

W48(436)

Memorandum

To: Federal Agency and Museum Officials and Indian Tribe and Native Hawaiian Organizations Representatives

From: Departmental Consulting Archeologist

Subject: Draft Recommendations regarding the Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Object.

Section 8 (c)(5) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*) requires the Review Committee to recommend specific actions for developing a process for the disposition of culturally unidentifiable Native American human remains. The seven individuals on the committee have given this matter great thought and have developed the enclosed draft outlining their position and several options. The enclosed draft is intended for wide circulation to elicit comments from Indian tribes, Native Hawaiian organizations, museum, Federal agencies, and national scientific and museum organizations. We also plan to publish this draft in the *Federal Register* for broad public comment.

Anyone interested in commenting on the committee's draft recommendations should send written comments to:

The NAGPRA Review Committee
c/o Archeological Assistance Division
National Park Service
Box 37127, Suite 210
Washington DC, 20013-7127

Comments should be received by **September 30, 1995** in order for them to receive the committee's full consideration at their next scheduled meeting. For additional information, please contact Dr. C. Timothy McKeown at (202) 343-4101.

Enclosure

Call For Comments
Draft Recommendations By The
N.A.G.P.R.A. Review Committee
On The Disposition Of
Culturally Unidentifiable Native
American Remains

Under NAGPRA (25 U.S.C. 3007 (c)(5)) the Review Committee is specifically charged with "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." What follows below is a draft of recommendations from the Review Committee to the Secretary in compliance with the mandate in NAGPRA. This draft is intended for wide circulation to elicit the comments, suggestions and opinions of members of Indian tribes, Native Hawaiian organizations, scientific organizations, and museums as described under 25 U.S.C. 3007 (e). We wish to emphasize that these recommendations are preliminary and every element is open to change depending on the comments of the public.

In fulfilling their responsibility, the Review Committee makes the following observations and recommendations:

1. Although the disposition of culturally "unidentifiable human remains" is left open in NAGPRA, there is a firmly established principle in the act that assigns responsibility for what happens to human remains and associated funerary objects to lineal descendants and culturally affiliated tribes. This general principle should be followed in determining the disposition of culturally "unidentifiable human remains" that are known to be ancestral Native Americans. It is true that there are remains and associated funerary objects in museums and Federal agencies for which it is not possible to identify specific cultural connections to any particular tribe today. However, such remains and objects, no matter how ancient, are nevertheless Native American, and they should be treated according to the wishes of the Native American community. *Ultimately, decisions about what happens to the remains of Native American individuals from anywhere in the United States and associated funerary objects should rest in the hands of Native Americans.* These decisions can and should be informed by anthropological, archaeological, historical, folkloric, biological, linguistic and spiritual evidence, and nonNative Americans can and should be consulted when appropriate in the decision making process. However, the final decision should be made entirely by Native American people.
2. Although the Act specifically mentions only "unidentifiable human remains", it is consistent with other aspects of the Act to include in this discussion "associated funerary objects" as well. Therefore all recommendations on the disposition of unidentifiable human remains also apply to any funerary objects that are associated with those remains as those terms are defined in the Act. It may be that additional legislation will be required to insure that Native American groups are provided with the opportunity to repatriate associated funerary objects accompanying unidentified remains.

3. The Committee has heard extensive testimony from physical anthropologists and archaeologists as to the broader scientific, medical, and humanistic values that may be gained from analysis of Native American skeletal remains from both the recent and distant past. While the Committee recognizes there may be potential value in such analyses, such values do not provide or confer a right of control over Native American human remains that supersedes the spiritual and cultural concerns of Native American people who clearly have the closest general affiliation to these remains. The issue is not whether there is positive benefit to be gained from analysis of remains, but who has the right and responsibility to make decisions about whether such analysis should take place.

It is the responsibility of archaeologists and physical anthropologists to communicate with Native American tribes and groups to inform them of the potential values of analysis of human remains and associated funerary objects and allow the tribes and groups to use this information as they choose in making their decisions about the treatment and disposition of those remains and objects.

4. The term "unidentifiable human remains" can be applied to three different groups of remains and these should be considered separately. The three categories include: 1. remains for which there is cultural affiliation with Native American groups who are not formally recognized by the BIA; 2. ancient remains for which there is specific information about the original location and circumstances of the burial; and 3. remains which may be Native American but which lack information about their original burial location.

