COMMENTS ON INTERIM GUIDELINES FOR THE IMPLEMENTATION OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT OF 1990

Submitted by
The Society for American Archaeology
Task Force on Repatriation

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Thank you for giving the SAA Task Force on Repatriation an opportunity to comment on the preliminary draft of the interim guidelines for the implementation of NAGPRA. Since we had only a few days to prepare our response, several Task Force members were unable to submit their comments. We will undoubtedly have additional suggestions for improving the guidelines as the process of drafting the final document progresses.

We feel that this preliminary draft provides a good starting point for the development of the final guidelines. Some of the sections are in much better shape than others. For example, we see few problems with the sections dealing with intentional and inadvertent discovery and the interaction between NAGPRA and other laws dealing with archaeological remains. Our main concerns are with sections III, IV, and V. First, I will summarize the major problems we see with these sections. This is followed a section-by-section analysis of the document with specific suggestions for changes in language.

General Comments

The draft guidelines appear to be based upon several assumptions that were not the intent of the legislation. In several instances they give more power and authority to the Review Committee than is written into the legislation. They also incorrectly assume that the goal of the statute is total repatriation unless otherwise proven. The guidelines also ignore the principle of a case-by-case request procedure for material in museums and other repositories.

The guidelines fail to deal with several significant issues. The most important of these is the absence of detailed information about the criteria that museums should use to determine cultural affiliation or the lack of it. There is no mention of the important role that data on chronology and cultural period should have in determining cultural affiliation. Archaeological and physical anthropological evidence frequently show that different groups occupied the same geographic area at different times in the past. These types of data should be mentioned in the guidelines as relevant for determining cultural affiliation.

The guidelines make no provision for maintaining the security of known archaeological sites. We are concerned that widely distributing information on site locations as part of the notification process may have the inadvertent result of increasing the rate at which sites are damaged through looting.

The following is an article-by-article analysis of the proposed guidelines in which these problems are discussed in more detail. Suggestions for alternative language are also provide where appropriate.

Section-by-Section Analysis

Sec. III.A., par. 4

This section notes that eligible Indian tribes can be a larger list than those tribes recognized by the Bureau of Indian Affairs. It lists such groups as "national or regional incorporated nonprofit Native American organizations" and "urban Indian centers." Yet Section III.A.1. suggests that "groups of Native Americans of diverse backgrounds who associate together for some purpose or purposes are not viewed as proper claimants under the provisions of the statute." The guidelines should clarify the kinds of tribes that are eligible to make repatriation requests.

There are cases in which families of documented descendants are not members of a federally recognized tribe or other formal organization. The guidelines should acknowledge this type of community as an appropriate group to be involved in the repatriation process.

Sec. III.A.1., par. 1

This paragraph states that section III of the act defines and establishes

"a hierarchy for cultural affiliation .... if Tribes are to...be successful claimants of cultural items in repatriation requests."

This implies that section III refers to repatriation requests from museums; it does not. Section III only is concerned with NEWLY DISCOVERED OBJECTS. The listed priority order, which includes "Indian tribes recognized as aboriginally occupying the area" does not apply to human remains nor other cultural items in museum collections.

Sec. III.A.1., par. 1, sen. 4

Do you mean "familial" here instead of "familiar"? The word "familiar," in any regard, could have several unintended interpretations. Minimally, the word "familiar" should be changed to "familial," which is far less equivocal.

We would feel a bit more comfortable with this passage if it required not just a "tie," but a "direct tie." How about this for an alternative wording: " ... this term is taken to mean a direct genetic or familial tie reasonably established between generations ...."

The rationale for this change is simply to make clear that overall genetic similarity, or simple membership in a clan (which may be based on filiation rather than descent) are not enough to establish the "tie" of lineal descent.

Sec. III.B., par. 2,

Here and elsewhere (eg. Sec. V.A.1, par. 7) it should be made clear that "cultural items" refers only to objects that have the potential to be repatriated under the terms and definitions of this act.
The last sentence in this paragraph should read:
"Museums are required to conduct inventories or written summaries of all cultural items (as defined in section IV) within their collections regardless of their means of accession or geographical point of origin."

Sec. III.D., Duties of DCA #(4)

The implication in the "if one is developed" clause is that a grants-in-aid-program may not be developed. We find this very disturbing. The legislation calls for a grants program. We assume that this along with all of the other provisions of the legislation will be implemented. This conditional phrase is thus inappropriate and should be removed from the guidelines.

