

To: Steve Heeley and Lurleen McGregor
Senate Select Committee on Indian Affairs

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Date: September 12, 1990

Re: S. 1980
Native American Grave Protection and Repatriation Act

In an effort to reach a consensus on this legislation, the SAA, NCAI, NARF and AAIA have developed amendments to S. 1980 which are mutually agreeable to the four organizations. These amendments (made to the July 30, 1990 draft) are as follows:

SUBSTANTIVE AMENDMENTS

1. Cultural Affiliation

Page 2, lines 5-6

Insert before "inferred", the word "reasonably"
Delete "with reasonable certainty"

Page 6, lines 3-8

"(9) The term 'cultural affiliation' means a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."

Page 17, line 19

Insert "(4) Upon request and pursuant to subsections (b) and (c), Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."

Page 18, line 9

Delete "an", insert "the culturally affiliated"

Reason: These amendments are designed to ensure that:

(1) the definition accurately describes the relationship necessary to show cultural affiliation in a manner that is workable in regard to both historic and prehistoric remains and materials;

(2) there is a clear process for determining cultural affiliation which specifies acceptable types of evidence and makes clear that tribes seeking to establish cultural affiliation must meet a preponderance of the evidence test (not scientific certainty), which is the typical burden of proof in a civil context -- the process for determining what cultural affiliation is is as important as defining what it is;

(3) the findings are consistent with the standards in the bill;

(4) it is clear that the provision permitting tribes to request repatriation of remains and objects from museums applies only to culturally affiliated tribes (or Native Hawaiian organizations).

NOTE: We consider these changes to be interrelated, particularly the definitional change and the addition of clause (4) specifying the appropriate process.

2. Right of possession

Page 8, line 2

Delete "(A)"

Page 8, line 4

Delete ";", insert "where"

Page 8, line 5

Delete "(B)", insert "(A)"

Page 8, line 6

After "sacred object", insert "was"

Page 8, lines 11-12

Delete "is deemed to give right of possession to that object"
 After ":", insert "or"

Page 8, line 13

Delete "(C)", insert "(B)"

Page 8, line 14

After "patrimony", insert "was"

Page 8, lines 17-18

Delete "is deemed to give right of possession to that object"
After ";", delete "and", insert "or"

Page 8, line 19

Delete "(D)", insert "(C)"

Page 8, line 21

After "obtained", insert "was"

Page 8, lines 24, Page 9, lines 1-2

Delete "is deemed to give right of possession to that object"

Page 9, lines 7-8

After "ownership", insert "or"
Delete ", or right of possession"

- Page 18, lines 1-2

Delete "and the museum or Federal agency has the right of possession"

Reason: These changes are designed to make clear that a right of possession is established by showing that both the original acquisition and subsequent transfer of the materials were with the consent of the person or entity having the authority to consent. In addition, our amendments delete the term "right of possession" from the ownership and scientific study sections as it is inappropriate in both contexts.

3. Prospective ownership of remains and objects

Page 10, lines 1-8

Delete current clause (C), insert new clause (C) as follows:

"(C) if the cultural affiliation of the items cannot be reasonably ascertained and if the items are discovered on Federal land that

is recognized by a final judgment of the Indian Claims Commission as the aboriginal land of some Indian tribe or Native Hawaiian organization --

(1) in the Indian tribe or Native Hawaiian organization that is recognized as aboriginally occupying the area in which the items were discovered if, upon notice, such tribe or organization states a claim for such objects or remains, or

(2) if it is shown by a preponderance of the evidence that a different Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the objects or remains than the Indian tribe or Native Hawaiian organization specified in paragraph (1), in the Indian tribe or Native Hawaiian organization that has the strongest demonstrated relationship if, upon notice, such tribe or organization states a claim for such objects or remains."

Reason: These changes are designed to make this section more workable. They are designed to reduce the possibility of multiple tribal claims to materials, but at the same time ensure that the most appropriate tribe can assert a right of ownership or control over materials hereafter discovered.

NOTE: The linkage of the aboriginal land ownership section to the Indian Claims Commission is workable in regard to aboriginal claims in the "Lower 48". It may not work for Alaska Natives and Native Hawaiians. Our organizations believe that Alaska Natives and Native Hawaiians should be treated equivalently and support the development of appropriate language to achieve that goal.

4. Treatment of remains and objects

Page 10, line 9

After "(b)" insert "The disposition of"

Page 10, line 11

Delete "disposed of", insert "determined"

Page 14, lines 24-25

Delete "be an authorization for", insert "require"

Reason: These amendments are designed to clarify that the inventory requirement does not prevent scientific research that would otherwise be legal and proper and that the regulations to be developed by the Secretary of Interior for unaffiliated remains and

objects may explore a full range of options for the disposition of those materials.

5. Permit process

Page 10, line 24

Delete "subject to this section", insert "which would be subject to the provisions of the Archeological Resources Protection Act of 1979"

Page 11, lines 2-3

Delete "this section or"

Page 11, lines 13-15

Delete clause (4) in its entirety, insert new clause (4) as follows:

"This section shall apply to remains and objects less than 100 years of age, notwithstanding the definition of 'archeological resources' in section 470bb of the Title 16 of the United States Code."

Reason: These changes are designed to streamline the permit process by utilizing the ARPA process, rather than a new and separate process. ARPA permittees would be required to provide tribal notice and obtain consent (where required) before excavation. Moreover, unlike ARPA, this Act would cover remains and objects less than 100 years of age.

6. Legal cause of action

- Page 24, line 7

Delete "person", insert "aggrieved party"

Reason: There is some case law which suggests that an Indian tribe is not a "person" unless expressly made so by statute. The suggested change would simply make it clear that an Indian tribe has standing to sue to protect its rights under S. 1980. Moreover, the current language could provide standing to "any person", not simply those directly protected by the Act. This language would clarify who has standing to sue.