

United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W
Washington, D.C. 20240

IN REPLY REFER TO

W42(2275)

JAN 6 2000

Keith W. Kintigh
President
Society for American Archaeology
900 Second Street NE #12
Washington, DC 20002-3557

Dear Dr. Kintigh:

Secretary Babbitt has asked that I respond to your letter of April 13, 1999, that addresses three critical issues in implementation of the Native American Graves Protection and Repatriation Act (NAGPRA). I shall address each of these issues in turn:

1. Are there any legal limitations to the concept of joint cultural affiliation?

NAGPRA requires that each Federal agency and museum determine the cultural affiliation of Native American human remains and associated funerary objects in its possession or control [25 U.S.C. 3003]. "Cultural affiliation" is defined 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 [25 U.S.C. 3001(2)]. Criteria for determining cultural affiliation have been established by regulations at 43 CFR 1014 (c).

Congress seems to have contemplated the possibility of more than one tribe or organizations being culturally affiliated with a particular cultural item. In the definition of "Native Hawaiian organization," Congress included both the Office of Hawaiian Affairs and Hui Malamna I Na Kupuna O Hawaii Nei, as well as any other organizations that fit the statutory criteria [25 U.S.C. 3001 (11)]. Nearly half of the Notices of Inventory Completion published between 1990-1998 indicate cultural affiliation with more than one Indian tribe or Native Hawaiian organization.

Within this context, it is clear that the primary "limitation" to determining joint cultural affiliation is one of "reasonableness." For example, you note on page two of your letter an example from the Southwest where the Apache tribes can be considered "...a single, well-defined group [that] has been divided.. into more than one administratively distinct recognized tribe." Blacks Law Dictionary defines reasonable as "fair, proper, just, moderate, suitable under the circumstances" [1990, page 1265]. Given the unique combinations of the available geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, and other relevant information or expert opinion applicable to each situation, as well as the challenge of determining the preponderance of these various lines of evidence, it seems natural that reasonable people might arrive at different determinations. In situations where a Federal agency or museum has made a determination of cultural affiliation with which you take issue, we recommend you raise your concerns with them directly.

Federal agencies and museums are required to publish notices of inventory completion and notices of intent to repatriate. These notices include determinations regarding the cultural affiliation of human remains and associated funerary objects. A copy of each notice is to be provided to the Secretary of the Interior who is required to publish it in the Federal Register. Publication by the Department of the Interior does not indicate approval or agreement by the Secretary. As you pointed out in your April 20, 1999, testimony before the Senate Indian Affairs Committee, the Department's role in publication of these notices is administrative. Given the nature of our role, the National Park Service is unable to suspend publication of Notices of Inventory Completion that include joint cultural affiliation.

2. Is congressional action required in order to repatriate culturally unidentifiable human remains?

No. The disposition of culturally unidentifiable human remains is specifically addressed by the statute [25 U.S.C. 3006 (c)(5)] and the Secretary of the Interior is required to promulgate regulations to implement the statute as a whole [25 U.S.C. 3011]. A separate section of the regulations has been reserved to address the issue of culturally unidentifiable human remains [43 CFR 10.111]. Until this section of the regulations is complete, museums and Federal agencies are required to retain possession of culturally unidentifiable human remains unless legally required to do otherwise, or recommended to do otherwise by the Secretary of the Interior [43 CFR 10.9 (e)(6)]. Over the past few years, the Review Committee has been asked by several Federal agencies and museums to make specific recommendations regarding the disposition of culturally unidentifiable human remains in their possession or control. In some, but not all of these cases, the Review Committee and the Secretary of the Interior concurred with the Federal agency or museum's request. Each of these recommendations was reviewed by the Office of the Solicitor and found to be consistent with the statute.

3. What is the status of written guidance on excavations and discoveries?

We agree that additional guidance is needed to ensure that appropriate and adequate consultation and documentation of inadvertently discovered human remains and other cultural items occur. Additional guidance clarifying the excavation and discovery requirements in 25 U.S.C. 3002 and 43 CFR 10.3-10.7 is being developed currently.

I hope that these responses help clarify your concerns regarding the implementation of the NAGPRA.

Sincerely,

/s/

Katherine H. Stevenson
Associate Director, Cultural Resource
Stewardship and Partnerships