The availability of these grants is essential to the compliance process. The amount of work demanded by the legislation and the guidelines will leave museums destitute unless funds are available to conduct the inventory, to contact Native American groups, to negotiate any claims, and to go through the expense of actually returning material. Even the simplest case will cost at least $2000. Large museums with complex collections such as the Lowie Museum estimate their costs to be as much as $9,000,000,000. There is no way that they can bear such costs unless the grant program is established VERY SOON.

The administration and procedure of applying for the grants should be spelled out in the guidelines. If no money is budgeted for these grants, then the extensions of the five year deadline for the inventory of collections will need to be granted with great leniency.

Sec. III.E., par. 2

This section of the guidelines calls for the Review Committee to inventory unaffiliated materials and make recommendations for their disposition. THIS PROVISION AND POWER ARE NOT IN THE LEGISLATION. The Committee was not empowered to act independently and it has no claims on any material in museums. Their role, as stated in the legislation, is to develop a PROCESS, not to develop specific recommendations.

Furthermore, this language is vague. It does not define what without cultural affiliation means. Is Clovis lacking cultural affiliation? Does the Committee want an inventory of such material? Surface finds? The report to Congress describes the activities of the Committee, not what it discovered in the museums of America.

The sentence:

"The Committee also must compile an inventory of items without cultural affiliation held by museums and Federal agencies, and recommend disposition actions."

should read:

"The Committee also must compile an inventory of CULTURALLY UNIDENTIFIABLE HUMAN REMAINS held by museums and Federal agencies, and recommend specific actions for DEVELOPING A PROCESS FOR DISPOSITION OF SUCH REMAINS."

Sec. IV.A., par. 2-3

The meaning of these paragraphs is unclear. Few museums keep skeletal remains in the same storage unit as artifact associations, so does this mean that these artifacts are not meant to be associated funerary objects? The essential point to make here concerns whether documentation exists to indicate that an association existed when the remains were discovered in an archaeological context. Even with such a correction in wording, a more explicit statement would be helpful since some spatial associations of artifacts with skeletal remains are incidental. The preponderance of evidence should show that associations were purposeful.

Delete the last clause, starting with "and that there has been no post-removal separation ..." The whole issue of post-removal separation is irrelevant. For example, if the human remains were separated after removal, BUT LATER WERE REUNITED WITH THE FUNERARY OBJECTS, then the latter would still be considered "associated" under the terms of this legislation.

Sec. IV.A., par. 6

The use of the word "traditional" here is unclear. How significant is temporal duration in the definition of traditional? Is a religious practice traditional if it is only 10 years old? Some clarification of the meaning of this term would be helpful.

Sec. IV.A.1

It should be the responsibility of the federal agencies to contact museums about the status of their collections. Since these collections are on loan to museums, the agency should take full responsibility for the cost of any repatriation, including the cost of packaging and shipping.

Sec. V.A., par. 1

The last line of this section creates a false expectation. Objects of cultural patrimony DO NOT HAVE TO BE REPATRIATED until the request procedure is exhausted. Just because a request comes to a museum for an object does not mean that it has to be returned. Many items are open to debate because they were obtained legally and full claim and restitution must be met. The guidelines forget that items in museums are accessioned and cataloged. To deaccession any object in most museums is a legal procedure and very time consuming. The guidelines do not acknowledge this at any point and they have to. Otherwise false expectations will be created. The guidelines must be more aware of museum procedures that must be followed before any item can be repatriated, even if the request is acceptable.

Sec. V.A.1.

The sentence "Consultations... needed throughout the inventory process" goes beyond what the law says. Why are they needed? Consultation is not required by the law. It may be desirable but it is not required. This should be changed to "Consultations... DESIRABLE throughout the inventory process."

Sec. V.A.1., par. 1

How can museums notify culturally affiliated tribes before they complete the inventory that will serve as a basis for determining the groups that may possibly be culturally affiliated? This section assumes that museums know the cultural affiliation of the objects in their collections. In many cases this relationship will not be discovered until the inventory is well underway. To call for consultation before the fact is unworkable, particularly for museums with large collections from areas with complex culture histories.

Sec. V.A.1., par. 7

The sentence:

"Cultural items under scientific study also must be returned expeditiously upon request, unless..."

should read:

"Cultural items under scientific study also must be returned expediently upon request by affiliated Native American groups unless these items..."

Clarification would be helpful here about the types of scientific studies that might be considered "of major benefit to the United States."

Sec. V.A.2.

The description of the inventory process is inconsistent with the law. The statutory language describes "a plan to carry out the inventory and identification process." Moreover, this plan IS NOT REQUIRED in statute; it is only a requirement for institutions wishing to demonstrate a good faith effort in order to get an extension for the 5 years to complete an inventory. It is not a specific requirement to apply for a grant under the statute.

