



SOCIETY FOR AMERICAN ARCHAEOLOGY

January 17, 2005

Dr. Sherry Hutt
Manager
National NAGPRA Program
National Park Service
1849 C Street NW
Washington, DC 20240-0001

**RE: SAA COMMENTS ON PROPOSED REGULATIONS FOR THE FUTURE
APPLICABILITY OF NAGPRA: 43 CFR § 10.13**

Dear Dr. Hutt:

The Society for American Archaeology (SAA) appreciates this opportunity to comment on the proposed regulation for the future applicability of NAGPRA, 43 CFR § 10.13. The SAA is an international organization that, since its founding in 1934, has been dedicated to the research, interpretation, and protection of the archaeological heritage of the Americas. With more than 7,000 members, the Society represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 states as well as many other nations around the world.

Concerns about the Proposed Regulation

SAA believes that the proposed regulation exceeds the scope of the Department of Interior's authority by imposing ongoing inventory and summary obligations after the requirements set forth in NAGPRA Sections 5 and 6 have been met. The regulation, as proposed, does not "merely clarify the applicability of the Act," as stated in the Supplementary Information section of the published notice. Instead, the proposed regulation imposes new and ongoing burdens on institutions by requiring that each covered museum or agency (1) take ongoing actions to update its inventory and summary after completing the actions required by Sections 5 and 6 of the Act, and (2) continually monitor the Federal Register in order to identify and initiate contact with newly recognized Indian tribes with potential NAGPRA claims.

The statute does not impose such obligations; it requires only that each covered institution prepare an inventory of human remains and associated objects (Section 5) and

a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony (Section 6), and to file those documents with the Department of the Interior by specific dates set forth in those respective sections. In addition, the law does not expressly authorize the Department to issue regulations related to the ongoing applicability of Sections 5 or 6 after initial filings are completed.

Section 3005(a)(4) provides a process for the repatriation of human remains and funerary objects not included upon an institution's original inventory or summary. That section does not require an update to the institution's inventory or summary. Instead, it provides that such items are to be returned to claimants showing cultural affiliation by a preponderance of the evidence.

The specificity of filing deadlines, coupled with the absence of any requirement to take further action under those sections, as well as the express provision in Section 3005(a)(4) providing a process for repatriation of items that do not appear on inventories or summaries, indicate that Congress did not intend to impose ongoing obligations to update inventories and summaries once the initial filings were completed.

As a consequence of the proposed obligations, museums would be subject to a new and ongoing risk of civil penalties for noncompliance under Section 9 of the Act.

Comments on the Proposed Regulation, Should it Proceed

If, despite the serious legal and procedural issues outlined above, the proposed regulation is adopted, SAA recommends the following modifications:

1. Museums should not bear the burden of continually monitoring the Federal Register to identify changes to the list of federally recognized Indian tribes. A more appropriate solution would be to place the burden of notification on the Department of the Interior, which would notify all museums and agencies subject to NAGPRA when a change to the list occurs. Deadlines for filing inventory and summary updates should be measured from the dates that institutions receive those notices, rather than from the date of publication in the Federal Register. It may be appropriate for the Department to issue an annual update with any changes to the list, thereby establishing a single, consistent update period during which institutions can anticipate, plan for, and conduct their update activities.
2. The regulation should expressly acknowledge the applicability of Section 3003(c) to update activities, permitting deadline extensions, if necessary, for museums making good faith efforts to carry out the inventory and summary update requirements.
3. The types of materials that may be repatriated without publication of a notice should be clarified. It would seem reasonable, for example, that newly discovered fragments of a previously repatriated cultural item could be

repatriated to the item's possessor without published notice, whether the repatriation occurred prior to or subsequent to 1990.

Comment on the Published Notice Provision on "Takings"

In arguing that the regulations do not constitute a taking, the proposed regulations incorrectly cite Section 3005(c) as establishing the standard for repatriation applicable to human remains and associated funerary objects as well as to other cultural items. Section 3005(a), rather than Section 3005(c), establishes the standard for repatriation applicable to human remains and associated funerary objects. Section 3005(c) expressly limits its applicability to unassociated funerary remains, sacred objects, and objects of cultural patrimony, which are the cultural items included in the summary requirements of Section 6. Even if such a distinction does not impact the question of whether the proposed regulation constitutes a taking, the scope of Section 3005(c)'s coverage should be correctly stated.

Thank you for your time and consideration of the SAA's comments.

Sincerely,

/s/

Lynne Sebastian Ph.D., RPA

President