

COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW WASHINGTON, DC
WASHINGTON, DC 20004-2401 NEW YORK
TEL 202.662.6000 LONDON
FAX 202.662.6291 BRUSSELS
WWW.COV.COM SAN FRANCISCO

JAMES A. GOOLD
TEL 202.662.5507
FAX 202.778.5507
JGOOLD@COV.COM

February 7, 2002

Robert Stearns
Manager
National NAGPRA Program
United States Department of the Interior
National Park Service
1849 C Street, N.W.
Washington, D.C. 20240

Katherine H. Stevenson
Associate Director, Cultural Resource
Stewardship and Partnerships
United States Department of the Interior
National Park Service
1849 C Street, N.W.
Washington, D.C. 20240

Re: Department of the Interior Authority Concerning
Culturally Unidentifiable Human Remains Under NAGPRA

Dear Mr. Stearns and Ms. Stevenson:

I am writing on behalf of the Society for American Archaeology ("SAA") with respect to the potential issuance by the Department of the Interior of regulations concerning culturally unidentifiable human remains ("CUHR") under Section 3006 of the Native American Graves Protection and Repatriation Act ("NAGPRA"). SAA played an active role in the development of both the concepts and the specific language contained in NAGPRA, and remains active in the implementation of NAGPRA. On behalf of SAA, I reiterate the appreciation of the SAA Committee on Repatriation, the SAA Committee that has been assigned responsibility to monitor NAGPRA developments and assist in implementation of NAGPRA, in your having taken the time to meet with SAA representatives on January 16, and for your having kept the SAA representatives informed of the Department's thinking with regard to CUHR under NAGPRA.

We understand that the Department has appointed a task force that is proceeding with the drafting of regulations pertaining to CUHR based on an interpretation that the Department was granted authority to do so by NAGPRA. We have also reviewed your January 6, 2000 letter to Dr. Keith Kintigh, then-President of SAA, Department Reference No. W42 (2275), in which you advised that the Department construes Sections 3006(c)(5) and 3011 as conferring authority on the Department to promulgate regulations concerning CUHR without further action by Congress. We provide ongoing legal advice to SAA on the interpretation and application of NAGPRA.

Robert Stearns
Katherine H. Stevenson
February 7, 2002
Page 2

In view of the Department's reported intention to promulgate regulations pertaining to CUHR, we believe it is now appropriate to provide you with our analysis of the legal reasons why the Department does not have authority to promulgate such regulations.

As the SAA Repatriation Committee representatives noted during the January 16 meeting, it is SAA's understanding based on the extensive negotiations among interested parties that led to NAGPRA --- in which SAA was a leading participant --- and the language of NAGPRA which SAA assisted in drafting, that CUHR was recognized to be a category of material separate from the other materials for which the Department was given authority to develop regulations. As is reflected in the special treatment accorded CUHR under Section 3006, and particularly the separation of CUHR from all other material for which repatriation criteria were defined and for which clear regulatory authority was agreed to and conferred by NAGPRA, it was agreed that regulatory authority would not be granted as to CUHR. Instead, the Review Committee was directed in Section 3006(c)(5) to compile an inventory of CUHR in federal agencies and museums in order to develop a baseline body of information on the dimensions of the problem and to develop "specific recommendations for developing a process for disposition of such remains." It was understood that regulatory authority would not be granted as to CUHR pending completion by the Review Committee of these assignments. Once the Section 3006(c)(5) information became available, Congress would then be in a position to determine whether amendments to NAGPRA would be appropriate to establish repatriation criteria for CUHR and extend the Department's regulatory authority to that material or to take some other course of action.

It is well-established that "[a]n agency's power to promulgate legislative regulations is limited to the authority delegated to it by Congress." Amalgamated Transit Union v. Skinner, 894, F.2d 1362, 1368 (D.C. Cir. 1990) (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)). When "there is no statute conferring authority, a federal agency has none." Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Accordingly, "[a]n agency can neither adopt regulations contrary to statute, nor exercise powers not delegated to it by Congress." Ball, Ball & Brosamer, Inc. v. Reich, 24 F.3d 1447, 1450 (D.C. Cir. 1994); see generally Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

The conclusion that Congress elected not to establish repatriation criteria for CUHR, and not to authorize the Department to promulgate regulations in the absence of such criteria is supported not only by the text of NAGPRA, but also by the statute's structure and legislative history.

