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DETAILED ANALYSIS OF ARCHAEOLOGICAL PROVISIONS OF  
S. 1578 and S. 1579

Senator Wyche Fowler introduced S.1578, the Historic Preservation Administration Act and S. 1579, the National Historic Preservation Policy Act on August 4, 1989. Companion legislation (H.R. 3412) was introduced by Representative Charles Bennett on October 5, 1989. Many provisions in these bills relate directly to archaeological resource management, protection and interpretation. Many of the archaeological provisions are offered as amendments to the Archaeological Resources Protection Act (ARPA).

Following highlights the major provisions relating to archaeological resources by topical interest. Except where noted otherwise, the analysis refers to S. 1579 (and identical provisions in H.R. 3412). The page numbers are from S. 1579. The views or recommendations of the SAA on specific provisions are highlighted in boldface.

I. ORGANIZATION

- A. **Agencies:** S. 1579 retains the status quo on the organization of Federal archaeological programs and the Secretary of Interior/National Park Service and Advisory Council on Historic Preservation. S. 1578 would combine their functions into a new independent agency.

**SAA supports the concept of the independent agency as proposed in S. 1578, but absent such a change also supports the provisions in S. 1579 which strengthen the existing roles of Interior and the Council.**

- B. **Advisory Committee:** S. 1578 establishes a Preservation Advisory Committee modeled after the current Advisory Council on Historic Preservation. The membership would be revised somewhat to specify more clearly the appointments of Federal agencies, to require that the three members representing the general public have a "demonstrated interest or involvement in historic preservation," and to limit the four persons expert in historic preservation to the fields of architecture or architectural history, American history, archaeology and anthropology.

**SAA supports the changes and would recommend their incorporation into S. 1579 as modifications to the existing Council should the independent agency envisioned in S. 1578 not be enacted.**

- C. **Archaeology Advisory Board:** Both bills add a new section to ARPA to establish an Archaeology Advisory Board (Section 7 of S. 1578, pages 11-12 and Section 122 of S. 1579, pages 56-58). The purpose of the board is to provide advice on policies, standards, and other matters relating to archaeology. The board would consist of eight members: four professional archaeologists--two specializing in prehistoric archaeology and two in historic archaeology-- two representatives of Native American interests, one representative of avocational groups or interested organizations and one representative of the general public.

SAA supports the establishment of an archaeology advisory board but recommends that, because of the professional/technical nature of this board, that the provision for a member representing the general public be dropped. This has the added advantage of providing for a somewhat smaller, odd-numbered, seven-member board which would facilitate decision making.

SAA also recommends that provisions be added to stagger the lengths of tenure (currently all would serve equal four-year terms), place a two-term limit on membership, provide for continuation of an expiring membership until a new member is appointed, provide for the appointment or election (SAA prefers the latter) of a chairman, authorize the use of Federal property and staff assistance, provide for reimbursement for expenses.

- D. **Preservation Technology:** Section 8 of S. 1578 would establish a National Center for Preservation Technology to develop and transfer preservation and conservation technologies for the identification, evaluation, conservation and interpretation of prehistoric and historic resources. This would be done through research, professional training, technical assistance and programs for public awareness. The director would be appointed by the Administrator of the Historic Preservation Agency with the concurrence of the 19-member Board of Trustees. The board would provide leadership, establish priorities and submit annual reports to the President and the Congress. Regional analytical or technical laboratories and service facilities would be established. Grants and donations to the Center and contracts and cooperative agreements would be authorized.

SAA strongly supports creation of the National Center for Preservation Technology and recommends that, if S. 1578 is not enacted, that the provisions for its establishment be included in S. 1579, and that references to the Historic Preservation Agency and its Administrator be modified to reference the National Park Service and its Director.

Further refinements will be needed in the legislation to clarify the Center's roles and responsibilities with respect not only to the National Park Service but to other Federal and non-Federal entities. The purpose of the Center is to be a coordinating one, to utilize a consortia approach that brings together existing as well as new facilities for preservation-technology development and transfer.

