SENATE COMMITTEE ON INDIAN AFFAIRS
Oversight Hearing:
Implementation of the Native American Graves Protection and Repatriation Act

Tuesday, April 20, 1999, 9:30 a.m., 485 Russell Senate Bldg.

STATEMENT OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY AND THE AMERICAN ASSOCIATION OF PHYSICAL ANTHROPOLOGISTS

Keith W. Kintigh, Ph.D., SAA President

Mr. Chairman, the Society for American Archaeology (SAA) thanks the Committee for this opportunity to comment on the current state of NAGPRA implementation. SAA is the leading organization of professional archaeologists in the United States. Starting in 1989, SAA led the scientific community in working with congressional staff on the language of NAGPRA. We provided testimony at Senate and House Committee hearings and helped form a coalition of scientific organizations and Native American groups that strongly supported NAGPRA's enactment. Since that time, we have closely monitored its implementation and have consistently provided comment to the Department of the Interior and to the NAGPRA Review Committee. We urge our members always to work toward the effective and timely implementation of the Act. We are joined in this testimony by the American Association of Physical Anthropologists, which is the leading organization of physical anthropologists in the United States and which also supported the enactment of NAGPRA.

On behalf of the scientific community, we address four major issues: (1) maintenance of NAGPRA coordination functions within the National Park Service's (NPS) Archeology and Ethnography Program; (2) problems with federal agency compliance; (3) extensions for museums that are making good-faith efforts to complete their inventories; and (4) problems associated with the implementation of the Act's definition of cultural affiliation.

Nine years ago, I stood before this Committee to present SAA's testimony on S.1980, the bill that became NAGPRA. Reflecting on the last nine years, I think that, despite the problems that remain, the Committee should be proud of what NAGPRA has accomplished.

- Over a thousand museums and federal agencies submitted summaries to tribes, and over 700 have submitted inventories.
- Repatriations of human remains and cultural items, from both museum collections and new excavations, occur regularly. Most of these repatriations result from mutual agreements between tribes and museums and agencies.
- Consultations mandated by NAGPRA have led to the development of improved understandings between tribal people, museum personnel, and scientists. Many cooperative ventures not required under the law have been successfully pursued.

In the interests of improving NAGPRA's implementation, we now turn to a brief discussion of the four issues.

1. Coordination of NAGPRA Functions by the Departmental Consulting Archeologist

The Secretary of the Interior has delegated responsibility for NAGPRA coordination to the Departmental Consulting Archeologist (DCA) who is manager of the NPS Archeology and Ethnography Program. Some have suggested that this policy should be reconsidered in light of what has been characterized as a conflict of interest by the DCA. In our opinion, any such move is inadvisable as it would impede and delay rather than enhance and accelerate the implementation of NAGPRA.

- Transfer of the NAGPRA coordination functions from the Archeology and Ethnography Program would require development of a new, expensive, and redundant administrative unit.
- A move outside of the Department of the Interior would require an amendment to the law, fostering new uncertainty and delay.
- The Archeology and Ethnography Program has nine years of experience in coordinating NAGPRA and works extensively with archaeologists, Native Americans, and museums in the context of satisfying its other legal responsibilities.
- No other administrative unit, either inside or outside the Department of the Interior, has the expertise necessary to coordinate NAGPRA, and only the DCA is in a position to facilitate the critical articulation of NAGPRA with closely related historic preservation law.[1]
- The most common and most serious complaints about the NAGPRA coordination function, including those voiced by the Review Committee, tribes, and museums, are a direct consequence of inadequate staffing and funding; they are not due to the location within NPS.[2] Without additional funding, the DCA simply cannot satisfy all of the responsibilities assigned by the Secretary in a timely way.[3] A move would not resolve the critical funding crisis.
- The argument that the DCA has an inherent conflict of interest is not as straightforward as it might seem. Certainly, some Native American groups have argued that their interests have not been adequately taken into account. However, I can assure you that within the scientific community there is a widespread conviction that scientific interests are routinely ignored. In these contexts, we must remember that NAGPRA was a legislative compromise intended to *balance* the legitimate concerns of American Indians and Native Hawaiians with the interests

---

[1] The expertise that permits this articulation is becoming increasingly important because of the urgency of repatriation issues associated with new excavations and inadvertent discoveries covered by NAGPRA Section 3 and by other federal law.

