

ILLINOIS



DEPARTMENT OF  
NATURAL  
RESOURCES

May 14, 2010

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Submitted Via Online Submission

Dr. Sherry Hutt, Manager  
National Park Service  
Docket No. 1024-AC84  
1849 C Street NW (2253)  
Washington, D.C. 20240

RE: Comments on "final" rule 1024-AD68

Dear Dr. Hutt:

This letter provides comments on the proposed Rule for 43 CFR Part 10 of the Native American Graves Protection and Repatriation Act (NAGPRA) Regulations—Disposition of Culturally Unidentifiable Human Remains; Final Rule, as published in the *Federal Register*, Vol. 75, No. 49, March 15, 2010. While we appreciate the significance of this issue and the efforts of the NAGPRA Review committee, the staff of the Park Service's National NAGPRA Program, and the Department of the Interior, we question the statutory foundation of elements of the proposed Rule and their practical application. It is unfortunate that we are reiterating many of the same serious concerns that were raised by museums and professional organizations during the comment review for the October 16, 2007 draft of the proposed Rule, but were summarily dismissed by the Department of Interior. I am writing in my capacity as Director of the Illinois State Museum and represent the opinions of my fellow anthropologists at the Illinois State Museum, all of whom have been involved with NAGPRA over the years.

We understand the fundamental underpinning of NAGPRA (hereafter referred to as the Act) to be the right of a lineal descendant or a culturally affiliated Indian tribe or Native Hawaiian organization to control the treatment and disposition of a related set of human remains and, if present, associated funerary objects. The Act mandated repatriation only when there was a demonstrable cultural affiliation between remains and a modern Federally recognized tribe. The Rule for Culturally Unidentifiable Human Remains (hereafter referred to as the Rule) expands the class of qualified claimants beyond the letter and intent of the original statute and will force return of remains to Indian tribes or groups that have no demonstrable cultural affiliation. As applied to Illinois, the geographically determined means by which potential claimants are established would give authority to tribes for which there is no demonstrable evidence of their relationship to culturally unidentifiable human remains. For example, land cession treaties and adjudicated land-claim determinations for Illinois involve tribes that reportedly first arrived in the region no earlier than the 17<sup>th</sup> century. Congress allowed claims to be based upon lineal descent, cultural affiliation, or Indian Claims Commission maps for newly found human remains and cultural items on Federal and tribal lands, but for some reason chose not to do so with respect to existing collections from Federal and other property, opting instead to limit claimants to lineal descendants or culturally affiliated Indian tribes or Native Hawaiian organizations. Thus, this element of the Rule has no foundation in the Act. Furthermore, it puts museums at risk of

returning remains to unrelated claimants and facing potential lawsuits from other tribes who may come forward later.

The Rule also raises the possibility of returning remains to non-Federally recognized Native American tribes or groups. It was our experience during our NAGPRA consultations that Federally recognized tribes were not supportive of including other Native American groups in discussions regarding the disposition of Native American human remains and other cultural objects. Moreover, as it now stands, museums and Federal agencies would be burdened with the responsibility to determine which Native American tribes or groups should be included in consultation. In our opinion, this burden should be shouldered by the Department of the Interior.

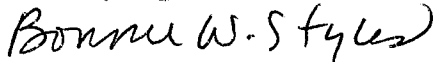
The issue of possession is troubling. By definition, it is impossible for museums to demonstrate right of possession for culturally unidentifiable human remains. The Rule defines right of possession as "...possession obtained with the voluntary consent of an individual or group that had authority of alienation" 43 CFR 10.10(a) (2). Because the Rule, 10.2(e) (2), defines "culturally unidentifiable human remains" as those "...for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified through the inventory process," it is not possible to obtain consent. Thus, museums or Federal agencies by definition cannot prove right of possession and "must offer to transfer control of the human remains." Use of this definition of right of possession and implementation of the Rule would deprive the entire world of valuable scientific and historical information on biological and cultural heritage, diversity, and change and severely impact many museums' ability to educate the public about human heritage and, in our case, the cultural heritage of Illinois. It seems to us that the definition of right of possession is ripe for legal challenge, which is a costly and often divisive process. In Illinois, two State laws address disposition of human remains from archaeological contexts and place ownership with the State and disposition with the Illinois State Museum. The Illinois Archaeological and Paleontological Resources Protection Act (20ILCS3435/) designates that archaeological collections from public lands, specifically including human skeletal remains, are the property of the State and gives the Illinois State Museum the responsibility of managing the remains. The Illinois Human Skeletal Remains Protection Act (20ILCS3440/) designates "that all human skeletal remains and grave artifacts are held in trust for the people of Illinois by the State..." and that "All materials collected under this Act shall be maintained, with dignity and respect for the people of the State under the care of the Illinois State Museum." The Illinois State Museum holds these remains in the public trust for the State of Illinois, but we are concerned that this would apparently not qualify as right of possession under the Rule. The Illinois State Museum has diligently followed NAGPRA and worked to repatriate human remains that can be affiliated with a Federally recognized tribe. Because the final Rule exceeds the authority of the Act, and could lead to disposition of remains to Indian tribes or groups with no demonstrable cultural affiliation, it raises concerns about the Illinois State Museum's public trust responsibilities.

While we understand the explanation for the inclusion of associated funerary objects in the Rule, we question the authority upon which one includes language in the Rule for an action that does not have foundation in the Act, let alone one that is described as a voluntary action. It would seem that this issue would require amendment of the statute before regulatory language could be offered. This matter is particularly troublesome because it has been critically addressed in previous drafts of the Rule. Its inclusion in this version of the Rule gives the appearance of a mandate rather than a voluntary action. Such insensitivity to the rule of law sends the wrong message to parties involved in complicated negotiations in which compromise appears to be the only responsible outcome.

The proposed language also places substantial unfunded financial burdens, including labor costs, on museums and Federal agencies at a time when resources are scarce. Museums and Federal agencies are obligated to initiate consultation, evaluate requests, and provide a variety of information to tribes and Native Hawaiian organizations engaged in consultation. The argument put forward in the review of comments for the previous draft of the Rule that disposition would save museums money is unfounded and ignores the significant losses to our shared cultural heritage and public education about this topic.

In summary, the "final" Rule should not be implemented because it is not built upon a statutory foundation. It contradicts the original Congressional intent to repatriate remains to federally recognized tribes with demonstrable cultural affiliation and does not embody the balance and spirit of compromise of the Act. As it now stands, the Rule would divide parties rather than seek mutual interest upon which to build. It ignores and potentially undermines many positive negotiations and unique local solutions that have been developed following the Act, such as the establishment of a Cooperative Curation Agreement between the Peoria Tribe of Indians of Oklahoma and the Illinois State Museum for the Peoria Tribe Archaeological Collection. Another local outcome of these negotiations is that several Federally recognized tribes have agreed that objects of cultural patrimony should remain at the Illinois State Museum. The Rule would open the possibility that unrelated Native American tribes could claim remains on the basis of geographical presence rather than cultural affiliation. Unrelated peoples could claim remains and potentially overturn carefully crafted, mutually beneficial agreements to the detriment of both the Native American tribes and the Illinois State Museum. Surely such an unintended consequence of the Rule is unacceptable to all parties. Ultimately, unless we forge a compromise, we stand to lose the opportunity to develop a productive dialogue about how we explore human cultural and biological heritage, diversity, and change and how we share this information with the public.

Sincerely,



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