In addition, direct appropriations to the Center from the Congress should be clearly authorized to be used to further the purposes of the Center and to provide funds to affiliated entities, such as the regional centers. The provision for the Center to have matching grants from the Historic Preservation Fund would thereby not be necessary.

## II. REBURIAL

S. 1579 contains a number of provisions relating to the reburial and/or repatriation of human remains and grave goods. (Section 120, page 51 for policies & procedures; Section 113, pages 34 and 35 for definitions).

- A. **Process:** The bill establishes a process for archaeologists, museums and Native Americans to resolve issues of concern about human remains and grave goods. Every state, tribal and local historic preservation program receiving Federal funds would adopt standards which address grave disturbances due to land use and development, natural causes, archaeological excavation and other related factors. It finds that, as a general rule, human remains and grave goods should not be disturbed. If there is a legitimate need for disturbance, the remains and grave goods should be handled in accordance with appropriate archaeological methods of recovery and documentation. If excavated, they should be disposed of in a respectful manner that balances the interests of descendants and of research. If living descendants are identified they should determine the manner of treatment and disposal. Where there are no living descendants a commission or other entity will determine treatment.

Although SAA would prefer any new reburial legislation to wait until the reburial/repatriation provisions of the newly enacted legislation authorizing the Smithsonian National Museum of the American Indian (P.L.101-185) have had a chance to be tested, SAA supports the provisions in S. 1579 as a reasonable and fair way to balance the rights of descendants and the concerns of affected Native Americans with the interests of science and the contributions that can be gained from scientific research.

- B. **Definitions:** The bill defines "descendant" to mean a living person or group evidenced by biological, archaeological, anthropological, folkloristic, historical, or other research to be descended from an historic or prehistoric group of people. The term "grave goods" refers to any object that was found in a grave and appears to have been deliberately placed in association with the human remains. "Human remains" means a human body or part of body in skeletal, fossil, mummified, unummified or other form. The bill deletes graves and human skeletal materials from the definition of archaeological resource.

Although SAA generally supports these definitions the Society recommends that the terms used in the new Smithsonian legislation, especially the definition of "funerary object" and "burial site" be utilized in place of the relevant definitions in S. 1579.

## III. ANTI-LOOTING

The issue of archaeological looting and vandalism is covered very broadly in the bill and ranges from protection of resources on private lands to amending the 1979 Archaeological Resources Protection Act (ARPA), to establishing an artifact registration system. (Sections 113 - 122, pages 30-58)

- A. **Definitions:** S. 1579 would amend ARPA to include a number of key definitions, many of which are new or substantially changed from existing law. (Section 113, pages 30-35).

The definition of "archaeological resource" is changed from the laundry list in the present Act to a much broader definition: "a historic property whose significance is derived in whole or in part from its past or potential contribution to the archaeological study of history or prehistory." Other definition changes include "Federal land manager" which is made broader by including the Indian land manager; "public lands" definition is amended by deleting the reference to the Smithsonian Institution; "Indian tribe" definition is amended by adding that a tribe is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

New definitions include "descendent," "grave goods" and "traditional cultural authority" (see above, under Reburial). Other newly defined terms include "cultural affiliation" which means a relationship between a modern group of people and a historic or prehistoric group based on cultural similarities. The term "artifact" means material in or derived from an archaeological resource or other historic property. For example pottery, stone carving, weapons, tools, and articles of personal adornment, architectural remains and the remains of foodstuffs and the by products of tool manufacture. "Historic property" or "historic resource" has the same definition as in the National Historic Preservation Act. The term "traditional cultural authority" means a person in a Native American group or other social or ethnic group who is recognized by members of the group as an expert on the group's traditional practices.

