

LEGAL PERSPECTIVES ON CULTURAL RESOURCES

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ARCHAEOLOGICAL PERSPECTIVES ON THE NAGPRA: UNDERLYING PRINCIPLES, LEGISLATIVE HISTORY, AND CURRENT ISSUES

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The Society for American Archaeology (SAA) has acted as a primary voice for archaeological perspectives on repatriation since the mid-1980s. This archaeological perspective has been guided by several underlying principles that have conditioned SAA's actions on the passage of legislation and the implementation of regulations. Among these principles are the importance of direct consultation among concerned groups, issues of demonstrated cultural affiliation between contemporary groups and human remains, and the balance of scientific and Native American interests. This chapter explores the application of these principles to the historical development of repatriation legislation in the United States.

The Native American Graves Protection and Repatriation Act (NAGPRA), which was passed by the United States Congress in 1990, is a carefully crafted legislative consensus that balances the interests of various parties in human remains and cultural objects.¹ The difficult task of achieving consensus required discussion, negotiation, and compromise. This consensus was achieved by parties who had, on numerous occasions, found themselves in direct opposition due to differing worldviews and political exigencies.²

SAA was the primary scientific organization that rose to this challenge. Over the several years prior to the enactment of NAGPRA, the Society internally grappled with the formulation of an effective set of principles to guide its actions concerning repatriation. Since the passage of NAGPRA, the Society has continued to be concerned with those principles and the practice of repatriation.

In 1989, SAA's board appointed a task force on reburial, which later evolved into the Committee on Repatriation. This group's charge has been to advise the board on matters having to do with repatriation. In addition to their advisory role, members of this committee have tracked national legislation,

testified at hearings, and represented SAA in discussions and negotiations on repatriation issues. We, the authors of this chapter, are long-term members of this committee who were actively involved in the passage of NAGPRA and the implementation and ramifications of the law. Thus, we present an "SAA-centric" perspective on NAGPRA, focusing on the principles that have shaped SAA's positions on repatriation over the past dozen years.³

DEFINING THE CENTRAL ISSUES

With the ascent of repatriation as an active issue on national and state legislative agendas in the mid-1980s, SAA became the principal organizational voice for North American archaeologists, and indeed for other interested scientists. In order to respond to legislative initiatives, SAA crafted a policy on repatriation that could guide its public-policy efforts. In developing this policy, the organization sought to understand the considerable range of opinion among its members and to stimulate a more thorough consideration of these important issues by the membership.

SAA-sponsored forums on repatriation (including participation by strong Native American advocates of repatriation) demonstrated that virtually the entire spectrum of opinion was represented within our membership, from omnibus repatriation on demand, to adamant resistance to any repatriation regardless of the circumstances.⁴ This debate was particularly informed by the opinions of Native American archaeologists and the archaeologists who worked for the tribes. Based on these observations, SAA's board decided that the Society had to do more than react to individual legislative initiatives—it needed a set of guiding principles from which our public-policy positions and responses to specific proposals could logically be derived.

With this understanding of the range of positions of our members, and an awareness of the issues being raised in proposed legislation, SAA undertook the development of a policy that would recognize the potential of human remains to contribute important knowledge about the past, to properly accommodate appropriate scientific information in the decision-making process, and to incorporate the interests and voices of indigenous communities. This policy articulated a set of principles that provided a philosophical basis upon which proposed legislation or regulations could be evaluated. While it was recognized that all segments of the membership would not agree with all positions the Society might take, the intent was to incorporate core archaeological values with which the membership would be generally comfortable.

SAA'S GUIDING PRINCIPLES

The principles guiding SAA were embodied in its *Statement Concerning the Treatment of Human Remains*, which was originally adopted by SAA's board in May 1986 and reaffirmed in March 1999.⁵ The statement has four major components:

1. that Native American and scientific interests in human remains and funerary objects from archaeological contexts are legitimate and that repatriation procedures should strike an appropriate balance between these sometimes competing interests;
2. that the scientific value of human remains (and funerary objects) varies with their potential to contribute significant information about the past and that the traditional values of Native American groups should be weighed according to the strength of their relationship to the remains or objects;
3. that repatriations should be implemented on a case-by-case basis to balance the particular scientific values and strengths of relationship with modern native groups and to account for variability in belief systems and the wishes of individual groups to which remains may be repatriated; and
4. that this case-by-case determination should be made in the context of direct communication in order to foster better understanding among concerned tribes, institutions, and scientists.

It was, and remains, the Society's assessment that, at least on its face, NAGPRA largely meets these concerns in theory, albeit with varying success in practice. However, there remains substantial discussion about the implementation of NAGPRA that revolves around some of these same issues. Furthermore, it is within the context of these principles that SAA continues to evaluate proposed changes to NAGPRA and its regulations. This chapter discusses these principles in further detail largely due to their continuing utility as the foundation for SAA's responses to policy issues and for the fact that NAGPRA continues to be interpreted differently by various stakeholders in the process.

