

**COMMENTS ON
DRAFT RECOMMENDATIONS
BY THE NAGPRA REVIEW COMMITTEE
REGARDING THE DISPOSITION OF CULTURALLY UNIDENTIFIABLE REMAINS**

By

The Society for American Archaeology
Task Force on Repatriation

The SAA Task Force on Repatriation, on behalf of the Society for American Archaeology, would like to take this opportunity to thank the NAGPRA Review Committee for its efforts in preparing the set of Draft Recommendations Regarding the Disposition of Unidentifiable Remains, and for its consideration and inclusion of earlier SAA and individual comments on this topic. The following comments incorporate the views of SAA members gained through specific requests for comments on unaffiliated remains as well as electronic and verbal responses derived from a special SAA Forum held at our Annual Meeting in Minneapolis in May of 1995. We note that our Task Force has received more comment on this issue than on any other repatriation topic.

All of the following comments are prefaced by the Task Force's position (already outlined in a previous letter to NAGPRA Review Committee Chair Naranjo) that the Draft Recommendations on the Disposition of Culturally Unidentifiable Remains are premature. Any such procedures should be based upon experience and knowledge gained by all parties from the process of repatriating affiliated remains. And, in fact, this is one reason that culturally unidentifiable remains were set aside in the original legislation; that is, proper treatment of this difficult topic should be informed by the lessons learned on the culturally affiliated materials.

The first issue is the question of whether or not the draft recommendations go beyond the Committee's responsibilities as articulated in NAGPRA. There are two components to this particular issue. One of these relates to Committee responsibility for the treatment of human remains. Unaffiliated remains were set aside in NAGPRA because all parties understood that resolving this issue could require a separate piece of legislation and definitely require more extensive negotiations, and further, that these negotiations would benefit from experience gained from the treatment and disposition of affiliated remains. The second component addresses the significant fact that unaffiliated funerary artifacts are not included as a provision of the original act for this category of remains. Taking these two components together, the SAA argues that the NAGPRA Review Committee has gone beyond its legislative jurisdiction in drafting this document. This observation is made irrespective of the intentions of the committee. It is simply a statement that if the Committee wishes to proceed with these recommendations it will have to proceed with a request for supplementary legislation.

Our second comment directs itself to the articulated and highlighted statement by the Committee that "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.” While this is a laudable statement, neither the Recommendations nor the Draft Possible Procedures for Deciding the Disposition of Unaffiliated Remains seem to follow this suggestion. The Committee does not allow for the possibility that a tribe(s) may wish further scientific study and, in lieu of repatriation, choose curation, both of which are clearly acceptable tribal decisions in the context of NAGPRA. In effect, the Committee may have limited the acceptable choices available to tribes. We acknowledge that many or even most tribes may not find this direction desirable, but if the Committee believes in the principle stated, then the options must remain open.

Additionally, the SAA reasserts its interpretation of NAGPRA that decisions regarding disposition should ultimately rest in the hands of those Native Americans who are most closely affiliated with the affected remains. Such an underlying principle assures that any decisions regarding ultimate disposition and treatment are consistent with a related set of cultural beliefs, and guards against the possibility of potentially erroneous and irreversible decisions being made about disposition. Scientific study may play a significant role in this determination, and NAGPRA recognizes the legitimacy of such scientific interest.

NAGPRA clearly recognizes that human remains may have substantial scientific as well as cultural value. The position articulated in the recommendations, in particular the lack of any option for curation, suggests that the Committee has not taken this point into consideration as it relates to the rights of tribes to make decisions, and the rights of institutions to negotiate with tribes. The Committee seems to assume that analysis is incompatible with Native American spiritual and cultural concerns as well as rights of control. This need not be the case, and it seems to us that it is the Committee’s particular role to make this point in assisting tribes in understanding their rights under the law.

The Draft Recommendations outline three categories of culturally unidentifiable human remains. The following comments are organized according to these categories.

- Remains for which there is cultural affiliation with Native American groups who are not formally recognized by the BIA. We largely agree with the Committee’s identification and treatment of this category. We would further suggest that tribes recognized at the State level be included as candidates for notification and repatriation. In addition, state level Native American commissions, governmental or non-governmental, can be of valuable assistance in assessing and determining potentially affiliated groups. We urge the Committee to incorporate both groups into the consultation process. Nonetheless, there are still serious issues about how potentially affiliated tribes can be consistently and fairly identified. The Committee needs to further consider this particular problem.
- Ancient remains for which there is specific information about the original location and circumstances of the burial. The Task Force believes that this category constitutes the majority of the potential cases to be addressed by these recommendations. Ancient remains pose a particularly difficult problem. The Draft Recommendations create a potential conflict of interest for the Committee. If the Committee determines which tribes are potentially affiliated with a set of remains, and if this same set of remains is central to a dispute between an institution and one of the tribes identified by the Committee, the Committee may find itself in a conflict of interest position in resolving such a dispute. Related to the role of the Committee, the SAA Task Force argues that it is essential that affected institutions receive any listing of potentially affiliated tribes as well as specific letters from appropriate officials in each tribe articulating their position with regard to affiliation. Without agreement by all affected tribes, remains cannot be released.

- Remains which are likely to be Native American but which lack information about their original burial location. The Task Force appreciates the difficulty of appropriately addressing this category, but notes that this category represents a group for which both previous experience and future knowledge hold the potential for more specific identification. It therefore constitutes a primary situation where alternate decisions regarding disposition become more likely, and possibly more important, for all parties.

Consistent with our commentary throughout this document, we find the “Possible procedures for deciding the disposition of unidentified remains” to be premature, and not adequately informed by the ongoing process of repatriating affiliated remains. On a separate but important note we question whether NPS has the funds or staff to undertake the roles outlined in these procedures.

Finally, even SAA members who are vigorous supporters of the Draft Recommendations raise questions about fuzzy concepts within the document. Of particular concern is the concept of “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.” What is the relationship between the term “affinity”, and the NAGPRA definition of “affiliation”? Is there a territorial principle being asserted here? If so, it should be noted that such territorial principles were explicitly rejected by Congress in final versions of the bill, and we must oppose its reinstatement in the Draft Recommendations. In sum, how will this concept of affinity be fairly implemented and applied, and what exactly does it mean?

Clearly, negotiating solutions to the disposition of unaffiliated remains will continue to be an ongoing activity of the NAGPRA Review Committee. In its future engagement with this issue we believe it is essential that the Committee more clearly establish and articulate the principles which will underpin such disposition prior to the point where procedures for disposition are developed and implemented. The Society for American Archaeology thanks the Committee for this opportunity to comment on the Draft Recommendations. If we may be of further assistance in the formulation and review of this document please do not hesitate to contact us.

Respectfully submitted,

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