

AMERICAN ASSOCIATION OF PHYSICAL ANTHROPOLOGISTS

President

Dennis H. O'Rourke
Dept. of Anthropology
University of Utah
270 S 1400 E, Room 102
Salt Lake City, UT 84112
(801) 581-7454
FAX: (801) 581-6252
orourke@anthro.utah.edu

President-elect

Lorena Madrigal
Dept. of Anthropology
University of South Florida
Tampa, FL 33620-8100
(813) 974-0817
FAX: (813) 974-2668
madrigal@cas.usf.edu

Vice President

Karen Rosenberg
Dept. of Anthropology
135 John Munroe Hall
University of Delaware
Newark, DE 19716
(302) 831-1855
FAX: (302) 831-4002
krr@udel.edu

Secretary-Treasurer

Lyle W. Konigsberg
Dept. of Anthropology
109 Davenport Hall
607 S. Mathews Ave. MC-148
University of Illinois
Urbana, IL 61801
(217) 333-3616
FAX: (217) 244-3490
lylek@illinois.edu

May 10, 2010

Dr. Sherry Hutt, Manager
National NAGPRA Program
National Park Service
Docket No. 1024-AD68
1201 Eye Street NW, 8th Floor
Washington, D.C., 2005

[comments submitted via email to: <http://www.regulations.gov>]

Comments on 43CFR Part 10: Native American Graves Protection and Repatriation Act Regulations—
Disposition of Culturally Unidentifiable Human Remains; Final Rule
Federal Register 75:49:12378 (March 15, 2010)

Dear Dr. Hutt:

We write in response to the Federal Register Notice (March 15, 2010) to provide comments on the final rule on the disposition of culturally unidentifiable human remains under the Native American Graves Protection and Repatriation Act (NAGPRA) on behalf of the American Association of Physical Anthropologists. This letter follows on our correspondence of January 14, 2008, which addressed similar concerns with the Proposed Rule for Disposition of Culturally Unidentifiable Human Remains [72 Fed. Reg. 58582 (Oct. 16, 2007)].

The American Association of Physical Anthropologists (AAPA) is the largest professional scientific organization devoted to the study of physical anthropology in the United States. We were part of the coalition of Native American and scientific groups that worked for the passage of the Native American Graves Protection and Repatriation Act (NAGPRA). The AAPA continues to support NAGPRA's key goal of ensuring that culturally affiliated, federally recognized tribes are empowered to make decisions regarding the disposition of their ancestral remains. However, these notable goals have been overshadowed by the

Christopher Ruff
Editor, AJPA
Center for Functional
Anatomy & Evolution
Johns Hopkins Univ.
1830 E. Monument St.
Baltimore, MD 21205
(410) 955-7126
FAX: (410) 614-9030
cbruff@jhmi.edu

Robert Sussman
Editor, Yearbook of
Physical Anthropology
Dept. of Anthropology
Washington University
Campus Box 1114
St. Louis, MO 63130
(314) 935-5252
FAX: (314) 935-8535
rwsussma@wustl.edu

M. Anne Katzenberg
Executive Committee
Department of Archaeology
2500 University Drive NW
University of Calgary
Calgary, Alberta T2N 1N4
(403) 220-3334
FAX: (403) 282-9567
katzenbe@ucalgary.ca

Debbie Guatelli-Steinberg
Executive Committee
Dept. of Anthropology
The Ohio State University
4006 Smith Laboratory
174 W. 18th Avenue
Columbus, OH 43210
(614) 292-9768
FAX: (614) 292-4155
Guatelli-Steinbe.1@osu.edu

Agustín Fuentes
Executive Committee
Dept. of Anthropology
Univ. of Notre Dame
Notre Dame, IN 46556
(574) 631-5421
FAX: (574) 631-5760
afuentes@nd.edu

Susan Antón
Executive Committee
Dept. of Anthropology
Center for the Study of
Human Origins
25 Waverly Place
New York University
New York, NY 10003
(212) 992-9786
FAX: (212) 995-4014
susan.anton@nyu.edu

promulgation of rules by the National Park Service that redefine the language and intent of NAGPRA toward an expedient and destructive solution that was in no way envisioned by those who worked towards the passage of the law. Our primary concerns, as outlined below, pertain to: (1) the unacceptable deviation from the intent and letter of the law and (2) the erosion of U.S. stewardship/ preservation of the history of indigenous Americans.

