COMMENTS ON THE DRAFT ADVISORY MEMORANDUM REGARDING
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 revised guidelines for the implementation of NAGPRA. You have taken care of many of the problems we noted in the earlier draft. We believe that an edited version of document will serve as a good starting point for the development of NAGPRA regulations. There are still areas of sections III and V that might mislead or confuse a person who is unfamiliar with the Graves Protection Act and its Reports. The following is a summary of our general comments followed by a section-by-section analysis with specific suggestions for changes in language.

GENERAL COMMENTS

We would like to see a statement at the beginning of the document that urges museums and agencies to move ahead with the process of opening dialogues with Native groups, developing plans, consulting and so forth. The goals of historic and cultural preservation are not served by waiting for the final regulations that, at the current rate of implementation, are likely to be years away. It also should be stated that most of this is anticipated to occur at the local level as a result of museums and tribes working together. All these points are made elsewhere in the guidelines. Stating them at the beginning would set a good tone for the rest of the document.

The consultation process outlined in the guidelines puts a burden on museums and scientific institutions that is not really in the law. Many museums with small staffs and limited resources are going to experience great difficulty in complying with these recommendations. Curators of many small collections will frequently not have the training in archaeology and physical anthropology necessary to make scientifically sound determinations of cultural affiliation. If this law is to be successful, the Secretary will need to help such institutions in identifying culturally affiliated groups. For example, the grants program the Secretary is directed to establish could be structured so it provides museums with this kind of assistance. Our concern here is to avoid setting up an impracticable process doomed to failure from the beginning.

SPECIFIC SUGGESTIONS

Sec. I. INTRODUCTION, par. 1

The sentence:
"The law has generated widespread interest among Native Americans, museum professionals, and Federal agency employees charged with meeting its requirements."

Should read:
The law has generated widespread interest among Native Americans, museum professionals, ARCHAEOLOGISTS, and Federal agency employees charged with meeting its requirements.

It is time to recognize archaeologists as the individuals directly involved in implementing the Intentional Excavation section of the statute.

Sec. I. INTRODUCTION, par. 3

This paragraph states that tribes are entitled to items with which they are affiliated. Although this is a summary, it is misleading in that they are not entitled to unaffiliated objects and etc. unless they also can show "right of possession." This paragraph should be reworded so it does not engender misconceptions about the types of items that can be repatriated.

Sec. II. PURPOSE

The sentence:

"Once cultural affiliation and the right of possession has been demonstrated, Indian tribes or Native Hawaiian organizations normally make the final determination on the disposition of human remains or cultural objects defined by the statute."

Should read:
"Once cultural affiliation and, IF NECESSARY, right of possession have been established..."

This is the reverse of the previous comment about the demonstration of "right of possession." This sentence is misleading because it implies right of possession is required for all repatriations. This will often not the case.

Sec. III.A.

The sentence:
"Other Federal agencies also offer benefits specifically to Indians."

The point of this sentence is unclear. Dose this mean there are groups not on the BIA list to which the law also applies? If so, the guidelines should say that the law applies any group that is eligible for benefits from any federal agency.

Sec. III.A.1

The sentence:
"Although tribes need not be Federally recognized to be potential claimants, we believe they must have a shared tribal identity that extends backward in time somewhat."

This is not correct. We STRONGLY object to its inclusion in the guidelines. The statute defines a tribe as a group "which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

From this definition, a group clearly MUST be federally recognized to be considered a "tribe" under the terms of the law and thus as a potential claimant. It seems clear from the Reports that this is what the House and Senate intended. Without some statutory justification for this statement it should be removed from the guidelines.

The sentence:
"Federally recognized tribes would still need to show cultural affiliation."

This is also not true. If the museum or agency determines the cultural affiliation, they need not show anything. This implies a burden that is not necessarily there. They need to show affiliation only if they contest what the agency or museum determines.

The sentence beginning:
"Section 3 of the act defines a rank order for establishing cultural affiliation..."

