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**Society for American Archaeology
Attachment to the Statement on H.R. 5237
Native American Grave Protection and Repatriation Act**

**For the House Committee on Interior and Insular Affairs
July 17, 1990**

**Presented by Keith W. Kintigh, Chair
Task Force on Reburial and Repatriation**

General Comments

As is outlined in our prepared statement, the Society for American Archaeology is supportive of the general thrust of H.R. 5237. However, we believe that there are several issues that need further consideration. These comments and suggestions are offered in the spirit of assisting in the improvement of the bill. In the comments presented below, proposed text for the bill is printed in *italics*.

Sec. 2. Definitions

(2) Cultural Affiliation.

The term "cultural affiliation" means a direct relationship between a present day Indian tribe or Native Hawaiian organization and an identifiable historic or prehistoric Native American group that is sufficiently strong to indicate a continuity of group identity from the earlier to the present day group.

Of critical importance to the bill is an adequate definition of "cultural affiliation." The definition proposed above closely follows the substitute S.1980 language. This definition is not intended to be overly restrictive. Rather it is intended to convey, in terms meaningful in both everyday and technical language, the concept of cultural affiliation (or tribal origin) with a scope that we believe is intended by the authors of the bill. Problems with the definition incorporated in H.R.5237 are detailed in our prepared statement.

(6) Inalienable Communal Property

This is a more accurate and descriptive term than substitute S. 1980's "cultural patrimony."

(14) Sacred Object

We believe that this definition is an improvement over that offered in substitute S.1980.

Sec 3. Ownership

(a) Native American Human Remains and Objects

As noted in our prepared statement, we believe that the order of (a)(2)(A) and (a)(2)(B) should be reversed.

We also suggest that (a)(2)(C) be eliminated. If there is no cultural affiliation, we believe that the public interests in the remains or objects for education, study, and preservation of Native American heritage, outweigh the claims of groups do not have any clear connection to the remains or objects.

If this subsection is kept, it must be recognized that there are likely to be many groups that fit this criterion. However, without considerable research it may not be evident which are the relevant groups. While all relevant groups may not make claims, all have a legitimate interest in the outcome and must be involved in the decision-making

This section specifies the ownership of human remains and objects. However, the provisions here and elsewhere in this section do not seem to provide adequate procedures for the ownership to be known or accepted by the Native American group. There should probably be some procedure for notification, and trusteeship of the remains or objects when the Native American group does not accept or act on that ownership.

(b) Native American Remains and Objects for Which Ownership or Control Cannot Be Ascertained

This subsection should be eliminated.

However, if it is kept it is unclear what is meant by "disposal" in this context. Disposal options should include curation in a public repository. This subsection refers "claims" in subsection (a), but there is no claiming process established there.

Also, change page 7 lines 14-15 to *the review committee established under section 7, Native American groups, and scholarly societies*. Scholarly groups have legitimate interests and perspectives that should be taken into consideration.

(c) Excavation and Removal of Native American Human Remains and Objects

(1) This subsection appears to be redundant with ARPA, except to indicate that the permit shall be consistent with this act, which is in part covered in (4).

(2) As noted in our prepared statement, we are sympathetic with the intent but fear that this subsection is likely to be a major impediment to passage of the bill and would be unworkable if it were passed. If this is maintained in the bill, "appropriate [page 8, line 3]" should be changed to *culturally affiliated*. However, the bill's current definition of cultural affiliation would often include several groups. Usually, the determination of "appropriateness" (or whatever) will usually be impossible prior to excavation and study.

If this provision is kept, important practical problems will arise. Often archaeologists will not know when their properly permitted excavations will be subject to these provisions. While human burials with associated grave goods are usually relatively clear, teeth and isolated fragments of human bone are very frequently found when excavating in areas outside cemeteries. Furthermore, it is generally impossible to determine that some other object is a sacred object or an object of inalienable communal property until it is excavated. Archaeologists working under a valid permit, using due caution and reasonable judgment should not be liable for unwitting violations of this subsection.

(3) This subsection appears to be redundant except to include the "Notwithstanding any other provision of law" that could be added to (a). However, we would like to know what provisions, if any are being overridden in order to decide whether a more important purpose is being forgone.

(4) As written, this subsection is likely to introduce major delays in dealing with human remains that are subject to destruction, even if tribal consent is obtained. It would be impossible to use blanket ARPA permits under which much salvage archaeology is accomplished. Instead, individual permits would have to be issued for each group of human remains affected. These permits generally take considerable time (many weeks or months) for processing, not only slowing construction, but probably also threatening the remains in the interim.

A better alternative would be to make a condition of all ARPA permits (including the blanket permits) that human remains or objects covered under this legislation could not be excavated without the specific authorization of the Federal official responsible for obtaining the consent.

