

American Association of Physical Anthropologists

August 11, 1999

Native American Graves Protection and Repatriation Committee
c/o Departmental Consulting Archeologist
National Park Service (2275)
1849 C St. NW. (NC340)
Washington DC, 20240

Dear Committee Members:

The American Association of Physical Anthropologists (AAPA) appreciates the opportunity to comment on the "Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains." The AAPA is the leading professional organization for physical anthropologists in the United States. We currently have more than 1700 members with research interests in all areas of human biology, including the study of human skeletal remains spanning the entire history of humankind in all areas of the world. The AAPA was part of the coalition of Native American and scientific groups that worked for the passage of NAGPRA. We continue to support the key goal of NAGPRA, which is to ensure that culturally affiliated Native American groups are allowed to make decisions regarding the disposition of their ancestral remains.

We appreciate the difficulty of the task you face in attempting to develop recommendations for "specific actions for developing a process for disposition" of culturally unidentifiable human remains. This is one of the most important duties Congress gave to your committee. We believe the draft principles provide a good starting point for the development of a recommendation for such a process. However, there are several areas where the draft principles extend NAGPRA beyond the legislative intent expressed in the statute and in the associated House and Senate reports.

The draft principles are based on the flawed premise that repatriation of culturally unidentified human remains is the intent of the NAGPRA (section A.1.B., for example). Instead, its purpose is to provide federally recognized groups with the authority to determine the "appropriate disposition" of culturally affiliated remains. Culturally affiliated groups have used this authority in many different ways. In some cases they have decided on repatriation and reburial while in others they have determined that an appropriate disposition of their ancestral remains is to allow them to be maintained in museums. It is presumptuous of the committee to imply that these alternative dispositions are inappropriate or in some way in conflict with the fundamental goal of NAGPRA.

Culturally unidentifiable remains, by definition, are those of people who do not have a relationship of shared group identity with a modern tribe. Modern tribes, therefore, do not have the authority under NAGPRA to make decisions about the disposition of culturally unidentifiable collections. The task of your committee is to balance the absence of a relationship of shared group identity between culturally unidentified remains and any specific group of modern people against the value these remains have as sources of information about our collective past. Culturally unidentifiable remains have enormous scientific value because of the broad implications the information they can yield has for basic and applied research in the social and natural sciences, medicine, and forensic work. That is, these remains have value for learning about life in distant times, as well as importance for significant present-day medical and forensic concerns. In many cases, these are remains of people who have many living descendants that may not be tribal members or even identify themselves as Native Americans. In other cases, culturally unidentifiable remains may be those of people from extinct groups very distantly related to any modern people.

Because many people who do not identify themselves as Native Americans have a relationship to and thus a valid interest in the disposition of culturally unidentifiable human remains, Congress wisely decided to exclude them from the scope of the regulatory authority provided by NAGPRA. Instead, Congress instructed your committee to recommend "specific actions for developing a process for their disposition." This is in stark contrast to other areas of NAGPRA, such as its penalty provisions, in which the Secretary of Interior is explicitly instructed to develop regulations to carry out a provision of the act. In formulating your recommendations, it is important for you to bear this in mind: the Secretary of Interior does not have the authority to implement regulations that compel museums to give culturally unidentifiable remains to any group or coalition of groups. Such regulations are clearly beyond the scope of the Secretary's regulatory authority.

On the other hand, making recommendations for regulations that identify ways in which museum, scientific, Native American, and other groups can, on a *voluntary* basis, develop mutually satisfactory agreements regarding the disposition of culturally unidentifiable remains is clearly within the scope of the regulatory authority the Secretary of Interior has under NAGPRA. These are the kinds of recommendations that you should be considering. Your apparent misunderstanding of the authority the Secretary of Interior has for promulgating regulations under NAGPRA is a flaw that runs through the proposed guidelines. To be useful to the Secretary, the actions you propose must be within the scope of his authority and much of what the guidelines propose is not.

In section A.4.b. the assumption is made that repatriation is "the most reasonable and consistent choice" for the disposition of culturally unidentified human remains. This may be the opinion of some members of the committee, but we see no basis for this conclusion in the statute. Why is giving culturally unidentifiable remains to culturally unaffiliated groups the most "reasonable choice" when the goal of

NAGPRA is to give culturally affiliated groups the opportunity to determine the disposition of remains they are culturally affiliated with? There are other choices that can and are being made. We believe that such choices should be made on an institutional or local basis through consultation between the museums and the culturally unaffiliated groups that have an interest in specific collections of culturally unidentifiable remains.

One ethically problematic aspect of NAGPRA is its denial of the right to make decisions about repatriation to non-federally recognized tribes simply because they lack federal recognition. Forcing such groups to be adopted by a federally recognized group as is suggested in section C.2.a. is an effective, if demeaning, solution to this inherent inequity in the law. Pointing to the Mashpee case as an example of a generally applicable solution to this problem is misleading. Everyone recognizes that such clear-cut situations in which there is complete agreement between a museum, a federally recognized group, and a non-federally recognized group are going to be exceedingly rare. Using the Titicut as an example is also problematic because most of the rest of the proposed guidelines are directed towards speeding the repatriation of culturally unidentified remains. This apparent objective of the guidelines would, in effect, give the right to make decisions about the disposition of culturally affiliated remains to a small number of select groups that have the money and political clout necessary to obtain federal recognition in the future within a legal structure designed to deny federal recognition and its associated entitlements to as many Native American groups as possible.