First Principle: Legitimacy of Native and Scientific Viewpoints

SAA's *Statement* begins with the premise that "Archaeologists are committed to understanding and communicating the richness of the cultural heritage of humanity, and they acknowledge and respect the diversity of beliefs

about, and interests in, the past and its material remains," and it further states that SAA "recognizes both scientific and traditional interests in human remains. Human skeletal materials must at all times be treated with dignity and respect." As the largest organization of professional archaeologists in the Americas, SAA has a responsibility to argue for the importance of archaeological and physical anthropological collections because of our commitments to a scientific understanding of the past. SAA firmly believes that scientific research has been, and can continue to be, beneficial not only to other archaeologists but to individual tribes, Native Americans at large, and the nation as a whole. However, as anthropologists we also feel an ethical responsibility to respect the beliefs of the descendants of those individuals we study.

SAA's position does not assert a universal priority of scientific over traditional interests. Instead, it says that these interests must be balanced with the legitimate traditional concerns of Native Americans. Such a balance must be struck in a manner that recognizes the value of scientific and Native American concerns, is sufficiently flexible to allow for negotiations among concerned groups, and can recognize the varying interests of these groups.

Second Principle: Scientific Importance versus Strength of Affinity

A second key point is that this balance of interests should be reached on the basis of evidence. "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." Thus, human remains or objects lacking context and archaeological association are generally judged as less scientifically valuable than are carefully documented collections:

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. If remains can be identified as that of a known individual for whom specific biological descendants can be traced, the disposition of those remains, including possible reburial, should be determined by the closest living relatives.⁶

In the context of NAGPRA, the scale of closeness of relationship anticipated by the SAA policy is approximated by the concept of "cultural affiliation." While determinations of cultural affiliation under the law are to be based on a range of acceptable kinds of evidence, SAA has always acknowledged that a broad range of evidence should be considered, including traditional histories of native groups (a provision in NAGPRA that was supported by SAA).

The need to demonstrate “cultural affiliation” is not simply a vehicle through which archaeology attempts to exclude collections from repatriation; rather, it represents a recognition of things we have learned from archaeology and physical anthropology worldwide: that all biological populations have not survived into the present and that groups past and present have changed their geographic locations. Indeed, we know that in some cases multiple contemporary groups maintain identities that may be traced from common origins. Cultural affiliation is not as simple as being located in the same geographic area or as having a similar economy. The difficulties in application of this particular principle are well embodied in the legislative history of NAGPRA, and they continue to be a focus of discourse as NAGPRA is implemented today.⁷ However, it is clear that in some instances it may not be possible, with the available evidence, to demonstrate that cultural affiliation is present between a contemporary Native American group and an identifiable earlier group, which leads to the current contention over unaffiliated and unclaimed remains and objects. A key point is that the determination of cultural affiliation must be based on evidence that can be examined and evaluated; such determination cannot be based on assertions alone.

Third Principle: Case-by-Case Implementation

A third principle is that repatriation decisions should be made on a case-by-case basis. This means that repatriation claims should be evaluated on the basis of the specific information available for a particular collection and the concerns of the potentially affiliated group. Different collections are not equal in available information, content, or significance to concerned parties, even where potentially affiliated with the same group. The quality of information about provenance, acquisition, and transfers of fiduciary responsibility will vary from collection to collection. Collections may also contain materials where the strength of relationships with modern groups varies, and the objects within any collection may differ in importance to potentially affiliated groups. Given this range of variation, each collection under consideration requires independent, case-specific evaluation in the context of individual claims.

Fourth Principle: Communication and Consultation

SAA has consistently taken the stance that regular and ongoing communication among Native American groups, museums, government agencies, and individual archaeologists is the cornerstone of strong and mutually beneficial working relationships. The only fashion in which misunderstandings on different sides of this issue will be minimized is through direct interactions among

the concerned parties, not among intermediaries representing these parties, whether legal, political, or bureaucratic. Direct interaction is the foundation through which respectful working relationships and trust develop. Most SAA members, and the institutions that they represent, are regionally focused, thereby allowing long-term engagement with known individuals and groups, and reducing the unknowns associated with sporadic dialogue. The intent of this principle is to foster communication that will act to educate all parties concerned, to put individuals—not institutions—in direct contact, and to lead to greater respect for differing perspectives by all participants, recognizing that this will not necessarily lead to an outcome in which all parties agree. We believe that, in the long run, these interactions will serve to alleviate political tensions.

The four principles just outlined have allowed SAA to consistently evaluate the content of different pieces of legislation, proposed regulations, and other repatriation issues (such as those recently adjudicated in the Kennewick case). SAA negotiations in the context of NAGPRA have benefited from this consistency, and it should be pointed out that they have sometimes led to positions that are *not* in the interests of maintaining collections in museums. For, example, during the negotiations over NAGPRA, the museum community suggested a sort of statute of limitations on claims—that, in order to be valid, all claims for repatriation must be made by some specific date. SAA opposed that provision (despite the fact that it would have served to protect collections) on the principled grounds that if repatriation is ethically warranted, the validity of that claim should not expire.

THE LEGISLATIVE ROAD TO NAGPRA

Only a few months after SAA had adopted its *Statement Concerning the Treatment of Human Remains*, the first federal repatriation bill was introduced in the Senate in October 1986. Even though this initial bill never came to the floor, congressional interest did not wane. Over the next few years, bills with repatriation provisions continued to be introduced at an ever increasing rate. The 99th Congress saw the lone bill just mentioned, the 100th Congress considered two repatriation bills, and the 101st Congress considered no fewer than ten such bills—two of which were eventually signed into law (see appendix F). For present purposes, it is convenient to discuss these bills in four groups, each of which represented a distinctive historical thread in Congress's approach to the problem of repatriation.

