commingled burials where discrete individuals cannot be identified (the minimum number of individuals represented and the criteria used to make this determination)

3) Geographic origin of the skeletal remains

4) Cultural affiliation or absence of cultural affiliation

5) Evidence used to establish cultural affiliation or its absence

10.08 (a) (04)

It looks to me like there are 2 section (4)'s

10.08 (a) (04) (iv)

Change "may be" to "are potentially"

10.08 (a) (04) (iv) (A)

Change "clearly identifiable" to "identified by the museum or Federal agency." Adding "clearly" muddies things.

10.08 (a) (04) (iv) (B)

Change "may be reasonably believed to be the" to "are potentially"

10.08 (b) (01)

Change "within the time frame required by the statute" to "November 16, 1993. Extensions cannot be granted."

10.09 (c)

This section seems to be missing.

10.09 (g)

Is this provision in conflict with the takings clause of the constitution?

10.09 (h)

Insert "time." at the end.

10.09 (j)

Where is this section?

10.09 (k) (01)

Delete "American"

10.09 (k) (01)

The Committee recommends to the Secretary regarding "disposition" of unaffiliated human remains. This implies that there will be no unaffiliated remains, because "disposition" means relinquishment of control" [10.4 (d) (12) see also 10.15 (5)]. This or the definition of "disposition" should be rewritten so that the Committee can recommend whatever it wants on the request of the institution.

10.09 (k) (02)

Insert "initial" before "consultation" and "notification." In the last sentence, "curate" is not a verb.

10.09 (k) 1

Again, the implications of "developing a procedure for the disposition of such human remains" is contingent the way in which "disposition" is defined. Disposition needs to be defined in a way that allows the review committee to recommend a variety of ways of dealing with unaffiliated remains.

The wording in (k) (1) is muddled anyway: if subsection (1) focuses on human remains, the words "and other cultural items" should be deleted from the first sentence, and the words "items" (immediately after "Hawaiian organizations,") replaced by "remains". The word "remains" appears alone in the following sentences, without "items", consistent with the subsection heading. Subsection (2) deals with the 'cultural items' as distinct from "human remains", and the wording is consistent.

10.10

To the title should be added "with respect to Inadvertent Discovery and Intentional Excavation.

Line 3 of the introductory paragraph: "effect" should be "affect"

10.10 (d)

This is actually wrong. For tribal lands, the culturally affiliated tribe does not determine disposition, the land-owning tribe does.

10.13 (a)

According to the act, the person must also stop and attempt to protect the remains from further damage. This does not appear in the regulations.

10.15

The regulations provide the committee with much more guidance. Topics such as rules for voting (Telephone? Ballot? etc. should be covered). Perhaps the rules that are being drafted for the Smithsonian's Review Committee could be used as a model.

10.15 (05)

Regarding "culturally unidentifiable human remains": which Indian tribes will be consulted regarding disposition of these remains, if the remains cannot be associated with any particular tribe (if they were, they would not fall into this category of remains)?

For that matter, which "appropriate scientific and museum groups" will be included in consultations?

In line 3, change "recommending" to "recommend"; line 4, "theses" should be "these").

10.17 (a)

It should be made clear here that transportation for purposes of scientific research is not to be construed as "use for profit."

10.17 (c) (07)

It is unclear why civil penalties monies are to be transferred to Native Americans. This could encourage the making of claims to the Department of the Interior instead of entering into good faith negotiation with institutions.

Also the phrase, "item forfeited" is unclear, why are items to be forfeited since the purpose of being in compliance is to accomplish the proper disposition of such items?

10.17 (c) (10)

The wording, "the maximum amount of the penalty shall be the full archeological value of the item" makes no sense. The language in the statutes uses value in a different way, in which the "archeological value" of an item is to be taken into consideration in assessing the penalty. It is nonsensical to say the penalty shall equal the "archeological value";

"archeological value" cannot be measured as a dollar value.

10.17 (c) (11) (i) (B)

"archaeological, historical or commercial value" needs to be defined.
The ARPA definitions might work.

10.17 (c) (11) (ii)

Perhaps change "objects and" to "objects or."