



## SOCIETY FOR AMERICAN ARCHAEOLOGY

August 30, 1999

NAGPRA Review Committee  
c/o Departmental Consulting Archaeologist  
National Park Service (2275)  
1849 C St. NW. (NC340)  
Washington DC, 20240

Dear Members of the Review Committee:

SAA appreciates this opportunity to comment on the NAGPRA Review Committee's *Draft Principles of Agreement Regarding the Disposition of Culturally Unidentifiable Human Remains*. SAA is the leading organization of professional archaeologists in the United States. Starting in 1989, SAA led the scientific community in working with congressional staff on the language of NAGPRA. We provided testimony at Senate and House Committee hearings and helped form a coalition of scientific organizations and Native American groups that strongly supported NAGPRA's enactment. Since that time, we have closely monitored its implementation and have consistently provided comment to the Department of the Interior and to the NAGPRA Review Committee. We urge our members always to work toward the effective and timely implementation of the Act.

SAA approaches the difficult issue of the disposition of culturally unidentified human remains recognizing the legitimacy of Native American interests in determining the disposition of their ancestors' remains and the legitimacy of scientific interests in learning from the study of those remains. We believe that conflicting claims concerning the proper treatment and disposition of particular human remains must be resolved on a case-by-case basis through consideration of the scientific importance of the material, the cultural and religious values of the interested individuals or groups, and the strength of their relationship to the remains in question. The scientific importance of particular human remains should be determined by their potential to aid in present and future research, and thus depends on professional judgments concerning the degree of their physical and contextual integrity. The weight accorded any claim made by an individual or group concerning particular human remains should depend upon the strength of their demonstrated biological or cultural affinity with the remains in question.

The study of human remains, Native American and otherwise, has contributed a great deal towards our knowledge of the past. With recent scientific developments, there is a great potential for learning much more. Mortuary evidence is an integral part of the archaeological record of past culture and behavior throughout the world. It informs directly upon social structure and organization and, less directly, upon aspects of religion and ideology. Human remains, as an integral part of the mortuary record, provide unique information about demography, diet, disease, and relationships among human groups. Research in archaeology, bioarchaeology, biological anthropology, and medicine depends upon responsible scholars having collections of human remains available both for replicative research and research that addresses new questions or employs new analytical techniques.

Congress intended that NAGPRA provide the balance between traditional and scientific interests and due consideration for multiple views. Both the legislative history of NAGPRA and the law itself articulate this intended balance. SAA commends the Review Committee on its explicit commitment to adhere to the law, and its acknowledgment of the various legitimate public interests in Native Americans, our country's past, and the scientific information conveyed by human remains. While SAA supports many aspects of the Draft Principles, as written, these Draft Principles nevertheless fail to achieve a balance of all affected parties' interests and they sometimes create a context in which the interests of science, museums, and public education are minimized or ignored.

Our comments on the Draft Principles follow. These comments are presented in two parts: First, we provide some commentary on the general topics indicated by the main headings in the Review Committee's Draft Principles along with some critical analysis of the Committee's approach. Second, we provide more abbreviated, line-by-line, comments on the specific wording of the draft principles that we hope may help as the Committee moves forward with recommendations. We regret the redundancy but hope to be as clear and helpful as possible.

### SAA's Narrative Comments on Review Committee Draft

#### A. Intent of NAGPRA

Legislative Intent. While repatriation is a crucial component of NAGPRA, the intent of the law is not repatriation per se, as the draft indicates, but rather to assure lineal descendants' and culturally affiliated tribes' control over the disposition of human remains and certain types of defined cultural items. De-emphasizing alternative dispositions denigrates the thoughtful decisions made by tribes or lineal descendants regarding the appropriate disposition and care of important items. While the intent of NAGPRA is to put into the hands of Native peoples the decisions regarding certain types of culturally affiliated material, as the draft suggests, it omits the fact that the legislative history and statute are clear that NAGPRA is also intended to be a context in which Native peoples, scientists, and others with

legitimate interests in our heritage could find common ground and develop productive relationships. Limiting the intent of NAGPRA to repatriation and protection fails to acknowledge the productive relationships that can, and have, developed among tribes and museums and federal agencies in the course of carrying out the law.

