

COMMENTS BY THE SOCIETY FOR AMERICAN ARCHAEOLOGY ON
THE FINAL RULE ON DISPOSITION OF CULTURALLY UNIDENTIFIABLE HUMAN REMAINS
UNDER THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT
(NAGPRA)
May 11, 2010

The Society for American Archaeology offers these comments on the final rule on the Disposition of Culturally Unidentifiable Human Remains (75 Fed. Reg. 49: 12378-12405, March 15, 2010) to supplement and reiterate its comments made to prior drafts of the rule. The Society supports the goals and objectives of NAGPRA, including the need to address the important issue of culturally unidentifiable human remains in institutional collections. Museums, tribes, and scientists have worked together over the course of the past twenty years to implement NAGPRA. Processes have emerged from those efforts and relationships to allow parties to ensure that human remains are treated with respect and that repatriations and other dispositions are handled in ways acceptable to the parties involved. The Society offers these comments to express its concern with the process articulated in this rule and to improve the process by which this issue is addressed, so that the productive relationships that have been established through the implementation of NAGPRA can be maintained.

While the final rule reflects substantial revisions to the 2007 published draft, many of the problematic issues identified by the Society in its earlier comments were not addressed. One important exception is that the revised rule highlights the importance and centrality of meaningful consultation among Indian tribes, Native Hawaiian Organizations, museums, and federal agencies as they carry out the disposition process. The earlier draft pressed museums and agencies to deaccession human remains as quickly as possible, devaluing the role of continuing consultation and the ongoing process of connecting human remains with Native American groups that have a meaningful connection to them. The Society supports processes under NAGPRA that embody substantive, well-balanced efforts and communication as parties exchange information, engage in consultations, identify potentially affiliated and interested groups, and move forward with repatriations and dispositions as appropriate.

Although the rule as revised is an improvement in some important ways, the disposition process remains problematic because, as the NAGPRA Review Committee acknowledged in its published recommendations, there may be differences in appropriate disposition decisions depending on the reasons for which certain human remains are deemed to be culturally unidentifiable under the law. In its published recommendations, the Committee acknowledged that the statute explicitly seeks to balance a legitimate public interest in the educational, historical, and scientific information conveyed by human remains with a legitimate need to return control over ancestral human remains to Native people. The Committee also acknowledged the importance of the relationship of some of these human remains to building on understandings of America's shared past. The rule as drafted fails to recognize scientific study as an important part of increasing knowledge about the human past.

The Society continues to stand by its opinion, as discussed in detail in its comments to the draft rule, that Congressional action, not regulatory action, is the appropriate means by which the disposition process for culturally unidentifiable human remains should be addressed. However, if the Department of the Interior proceeds with its decision to issue regulations on this matter, the Society strongly supports modification of the rule to address the following points, in order to better align it with the letter and spirit of NAGPRA:

First, 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.

Second, 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.

Third, 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.

Fourth, 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.

The engagements implementing NAGPRA take time and resources. Importantly, there will be a need for increased funding to enable tribes and museums to engage in the consultations mandated and anticipated by this rule. The Society strongly supports an increase in funding to support the consultation and disposition activities mandated by the rule. The Society continues to believe that the costs of compliance with this rule will significantly exceed the Department’s forecast and will place an unfair financial burden on tribes, museums, and repositories without additional federal funding.

The Society urges the Department of the Interior to focus carefully on consistency in NAGPRA’s processes. The Society continues its strong support for processes that allow tribes, archaeologists, museums, and agencies the time and flexibility to work together without the pressure of arbitrary deadlines. It strongly supports a balanced structure that allows parties to continue their working relationships without disruption or bifurcation as they address concerns, questions, and potential resolutions for culturally affiliable and culturally unidentifiable human remains. Efforts to determine cultural affiliation should remain paramount.

In closing, the Society wishes to underscore the continued need for maintaining both consistency and the consultative relationships that have emerged in the implementation of NAGPRA.