

May 13, 2010

Dr. Sherry Hutt, Manager  
National NAGPRA Program  
National Park Service  
1201 Eye Street, NW., 8th Floor  
Washington, DC 20005  
(Submitted via [www.regulations.gov](http://www.regulations.gov))

Dear Dr. Hutt,

I am writing to submit comments on **1024-AD68**, the Native American Graves Protection and Repatriation Act Regulations--Disposition of Culturally Unidentifiable Human Remains, published March 15, 2010 and effective May 14, 2010.

The American Association of Museums (AAM) is proud to represent the full range of our nation's 17,500 museums – including aquariums, arboretums, archaeological museums, art museums, botanical gardens, children's museums, culturally specific museums, historic sites, history museums, maritime museums, military museums, natural history museums, nature centers, planetariums, presidential libraries, science and technology centers, zoological parks, and other specialty museums – along with the 500,000 professional staff and countless volunteers who work for and with museums.

As you know, AAM and many of its members have been long time partners in NAGPRA, working to build bridges that have made the implementation of this important legislation successful for both museums and tribes. At its core, NAGPRA calls for respect, collaboration and consultation between museums and tribal communities to resolve issues. This balanced approach has been enormously fruitful and built beneficial relationships that extend beyond core NAGPRA issues to broader goals of increased education, exchange and understanding.

In light of its experience working with NAGPRA, the museum community has serious concerns about the final rule concerning the application of NAGPRA to culturally unidentifiable human remains and associated funerary objects. As written, the rule would shortchange the consultative process between museums and federally recognized tribes which has made NAGPRA so productive. It exceeds the regulatory authority granted to the Department of Interior in the original NAGPRA law. It would expose museums to major new legal risks, and impose significant new costs above those related to compliance with the original NAGPRA regulations. AAM's specific concerns are as follows:

**Lack of clarity.** The new regulations define the term aboriginal lands in a vague manner that is inconsistent with other sections of the regulation. While the law and Section 10.6 of the regulations define aboriginal land as land that is “recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims” the definition of aboriginal land introduced in Section 10.11 also includes land identified in treaties, Acts of Congress, or Executive Orders. Additionally, in National NAGPRA’s training on the 10.11 regulations, museums are strongly encouraged to use this expanded list as the starting point for identifying aboriginal lands and to consider other sources beyond those listed in the regulations. Consequently the source material for identifying aboriginal land is almost limitless. This vague definition will make it very difficult for museums to identify the tribes who are the appropriate consultation parties, and to award disposition based on aboriginal lands.

In addition to the above, the regulations give a misleading impression that museums must return culturally unidentifiable associated funerary objects. Throughout the regulations, there are repeated references to remains “with or without funerary objects.” This language implies that there are two types of culturally unidentifiable human remains: those with funerary objects and those without. This vague language, combined with the numerous points in which museums are encouraged to include associated funerary objects in their disposition agreements, provides the impression that museums and federal agencies should award disposition of associated funerary objects, although they are not mandated to do so by law.

**Unintended consequences.** The rule preempts the rights of tribes that have not yet received federal recognition and diminishes the prospects for consultations that can lead to findings of cultural affiliation. Given the requirement in the rule that disposition must be awarded for culturally unidentifiable human remains, the threat of civil penalties and the potentially ruinous expense of extended consultations with an unknown number of groups, some museums will feel pressured to return human remains to the first claimant, precluding the possibility of finding a correct cultural affiliation. Indeed, in training on the new regulations, the National NAGPRA Program has suggested that museums submit Notices of Inventory Completion and award disposition to the first claimant who comes forward after a Notice is published. This approach will preclude the extensive consultations that could lead to cultural affiliation. Additionally, it will preclude repatriation to tribes who have not yet received federal recognition. There are many tribes seeking recognition who are not entitled to repatriations under the law, and their clear cultural relationship to remains will be bypassed in favor of geography-based disposition agreements to currently federally recognized tribes.

**Constitutionality.** The original act was carefully constructed to avoid potential constitutional problems. Notably, it avoided creating unequal protection for different classes of citizens by invoking the special relationship between the federal government and other sovereign governments (i.e., federally recognized tribes). The new rule mandates that museums seek consultation with tribes that do not have cultural affiliation. It also mandates disposition to a federally recognized tribe as long as there is geographic overlap with the remains, even when there is a non-recognized tribe that is culturally affiliated to the remains and is in the process of gaining federal recognition. By expanding the scope of consultation

and precluding the ability for tribes to claim remains when they receive federal recognition, the 10.11 regulations violate the equal protection created by the law.

**Legal jeopardy.** The new rule subjects museums to potential legal action. The new regulations require disposition to be awarded to tribes based on tribal or aboriginal lands. It proposes one criterion – geography – for disposition and determines and identifies sources of evidence (such as treaties, etc.) that are unfamiliar to many museums professionals and can offer contradictory and conflicting information. Furthermore, geography-based disposition agreements have been explicitly disallowed in federal court. To require museums to reach such dispositions exposes them to legal challenges. While the law contains an explicit provision that protects museums from legal action when the museum repatriates a cultural item in good faith, the law offers no legal protection for museums when they award disposition of culturally unidentifiable human remains in good faith.

**Civil penalties.** The original Act established the premise that museums are suitable repositories for human remains and cultural artifacts covered by the law in the absence of a valid claim. The rule reverses this premise—it specifies that right of possession can only be transferred by Native American groups or individuals affiliated with the remains. Since culturally unidentifiable human remains are, by definition, unaffiliated, this means that museums can never prove right of possession. A museum is subject to civil penalties if it does not transfer control of culturally unidentifiable human remains for which it cannot prove right of possession. This creates an untenable situation.

**Expense.** Many museums feel that the expense of implementing this rule would be crushing. It would require them to redo portions of their original NAGPRA inventories through the completion of Notices of Inventory Completion for culturally unidentifiable human remains, a task that was not part of the original inventory, and consulting with an unknown but far larger number of tribes with aboriginal land claims in the area where the remains were removed. The research required to determine the appropriate tribes with which to consult will be time-consuming and costly since there are no existing lists or sources that identify all potential claimants. After completing this research, extensive consultation will be required. The costs of consultation will also be prohibitive.

Taken together, these new requirements and the uncertainties around them will add substantially to the complexity and cost of implementing NAGPRA. Museums recognize their important responsibilities in NAGPRA and it is through their dedicated efforts working with the tribal community that so much has been accomplished.

However, like many charitable organizations, museums have been hit hard by the recession and are struggling. The U.S. Department of Interior's cost estimates around this regulation vastly understate what our members believe their costs will be. Similar efforts in Colorado reported that consultation alone cost \$1,200 per individual. Other museums have estimated that implementing this regulation will amount to decades of work hours.

We once again appreciate the opportunity to submit these additional views and urge the Secretary to reject this final rule and revisit the issue in a manner that builds on the many achievements of NAGPRA. We would be happy to assist in this matter in any way.

Sincerely,

A handwritten signature in black ink, appearing to read "Ford W. Bell". The signature is written in a cursive, flowing style with some loops and flourishes.

Ford W. Bell, DVM  
President, American Association of Museums