The first (and earliest) group comprised two versions of the same bill: the Native American Cultural Preservation Act, which was introduced by

Senator John Melcher in the Ninety-ninth Congress as S. 2952 and later reintroduced in the One-hundredth Congress as S. 187. These bills proposed in part to set up a commission that would help resolve disputes between museums and Native American groups over human remains and funerary objects. The commission could not only mediate negotiated settlements, but it could also issue orders regarding the disposition of such items. SAA testified at hearings held in February 1987; it opposed S. 187 because of a lack of balance between Indian and scholarly interests in the commission's membership and also because of an absence of mechanisms for appealing the commission's orders.⁸ The bill was reported out of committee but never passed.

The second group consisted of bills that were designed as comprehensive reorganizations of the federal historic-preservation system. In chronological order, these were the Comprehensive Preservation Act of 1988 (S. 2912), introduced by Senator Wyche Fowler in the 100th Congress; the Historic Preservation Administration Act of 1989 (S. 1578), introduced by Senator Fowler in the 101st Congress; and the National Historic Preservation Policy Act of 1989 (H.R. 3412), introduced by Representative Charles Bennett as a companion to S. 1578. Among many other provisions, these bills required federal agencies and (in some versions) all federally funded preservation programs to adopt policies and procedures regarding the disposition of human remains and funerary objects. These policies and procedures had to be consistent with a set of principles that were spelled out in the proposed statute. SAA worked with congressional staff and commented extensively on the language of these bills, including the repatriation language. In congressional testimony, SAA supported S. 1578, both in general and with respect to its repatriation provisions.⁹ None of these bills passed, and their approach to repatriation was not taken up in subsequent legislation.

The third group of bills was targeted directly at the Smithsonian Institution, beginning with the National American Indian Museum and Memorial Act (S. 1722), introduced by Senator Daniel Inouye in the One-hundredth Congress. This bill provided for the establishment of a National Museum of the American Indian connected with the Smithsonian Institution and for the construction of a memorial at which some or all of the Smithsonian's Native American skeletal collections would be interred. SAA submitted congressional testimony in which it applauded the idea of an Indian museum and expressed support for the principle of repatriation; however, it also expressed concerns about the bill's ambiguity with regard to which remains would be reburied and the losses to science that might result.¹⁰ Ultimately, the bill was amended to transfer the Smithsonian's skeletal collections to the new museum but to defer reburial pending a determination by the Congress as to final disposition; the amendment also created a presidential commission

charged with making recommendations on the disposition of these remains. Even so, the amended bill did not pass. Following the trail blazed by S. 1722, more such bills were introduced in the subsequent 101st Congress. The first was the Indian Remains Reburial Act (H.R. 1124), sponsored by Representative Byron Dorgan, and this was soon followed by two more: the Native American Indian Museum Act (S. 978), sponsored by Senator Inouye, and a companion bill (H.R. 2668) with the same name, introduced by Representative Ben Nighthorse Campbell. The Dorgan bill never moved, but the Inouye bill was quickly passed by both houses and in November 1989 became P.L. 101-185, the National Museum of the American Indian Act. This law required the Smithsonian to inventory its collections and to determine the "tribal origin" of the human remains and funerary objects therein. Any Indian tribe that was affiliated with such remains or objects was granted the right to reclaim them. Politically, this bill clearly signaled Congress's willingness to act favorably on repatriation matters; thus, it set the stage for the passage of NAGPRA, almost exactly a year later. SAA submitted written comments on S. 978 to congressional staff but was not given the opportunity to testify.¹¹

The fourth group of bills took a similar approach to museum collections, but they targeted federal agencies and federally funded museums other than the Smithsonian; these bills also contained repatriation provisions governing the excavation of Native American burials on federal and tribal lands. All were considered in the 101st Congress. The House of Representatives saw the Native American Burial Site Preservation Act of 1989 (H.R. 1381) introduced by Representative Bennett, the Native American Grave and Burial Protection Act (H.R. 1646) introduced by Representative Morris Udall, and the Native American Graves Protection and Repatriation Act (H.R. 5237) also sponsored by Representative Udall. The Senate considered the Native American Grave and Burial Protection Act (S. 1021), introduced by Senator John McCain, and the Native American Repatriation of Cultural Patrimony Act (S. 1980), introduced by Senator Inouye. Ultimately, it was the second Udall bill that passed both houses of Congress and became P.L. 101-601, the Native American Graves Protection and Repatriation Act, in November 1990. Along the way to passage, this bill incorporated elements of the two Senate bills as well.

S. 1980 was shaped in part by the report of a special conference that was organized by the American Association of Museums and Native Americans, with congressional encouragement and observation.¹² The Panel for a National Dialogue on Museum/Native American Relations met over a period of several months in 1989 at the Heard Museum in Phoenix. Of the fourteen panelists who were invited, twelve were able to participate: six Native American representatives, three museum representatives, and three representatives from scientific organizations (SAA, the American Association of Physical Anthro-

pologists, and the Society of Professional Archaeologists). During the panel's wide-ranging discussions, SAA's representative held to the Society's 1986 principles and attempted to keep the conference focused on the central issues. Although the panel failed to reach consensus on some of these issues, a report was sent to Congress that gave the impression of consensus and glossed over the areas of disagreement.¹³ Subsequently, the three representatives of scientific organizations on the panel released a letter and minority report that were included in the record of the congressional hearings on S. 1980.¹⁴ These documents expressed concerns about a lack of consensus and understanding on the issue of unaffiliated human remains; it pushed for the importance of a case-by-case approach; and it pressed the need for equal consideration for all parties.

