

July 1, 2011

Mr. David Tarler  
National NAGPRA Program  
National Park Service  
U.S. Department of the Interior

via email: david\_tarler@nps.gov

**Re: Comments on Discretionary Review of NAGPRA Regulations**

Dear Mr. Tarler:

The American Association of Museums appreciates the opportunity to submit comments as the Department of the Interior undertakes a discretionary review of the Native American Graves Protection and Repatriation Act (NAGPRA), which was enacted 20 years ago.

The American Association of Museums (AAM) is proud to represent the full range of our nation's 17,500 museums – including aquariums, arboretums, archaeological museums, art museums, botanical gardens, children's museums, culturally specific museums, historic sites, history museums, maritime museums, military museums, natural history museums, nature centers, planetariums, presidential libraries, science and technology centers, tribal museums, zoological parks, and other specialty museums – along with the 400,000 professional staff and numerous volunteers who work for and with museums.

Museums have held objects in the public trust for hundreds of years. Today, American museums preserve and protect more than a billion objects. Sometimes they face questions related to historic artifacts; ownership; Nazi-era assets; sacred objects; human remains; the loan, sale, or donation of objects; or their diligence in probing the history of such objects.

Museums take these concerns very seriously. Since 1925, the museum field has been actively working to ensure that museums adhere to rigorous ethical standards. These field-wide standards, best practices, and ethics currently include:

- The American Association of Museums (AAM) Code of Ethics for Museums
- AAM's Standards and Best Practices for U.S. Museums
- AAM's Accreditation Program Requirements
- Each museum's Institutional Code of Ethics
- Each museum's Institutional Mission
- Guidelines established by other national organizations such as the American Association for State and Local History, the Association of Zoos and Aquariums, and the Association of Art Museum Directors

AAM lists all of its standards and ethics on its website ([www.aam-us.org](http://www.aam-us.org)) and provides many opportunities for the museum field to learn more about them and how to adopt them within their own institutions. We offer an online library of resources, an Information Center for our members, numerous titles in our bookstore, and numerous professional development opportunities – both in person and online – for the entire museum field.

AAM’s Code of Ethics for Museums clearly states that the “stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility, and responsible disposal.” This standard serves as the very foundation of collections care and management in our nation’s museums.

Twenty years ago, the museum community joined many other constituencies in working with Congress to enact a law that struck a careful balance: ensure that extensive research is conducted to draw correct conclusions about the origin of artifacts, establish detailed processes for consultations and repatriations, and repatriate artifacts accordingly. For 20 years, museums have been diligent in their efforts to build bridges and foster collaboration and cooperation with the tribal community and have repatriated numerous objects and artifacts in accordance with the law.

However, the museum community has serious concerns about the regulations related to culturally unidentifiable human remains (Section 10.11) and associated funerary objects. We commend the National NAGPRA Review Committee for recently voting unanimously (as they did in 2008 in response to a broadly similar draft) to ask the Department to revise the Section 10.11 regulations to address serious flaws.

AAM has expressed its concerns to the Department of the Interior’s National NAGPRA Office on several occasions (January 14, 2008, May 13, 2010, and May 19, 2011), each time in response to a request for public comment, and we are pleased to outline these concerns once again as the Department undertakes its discretionary review:

**Lack of clarity.** The new regulations define the term “aboriginal lands” in a vague manner that is inconsistent with other sections of the regulation. This vague definition makes it very difficult for museums to identify the tribes who are the appropriate consultation parties and to award disposition based on aboriginal lands. This definition should be revised, especially with an eye toward consistency and clarity.

**Unintended consequences.** Repatriation is about ensuring the correct disposition of human remains and cultural items. The rule prematurely limits the rights of tribes that have not yet received federal recognition. It also diminishes the prospects for consultations that can lead to findings of cultural affiliation. Any future regulations should reaffirm that the correct disposition of human remains and cultural items is the primary objective of repatriation.

**Legal jeopardy.** The NAGPRA law contains an explicit provision that protects museums from legal action when the museum repatriates a cultural item in good faith. However, the law currently offers no legal protection for museums when they award disposition of culturally

unidentifiable human remains in good faith. Any future regulations regarding culturally unidentifiable human remains should explicitly include such legal protections for museums.

**Civil penalties.** The original law established the premise that museums are suitable repositories for human remains and cultural artifacts covered by the law in the absence of a valid claim. The rule appears to reverse this premise – it specifies that right of possession can only be transferred by Native American groups or individuals affiliated with the remains. Since culturally unidentifiable human remains are, by definition, unidentifiable and therefore unaffiliated, this means that museums can never prove right of possession. The new regulation would subject museums to civil penalties if they do not transfer control of culturally unidentifiable human remains for which they cannot prove right of possession. This creates an untenable situation. Any new regulations should explicitly recognize that museums are appropriate repositories for human remains and cultural items absent a valid claim.

**Expense.** The new rule would require museums to redo portions of their original NAGPRA inventories by submitting Notices of Inventory Completion for culturally unidentifiable human remains. It also calls for additional consultation with an unknown but far larger number of tribes with aboriginal land claims in the area where the remains were removed. The research required to determine the appropriate tribes with which to consult is time-consuming and costly since there are no existing lists or sources that identify all potential claimants. After completing this research, extensive consultation is required. The cost of completing these additional steps is prohibitive. Currently, the National NAGPRA Office provides grants to support the cost of repatriating an object or artifact, but there are no grant funds available to support the extensive research and outreach necessitated by the law and critical to ultimately determining if and to whom repatriation is appropriate. To remedy this situation, we recommend establishing a fund to support the extensive work that museums undertake to comply with the law. While this may not be feasible through the regulatory process, it should be considered as part of any further legislative efforts.

