

SOCIETY FOR AMERICAN ARCHAEOLOGY

**Comments on 2007 Proposed Rule
Relating to Culturally Unidentifiable Human Remains
Under the Native American Graves Protection and Repatriation Act
[79 Federal Register 58582, Published Tuesday October 16, 2007]**

TO: Department of the Interior

FROM: Society for American Archaeology

SUBJECT: Proposed NAGPRA Rule Relating to Culturally Unidentifiable Human Remains (79 FR 58582, October 16, 2007)

DATE: January 14, 2008

**PART 10—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION
REGULATIONS**

1. The authority for Part 10 continues to read as follows:
Authority: 25 U.S.C. 3001 *et seq.*, 16 U.S.C. 470dd (2).

GENERAL COMMENTS

The Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. § 3001, *et seq.* (2000), does not grant authority to the Department of Interior (“DOI”) to promulgate regulations concerning the repatriation of culturally unidentifiable human remains (“CUHR”) under sections 8(c)(5), 8(c)(7), 13, or otherwise.¹ The plain language of NAGPRA and its legislative history make clear that with respect to CUHR, the statute authorizes only the preparation by the Review Committee of recommendations to Congress and does not grant regulatory authority to DOI. NAGPRA’s treatment of CUHR stands in sharp contrast to its treatment of culturally affiliated human remains and associated materials where Congress in fact intended to grant the agency regulatory authority. In addition, NAGPRA contains no general grant of rulemaking authority that would provide a basis to issue the proposed CUHR regulations. Finally, even if NAGPRA conferred rulemaking authority regarding CUHR, which it does not, the proposed regulations go beyond the limits of the statute and are contrary to the framework it establishes for the reasons discussed in the section-by-section analysis of the regulations below.

NAGPRA Provides No Authority for Regulations Concerning CUHR.

Nothing in NAGPRA provides authority or direction to the DOI to adopt regulations concerning CUHR. An “agency’s ‘power to promulgate . . . regulations is limited to the authority delegated’ to it by Congress,” *Amalgamated Transit Union v. Skinner*, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (*quoting Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)), and an “agency can neither adopt regulations contrary to statute, nor exercise powers not delegated to it by Congress,” *Ball, Ball, & Brosamer, Inc. v. Reich*, 24 F.3d 1447, 1450 (D.C. Cir. 1994).

¹ The DOI also has identified the Archaeological Resources Protection Act, 16 U.S.C. §470aa-mm, as a basis for its authority, but that statute does not specifically address either repatriation or culturally unidentifiable human remains, nor does it purport to provide the DOI authority to promulgate regulations concerning the disposition of CUHR.

NAGPRA only addresses CUHR in limited ways. Culturally unidentifiable human remains are specifically mentioned in NAGPRA only once, in Section 8(c)(5), pursuant to which the Review Committee established by Section 8 of the statute, was directed to:

compil[e] an inventory of culturally unidentifiable human remains...in the possession or control of each Federal agency or museum and recommend[] specific actions for developing a process for disposition of such remains.

Congress thus provided a clear, narrow directive regarding CUHR: it sought to have the special expertise of the Review Committee brought to bear on a complex issue and have the Review Committee “consult[] with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups,” in making *recommendations* for possible future legislative action in its report. NAGPRA § 8(3). Insofar as CUHR is concerned, NAGPRA as enacted begins and ends with the submissions of these recommendations.

NAGPRA’s legislative history confirms that Congress did not grant authority to the DOI to enact regulations regarding CUHR because Congress recognized that the subject raised complex, controversial, and distinct issues from those raised by other categories of human remains and objects for which it granted regulatory authority. The House Committee Report on NAGPRA acknowledged that the Act only covered “the repatriation of culturally affiliated items” as opposed to culturally unidentifiable ones. H.R. Rep. No. 101-877, at 10 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4369. The Report explains that Congress drew this distinction because it recognized that “[t]here is general disagreement on the proper disposition” of CUHR. H.R. Rep. No. 101-877, reprinted in 1990 U.S.C.C.A.N. 4367, 4375.

Section 8(c)(5) was envisioned by Congress simply as a way for it to develop the information necessary to examine the question further. This point is reinforced by an early draft of NAGPRA, which spelled out that the Review Committee was to make its recommendations directly to Congress and to the Secretary of the Interior. This earlier draft of NAGPRA provided that:

[n]ot later than 6 years after the date of establishment of the [review] committee, the committee shall report on the inventory, together with the recommendations, to the Secretary [of the DOI] and to the Congress.

H.R. 5237, 101st Cong. § 7(d)(2) (July 10, 1990). Although this language was omitted from NAGPRA’s final text, the House Committee Report makes clear that Congress’ intent remained for the Review Committee to provide it with further information on CUHR. Echoing the final language of Section 8, the House Report issued by the Committee on Interior and Insular Affairs states that the Committee “looks forward to the Review Committees [sic] recommendations in this area.” H.R. Rep. No. 101-877, reprinted in 1990 U.S.C.C.A.N. 4367, 4375. ²

Indeed, in comments submitted to the House Committee on Interior and Insular Affairs regarding the earlier version of what ultimately became NAGPRA (H.R. 5237), the DOI itself acknowledged that it would have no regulatory authority over CUHR under the proposed statutory language. In a letter to then-Chairman Morris K. Udall, Scott Sewell, then-Deputy Assistant Secretary for Fish, Wildlife and Parks, stated that:

² Moreover, NAGPRA’s final language requires the Committee both to provide its recommendations in a report under § 8(e), and to file its annual report with Congress, under § 8(h), which would render superfluous the language in the earlier draft. The effect of the change was thus to remove a proposed requirement in the earlier draft that the Review Committee recommendations would be submitted to the Secretary, and to provide only that they would go to Congress, and to remove a deadline for when the recommendations would be submitted. The amendment accordingly further shows that the Review Committee report was not intended to provide a basis for the Secretary to act upon without Congressional authorization.

[i]f the regulations contemplated in section 3(b) of the bill (providing procedures to be followed in determining proper treatment for unclaimed items) are intended to provide...broad authority [to develop regulations for the treatment and disposition of items that are determined to be unaffiliated with any modern Native American entity], report language establishing this intent is necessary.

H.R. Rep. No. 101-877, reprinted in 1990 U.S.C.C.A.N. 4367, 4390. DOI thus clearly advised Congress that it understood that it would have no regulatory authority with respect to CUHR unless Congress gave guidance to the contrary. No such language was ever included in the Committee Report, and no relevant changes were made to the bill prior to enactment.³

The plain language of NAGPRA and its legislative history thus make clear that DOI has no authority to promulgate regulations concerning CUHR and that any further action was reserved for Congress in response to the recommendations and report of the Review Committee.

NAGPRA Is Otherwise Clear Where Granting Regulatory Authority

Where Congress intended to grant regulatory authority under NAGPRA, it did so expressly and with a detailed definition of the subject matter of the regulations. It “is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.” *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (internal quotations omitted). As recently put by the United States Court of Appeals for the Fifth Circuit, “[w]hen Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken.” *Texas v. United States*, 497 F.3d 491, 502 (5th Cir. 2007) (finding that the Secretary of the Interior lacked authority to promulgate certain regulations under the Indian Gaming Regulatory Act).