Throughout the legislative process, SAA gave congressional staff comments designed to align each of these bills as closely as possible to the principles articulated in its *Statement Concerning the Treatment of Human Remains*.¹⁵ With this goal in mind it also testified at congressional hearings in May and July of 1990.¹⁶ Although it identified strengths and weaknesses in each of these bills, SAA generally opposed H.R. 1381 because of its sweeping prohibition against all excavations of Native American burials unless specifically permitted by state law—a provision that was not only at odds with the principles in SAA's *Statement* but also one likely to cause havoc with federally mandated cultural resource management throughout the United States. At the same time, SAA was generally supportive of H.R. 5237 and S. 1980. It particularly applauded their inventory and repatriation provisions, which took a case-by-case approach, as well as their antilooting provisions. SAA described both bills as "positive and workable" proposals and made a number of specific suggestions for improvement.

In September of 1990, SAA representatives met with their counterparts from the Native American Rights Fund (NARF) and the Association on American Indian Affairs (AAIA)—the two major Indian advocacy organizations involved with this legislation—and agreed on compromise language, which, in October of 1990, was incorporated into the bill (U.S. Congress 2000: 133–35). This compromise language included, among other things, the current statutory definition of "cultural affiliation." As H.R. 5237 neared its final form, it became clear that this bill, while not perfect, came close enough to these principles to warrant the Society's support. This prompted SAA to take the initiative in sending two key letters of support for this bill, both of which were jointly signed by a coalition of scholarly, museum, preservation, and Native American organizations.

The first letter, sent to Representative Udall on October 12, 1990, endorsed H.R. 5237, as it had been marked up by the Committee on Interior and Insular Affairs two days earlier to include the compromise language

described earlier. Jointly signed by SAA, NARF, AAIA, and the National Congress of American Indians (NCAI), it was also accompanied by a statement of support from the American Association of Museums (AAM). The letter's last sentence makes clear the collaboration that took place in shaping the final bill:

We are grateful to you, to the Committee members, and to the Committee staff for working with all of us in the drafting of legislation that has earned the support of these Indian, museum, and scientific organizations.

The second letter was sent to President George Bush on November 2, 1990, urging him to sign the bill that had just been passed by Congress. In addition to SAA, NARF, AAIA, and NCAI, this letter was also signed by the American Anthropological Association, the American Association of Physical Anthropologists, the Archaeological Institute of America, the National Conference of State Historic Preservation Officers, the National Trust for Historic Preservation, Preservation Action, the Society for Historical Archaeology, and the Society of Professional Archaeologists. The body of the letter read as follows:

The Native American Grave Protection and Repatriation Act is a vital piece of legislation that is the product of a carefully constructed compromise which has earned the support of the Indian, museum, scientific and historic preservation communities.

We believe that the bill will create a workable framework fostering sensitivity and cooperation in achieving the appropriate repatriation of Native American human remains and cultural objects. As representatives of these diverse organizations, we strongly urge you to sign H.R. 5237.

These letters, with the accounts of others who were closely involved in the legislative process,¹⁷ clearly show that NAGPRA was seen by all sides as a compromise that balanced the interests of the scientific, museum, and Indian communities.

More important, the record also shows that, from 1986 on, SAA explicitly recognized the validity of repatriation in principle and worked constructively with Congress to craft a balanced solution that would be consistent with the policy articulated in its *Statement*—an effort in which it arguably succeeded.¹⁸ Assertions that SAA opposed NAGPRA or, at best, was a last-minute convert are based more on stereotypes than on fact.¹⁹

MORE GUIDING PRINCIPLES

In 1995, the SAA published *Ethics in American Archaeology: Challenges for the 1990's*.²⁰ This volume was revised, and a second edition was published in

2000.²¹ These volumes are the result of a series of discussions among archaeologists holding different views, and they outline the principles of archaeological ethics (seven in the 1995 volume, eight in the 2000 volume). These principles go beyond issues of repatriation, but all four repatriation principles are consistent with the principles of archaeological ethics. In particular, the ethical principles that relate most directly to our repatriation discussion are stewardship, accountability, and public education and outreach. Rather than associate particular ethical principles to each of the repatriation principles, a more general discussion should provide a better context for both documents and for SAA decisions.

The principle of stewardship is central to all of the SAA ethical principles. Stewardship speaks to the special obligations of archaeologists to understand the archaeological record and preserve it for future generations. However, this principle does not say that a nonthreatened site should never be excavated, nor does it privilege archaeologists' views above all others. Indeed, discussion of the stewardship principle highlights the requirement that archaeologists be aware of and respect other legitimate interests in and concerns for the past.²² Several of the repatriation principles are also linked to this stewardship obligation and the understanding that many have legitimate interests in and claims on the past. For archaeologists, a critical factor, as Lynott notes, is that "The archaeological record is a part of our cultural heritage and belongs to all of humanity."²³ This does not mean that decisions are always made according to the wishes of a particular group but that the public interest must also be considered.

