

**American Association of Physical Anthropologists
Position Statement on the Department of the Interior's Proposed Rule for the
Disposition of Culturally Unidentifiable Human Remains¹**

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On October 16, 2007, the Department of the Interior (DOI) published draft regulations for the Native American Graves Protection and Repatriation Act (NAGPRA) dealing with "culturally unidentifiable human remains" (*Federal Register* 72 (199): 58582-58590). By definition, culturally unidentifiable human remains lack a demonstrably close relationship to any modern tribe. The collections targeted by these regulations include human remains that are many thousands of years old, such as those of the Kennewick Man, that the Ninth Circuit Federal Court ruled are not covered by NAGPRA because they lack a clear relationship to any modern group of people. As written, the proposed rule apparently applies to all culturally unidentifiable collections of human remains, even including those lacking any evidence of Native American origin.

The AAPA lobbied for the passage of NAGPRA and has consistently supported the way in which the act balances the legitimate interests that Native American, museum, and scientific communities have in archaeological collections. The AAPA opposes the enactment of these deeply flawed proposed regulations for the following reasons:

- The proposed regulations contradict Congress's clearly stated goal in the passage of NAGPRA. They therefore constitute an illegal amendment of the act by regulatory fait.
- Despite assertions to the contrary, as written, the regulations violate the Fifth Amendment takings provision of the Constitution. This and other flaws in the legal basis of the regulations will result in extremely expensive, divisive, and counterproductive legal challenges that could potentially threaten the constitutional basis of the act itself.
- If enacted these regulations would, through the destruction of unique information about our shared history contained in museum collections of human skeletal remains, result in a world heritage disaster of unprecedented proportions that will permanently hobble our understanding of American history and the place of America's first inhabitants in the biological history of all humankind.
- If enacted, they will irreparably damage the strong, highly productive, collaborative relationships NAGPRA has fostered between Native Americans and the scientific community that are made possible by the way in which Congress carefully balanced legitimate scientific, museum, and Native American interests when it crafted NAGPRA.

If finalized, these illegal regulations will impose enormous costs, arguably amounting to many hundreds of millions of dollars, on the museums and federal agencies that would be forced to implement them. At the same time, the regulations will rob our descendants of the unique insights concerning the shared heritage of all people that physical anthropological studies of culturally unidentifiable human remains can provide. The collections these regulations threaten to destroy are a world heritage of enormous value. They help us understand crucial issues such as: the social consequences of rapid economic and climatic transitions; the health consequences of dietary shifts; the origins and history of modern infectious diseases; the causes of intergroup

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conflict and traditional mechanisms of conflict resolution; and the population affinities of our ancestors. These unique collections are of great historical importance because the biocultural information they contain is available from no other source.

The American Association of Physical Anthropologists (AAPA) participated in the development of NAGPRA and was part of the coalition of Native American and scientific groups that worked for its passage. We continue to support NAGPRA's key goal of ensuring that culturally affiliated, federally recognized Native American groups are allowed to decide the disposition of their ancestral remains. We worked for the passage of NAGPRA because of the way in which it was carefully crafted to balance the legitimate interests of the scientific, museum, and Native American communities. Indeed, the 1999 NAGPRA Review Committee's own Draft Principles of Agreement Regarding Disposition of Culturally Identifiable Human Remains acknowledged "...the legitimate public interest in the educational, historical, and scientific information conveyed by those remains and objects. (25 U.S.C. 3002 (c); 25 U.S.C. 3005 (b))." (FR64, 145, p. 41135).

By ignoring those legitimate interests, the newly proposed regulations destroy this careful balancing of divergent interests that has been the key to NAGPRA's success. NAGPRA has worked because it recognizes both the legitimate interests of Indian tribes in their ancestral remains and the legitimate interests of science and the broader public in gaining knowledge about our common human heritage from archaeological and physical anthropological studies of human remains.

Instead of attempting to implement the plain language of the law, the proposed regulations drafted by the National Park Service completely disregard the valid interests that members of the public and museum and scientific communities have in the disposition of collections of culturally unidentifiable human remains; collections that by definition cannot be shown to have a relationship of shared group identity with any specific modern Native American tribe. In doing so, the proposed regulations destroy the highly productive compromise that was reached when the AAPA and other scientific and museum organizations joined with Native American groups to urge the passage of NAGPRA.