1. Remains for which there is cultural affiliation with Native American groups who are not formally recognized by the BIA

There are remains that can be directly traced by a preponderance of the evidence to tribes, villages, communities of Native Americans which may not be formally recognized by the Bureau of Indian Affairs as "Tribes". In these cases, the remains are only "unidentifiable" because of the wording of the Act. In the Act, the definition of Indian "Tribe" has been interpreted by the Department of the Interior to mean only those groups that have received formal recognition by the BIA as "tribes". There are, however, many groups in the United States that are "eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (25 U.S.C. 3001 (7)), but have not received formal BIA recognition by choice or other circumstances.

In cases where such groups are able to establish cultural affiliation with specific remains it is the unequivocal recommendation of the Review Committee that they should be accorded the same rights and responsibilities given to BIA recognized Tribes for the repatriation of those specific remains. Cultural affiliation in these cases should follow the guidelines of the Act and be determined by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion (25 U.S.C. 3006. (a)(4)).

The Review Committee would appreciate suggestions on how to identify and recognize those Native American groups who should be eligible to claim remains for repatriation but are not on the Bureau of Indian Affairs list of federally recognized "tribes".

2. Ancient remains for which there is specific information about the original location and circumstances of the burial

There is a very large number of remains from across the United States which come from earlier time periods and it is not possible to trace directly ancestry to any known contemporary tribe or group. Remains coming from archaeological excavations at sites that were occupied before the arrival of Europeans will most commonly fall into this category. From available evidence, it is often possible to

determine that several groups or tribes may have historical or deeper ancestral ties to the area. In these cases, it may or may not be possible to establish direct links between the ancient remains and any specific contemporary groups or tribes.

In these cases, responsibility for what happens to such remains rests with those tribes and groups who are able to show an affinity both to the territory and to the general time period from which the remains came. Tribes or groups will demonstrate such geographic and temporal affinity through evidence based on biological, archaeological, linguistic, folkloric, oral traditional or other relevant information or expert opinion. Tribes or groups who are able to demonstrate geographical and temporal affinity to ancient remains will decide on what happens to those remains based on consensual agreement. It is the responsibility of the tribes who claim affiliation to come forward and state their claim and present their evidence of affiliation. Based on information in the inventories received from museums and Federal agencies, the Review Committee will take responsibility for notifying all tribes who may be potentially affiliated with particular remains .

The Act anticipates the circumstances of more ancient remains to some extent in Sec. 7 (e), "Competing Claims". This section deals with situations in which there are multiple claims for remains or objects and advises that museums and Federal agencies retain those remains and objects until the "requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction." Although the case of "unidentified" remains may well not involve a dispute, the same general principles should apply. Specifically, a museum or Federal agency should retain "culturally unidentified" remains and associated funerary objects until such time as all potentially affiliated tribes and groups reach consensual agreement on disposition of the remains and associated objects.

3. Remains which are likely to be Native American but which lack information about their original burial location

There are remains in museums and Federal agencies which are known or appear to be Native American through museum records or simple visual examination but which lack sufficient information to identify more specific cultural or geographical affinities. There are two broad types of remains that may fall in this group. First, there are remains for which there may be some indication that they are culturally affiliated with one federally recognized Tribe or Native Hawaiian group, but there is insufficient independent evidence to confirm the affiliation. It is possible, for example, to have remains in museums which are labeled as belonging to one tribe or group, but with no supporting evidence of any kind to support that identification. In such cases the remains may be affiliated with one or more additional groups of Native Americans or with non-Native Americans. In these cases, however, the museum or Federal Agency should not have to bear the responsibility of determining whether the remains should be returned to a specific group. The Act actually does speak to this situation to some extent in Sec. 7(a)(4). In this section there are guidelines for when a museum or federal agency is unable to establish cultural affiliation of remains in the inventory process. In these cases, the burden of responsibility goes to the Tribe to "show cultural affiliation by a preponderance of the evidence".

In cases such as this, when the museum or Federal agency is unable to reasonably confirm the cultural affiliation of specific Native American human remains, the inventory of these remains should be provided to the Review Committee, along with a summary made by the museum or Federal agency of whatever limited information is available that might relate to the identity of the individuals involved. The Review Committee then has the opportunity to review available information. The Committee can either decide there is sufficient evidence to reasonably determine cultural affiliation or that the remains should continue to be treated as "unidentifiable."