The guidelines provide no guidance whatsoever for assessing the strength of the relationship that must exist between federally recognized and federally non-recognized groups in order for a BIA listed tribe to bestow federal recognition upon another non-recognized group. The Mashpee example you cite is an inappropriate model for such cases since it involved a federally recognized group (the Wampanoag Tribe of Gay Head) that was clearly culturally affiliated with a set of remains (and thus clearly an "appropriate" claimant) giving its approval to repatriation to a non-federally recognized group which was also an appropriate claimant, albeit one without legal standing. The situations that you are attempting to address in the guidelines are very different from this Mashpee example: by definition, there are no federally recognized tribes that are culturally affiliated with culturally unidentifiable remains. The committee's apparent confusion over this issue leaves the door open for abuse. For example, what will legally prevent Tribe A in Montana that has federal recognition from giving its authority to Tribe B, a federally unrecognized group in Connecticut, when there is no relationship of shared group identity between Tribe A in Montana and the remains in question?

We strongly object to the assertion in section C.2b. that "human remains for which there is little or no information... should be speedily repatriated since they have little educational, historical or scientific value." This is simply not true. Human remains without contextual information (e.g., provenience, historical context, and so on) do have very significant educational and scientific values. In many respects they are comparable to the extensive collections of well-preserved unprovenienced artifacts from burial contexts that constitute the bulk of the teaching collections used by archaeologists in the United States. For example, these unprovenienced skeletal remains serve an extremely important role both in teaching students osteology and in forensic research. Although many of the culturally unidentifiable skeletal remains in teaching collections are from people of European, Asian, and African ancestry, unprovenienced Native American remains are a key component of these collections. They give students an important comparative perspective on human variation and the differences between ancient and modern materials that is available from no other source.

In the long term, allowing us to continue teaching osteology with unprovenienced, culturally unidentifiable Native American remains will be beneficial for both scientists and Native Americans. The students who are learning osteology today are the ones who will make identifications of human remains in the future and who will provide information essential for determining whether the newly discovered remains are those of ancient Native Americans or those of more recent immigrants to the New World. Because of this important scientific value, these unaffiliated remains should not be "speedily repatriated." Moreover, it is likely that DNA is preserved in culturally unidentifiable remains. In the future this genetic evidence has the potential to provide important information on cultural affiliation. With such information in hand, the likelihood of being able to affiliate remains with a federally-recognized tribe increases.

The Committee is correct in asserting (section C.3.b.) that invasive testing for the purpose of documentation is not required under the statute. However, the guidelines fail to mention that the Department of Interior has taken the position that scientific analysis, especially if it has the potential to clarify the legal status of remains is both permissible and, in many cases, highly desirable. This is entirely consistent with NAGPRA's requirement that cultural affiliation be established by a "preponderance" of the evidence from all relevant sources including "biological, archaeological, [and] anthropological" information. We strongly object to the stipulation that such testing "may be performed if agreed upon by the parties in consultation." This condition appears to give groups whose relationship to a set of remains is yet to be determined the authority to subvert the NAGPRA process by denying permission for the scientific studies necessary to determine preponderance of evidence (including that from biological, archaeological, and anthropological sources) in a specific case. For example, it would appear to give a group that was consulted as a courtesy owing to their concerns about the identity of unidentified remains the authority to deny investigators the ability to conduct tests to determine if a set of remains derived from recent non-Native American immigrants to the United States or ancient Native Americans.

There are clear instances in which invasive testing, such as radiocarbon dating, provides the only way to assure that inappropriate repatriations do not take place. For example, this is what the Department of Interior has decided to do as part of its attempt to determine the legal status of the Kennewick remains. It is unacceptable to give one of the parties consulted as part of an investigation into the identity of a set of remains the authority to deny other groups with equally valid claims the ability to obtain the scientific information necessary to resolve a dispute based on the preponderance of *all* relevant sources of information as is clearly stipulated in the statute.

The problems posed by the failure of the guidelines to provide a basis for determining which groups have the standing to make decisions about the testing of human remains is underscored in section D.1 in which it is stated that "joint recommendations by institutions, Federal

agencies, or states and appropriate claimants" should provide the basis for making decisions about the disposition of culturally unidentified human remains. Who are the "relevant parties" (D.I.a.) that the committee envisages as having the authority to enter into such agreements? The examples given, such as the Nebraska case, do not give us confidence that such agreements would actually involve non-coercive agreements produced through consultation with all relevant parties.

The committee's suggestion in section D.2. that "...it is reasonable to look for regional solutions that best fit regional circumstances" makes a great deal of sense. However, it must not be assumed that simply because remains from Site A are located in an area Tribe A currently inhabits that these culturally unidentified remains somehow have a special relationship with Tribe A. This is *not* what the statute envisages as cultural affiliation and should not be used as the basis for a weakened or attenuated interpretation of affiliation that is extended to culturally unaffiliated remains. That said, consultation involving all "relevant parties" is a productive and important part of the discussion and should be encouraged. We strongly believe that such consultation should involve *all* groups and individuals with a potential relationship to a set of human remains in a meaningful way, not just those groups and individuals that have the financial and political resources to assert their views in the legal arena.

Thank you for considering the views of the American Association of Physical Anthropologists on this important issue. I look forward to discussing our concerns with you at your next committee meeting.

Sincerely,

/s/

Clark Spencer Larsen
President, American Association of Physical Anthropologists