[2] In a November 13, 1998 letter to Secretary Babbitt, NAGPRA Review Committee chair Tessie Naranjo conveyed the Committee's unanimous sense that the Program has not been given adequate funds or staff to accomplish the tasks it has been assigned.

[3] For example, NPS has completed processing inventories from only about a third of the 733 institutions that have submitted inventories. Of the 1032 NAGPRA summaries received by NPS by 30 November 1998, only 38 are in the database intended as a clearinghouse for information and only 57 of 733 inventories are in the database.

of the scientific community and the broader American public in our shared American heritage. The DCA has consistently attempted to maintain the critical balance that NAGPRA requires.

- Although there is considerable misunderstanding of this point, the Archeology and Ethnography Program does *not* have a decision-making role in the determinations of cultural affiliation, even within the National Park Service. These determinations are made by the museums and the federal entities that hold the collections, not by the DCA.[4]
- The Archeology and Ethnography Program serves a *staff* function to the Review Committee. The Review Committee reports on its activities and in its advisory role *not* to the DCA but directly to Congress and to the Secretary. The DCA has a duty to execute Review Committee decisions, and provides the necessary staff and expertise to do so.
- Since its creation, the NAGPRA Review Committee has worked intensively with the Archeology and Ethnography Program staff. The Review Committee has *not* recommended that the NAGPRA functions be moved.[5]
- Allegations that the NAGPRA grant program is unfairly administered, favoring museums over tribes, are unfounded. Documentation provided the Review Committee indicates that as of November 30, 1998, tribes have received 57 percent of the grants and 61percent of the money awarded.[6]

2. Federal Agency Compliance

SAA and AAPA join the NAGPRA Review Committee, NCAI, tribes, and museums in expressing our dismay over the lack of compliance of some federal agencies with the plain requirements of NAGPRA. For example, despite the statutory requirements that agencies complete their inventories in five years (by November 1995), a representative of a key federal agency testified to the NAGPRA Review Committee that it would take decades to complete its inventories. Further, the lack of timely completion of inventories by a number of agencies is not the only compliance problem. Agency determinations of cultural affiliation are often made without adequate consultations with tribes and without reasonable efforts to compile and weigh either scientific or traditional sources of evidence.

As NAGPRA provides no enforcement provisions affecting agencies, we would ask Congress to employ the means at its disposal to induce or to compel agency compliance. While some appropriations are needed, punitive measures also may be required. In pursuing this objective, the

---

[4] If the DCA had such authority, we would not expect the dramatic inconsistency that is seen in the cultural affiliations of closely related materials that are held by different institutions.

[5] In the November 13, 1998 letter to Secretary Babbitt mentioned in a previous footnote, Review Committee chair Tessie Naranjo strongly praised the dedication and professionalism of the NPS Archeology and Ethnography Program staff and noted its role in the successful implementation of NAGPRA.

[6] Tribes received 116 grants for $6.5 million, while museums received 89 grants for $4.2 million. Further, most of the museum grants include funding to pay tribal expenses for consultation.

Committee should ensure that agencies do not achieve compliance with NAGPRA at the expense of other critical cultural resource programs.

3. Extensions for Museums to Complete NAGPRA Inventories of Human Remains and Associated Funerary Objects

The Department of the Interior is evidently considering or has decided upon a blanket denial of the six museum requests for extensions for the completion of inventories. SAA and AAPA believe that denial of extensions to those museums that have very large collections and have demonstrated a good-faith effort[7] to comply with the law would be contrary to the objectives of NAGPRA. Such a decision would damage productive cooperative arrangements that have developed between tribes and these museums. It also seems unduly harsh in light of the federal agency problems highlighted above.