Another group of remains with limited cultural or geographical information remains are those for which there is no available information about their origins or any possible contemporary descendent Tribes or groups. There are, for example, remains in museums which are simply identified as "Native American" or "Indian", with no information about where they came from. In these cases, there is insufficient evidence to reasonably identify tribal affiliation either culturally, biologically or geographically. Although this is likely to be a relatively small number of individuals, they are no less important than the other remains held by museums and Federal agencies today.

If it has been determined that these remains are Native American, then broad regional associations of Native American tribes and groups may take responsibility for determining the ultimate disposition of such remains. One possibility that has been raised is a series of regional cemeteries or mausoleums can be established on protected lands where these unidentified individuals can be reburied and protected forever. Other alternatives to regional cemeteries for the disposition of unidentifiable Native American remains may also be worked out by the regional associations.

5. Several groups have stepped forward and made explicit claims for all those Native American remains for which there are no identifiable cultural descendants. The sentiment of these groups expressed in this public commentary is that such remains should not be left unattended in museums, but should be returned for reinterment in the earth. The exact cultural affiliation of these individuals is not as important as the fact that they were removed from their final resting places without consent. There is diverse opinion in the Native American community about the treatment of individuals without cultural affiliation. The conditions outlined above for individuals without specific tribal affiliations should be applied for all so-called "unidentifiable" individuals.

6. The continuance of a Review Committee is integral to the long-term resolution of issues and problems related to the ultimate disposition of culturally unidentified human remains and associated funerary objects.

7. The Review Committee recognizes that many Native American tribes and groups have already developed regional and cultural associations to address the issue of culturally unidentified remains. These existing associations provide good models for repatriating and caring for culturally "unidentified" remains (as defined by the Act) in an expeditious and respectful manner. The guidelines outlined above are explicitly intended to facilitate and encourage the efforts of these existing associations.

8. As a means of stimulating discussion, the Review Committee would like to offer some suggestions about possible alternative procedures for repatriating unidentifiable human remains. These are suggestions only and not intended in any way as proposed regulations. The Committee offers more than one option for resolving several procedural issues and would like to solicit comments about the relative desirability of these or other options.

DRAFT FOR COMMENT ONLY
Possible procedures for deciding the disposition of unidentified remains

Procedures for identification of potential claimants

Option 1

- (1) NPS compiles map of groups and tribes who may be related to all lands across time in the United States.
- (2) NPS sends inventories of unidentifiable remains to groups with historical or cultural ties to the area from which the remains were taken, or where they currently reside if their original location is unknown.
- (3) Interested Native American groups determine if there is evidence of a direct biological or cultural affinity between them and the remains.
- (4) In the absence of such evidence, groups may use geographical and chronological information to establish an affinity to the remains.

Option 2

- (1) NPS prepares abstracts of the complete national inventories and sends copies of these abstracts to every tribe and potentially descendant Native American group in the United States.
- (2) Interested Native American groups review information on remains from areas where they maintain cultural and historical affinities.
- (3) Interested groups determine if there is evidence of a direct biological or cultural affinity between them and the remains.
- (4) In the absence of such evidence, groups may use geographical and chronological information to establish an affinity to the remains.

Procedures for reviewing claims

Option 1

- (1) Tribe(s) or group(s) make a request for repatriation by providing NPS evidence of their affinity to the remains.
- (2) NPS reviews claims for remains and, in consultation with the NAGPRA review committee, makes determinations of cultural affinity.
- (3) The museum or requesting group may appeal the NPS decision to the NAGPRA review committee or appropriate courts.

Option 2

- (1) Tribe(s) or group(s) requests repatriation by presenting evidence of an affinity with the collection to the museum or Federal agency holding the remains.
- (2) Museum or Federal agency reviews request for repatriation and makes determinations of cultural affinity.
- (3) If the museum or Federal agency decides an affinity does not exist, the requesting group may appeal the decision to the NAGPRA review committee or appropriate courts.

Procedures for making repatriations to Native American groups without BIA recognition

- (1) If it is determined that a Native American group has an affinity with the remains, a notice of

intent to repatriate is published in the federal register with an appropriate waiting period to allow other tribes enough time to file additional claims.

- (2) If additional claims for specific remains are filed after this publication, the NPS will review the case for each additional request.
- (3) If it is determined based on this review that the additional requesting tribe or group does have an affinity with the remains no repatriation will occur until all claimants reach a consensual agreement on the disposition of the remains.
- (4) If agreement is reached, the remains will be repatriated to the requesting groups.
- (5) If agreement cannot be resolved through consensual agreement, the claimants can ask the NAGPRA review committee to mediate the dispute or appeal to the appropriate courts.