Congress provided expressed and specific guidance to the DOI in NAGPRA concerning the subject matter of the regulations it was authorized to promulgate. For example:

- Section 3(b) requires the Secretary, in consultation with the Review Committee, Native American groups, museums, and the scientific community, to promulgate regulations regarding unclaimed cultural items;
- Section 8(g)(1) requires the Secretary to establish rules and regulations necessary to the functioning of the Review Committee; and
- Sections 9(a) and (b) require the Secretary to promulgate regulations establishing procedures for assessing civil penalties against museums for NAGPRA violations.

In sharp contrast to these specific provisions, NAGPRA provides no authorization or guidance concerning rules or regulations governing CUHR. The DOI cannot interpret this Congressional silence as regulatory authority, particularly where DOI itself called attention to the fact that Congressional silence was understood to exclude CUHR from DOI authority.

NAGPRA Does Not Confer General Rulemaking Authority Upon the DOI

Finally, NAGPRA contains no general grant of rulemaking authority to DOI to promulgate regulations beyond the subject matters for which it was expressly conferred. Section 13 provides that “[t]he Secretary shall promulgate the regulations to carry out this Act within 12 months of November 16, 1990.” The draft regulations identify this provision of NAGPRA as a basis for DOI’s authority, but this provision is not a

³ The draft regulations do not rely on Section 3(b) of NAGPRA as a basis for the agency’s authority, nor does Section 3(b) provide authority to the DOI to issue draft regulations concerning CUHR.

general grant of rulemaking authority because it concerns the timing of the regulations, not their content or scope.

Section 13 simply means that insofar as the DOI was granted rulemaking authority by NAGPRA, the specific categories of regulations authorized by the statute were to be issued by November 16, 1991. Indeed, there could have been no expectation that the Review Committee's report and recommendations regarding CUHR could have been implemented by this deadline, making it even more evident that CUHR falls outside the scope of the issues on which Congress had reached a decision. Moreover, were Section 13 to be read as a general grant of rulemaking authority, sections 3(b), 8(g)(1), and 9(a) and (b), defining the specific subjects on which NAGPRA granted regulatory authority, would be rendered superfluous, thereby violating a basic principle of statutory construction. General rulemaking authority neither empowers an agency "to extend its authority...beyond the limits established by Congress," *NRDC v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992), nor allows an agency to "trump the specific provisions of" a statute." *Id.*

The Draft Regulations Are Otherwise Beyond NAGPRA's Authority and Contrary to the Framework Established by the Statute

Even if NAGPRA conferred general rulemaking authority, which it does not, the proposed regulations go beyond the limits of the statute and are contrary to the framework it establishes. For reasons including those identified in the section-by-section comments below, even if the DOI had been granted authority to issue regulations concerning CUHR, the proposed regulations are contrary to the administrative structure and policies that Congress enacted into law through NAGPRA.

SPECIFIC COMMENTS

.....
2. In § 10.1 revise paragraph (b)(3) to read as follows:

§ 10.1 Purpose and applicability.

* * * * *

(b) * * *

(3) Throughout this part are decision points that determine how this part applies in particular circumstances, e.g., a decision as to whether a museum "controls" human remains and cultural objects within the meaning of the regulations, or, a decision as to whether an object is a "human remain," "funerary object," "sacred object," or "object of cultural patrimony" within the meaning of the regulations. Any final determination making the Act or this part inapplicable is subject to review under section 15 of the Act. With respect to Federal agencies, the final denial of a request of a lineal descendant, Indian tribe, or Native Hawaiian organization for the repatriation or disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony brought under, and in compliance with, the Act and this part constitutes a final agency action under the Administrative Procedure Act (5 U.S.C. 704).

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COMMENTS

According to the expressed statutory language of NAGPRA, Section 3 activities (pertaining to new discoveries and excavations) and Section 5 and 6 activities (inventory and summary requirements for cultural items in museum or agency collections), as well as Section 7's repatriation requirements, all apply only to human remains and cultural items that are Native American. Further, the Review Committee's mandate is limited by Section 8(a) of the statute to monitoring and reviewing the implementation of the inventory, identification process, and repatriation activities under sections 5, 6, and 7, all of which involve human remains and cultural items that are Native American, whether or not they

can be culturally affiliated with an Indian tribe or Native Hawaiian organization. Consequently, the proposed regulations would exceed the statute's authority to the extent that they are intended to apply to non-Native American human remains or cultural items.

The proposed regulations should, in their entirety, apply only if as a starting point a finding of Native American status is made. If there is not a finding that the human remains are Native American, they do not come within NAGPRA's purview and should not be subject to regulation under NAGPRA. Rather, they may remain subject to other existing law, including the Antiquities Act, ARPA, etc. as applicable, and associated regulations. In this regard, the United States Court of Appeals for the Ninth Circuit has held that under NAGPRA "Congress's purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them" and that such a construction of NAGPRA is contrary to the statute. *Bonnichsen v. United States*, 367 F.3d 864, 876 (9th Cir. 2004). As explained by the court, "[t]he exhumation, study, and display of ancient human remains that are unrelated to modern American Indians was not a target of Congress's aim, nor was it precluded by NAGPRA." *Id.* The court's ruling has added significance with respect to the proposed regulations because DOI has endorsed the court's ruling before Congress and confirmed that it accurately reflects Congress' intent as well as DOI's own understanding of NAGPRA's purposes and policies. In a July 28, 2005 written statement to the Senate Committee on Indian Affairs on a proposed amendment to the NAGPRA definition of Native American, the Deputy Assistant Secretary for Fish, Wildlife and Parks cited the court's ruling and quoted this same language from that decision as grounds to oppose a proposed amendment that would have broadened the definition of Native American, advising that broadening the definition would be inconsistent with the fundamental balance established by Congress in NAGPRA. DOI's submission to Congress stated that "We believe that NAGPRA should protect the sensibilities of currently existing tribes, cultures, and people while balancing the need to learn about past cultures and customs. In the situation where remains are not significantly related to any existing tribe, people or culture they should be available for appropriate scientific analysis. The proposed legislation would shift away from that balance."

A finding that remains or items are Native American is the first step to trigger NAGPRA's applicability. A finding of cultural affiliation, or culturally unidentifiable status, is a subsequent step in the process of determining whether these remains or items are subject to the disposition options delineated by NAGPRA.

.....
3. Amend § 10.2 by revising paragraph (e) and adding paragraph (g)(5) to read as follows:

§ 10.2 Definitions.

* * * * *

(e)

(1) What is cultural affiliation? Cultural affiliation means that there is a relationship of shared group identity that can be reasonably traced historically or prehistorically between members of a present-day Indian tribe or Native Hawaiian organization and an identifiable earlier group. Cultural affiliation is established when the preponderance of the evidence—based on geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion—reasonably leads to such a conclusion.