**Specific Statutory Mandates.** The statute mandates the disposition and control over all Native American human remains and cultural items excavated or discovered on Federal or tribal lands after November 16, 1990. For items in federal agency and museum collections, what the statute mandates is not repatriation but providing culturally affiliated tribes with the authority to determine the disposition of culturally affiliated human remains and cultural items. While the development of regulations for unclaimed remains (those excavated after November 16, 1990) is clearly specified in the Act, it should also be noted that nowhere is the development of regulations for culturally unidentified human remains (those from agency and museum collections) so stipulated. Moreover, regulations for unclaimed material are specifically the responsibility of the Secretary of the Interior, whereas NAGPRA's discussion of culturally unidentifiable remains is brief and consists exclusively of assigning the NAGPRA Review Committee the task of "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."

**Implications of the statute.** The Review Committee is incorrect in stating that the statute implicitly puts disposition "primarily in the hands of Native people." Nor does the statute imply that "repatriation is the most reasonable and consistent choice." Congress consistently expressed its intent that NAGPRA provide a context for museums and federal agencies and tribes to come to agreements regarding the appropriate disposition of material.

Is it the Review Committee's position that, having listened to all arguments presented, it considers Native Americans' beliefs as overwhelmingly more important than those of other interested parties that are recognized in the statute? If so, then the Review Committee needs to clarify that this is explicitly its philosophy and make that recommendation to the Secretary, rather than present this position as an assessment of the statute. SAA would strongly disagree with such a position, and encourages the Review Committee to seek ways to incorporate explicitly the interests of science and the broader public that are clearly recognized in the statute and the legislative history.

#### *B. Culturally Unidentifiable Human Remains Defined*

**Change in determinations of culturally unidentified.** While we agree that some remains initially identified as culturally unidentifiable may change to "culturally affiliated" with new information, it would be unrealistic to assume that, with sufficient time and new information all culturally unidentifiable human remains would be determined to be affiliated. NAGPRA has identified a category of human remains for which the standard of "cultural affiliation" cannot be met. These remains must be dealt with differently than culturally affiliated human remains, and should not simply be redefined to make them fit some category of affiliation.

**Classification of culturally unidentified human remains.** SAA agrees with the Review Committee that there are several types of culturally unidentifiable human remains, but finds the breakdown presented in the Draft Principles problematic. The category of remains "affiliated" with non-federally recognized groups is one for which the Review Committee has successfully developed a process, and it appears that the Secretary of the Interior has been able to proceed on the Review Committee's case-by-case, recommendations. This process and recommendations have not been written into regulations, nor has the Review Committee asked that they be. It is worth keeping the success of the current process and this flexibility in mind when considering guidelines for disposition (Section D, below). We propose a substitute categorization of culturally unidentifiable human remains.

1. Human remains that are associated with an identifiable earlier group and would meet the legal standard of cultural affiliation with a present-day group, if that group were a federally recognized tribe or Native Hawaiian organization. In this case the Review Committee needs to specify criteria that allow a museum or federal agency to identify legitimate present-day groups and to exclude those that would not be legitimate. Currently, the Review Committee has a process in place whereby it can recommend repatriation based on its case-by-case assessment of this legitimacy.
2. Human remains that are not associated with an identifiable earlier group. This category might be subdivided into two groups:
  - A. The human remains are likely to be Native American, but are undocumented or so lacking in contextual documentation that an assignment of cultural identity is and probably will remain impossible. This condition probably will not change, and therefore, barring some extreme efforts for determining cultural affiliation, these remains are likely to remain "culturally unidentifiable." While these remains may have considerable scientific importance, their importance will usually be less than for other categories of remains with better contextual documentation.
  - B. The human remains are reasonably documented but the contexts from which they derive are not adequately understood to provide an assignment of cultural identity. These will often be remains of considerable antiquity and may be of substantial scientific importance. In some cases, additional study of remains in this category may lead (now or in the future) to assignments of cultural identity.
3. Human remains that are associated with an identifiable earlier group but there is no present-day group to which a relationship of shared group identity can be reasonably traced. Remains in this category can be subdivided into three groups:
  - A. The human remains are associated with a culture that the preponderance of the evidence indicates became extinct. This might be the case for groups that were exterminated.

