



## PEABODY MUSEUM *of* ARCHAEOLOGY & ETHNOLOGY

WILLIAM L. FASH

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

January 14, 2008

Dear Dr. Hutt:

Wishing you the best in your work, I am writing regarding the **Native American Graves Protection and Repatriation Act (NAGPRA) Regulations-Disposition of Culturally Unidentifiable Human Remains, 43 CFR 10 Section 10.11 proposed rule Federal Register October 16, 2007, FR doc E7-20209.**

The Peabody Museum of Archaeology and Ethnology at Harvard University has committed significant resources, expertise and attention over many years in a good faith effort to implement the Native American Graves Protection and Repatriation Act ("NAGPRA") and to cultivate the respectful relationships necessary to this effort. The museum has partnered with Native American communities across the United States to work toward mutual goals of education and research. We continue to work together to develop new models for collaboration beyond NAGPRA implementation. The museum recognizes the continuing importance of NAGPRA, both for giving voice to diverse viewpoints and for reflecting on historical practice. Our museum has had success in implementing NAGPRA and we have considered the experience to be a privilege; the process has benefited each of our missions of education, research and developing relationships with indigenous communities and scholars.

The Peabody Museum is responsible for NAGPRA implementation for one of the largest and broadest collections subject to the Act and to this proposed rule. We consult on human remains and funerary objects from nearly every state. Our museum already has completed requirements to enable repatriation of approximately 3,137 individual human remains and over 10,000 funerary objects. This represents approximately 10% of the total number of human remains and funerary objects that are available for repatriation nationally. Our wide-ranging repatriation efforts have given us extensive experience with many of the Act's successes and challenges. For these reasons, the museum appreciates the opportunity to contribute to the ongoing dialogue about NAGPRA's implementing rules.

While we commend the goal of the proposed rule, we are concerned that in its present form it imposes obligations that are beyond those intended by the statute and is fundamentally impracticable. Based on our experience, we find we must recommend

against the proposed rule in its entirety. We believe the proposed rule is such a departure, and presents such unclear standards that it will be vulnerable not only to legal challenge but will create an atmosphere of divisiveness, uncertainty and risk for those who must work with it. These comments are intended to address these concerns.

I. The proposed rule is beyond the scope of NAGPRA

The proposed rule reaches beyond the scope of NAGPRA in three main respects. First, cultural affiliation, a distinct relationship of shared identity, is the current standard for determining appropriate disposition of human remains and funerary objects. The proposed rule appears to change the standard such that racial type and geography alone may be sufficient to initiate repatriation. For instance, the proposed rule would permit repatriation of culturally unidentifiable human remains to any Native American tribe if that tribe happened to be located near the site of initial discovery or happened to be located near the museum in which the remains are housed, regardless of where the remains were found. This change leaves open the possibility of challenge if, after repatriation, new information later reveals a cultural affiliation to another tribe entirely.

In addition, the proposed rule imposes civil penalties on museums that do not offer to repatriate culturally unidentifiable human remains and cannot show a right of possession. This is the case even absent any request for those remains. Since “right of possession” is defined in such restrictive terms that it is unlikely for any museum to be able to claim this “right,” museums will be under pressure to repatriate quickly, before penalties might be imposed, regardless of the tenuous nature of the relationship between the remains and the recipients. Needless time pressures, especially in situations where no request has even been made, will no doubt lead to mistakes and misunderstandings.

Second, under the NAGPRA statute, the definition of “right of possession” only pertains to culturally affiliated human remains. 25 USC 3001(13). The proposed rule alters this Congressional choice by making this term applicable to culturally unidentifiable human remains. We question whether the regulators may do this absent explicit authority under the statute. Further, even with respect to the repatriation of culturally identifiable human remains, Congress built exceptions into the law designed to strike a careful balance between interests of cultural respect and interests in fostering research. The regulations unaccountably do not carry forward these exceptions to the treatment of culturally unidentifiable human remains.

Third, under NAGPRA, Congress entrusted the Review Committee with “recommending specific actions for developing a process for disposition of...” culturally unidentifiable human remains and the Secretary for promulgating rules to implement the statute generally. 25 U.S.C. 3006(c)(5); 25 U.S.C. 3011. However, it is not clear that Congress intended to give the Secretary authority to require the transfer of unassociated funerary objects in the way proposed in the proposed rule. The absence of a similar mandate in the legislation for the development of rules to govern the process with respect to unassociated funerary objects speaks to a different Congressional intent. The change made by this proposal is not without real consequence. As with culturally unidentifiable

human remains, premature disposition of unassociated funerary objects would foreclose an opportunity to discover a cultural affiliation to a present day group. We do not believe these important issues have been dealt with clearly enough or in a balanced way in the present proposal.

II. The consultation and disposition process outlined in the proposed rule is impracticable and raises new risks and uncertainties.