(2) What does culturally unidentifiable mean? Culturally unidentifiable refers to human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.

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COMMENTS

The word "has" is critical here. It does not say "cannot," which would imply a permanent inability to determine a lineal descendant. There's always the possibility that new evidence (indeed not necessarily evidence on the particular or sets of objects and/or remains in question) may provide insight into descent.

This definition of culturally unidentifiable in itself implies that the necessary work has not been done to identify the lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization or that existing research is insufficient to make a determination of cultural affiliation. “Has” and “can” have two very different meanings and implications. There is big difference in “culturally unidentified” and “culturally unidentifiable.” The former presumes that the needed work to attempt an identification has not been done, while the latter suggests such attempts have failed or are inconclusive.

The definition of CUHR (“...for which no lineal descendant or culturally affiliated tribe or [NHO] has been identified”) assumes (i) that the human remains are Native American, and (ii) that a lack of identification at this time means that the human remains are incapable of being culturally affiliated at a later date through additional consultation and/or study.

Ongoing efforts to determine cultural affiliation and otherwise learn about biological and/or cultural characteristics should be allowed to continue as long as there is a reasonable, good faith belief that it may be possible to determine (i) whether or not the remains are Native American, and (ii) if Native American, the cultural affiliation of those remains. The statute itself requires museums and agencies to prepare inventories and repatriate only Native American human remains. (See Section 5 and Section 7).

The definition of CUHR in the proposed rule only speaks to lineal descendants and culturally affiliated tribes/organizations. In comparison, Section 3 prioritization of claimants also includes (i) tribes from whose lands the human remains were removed, and (ii) tribes who were determined by final judgment to have aboriginally occupied the land from which the human remains were removed, or a group with a stronger cultural relationship than that tribe. It seems that claims, whether under Section 3 or Section 5, should honor the same claimants in the same order of priority.

The statute authorizes action, in the form of recommendations, solely for culturally unidentifiable human remains and not for other culturally unidentifiable items. *Specifically, the statute does not include funerary objects in its governance of culturally identifiable human remains.* The regulatory definition in Section 10.2(e)(2) should delete the phrase “and associated funerary objects” to be consistent with the statute.

We think there is an important distinction that could be made here with respect to culturally unidentified and culturally unidentifiable remains. Culturally unidentified should be specified such that it refers to remains to which no cultural affiliation has been previously listed, but that may be determined following consideration of available information and potentially other appropriate studies. Culturally unidentifiable in turn may refer to remains for which no affiliation can be determined following detailed review of all currently available and pertinent information and potentially other appropriate studies. These two terms have implications for subsequent sections.

For consistency and clarification we also recommend adding to the end of (e)(2) the following: “... through the inventory process mandated under Sections 5 and 6 of the Act.”

.....

(g) * * *

(5) *Disposition* means the transfer of control over Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony by a museum or Federal agency under this part. This part establishes disposition procedures for several different situations:

- (i) Custody of human remains, funerary objects, sacred objects, and objects of cultural patrimony excavated intentionally from, or discovered inadvertently on Federal or tribal lands after November 16, 1990 is established under § 10.6;
- (ii) Repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony in museum and Federal agency collections to a lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization is established under § 10.10.

(iii) Disposition of culturally unidentifiable human remains, with or without associated funerary objects, in museum or Federal agency collections is established under § 10.11.

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COMMENTS

“Disposition” is commonly, and more broadly, defined as a final settlement or determination rather than the more narrow definition here requiring transfer of control. The statute refers to both “repatriation” and “disposition,” which indicates that the law’s drafters did not intend for disposition to automatically equate to a transfer to a claimant. The broader definition is more consistent with common usage, with the statutory language itself, and with the stated legislative intent to allow NAGPRA to serve as a tool for consultation, collaboration, and cooperative resolutions that can show respect for a variety of viewpoints and interests.

Parties to the NAGPRA process should be able to develop customized solutions for human remains and other cultural items, including solutions that may not necessitate a transfer of control of the object at issue. For example, the Hopi have placed a current moratorium on repatriation of sacred masks that may have been contaminated with arsenic while in curation, because of the health hazards it could pose to those who handle the items. Ongoing collaborative efforts to address complexities such as this are leading to a diversity of customized solutions that respect the interests and concerns of all involved. *A transfer should not be assumed or forced.*

Some tribes have expressed concern that they have been inundated with paperwork relating to the NAGPRA process, such as inventory notices, and that it takes time, effort, and funds to participate in and complete the full consultation process as a potentially culturally affiliated tribe. In addition, some discussed the fact that they did not have appropriate ceremonies addressing repatriation and that they needed time within their communities to determine appropriate actions, if any, to take. At the joint consultation meeting in Phoenix in October 2007, several tribal members expressed concern about being rushed into a need to assert rights before they were fully prepared, and that they would lose the right to do so if other groups could assert claims and take possession of human remains and other cultural items first. They did not want a time limit imposed upon them; these regulations would do just that.

This definition constitutes a rewriting of the original law. It does not allow for all possibilities, including retention of remains and objects by a repository. It does not allow for negotiated dispositions of the sort that have been very successful in recent years. It also goes well beyond regulations for unidentified remains to include funerary objects, sacred objects, and objects of cultural patrimony.

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4. Amend 10.9 by revising paragraphs (e)(2), (5), and (6) as follows:

§ 10.9 Inventories.

* * * * *

(e) * * *

- (2) The notice of inventory completion must:
 - (i) Summarize the contents of the inventory in sufficient detail so as to enable the recipients to determine their interest in claiming the inventoried items;
 - (ii) Identify each particular set of human remains or each associated funerary object and the circumstances surrounding its acquisition;
 - (iii) Describe the human remains or associated funerary objects that are clearly identifiable as to cultural affiliation;
 - (iv) Describe the human remains or associated funerary objects that are not clearly identifiable as culturally affiliated with an Indian tribe or Native Hawaiian organization, but that are likely to be culturally affiliated with a particular Indian tribe or Native Hawaiian organization given the totality of circumstances surrounding acquisition of the human remains or associated objects; and

(v) Describe those human remains, with or without associated funerary objects, that are culturally unidentifiable but that may be transferred under § 10.11.

.....

COMMENTS

The wording here appears to rule out additional study and implies that consideration of affiliation is expected to go forward with only existing evidence. Rewording should indicate that additional study may be authorized, requested, or otherwise developed as part of the consultation and affiliation determination process. Museums already have provided DOI with inventories of all possible NA human remains and funerary objects in their collections. This inventory must contain sufficient information for tribes to be able to consider whether they wish to initiate further study that may assist in a finding of cultural affiliation. This language seems to imply that museums must bear the burden of figuring which are “likely culturally identifiable” from those that are “culturally unidentifiable.” Given the definition of “culturally unidentifiable” in 10.2, what exactly is this difference if no descendent “has” been identified? This section would seem either to require judgment calls on the behalf of museum staff (who likely are not experts in making such judgments), or requiring museums to spend considerable sums to hire professionals who are. But, how can one professional’s judgment as to what remains “are likely” to be culturally identifiable stand up in court against another’s professional judgment/opinion? This dichotomy is very confusing.

