



SOCIETY FOR AMERICAN ARCHAEOLOGY

June 29, 2011

Mr. David Tarler
Designated Federal Officer
National NAGPRA Program
National Park Service
1201 Eye Street, NW
Washington, D.C. 20005

Dear Mr. Tarler,

The Society for American Archaeology appreciates this opportunity to provide comments for consideration in the upcoming discretionary review of the full Native American Graves Repatriation Act (NAGPRA) regulations. As an active supporter of the idea, passage and implementation of the Native American Graves Protection and Repatriation Act, and as one of the key organizations involved in drafting the original regulations, the Society for American Archaeology is pleased to respond to the questions recently posed by the National NAGPRA Program, National Park Service: “(1) Based on 15 years of use, do the rules currently codified at 43 C.F.R. Part 10 need any amendments, such as (but not limited to) corrections, clarifications, or refinements?; and (2) If the answer is yes, then how should the rules be amended?” We commend the National NAGPRA Program for undertaking this discretionary review, and offer the comments that follow as constructive recommendations to provide greater clarity, efficiency and transparency to both NAGPRA requests and to NAGPRA compliance efforts, and to better achieve the balance of interests that lies at the heart of the legislation.

The Society is composed of some 6,800 members, representing a diverse range of interests, who promote the Society’s goals of scientific and responsible archaeological research, cooperative stewardship of the archaeological record, and education of the broader public of the value of archaeological knowledge. In this, we believe that NAGPRA has worked well and the original regulations have proven robust, resulting in engagement and collaborative research involving Indian tribes, Native Hawaiian organizations, non-Federally recognized Native communities, museums, repositories and Federal agencies. Consultations among archaeologists, museums and Native communities, whether tribes or Native Hawaiian organizations, take place daily, and a new generation of scholars has grown up with NAGPRA as a basis for ethical research and practice. According to the most recent NAGPRA National Program repatriation summary (available at the NAGPRA Program’s web site FAQ) repatriation actions to date have involved nearly 40,000 individuals and one million objects.

While the original NAGPRA regulations have been effective, we remain concerned by more recent developments over the past four years. This includes the drafting and implementation of the regulations on the Disposition of Culturally Unidentifiable Human Remains, or 43 CFR 10.11, and the recent Government Accountability Office (GAO) reports on NAGPRA and the Smithsonian Institution. In regards to 43 CFR 10.11, and associated sections 10.12 and 10.16, the Society maintains its previously stated position in our comments submitted to the Department on May 11th 2010 that these regulations, as

written, have the potential to harm the productive and collaborative relationships that have developed through the good faith efforts of institutions to repatriate human remains and objects covered by NAGPRA to descendant communities. Furthermore, the Society wishes to learn what actions will be taken in response to the two GAO reports, particularly regarding: 1) what will constitute full compliance and accurate reporting under the law, including penalties for failure, 2) what structural changes may be made within the National NAGPRA Program to help facilitate greater efficiency of compliance efforts by all parties; and 3) how the NAGPRA Review Committee will be managed to maintain the fairness of process defined within the regulations.

We are particularly concerned by this apparent erosion of balance in both recent rulemaking and in the actions of the Review Committee. The Act was premised on a balance not merely between the interests of tribes and scientists, where individuals might feel one or the other might take precedence, but on the crucial balance between the valid interests of Native communities to reclaim ancestral remains on the one hand, and the equally valid and vital public interest in the documentation, interpretation, and preservation of our shared human past on the other. Our comments are aimed at restoring a balance we believe has been lost in recent years.

While our comments are organized by section for your convenience, we wish to emphasize that our primary concerns are with the more recently promulgated regulations issued as § 10.11 Disposition of culturally unidentifiable human remains.

§ 10.2 Definitions.

- The definitions of *unassociated funerary objects* and *museums* need to be consistent between the law and the regulations. Currently they differ in ways that allow for confusion in interpretation. Suggested language for each is as follows with additions to the regulations in bold print and deletions struck through:
 - *Unassociated funerary objects* means **objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains** ~~those funerary objects for which the human remains with which they were placed intentionally~~ are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently returned or distributed according to traditional custom to living descendants or other individuals are not considered unassociated funerary objects.
 - *Museum* means any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds. **Such term does not include the Smithsonian Institution or any other Federal agency, as specified in §2 subsection 8 of the Act.**

§ 10.8 Summaries.