Accountability is the ethical principle most closely tied to SAA's *Statement Concerning the Treatment of Human Remains*:

Responsible archaeological research 3 requires an acknowledgment of public accountability and a commitment to make every reasonable effort, in good faith, to consult actively with affected group(s), with the goal of establishing a working relationship that can be beneficial to all parties involved.²⁴

SAA's position on repatriation has consistently held to this principle by recognizing that there is more than one legitimate view, by acknowledging the importance of affinity or cultural affiliation in decision making and deciding among conflicting views, by arguing for a case-by-case approach that focuses on the specifics in a given situation, and by calling for consultation and communication in the short- and long-term. The accountability principle makes archaeologists answerable to the peoples they study, but it also mandates that archaeologists develop relationships with these peoples.

Finally, the third relevant ethical principle is public education and outreach. The SAA's positions on repatriation do not directly come from the

obligation of an archaeologist to be concerned about public education, but if the archaeologist acts as steward and is accountable, that individual would also have to be concerned with outreach. This principle mandates enlisting public support, explaining archaeological methods, and communicating archaeological interpretations. Everything the SAA has done in terms of NAGPRA, from working with Congress to providing forums for discussion, has been done in the spirit of this principle.

The ethical principles were written several years after the repatriation principles and were not based on them. However, both sets of principles are related and linked because the profession accepts these ideas as constituting ethical and appropriate behavior.

NAGPRA AND SAA: SOME CURRENT ISSUES

On its face, NAGPRA incorporates a number of SAA's key principles. First, it recognizes traditional and scientific interests in human remains and seeks to balance those interests. Second, rather than weigh the potential to contribute scientific information with closeness of relationship to modern groups (as SAA suggests), the law balances scientific and traditional interests by establishing a threshold for closeness of relationship (cultural affiliation), which, if met, grants the related tribe control over the disposition of the remains or objects. If remains or objects do not meet the threshold of closeness of relationship (i.e., are not found to be culturally affiliated), then control over those remains (and hence access for scientific study) remains with the museum or federal agency. Third, repatriation decisions are to be made on a case-by-case basis, incorporating both scientific and traditional evidence concerning the closeness of relationship. And fourth, consultation between institutions and Native American groups is required the law, and telephone or face-to-face discussions are strongly encouraged in the NAGPRA regulations.

NAGPRA is not a perfect document from the position of any of the stakeholders. Indeed, it seems exceedingly unlikely that any resolution could have been found that would have completely satisfied all the interested parties. Native Americans, archaeologists, physical anthropologists, and museum professionals can all find components of the law that they see as problematic. Thus, there is a continuing debate over the interpretation (and implementation) of certain provisions in the law. In addition, NAGPRA leaves unresolved the important issue of culturally unidentifiable human remains.

While SAA supports NAGPRA as a workable compromise, in the remainder of this section we discuss four issues of current concern: the interpretation of cultural affiliation, documentation, scientific study, and the dis-

position of culturally unidentifiable human remains. With this discussion, we include a consideration of the relevant implications of the Kennewick decision,²⁵ which provides the only available guidance from the courts relevant to these issues.

Cultural Affiliation

The determination of cultural affiliation is the cornerstone of NAGPRA because most decisions about the disposition of human remains and objects are made with reference to that standard. In most circumstances, cultural affiliation is the threshold for closeness of relationship that must be met for a Native American group to determine the disposition of the remains or objects. As a consequence of its centrality to the decision-making process, the interpretation of this term is hotly contested.

The statute defines cultural affiliation to be “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.”²⁶ This definition has three components: a present-day group, an identifiable earlier group, and a relationship of shared group identity that can be reasonably traced between them. NAGPRA defines “present day Indian tribe” as a federally recognized tribe. While some would like to broaden this definition, from a legal standpoint it appears to be unambiguous. “Identifiable earlier group,” on the other hand, is not defined in the statute and is not so straightforward to interpret.²⁷ The Society for American Archaeology has argued that Congress intended that an identifiable earlier group is a social entity that is analogous to a modern tribe in terms of its composition and scale (absent, of course, the government recognition). This interpretation is supported by the “relationship of shared group identity” that must be traced between the present-day tribe and the identifiable earlier group. Surely, if these two entities are to have a shared identity, they must be analogous.

In practice, an identifiable earlier group has often been equated with an archaeological “culture” defined by a complex of material traits. In some cases, this may be the best that can be done. However, recent work has shown how evidence from traditional history can be productively used in conjunction with archaeological evidence in identifying the earlier groups and establishing the linkage between them and modern tribes.²⁸ The Kennewick litigation, mentioned earlier, is the example that has received the most public attention. In this case, the Secretary of the Interior (on behalf of the United States government) argued that there was a cultural affiliation between the nine-thousand-year-old skeleton and a coalition of five tribal claimants. In an *amicus curiae* brief, SAA argued that the statutory standard

for cultural affiliation had not been met by the government.²⁹ In its recent decision, the court agreed with SAA and found that:

The Secretary did not articulate a cogent rationale that supports his finding of cultural affiliation. The Secretary neither identified the earlier group to which the Kennewick Man belonged, nor explained how he inferred a “shared group identity” over a span of 9,000 years between the Tribal Claimants and this unknown earlier group. Based on a thorough review of the record, I conclude that the evidence before the Secretary was insufficient to establish cultural affiliation by a preponderance of the evidence.³⁰