A technical point but an important one: this is NOT a hierarchy of cultural affiliation but instead a hierarchy of claims to ownership. These are distinct concepts and MUST be kept separate. Reservation land ownership, for example, in no way conveys cultural affiliation to a group. It does, however, provide a valid basis for a claim to own certain objects found on those lands. In this context, reservation land ownership is viewed as more important than cultural affiliation as defined by the act.

The sentence:
"(3) if cultural affiliation cannot reasonably be ascertained... proper affiliates may be the Indian Tribes recognized as aboriginally occupying the area from which the items were excavated."

Here and in the following sentence "affiliate" should be replaced with a different word such as "recipient." This will avoid confusion and make it clear that such groups have not shown "cultural affiliation."

Paragraph beginning with:
"Partially in response.."

Under any reasonable definition of "extinct culture," there can be no cultural affiliation. How can "a relationship of shared group identity which can be reasonably traced historically or prehistorically" exist between an "extinct culture" and an extant tribe? The fact of extinction precludes the demonstration of cultural affiliation under the terms of the

law.

It is worth inserting a statement here to make it clear there can be no uniform standard of time depth for the demonstration of cultural affiliation. It will vary in different parts of the country and for different groups, depending on their history.

The language of the bill implies that "cultural affiliation" is an all or nothing attribute--you have it or you don't. As archaeologists, we find this to be an intellectually untenable position; cultural affiliation is a matter of degree. However, the Congress clearly saw it as a yes/no question and was totally unreceptive to our contrary argument. This raises the question of whether more than one tribe could have cultural affiliation with a prehistoric group. In spite of our comments, the committees do not appear to have seriously contemplated this possibility.

This question of competing claims of cultural affiliation should be addressed more thoroughly than they are here. Often, one historically or archaeologically identified cultural group has divided into multiple modern recognized tribes. In such cases, archaeological materials cannot be sensibly assigned to one of the modern groups in preference to another.

Three additions to the guidelines could help archaeologists to deal with such situations:

(1) Where multiple tribes have valid claims to cultural affiliation under the definition of the act, the group with the closest affiliation would have the right to determine disposition etc.

(2) If more than one tribe appears to have equally valid claims of affiliation, then an agreement among all such tribes would be accepted.

(3) Resolution of disputes among the strongest, but equally affiliated tribes will have to await final regulations.

Sec. III.B.

The sentence:
"The issue of how much Federal funding must be received by museums as a requisite for compliance with the Act is unknown and must await regulations development."

The statute leaves no room for confusion on this point. It defines a museum as any institution with the exception of the Smithsonian that "receives federal funds." It seems clear that the intent of the law was receiving ANY federal funds is sufficient to qualify an institution as a "museum." It appears that if a museum stops receiving funds then it is not covered, but as soon as it accepts any money, it must comply. We do not support any attempt to weaken the bill by creating a funding threshold.

Sec. III.C.

In the sentence:
"(1) producing inventories and written summaries of cultural items in their collections or controlled by them, informing Tribes and Native Hawaiian organizations that may be affiliated with these items of their holdings, and working with Native Americans in order to proactively seek groups to identify in the consultation process..."

The phrase "in order to proactively seek groups to identify in the consultation process" is bureaucratic gibberish that has no place in a document that is intended to make clear the implications of a law. Many questions might be raised here. For example, what consultation process? There are many defined in the bill.

Sec. III.D.

The sentence:
"In addition, the Secretary may do the following: (1) develop and administer a grants program to assist ...."
This sounds too discretionary. The Senate Report states that the bill "provides for grants." In other words, the Secretary has been directed to develop a grant program by Congress.

Sec. III.E.

The sentence:

"It is anticipated that the Committee's role in consulting and dispute resolution will only be invoked when such agreements are not possible."

Should read:
"It is anticipated that the Committee's role in consulting and FACILITATING dispute resolution will only be invoked when such agreements are not possible."

As written, the statement makes it sound as if the committee has the power to decide disputes which is not true. Its role is to facilitate dispute resolution.

Sec. III.F.2.