.....

(3) * * *

(4) * * *

(5) Upon request by an Indian tribe or Native Hawaiian organization that has received or should have received a notice and inventory under paragraphs (e)(1) and (e)(2) of this section, a museum or Federal agency must supply additional available documentation.

(i) For purposes of this paragraph, “documentation” means a summary of existing museum or Federal agency records including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding the acquisition and accession of human remains and associated funerary objects.

(ii) Documentation supplied under this paragraph is considered a public record except as exempted under relevant laws. Neither a request for documentation nor any other provisions of this part may be construed as authorizing either:

(A) The initiation of new scientific studies of the human remains and associated funerary objects; or

(B) Other means of acquiring or preserving additional scientific information from such remains and objects.

.....

COMMENTS

Paragraphs (ii) A and B are particularly troublesome. The statements are not restricted to destructive or invasive testing, but appear to prohibit any form of either further research or the preservation of information relating to such studies, even if such research is requested by tribes. While we understand that this section is specifically in relation to requests for information, it appears to presume that such authorization is required prior to any additional studies, whether invasive or not. Given that affiliation is to be determined based on the totality of circumstances, it is troubling that archaeologists are prohibited from contributing to that totality or affecting its character in the future. SAA has consistently emphasized the importance of scholarly and scientific research, and it is the stated position of SAA that scientific research should be conducted whatever the ultimate disposition of the remains or objects.

As worded paragraphs (ii)A and B could be construed to restrict even new studies and preservation of materials, data, archival records, interview and consultation information received from tribal and organizational representatives, and other evidence available to museums and agencies seeking to identify cultural affiliation under the inventory provision of Sec. 5 and work with tribes seeking to demonstrate affiliation for repatriation purposes under Section 7. The core effort to identify cultural affiliation for items is embedded in efforts to study human remains and cultural items with the goal of seeking cultural affiliation. Human remains and cultural items that had not been studied but simply sat on curatorial shelves were an important part of why NAGPRA came about – to trigger actual efforts to learn what we can and then to handle disposition respectfully thereafter. By denying a justification for research even in the effort to seek cultural affiliation, the regulations are working against the goal of NAGPRA – to seek cultural affiliation when possible and then to allow the affiliated group, if identified, to assert its interest in determining an appropriate outcome, or disposition, for the items.

Further, NAGPRA does not prohibit research on collections for which a valid claim is not pending. As noted by the court in a case involving Native Hawaiian human remains, “[e]xaminations done for the purpose of accurately identifying cultural affiliation or ethnicity are permissible because they further the overall purpose of NAGPRA, proper repatriation of remains and other cultural items.” *Na Iwi O Na Kupuna O Mokapu. et al. v. Dalton*, 894 F. Supp. 1397, 1415 (Dist. Ct. Hawaii 1995). Significantly, in 1998 testimony before Congress relating to a proposed amendment to NAGPRA, the Department of the Interior stated that, “NAGPRA does not prohibit new scientific studies; it simply cannot be used as the authorization for them. Public agencies and museums that hold such remains and objects are permitted to undertake or allow new studies under ARPA and other statutes and regulations. In the case of museums, they are permitted to undertake or allow new studies according to their articles of incorporation, statements of purpose, or other legal statements under which they were established.” (DOI testimony, June 10, 1998.)

The current statement in NAGPRA that a request for documentation does not constitute independent “authorization” for study has been misconstrued by some to mean that study is prohibited; the proposed language runs the same risk. For purposes of accuracy and clarity, we encourage the inclusion of a statement in the regulation consistent with the above-quoted testimony of the Department of the Interior, confirming that this language does not prohibit studies or other means of acquiring or preserving information otherwise permitted by law.

There may be a situation in which a tribe *wants* DNA analysis. There may be situations where non-Native American remains are mixed with Native American remains in an unanalyzed collection. Does looking at the catalogs, remains, and objects by an expert with graduate-level training constitute a “scientific study?” Museums or agencies might not be able to carry out necessary forensic analysis or fulfill part 10.9 without doing basic research. They cannot determine possible cultural affiliation without carrying out basic research on the case in question.

Much of the wording in these regulations appears to indicate that the federal government wants to divest itself of the “problem” of identifying proper cultural relationships for remains. There is considerable expertise brought to bear and funds spent by the federal government on identifying military or crime casualties. Why should there be any lesser treatment for Native American remains?



(6) If the museum or Federal agency official determines that the museum or Federal agency has possession of or control over human remains, with or without associated funerary objects, that cannot be identified as affiliated with a lineal descendent, Indian tribes, or Native Hawaiian organizations, the museum or Federal agency must provide the Manager, National NAGPRA Program notice of this result and a copy of the list of such culturally unidentifiable human remains and any associated funerary objects. The Manager, National NAGPRA Program must make this information available to

members of the Review Committee. Culturally unidentifiable human remains, with or without associated funerary objects, are subject to disposition under § 10.11.

.....

COMMENTS

“Native American” should be added ahead of “human remains” in the second line because if adopted the proposed Rule will inevitably cover remains that are not Native American under the law as it currently exists.

The statute does not include associated funerary objects in its provisions dealing with culturally unidentifiable human remains. Requiring museums and agencies to provide a list of those objects to the National NAGPRA program, to the extent that it requires action beyond the inventory requirements already set forth in Section 5 of NAGPRA, is an overreaching proposal by DOI.

We note a minor procedural flaw in the proposed regulation. Under 10.2(c)(3) the Departmental Consulting Archaeologist is the authority responsible for administering the regulations. However, the DCA is dropped out of this subsection and replaced with the NAGPRA Manager. Why? If the DCA is to play a meaningful role, then the DCA should be notified when a museum or Federal agency determines that it has CUHRs. We suggest the following be added to the end of the first sentence in (6)

“.. must notify the Departmental Consulting Archaeologist of this result and provide the Manager, National NAGPRA Program with a copy of the list of such culturally unidentifiable human remains and any associated funerary objects.”

Additionally, the rule’s language does not make it clear that the Review Committee shall make this information available to tribes. A determination of "culturally unidentifiable" ought to be made in consultation with tribes, but in any case, the list of such remains must be made available to all interested parties.

.....

5. Add § 10.11 to read as follows:

§ 10.11 Disposition of culturally unidentifiable human remains.

(a) General. This section implements section 8 (c)(5) of the Act.

(b) Consultation.

(1) The museum or Federal agency official must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects:

(i) Within ninety (90) days of receipt of a request from an Indian tribe or Native Hawaiian organization to transfer control of culturally unidentifiable human remains and associated funerary objects; or

(ii) Absent such a request, before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects.

.....