As the largest national association representing all types of museums, AAM represents many museums that have raised significant concerns about their interactions with the National NAGPRA Office and the National NAGPRA Review Committee. While it is unclear how broadly and deeply the Department is reviewing the NAGPRA law and regulatory process, AAM would like to take this opportunity to raise several additional concerns on behalf of and as reported by the museums we represent:

- When the original law was enacted, it did not make any federal funding available to support the extensive work that museums would undertake to comply with the law. It is not entirely surprising that the Government Accountability Office reported earlier this year that federal agencies (holding such objects in their collections) have been slow to comply with the law. In many cases, these agencies point to a lack of resources as the reason for their non-compliance. It is important to note that despite the lack of resources available for this purpose, museums across the nation – the overwhelming majority of which are non-profit educational institutions – have hired staff, invested significant resources, and otherwise worked diligently to fulfill the policy goals of NAGPRA. While the National NAGPRA Office provides grants to support the cost of repatriating

an object or artifact, there are no grant funds available to support the extensive research and outreach necessitated by the law and critical to ultimately determining if and to whom repatriation is appropriate.

- The regulatory process and oversight of NAGPRA has been highly unusual, and has included: the incorrect determination that the proposed rule would have a “minimal impact”; an “Interim Final” rule that essentially rewrote portions of the law; and a poorly run telephone consultation that was intended to collect information from the public but where the National NAGPRA Office did not respond to any of the questions posed by participants. The telephone consultation also left several museum representatives scheduled to speak unable to do so due to apparent technical difficulties.
- The “NAGPRA at 20” symposium was also an unusual event. Initially, AAM was informally approached about the idea of participating in such an event, but as the event was being planned it became evident that a national museum association like AAM was not going to be invited to participate. We believe that the limited range of viewpoints diminished the overall impact and value of such an event. In one case, when a George Washington University museum studies graduate student asked a question about the challenges of identifying the proper ancestry and disposition of cultural items and artifacts, she was abruptly told by a staff member of the Department of the Interior’s Office of the Solicitor (Division of Indian Affairs) that if a museum made a mistake it could not be prosecuted. I would have expected that a symposium that billed itself as a “conversation about the past, present, and future of NAGPRA” would not only include the museum perspective in these conversations but would not facilitate this type of dismissive attitude toward museum professionals and graduate students who will work throughout their careers to diligently comply with the law.
- Earlier this year, an AAM member traveled from Alaska to Washington, DC to participate in a consultation before the National NAGPRA Review Committee. This museum curator reported a highly unusual circumstance: One Review Committee member identified herself as having a conflict of interest in the case at hand and recused herself from participating in the consultation. However, she then testified on behalf of one of the parties to the consultation, throwing the entire consultation into a state of uncertainty. No resolution was reached during the consultation.

All of these issues have complicated and added great uncertainty to the efforts by museums and tribal communities to work together on repatriation. I urge the Department to ensure that the National NAGPRA Office is operating at the highest level. Museums that are diligently working to ensure compliance with NAGPRA deserve nothing less.

It should be noted that the vast majority of AAM members involved with repatriation issues have found the NAGPRA process to be collaborative and consultative, and that it has strengthened community relationships and fostered cultural understanding and exchange. However, we hear continuously from museums that are greatly concerned about the regulations related to the culturally unidentifiable human remains, as outlined above. I therefore want to reiterate the concern related to culturally unidentifiable human remains: The original law created a process

for the repatriation of those Native American human remains that can be culturally affiliated to a present-day Indian Tribe. The Section 10.11 regulations, however, create a new process for the disposition of culturally unidentifiable human remains. Museums do not oppose the creation of a process to deal with culturally unidentifiable human remains, but they question whether this new process should have originated through the regulatory process or is more appropriately handled by Congress.

Finally, the GAO Report also indicated irregularities in the selection process of members of the National NAGPRA Review Committee, and I would like to summarize AAM's most recent experience on this area. As you know, the NAGPRA law requires that the Review Committee be comprised of members of the museum, scientific, and tribal communities. In June 2008, AAM submitted names of potential Review Committee Members to the Department of the Interior, and none of them were selected. However, I am very pleased to note that when AAM once again submitted names in December 2010, one of our nominees, Alex Barker, was selected. Dr. Barker, who serves as Director of the Museum of Art and Archaeology and as an Adjunct Associate Professor at the University of Missouri, will be a tremendous asset to the Committee. He is truly a seasoned professional with many years of experience working with all of the complex issues surrounding the NAGPRA law.

Thank you once again for the opportunity to submit comments as the Department undertakes its discretionary review. I welcome the opportunity to work more closely with the Department of the Interior and the National NAGPRA Office to fulfill the mandate of the original NAGPRA law.

Sincerely,

A handwritten signature in black ink, appearing to read "Ford W. Bell". The signature is written in a cursive, flowing style.

Ford W. Bell, DVM