

SENATE COMMITTEE ON INDIAN AFFAIRS

**Oversight Hearing:
Native American Graves Protection and Repatriation Act**

Tuesday, July 25, 2000, 10:00 a.m., 485 Russell Senate Bldg.

**STATEMENT OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY AND
THE AMERICAN ASSOCIATION OF PHYSICAL ANTHROPOLOGISTS**

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Mr. Chairman, the Society for American Archaeology (SAA) thanks the Committee for this opportunity to comment on the current state of NAGPRA implementation. 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, to the NAGPRA Review Committee, and to this committee. We urge our members always to work toward the effective and timely implementation of the Act. We are joined in this testimony by the American Association of Physical Anthropologists (AAPA), which is the leading organization of physical anthropologists in the United States and which also supported the enactment of NAGPRA.

- N** Ten years ago, I stood before this committee to present SAA's testimony on S1980, the bill that became NAGPRA. Despite the problems that remain, reflecting on the last ten years, I think the Committee should be proud of what NAGPRA has accomplished.
- N** Over a thousand museums and federal agencies submitted summaries to tribes, and more than 700 have submitted inventories.
- N** While we more often hear about the difficult and confrontational cases, repatriations of human remains and cultural items, from both museum collections and new excavations occur routinely. Most of these repatriations result from mutual agreements between tribes and museums and agencies.
- N** Consultations mandated by NAGPRA have led to the development of improved understandings between tribal people, museum personnel, and scientists. Many cooperative ventures not required under the law have been successfully pursued.

In the interests of improving NAGPRA's implementation, we now turn to a brief discussion of several issues relating to the current implementation of NAGPRA.

Federal Agency Compliance

In last year's testimony before this committee, SAA and AAPA expressed dismay over the lack of compliance of some federal agencies with the plain requirements of NAGPRA. While there has been some good work by agencies, lack of compliance by some federal agencies remains the single largest stumbling block in implementing NAGPRA. This has frustrated tribes and scientists alike.

The most obvious problem has been the lack of completion of the inventories that were due five years ago. A less obvious but more pernicious problem is that determinations of cultural affiliation are often made without adequate consultations with tribes and without reasonable efforts to compile and weigh either the scientific or the traditional sources of evidence.

While some Federal agencies are moving too slowly in repatriation matters, problems also arise when an agency moves too quickly, or without adequate consultation or consideration of the evidence. Two examples will suffice. In the well-known case of Kennewick Man, the court found that in its haste to repatriate the remains, the Corps of Engineers failed to satisfy the legal requirements. The unfortunate consequence has been a lengthy lawsuit.

More recently, the Review Committee found unanimously that Chaco Canyon National Historical Park had utterly failed to do adequate assessments of cultural affiliation and recommended that the Park redo its inventory with appropriate consultation and attention to the scientific and traditional evidence. In the Chaco case, the scientific community, nearly all the affected tribes, and the Review Committee agree on *all* the key points. Unfortunately, the NPS Intermountain Regional Director saw fit to dismiss the Review Committee's recommendations, arguing in effect that the job the Park had done was good enough.

As NAGPRA provides no enforcement provisions affecting agencies, we would ask Congress to employ the means at its disposal to induce or to compel full agency compliance. In pursuing this objective, the Committee should insure that agencies do not achieve compliance with NAGPRA at the expense of other critical cultural resource programs.

Speed of the Repatriation Process

At Review Committee meetings, tribes have expressed considerable unhappiness with the length of time it is taking to achieve repatriation of Native American human remains. Clearly, there have been problems and federal agency compliance is a key issue that must be addressed.

However, a lack of speedy reburial is not a necessary indicator that the process has gone awry. It must be remembered that universal reburial was never NAGPRA's goal. Its objective is to provide culturally affiliated tribes with the *right to determine disposition* of remains of their ancestors. Repatriation is only one of many possible dispositions. The fact is that tribes have requested repatriation of only a small fraction of the remains that have been culturally affiliated by museums and agencies.