COMMENTS

An institution’s obligation to consult in this context should be triggered by a request from a potential claimant that has been identified in the regulations as a potential recipient for the remains. This section of the proposed rule places no limits on the parties with whom consultation should be initiated, which again could place an enormous burden on institutions who apparently would have to attempt consultation with an impossibly broad and undefined universe of potential claimants.

As per 3(e)2 comment above, we have concerns about the lack of clear differentiation between culturally unidentified and culturally unidentifiable remains.

Who is to pay the costs of consultation? Some remains “may” be culturally affiliated with more than a dozen tribes (a reason why they are culturally unidentifiable). Others will require lengthy and expensive analysis for identification. Contrary to the unsupported assertion made by the Department of the Interior the cost of implementing the proposed Rule will exceed \$100 million by one or two orders of magnitude, a prohibitive cost.

.....

(2) The museum or Federal agency official must initiate consultation with officials and traditional religious leaders of all Indian tribes and Native Hawaiian organizations:

(i) From whose tribal lands, at the time of the removal, the human remains and associated funerary objects were removed;

(ii) From whose aboriginal lands the human remains and associated funerary objects were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order; and

(iii)

(A) With a cultural relationship to the region from which the human remains and associated funerary objects were removed; or

(B) In the case of human remains and associated funerary objects lacking geographic affiliation, with a cultural relationship to the region in which the museum or Federal agency repository is located.

.....

COMMENTS

The moral force of the Act was based in large part on the idea that human remains and associated funerary objects should be returned to descendent communities, and more broadly that museums, repositories and agencies should consult with descendent communities regarding the treatment and disposition of such remains.

Institutions may already have initiated consultation with tribal groups in these categories but absent substantial financial support, these may have been nonproductive. We urge that sufficient funding be allocated to support these efforts.

Aboriginal occupation: Section 3 of the statute clearly defines limits on identifying aboriginal claimants based on the land claims process that led to final determinations, which provides a reasonable basis for institutions to assess claims and determine parties with whom it should consult. The proposed provision improperly seeks to impose new obligations on museums or agencies beyond the clear limits set in the statute.

A cultural relationship to a region, without additional demonstrable contextual connections to particular human remains, is too tenuous to provide any reasonable structure for assessing potential claimants and implementing a consultation process. Section 2(iii)(B), allowing a claim based solely on the fact that the present location of the curatorial facility happens to be near the present location of a group without any regard for the historical realities of the geographical origins and relocations of the human remains themselves over time, is a wholly illogical basis upon which to empower a claim. This must be deleted from the regulations. It demonstrates disrespect for NAGPRA’s carefully structured process for allowing parties with genuine cultural connections to human remains to engage with institutions in the process of determining ultimate disposition options.

The term “cultural relationship” as used in (2) (iii) (A) and (B) is not defined in either the statute or regulations. The drafters of the proposed regulations acknowledge this deficiency by inviting comments on the term (see FR page 58586). The term should be defined as part of the proposed regulations.

This section does not seem to make adequate provision for incorporation of study results and evaluation of preponderance of evidence. We are particularly concerned regarding an apparent lack of provision for incorporation of the age of remains and existing knowledge regarding migration and patterns of ethnogenesis. We note there is no provision for remains of great age, for whom there may be no cultural descendents or whose cultural descendents may no longer be in the region in which the remains were identified.

Paragraph (2) (iii) (B) The location of a museum or repository might have absolutely nothing to do with cultural affiliation of the remains they curate. Many institutions have collections and human remains from very wide geographic areas. For a variety of reasons, including when and for what reason remains were acquired, documentation of the remains’ geographic origins may be incomplete or non-existent. Remains with no geographic affiliation may have originated in another country. Likely geographic affiliation of remains often can be determined through strontium analysis. Some groups are concerned that they receive only remains of their ancestors—not remains from another group— because they do not wish to do ceremonies for people who did not share their beliefs.

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- (3) The museum or Federal agency official must provide the following information in writing to all Indian tribes and Native Hawaiian organizations with which the museum or Federal agency consults:
- (i) A list of all Indian tribes and Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains and associated funerary objects;
 - (ii) A list of any non-federally recognized Indian groups that are known to have a relationship of shared group identity with the particular human remains and associated funerary objects; and
 - (iii) An offer to provide a copy of the original inventory and additional documentation regarding the particular human remains and associated funerary objects.
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COMMENTS

Section ii requires museums and other institutions to list non-recognized groups who may have an affiliation with remains or objects. This will be difficult for museums to fairly achieve, as non-recognized groups may include virtually any kind of organization, of any scale, and with the validity of claims either to the remains and objects or even to native ancestry or heritage difficult to assess by individual museums. While we recognize concerns in native communities that only federally recognized groups currently have standing under the Act, the wording of this section is excessively broad and vague, and could be strengthened by restricting such consultations to a federally compiled or federally approved list of non-federally recognized groups or communities. Expansion of the Act to include groups not recognized by the federal government would undermine the constitutional justifications for the validity of the Act, which rests on the special relationship between the federal government and recognized tribes.

The statute, by its expressed terms, imposes requirements on museums and agencies only when federally recognized tribes or defined Native Hawaiian organizations are involved. See NAGPRA Section 12: “This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government” (emphasis added). The proposed regulations clearly exceed the authority of the statute when they impose requirements on a museum/agency with respect to a non-federally recognized group. Regulations are limited in power to implementing statutes, not expanding or changing them. A museum may elect to consult with a non-federally recognized group and, if there is no other law restricting its actions, it can elect to transfer control to the group. However, NAGPRA

regulations cannot require such actions, which might violate ARPA or other laws mandating retention and/or curation.

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- (4) During consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations:
- (i) The name and address of the Indian tribe official to act as representative in consultations related to particular human remains and associated funerary objects;
 - (ii) The names and appropriate methods to contact any traditional religious leaders who should be consulted regarding the human remains and associated funerary objects;
 - (iii) Temporal and/or geographic criteria that the museum or Federal agency should use to identify groups of human remains and associated funerary objects for consultation;
 - (iv) The names and addresses of other Indian tribes, Native Hawaiian organizations, or non-federally recognized Indian groups that should be included in the consultations; and
 - (v) A schedule and process for consultation.
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COMMENTS

There are inconsistencies in the rules developed in this section. Recognized groups have specific structures including individuals who may act for the tribe or group in respect to NAGPRA, and section i reflects this. Non-recognized groups do not necessarily have such a structure, but it would appear that museums must request the name and address of officials representing that group.

Regarding Section 4(iii): It is appropriate for the museum/agency to request tribe/organization input on its perspectives of temporal and geographic criteria that would be meaningful to help identify which human remains and cultural items the group wishes to assess during the consultation process. However, the tribe/organization criteria should not be the only information that the museum/agency “should use;” rather, these criteria should be used along with criteria deemed by the museum/agency and/or the tribe/organization to be of use in assessing whether a group might share a relationship of shared group identity with human remains and other cultural items in its collection. If the museum/agency believes that there is potential cultural affiliation with certain remains/items, it should be able to include those remains/items in the consultation process along with remains/items that the group itself identifies as appropriate for inclusion. Specialists in the archaeology of the region should also be consulted.