NAGPRA does not explicitly provide for joint affiliations in which several tribes are culturally affiliated with a single earlier group. Nonetheless, it has become commonplace for federal agencies and some museums to affiliate a single set of human remains with a diverse set of modern tribes on the theory that, if the set of tribes is sufficiently inclusive, then the true affiliation is in there somewhere. Although SAA recognizes that joint affiliations are appropriate in cases where all the tribes represent a single “people” (as with the three federally recognized Cherokee tribes), SAA has opposed joint affiliations when they have been used to circumvent the requirement of demonstrating a relationship of shared group identity between ancient remains and a modern tribe. Again, agreeing with argument presented by SAA in its amicus curiae brief, the court in the Kennewick case disallowed joint affiliation, except in narrowly defined circumstances that do not defeat the law’s purpose of establishing a close relationship.³¹

Documentation

SAA’s *Statement Concerning the Treatment of Human Remains* stipulates that “whatever their ultimate disposition, all human remains should receive appropriate scientific study.” In the discussions with Congress that led to NAGPRA, SAA argued unsuccessfully for a provision in the law that would have explicitly required basic scientific documentation of all human remains and cultural items prior to any repatriation. In the end, the law that was passed mandated such documentation for intentional excavations and inadvertent discoveries on federal land but not for existing agency and museum collections.

For intentional excavations or inadvertent discoveries on federal lands, basic scientific recording is required by the Archeological Resources Protection Act,³² which is explicitly referenced in NAGPRA.³³ This interpre-

tation was confirmed by the U.S. Department of the Interior, the lead agency for implementing NAGPRA, in recent congressional testimony:

The use of contemporary, professional scientific archeological methods and techniques is required. Proper professional recording, examination, interpretation, and reporting of the results of the excavation or removal must be carried out by the responsible agency before any disposition of the remains occurs.³⁴

Despite the existence of this legal requirement, human remains and funerary objects are often not properly documented when burials are encountered in the field and Native American groups demand immediate repatriation. In such cases, not only is important scientific information lost, but decisions on cultural affiliation and repatriation are also made in the absence of any systematic evidence on the specific characteristics of the human remains, cultural items, or their contexts.

For inventories of existing collections, the statute requires only that federal agencies and museums provide a "simple itemized list" summarizing the relevant objects³⁵ and that cultural affiliation be determined "to the extent possible based on information possessed by such museum or Federal agency."³⁶ At the same time, NAGPRA does not prohibit collecting additional documentation, and such information can often be extremely helpful in determining cultural affiliation. In practice, the quality of the basic documentation is largely left up to the agency or museum doing the inventory.

Scientific Study

Despite persistent and adamant claims to the contrary, NAGPRA does not prohibit scientific study of human remains and cultural items in museum or agency collections. The Department of Interior's recent congressional testimony is crystal clear on this point:

In its present form, NAGPRA cannot be used as "authorization for . . . new scientific studies . . ." as part of the documentation for inventories of Native American human remains and funerary objects held in public agency or museum collections. NAGPRA does not prohibit new scientific studies; it simply cannot be used as the authorization for them. Public agencies and museums that hold such remains and objects are permitted to undertake or allow new studies under ARPA and other statutes and regulations. In the case of museums, they are permitted to undertake or allow new studies according to

their articles of incorporation, statements of purpose, or other legal statements under which they were established.³⁷

The same testimony goes on to point out that scientific studies can provide important evidence that bears on determinations of cultural affiliation:

In fact, certain kinds of studies are needed for effective implementation of NAGPRA. For example, making determinations of cultural affiliation for Native American human remains and other cultural items in their collections requires agency and museum staffs to investigate a wide range of scientific, historical, and administrative information. The process of gathering, evaluating, interpreting, and reaching a decision about cultural affiliation requires study.³⁸

Culturally Unidentifiable Human Remains

Despite a widespread belief that NAGPRA mandates the repatriation of all Native American human remains, this is plainly not the case. The law gives culturally affiliated tribes control over the disposition of culturally affiliated human remains; it does not necessarily provide for the repatriation of human remains and cultural items that reside in the collections of museums or federal agencies and that cannot be culturally affiliated—that is, the so-called culturally unidentifiable human remains. For many Native Americans, this seems to be the key unresolved issue.

When NAGPRA was under consideration, it was clear to Congress that culturally unidentifiable remains represented a particularly difficult problem. Not only was there a lack of agreement among tribes, museums, and the scientific community, there was no agreement among Native American groups on how this issue should be resolved. Congress hoped that the experience developed by tribes, federal agencies, and museums through the repatriation of affiliated remains might lead to a resolution of this problem; hence, they requested recommendations from the Review Committee established by NAGPRA.³⁹

This committee has provided its recommendations.⁴⁰ It recommended that the Secretary of the Interior publish draft regulations that would provide for the disposition of culturally unidentifiable human remains based on agreements reached at regional consultation meetings. As of this writing, draft regulations have not been published in the *Federal Register*. However, the Department of the Interior provided the Review Committee with a proposed draft rule that was first endorsed and later rejected by the Review Committee. SAA does not believe NAGPRA gives the Secretary the legal authority to issue regulations mandating the disposition of culturally unidentifiable human remains, instead arguing that Congress intended that new legislation is required.⁴¹

As recognized by the review committee, human remains may be culturally unidentifiable for a number of reasons. In some cases, the collection of additional evidence may lead to a change to a culturally affiliated status. In other cases, age or lack of documentation of the remains makes it seem unlikely that an affiliation can ever be established. The fact that some institutions and agencies are circumventing congressional intent (and probably the law) by associating what are certainly culturally unidentifiable remains with geographically based collectives of unrelated tribes for purposes of rapid repatriation is of particular concern here. Geographical proximity or coincidence is not a sufficient condition for establishing cultural affiliation, and it is cultural affiliation that allows repatriation to be legitimate.