Where Congress intended to establish repatriation requirements for culturally affiliated materials and other designated types of materials, Congress left no doubt that it was establishing such requirements, defining the criteria for repatriation in

Robert Stearns
Katherine H. Stevenson
February 7, 2002
Page 3

direct, mandatory language, as is contained in Sections 3002 and through 3005. And where Congress intended for the Department to promulgate regulations, it did so expressly and with a detailed definition of the subject matter of the regulations. Section 3002(b), for example, specifically requires the Department, in consultation with the Review Committee, Native American groups, museums, and the scientific community, to promulgate regulations regarding unclaimed cultural items. Under Section 3006(g), the Department is authorized to establish rules and regulations necessary to the functioning of the Review Committee. Similarly, Sections 3007(a) and (b) require the Department to promulgate regulations establishing penalties and procedures governing violations of NAGPRA. Congress' direct and explicit language in Section 3002(b) – “[unclaimed remains] shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee . . .” highlights the sharp contrast with Section 3006(c)'s provisions that “The [review] committee [not the Secretary] shall be responsible for . . . [5] . . . recommending specific actions for developing a process for disposition of [CUHR.]” When it intended to do so, Congress thus specifically defined regulations it authorized the Department to promulgate and spelled out their subject matter and deliberately stopped short of authorizing regulations for CUHR.

In another critical respect, NAGPRA's treatment of CUHR also stands in sharp contrast to how Congress dealt with the categories of material for which the Department was given regulatory authority. No definition of the criteria to be used in repatriation decisions for CUHR is provided in NAGPRA, in direct contrast to the detailed criteria established for other materials. Indeed, CUHR is mentioned in only one NAGPRA provision, Section 3006(c)(5), and Congress there defined in detail just what was to be done with respect to CUHR for the time being; the Review Committee was assigned responsibility for “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.” Section 3006(c)(5) thus not only contains no repatriation criteria for CUHR, it is directed solely to the Review Committee and confers no tasks or responsibility upon the Department. Notably absent from Section 3006(c)(5) and from the statute in general is any reference to or authorization of mandatory action regarding CUHR. Had Congress intended for the Department to issue regulations applicable to CUHR it could have done so in the same manner as it did for unclaimed cultural items in Section 3002(b). Congress could also have included CUHR in Section 3005 which addresses repatriation. Instead of doing so, however, Congress chose not to include CUHR in these sections and authorized the Review Committee only to formulate recommendations on how a CUHR process might be developed.

Robert Stearns
Katherine H. Stevenson
February 7, 2002
Page 4

The Supreme Court has repeatedly reminded agencies that “it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.” BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994). “Congress is assumed to be conscious of what it has done, especially when it chooses between two available terms that might have been included in the provision in question.” American Petroleum Institute v. EPA, 198 F.3d 275, 279 (D. C. Cir. 2000). The authorization to take regulatory action in some sections of NAGPRA, but not in others, indicates Congress’ intent only to confer regulatory authority as to those materials for which Congress established repatriation criteria.

NAGPRA’s legislative history also confirms that Section 3006(c)(5) was not intended to establish repatriation criteria or regulatory authority for CUHR, but rather to develop information based on which Congress could examine the question further. The House Committee Report on NAGPRA acknowledged that the Act covers “the repatriation of culturally affiliated items, “ as opposed to culturally unidentifiable ones. H.R. Rep. No. 101-877, at 10 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4369 (emphasis added). The House Report explains that Congress drew this distinction because it recognized that “[t]here is general disagreement on the proper disposition of” CUHR. H. R. Rep. No. 101-877, at 16. Unlike culturally affiliated material, for which repatriation criteria had been agreed, there was no consensus regarding how culturally unidentifiable items should be treated. This is because CUHR is, by definition, culturally unidentifiable and therefore presents extraordinarily complex issues as to how to determine whether repatriation is appropriate and, if so, to whom. Congress therefore chose to deal with the unsettled and controversial issue of CUHR not by establishing repatriation criteria and granting the Department authority to issue regulations, but rather by directing the Review Committee to recommend to Congress a process for Congress to consider at some future point.