The proposed rules do not lay out clear guidelines for the circumstances under which museums and federal agencies must initiate consultation with Indian tribes and Native Hawaiian organizations. There are no discernible limits to discussions that must take place or the parties who must take part in the discussions. Because the regulations include non-federally recognized groups for the first time, this increases the number of potential parties significantly, thereby also increasing the complexity and costs associated with these consultations. Further, since the requirement to consult with unrecognized groups will mean almost no constraint on who might be a claimant, it will also never be clear when a particular consultation process reaches a definitive conclusion. The cost of conducting these large-scale and open-ended discussions will simply be overwhelming, not only for museums and federal agencies, but for the Review Committee, which has been tasked with resolving disputes. We also believe the time for implementing this process has been vastly underestimated. Based on previous NPS NAGPRA grants devoted to consultations for culturally unidentifiable human remains, the number of hours per individual set of remains is more than 40 hours rather than the 26 cited in the proposed rule. The estimate of 40+ does not even include the amount of time tribes would need to devote. Lastly, the proposed rule leaves open the possibility that even parties outside of the United States may be entitled to consult on culturally unidentifiable human remains because the notion of ancestry in the proposed rule is extremely broad. At the very least, the regulations should include a statement regarding its intentions for foreign based groups.

All of the factors described above are likely to contribute to an atmosphere of confusion, delay and expense for Tribes and institutions. This will encourage short-cutting, and ultimately transfers of human remains which were likely not intended by Congress. It is important that a well structured, national-level process be devised, so that we may avoid this splintered approach to dispositions.

The conflicts arising from the proposed rule's scheme may also have implications for the partnerships we and other institutions have cultivated with indigenous communities in the areas of science, social science and humanities. These kinds of partnerships between Native American groups and museums and federal agencies have broadened the landscape of thought and practice in anthropology and other fields by increasing professional responsibility and understanding of diverse perspectives. Here at the Peabody and at Harvard we have seen a flowering of these relationships with new programs in the law and government, new courses on the archaeology of Harvard's Indian College, new courses in history and literature, and numerous partnerships to assist

Native American groups develop their own museums, arts and education programs, and other resources.

In addition, the Peabody Museum has been fortunate to welcome new collections into the public galleries in collaboration with tribes to honor repatriations. For example, delegations from all over the United States, from Alaska to New York, have presented the museum with items to honor specific repatriations. These have become part of public exhibits and university-level classes. A new totem pole, made from a cedar tree given to the museum by Cape Fox Corporation in Alaska, stands dramatically in the museum's public gallery as testimony to the success of NAGPRA. Next to the totem pole, the museum presents a film that documented the repatriation of a memorial pole, its predecessor--an object of cultural patrimony, and repatriated under NAGPRA. The new totem pole was carved by a contemporary Tlingit artist; a collaborative ceremony was held to install the new totem pole in the museum's public gallery in honor of the repatriation of the memorial pole.

I am deeply concerned that these relationships and the progress that we have made will be put at risk by regulations that embody an ill-conceived process likely to be dominated by strife and frustration.

III. The proposed rule seems to disregard previous recommendations on disposition from the Review Committee.

This proposed rule follows three previous attempts by the Review Committee to resolve issues through comment concerning the development of a process for disposition of culturally unidentifiable human remains: (1) the 1995 draft recommendations regarding disposition, (2) the 1996 draft recommendations regarding disposition, and (3) the 1999 draft principles of agreement on disposition. The NAGPRA Review Committee followed a detailed process including conducting public hearings and receiving written comments on these drafts. As the "supplementary information" to the proposed rule notes, numerous institutions, organizations, Indian Tribes and Native Hawaiian organizations participated in that process, but the proposed rule does not resemble the recommendations made by the Review Committee nor does it appear to have considered comments to them. In particular, the proposed rule does not consider the Review Committee's recommendations that there are various categories of culturally unidentifiable human remains for which various means of disposition, other than repatriation, would be appropriate. These previous recommendations had acknowledged the potential role of collections for education and research. The specific benefit of collections with respect to health-related matters also was noted. These previous recommendations also emphasized that approaches to disposition may vary by geography, and that, though it may be recommended under NAGPRA, the Act does not require legal transfer in all cases. Although the Peabody Museum had concerns about those recommendations as well, the proposed rule disregards all that was recommended by the Review Committee and has adopted, against the weight of those recommendations, a scheme of mandatory repatriation.

Once again, I appreciate this opportunity to comment on the proposed rules. At the Peabody Museum, we have been pleased with our record on NAGPRA and grateful for the strong relationships we have developed that have benefited the institution so broadly. I am deeply concerned that, despite our strong commitment to the letter and spirit of NAGPRA, this proposed rule will introduce haste and uncertainty that will undo a great deal of good work, and a mandatory repatriation scheme that totally devalues previously acknowledged competing values of scholarship, teaching and research. Thank you for your time and consideration.

Respectfully,

A handwritten signature in black ink, appearing to read "William Fash". The signature is written in a cursive, flowing style.

Professor William Fash  
William and Muriel Seabury Howells Director