CONCLUSION

The authors believe that the principles adopted by SAA have served it well in negotiating the language of NAGPRA, in assessing the law's implementation through regulations, and in evaluating proposed legislation. These principles attempt to balance scientific concerns with those of indigenous peoples. As the largest professional organization of archaeologists, SAA has worked to represent archaeology on a national level while recognizing that some diversity of opinion remains among archaeologists and that views on repatriation are not static but change with further experience and consideration. Since the passage of NAGPRA, SAA has not only been open to communication with tribes, but it has forcefully urged its members to work closely and openly with tribes in repatriation and on other issues of common concern (such as looting).⁴² While we will not always agree, we will always respectfully listen and try to understand all positions, and we will work to use the insights gained to refine our own perspectives. We trust that tribes will approach us in an equally open atmosphere. Such open communication and mutual respect provide us the best path toward developing mutually acceptable solutions to these difficult issues.

NOTES

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also thank the editors of the current volume, Jennifer Richman and Marion Forsyth, for their many helpful suggestions.

1. Pub. L. No. 101-601, 25 U.S.C. §§ 3001-3013.
2. Lynne Goldstein & Keith Kintigh, *Ethics and the Reburial Controversy*, 55 AM. ANTIQUITY 585-91 (1990).
3. Even though we write from the perspective of our involvement with Society for American Archaeology, it should be stressed that all opinions expressed in this paper are our own and do not necessarily reflect the views of the Society.
4. Dena F. Dincauze, *Report on the Conference on Reburial Issues*, 3 BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 1-3 (1985); Thomas F. King, *Letter to the Editor*, 4(2) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 4-5 (1986); Thomas F. King, *Letter to the Editor*, 4(3) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 5-6 (1986); Larry J. Zimmerman and Jan Hammil, *Letter to the Editor*, 4(2) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 5 (1986); *Announcement of Plenary Session, SAA Annual Meeting, New Orleans, Apr. 24, 1986*, 4(1) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 1-2 (1986); Polly McW. Quick, *Proceedings: Conference on Reburial Issues, Newberry Library, Chicago, June 14-15, 1985*. Society for American Archaeology, Washington, D.C.
5. *Statement Concerning the Treatment of Human Remains*, 4(3) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 7-8 (1986); see Appendix E for full text.
6. *Id.*
7. Keith Kintigh, *Let's Start with the Definition: A Relationship of Shared Group Identity, Identifiable Earlier Group, and Issues of Joint Affiliation*. Paper presented at the Second Durango Affiliation Conference on Ancestral Peoples of the Four Corners Region, Durango, Colorado, 1998.
8. *Don D. Fowler President's Report*, 4(5) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 1-2 (1986); *Native American Cultural Preservation Act: Hearing before the Select Comm. on Indian Affairs, United States Senate, 100th Congress, First Session, on S. 187*, 55-65, 176-79 (Feb. 20, 1987).
9. William A. Lovis & Jeremy A. Sabloff, *S. 1578, the Independent Historic Preservation Agency Act, and S. 1579, the National Historic Preservation Policy Act*, 8(1) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 1-2 (1990); *SAA, Treatment of Human Remains*, 8(1) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 2 (1990); *Historic Preservation Administration Act of 1989 and the National Historic Preservation Policy Act of 1989: Hearings before the Subcomm. on Public Lands, National Parks, and Forests of the Comm. on Energy and Natural Resources, United States Senate, 101st Congress, Second Session, on S. 1578, S. 1579*, 159-71 (Feb. 22, 1990).
10. *National American Indian Museum Act: Joint Hearing before the Select Comm. on Indian Affairs, United States Senate, and the Comm. on Rules and Administration, United States Senate, 100th Cong. First Session, on S. 1722 and S. 1723, Part 1*, 113-16 (Nov. 12, 1987); *National American Indian Museum Act: Joint Hearing before the Select Comm. on Indian Affairs, United States Senate, and the Comm. on Rules and Administration,*

United States Senate, 100th Cong., First Session, on S. 1722. and S. 1723, 98–101 (Nov. 18, 1987).

11. *National Memorial Museum of the American Indian: Joint Hearing before the Select Comm. on Indian Affairs, United States Senate, and the Comm. on Rules and Administration, United States Senate, 101st Cong., First Session, on S. 978, 101–203* (May 12, 1989).

12. See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L. J. 35 (1992).

13. Heard Museum, *Report of the Panel for a National Dialogue on Museum/Native American Relations*. 14(1) MUSEUM ANTHROPOLOGY 6–13, reprinted in 24 ARIZ. ST. L. J. 487 (1992).

