

June 12, 2002

National Park System Advisory Board

RECOMMENDATIONS REGARDING THE NATIONAL PARK SERVICE PROCESS
FOR MAKING DETERMINATIONS OF CULTURAL AFFILIATION
UNDER THE NATIVE AMERICAN GRAVES PROTECTION
AND REPATRIATION ACT

RECOMMENDATIONS TO THE NATIONAL PARK SYSTEM ADVISORY BOARD
REGARDING A REVIEW OF THE NATIONAL PARK SERVICE PROCESS FOR MAKING
DETERMINATIONS OF CULTURAL AFFILIATION UNDER THE NATIVE AMERICAN
GRAVES PROTECTION AND REPATRIATION ACT

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Introduction

In July 2000, then National Park Service Director Robert Stanton requested a servicewide review of the process used by the National Park Service (NPS) to make determinations of cultural affiliation of human remains and associated funerary objects as required by the Native American Graves Protection and Repatriation Act (NAGPRA). This request grew out of concerns raised by the Hopi tribe and by the NAGPRA Review Committee regarding cultural affiliation decisions by some units of the National Park System in the Southwest as well as a desire to evaluate how NPS has carried out the pertinent provisions of NAGPRA over the past decade.

Margaret (Margie) Brown, a NPSAB board member served as the lead, assisted by board member Marie Ridder Ms. Brown and Ms. Ridder received professional staff assistance and advice from Fred York, Ph.D., NPS Pacific West Regional Anthropologist; Gary Somers, Ph.D., Chief, Natural and Cultural Resources, Shenandah National Park; Paul Scolari, Historian and Tribal Liaison Officer, Golden Gate National Recreation Area; Ronnie Emery, Historian, Oglala Lakota and Cheyenne River Sioux, American Indian Liaison Office; and Patricia Parker, Ph.D., Chief, American Indian Liaison Office. These individuals all have direct experience in working with NAGPRA and its implementing regulations.

The Review Objective

The objective of the review was to determine whether or not the process used to make determinations of cultural affiliation has been reasonable and consistent.

The Review Process

The NPSAB members were provided with individual briefings concerning the pertinent elements of the NAGPRA statute and implementing regulations by John Robbins, Assistant Director, Cultural Resources Stewardship and Partnerships and Francis P. McManamon, Departmental Consulting Archeologist and Program Manager, Archeology and Ethnography, and Chief Archeologist.

The review was carried out over a 4-month period between August and November 2001. The American Indian Liaison Office prepared notebooks of the materials listed below in consultation with NPS NAGPRA staff. NPSAB members and NPS staff reviewed the materials prior to meeting in Seattle the week of September 10 to analyze the materials as a group. In September and October, a draft report was prepared. There was a second meeting in Santa Fe the week of October 22 to put the draft report into final form.

Background Materials

The recommendations are based on a review of the NPS consultation process with affected and potentially affected Native American groups¹, NPS's gathering and consideration of evidence, and NPS's commitment of finances and other resources involved in making determinations of cultural affiliation. The following materials were referred to—

- 25 U.S.C. 3001 et seq. Native American Graves Protection and Repatriation Act, Public Law 101-601, November 16, 1990.
- 43 CFR Part 10 Native American Graves Protection and Repatriation Regulations

¹For purposes of this document, "Native American" and "Native American group (s)" means Indian tribes, Alaska Natives and Native Hawaiians and Native Hawaiian organization as defined by NAGPRA.