- There is an unnecessary duplication of effort in the publication of summaries in the Federal Register regarding *associated funerary objects* and *unassociated funerary objects* when these cultural items come from the same archaeological site. This issue also applies to sections **§ 10.9 Inventories** and **§ 10.10 Repatriation** (when applicable). Currently, two separate sets of documents are required to meet requirements for compliance with the regulations when these cultural items come from the same archaeological site. Given that the only difference between an associated and unassociated funerary

object is the presence of human remains either from the associated archaeological context or the holdings of the museum or Federal agency, we would suggest that the process be streamlined to allow for these cultural items to be published in the same documents. This would reduce the burden of effort for museums and Federal agencies, and, where appropriate, facilitate the process of repatriation.

§ 10.9 Inventories.

- The determination of the number of individual sets of human remains from sites with 1) multiple burials, 2) from mixed use sites, or 3) where the remains have been fragmented or disintegrated to a point where identification is uncertain leads to imprecision in the inventory process. This is recognized by forensic and bioarchaeological specialists and cannot be controlled for by the museums or Federal agencies during the inventory process. As a result, numbers of individual remains submitted in the inventories are not always correct and human remains can be missed or misidentified as animal remains. Currently, when these errors are recognized, museums and Federal agencies must submit a new Notice of Inventory Completion and, in the case of culturally affiliated human remains, a new Notice of Intent to Repatriate. This is an unnecessary burden and we recommend developing a process to allow for an amended notice rather than submission of a new one. Similarly, minor changes in other kinds of information, such as identified categories of cultural items, might also be better served by amended rather than new notices.
- See also comments under **§ 10.8 Summaries.**

§ 10.10 Repatriation.

- As noted above with the inventory process, there should be a means of submitting an amended notice rather than a new Notice of Intent to Repatriate in cases where errors in the original inventory of human remains and/or the categories of cultural items have occurred and are simply being corrected.
- See also comments under **§ 10.8 Summaries.**

§ 10.11 Disposition of culturally unidentifiable human remains.

Please note: the first four points that follow reflect views previously stated to the Department in our May 11th, 2010 comments on the final rules for 43 CFR 10.11.

- The newly-created definition for the term “disposition” should be deleted. The statute uses the term “disposition” without definition, and parties have spent the past twenty years interpreting the term according to its ordinary meanings as they work together to consider and construct customized resolutions for human remains and cultural items in collections. Tribes, museums, and agencies should be allowed to continue developing customized resolutions that reflect the diversity of perspectives and interests involved. The new definition, requiring a “transfer of control,” creates confusion about interpretation and appears to limit the potential opportunities for parties to customize resolutions.
- Section 7(b) of NAGPRA, accommodating scientific study under specific circumstances, should be extended to apply to culturally unidentifiable human remains as well as those already affiliated. The justifications underlying this provision apply equally to all human remains and cultural items. During NAGPRA’s implementation over the past twenty years, mutually agreed upon forensic investigation has proven to be extremely valuable in resolving affiliation questions. Such activities can be expected to be even more useful in addressing the complex questions associated with currently unaffiliated human remains and they should be supported.

