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A N T H R O P O L O G I C A L
A S S O C I A T I O N

December 28, 2007

Dr. Sherry Hutt, Manager,
National NAGPRA Program
National Park Service
Docket No. 1024-AC84
1849 C Street, NW, (2253)
Washington, DC 20240

RE: RIN 1024-AD68

Dear Dr. Hutt,

The American Anthropological Association (AAA) offers the following comments on the proposed rule for the Disposition of Culturally Unidentifiable Human Remains for the Native American Graves Protection and Repatriation Act Regulations (43 CFR Part 10), published in the Federal Register (72 FR 58582). The AAA is the primary professional society of anthropologists in the United States, founded in 1902. With more than 11,000 members, it is the world's largest professional organization of individuals interested in anthropology. These comments were developed through consultation among members of the AAA, including archaeologists, biological anthropologists, museum anthropologists, and Native American anthropologists.

The AAA supports the fair and equitable implementation of NAGPRA, and recognizes the need for developing a process for the disposition of culturally unidentifiable human remains. Pursuant to NAGPRA, human remains may be culturally unidentifiable if a lineal descendant or culturally affiliated tribe is not identified, if evidence is insufficient to identify an earlier group, or if cultural affiliation is determined with a Native American group that is not a federally recognized Indian tribe. The AAA recognizes that an initial determination that human remains are culturally unidentifiable may change to one of cultural affiliation if additional information becomes available through research and consultation.

In preparing these comments, the AAA respects both the legitimate need to return control over ancestral remains and funerary objects to Native peoples and the legitimate public interest in the scientific and historical knowledge that may be gained from the study of those remains.

The AAA endorses the four principles that the NAGPRA Review Committee established in 1999 as the foundation for regulations on the disposition of culturally unidentifiable human remains. These principles, published in the Federal Register (64 FR 41136), are that the regulations need

to be (1) respectful of all human remains (2) equitable, fair, and within the intent of the statute, (3) doable by creating a process that can be implemented, and (4) enforceable. The AAA is concerned that some sections of the proposed regulations do not meet these principles inasmuch as they are ambiguously worded or create a process that will be difficult to implement. The AAA therefore offers the following specific comments intended to improve the regulations.

1. *Section 10.2 Definitions*. Two additional definitions are needed in order for these regulations to be doable with a process that can be implemented. The terms needing definition are: "cultural relationship" and "non-federally recognized Indian group." These concepts are key to the implementation of the regulations, and without definition, it will be difficult or impossible for the regulations to be implemented in an equitable and fair manner within the intent of the statute. The AAA requests that it be allowed to comment on a definition of "cultural relationship" prior to its promulgation in regulations.
2. *Section 10.2(e)(2)*. In order for the regulations to remain within the intent of the statute, the definition of culturally unidentifiable remains needs to clearly establish that they are Native American remains. Some culturally unidentifiable human remains in museums may not be Native American. The AAA therefore recommends rewriting the definition so that it reads: "Culturally unidentifiable refers to Native American 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."
3. *§ 10.9(e)(2)(v)*. This section needs language to establish that this requirement only pertains to inventories completed after the regulations are promulgated. The AAA is concerned that these regulations not require museums that have completed their inventories to redo them to meet this new requirement. The AAA recommends the language of this paragraph be revised to state: "Inventories prepared after [insert date regulations are promulgated] shall describe those human remains with or without associated funerary objects, that are culturally unidentifiable but that may be transferred under § 10.11."
4. *§ 10.11(b)*. The AAA notes that the consultation mandated in this section of the regulations will be time-consuming and costly for both museums and tribes. The AAA therefore requests that NAGPRA grants be made available to support this consultation. The National Park Service should request that Congress increase the funding available for NAGPRA grants.
5. *§ 10.11(b)(2)(ii)*. The AAA notes that the language in this section extends the definition of aboriginal land as specified in the statute as that being recognized by a final judgment of the
6. Indian Claims Commission or the United States Court of Claims to include aboriginal land recognized by a treaty, Act of Congress, or Executive Order. The AAA thinks this expanded definition is fair and equitable for Indian tribes.
7. *§ 10.11(b)(2)(iii)(A)*. The AAA thinks consulting with tribes associated with the region from which human remains and associated funerary objects were removed is reasonable and

appropriate. However, the undefined concept of "cultural relationship" used in this section is a key concept that needs to be defined in Section 10.2, Definitions.