**SAA supports the new definitions (although see comments above under "Reburial").**

**B. Federal and Indian lands:** The bill changes some provisions of ARPA which regulate the taking of archaeological resources on Federal and Indian lands and the prohibitions on the sale, purchase, transport or entry into interstate commerce of items taken in violation of the Act. (Section 114, pages 35-45). Following analyzes some of these provisions.

- 1. Permits (Pages 35-38):** ARPA's existing permit system is continued for excavating archaeological resources. However, under Section 114, the Advisory Council is given a new role in promulgating regulations authorizing Federal and Indian land managers to issue permits for individuals and organizations (including government agencies when not acting pursuant to Sections 106 or 110 of the National Historic Preservation Act). New information requirements from potential permittees are included, as are new stipulations relating to the granting of the permit. Provisions for suspension of permits are also included.

Although SAA recognizes the need for improving coordination of the ARPA permitting process currently carried out through the Secretary of the Interior with the Council's 106 process, SAA does not believe that the actual authority for promulgating the regulations should be shifted to the Council. The existing permitting system, which is carried out under uniform regulations developed by all the affected Federal agencies with the Coordination of the Secretary of the Interior works reasonably well and does not need such a dramatic change. If, however, S. 1579 were to be enacted as introduced, SAA would recommend that, at a minimum, the Archaeology Advisory Board be consulted in the development of the regulations.

Some of the other provisions in this Section merit attention, including the provisions for the final disposition of artifacts and the requirement for an applicant to have a plan for the conservation and curation of recovered materials.

2. **Notification and Tribal Provisions** (p. 38-39): A new requirement is added for Federal authorities to notify potentially affected groups when a permitted activity may affect a traditional religious practice or property of cultural importance to an Indian tribe or other Native American group. Such groups must be consulted and their views taken into account when final decisions are made about the permits. No Federal permit would be required if a tribe has a regulatory ordinance for excavations, requests that a tribal permit be substituted and the Advisory Council determine that the protections would be substantially equal to the Federal ones.

**SAA supports the notification and tribal permitting provisions as they are carefully defined in S. 1579.**

3. **Suspension and Revocation** (p. 39) A permit may be suspended by a Federal or Indian land manager when the permittee has violated section 4(a) of ARPA or section 106(a) of the National Historic Preservation Act. A permit may be revoked upon assessment of a civil penalty or criminal conviction against the permittee in violation of ARPA.

**SAA strongly supports the suspension and revocation provisions.**

4. **Prohibitions and Penalties** (Pages 42-45)

The bill adds to the list of unlawful activities the term "destroy." They also extend the provisions to include those persons who "counsel, solicit, procure or employ another person to excavate..." archaeological resources on Federal or Indian lands unless the activity is pursuant to Section 106 of the National Historic Preservation Act or a permit under ARPA. Similar prohibitions are included with respect to the sale, purchase, exchange etc. of such archaeological resources.

ARPA's initial \$10,000 fine for a first conviction of a person who "knowingly violates" the prohibitions is deleted, and a new two-tiered test is substituted. Where the cost of repair, restoration and return is less than \$500, the penalty is a \$20,000 fine and up to one year in prison. Where restoration and return is impossible or is more than \$500, the penalty is a \$50,000 fine and not more than two years in prison. The \$100,000 fine/up to 5 years in prison for subsequent violations is retained.

Also, a new provision is added for the Advisory Council, in consultation with the Justice Department, to promulgate regulations for assessment and collection of civil fines on persons who violate any provision of the Act. Civil fines may be in addition to criminal penalties. The fines are to be used to pay the cost to restore, repair, return, stabilize, research and interpret the resource involved (or a similar resource if the one in question has been destroyed or damaged beyond restoration). If the resource is on or removed from Indian lands, the fine will be paid to the appropriate tribe or Indian landowner. Fines in excess of the amount needed to restore the resource will be paid into the Historic Preservation Fund.