- Section 7(f) of NAGPRA, limiting liability for museums taking actions in good faith, should be extended to apply to dispositions under the new rule as well as repatriations under the statute. Museums carrying out their obligations under NAGPRA, whether involving repatriation of culturally affiliated human remains and cultural items or disposition of those designated as culturally unidentifiable, should be given consistent protection from challenges to their actions.
- Unilateral reburial by museums or agencies should not be an option proposed by the rule. Such a suggestion discounts the importance of appropriate cultural and spiritual contexts for reburials and fails to acknowledge any value associated with ongoing curation of human remains.
- Currently there is no specific time frame for full compliance with this section of the regulations, and the Society would argue against strict time frames for any section regarding compliance other than the standard 90 day requirement for the initiation of consultation under paragraph (b)(1)(i). Given the scope of work for consultation and documentation specified in this section it would be an unreasonable burden to require a deadline for completion of compliance efforts.
- Paragraph (b)(2)(ii) represents a controversial aspect of the regulations that is recognized by museums, Federal agencies, and Indian tribes. Given the multiple ways in which aboriginal lands may or may not be identified, there is a potential for conflict to arise during the consultation process as multiple claimants may have equal title. There is significant concern as to how ‘aboriginal lands’ would be defined, impacts on individual Indian tribes’ rights to assert future claims based on how aboriginal lands are defined in this section, and how all potential parties involved would achieve a mutually agreeable disposition proposal. We recommend that the Department of Interior convene a task force of stakeholders to determine the nature of the process through which temporal and geographic affinity would be determined in a case-by-case basis for the specific parties involved.
- Paragraph (b)(4)(iii) is unclear as to what constitutes ‘temporal and geographic criteria’ that would be requested of Indian tribes with whom museums and agencies would consult. If this is linked to paragraph (b)(2)(ii), then the language should be revised to reflect this link. If this is not the case, then this section should be either clarified as to what it is requesting or deleted. As we noted above, we recommend that the Department of Interior convene a task force of stakeholders to determine the nature of the process through which temporal and geographic affinity would be determined in a case-by-case basis for the specific parties involved.
- Paragraph (c)(1) presents a paradoxical situation for museums and Federal agencies. Since the human remains in this section are, by definition, culturally unidentified, then it is impossible for a museum or Federal agency to prove right of possession as defined in section 10.10(a)(2) of the regulations. We recommend revised language acknowledging that museums represent appropriate repositories which may hold right of possession (albeit not title) to human remains absent a valid claim.
- Following on the last point, there is no stated contingency for the situation where culturally unidentifiable human remains may continue to be held in control by a museum or Federal agency. It is implied in the language of paragraph (b)(2) with the use of the word ‘may,’ but we recommend that this possibility should be more explicitly stated. This is particularly important in cases where cultural affiliation could be determined with additional study.
- Overall, the Society urges the Secretary of the Interior and the National NAGPRA Program to revise section 10.11 in a manner that recognizes the consensus-based process that has been a successful building block of the achievements of NAGPRA, rather than one that threatens the cooperative relationships that have developed between museums and American Indian communities over the course of the past 20 years.

§ 10.16 Review Committee.

- In reference to paragraph (b), there is increasing misunderstanding of the advisory nature of the Review Committee’s recommendations, findings, reports, or other actions. The committee is

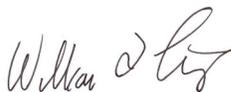
constituted as a requirement of the Act and subject to the Federal Advisory Committee Act. As such, it must be made clear to all parties who would use the committee for dispute resolution or findings of fact that all recommendations, findings, reports, or other actions are non-binding.

- Also in reference to paragraph (b), the Society recommends that the language be clarified by amending 'not binding on any person' to 'not binding on any person, museum, or Federal agency'.
- A general point in regard to the Review Committee is the GAO report findings regarding appointees to the committee. The report indicated that the National NAGPRA Office had interfered with the nomination process of members to the committee on more than one occasion. The Society agrees with the statement in the report that that this damages the credibility of the Review Committee, and we recommend that appropriate language be inserted into this section of the regulations to provide a level of transparency to the appointment process that is currently absent.

As stated in the opening of this letter, the Society continues to endorse the regulations as originally developed. However, the Society maintains its position in regards to its overall view of the problems inherent in the new regulations outlined in 43 CFR 10.11. The work inherent in making good faith efforts to comply with this section has increased costs both in time and money that is a potentially unreasonable burden on museums and Federal agencies. In addition, the process as outlined requires museums and Federal agencies to make decisions that are problematic, such as selecting criteria for determining aboriginal lands, which could lead to conflict and frustration over potential dispositions. Finally, the disposition process itself outlined in the new regulations is unclear on key points and is inconsistent with the rest of the regulations in terms of maintaining and recognizing the mutual interests of all parties involved. In order to resolve these concerns, clarifications and revisions must be made to this section to avoid causing undue harm to all parties involved.

Once again, the Society would like to offer our appreciation for the opportunity to provide comments on the existing 43 CFR 10 regulations in anticipation of the planned discretionary review, and we would be pleased to work with the Department of the Interior and the National NAGPRA Program in framing revised regulations to better accomplish the important goals of the Native American Graves Protection and Repatriation Act.

Sincerely,

A handwritten signature in cursive script, appearing to read "William F. Limp".

William F. Limp, Ph.D.
President