

January 13, 1993

Dr. Frank McManamon
Departmental Consulting Archaeologist
PO Box 37127
National Park Service
Washington DC 20013

Re: NAGPRA Regulations, Second Draft 4 (10/10/92)

Dear Frank:

Some time ago, I received a copy of the a new draft 4 of the NAGPRA regulations from Phil Walker. Attached is a summary of my preliminary review of the new draft. (In the future it might be well not to have two different drafts with the same number.) This appears to be a substantial improvement over the earlier draft 4 (10/2/92), although there remain some errors and problems. For ease of reference, I'll present my comments serially; I think their relative importance is clear. If you would like to discuss any of these comments, please let me know.

As I know you expect to publish the regulations soon, I felt it important to get these comments to you immediately. I have not yet had the opportunity to get feedback on these comments from the rest of the SAA Task Force but will notify you of any additions or changes they suggest. I hope it will be useful.

Also, I would appreciate it if you would place me on a mailing list to automatically receive new drafts of the regulations and related notices.

Sincerely,

Keith Kintigh, Co-chair
Society for American Archaeology Task Force on Repatriation

cc: Jack Trope
Walter Echo-hawk

Comments on Draft 4 (10/10/92)
Keith Kintigh, SAA Task Force, January 13, 1993

10.2 DEFINITIONS

Tribe

10.2(a)(9) (page 4). The descriptive language starting at the top of page 4 seems a bit overstated. The word "continuous" was specifically removed from the definition of "cultural affiliation" during the legislative process and should not be reintroduced here. Also, throughout history" might be interpreted broadly so as to include prehistory, in which case it is overly burdensome (to say the least).

Traditional Religious Leader

10.2(a)(13) (page 4). With this definition, in many groups, every member or every initiated member of the tribe would qualify under criterion (i). The "or" at the end of (i) should be "and". That is, a leadership role not just participation should be required.

Lineal Descendent

10.2(a)(14) (page 5). It may be a tricky business mixing traditional kinship systems with the definition of lineal descent. The legislative intent was that lineal descent be determined in conformance with ordinary English usage. Insofar as the traditional systems informs on such issues as adoption, it may be useful. However, a radically divergent interpretation of lineal descent would not be allowable. Raising the whole difficult issue of translation or lack thereof, between the English language category of "lineal descendent" and traditional categories of reckoning descent should not be done lightly.

Human Remains

10.2(b)(1) (page 5). What about human remains, not freely given, that are incorporated into objects that are not cultural items, such as scalp shirts.

Cultural Items

10.2(b)(2) (page 5). This definition does not conform with the definition in the act.

Associated Funerary Objects

10.2(b)(3)(ii) (page 6). This would be clarified if a parenthetical statement were appended, e.g. "(whether or not the associated human remains are currently in possession or control of a museum or Federal agency.)" The difference between (i) and (ii) is otherwise difficult to see.

Objects of Cultural Patrimony

10.2(b)(6) (page 6). Creates a circularity in definition. "Cultural items" in the first line should be replaced by "items".

Cultural Affiliation

10.2(c) It would add to clarity if the definition would encompass the relationships for objects as well as people, since the act uses it in that way. This shouldn't create any problems.

Tribal Lands

10.2(d)(2) The definition of tribal land ought to deal explicitly with three different land classes: 1) tribally owned reservation land 2) allotted (individually owned) tribal land and 3) tribally owned non-reservation land. The question is: Does the Act apply to each of the second and third classes of land? It seems to me that Jack Trope's point in his 11/30/92 letter to you regarding the unwarranted exclusion of private lands is well taken. In any case, these land status issues should be clarified in the regulations.

Possession and Control

10.2(e)(5),(6) It might be argued that this begs the question. I think Walter Echo-hawk has argued that under common law, museums do NOT have a sufficient legal interest in human remains to do anything with them. In any event, this act specifically redefines the ownership.

10.4 INADVERTENT DISCOVERY

Discovery.

10.4(b) (page 12) This well-intentioned section is overly broad. It appears to compel people who have nothing whatsoever to do with the disturbance or discovery to report it. It should refer to people engaged in some sort of land-disturbing undertaking on Federal or Tribal land, not to everyone.

Federal Lands

10.4(d)(2) (page 13) Change to: notify within one working day the Indian Tribe or Tribes known or likely to be.... Also, it is not clear why "any other Indian Tribe that is reasonably known to have a relationship to the human remains or cultural items" should be notified if they are not candidates for being culturally affiliated. If they are potentially affiliated, then they should be notified, otherwise they have no legitimate interest.

10.5 CONSULTATION

Programmatic Agreements

10.5(f) (page 16) While programmatic agreements may facilitate the workings of the bureaucratic machinery, I do not believe they should, at this stage, be encouraged: "Whenever possible, ...". Surely they will serve the interests of the bureaucracy but not the interests of the Indian Tribes or the scientific community or the broader public. Until some real experience with repatriation exists, people are not in an informed position to decide on all of the abstract issues that will be thrown at them in the programmatic agreement.

Time and again, the experience shows that if one asks, in the abstract "Is digging of burials permissible?", the answer will be "no". However, if one asks, "Is it permissible (or even advisable) to excavate this particular threatened burial that we see here in the ground?", the answer will be "yes." If you ask the abstract question, "Can we publish drawings of a burial?", a group might say "no" when they would assent to or encourage the publication of a specific drawing that they can review.

When faced with making blanket agreements all of the implications of which are not foreseeable (far from it), the intelligent reaction (of anyone, not just Indian people) is to exercise extreme caution and be quite conservative. In making decisions on specific cases, people can see the implications and will often make quite different decisions and I think better informed.

Thus, it is premature to encourage programmatic agreements, indeed, I think they should be actively discouraged until there has been some amount of case-by-case working through of repatriation decisions. It will take more time and more money this way, but Indian and public interests (and the legislative intent) will be better served.

10.8 SUMMARIES & 10.9 INVENTORIES

Consultation

10.8(d)(1)(ii), 10.9(b)(1)(ii) (pages 21 & 24) Parties (A) and (B) are legally irrelevant to the decisions regarding museum and agency collections (they only apply to intentional excavations and inadvertent discovery). In the relevant section of the act, cultural affiliation is the only relevant criterion. Thus, the groups who should be consulted are only those that are potentially affiliated. If the tribes on whose lands or aboriginal lands the items were found are affiliated or potentially affiliated, then they should be consulted because of the affiliation relationship.

10.10 REPATRIATION

Exceptions

10.10(c)(3) (page 32) Under the Act the issue of fifth amendment taking does not apply to human remains and associated funerary objects (contrary to these regulations). In the Act, this language appears under the definition of right of possession. The relevant phrase is "unless the phrase [right of possession] so defined would, as applied in section 7(c) result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 USC 1491..." Section 7(c) of the act has to do with the standard of repatriation only for "unassociated funerary objects, sacred objects, or objects of cultural patrimony." Thus, there is no justification for extending this to human remains and associated funerary objects. Further, I note the argument presented by Jack Trope in his 11/30/92 letter to you concerning the importance of the statute's reference to a determination by the United States Claims court.