The exemptions for the surface collection of arrowheads are removed. Also removed are the provisions for any "aggrieved" person to petition for judicial review of a civil penalty. Added is a provision authorizing the Advisory Council to offer a \$1000 reward to a person who furnishes information leading to a conviction or assessment of a civil penalty for violation of the Act.

**SAA strongly supports these provisions.**

- C. **Private Lands:** Anti-looting also relates to sections of the bill which deal with protection of sites on private lands. (Section 119, pages 50-51). In order to promote and protect archaeological resources on private lands, the Advisory Council would promulgate regulations to ensure state preservation programs take into account archaeological sites on private lands. Owners of private land with archaeological resources are encouraged to preserve these resources in place and, if necessary, to conduct excavations to meet Federal standards, to register artifacts, to donate or lend significant artifacts to research institutions and to allow access to resources for research.

**SAA strongly supports these provisions, but recommends that the Secretary of the Interior, who has the responsibilities for reviewing and approving State historic preservation programs, be authorized to promulgate the regulations rather than the Advisory Council.**

- D. **Artifact registration:** In an effort to curb the illegal market in antiquities and artifacts, the bill provides that the Advisory Council shall establish a registration program for artifacts that are removed from archaeological sites in the United States and abroad. (Section 121, page 55).

Registration of artifacts from Federal lands and projects will be mandatory. Registration of materials from private lands will be voluntary. Registration will be carried out in cooperation with appropriate Federal agencies, SHPO's, Tribal historic preservation officers and others. Only lawfully recovered artifacts may be registered. The Advisory Council is exhorted to discourage interstate and international traffic in unregistered artifacts.

**Although SAA supports the concept of artifact registration, the Society questions the feasibility of such a registration system on a national scale. Nevertheless, given the current dire situation of the illegal trafficking in looted artifacts, the registration system is worth a try. Perhaps a pilot project could be substituted initially as a test of such a program.**

- E. **International Conference on Antiquities Trade:** The bill directs the Advisory Council, in consultation with the Cultural Property Advisory Committee (in the USIA) to call for and organize United States participation in an international conference on the international antiquities trade. (Section 117, pages 48-49). The conference would focus on adequate controls, enforcement and incentives to ensure that traded artifacts are from properly conducted excavations and on exchange of information between nations to enhance public knowledge of each nation's cultural heritage. No date for the conference is set, but the bill states that the goal of the conference is to have in place an effective program to control looting and trafficking in stolen artifacts in time for the celebration of the 500th Anniversary of the Columbus Discovery Voyage in 1992.

**SAA strongly supports these provisions and suggests a number of additional provisions, including a timetable for when the conference will be held and when the report would be prepared and distributed. More detailed guidance could be provided, calling for a consensus statement reaffirming the United States' position that the illegal international trade in antiquities is unacceptable; recommendations for legislation and accords to curb such activities at the national and international levels; and recommendations for cooperative efforts to enforce the provisions of such legislation and accords.**

#### IV. ABANDONED SHIPWRECKS:

S. 1579 (but not H.R. 3412) also amends the Abandoned Shipwreck Act of 1987 to extend its provisions beyond the current limit on State submerged lands (generally 3-miles from shore) to include shipwrecks and archaeological resources embedded in or lying on the seabed in the Exclusive Economic Zone (generally 200 miles from shore). The United States asserts title to these resources and, in the case of disputes, the Secretary of Interior, in consultation with the Archaeological Advisory Board and Secretary of State, shall determine whether a site or object is included.

**SAA strongly supports these provisions, but recommends that enactment wait for another year so that the provisions of the Abandoned Shipwreck Act, enacted in 1988, have an opportunity to be further tested.**

#### V. ARCHAEOLOGICAL RESEARCH:

The bill provides that archaeological research priorities would be established and periodically revised in consultation with the Archaeology Advisory Board and Advisory Council on Historic Preservation. (Section 116, page 45). These priorities will address questions of anthropology, history and related disciplines to which archaeological research can provide information. The Advisory Council may assemble study groups to assist in formulating the priorities, which must take into account relevant priorities in State historic preservation plans. Regional Archaeological Review Groups will be established to translate the priorities into regional terms.