The statute does require consultation with tribal government and traditional religious leaders. The guidelines state that museums must identify tribes that have "an interest in components of their collection"; "likely Native American affiliates for the items to be inventoried"; and form a "consultation group for each of the various accessions or components of the collection." These requirements and recommendations go beyond the requirements of statute and place an unworkable burden on museums.

The guidelines should make it clear that the consultation process is different from the notification process. Notification is to involve a large universe of potential claimants; potential claimants who are not notified ("should have been notified") are also permitted to make inquiries and request information during this part of the process. The consultation process, on the other hand, is to involve Indian representation but in a small enough and broad enough manner that it permits the inventory process to proceed.

A museum should not be expected to search out and use many dozens or even hundreds of Native American representatives as consultants, which could be the situation for large museums with diverse collections. Setting up all these groups is unworkable. There is no reason to have all of these people in on it at the beginning. The museums will NOTIFY large numbers of tribes, triblets, rancherias, etc. during the notification process.

In many cases, cultural affiliation will be unknown until the inventory procedure is completed. The guidelines should spell-out how to do the inventory. They should say consultation with Native American groups should begin as soon as cultural affiliation is established.

Sec. V.A.2.(1)

The heading "develop a repatriation plan" is inappropriate language. What needs to be developed is an INVENTORY PLAN. There is nothing in the legislation that says all material must be repatriated. The responsibility of the museum is to have an inventory plan. The guidelines should define the repatriation procedure on a case-by-case basis. There is no reference in the legislation to the repatriation of anything unless requested. There is a requirement to perform an inventory and to make that information available.

Sec. V.A.2.(2)

The Guidelines require much broader access to documentation than does the legislation. The law states that Indian tribes that receive or should have received notice may request additional documentation; it does not state that this "broad access" needs to be given to consulting Native Americans.

The term "broad access" could be interpreted to include information on specific sites where material was acquired. This information is often held in confidence in order to prevent sites from being looted. The guidelines need to be modified to state that level of public information to be provided

should be sufficient to establish cultural affiliation without risking disclosure of specific site locations.

The sentence "The initiation of studies to acquire new scientific information is not part of the inventory" should be modified to read: "The initiation of studies to acquire new scientific information is not required as part of the inventory."

Sec. V.B., par. 3, sen. 3

The requirement that "tribes are to be provided with access to information regarding collections "at any time during or after the inventory" is too broad. Again, information access is part of the notification process, which can be conducted in a way that may involve several potential claimants. Random requests for information are likely to delay the inventory process, especially for major collections.

Sec. V.B., par. 3, sen. 6

Here is a typo that your spelling checker will miss that should be changed as soon as possible:

"Naive Hawaiians" should be "Native Hawaiians"!

Sec. V.B.1., par. 3

Again these constraints on museum activities are not part of the legislation. If there are no claims to material, the guidelines have no control over what a museum does with them. Museums do have their own policies that are sensitive to this issue. Obviously a Hopewell pipe was a sacred object but why should it not be displayed. It is one of the great cultural achievements of humankind and now the government says it cannot be exhibited? This was not the intent of the legislation and this paragraph should be struck. Similarly, unclaimed items are unclaimed and remain the property of the museum. The Review Committee has no right to them, only Native American and Native Hawaiian groups can make claims, not the federal government or its agents. The government will be in court often if this provision remains in the guidelines.

In the next-to-last sentence "Exhibitry" is not in our dictionary. The word should be changed to "Exhibiting."

The last sentence should be clarified to state:

"The regulations will identify ways to dispose of any items not claimed under the provisions of the statute THAT THE AGENCY OR MUSEUM DOES NOT WISH TO RETAIN."

Sec. V.B.1.3.

There has to be a limit on the time during which claimants have to respond. It would be reasonable to set such a limit in the guidelines. In this way the repatriation process could be brought to a timely closure. How else can museums develop collections management procedures and plan for the future?

Sec. V.C.2., par. 3, sen. 3

The phrase "as the preferred orientation" makes no sense in this context. Perhaps it should be replaced by, "is the preferred solution".

Typographical Errors

Finally, here are a few typographical errors that we noted in the document:

Sec. I, par. 4, sen. 2
"advice ON carrying out key provisions ..."

Sec. II, par. 3, sen. 1
"... existing ARCHEOLOGICAL Resources ..."

Sec. III.A.1, last sentence
"claims, among THEM anthropological ..."

Sec. IV.D, par. 1, sen. 2
"Such MEMORANDUM would ..."

Sec. IV.D, par. 2
Hyphenate "30-day"; "... the following EXPANSION.."