- United States Department of the Interior, National Park Service Handbook, Native American Graves Protection and Repatriation Act, 1998
- *Federal Register*: February 10, 2000 (Volume 65, Number 28) (NAGPRA Review Committee Advisory Findings and Recommendations Regarding Human Remains and Associated Funerary Objects in the Control of Chaco Culture National Historical Park).
- Selected NAGPRA Review Committee Meeting Minutes:
 - NAGPRA Review Committee, Sixteenth Meeting
December 10-12, 1998, Santa Fe, NM
 - NAGPRA Review Committee, Seventeenth Meeting
May 3-5, 1999, Silver Spring, Maryland
 - NAGPRA Review Committee, Eighteenth Meeting
November 18-20, 1999, Salt Lake City, Utah
 - NAGPRA Review Committee, Twentieth Meeting
December 11- 13, 2000, Nashville, Tennessee
- House of Representatives; Report 101-877, Providing for the Protection of Native American Graves, and for Other Purposes, 101st Congress 2nd Session (NAGPRA legislative history).
- Thirty-four Notices of Inventory Completions published in the *Federal Register* by units of the National Park System.²
- Notice of Proposed Disposition of Human Remains and Cultural Items from four parks.
- Park-specific information including (1) a chronology of how potentially culturally affiliated tribes were consulted, (2) a list of documents/expert witnesses which/who were consulted, and (3) the estimated costs involved in research and consultations to determine. cultural affiliation.
- *National Park service Management Policies 2001*.

Overview of NPS Determinations of Cultural Affiliation³

Of the various requirements established by NAGPRA, the focus of this review was concerned only with the provision in the law that required all NPS units to complete an inventory of all Native American human remains and associated funerary objects in their control (Public Law 101-601, Sec. 5). All NPS units completed their item-by-item inventories by November 16, 1995, as required by the statute. One hundred and three NPS units identified a total of 6,005 Native American human remains and 85,524 associated funerary objects in their control. Cultural affiliation determinations were made for approximately 75 percent of these Native American human remains, while approximately 25 percent of these remains were found to be culturally unidentifiable, *i.e.*, cultural affiliation could not be determined.

NPS units that identified culturally affiliated human remains in their control notified the potentially culturally affiliated Native American groups by May 16, 1996, in conformance with the statute. Further, by January 2001, 32 NPS units had published Notices of Inventory Completion in the *Federal Register*, thereby finalizing and making public their determinations of cultural affiliation. The bulk of the review carried out by the subcommittee focused on these published Notices of Inventory

²The notices came from 32 parks. Two parks published two notices each.

³Information in this section was provided by the NPS Archeology and Ethnography Program.

Completion, as well as supplemental information provided by the NPS units that completed these notices.⁴

FINDINGS AND RECOMMENDATIONS

Based on the information provided, the review resulted in the finding that the process used by the National Park Service to make determinations of cultural affiliation has met the standards of the statute. However, the NPS cultural affiliation process can be improved, based on the following findings and recommendations.

1. TRADITIONAL ASSOCIATION AND CULTURAL AFFILIATION

Finding—"Cultural affiliation" as defined by NAGPRA and "traditional association" as defined by National Park Service Management Policies 2001 are different. However, in some of the Notices of Inventory Completion reviewed, distinctions between the two types of relationships are not clear. Thus, not distinguishing between the two relationships has affected the process by which NPS makes determinations of cultural affiliation.

Park managers have in the past conducted inquiries to determine which groups are "traditionally associated" with specific park units for various purposes including soliciting specialized knowledge to help guide park management concerning resource protection, sacred sites, and special park uses.

National Park Service Management Policies 2001 define "traditionally associated peoples" as "tribes, communities, and kinship units traditionally associated with a particular park when (1) the entity regards park resources as essential to its development and continued identity as a culturally distinct people; (2) the association has endured for at least two generations (40 years); and (3) the association began prior to the establishment of the park."

Thus, the term "traditional associated peoples" as used by the NPS describes a relationship connecting contemporary people with **places** to which they have ancestral ties, *i.e.*, to the park itself

In contrast, as it is used in NAGPRA "cultural affiliation" is a relationship between Native Americans and **cultural items**, *i.e.*, those cultural items in a park's collections subject to repatriation under NAGPRA.

NAGPRA defines "cultural affiliation" as 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." NAGPRA also requires museum's and federal agencies to establish the "geographical and cultural affiliation of such items in their collections." Therefore, "cultural affiliation" refers to a relationship to cultural items, *i.e.*, human remains, associated funerary objects, unassociated funerary items, sacred objects and (objects) of cultural patrimony.