8. *§ 10.11(b)(2)(iii)(B)*. The AAA thinks the wording of this paragraph is ambiguous. The term "geographic affiliation" is unclear. If the drafters of the regulation mean "human remains from an unknown location" they should state this in plain language. Second, the meaning of the phrase "cultural relationship to the region in which the museum or Federal repository is located" is not clear. The concept of "cultural relationship" as it applies to a region in which a museum is located needs to be defined. If the language of this section is left ambiguous, it will make the regulations difficult to implement.
9. *§ 10.11(b)(3)(ii)*. The wording in this paragraph is ambiguous because it is not clear which party possesses the knowledge referred to. Furthermore, the concept of "non-federally recognized Indian groups" needs to be defined in Section 10.2 Definitions. The AAA suggests this paragraph be rewritten to read: "A list of any non-federally recognized Indian groups that the museum or Federal agency knows shares a group identity with the particular human remains and associated funerary objects; and"
10. *§ 10.11(b)(5)*. As written, this section requires museums and Federal agencies to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the Indian tribes and other parties specified in *§ 10.11(b)(2)*. The AAA thinks that developing a proposed disposition for culturally unidentifiable human remains and associated funerary objects is the purview of Indian tribes. Language is needed to respect tribal sovereignty and the cultural rights and responsibilities of Indian tribes to make decisions regarding the disposition of Native American human remains. The AAA therefore suggests this section be rewritten to state: "During consultation, the museum or Federal agency official should consider a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is developed by and mutually agreeable to the parties specified in paragraph (b)(2) of this section and to the museum and Federal agency."
11. *§ 10.11(b)*. The AAA recommends a new paragraph be added to this section to allow for additional documentation of culturally unidentifiable human remains and associated funerary objects prior to their transfer to Indian tribes or groups under *§ 10.11(c)*. The level of documentation required under 43 CFR 10.9(c) may not be sufficient to preserve scientific information of value to tribes and the public, especially for inventories prepared more than a decade ago. The AAA recommends the following paragraph be added to the regulations: "In consultation with the tribes identified in *§ 10.11(b)(2)*, the museum or Federal agency may

undertake additional documentation of human remains and associated funerary objects prior to their transfer under *§ 10.11(c)*. This documentation shall be completed within two years of an

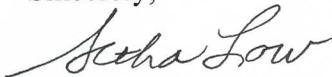
offer to transfer culturally unidentifiable human remains unless the consulting tribes agree that additional time (beyond two years) is needed.”

12. § 10.11(c)(1). By stating that museums and Federal agencies “must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order ...,” this section presupposes that the transfer of control of culturally unidentifiable human remains is the only solution that will be developed by tribes during the consultation process required in § 10.11(b). In some regions, it is conceivable that the consulting tribes may decide that control of some culturally unidentifiable remains should remain with museums or Federal agencies. In other cases, consultation may result in new research that determines cultural affiliation. The AAA recommends this paragraph be rewritten to read: “(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 only if that is the disposition developed in consultation with Indian tribes and Native Hawaiian organizations. Offers to transfer control of human remains shall be made in the following priority order:”
13. § 10.11(c)(1). In situations where consultation with tribes results in a proposed transfer of control of culturally unidentifiable human remains, the AAA supports paragraphs (i) and (ii) of this section that require museums and Federal agencies to offer to transfer control of human remains to Indian tribes and Native Hawaiian organizations from whose tribal land the human remains were removed, and the Indian tribes that are recognized as aboriginally occupying the area from which the human remains were removed.
14. § 10.11(c)(1)(iii)(A). This section requires museums and Federal agencies to offer to transfer control of culturally unidentifiable remains to tribes or Native Hawaiian organizations with “a cultural relationship to the region from which the human remains were removed.” The AAA thinks this section will be difficult to implement unless the concept of “cultural relationship” is defined in the regulations.
15. § 10.11(c)(1)(iii)(B). The AAA thinks this section is problematical. First the term “geographic affiliation” is unclear. If the drafters of the regulation mean “human remains from an unknown location” they should state this in plain language. Second, the AAA does not understand the logic of requiring museums and Federal agencies to offer to transfer control of human remains to Indian tribes and Native Hawaiian organizations based on a tribe’s having a “cultural relationship to the region in which the museum or Federal repository is located.” The lack of definition of “cultural relationship to a region” will make this section difficult to implement. If the consultation with tribes required in §10.11(b)(2) results in a plan for disposition acceptable to a museum or Federal agency and the tribes, the regulations should allow for this. The AAA therefore recommends this paragraph should be changed to read: “For human remains from an unknown location, the museum or Federal agency may, upon receiving a recommendation from the Secretary or authorized representative, transfer control over the human remains to tribes consulted in §10.11(b).”

16. § 10.11(c)(3) and (c)(4). The AAA notes that the language in these paragraphs allows but does not require museums to transfer control of culturally unidentifiable human remains to non-federally recognized Indian groups if the Secretary or authorized representative so recommends, and only after Indian tribes from whose tribal land or aboriginal area the remains came from give their written consent. The AAA recommends the language using the verb "may" be retained in the final regulation.
17. § 10.11(c)(5). The AAA notes that the language in this paragraph allows but does not require museums and Federal agencies to transfer control of funerary objects that are associated with culturally unidentifiable human remains. The AAA recommends the language using the verb "may" be retained in the final regulation.

In conclusion, the American Anthropological Association is pleased to have the opportunity to comment on the proposed rule for the Disposition of Culturally Unidentifiable Human Remains for the Native American Graves Protection and Repatriation Act Regulations (43 CFR Part 10). We urge the Department of Interior to modify the current draft regulations so that they support the fair and equitable implementation of NAGPRA, and respect the legitimate interests of both Native communities and the scientific and public communities.

Sincerely,



Setha Low
President