

13 May 2010

Dr. Sherry Hutt  
Manager, National NAGPRA Program  
National Park Service  
1201 Eye Street, NW 8<sup>th</sup> Floor  
Washington, DC 20005

Re: RIN 1024-AD68, final rule regarding procedures for the disposition of culturally unidentifiable human remains in the possession or control of museums and Federal agencies.

Dear Dr. Hutt:

The Ohio Historical Society (OHS) is a private, non-profit corporation that partners with the State of Ohio in the management of historic, archaeological, and natural history resources. The mission of OHS is to help people connect with Ohio's past in order to understand the present. Part of that mission involves the preservation of archaeological resources, including Native American human remains and associated funerary objects, for educational and research purposes. The culturally unidentifiable human remains and associated funerary objects that are the subject of the Final Rule are of vital importance to the fulfillment of our mission. On behalf of the Board of Directors and members of the OHS, I offer the following comments opposing the Secretary of the Interior's (SOI) final rule regarding the disposition of culturally unidentifiable human remains and associated funerary objects.

The OHS has four principal objections to the final rule:

1. The final rule fails to acknowledge the important scientific and cultural value of culturally unidentifiable human remains and associated funerary objects, which was an important part of the original NAGPRA compromise.
2. The SOI does not have the authority to promulgate the final rule.
3. The final rule constitutes a radical shift in the intent of NAGPRA from repatriating human remains and associated funerary objects to groups that share a cultural affiliation with them to giving such material to groups that share only a geographical relationship with such remains and objects.
4. The final rule is unreasonable in leaving museums vulnerable to legal claims for dispositions.

**The final rule fails to acknowledge the important scientific and cultural value of culturally unidentifiable human remains and associated funerary objects, which was an important part of the original NAGPRA compromise.**

Just as it is important for museums to curate the skeletal remains of 3-million-year-old human ancestors, such as "Lucy," for the insights they can offer regarding our evolutionary history and the lives of ancient ancestors, it also is important to curate the remains of more recent human remains, which can offer insights into subsequent periods of human history. The fact that most of the human remains in the collections of the OHS are from cultures that were indigenous to North America in no way diminishes its importance to our understanding of the broader human story. In a 1998 interview for the video "Great Museums: Smithsonian National Museum of the American Indian," Richard West, that institution's Founding Director, reminds us that "Native history and culture and art and life, is a part of the shared cultural heritage of all of us."

The OHS archaeology collections, including the culturally unidentifiable human remains and associated funerary objects, are a vitally important record of the people of ancient Ohio. From human remains we can learn about the age, sex, and health of individuals as well as information about where they grew up, what activities they engaged in over the course of their lives, what kinds of food they ate, and how they died. Richard Steckel, in his summary of "Health and nutrition in Pre-Columbian America: the skeletal evidence," asserts that "...skeletal data can contribute to a wide range of topics, including the health of women and children, long-term trends in patterns of trauma and violence, biological inequality, aging and health, geographical patterns of health, migration patterns informed by ancient DNA, and the co-evolution of humans and disease as shown by the DNA of ancient pathogens" (Steckel 2005, *Journal of Interdisciplinary History*, p. 2). Moreover, such studies "...have implications for understanding the environmental determinants of health, the pre-Columbian disease environment, plausible ranges of pre-contact population size, and the pattern of European conquest" (Steckel 2005:2). Studies of disease and nutrition in ancient populations can provide important clues to the health problems of contemporary Native Americans. From the associated funerary offerings and the various ways in which ancient peoples treated their dead, we can learn about levels of social inequality as well as the religious practices of particular societies.

The collections of the OHS have been in the forefront of innovative research on ancient human remains. For example, research on DNA recovered from Hopewell culture human remains has revealed new insights into the biological history of these people and recent analyses of Hopewell culture funerary objects, utilizing a variety of new techniques and procedures, have disclosed new insights into material culture and its use in the social and religious lives of the Hopewell people.

The OHS collection of human remains continues to be one of the most heavily utilized components of the OHS archaeology collections by outside researchers. Even after a collection has been studied, it is important to curate the collections so that other researchers can repeat the analyses to corroborate or refute the conclusions of previous researchers. Moreover, new analytical techniques constantly are being developed, such as the recovery of DNA from ancient bones that make these archives of human remains and their associated funerary objects of incalculable and inexhaustible research potential.

In 1999, in its Draft Principles of Agreement Regarding Disposition of Culturally Identifiable Human Remains, the NAGPRA Review Committee 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))."