Many parks begin consultations regarding cultural affiliation with all Native American groups traditionally associated with a park. However, traditional associations with a park may or may

⁴There are a large number of Notices of Inventory Completion underway towards publication in the *Federal Register*, but only published notices were considered during this review.

not correspond with cultural affiliation to cultural items in a park's collections. Over time, different Native American groups may have occupied, used, or valued parks at different times, or in different ways. All of these Native American groups may be traditionally associated with a park, but all, some, or none of them may be culturally affiliated with all, some, or none of the cultural items in a park's collections.

> Recommendation 1

The NPS NAGPRA Handbook should incorporate further guidance to clarify the meaning and use of "cultural affiliation" as defined in NA GPRA and "traditionally associated people" as defined in National Park Service Management Policies 2001.

2. CONSULTATION

Finding—All of the NPS units that published Notices of Inventory Completion made earnest efforts to conduct effective consultation with Native American groups. The NPS has devoted considerable resources to consulting with tribes.

In some cases, a park has consulted through collective meetings with participation by all Native American representatives potentially culturally affiliated with cultural items in a park's collections. This collective consultation may not satisfy Native American groups' needs for consultation on an individual tribal basis. Without the opportunity for consultation on an individual tribal basis, some tribally specific and confidential information important to the decision-making process regarding cultural affiliation might not be considered. The lack of pertinent information might hinder the NPS' ability to meet the standards of "preponderance of evidence" and "totality of circumstances" as required by NAGPRA.

> Recommendation 2

In many cases the NPS has been responsive to requests for consultation on an individual tribal basis, however, further guidance in the NPS NAGPRA Handbook is needed to ensure that the NPS understands the importance of, and is responsive to, requests for individual tribal consultation regarding cultural affiliation, and that the NPS offers such opportunities whenever appropriate.

3. DETERMINING CULTURAL AFFILIATIONS

Finding—The administrative record available for review shows a major effort to consider all lines of evidence cited in NAGPRA, but does not always demonstrate precise determinations of cultural affiliation based on the "preponderance of evidence" and "totality of circumstances."

As specified in NAGPRA, cultural affiliation is established when the preponderance of the evidence supports such a determination. The law gives no pre-eminence to any evidence. In some cases, the NPS has culturally affiliated all cultural items in a park's collections with all Native American groups who are traditionally associated with a park even when there may have been sufficient evidence to make a more precise determination.

> Recommendation 3

The NPS should strive to make the most precise determinations of cultural affiliation possible regarding each cultural item in a park's collections. Further guidance in the NPS NAGPRA Handbook is needed.

4. TECHNICAL IMPROVEMENT IN NOTICES OF INVENTORY COMPLETION

Finding—Notices of Inventory Completion published in the *Federal Register* provide an opportunity to impart significant information to the public in general and the affected tribes in particular. The information contained in the notices has improved over time, however, the full range of information gathered by parks during the cultural affiliation determination process is not always reflected in the published notices, for example, notices vary in the completeness of their descriptions of Native American participation in the repatriation process.

> Recommendation 4

Notices should consistently reflect each Native American group's status in the repatriation process specifically noting if there are agreements among groups regarding which group will lead in a repatriation, which groups, if any, have elected to withdraw from a repatriation, and any other pertinent information.

The NPS NAGPRA Handbook should provide additional guidance about preparing notices, emphasizing consistent types of information and consistent format.

5. FURTHER PUBLIC PARTICIPATION

Finding—This review focused on the NPS cultural affiliation process as represented in the administrative record described above. The views of Native Americans regarding the NPS cultural affiliation process is known only through these materials, particularly as described in the selected NAGPRA Review Committee Meeting Minutes.

> Recommendation 5

Further discussions with Native Americans and others affected by NAGPRA should be included as the NPS considers developing the guidance called for in this report.

This report is respectfully submitted to the National Park System Advisory Board by Margaret Brown with acknowledgment of and appreciation to fellow Board Member Marie Ridder and staff of the National Park Service for their invaluable assistance.