This conclusion is reinforced by an early draft of NAGPRA which spelled out that the Review Committee was to make its recommendations directly to Congress. As originally introduced, NAGPRA provided that “[n]ot later than 6 years after the date of establishment of the committee, the committee shall report on the inventory, together with the recommendations, to the Secretary and to the Congress.” H.R. 5237, 101st Cong. § 7 (1990) (July 10, 1990). Although this language was omitted from the final text of NAGPRA, the House Committee Report made clear that Congress’ intent remained to receive further information on CUHR, not for the Department to proceed unilaterally to develop its own repatriation criteria. The House Committee thus states that it “looks forward to the Review Committees [sic] recommendations in this area.” H.R. Rep. No. 101-877, at 16 (emphasis added). In short, Congress clearly recognized the difficulties associated with resolving what should be done with CUHR, and intended to revisit these issues with the benefit of the Review Committee’s report.

Robert Stearns
Katherine H. Stevenson
February 7, 2002
Page 5

In the January 2000 letter to SAA, and during the January 16, 2001 discussions, the Department has advised that it interprets Section 3011 of NAGPRA as a source of regulatory authority for CUHR. Section 3011, however, provides no basis for overriding Congress' decision in Section 3006(c)(5) to request recommendations and not mandate regulatory action. Agencies "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 231 n. 4 (1994) (emphasis added). Here, Congress specifically charged the Review Committee, not the Department, with responsibility for studying CUHR and recommending future action. Section 3011 thus does not provide justification for overriding Section 3006(c)(5) or converting an assignment given the Review Committee into regulatory authority for the Department.

When an agency is granted general rulemaking authority, such as the Department construes Section 3011 to mean, that authority may not "trump the specific provisions of" a statute. Natural Resources Defense Council, Inc. v. Reilly, 976 F.2d 36, 41 (D.C. Cir. 1992); see also National Mining Assoc. v. Department of the Interior, 105 F.3d 691, 694 (D.C. Cir. 1997) (invalidating a Department of the Interior rule). General rulemaking authority also does not empower an agency "to extend its authority . . . beyond the limits established by Congress." Reilly, 976 F.2d at 41. An agency may not "rely on its general authority to make rules . . . when a specific statutory directive defines the relevant functions of [the agency] in a particular area." American Petroleum Institute v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995).

Section 3011 cannot serve as a general grant of authority that overrides Section 3006(c)(5) for another important reason. By its terms, Section 3011 is concerned with the timing of regulations, not their content or scope, providing that "[t]he Secretary shall promulgate regulations to carry out this chapter within 12 months of November 16, 1990."

Congress was well aware that the Review Committee's report would not be ready for implementation by November 16, 1991, the date by which NAGPRA regulations were required to be promulgated under Section 3011. Because of the general disagreement surrounding CUHR, Congress directed the Review Committee to consult with "Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups" in formulating its recommendations. 25 U.S.C. § 3006(e). There was general recognition that this would be a lengthy process; indeed, Congress initially proposed to allow the Review Committee up to six years to report on CUHR. See H.R. 5237, 101st Cong. § 7 (1990). There was no expectation that the Review Committee's report would be implemented by the November 16, 1991 deadline for regulations contemplated by Section 3011. It is evident, therefore, that CUHR falls outside the

COVINGTON & BURLING

Robert Stearns
Katherine H. Stevenson
February 7, 2002
Page 6

scope of issues Congress intended for the Department to address under Section 3011. Section 3011 sets a schedule for the implementation of regulations authorized elsewhere in NAGPRA. It does not confer general rulemaking authority for other matters.

In sum, Section 3006(c)(5) pointedly refrains from authorizing regulatory action concerning CUHR and is limited to directing the Review Committee to develop information necessary for Congress to address what should be done with CUHR. We respectfully submit that it is not consistent with the structure, language and history of NAGPRA for the Department to construe Section 3011 as overriding Section 3006(c)(5) and giving the Department regulatory authority beyond the tasks assigned by Section 3006(c)(5) to the Review Committee.

We appreciate your continued willingness to consult with SAA regarding NAGPRA, and thank you in advance for your consideration of this issue.

Sincerely,



James A. Goold

cc: C. Mattix, Esq.