- B. The human remains are associated with a culture that the preponderance of the evidence indicates has a traceable ancestral relationship with one or more present-day groups but that does not meet the standard of "shared group identity" sufficient to be identified with cultural affiliation.
- C. The human remains are associated with a culture where the evidence is insufficient to determine whether there is a present-day group that meets the standard of cultural affiliation.

### *C. Guidelines for the Disposition of Culturally Unidentifiable Human Remains*

**Principles.** The Review Committee's statutory charge is to recommend a process for the disposition of culturally unidentifiable human remains. SAA would agree that the Review Committee's recommendations (not regulations) must provide a process that is respectful, fair, feasible, and enforceable. The Review Committee needs to provide reference to what is fair, however; "equitable" needs a reference group to have any meaning, and in the context of the Review Committee's recommendations this meaning must be explicit and must include agencies and institutions. The process should be worthy of museums', federal agencies', and tribes' implementation efforts.

**Variety of appropriate dispositions.** Having heard the widely varying issues regarding cultural affiliation, and understanding that these issues may be dramatically different in different parts of the country, the Review Committee appears to recognize the need for flexibility in weighing criteria that would lead to the best disposition of culturally unidentifiable human remains. We suggest that not only should guidelines for the disposition of culturally unidentified human remains be developed, but also that mechanisms for case-by-case determinations be provided. Within an appropriate (regional) framework, we believe that it is appropriate to develop different guidelines for different categories of remains enumerated above.

In light of complexity of the problems and the lack of statutory authority for the Secretary to issue regulations on the disposition of culturally unidentified human remains, SAA suggests that the development of guidelines (such as those implicitly developed for affiliation of non-federally recognized groups), rather than regulations, is the proper way to proceed. When NAGPRA was drafted, Congress intentionally held the unidentified remains in abeyance because they represented a particularly problematic issue on which a consensus regarding appropriate disposition had not been achieved.

It is *not* appropriate to assume, as the draft does, that remains for which there is little or no information with respect to cultural affiliation have little interest or value to the museum, scientific, or educational communities (Draft Principles, paragraph C.2.b). While undocumented remains will have less scientific significance than well documented ones, paragraph B.3.c in the Committee's Draft Principles, which refers to remains that lack information pertaining to determining cultural affiliation, may include remains of enormous scientific importance. "Information" as used in the context of NAGPRA should include not only those data that inform on specific cultural identification but also those data that relate to stratigraphic context, the archaeological record, or various aspects of the remains themselves (for example, those aspects of bone that inform on health or age). In some contexts, the very presence of human remains regardless of specific cultural identification is of great consequence.

**Documentation.** There are two different senses in which the word "documentation" is used in this section. Both are important, but they need to be better distinguished. One sense of "documentation" refers to the basis (derived from statute) on which a museum or federal agency made its determination of "culturally unidentifiable." We will refer to this as "statutory documentation." The second sense of documentation we refer to as "additional recording" of information that would be considered of educational, historical, or scientific significance. We agree with the Committee that guidelines for the disposition of culturally unidentifiable human remains include a requirement for the additional recording of information of educational, historical and scientific importance, especially for culturally unidentified human remains to be repatriated. We also agree that the intensity of such additional recording should be proportionate to the potential to yield important information.

