



SOCIETY FOR AMERICAN ARCHAEOLOGY

April 13, 1999

Honorable Bruce Babbitt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Re: Request for Legal Review of Critical Issues in the Implementation of NAGPRA

Dear Secretary Babbitt:

On behalf of the Society for American Archaeology, I am writing to request that you initiate a legal review of three problematic issues whose clarification is critical to the proper implementation of the Native American Graves Protection and Repatriation Act (NAGPRA). These issues are: cultural affiliation by multiple tribes, culturally unidentifiable human remains, and scientific study.

The Society for American Archaeology (SAA), the largest organization of professional archaeologists in the United States, has, for more than a decade, led the scientific community in national discussions about the repatriation of Native American human remains and objects of importance to contemporary Native American tribes. In 1990, SAA was the primary scientific organization involved in the negotiations with Native American organizations, museums, and Congress that resulted in the landmark consensus represented by NAGPRA. Although each party to these discussions had to compromise to reach a consensus, there was a general sense that Congress intended that NAGPRA would reasonably balance Native American interests in the past with those of the scientific community and the broader public.

With the intent of maintaining the balance struck by NAGPRA, SAA has consistently provided comment to the Department and to the Review Committee regarding the development of regulations and the implementation of NAGPRA. We continue to support NAGPRA and have, from the beginning, strongly urged our members to work towards its effective and timely implementation.

Since NAGPRA's passage, we have been alarmed to see an increasing divergence between the actual practice of NAGPRA implementation by federal agencies and museums and what we believe to be plainly required by the letter and spirit of the Act. Recent events indicate that unless this trajectory is reversed, the Act will be thoroughly undermined and the consensus compromise destroyed.

We ask that you conduct an internal legal review of a limited number of central issues. Implementation of the findings of such a review by the Departmental Consulting Archaeologist (in his delegated oversight role over NAGPRA) would do much to restore a balance among Native American, scientific, and public interests in the past.

SAA's concerns about NAGPRA focus on three issues: cultural affiliation, culturally unidentifiable human remains, and scientific study. It is these issues that we request be reviewed. Our principal concerns follow below.

1. Cultural Affiliation. Because "cultural affiliation" must be demonstrated in order for repatriation of museum and agency collections to occur and before many newly excavated or inadvertently discovered remains and funerary objects can be returned to claimants, the concept of cultural affiliation is a cornerstone of NAGPRA. Under the Act, a finding of cultural affiliation requires that a preponderance of

recognized tribe and an identifiable earlier group. The most important problem that has arisen in NAGPRA implementation is the widespread extension, by both agencies and museums, of the statutory definition of cultural affiliation beyond any legally defensible limits.

Over-broad cultural affiliations are most often effected using a concept of "joint affiliation," in which an identifiable earlier group is said to be culturally affiliated with many federally recognized tribes. Although NAGPRA does not explicitly recognize joint affiliations, we believe this is a sensible and legally defensible concept in limited circumstances, most clearly in cases where a single, well-defined group has been divided, usually as a result of government action, into more than one administratively distinct recognized tribe. The Apache tribes in Arizona are an excellent example.

However, joint affiliation is now being used in ways that clearly extend beyond the statutory definition of cultural affiliation. Using this strategy, joint affiliation is asserted between a prehistoric cultural group that may be thousands of years old with a broad collective of tribes that may be very different or even traditional enemies. This argument has been used to broaden the concept of cultural affiliation to the point that all remains become "culturally affiliated," which is clearly inconsistent with the definition employed by the statute. We recognize that in such cases the tribes involved in the consortium may agree that proposed repatriation is appropriate. Under NAGPRA, such agreement is not enough. Cultural affiliation provides the legitimacy to repatriation claims. While the law requires evidence demonstrating cultural affiliation, agencies and museums often offer little or no evidence supporting such claims. Frequently in these cases, substantial scientific evidence clearly indicates a lack of a traceable "relationship of shared group identity." Under the law, where this scientific evidence constitutes a preponderance of the evidence, this evidence must prevail.