The lack of repatriation requests is probably due to several causes. Tribes are entitled to choose not to request repatriation or to have a museum continue to hold remains and objects. In other cases lack of repatriation of culturally affiliated human remains may reflect tribal priorities or a lack of funding. In the Southwest, and probably throughout the West, concern with the ongoing excavations of human remains (those on federal and Indian lands are covered by NAGPRA's Section 3) generally take precedence over repatriation of human remains from

museum or agency collections because the ongoing excavations are viewed as presenting the most pressing problems.

Culturally Unidentifiable Human Remains

The disposition of culturally unidentifiable human remains continues to be an issue of concern. We offer several observations:

1) *Possibility of Affiliating Remains now Classified as Culturally Unidentifiable.* Under NAGPRA, it is the strength of relationship as indicated by cultural affiliation that provides the legitimacy to claims for repatriation. The plain language of NAGPRA and its legislative history make clear that, whenever possible, control over disposition should be granted to the tribe or tribes that have cultural affiliation.

The Committee should recognize that many of the remains currently classified as culturally unidentifiable could, with appropriate consultation with tribes and research by scientists, be culturally affiliated. This point was specifically recognized by the NAGPRA Review Committee in its recent recommendations regarding culturally unidentifiable human remains. The problem of remains that can be affiliated but that are now categorized as culturally unidentifiable was exacerbated a year ago when the Department of Interior denied museums that were making good faith efforts additional extensions. The Department directed the museums to complete their inventories based on information currently at hand, thus precluding adequate consultation for many collections. In many cases this has led to determinations that remains are culturally unidentifiable where the museums readily acknowledge that it may be possible, with more tribal consultation and more research, to make determinations of affiliation. Because of DOI's shortsightedness, a much larger burden now rests with tribes to pursue further consultation and to show that a preponderance of the evidence supports cultural affiliation.

2) *Review Committee Recommendations.* NAGPRA charged the Review Committee with "recommending specific actions for developing a process for disposition of [culturally unidentifiable human] remains." (NAGPRA Section 8(c)(5)). This language reflected Congress' uncertainty about the proper treatment of culturally unidentifiable human remains in light of the lack of agreement among tribes and between tribes and the museum and scientific communities on this question. Congress also hoped that our experiences in determining the disposition of affiliated remains could provide important models for the resolution of the disposition of culturally unidentifiable human remains. The Review Committee issued its recommendations less than two months ago (Federal Register, June 8, 2000 65(111)). At this point we need to see how those recommendations fare.

3) *Permitting Tribal Consortia to Determine the Disposition of Culturally Unidentifiable Human Remains.* A coalition of Southeastern tribes has offered an alternative approach to determining the disposition of culturally unidentifiable human remains. Their suggestion is to empower regional consortia of tribes to determine the disposition of these remains.

As discussed above, many remains now classified as culturally unidentifiable have the strong potential to be affiliated. Empowering tribal consortia to decide quickly on the disposition of culturally unidentifiable human remains would result in a serious disservice to the tribes that could show affiliation. This solution violates the rights of lineal descendants and culturally affiliated tribes that are specifically privileged by NAGPRA because of the closeness of their relationship.

Furthermore, this approach fundamentally upsets the balance and spirit of compromise that is embodied in NAGPRA and that is reflected in the composition of the Review Committee. Decisions about disposition must be made jointly by representatives of the scientific, museum, and Native American communities. In fact, the Review Committee's recommendations include use of tribal consortia in regional consultations on the disposition of culturally unidentifiable human remains, but consistent with NAGPRA, their recommendations include museums and federal agencies in the consensus-based decision-making.

Scientific Interests

Congress carefully crafted NAGPRA to balance diverse interests in Native American human remains and cultural items. NAGPRA was supported by the tribes and by scientific and museum organizations because it represented a reasoned compromise among diverse interests. Scientific interests in human remains and cultural items derive from their ability to tell us about our nation's, and indeed, our human heritage. For example, the human genome project is opening up the potential for important medical research. The next fundamental step in this research will be charting the variation within the human genome. Also, there is enormous public interest in understanding the original peopling of the Americas. The study of Native American human remains will be essential to these and many other worthy efforts. We do not suggest that these interests necessarily outweigh those of tribes; we simply point out that scientific interests are appropriately recognized as legitimate by NAGPRA.