The term "documentation" as used in 25 U.S.C. 3003(b)(2), specifically refers to gathering information for the purpose of creating the initial inventory of human remains and determining cultural affiliation for that inventory. For clarity, the Review Committee should consider revising the existing language of paragraph C.3.a to read "Documentation with respect to attempts to establish cultural affiliation should be prepared and maintained in accordance with defined standards such that particular cases may be compared and the consistent and fair implementation of the law assured." This direction would then require the Review Committee to provide standards and a process by which to monitor that documentation. Following what we understand to be the Committee's intent, we suggest adding to that paragraph: "Culturally unidentified human remains should be reasonably recorded according to generally accepted scientific standards." While it is laudable to create "defined standards," the standards for statutory recording should not be the same as standards for additional recording of culturally unidentifiable human remains.

Appropriate statutory documentation can vary depending on the type of information already at hand and nature of the specific remains (Draft Principles, paragraphs C.3.c-d.). Since invasive testing may clarify issues of cultural affiliation, it may well be appropriate under certain circumstances to perform such tests. For example, it appears that as a result of the initial dating of Kennewick Man the Army Corps made its initial determination that the remains fell within the scope of NAGPRA. Additionally, the Department of the Interior has decided that invasive testing may play a role in determining if the remains of Kennewick Man can be culturally affiliated. The proposed requirement to allow such testing only if agreed upon by all parties is unrealistic. If the Review Committee wants to discourage invasive testing, or deems it inappropriate, then it should present its position more clearly as a recommendation and not a legal stipulation.

Using the limiting term "documentation prepared for compliance" in conjunction with the position that invasive testing is not required for

statutory documentation might be read to suggest that invasive documentation should not be a matter for public record. If invasive documentation were somehow agreed upon by consultative parties, the present language in C.3.e. could foster a situation in which, because the invasive studies go beyond basic "compliance," the findings could be withheld from the general public despite their potentially great intrinsic scientific importance.

We applaud the Committee's concern with consistent documentation and especially with its recognition of the need for additional recording of information of educational, historical, or scientific significance. This is an essential principle because such recording, to an extent, mitigates the loss of information conveyed by the remains through repatriation and thus helps achieve a balance of interests.

#### *D. Models for Disposition*

The Joint Recommendations Model as exemplified in the Draft Principles masks tremendous variety in context and approach, ranging from allowing state law to take precedent, to repatriating remains where affiliation lies among tribes that do not share a group identity, to material that may not be Native American and whose provenience and other information did not play a significant role in the repatriation process. SAA encourages the Review Committee to distinguish among these types of recommendations in developing models and articulating their components.

SAA considers Regional Consultations a potentially viable approach, but without additional detail it is difficult to say whether we could support such an approach. We reiterate that the purpose of such consortia would not necessarily be to repatriate culturally unidentifiable human remains, but rather to address regionally-specific issues of disposition. While the Review Committee could properly identify the *principles* that would guide the determinations of disposition, SAA would suggest that *guidelines* for the disposition of at least some categories of culturally unidentified human remains be *developed* on a regional basis. Further we suggest that mechanisms be provided for case-by-case determinations at a regional level where all of the relevant parties cannot come to an agreement. We also urge the Review Committee to actively seek information from tribes, museums, and federal agencies about situations in which interested parties have successfully worked out alternatives for culturally affiliated material that can also serve as models.

As we have indicated, SAA does not agree with the key premise incorporated in the "Draft Principles"—that repatriation should be the disposition of all culturally unidentifiable human remains. Because we see the tremendous contribution that these remains can make to a systematic understanding of our American heritage, we strongly encourage the Review Committee to consider how scientific values can be considered along with the values of Native American groups in order to identify circumstances in which other dispositions may be preferable.

Sincerely,

/s/

Keith W. Kintigh  
President