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December 3, 2007

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

Dear Dr. Hutt:

My name is Tim White. I have been a professor of Anthropology and Integrative Biology at the University of California, Berkeley, for thirty years. I am a member of the National Academy of Sciences. These are my personal views and they do not necessarily represent the University of California or the Berkeley Campus, who will provide independent responses to your call for comment. I, and my colleagues in such fields as medicine, physical anthropology, evolutionary biology, forensics and archaeology, rely heavily on the use of skeletal remains. Indeed, no students in these fields could be properly trained without direct access to relevant physical scientific evidence. I write now to comment on:

**43 CFR Part 10; RIN 1024-AD68
Native American Graves Protection and Repatriation Act Regulations — Disposition
of Culturally Unidentifiable Human Remains**

Published on October 17th, this proposed rule subverts the original intent of Congress and creates mandates that lack a statutory basis. Furthermore, it imposes impossible financial burdens on museums going beyond those stated, and violates the establishment clause of the U.S. Constitution.

I will abbreviate this letter to simply state that I fully support the Position Statement of the American Association of Physical Anthropologists. Below I consider additional points central to the proposed rule.

History

The legislative history of NAGPRA is clear. It was never the intent of Congress to empty museums of skeletal remains and cultural objects. Had it been, this would have been stated in the House and Senate reports accompanying the legislation, or in the Act itself. Instead, the law carefully defined "cultural affiliation" in order to make certain that a clear

relationship of shared group identity existed between living Native American claimants (lineal descendants and federally recognized tribes) and osteological and funerary objects from the archaeological record that are subject to its provisions. Congress clearly intended the process of establishing a relationship of shared group identity to be evidence-based.

The process for establishing cultural affiliation stipulated by Congress has proven successful. Congress anticipated that some remains and cultural items would prove to be "culturally unidentifiable" (and created the category). It charged the NAGPRA review committee with the task of recommending to Congress specific actions regarding the "disposition" of such remains.

The clearly stated statutory request was that a federal committee make recommendations to Congress. That is not the same thing as licensing said committee to implement whatever those recommendations might be. However, this is precisely what your proposed rule now attempts to do, effectively making that committee's recommendations a legal mandate.

In effect, what you are doing via this proposed rule is putting the Secretary of Interior--if he would be so unwise as to accept the regulations that you and your staff have drafted--into the position of attempting to circumvent congressional authority. In this way you (and, by implication, the Secretary of Interior), are usurping the right that Congress has, should it see fit, to take remedial legislative action concerning this important legal matter of considerable national importance.

Now, 17 years after the passage of NAGPRA, the long-anticipated proposed rule for culturally unidentifiable remains attempts to render evidence-based cultural affiliation a moot point and, in this way, to circumvent congressional intent. The proposed rule does this via a two-stage process: first by narrowly defining "disposition," and then by elevating, to the level of a legal concept, the undefined conjunction of the words "cultural relationship" lifted, out of context, from the statute.

Disposition

The Proposed Rule adds only one new definition to NAGPRA, defining "disposition" to mean "transfer of control." This narrow definition is crucial to the proposed rule's apparent intent to circumvent the evidence-based concept of cultural affiliation clearly set out in statute by Congress (NAGPRA Act):

"cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."

Nowhere does NAGPRA state that shared group identity can reasonably be traced through religious or spiritually-based assertions by either federally recognized or non-federally recognized Native American groups.

In the newly proposed rule, "disposition" is formally defined as "transfer of control." This definition was not part of NAGPRA. Its usage in the proposed rule completely undermines

the evidence-based tracing of ancestral-descendant relationships that Congress expected to serve as a basis for all determinations of cultural affiliation involved with repatriation or other dispositions--including those in which the *status quo* of museums retaining possession and control of remains is maintained.

"Disposal" (i.e. disposition via "transfer of control" of all remains to Native Americans) was clearly not the intent of Congress, so the definition chosen by you and the other authors of the proposed rule belies an agenda to create a legal mandate that Congress never authorized. Why was this particular definition of "disposition" chosen when other applicable definitions are available? For example "disposition" has the common meanings of:

"Action to be taken on a records series at a specified time. May entail destruction, usually by means such as shredding, recycling, or electronic wiping, or may entail reformatting, transfer, or permanent retention."

<http://www.gmu.edu/library/specialcollections/glossary.html>

"Actions taken regarding data or records after they are no longer required to conduct agency business."

