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Dr. Francis P. McManamon
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PO Box 37127
National Park Service
Washington DC 20013-7127

Re: Docket No. 1024-AC07
Society for American Archaeology Comments on Draft NAGPRA Regulations

Dear Frank:

Attached, please find two copies of the Society for American Archaeology's comments on the Draft NAGPRA regulations published in the May 28, 1993 Federal Register, 58(102):31121-31134. We hope that you will find these comments useful in your revision of the regulations. Please contact me if you have any questions.

Also, as requested in my last letter, I would very much appreciate it if you would place me on a mailing list to automatically receive drafts of the regulations and related notices.

Sincerely,

Keith Kintigh, Co-chair
Society for American Archaeology Task Force on Repatriation

cc: Jack Trope
Walter Echo-hawk

**Society for American Archaeology Comments on
Draft NAGPRA Regulations - 43 CFR Part 10 RIN 1024-AC07
July 20, 1993**

10.2 DEFINITIONS

Tribe

10.2(a)(9) The definition is overstated, given the language of the Act. The word "continuous" was specifically removed from the definition of "cultural affiliation" during the legislative process and should not be reintroduced here. Also, "throughout history" might be interpreted broadly so as to include prehistory, in which case it is overly burdensome (to say the least).

Traditional Religious Leader

10.2(a)(13) With this definition, in many groups, every member or every initiated member of the tribe would qualify under criterion (i). The "or" at the end of (i) should be "and". That is, a leadership role not just participation should be required.

Lineal Descendent

10.2(a)(14) It may be a tricky business mixing traditional kinship systems with the definition of lineal descent. The legislative intent was that lineal descent be determined in conformance with ordinary English usage. Insofar as the traditional systems informs on such issues as adoption, it may be useful. However, a radically divergent interpretation of lineal descent would not be allowable. Raising the whole difficult issue of translation or lack thereof, between the English language category of "lineal descendent" and traditional categories of reckoning descent should not be done lightly.

Human Remains

10.2(b)(1) What about human remains not freely given that are incorporated into objects that are not cultural items, such as scalp shirts? Isolated teeth, often lost before death, and appearing alone in a non-funerary context might reasonably treated similarly to the remains freely given.

Associated Funerary Objects

10.2(b)(3)(ii) This would be clarified if a parenthetical statement were appended, e.g. "(whether or not the associated human remains are currently in possession or control of a museum or Federal agency.)" The difference between (i) and (ii) is otherwise difficult to see.

Objects of Cultural Patrimony

10.2(b)(6) Creates a circularity in definition. "Cultural items" in the first line should be replaced by "items".

Tribal Lands

10.2(d)(2) The definition of tribal land ought to deal explicitly with tribally owned non-reservation land. It appears to us that Jack Trope's point in his 11/30/92 letter to you regarding the unwarranted exclusion of private lands is well taken. In any case, these land status issues should be quite clear in the regulations so that subtle legal interpretations are not left to the thousands of Federal agency officials who will implement the Act.

Possession and Control

10.2(e)(5),(6) It might be argued that this begs the question. Walter Echo-hawk has argued that under common law, museums do *not* have a sufficient legal interest in human remains to do anything with them. In any event, one of NAGPRA's primary objectives was to redefine ownership of these materials.

10.4 INADVERTENT DISCOVERY

Discovery.

10.4(b) This well-intentioned section is overly broad. It appears to compel people who have nothing whatsoever to do with the disturbance or discovery to report it (e.g. people driving by on a highway). It should refer to people engaged in some sort of land-disturbing undertaking on Federal or Tribal land, not to everyone.

Federal Lands

10.4(d)(3) Change to: "Notify within one working day the Indian Tribe or Tribes known or likely to be.... Also, it is not clear why "any other Indian Tribe that is reasonably known to have a relationship to the human remains or cultural items" should be notified if they are not candidates for being culturally affiliated. If they are potentially affiliated, then they should be notified, otherwise they have no legitimate interest.

10.5 CONSULTATION

Programmatic Agreements

10.5(f) While programmatic agreements may facilitate the workings of the bureaucratic machinery, they should not, at this stage, be encouraged ("Whenever possible, ..."). Surely these agreements serve the interests of the bureaucracy but *not* the interests of the Indian Tribes or the scientific community or the broader public. Until broader experience with repatriation exists, people are not in an informed position to decide on all of the abstract issues that will be thrown at them in the programmatic agreement.

Time and again, the experience shows that if one asks, in the abstract "Is digging of burials permissible?", the answer will be "no". However, if one asks, "Is it permissible (or even advisable) to excavate this particular threatened burial that we see here in the ground?", the answer will be "yes." If you ask the abstract question, "Can we publish drawings of a burial?", a group might say "no" when they would assent to or encourage the publication of a specific drawing that they can review.

When faced with making blanket agreements all of the implications of which are not foreseeable (far from it), the intelligent reaction (of anyone, not just Indian people) is to exercise extreme caution and be quite conservative. In making decisions on specific cases, people can see the implications and will often make quite different and better informed decisions.

Thus, it is premature to encourage programmatic agreements, indeed, they should be actively discouraged until there has been some amount of case-by-case working through of repatriation decisions. It will take more time and more money this way, but Indian and public interests (and the legislative intent) will be better served.

10.8 SUMMARIES & 10.9 INVENTORIES

Consultation

10.8(d)(1)(ii), 10.9(b)(1)(ii) Parties (A) and (B) are legally irrelevant to the decisions regarding museum and agency collections (they only apply to intentional excavations and inadvertent discovery). In the relevant section of the Act, cultural affiliation is the *only* relevant criterion. Thus, the groups who should be consulted are only those that are potentially affiliated. If the tribes on whose lands or aboriginal lands the items were found are affiliated or potentially affiliated, then they should be consulted because of the affiliation relationship.

10.10 REPATRIATION

Exceptions

10.10(c)(3) Contrary to this regulation, the Act does not raise the issue of fifth amendment taking in the context of human remains and associated funerary objects. In the Act, the fifth amendment language appears only in the portion of the definition of right of possession referring to unassociated funerary objects, sacred objects or objects of cultural patrimony. The relevant phrase is "unless the phrase [right of possession] so defined would, as applied in section 7(c) result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 USC 1491..." Section 7(c) of the Act (which is where "right of possession" is used) has to do with the standard of repatriation *only* for "unassociated funerary objects, sacred objects, or objects of cultural patrimony." There is no justification for extending this to human remains and associated funerary objects. Also, we note the argument presented by Jack Trope in his 11/30/92 letter to you concerning the importance of the statute's reference to a determination by the United States Claims Court.

This remains a problem remains despite the drafters' discussion in the section by section analysis of Section 10.10. The drafters discussion fails to acknowledge that NAGPRA's central goal is to redefine ownership and property interest in human remains and cultural items. The fifth amendment reference in 10.10(c)(3) seems to undermine the clear language of the Act and the unambiguous legislative intent with respect to human remains and associated funerary objects. The Act draws fundamental distinctions between the categories of human remains and associated funerary objects on the one hand and unassociated funerary objects, sacred objects, and items of cultural patrimony on the other. In particular, the latter categories are subject to repatriation only absent another's "right of possession." Human remains and associated funerary objects have no such restriction. While the Act does not specifically empower fifth amendment taking of the former categories, the context in which the fifth amendment is cited (referred to in the preceding paragraph) strongly implies a contrast.