When inventories are done with care and thorough consultation, museums are able to assign cultural affiliation to remains that, with a less intensive effort, would be deemed "culturally unidentifiable." Given the latitude provided by the law, it seems inevitable that blanket denial of extensions would lead to more remains being placed in the immensely troublesome "culturally unidentifiable" category. In this eventuality, a much larger burden is placed on a tribe to challenge the museum's finding and to show that a preponderance of the evidence supports its cultural affiliation. Further, by cutting short ongoing consultations, such a denial would do a disservice to both the tribes and the museums. However, we would suggest that it is appropriate at this point for the Department to set a relatively high standard for what constitutes a good-faith effort.

To this testimony we have attached a 6 April 1999 letter to Secretary Babbitt presenting, in a more complete form, SAA's assessment of the need for inventory extensions and SAA's argument of why a blanket denial is not a productive response to understandable Native American frustrations.

4. Cultural Affiliation and the Issue of Joint Affiliation

Cultural affiliation is a cornerstone of NAGPRA because it provides the legitimacy for most repatriation claims. A critical problem in NAGPRA implementation is the widespread expansion, by both agencies and museums, of the statutory definition of cultural affiliation beyond legally defensible limits. Further, while the law requires evidence demonstrating cultural affiliation, agencies and museums often offer little or no evidence or argument supporting their determinations. The evidentiary problem has three components: (1) insufficient consultation with tribes and consideration of traditional evidence they can offer; (2) inadequate attention collecting readily available scientific evidence; and (3) a lack of thoughtful deliberation of this evidence to arrive at a sound determination of cultural affiliation.

In a April 13, 1999 letter attached to this testimony, SAA asked Secretary Babbitt to undertake a legal review of the issue of joint affiliation by broad collections of tribes. Our letter discusses the linkage between the scope of "cultural affiliation" and the issues surrounding the disposition of "culturally unidentifiable" human remains. Pending that review, we ask for a suspension of actions that involve determinations of joint affiliation with a diverse group of

---

[7] This would include an active staff effort dedicated to the inventory completion, a strong record of consultation with tribes, and submission of completed inventories to tribes and of Notices of Inventory Completion to NPS.

modern tribes. Following that review, we ask that NPS provide more oversight and issue written guidance on determinations of cultural affiliation and joint affiliation in order to foster better compliance with the law. We also would encourage the Senate Committee to take whatever steps it believes would be helpful to encourage better conformance with the law. We suggest that procedural shortcuts and indefensible interpretations of the definitions have already led to problems such as that of the "Kennewick Man," and have the potential to lead to many more problems in the future.

Conclusion

In conclusion, we offer five recommendations.

1. As you have heard in the past, the overwhelming obstacle to the effective implementation of NAGPRA is the lack of funding for ongoing tribal, museum, and agency programs to deal with repatriation issues.[8] These costs will continue indefinitely into the future. We ask that the Committee attempt to address this very serious problem.
2. The Committee should discourage the transfer of NAGPRA coordination functions from the NPS Archeology and Ethnography Program. Instead, the Committee should use its influence to increase staffing and funding for this Program's NAGPRA functions.
3. We ask that the Committee apply the means at its disposal to bring federal agencies into compliance with NAGPRA.
4. The Committee should encourage the Department of the Interior to consider requests for inventory extensions based on a case-by-case evaluation of whether the museum has made a good-faith effort to comply.
5. Finally, as it considers the broader aspects of NAGPRA implementation, we ask that the Committee devote considerable attention to improving both agency and museum adherence to the letter and the spirit of NAGPRA, particularly with respect to determinations of cultural affiliation.

SAA and AAPA thank you for your consideration of our comments on the implementation of NAGPRA.

---

[8] A particular problem is the complete lack of federal support for tribal implementation of Section 3 (new excavations and inadvertent discoveries) repatriation issues.