In 2005, Paul Hoffman, the Deputy Assistant Secretary for Fish and Wildlife and Parks, gave the following testimony before the Senate Committee on Indian Affairs:

"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 final rule promulgated by the office of the Secretary of the Interior (SOI), radically undermines this understanding of NAGPRA and, through the exercise of arbitrary and capricious regulatory fiat, upsets the balance between tribal and other interests and disavows the legitimate educational, historical, and scientific value of this material in utter disregard of congressional intent.

**The SOI does not have the authority to issue the proposed rule.**

The SOI does not have the authority to promulgate a rule that would so radically alter the original intent of Congress in passing NAGPRA. The only language in NAGPRA that addresses the issue of culturally unidentifiable human remains and associated funerary objects is where the Review Committee is charged with "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)]. The Review Committee provided recommendations, which Congress has not seen fit to act upon. (Those recommendations, however, did acknowledge the legitimate scientific interest in this material.) Congress has not authorized the SOI to develop a rule that would require the disposition of culturally unidentifiable human remains and associated funerary objects from museums and Federal agencies to culturally unaffiliated Indian tribes and Native American groups. Therefore, promulgation of this rule is not warranted and likely will result in years of costly legal challenges.

**The final rule constitutes a radical shift in the intent of NAGPRA from repatriating human remains and associated funerary objects to groups that share a cultural**

**affiliation with them to giving such material to groups that share only a geographical relationship with remains and objects.**

The final rule will result in the transfer of culturally unidentifiable human remains and associated funerary objects in museums and Federal agencies to Indian tribes and Native American groups that have only a tenuous, if any, cultural or other connection with them. In the final rule, museums and Federal agencies must transfer control of culturally unidentifiable human remains and associated funerary objects to Indian tribes as well as, potentially, Indian groups that are not federally-recognized, based solely on geographical connections to the region in which the materials were found. Geography was intended to be only one of many criteria under which cultural affiliation could be established. Given the historical vicissitudes of migration over the past millennia, tribes not uncommonly may have a geographic connection to a place from which human remains were recovered and yet have no special genetic or cultural relationship to those remains. Thus, the proposed rule facilitates a result expressly unintended by Congress, the final disposition of human remains and associated funerary objects to culturally unaffiliated Indian tribes and Native American groups.

**The final rule is unreasonable in leaving museums vulnerable to legal claims for dispositions.**

Heretofore, NAGPRA has limited the liability of "any museum which repatriates any item in good faith" (25 U.S.C. § 3004(f)). This provides museums protection from "claims for breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions" of NAGPRA (25 U.S.C. § 3004(f)).

The SOI's final rule does not provide this protection for museums in regard to human remains and funerary objects subject to "disposition." Since, under the final rule, the "disposition" of culturally unidentifiable human remains and funerary objects is not a repatriation, museums are not protected from such claims, even when the museum is acting in good faith and in accordance with the terms of the final rule. As a result, museums that follow these regulations and transfer control of material to various federally-recognized and non-federally-recognized Indian groups will open themselves to potentially unlimited liability for their determinations of disposition.

It is to be expected that determinations of disposition for culturally unidentifiable human remains will be more contentious than repatriations of culturally affiliated material. Therefore, the threat to museums from legal action will be commensurately greater. Under these circumstances, it makes no sense to provide protection from liability for repatriations of culturally affiliated human remains and funerary objects, but not for the disposition of culturally unaffiliated human remains and funerary objects.

This problem is a direct result of the ill-considered and improper invention by the SOI of the process of "disposition" that exceeds any reasonable interpretation of the original intent of NAGPRA.

In conclusion, the OHS fully supports the original intent and spirit of NAGPRA and has worked consistently to comply with its provisions. The new regulations, however, represent such a radical departure from the original legislation that we must register our objections.

The final rule fails to acknowledge the important scientific and cultural value of the culturally unidentifiable human remains and associated funerary objects held by institutions such as ours. In our opinion, the SOI does not have the authority to promulgate the final rule. The shift from repatriating human remains to groups that share a cultural affiliation with them to transferring control over such material to groups that share only a geographical relationship with the remains has no basis in the original legislation and, in fact, undermines the carefully crafted compromise achieved by Congress between the interests of Native Americans, museums, and scientists. Finally, the final rule is fundamentally unfair, because it leaves museums vulnerable to legal claims for dispositions undertaken in good faith.

Sincerely,

Burt Logan  
Executive Director