Location of the NAGPRA Function Within DOI

The NAGPRA function within the Department of the Interior was reorganized in response to a perceived conflict of interest by the tribes. The current organization removes this appearance of conflict. At this point, we believe that the best course is for all of us to work with Mr. Robbins and his staff toward the effective implementation of NAGPRA.

Financial Support

Implementation of NAGPRA continues to be delayed by the lack of necessary resources. There is a need for increased funding for NAGPRA grants to tribes to effect repatriation and further consultations with museums. There is a complete lack of federal support for tribal implementation of Section 3 repatriation issues (new excavations and inadvertent discoveries).

There is an additional need for new federal funding to assist scholars in assessing cultural affiliation of items classified as culturally unidentifiable (such funding is not permissible under the NAGPRA grants language). Roger Echo-Hawk has argued (2000, *American Antiquity* 65(2): 267-290) that research into Native American traditional histories, which can help establish cultural affiliation, is a legitimate and productive subject of scholarship.

The NAGPRA office within NPS needs increased funding to accomplish its mandates under the law, including timely publication of notices of inventory completion, compiling the inventory of culturally unidentifiable human remains, and keeping its Native American Consultation Database up to date.

Cultural Affiliation

Thorough case by case assessment of cultural affiliation based on full consultation with the tribes remains the key to implementing NAGPRA as Congress intended. Cultural affiliation is a cornerstone of NAGPRA because it provides the legitimacy for most repatriation claims. A

critical problem in NAGPRA implementation is the widespread expansion, by both agencies and museums, of the statutory definition of cultural affiliation beyond legally defensible limits. Further, while the law requires evidence demonstrating cultural affiliation, agencies and museums often offer little or no evidence or argument supporting their determinations. The evidentiary problem has three components: (1) insufficient consultation with tribes and consideration of traditional evidence they can offer; (2) inadequate attention to collecting readily available scientific evidence; and (3) a lack of thoughtful weighing of this evidence to arrive at a sound determinations of cultural affiliation.

Conclusion

In conclusion, we offer four recommendations.

- N** We ask that the Congress apply the means at its disposal to bring federal agencies into compliance with NAGPRA.
- N** Once we see how the Department of Interior responds to the Review Committee's Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains, we will all have a better basis for evaluating whether any additional steps need to be taken.
- N** We ask that the Committee address the insufficient funding of tribal, museum, scientific, and agency programs to deal with repatriation issues.
- N** Finally, we ask that the Committee work toward improving both agency and museum adherence to the letter and to the spirit of NAGPRA, particularly in making evidentially based determinations of cultural affiliation.

The Society for American Archaeology and the American Association of Physical Anthropologists thank you for your consideration of our comments on the implementation of NAGPRA.

Attachment: Review Committee Recommendation for Amendments to NAGPRA

The Review Committee has recommended consideration of several amendments to NAGPRA. SAA lists three of the recommendations and offers a comment on each.

- N** Protect Native American graves on state or private lands from grave robbing and other forms of destruction;

SAA strongly supported language to this effect in 1990 and continues its strong support of this idea. Such an amendment would be an enormously effective tool in reducing looting of Native American grave sites.

- N** Permit Indian tribes and Native Hawaiian organizations to carry out reburial of repatriated human remains on Federally managed lands from which those remains were originally taken;

SAA has long argued with federal agencies to achieve this end and would support such an amendment.

- N** Exempt sensitive cultural information from the Freedom of Information Act (FOIA) when it involves material that is presented by an Indian tribe or Native Hawaiian organization solely for the purpose of documenting cultural affiliation or asserting a right to specific sacred objects or items of cultural patrimony.

SAA would support such an amendment as long as there are reasonable safeguards for appropriate, confidential, review of this information with respect to its relevance to the implementation of the Act.