(d) Discovery of Native American Remains or Objects

This subsection seems incomplete. It requires the reporting the activity, stopping work, and attempting to preserve the remains or objects, yet it is not clear what happens then. At the end of (1), it appears that after a "reasonable" time has elapsed the activity may resume whether or not anything has been done.

We suggest that the notification be in writing as it will make this provision easier to enforce. We also suggest that "reasonable amount of time" be defined, as popular conceptions of reasonableness may differ considerably depending upon whether one has to finish a logging contract or is primarily concerned with preserving the human remains or objects.

While (2) allows the Secretary of the Interior to assume responsibilities under (d)(1), no responsibilities are enumerated there. Responsibilities for Department Secretaries and agency heads must be defined.

Sec. 4. Illegal Trafficking

We support this subsection in its present form, however, we believe that it should be strengthened. As we read it, this applies only to human remains and objects from Federal or tribal lands, nearly all of which are already protected by ARPA. We would like to see this extended to all Native American human remains, funerary objects, sacred objects, and inalienable communal property, whatever its origin.

Although we strongly support prohibitions against buying and selling, we do have a concern that legitimate educational and scientific activities might be considered to be for "profit" under this subsection. For example, would it be illegal for a museum to ship an artifact to a specialist in another state for conservation, or for the conservator to ship it back, if that specialist is paid for the service? Can "profit" be deleted without weakening the ability of this section to discourage the antiquities market?

Sec. 5. Inventory

We generally support the provisions for inventory and notification. However, as indicated in our prepared statement we believe that the discouragement of further study is counter-productive to the goals of the legislation.

(b)(1)(A) We suggest changing "consultation with tribal government" to *consultation with relevant tribal government*

Sec 6. Repatriation

This section should be reorganized. Subsection (a) should stipulate that lineal descendants, Indian tribes, and Native Hawaiian organizations can request, in writing, the return of remains of culturally affiliated Native Americans, sacred objects, or inalienable communal property that they once possessed. Subsection (b) should be the burden of proof subsection now numbered (c). Current subsection (d) would best be (3) under the burden of proof subsection.

New subsection (c) should include the conditions of return, including: *(1) If such remains or objects to be returned are indispensable for the completion of a specific scientific study, the outcome of which would be of major benefit to the United States, such remains or objects shall be returned no later than 90 days after the date on which the scientific study is completed.* New subsection (c) should also include current (a)(3). Subsection (d) could then indicate the portions of the section to which the Smithsonian is subject.

In any case, the titles for (a) and (b) in this subsection are misleading. The title from subsection (b) should be used for (a).

As written, page 13, line 5-6 "Native Hawaiian" should be deleted as it appears to be unnecessary.

Failing the reorganization suggested above, page 13, line 8 and line 16 should be changed to read: *returned subject to the provisions of subsections (b) and (c) of this section.* Alternately make the changes noted above.

Although the definition of "right of possession" seems altogether reasonable, the Committee should recognize that often, the level of information about the conditions surrounding transfers that took place in the 19th and early 20th century will be insufficient to make this determination.

Sec. 7. Review Committee

(c)(5) Change to: *consulting with Indian tribes, Native Hawaiian organizations, and scholarly societies on matters within the scope of the work of the committee affecting such tribes, organizations, and societies.* Again the Committee should have the benefit of a range of interested and informed opinions.

Sec. 8. Grants

(b) Add to the end of this subsection, page 19, line 18: *and in fully documenting human remains and objects to be repatriated under section 6.*

We believe that it is important to attempt to preserve information concerning remains and objects to be returned under this bill. The documentation would involve photographs, measurements and other means of preserving reasonably accessible scientific information.

Finally, should there be a provision for authorization of additional monies to Federal agencies to cover these same expenses? They will certainly be reluctant to dip into their standard appropriations for these reasons.

Comments on the Disposition of Unaffiliated Remains

In several places [2(2), 3(a)(2)(A), 3(a)(2)(C), 3(b), 7(c)(4)], HR.5237 deals with remains for which no cultural affiliation can be established. As indicated in our prepared testimony, we do not believe that this legislation should attempt to determine the disposition of culturally unidentifiable remains (including those deriving from "aboriginal lands" of a Native American group).

Repatriation legislation must ensure that when remains or objects are returned, they are returned to the appropriate individuals or groups. Because greatly improved (DNA-based) methods for determining cultural affiliation are under development, we can foresee a time in which it may be possible to determine the affiliation of remains for which no affinity can now be established. However, it should be recognized that even with improved methods of determining affiliation, some human remains still will not be identifiable with any modern group because many groups have become extinct, both in historic and prehistoric times. In these cases, there is, quite literally no one to whom these remains can be appropriately returned. Turning over such remains of any group would be, in our view, an unwarranted destruction of our human heritage.

Conclusion

The Society for American Archaeology appreciates the opportunity to comment on this important legislation. If the Committee wishes to discuss any of these issues further, or if we can be of assistance in any other way, please contact us.