The sentence:
"For example, they may assist Federal agencies... and they may curate or be responsible for the curation of cultural items subject to the statute."

Despite bureaucratic usage, "curate" is not an English language verb.

Sec. IV.A.

The sentence:
"Associated funerary objects are objects reasonably believed to have been placed with human remains as part of a death rite or ceremony."

This and the following sentence are still confusing. The key point to get across here is that the human remains in question still exist and can be located, otherwise they are unassociated.

Sec. V.A

The sentence:
"In other cases museums and Federal agencies may have adequate documentation and cultural items can be expeditiously returned upon request from a group that is able to demonstrate cultural affiliation."

Here again, a requirement for demonstration is implied. Groups need not demonstrate anything if the museums or agencies identify them as affiliated.

Sec. V.A.2.

The sentence:
"Museums sometimes do not wish to wait for Federal agencies to start addressing their legal responsibilities under the statute, because they fear that delays will result in a museum being unable to meet statutory deadlines or other requirements and being subject to civil penalties."

This implies that museums are only responding to sanctions. In fact, museums may wish to move ahead because they believe it is the right thing to do.

Here, and elsewhere, there is discussion of "responsibility" and "transferring work load." Museums may be justifiably nervous about work load being transferred. The guidelines should clearly state that it is the AGENCY that has the responsibility either to do the inventory etc. itself or to contract (i.e. pay) for these activities.

Sec. V.A.2.

The sentence:
"Finally, Section 7(f) provides that any museum which repatriates any item in good fair pursuant ..."

"good fair" should be "good faith"

Sec. V.A.3

The paragraph beginning:
"Agencies and museums should first..."

Although the law requires that the inventory be completed in consultation with Native groups and traditional religious leaders, it is unclear how this requirement is to be met when culturally affiliated tribes are not believed to exist. Would simply notifying a modern tribe that they are not believed

to be culturally affiliated fulfill the consultation requirement?

Sec. V.A.4.

The sentence:
"With respect to human remains...(2) cultural affiliation..."

In this sentence the phrase "clearly proven by" should be replaced by the language of the statute. Indians rightly object to such strenuous requirements and none are included in the law. This phrase should be replaced by "establish by a preponderance of the evidence" which is the statutory language.

The phrase:
"(d) uncontested evidence presented by the claimant exists that would establish a right of possession to such object."

This again is a misstatement of the statute. It implies that any contest nullifies the claim. If the evidence is uncontested, there is repatriation. If the evidence IS contested by the museum, there is a standard in the statute to decide who wins the contest. This standard should be incorporated here.

The sentence:
"The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or native Hawaiian organization is deemed to give right of possession to those remains."

This section of the law is irrelevant and should be omitted from the guidelines. Human remains and associated funerary objects are subject to repatriation regardless of right of possession.

Sec. V.C.1

This section on inadvertent discovery seems a bit muddled and does not address some significant issues. The implications Sec. 3 has for archaeological research should be dealt with more fully. For example, if an archaeologist has an ARPA permit to excavate a site on BLM land for research purposes and a burial is discovered, whose job is it to do the consulting? It would be helpful if a recommended process could be suggested. Preliminary surveys and prior consultation with possibly affected tribes should be encouraged.

In the sentence:
"... while a compliment to the Section 106 consultation process, is not a substitute for compliance..."

"compliment" should be "complement"

Sec. V.C.2.

The sentence:
"We believe that the statute identifies preservation of the cultural items in situ..."

We can find noting in statute that supports this belief. It should be removed from the guidelines. In any event, "is the preferred orientation" should be replaced with something in English such as "as the preferred outcome."

This section skips a key point that should be made VERY explicit. This concerns the statement that the activity may proceed following the 30-day delay. This WILL BE taken by some agencies to mean that if the Indians don't do something within 30 days, then they can go ahead and bulldoze the graves. However, whatever NAGPRA says, the agencies are STILL bound by ARPA and NHPA and must deal with the stipulations of those laws. It must be crystal clear that NAGPRA does not somehow exempt them after 30 days. A statement in the House report makes this clear.