Regarding Section 4(iv): The museum may request this information, but it should not be required to consult with all named groups.

Regarding Section 4(v): A schedule and process for consultation should be mutually agreed upon, rather than dictated by either party, and these efforts, along with requests for contact information, etc., should be pursued from the outset of consultation.

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- (5) During consultation, the museum or Federal agency official should seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties specified in paragraph (b)(2) of this section. The agreement must be consistent with this part.
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COMMENTS

There are two problems with this section of the regulations: (1) it presumes that transfer of control is the only permissible “disposition” that can emerge from consultation; (2) it asserts that claimant groups are the only recognized authority for determining whether a 'relationship' [whatever that means] exists and hence whether a transfer of control must proceed.

Regarding the last sentence, “The agreement must be consistent with this part.” The museum/agency and involved Native American parties should be free to reach any agreement as to disposition that is permitted by all applicable laws. If no agreement is reached, the museum/agency should be able to determine disposition in good faith and be protected from liability for its good faith actions. This section does not address what would happen if the parties do not agree to disposition. How would these instances be resolved?

This part accords exclusive control over disposition of culturally unaffiliated remains to only those Native American groups or individuals identified in 10.11 (b)(2), without specifying any basis on which right of claim or strength of relationship should be assessed. The statute and regulations specify that for establishing cultural affiliation, a preponderance of evidence, including geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion. Yet for culturally unaffiliated remains, the proposed regulation does not specify any criteria whatsoever for establishing whether there is any significant relationship between claimants and the culturally unaffiliated remains. All that would be required for a repatriation to be mandatory is for any claimant, or group of claimants, to assert that “this material should be repatriated to us”, even if the museum were aware of contradictory evidence indicating that the claim of cultural relationship is inaccurate or unsubstantiated. By making agreement of the parties identified at 10.11(b)(2) the only requirement for transfer of control, the rule vitiates the careful consideration of evidence elsewhere required by the Act, and leaves the door wide open to transfer of control to groups with no significant relationship to the remains.

.....

(c) Disposition of culturally unidentifiable human remains and associated funerary objects.

(1) A museum or Federal agency that is unable to prove that it has right of possession, as defined at §10.10 (a)(2), to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:

- (i) The Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed;
- (ii) The Indian tribe or tribes that are recognized as aboriginally occupying the area from which the human remains were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order; or
- (iii) The Indian tribe and Native Hawaiian organization with:
 - (A) A cultural relationship to the region from which the human remains were removed, or
 - (B) For human remains lacking geographic affiliation, a cultural relationship to the region in which the museum or Federal agency with control over the human remains is located.
- (iv) If it can be shown by a preponderance of the evidence that another Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains than an entity specified in paragraph (c)(1)(ii) or (c)(1)(iii) of this section, the Indian tribe or Native Hawaiian organization that has the strongest demonstrated cultural relationship, if upon notice, the Indian tribe or Native Hawaiian organization claims the human remains.

(2) Any disposition of human remains excavated or removed from “Indian lands” as defined by the Archaeological Resources Protection Act (16 U.S.C. 470bb (4)) must also comply with the provisions of that statute and its implementing regulations.

.....

COMMENTS

We believe this section is inconsistent the intent of the Act, which was to allow descendent or affiliated communities to reclaim ancestral objects or remains. Assessing the cultural relationships of unaffiliated remains is a matter of considerable importance. Since passage of the Act archaeologists and museums have worked with tribes and native organizations to identify affiliated remains and objects and to arrange for either respectful treatment in existing repositories or the return of remains and objects to tribes or native organizations for appropriate disposition. These efforts were meant to ensure that remains and objects were respectfully affiliated with descendent communities rather than with unrelated institutions unable to offer proper respect or treatment. The remains listed as unaffiliated or culturally unidentifiable were not able to be associated with one or more groups based on the totality of circumstances, but those circumstances may change as tribes and native communities assess the evidence and as other researchers gain new information. We are concerned that the proposed regulations may lead to rushed consultations and overly hasty assessments of relationship, or absence of relationship. The result of part (c) (iii) may be dispositions that do not respect the diversity of beliefs and cultural practices by different tribes or native groups, or the importance of proper affiliation such a respect demands.

Requiring Proof of “Right of Possession”

This is an extremely problematic section. A museum/agency should be presumed to have legal right of possession over its collections under applicable laws unless shown to be otherwise. As an example of legal right of possession granted for human remains, ARPA expressly declares that archaeological resources, which are defined to include any human skeletal materials of at least 100 years of age found on federal land, would “remain the property of the United States, and such resources and copies of associated archaeological records and data will be preserved by a suitable university, museum, or other scientific or educational institution” (ARPA Section 4(b)(3)). Although NAGPRA changes the legal right of control over certain Native American human remains, other human remains continue to be governed by ARPA and other laws. Federal curation regulations currently in place impose obligations for respectful handling of items in curation and govern the ways in which curating entities must conduct their activities.

The burden to “prove” legal status of every item in a museum/agency collection is inappropriate and would place significant and overreaching financial and legal burdens on these entities. Culturally unidentifiable human remains have come into institutional curation from any number of sources over many years. Federal and state laws over time have vested legal rights of possession in certain institutions authorizing them to receive and curate human remains. In contrast to the general legal rights and obligations of institutions to possess and curate human remains, the concept of “right of possession” as used in NAGPRA applies very narrowly to situations where a tribe or next of kin directly granted permission to excavate Native American human remains. In such cases, the institution is authorized to retain those remains even though cultural affiliation is determined and the affiliated tribe or organization requests repatriation. This narrow and specific form of “right of possession” in the statute is a right offered to institutions to allow them to override otherwise applicable rights of possession allocated by NAGPRA. The proposed rule takes a benefit offered to institutions by the statute with respect to a narrow category of well-documented human remains and turns it into an insurmountable burden imposed on institutions that otherwise have a legal right to retain possession of human remains under federal or state law. Such action defies the statute and constitutes an abuse of regulatory authority.

Obligation to Initiate Efforts to Transfer Control

While we urge museums and agencies to be proactive, they should not be required to initiate efforts to transfer control of CUHR in their possession; a request by a tribe or organization authorized under the law to receive CUHR should be a prerequisite to any obligation on a museum or agency to transfer control.

(2) *Right of possession.* For purposes of this section, “right of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object, or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession to that object.

The remains and objects are *by definition* culturally unidentifiable, which means that it is *impossible* to have obtained “voluntary consent of an individual or group that had authority of alienation” This definition originally was applied only to unassociated funerary objects, sacred objects, and objects of cultural patrimony –not to culturally unidentifiable human remains and associated funerary objects. As such, this section constitutes a rewriting, through regulation, of the original law. It also directs repositories to offer all culturally unidentifiable human remains and associated funerary objects to groups that may have no cultural affiliation to the remains whatsoever, especially in the case of 1 (iii) (B).