The nature of these proposed regulations is especially startling because of their glaring inconsistency with the Department of the Interior's recently-stated support for the balancing of Native American, museum, scientific, and public interests that is at the heart of NAGPRA. After spending millions of dollars unsuccessfully arguing that NAGPRA gave the federal government the authority to surrender the 9,000-year-old Kennewick skeleton to a group of modern tribes lacking any demonstrable relationship to the remains, the DOI publicly recognized the wisdom of the Ninth Circuit Court's ruling in the Kennewick case. In testimony at the 2005 Senate Committee on Indian Affairs NAGPRA oversight hearing, the Department of the Interior Deputy Assistant Secretary for Fish and Wildlife and Parks Paul Hoffman embraced the clearly articulated goal Congress had in the passage of NAGPRA:

"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. The proposed legislation would shift away from this balance."

The proposed regulations are starkly inconsistent with the position the DOI took in its congressional testimony. Apparently, the National Park Service's personnel in the National NAGPRA Program who drafted these regulations sought to circumvent their own department's stated policy on this matter by crafting regulatory language that effectively reverses the Ninth Circuit Court's opinion. In this way, they have used regulatory language to expand the requirements that NAGPRA places upon museums far beyond Congress's clearly articulated legislative intent.

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. Realizing the difficulty of balancing the conflicting interests that exist over such culturally unidentifiable collections, Congress wisely instructed the NAGPRA review committee to simply make recommendations concerning possible future dispositions of such remains so that Congress could consider the advisability of possible future legislation dealing with issue.

In NAGPRA, the only language that addresses the disposition of culturally unidentifiable collections is the charge of the Review Committee, where it is assigned the task of "*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*" [25 U.S.C. 3006(c)(5)]. These are clearly instructions to make recommendations to Congress for possible future legislative action. They do not constitute an authorization for the review committee to mandate specific dispositions for culturally unidentifiable remains or for appointed NAGPRA officials to legislate unilaterally through regulatory fiat.

Instead of complying with congressional intent, the DOI has cobbled together an extra-legal plan that forces museum and federal agencies to make enormous expenditures to effect the transfer of their human skeletal collections to culturally unaffiliated tribes or "Indian groups" who believe they have a "cultural relationship" to the *region* from which they were acquired. Since the proposed regulations fail to define the meaning of the newly contrived notion of "cultural relationship," or set out any evidentiary requirement for its establishment, the regulation would seem to empower any coalition of two or more people to claim such a "cultural relationship" based on their religious or secular beliefs, dramatically lowering the standards for affiliation set forth in statute.

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.

Since it is logically impossible to meet this standard, the proposed regulations require museums to give their collections to any group or coalition of like-minded groups who assert that they have a "cultural relationship" to those collections. This clearly abandons the DOI's previous conclusion that "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). Once remains have been repatriated to a group that asserts a "cultural relationship" with them, congressional intent becomes a moot point.

The disenfranchisement of federally recognized tribes in this manner was clearly not the intent of Congress; nothing in statutory language or legislative history suggests that the right of federally recognized tribes to make repatriation claims was meant to have a time limit imposed by the enactment of regulations that transfer this tribal right to culturally unaffiliated groups.

Adding insult to injury, the regulations place the burden of additional unanticipated requirements on museums, which would now face the onerous, enormously expensive tasks of identifying all groups that might have a "cultural relationship" with their collections, and then serving as an unpaid mediator in a process fraught with legal difficulties of determining to which group or coalition of groups their collection will be "disposed."

Another particularly troubling aspect of these regulations is their potential to broaden the scope of NAGPRA to encompass all culturally unidentifiable human remains held by museums, even in cases in which there is absolutely no substantive evidence that such collections are in any way connected to Native Americans and in cases where there is a clear non-Native affiliation. In the regulations, "culturally unidentifiable" human remains are defined as all "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." Nowhere is it mentioned that such human remains must also meet the legal definition of "Native American" in order to be considered "culturally unidentifiable," and thus subject to the requirements of these regulations.

This broadening of the regulations is a transparent attempt to circumvent the Ninth Circuit Court's ruling in the Kennewick case. This ruling restricts the legal definition of "Native American" to ancient groups with a clear cultural connection to a modern tribe. The new regulations arguably apply to all culturally unidentifiable collections (Native American or not), including those anatomical collections used by medical schools for the training of physicians, nurses, forensic scientists, and other medical personnel.

The AAPA believes that, if finalized, these burdensome and ill-conceived regulations would result in a disastrous loss of unique and irreplaceable information that will forever hobble our understanding of the heritage shared by all people. The extra-legal regulatory mechanism devised in these proposed regulations—automatically giving museum collections to any culturally unaffiliated groups who express an interest in them—is not only inconsistent with the key goal of NAGPRA, but it is also ethically repugnant. It will rob all future generations of historical information on the human condition that our descendants will need to meet the many difficult future challenges the members of our species will undoubtedly be forced to confront.