<http://www.dir.state.tx.us/pubs/derm/roles/glossary.htm>

Legal definitions of "disposition" normally mean:

"Determination of the final arrangement or settlement of a case following judgment."

http://www.courts.state.va.us/glossary_of_court_terms.html

Merriam-Webster's Dictionary of Law presents two definitions:

dis·po·si·tion Function: noun

1 a : *the final determination of a matter (as a case or motion) by a court or quasi-judicial tribunal* <the beneficiary of such a *disposition* of charges against him —*United States v. Smith*, 354 Atlantic Reporter, Second Series 510 (1976)> —compare DECISION, HOLDING, JUDGMENT, OPINION, RULING, VERDICT **b :** *the sentence given to a convicted criminal defendant* <probation is often a desirable *disposition* —*W. Railroad LaFave and J. H. Israel*>; *also :* *the sentence given to or treatment prescribed for a juvenile offender* _

2 : *transfer to the care, possession, or ownership of another* <to either a surviving spouse or a charity, those *dispositions* are totally exonerated from the payment of taxes —*Matter of McKinney*, 477 New York Supplement Reporter, Second Series 367 (1984)>; *also :* the power of such transferral

<http://dictionary.reference.com/help/mwlaw.html>

The word disposition can mean different things; the one thing it probably wasn't meant to include is repatriation. This is because the statute clearly limits repatriation to culturally affiliated remains, and sets up a clear process by which this is to occur. And even if the newly proposed rule is read to include repatriation, it would take legislative, not regulatory,

action to implement such change, simply because such regulations, as written, would be contrary to the statute.

Congress recognized that the great historical and scholarly value of the culturally unidentifiable remains in question needed to be balanced against the concerns of culturally affiliated descendants. Hence, NAGPRA clearly constitutes compromise legislation. The proposed rule deliberately and completely abandons the legislative compromise that lies at the heart of NAGPRA's success. It seems clear that the selection of this narrow definition of "disposition" is part of a strategy by your National NAGPRA Program staff who drafted these proposed regulations to subvert the meaning of cultural affiliation.

Cultural Affiliation versus "Cultural Relationship"

Having created a pathway that insures all remains will be removed from Museums (by defining "disposition" as anything but their current "disposition," i.e. in museums), your proposed rule then plays a legal trick to enable this regulatory maneuver. In order to abandon the evidence-based evaluation required for cultural affiliation, your staff has created an undefined category termed "cultural relationship." However defined, this "cultural relationship" is evidently narrower than the relationship that all American citizens have with the archaeological evidence for the history of the territory currently under the jurisdiction of the United States.

Cultural affiliation stands at the core of NAGPRA. Most cultural affiliations have already been, by definition, accomplished during the Inventory process stipulated by NAGPRA. Cultural affiliation is explicitly evidence-based. The statute requires museums holding any collections possibly culturally affiliated with federally recognized tribes to determine cultural affiliation during the inventory process and beyond, on the basis of (NAGPRA Act):

"evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."

In NAGPRA statute, the words "cultural" and "relationship" are used once in conjunction with each other. This use is in reference to adjudicating competing claims among *culturally affiliated*, federally recognized tribes. Since this conjunction of words is not defined in the statute, we must assume (based on the context of its use and the plain language legal principle) that it refers to a relationship that exists between federally recognized tribes and earlier Native American groups with which those federally recognized tribes have a relationship of shared group identity.

Therefore, in the proposed rule, the statutory meaning of "cultural relationship," which constrains it to the rights of federally recognized tribes, is subverted by extending it to federally non-recognized tribes. By doing so, it disenfranchises federally recognized tribes. Such a violation of the trust relationship the federal government has with federally recognized tribes was clearly never the intent of Congress.

The plain language of NAGPRA makes it clear that the congressional instructions to the NAGPRA review committee concerning possible dispositions of culturally unidentifiable human remains were simply instructions to make suggestions about possible dispositions for such remains. These should not be construed as instructions to the manager of the National NAGPRA Program and her staff to hijack undefined conjunctions of words in the statute for use in regulations that legislate through administrative fiat.

The First Amendment

However it might ultimately be legally defined, to be meaningful, your novel construction "cultural relationship" will surely represent an expanded (rather than equal or contracted) definition of cultural affiliation. Otherwise it would have no legal significance. The list of evidence specifically mentioned in NAGPRA statute as relevant to establishing cultural affiliation is comprehensive, only leaving out things that are not normally considered to be evidence-based; spirituality and religious beliefs.