Priority Order of Claimants

Regarding the priority order of potential claimants:

- (i) This seems appropriate; it aligns with Section 3.
- (ii) This should also be consistent with the statutory language of Section 3, which requires a final judgment of the Indian Claims Commission or Court of Claims to entitle a tribe to assert a claim based on aboriginal occupation. The statute’s parameters cannot be expanded by regulatory fiat. National NAGPRA, in its training materials, has repeatedly used different and more expansive wording than the statutory language of Section 3, but the statute itself sets the legal limits and DOI has no authority to override the statute.
- (iii) (A) As discussed above, this is too broad and undefined to serve as a prioritizing mechanism for institutions attempting to comply with the law.
(B) As discussed above, this has no rational basis in terms of any legitimate relationship between the human remains at issue and the claimant tribe/organization. Items have moved throughout the country, as well as into and out of the country, and collections may be concentrated in certain locations for reasons wholly unrelated to the geographic origins of the items. Additionally, many tribes were forced to relocate to regions far from the location of their ancestors’ remains. The current location of a tribe or Native Hawaiian organization does not of itself provide justification for assuming any cultural connection to the human remains that happen to be curated at a nearby institution. This appears simply to be a default effort to force a transfer of all culturally unidentifiable human remains out of institutional curation. This most directly flies in the face of the balancing of interests that NAGPRA’s statutory structure painstakingly tried to establish and that has been the subject of 17 years of great effort, time, and expense by the many tribes, institutions, and scholars who have sought to implement NAGPRA in a manner that honors and respects the legitimate cultural interests at stake.
- (iv) If remains are culturally unidentifiable, and there is no tribe/organization with an aboriginal occupation connection or other cultural relationship to the region where the human remains are found, it is clearly a fiction to refer to a group with a “stronger” relationship. This provision should be deleted.

Applicability of ARPA

Section (c)(2) acknowledges that ARPA and its implementing regulations remain part of the federal legal framework. ARPA continues to govern human skeletal remains and associated funerary objects removed under its permitting process, unless they are shown to be Native American and subject to disposition under NAGPRA. The DOI cannot override ARPA or other federal statutes through regulatory action that exceeds or changes the statute it implements.

The NAGPRA Review Committee has been making decisions regarding the disposition of CUHRs on a case by case basis, which seems to be working well because it provides for the time needed to make carefully deliberated decisions involving multiple parties. The existing disposition process appears to be superior to what is being proposed here. In contrast, the disposition process as laid out in these proposed regulations is flawed. It is overly broad, uses undefined terminology, and fails to provide for any balance among tribal and non-tribal claimants to CUHRs and associated funerary objects.

.....

(3) If none of the Indian tribes or Native Hawaiian organizations identified in paragraph (c)(1) of this section agrees to accept control, a museum or Federal agency may, upon receiving a recommendation from the Secretary or authorized representative:

- (i) Transfer control of culturally unidentifiable human remains to a nonfederally recognized Indian group, or
- (ii) Reinter culturally unidentifiable human remains according to State or other law.

(4) The Secretary may make a recommendation under paragraph (c)(3) of this section only with the written consent of all Indian tribes and Native Hawaiian organizations stipulated in paragraphs (c)(1) and (c)(2) of this section.

.....

COMMENTS

We would like to see greater specifics and clarification on point (3)(ii). We assume because of the word “may” in part (3) that reintering remains is not required, but is possible in accordance with state law, and only with the authorization of the Secretary of the Interior. As we understand it, this would mean that the NAGPRA Review Committee would be made aware of any possible case of reinterment and would then advise the Secretary prior to remains being reintered. We are concerned about possible reinterments because of the critical importance of performing the proper ceremonies when Native Americans return remains to the earth. For example, the Anishinabe people have a set of important practices that should be performed prior to reburial, as do other tribes. The possibility that remains may be reintered without such ceremonies is troubling to Native Americans, and this is most likely to take place in cases where museums/institutions do not have accurate records related to the remains. This is a critical point for clarification and we are not sure most tribes would be comfortable with DOI or the NAGPRA Review Committee making the decision about reintering remains. Although tribes may not feel a strong cultural relationship with the remains and will therefore not claim them under these regulations, in some traditions tribes are still the primary stewards of the land from which the remains came and, as such, have responsibility to ensure that the remains are handled in a proper and respectful way.

There is no wording here that would allow for arrangements to be made between the requesting group and the museum to manage the objects and remains in an alternative way. Even though a tribe might not want the materials themselves that does not mean that they will not care about how those objects and remains are ultimately treated or disposed of. Reinterment may not be a preferred option at all. In several cases of repatriation at Pine Ridge objects were left out on the landscape in a safe place to decay naturally. Burial was not an option.

The removal of all human remains and associated or unassociated funerary objects from museums, repositories or agencies is not an outcome intended or anticipated by the Act, and does not reflect the balance of interests that the Act specifically sought to protect. As the Act has no statute of limitations or other temporal limits on when a group or groups may advance claims for affiliation, there is no time limit demanding actions of this kind. Continued research by both archaeologists and tribes may reveal affiliations and result in appropriate repatriations as outlined in existing regulations; the regulations promulgated here deny tribes or descendent communities any reasonable chance of having ancestral

remains properly affiliated and repatriated, and denies the public the ability to learn more about their past through subsequent research and study.

There is no legitimate reason to create a formal mechanism by which the Department of the Interior can pressure museums and agencies to take certain actions that they are not legally obligated to take and to restrict the ability of museums and agencies to make final dispositions otherwise allowable by law when no Indian tribe or Native Hawaiian organization has made a claim for CUHR. As written, this provision appears to restrict the ability of museums and agencies to work voluntarily with non-federally recognized groups or to reinter remains under state law, because institutions “may” take such actions only if they receive recommendations from the Secretary of the Interior and federally recognized groups. Museums and agencies, if otherwise legally authorized to do so, should be able, in their discretion, to take the actions listed in (c)(3)(i) and (ii), without the need to receive a recommendation from the Secretary of the Interior.

We recommend deleting the following phrase in Section (c)(3): “...upon receiving a recommendation from the Secretary or authorized representative,” and deleting Section (c)(4). We also recommend adding a final sentence: “Nothing in this rule precludes a museum or agency from implementing other disposition options reached in consultation with Indian tribes or Native Hawaiian organizations stipulated in paragraphs (c)(1) and (c)(2) of this section.”

.....

(5) A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary of the Interior recommends that museums and Federal agencies engage in such transfers whenever Federal or State law would not otherwise preclude them.

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COMMENTS

Rather than requiring continued efforts and dialogue with native groups or tribes to determine affiliation, the draft regulations specifically recommend that remains and objects be repatriated regardless of whether or not a group having an appropriate claim or an affiliation based on ethnicity, descent or cultural practice can be identified. The Act called for a balance between the interests of science and of descendent communities. The draft regulations do not reflect the balance envisioned by the Act. Specifically stating that the Secretary of the Interior recommends repatriation in the absence of reasonable evidence for affiliation or descent based on the totality of circumstances represents a remarkable departure from both the spirit and the wording of the Act itself, and suggests that the Secretary of the Interior and the National Park Service are giving themselves much greater powers, much broader and much less balanced, than the limited authorities granted them in the Act.