A key element of NAGPRA that led to its broad support and eventual passage on November 16, 1990, was the adoption of legal language that served to balance the needs and rights of Native American/Native Hawaiian groups to claim ancestral remains, sacred objects and objects of cultural patrimony, and the rights and obligations of the museum/scientific community on behalf of all Americans to protect and preserve the archaeological heritage of this country—a responsibility acknowledged by the United States government through the passage of such laws as the Antiquities Act of 1906 and the Archaeological Resources Protection Act of 1979. The legislative intent of balance in the implementation of NAGPRA is clearly indicated in Section 8 (25 U.S. C. 3006) of the statute, which specifies how the seven member review committee established to oversee inventory, identification and repatriation activities is to be composed: “(A) 3 [members] of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders; (B) 3 [members] of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and (C) 1 [member] who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

That a balance between these sometimes divergent interests was intentionally written into the law is supported by the remarks of Senator McCain, a member of the Select Committee on Indian Affairs, made at the time the law was passed:

The passage of this legislation marks the end of a long process for many Indian tribes and museums. The subject of repatriation is charged with high emotions in both the Native American community and the museum community. I believe this bill represents a true compromise....In the end, each party had to give a little in order to strike a true balance and to resolve these very difficult and emotional issues. (Congressional Record, October 26, 1990, 17173)

Congressional intent was again reiterated by Paul Hoffman, Department of the Interior Deputy Assistant Secretary for Fish and Wildlife and Parks, in his testimony at the 2005 Senate Committee on Indian Affairs NAGPRA oversight hearing:

*As previously stated, in *Bonnichsen* the Ninth Circuit concluded that congressional intent was ‘to give American Indians control over the remains of their genetic and cultural forbearers, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture.’ 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.*

Two terms central to the implementation of NAGPRA as a balanced act lie at the heart of AAPA concerns regarding the final rule: “cultural affiliation” and “Indian Tribe.” Cultural affiliation is defined in 25 U.S.C. 3001, Section 2 (2) as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier

group.” “Indian tribe” is defined in 25 U.S.C. 3001, Section 2 (7) as “any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (...), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians;” in other words, a federally recognized Indian tribe or Native Hawaiian organization. Together, these two terms define the basis for repatriation claims by Native American/Native Hawaiian groups pursuant to Section 5 (25 U.S.C. 3004): demonstration of a relationship of shared group identity between an earlier group and a present day, federally recognized Indian tribe. The nature of this relationship was further clarified by Judge Jeldirks in the *Bonnichsen v. United States* case, where he noted that the statute identifies an appropriate recipient in the singular as “the Indian tribe...which has the closest cultural affiliation.” (*Bonnichsen v. U.S.*, 217 F. Supp. 2d 1116, 1141-1142 (D. Or. 2002) in Seideman 2009).

Disposition, a term central to the implementation of the Final Rule for CUHR, and also to the AAPA’s concerns regarding the final rule, was not defined in the statute. Rather, Section 8(c) of NAGPRA simply instructed that “the committee established under subsection a) of this section shall be responsible for (5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains...” According to Merriam-Webster Online, “disposition” is variously defined as: “1) the act or power of disposing or the state of being disposed; as a) administration, control; b) final arrangement: settlement: transfer to the care or possession of another.” In other words, disposition can mean many types of settlements, including the retention of unidentifiable human remains in federal agencies and museums. Given that balance was crucial to the passage of NAGPRA, and that the term ‘disposition’ was not specifically defined in the statute, it is legally supportable to conclude that legislators left the term open to broad interpretation in order to facilitate the resolution on a case-by-case basis. However, the Final Rule as promulgated by the National Park Service narrowly defines disposition as: “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 changes an undefined term to a narrowly defined federal mandate for the expedient transfer of control of culturally unidentifiable human remains. All that follows in the final rule seeks to fulfill this unlawful mandate.