All Federal agencies will be required to ensure that scopes of work proposed by archaeologists include a discussion of which of the research problems they propose to address and justify their selections. The Advisory Council will coordinate the organization of data and periodically report to the President, Congress, relevant research communities and the public.

**While SAA is sympathetic to the intent of these provisions and the need for better coordination of research and dissemination of research results, the Society questions whether imposing a new national system of research priorities will, in fact, create more problems than it resolves. No similar requirement is included in the legislation for other historic properties. Many archeological sites are quite small and it would often be extremely difficult if not impossible to fit the research to be conducted at a specific within a Federally imposed priority system. At the very least, the burden for the use of these priorities should be on the Federal agencies themselves and not, as proposed in Section 15 (c)(1) just on the archaeologists who conduct the work on behalf of those agencies.**

#### VI. PROFESSIONAL STANDARDS FOR ARCHAEOLOGISTS

S. 1579 requires the Advisory Council to establish professional qualifications and performance standards for archaeologists and procedures to assure that these are met. (Section 118, page 49). Archaeologists wishing to do work on Federal lands, with Federal funds or to register artifacts will be required to meet the professional standards. In setting the standards, the Advisory Council is directed to take into account the certification systems of international, national, state and local archaeological organizations. The Advisory Council is directed to consult with the Archaeology Advisory Board, Society of Professional Archaeologists, Society for American Archaeology, Society for Historical Archaeology, Smithsonian Institution and other interested parties.

**SAA recognizes the desire of Federal agencies to have assurance that the archaeologists who contract with them are professionally qualified to do so. Such a need is as great if not even greater with other preservation professionals who, for the most part, are not required to meet the rigorous educational requirements and training which most archaeologists achieve to obtain a doctorate degree.**

SAA does not oppose the establishment of standards for Federal contract archaeology (and other disciplines where appropriate) but would suggest that the professionals working within those agencies--and not just those under contract--be required to meet those standards. If the provision is enacted, SAA welcomes the opportunity for participating in the developments of these standards and guidelines as provided in this section of the bill.

#### VII. OTHER ARCHAEOLOGICAL PROTECTION AND ANTI-LOOTING PROVISIONS:

Many other provisions in S. 1579 would directly and indirectly add protection for archaeological resources and address other anti-looting issues. These include provisions in which relate to protection of sites in Title I (especially pages 5-23) and to the establishment of education, interpretation and training programs. (Title V, pages 76-78).

- A. **Historic and Archaeological Resources of Critical Importance:** Under Title I, the Advisory Council would be authorized to develop criteria to identify resources of critical importance to the nation, state, tribe and localities (Section 111, page 23-26). In addition, the Advisory Council would also determine resources facing significant threats and develop protection standards for these properties and their surroundings. These actions will be done in consultation with the SHPO, Tribal HPO and local governments. The Advisory Council may take appropriate action to avoid or mitigate the occurrence of a threat to a critical historic property, including voluntary solution, suspension of Federal assistance and court injunction.

**SAA strongly supports these provisions in the bill which add protections for all historic properties, including archaeological resources.**

- B. **Education and Training:** Title V directs the Secretary of the Interior, in consultation with several other Federal agencies and organizations (including the SAA) to develop and implement a comprehensive preservation education and training program. The elements of such a program are identified and a requirement is included that Historic Preservation Fund recipients, including subgrantees, carry out appropriate forms of education and training as components of their federally assisted programs.

**SAA strongly supports these provision as some of the most significant ones in the bill. A more enlightened public, more sensitive to their heritage generally and to the needs of preservation specifically, would go a long way to avoid the kinds of problems addressed by the more regulatory aspects of the legislation (which SAA also strong supports).**