.....

(d) Notification.

- (1) Disposition of culturally unidentifiable human remains and associated funerary objects under paragraph (c) may not occur until at least thirty (30) days after publication of a notice of inventory completion in the **Federal Register** as described in § 10.9.
- (2) Within 30 days of publishing the notice of inventory completion, the National NAGPRA Program manager must:
 - (i) Revise the Review Committee inventory of culturally unidentifiable human remains and associated funerary objects to indicate the notice’s publication; and
 - (ii) Make the revised Review Committee inventory of culturally unidentifiable human remains and associated funerary objects accessible to Indian tribes, Native Hawaiian organizations, non-federally recognized Indian groups, museums, and Federal agencies.

.....

COMMENTS

As for (d)(1): 30 days is a very short time, and we are concerned that it does not provide tribes with enough time to respond before disposition occurs. Thirty days is not long enough, for any governing body or organization, to acquire comments or fully consider all their options, and we suggest that the time limit be extended to 60 or even 90 days. With regard to (d)(2)(ii): What specifically is meant by the term “accessible?” Is this an online inventory that tribes would then need to continually search?

The speedy repatriation (30 or more days after a published notice) to a claimant group with possibly no cultural connections may jeopardize the interests of tribes who may be affiliated but who have not had an opportunity to fully consult or coordinate with the museum or agency. In addition, it would be a significant impact to require institutions to expend the additional resources that would be required to compile inventories required by National NAGPRA for the more than 800,000 funerary objects associated with culturally unidentifiable human remains.

.....

(e) Disputes. Any person who wishes to contest actions taken by museums or Federal agencies regarding the disposition of culturally unidentifiable human remains and associated funerary objects is encouraged to do so through informal negotiations to achieve a fair resolution of the matter. The Review Committee may facilitate the informal resolution of such disputes that are not resolved by good faith negotiation under § 10.17. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.

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COMMENTS

The “informal negotiations” encouraged in the regulations seems vague. Are there already people in these institutions who handle these situations? The idea of informal negotiations is a good one, compared to formal legal action at the outset. However, neither the Review Committee nor National NAGPRA should insert itself unless requested to do so by both parties. This is consistent with the use of mediation or other alternative dispute resolution methods – they will only succeed if all parties to the dispute voluntarily agree to participate and seek resolution.

The original law held museums harmless (see below). This rewrite appears to allow lawsuits by any aggrieved person against museums ad infinitum. The expense of court cases would be devastating to the nation’s museums.

Sec 7. (f) MUSEUM OBLIGATION.--Any museum that repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

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6. Amend § 10.12 by:

- A. Revising paragraphs (b)(ii), (iii), and (iv), and
- B. Adding paragraph (b)(ix) to read as follows:

§ 10.12 Civil penalties.

* * * * *

(b) * * *

(1) * * *

- (ii) After November 16, 1993, or a date specified under § 10.13, whichever deadline is applicable, has not completed summaries as required by the Act; or
 - (iii) After November 16, 1995, or a date specified under § 10.13, or the date specified in an extension issued by the Secretary, whichever deadline is applicable, has not completed inventories as required by the Act; or
 - (iv) After May 16, 1996, or 6 months after completion of an inventory under an extension issued by the Secretary, or 6 months after the date specified under § 10.13, whichever deadline is applicable, has not notified culturally affiliated Indian tribes and Native Hawaiian organizations; or
- * * * * *
- (ix) Does not offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession under § 10.11.

.....

COMMENTS

Section (ix) requires a museum to invest time and resources to try to prove that it has a “right of possession” to all CUHR already in its possession and curated in accordance with federal law. If it cannot carry that burden of proof (which, by the regulation’s own definition, will be impossible to do), it must then initiate consultation with all groups identified in Section 10.11 even if no group seeks consultation, after which it must offer to transfer control to those groups, even if none of them has expressed an interest in the CUHR. Failure to do these things will subject a museum to civil penalties.

This provision is inappropriate and unjustifiably punitive. No civil penalties should be imposed on museums for failing to offer to transfer human remains when no group has requested a transfer. There is no legitimate justification for such a penalty. If NAGPRA was intended to rid all institutions of all human remains, whether or not they are related to Native American groups, it would not have created the complex mechanism in the statute that seeks cooperation, balance, and demonstrable cultural connection. This penalty provision would constitute an inappropriate misuse of power by the Department of the Interior against cultural institutions who under other laws have legal rights, and likely have legal and ethical obligations, to maintain and care for human remains in their possession. Legislative history reinforces the fact that NAGPRA was to serve as a balancing and healing tool encouraging collaboration among institutions and Native Americans rather than as a tool to force the universal transfer of all human remains and punish museums for failing to drive that effort regardless of tribal requests. The addition of civil penalties to this proposed rule exacerbates the imbalances created throughout the rule and further violates the letter and spirit of the statute.

The draft regulations represent a remarkable change from both the Act and other existing law. Previously groups could advance claims under NAGPRA that challenged a museum's goodness of title to remains or objects and based on this challenge remains or objects could be repatriated to affiliated tribes or organizations. The draft regulations presume that museums hold no valid title to any such materials and that they face penalties if they do not offer to return all such objects regardless of whether any affiliated or descendent group or tribe is known or can be identified. This contradicts the Act.

Moreover, section ix creates penalties for museums that do not offer to repatriate remains or objects for which a museum cannot prove right of possession. This would appear to be a reversal of all applicable laws and statutes, in which organizations are subject to penalties for failing to prove right of possession, rather than requiring the claimant to demonstrate right of possession.

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FINAL COMMENTS

In summary, the regulations, as proposed, are fatally flawed for the following reasons.

1. They are overly broad: it is not clear that they apply only to Native American human remains for which cultural affiliation has not been determined.
2. They prohibit the use of scientific investigation to assist in the disposition process.
3. They introduce new terminology that is not defined in the statute or in the regulations themselves.
4. They exceed the authority of the statute; this is especially true with regards to funerary objects.
5. They are burdensome to the federal agencies and museums.
6. They fail to establish the “checks and balances” needed to protect the interests of both tribal and non tribal parties.

Overall, the proposed regulations repeatedly seek to significantly expand and change NAGPRA, contrary to its plain language and the policies it reflects. Regulations cannot alter or rewrite a statute; they can only implement it as written. These proposed regulations significantly exceed the authority delegated to DOI by NAGPRA.

The proposed regulations should be withdrawn because DOI has no authority to issue them and they are otherwise contrary to the framework established by NAGPRA. All parties with interests in and concern for the future treatment of CUHR would be much better served by the development of fair processes that recognize the diversity of legitimate interests at stake than by the adoption of overreaching regulations that foment divisiveness and potential legal challenge. Any further action on the disposition of culturally unidentifiable human remains must involve both further Congressional authorization and an appropriate and reasoned balance of interests consistent with the letter and spirit of the statute.

.....
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