As members of our organization and other scientific organizations and museums have long pointed out, “cultural affiliation” is a key term in the repatriation process. Human remains and associated funerary objects determined to be culturally unidentifiable cannot reasonably be repatriated according to the guiding principles of NAGPRA, because they lack a demonstrable relationship of shared group identity between a modern day, federally recognized tribe and a past group. If such a relationship cannot be demonstrated, then the balance built into the statute that favors Native American/Native Hawaiians groups in decisions of repatriation where cultural affiliation can be demonstrated shifts to the side of American interests in the preservation of our collective heritage. However, based on the narrow definition of “disposition,” the final rule instead instructs for the transfer of control of culturally unidentifiable human remains according to a series of increasingly inclusive categories that deviate substantially from the statute’s definition of cultural affiliation. Museums and federal agencies are instructed to (10.11(b)(2) “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; and (ii) from whose aboriginal lands the human remains and associated funerary objects were removed.” While these levels follow on language included in Section 3(C)(1) of the statute, this language was specific to discoveries on Federal or tribal lands after November 16, 1990 and was not included in Section 5 of NAGPRA, which pertained to human remains and associated funerary objects already in federal agencies and museum repositories. Further,

even in Section 3(C) of the statute, the law indicates that “if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.” In other words, the statute recognizes that a modern day tribe may not be culturally affiliated with an earlier group, even if the modern day tribe occupied the land at the time aboriginal land claims were being recorded by the federal government.

Even more problematic, however, are instructions listed under 10.11(c), “Disposition of culturally unidentifiable human remains and associated funerary objects.” According to this section, “(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 according to a priority order discussed.” However, this section is flawed from the outset, as we noted in our January 14, 2008 response:

The definition of “right of possession” in the regulations is the lynchpin of the legal slight-of-hand that the people who drafted these regulations use to disguise this illegal taking of museum collections. The definition of right of possession in the proposed regulations makes it logically impossible for museums to have a legal right of possession to any of their culturally unidentifiable skeletal collections. In essence, it requires museums to show the impossible: that earlier groups without any modern culturally affiliated descendants somehow gave the museum the right of possession of ancient archaeological materials associated with their culture.

In consequence, all culturally unidentifiable remains would therefore appear to be subject to “disposition” [transfer of control, as defined by the 2010 Rules and Regulations] as follows:

(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; or

(ii) The Indian tribe **or tribes** that are recognized as aboriginal to the area from which the human remains were removed.

(2) 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:

(i) Transfer control of culturally unidentifiable human remains to other **[culturally unaffiliated]** Indian tribe or Native Hawaiian organizations; or

(ii) Upon receiving a recommendation from the Secretary or authorized representative:

(A) Transfer control of culturally unidentifiable human remains to an Indian group **that is not federally recognized; or**

(B) Reinter culturally unidentifiable human remains according to state or other law.

We contend that there are clear legal issues with each of the sections highlighted in bold. First, regarding 10.11(c)(1)(ii), both the statute and Jeldirks opinion in *Bonnichsen vs. U.S.* define cultural affiliation—the basis for repatriation under NAGPRA—as a relationship of shared group identity between a modern day tribe [singular] and an identifiable earlier group.

Second, regarding 10.11(c)(2)(i), we reiterate concerns expressed in our response (January 14, 2008) to the proposed regulations regarding the repatriation of human remains to culturally unidentifiable groups. Nowhere in NAGPRA is there language that authorizes the federal government to take culturally unidentifiable collections from museums and give them to groups culturally unaffiliated with those remains. As we noted then, according to the DOI's own conclusions, "A determination that human remains are culturally unidentifiable may change to one of cultural affiliation as additional information becomes available through ongoing consultation or any other source. There is no statute of limitations for lineal descendants, Indian tribes, or Native Hawaiian organizations to make a claim." (FR65, 111, p. 36463)." If this rule is enacted, human remains will be "disposed of" to non-culturally affiliated groups, removing any possibility that an "Indian Tribe" actually culturally affiliated with the remains could claim them at some future date when, perhaps through scientific discovery, such an affiliation becomes possible. This is in blatant contradiction to the statute and to the DOI's own interpretation of the statute.