14. *Native American Grave and Burial Protection Act (Repatriation): Native American Repatriation of Cultural Patrimony Act; and Heard Museum Report: Hearing before the Select Comm. on Indian Affairs, United States Senate, 101st Congress, 2nd Session on S. 1021 and S. 1980, 367–69* (May 14, 1990). Senate Hearing 101–952, 367–69; Lynne G. Goldstein, Michael Moratto, & Douglas H. Ubelaker, *The Panel for a National Dialogue on Museum/Native American Relations: A Minority View*, 14(1) MUSEUM ANTHROPOLOGY 15–16 (1990).

15. Keith Kintigh, *A Perspective on Reburial and Repatriation*, 8(2) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 2–3 (1990); William A. Lovis, *How Far Will It Go? A Look at S. 1980 and Other Repatriation Legislation*, 8(2) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 8–10 (1990).

16. *Native American Grave and Burial Protection Act (Repatriation); Native American Repatriation of Cultural Patrimony Act; and Heard Museum Report: Hearing before the Select Comm. on Indian Affairs, United States Senate, 101st Congress, Second Session, on S. 1021 and S. 1980, May 14, 1990*, Washington, D.C. Senate Hearing 101–952, 68–74, 529–43, 136–51, 229–34. U.S. Government Printing Office, Washington, D.C. (1990).

17. See, e.g., Senator John McCain, *Remarks on the Senate Floor*, CONGRESSIONAL RECORD, Oct. 26, 1990, S 17173; and Trope & Echo-Hawk, *supra* note 12, at 60.

18. Keith Kintigh, *Repatriation We Can Live With*, 9(1) BULLETIN OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY 6–7 (1991).

19. See, e.g., *Native American Graves Protection and Repatriation Act: Hearing before the Comm. on Indian Affairs, United States Senate, 106th Congress, Second Session, on Oversight Hearing to Provide for the Protection of Native American Graves*, 11 (July 25, 2000).

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21. MARK LYNOTT & ALISON WYLIE, *ETHICS IN AMERICAN ARCHAEOLOGY 2* (Society for American Archaeology, Washington, D.C. 2000).

22. *Id.* at 30–31.

23. *Id.* at 34.

24. Lynott & Wylie, *supra* note 20, at 11.

25. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002); *SAA Responds to the Kennewick Man Court Decision*, 2(5) SAA ARCHAEOLOGICAL RECORD 5–6 (2002).

26. 25 U.S.C. § 3001(2).

27. Memorandum of Law in Support of the Society for American Archaeology's *Amicus Curiae* Submission at 16–17, *Bonnichsen v. United States*, CV 96-1481-JE, June 1, 2001, available at www.saa.org/repatriation/kennewickbriefs.html (accessed January 26, 2003); Review of Secretary Babbitt's Final Determination of Cultural Affiliation for Kennewick Man at 3–5, *Bonnichsen v. United States*, CV 96-1481-JE, June 1, 2001, available at www.saa.org/repatriation/kennewickbriefs.html (accessed January 26, 2003).

28. Kurt Dongoske, Michael Yeatts, Roger Anyon, & T. J. Ferguson, *Archaeological Cultures and Cultural Affiliation: Hopi and Zuni Perspectives in the American Southwest*, 62(2) AM. ANTIQUITY 600; Roger C. Echo-Hawk, *Ancient History in the New World: Integrating Oral Traditions and the Archaeological Record*, 65(2) AM. ANTIQUITY 267 (2000); T. J. Ferguson and Micah Lomaomvaya, *Hoopog'yaqam niqw Wukoskyavi (Those Who Went to the Northeast and Tonto Basin): Hopi-Salado Cultural Affiliation Study*, Hopi Cultural Preservation Office, Hopi Tribe (1999); Peter M. Whiteley, *Archaeology and Oral Tradition: The Scientific Importance of Dialogue*, 67(3) AM. ANTIQUITY 405 (2002).

29. SAA Memorandum of Law, *supra* note 27; Review of Secretary Babbitt's Final Determination, *supra* note 27.

30. *Bonnichsen*, *supra* note 25, at 55–57.

31. *Id.* at 34–37.

32. 16 U.S.C. §§ 470aa *et seq.*

33. 25 U.S.C. § 3002(c)(1).

34. *Statement of Katherine H. Stevenson, Associate Director, Cultural Resource Stewardship and Partnerships, National Park Service, Department of the Interior, before the House Committee on Resources, Concerning H.R. 2893, a Bill to Amend the Native American Graves Protection and Repatriation Act to Provide for Appropriate Study and Repatriation of Remains for Which a Cultural Affiliation Is Not Readily Ascertainable. Hearing before the Comm. on Resources, House of Representatives, 105th Cong. 2nd Sess., on H.R. 2893, June 10, 1998, Washington, D.C. Available at www.kennewick-man.com/documents/testimony/stevenson.html (accessed January 26, 2003).*

35. 25 U.S.C. § 3003(e).

36. 25 U.S.C. § 3003(a); *see also* 43 C.F.R. § 10.9(c).

37. *Stevenson*, *supra* note 34, at 3–4.

38. *Id.* at 4.

39. 25 U.S.C. § 3006 (c)(5).

40. NAGPRA Review Committee, *Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains*, 65 Fed. Reg. 36,462–36,464 (June 8, 2000).

41. SAA Memorandum of Law, *supra* note 27.

42. *Kintigh*, *supra* note 18.