In this context, it must be remembered that a key feature of NAGPRA is the repatriation of remains and objects *culturally affiliated with modern tribes*. Despite the wishes of some tribal, agency, and museum personnel, the Act simply cannot be read to authorize or mandate the repatriation of all human remains and objects.

To address our concerns, we respectfully request that: (1) the Department undertake a legal review of NAGPRA's definition of cultural affiliation in order to refine the legally acceptable limits of joint affiliation; (2) NPS issue written guidance reflecting counsel's advice regarding the appropriate application of joint affiliation; and (3) that until such guidance is issued, NPS suspend further *Federal Register* publication of NAGPRA Notices of Inventory Completion that utilize joint affiliation (particularly those that involve large consortia of tribes).

2. Culturally Unidentifiable Human Remains. The illegal broadening of the concept of cultural affiliation bears directly on treatment of so-called culturally unidentifiable human remains-- those that cannot be culturally affiliated with any tribe. NAGPRA's discussion of these 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." 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. Congress hoped that experience in the process of repatriation of affiliated remains would result in a more informed approach for dealing with unaffiliated remains that, subsequently, could be embodied in law.

Despite our belief that culturally unidentifiable remains were excepted from repatriation under NAGPRA, based on the statute's only relevant language quoted above and the legislative history, the NAGPRA regulations state: "Section 10.11 of these regulations will set forth procedures for disposition of culturally unidentifiable human remains of Native American origin." They also state "Museums or federal agencies must retain possession of such human remains pending promulgation of Sec. 10.11 unless legally required to do otherwise, or recommended to do otherwise by the Secretary."

As a result of this language, federal agencies and museums are requesting, with dramatically increasing frequency, your permission to repatriate culturally unidentifiable human remains to tribal consortia. While tribes may believe that repatriation is the appropriate disposition, these requests are generally made in the absence of any apparent effort to consult with other affected constituencies--in particular, the archaeological and broader scientific community. We believe that routine, case-by-case approval of requests for repatriation of culturally unidentifiable human remains to tribal consortia under this logic undermines the Review Committee's efforts to develop the recommendations required by the statute and circumvents both the consensus on which NAGPRA was based and the plain language of the law. When legislation addressing such a difficult and emotional issue results from a consensus compromise, the resulting law is fragile and the compromise must be carefully maintained for it to be successful.

Thus, we would ask that your legal review include consideration of whether NAGPRA provides authority to effect repatriation of culturally unidentifiable human remains or whether Congress intended that further legislation was required. Pending the results of this review, we ask that you withhold approval of all such requests.

3. Scientific Study. The final issue that concerns SAA is scientific study. In practice, it is not uncommon that newly excavated, especially inadvertently discovered, remains are repatriated in the absence of basic documentation to assess issues of cultural affiliation. While the law does not explicitly address scientific study, NPS acknowledged, in testimony before the House Committee on Resources on the Hastings amendment (HR 2893), that scientific study is not prohibited under NAGPRA and that such scientific documentation and analysis are implicitly required under current law, such as the Archaeological Resource Protection Act. NPS stated that written guidance on this issue would be forthcoming, but thus far it has failed to appear. We ask that NPS move expeditiously to issue this urgently needed guidance.

In sum, SAA believes that through substantial good-faith efforts, the scientific and Native American communities achieved, in NAGPRA, a legislative compromise on the issue of repatriation. This carefully crafted compromise has been undermined by some federal agencies and museums, which are stretching the law beyond recognition. We believe that the legal review requested above is urgently needed and is warranted by the circumstances. Following that review, we would urge that NPS provide more oversight and issue written guidance to foster full compliance with the law. Pending the outcome of this legal review, we ask that you place a moratorium on all repatriations to tribal consortia when those affiliations are not based on clear demonstrations of affiliation.

Thank you for your consideration of our request.

Sincerely,



Keith W. Kintigh
President

cc: Mr. Donald Barry, Assistant Secretary, Fish and Wildlife and Parks
Mr. Robert Stanton, Director, National Park Service
Dr. Francis P. McManamon, Departmental Consulting Archeologist
NAGPRA Review Committee Members