Third, regarding 10.11(c)(2)(ii)(A), the regulations have no legal basis to recommend a disposition involving non-federally recognized tribes because the statute specifically limits repatriation to federally recognized tribes. As we have pointed out previously, recognition of non-federally recognized tribes in the federal repatriation process can only occur through the legislative process, not through rules and regulations written to clarify the implementation of existing legislation. NAGPRA excludes non-federally recognized groups from repatriation claims.

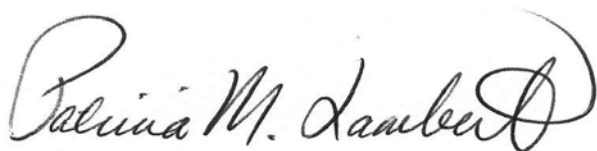
Fourth, regarding 10.11(c)(2)(ii)(B), the regulations have no legal basis to recommend a disposition in which culturally unidentifiable human remains are reinterred by museums, because reburial is not legislated by the statute. Nowhere in NAGPRA is "reburial" or "reinterment" mentioned. The statute pertains to repatriation only, where appropriate, and not to reburial. Reburial may be an outcome selected by a Native American/Native Hawaiian group/organization that demonstrates lineal descent or cultural affiliation with a collection of human remains, but there are many other possibilities available and that federally recognized Native American groups have adopted, including leaving claimed human remains in the care of museums. This instruction demonstrates a continued misunderstanding of NAGPRA as a reburial law, which it is not. Any instruction related to the reburial of human remains by museums under the guise of NAGPRA is entirely outside of the meaning, intent, and language of the statute.

The final rule for the disposition of culturally unidentifiable human remains is an expedient and unlawful "solution" to the complex problem of repatriation under NAGPRA. These rules and regulations could effectively remove from the conservation facilities that house our national heritage the archaeological human remains that document the rich and complex biocultural history of the first Americans. The final rule actually attempts to legislate for the wholesale reburial of indigenous history. The archaeological remains impacted by this rule are irreplaceable in terms of the biocultural history they indisputably document. Without carefully conserved and readily available scientific evidence, the history of North America can and will be rewritten in ways that bear little resemblance to our current scientific understanding of America's past. In this sense, the final rule on culturally unidentifiable human remains could well transform NAGPRA from a law of indigenous empowerment to one of disenfranchisement—and it is noteworthy that it would by no means be the first Federal law to do so. NAGPRA may well go down in history as the Dawes Act of the 21st century, a law with purported good intent but devastating consequences in the long run for indigenous Americans.

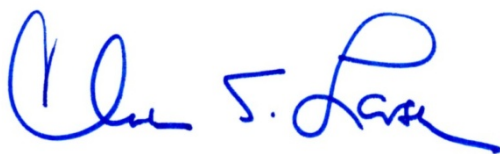
Sincerely,

A handwritten signature in black ink, appearing to read "Dennis O'Rourke". The signature is fluid and cursive, with the first name "Dennis" and last name "O'Rourke" clearly distinguishable.

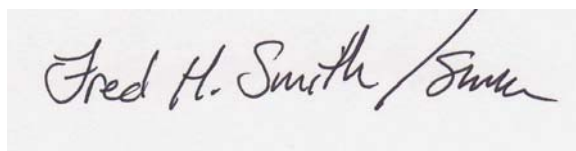
Dennis O'Rourke, President
American Association of Physical Anthropologists,
and for the AAPA Executive Committee

A handwritten signature in black ink, appearing to read "Patricia M. Lambert". The signature is cursive and elegant, with the first name "Patricia" and last name "Lambert" clearly distinguishable.

Patricia M. Lambert, Chair
Repatriation Committee, AAPA

A handwritten signature in blue ink, appearing to read "Clark S. Larsen". The signature is cursive and fluid, with the first name "Clark" and last name "Larsen" clearly distinguishable.

Clark S. Larsen
Repatriation Committee Member, and Former President,
American Association of Physical Anthropologists

A handwritten signature in black ink, appearing to read "Fred H. Smith". The signature is cursive and fluid, with the first name "Fred" and last name "Smith" clearly distinguishable.

Fred H. Smith, Past-President
American Association of Physical Anthropologists