However, a section-by-section analysis of Proposed Rule reveals the nature of additional beliefs that your National NAGPRA Program staff propose to take into account as part of the process for granting special claim rights on museum collections to both federally recognized and non-federally recognized Native American groups:

"customary religious and spiritual beliefs that link the disposition of funerary objects with the human remains with which they were intentionally placed."

Many Native Americans feel religious kinship and spiritual bonds, often speaking of the "Creator," and holding explicitly creationist views about having been created by a God equivalent ("Great Spirit). Many believe, all scientific evidence to the contrary, that their people have occupied their aboriginal territories since the "beginning of time." Indeed, in the Kennewick case, exactly this creationist viewpoint was at the heart of the demands of the coalition of Tribes requesting repatriation.

Concern for the potential use of the term "customary religious and spiritual beliefs" to circumvent the statute's mandate for evidence-based determinations is not mere speculation. Even before this new rule was proposed, in at least one case (involving the collections of the Phoebe Apperson Hearst Museum at the University of California, Berkeley) the National NAGPRA staff adopted repatriation recommendations based largely or completely on the demonstration of affiliation through prayer.

However heartfelt such spiritual and religious views are, they do not qualify as evidence of a relationship of shared group identity required by NAGPRA. The problems posed by governmental promotion of such religious views were clearly appreciated by the members of Congress who passed NAGPRA, as well as by the framers of the United States Constitution. The First Amendment to the Constitution states:

"Congress shall make no law respecting an establishment of religion..."

Belief in something does not make it so. Cultural Affiliation is evidence-based. From their use of the term "cultural relationship" in the proposed rule, it is clear that the National NAGPRA staff who wrote it envision "cultural relationship" as a religiously and spiritually based concept. Nowhere is the relationship that members of the secular world have to museum collections even mentioned in the proposed rule as it applies to remains in museum collections that cannot presently be culturally affiliated in the sense of the law.

The proposed rule therefore favors a specific creationist, religious view of ancestral relationships, trumping all other secular and religious beliefs. Therefore, it is in violation of the separation clause of the First Amendment that prevents our government from aiding religion in any way.

The undefined category "cultural relationship" was obviously inserted into the proposed regulations in order to make it possible to "dispose" of all Culturally Unidentifiable collections to both federally recognized and non-federally recognized Native Americans who believe that they should be repatriated to them. This brings about all of the negative consequences so well articulated in the AAPA Statement mentioned above that will ensue, if these illegal regulations are promulgated.

At a time when the teaching of intelligent design is constitutionally forbidden, it is odd that the federal government is entertaining rules that would require Museums and universities to make curatorial decisions based on religious and spiritual criteria.

Summary

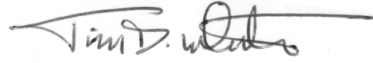
Congress passed NAGPRA in 1990. As part of this legislation, Congress instructed the NAGPRA review committee to consider possible dispositions for culturally unidentifiable collections of human remains and to make recommendations regarding their disposition to Congress. Instead of complying with these congressional instructions, the National NAGPRA Program staff have instead now decided to circumvent congressional intent by drafting a proposed rule that gives special legal rights to members of non-federally recognized American Indian groups based on the assertion of their creationist religious beliefs about ancestral relationships. In doing so, they impose enormous compliance costs on museums by forcing them to engage in inventory and consultation activities with non-federally recognized, religiously-oriented Native American groups, going far beyond the legal mandate of NAGPRA.

The proposed rule appears to have been formulated with an agenda in mind different from that of Congress when it passed NAGPRA. This agenda is exposed by the way "disposition" is narrowly defined, "cultural affiliation" is abandoned as an operational concept, and the common sense meaning of "cultural relationship" in the context of the statute is subverted.

The agenda appears to be one of opening the way for people with creationist religious beliefs—some of whom lack the special trust relationship with the federal government that belongs solely federally recognized tribes--to remove from the public and the scientific community crucial information necessary for the understanding of our shared past.

All Americans have a "cultural relationship" with these culturally unidentifiable collections, and the evidence that they provide concerning the history of humankind. Congress appreciated this when it crafted NAGPRA to strike a balance between the diversity of worldviews possessed by the citizens of the United States. The Proposed Rule abandons this balance, and by doing so, subverts science, the public interest, and the Constitution.

Yours sincerely

A handwritten signature in black ink that reads "Tim D. White". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Tim D. White, Ph.D.
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cc's:

Secretary Dirk Kempthorne
Department of Interior

Director Mary Bomar
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