

SAA COMMENTS ON STAFF DRAFT OF S.1980 SUBSTITUTE

May 10, 1990

Keith Kintigh, Chair
Society for American Archaeology
Task Force on Reburial and Repatriation

General Comments

The Society for American Archaeology is pleased with the many improvements made in S.1980 and is most grateful to Select Committee staff members Lurleen McGregor and Steve Heeley for their thoughtful consideration of our earlier comments and suggestions.

We do have some suggestions and some concerns about certain portions of the new draft. Also we have a serious objection to the extension of the bill, beyond the language of the original drafts of both S.1980 and S.1021, to provide for the return of all unaffiliated remains. This also seems to go beyond the intent of the bill as it was described to us by Senator Inouye on May 2.

Sec. 2. Findings

Finding 2(b)(1), recognizing both Native American rights and scientific values is an important addition to the bill.

2(b)(2) [Delete]

In our view, repatriation is not fundamentally an issue of human rights; rather it involves a conflict among differing, legitimately held values concerning the proper treatment of human remains and sensitive Native American objects. Among Native American groups, there is a great diversity of beliefs concerning the proper treatment of the dead and the nature of sacred objects. Native Americans, anthropologists, museum professionals, and the public at large all have legitimate interests in the material record of American history, including Native American history.

S.1980 is sensitive to these diverse interests and provides the outline of a workable compromise among them. Despite its rhetorical appeal, the assertion of paramount human rights, in our view, does not aid in the resolution of the difficult issues covered by in this bill.

2(b)(4) [Delete]

The Society for American Archaeology's most strenuous objection to the current draft relates to finding 2(b)(4) and its implementation in Sec 6(a)(3)(D). While we accept the need to provide for return, on request, of culturally affiliated remains, we do not believe that it is appropriate to dictate the return of all culturally unidentifiable human remains.

Although we realize that the return of culturally unidentifiable remains is a sensitive issue of concern to some people, we also know that many of these remains have great value for scientific research and public education, as indicated by finding (b)(1). We, of course, subscribe to the finding (b)(3) that all human remains must be treated with respect at all times and believe that this respect can be accorded in the context of preservation within museums.

As reflected by other sections of S.1980, any legislation dealing with repatriation has the responsibility to 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 will be possible to determine the affiliation of remains for which no affinity can now be established. Return of presently unidentifiable remains to the wrong group not only deprives the group to which the remains may be rightly affiliated, it also deprives all other groups, Native American and otherwise, of the opportunity to learn from those remains. In addition, many Native Americans believe that it would be wrong, or even harmful, to receive and rebury remains that are not of their ancestors.

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.

It is our impression that S.1980 is intended to provide for the repatriation of remains and objects that are clearly related to modern groups and whose return is desired by the groups. Since there is broad agreement on other important issues dealt with by the bill, we would strongly suggest that these difficult and highly contentious provisions be deleted.

Sec. 3. Definitions

We are strongly supportive of the revised definition for "Indian Tribe" 3(a)(5). We believe that this more accurately reflects the intent of the legislation as we understand (and support) it.

Of critical importance to us is the addition in the current draft of a definition of "cultural affiliation" 3(a)(10) that defines, to our satisfaction, a reasonable and workable scope for the bill (except as noted above).

3(a)(12) [Strike out the page 7, line 15-16 starting with "or":]

"(12) The term 'Native American sacred object' means an object, including (but not limited to) any dead or live animal or animal part, plant or plant part, mineral, or other substance, which is,

or has been devoted to a Native American religious ceremony.'

The definition of "Native American sacred object" 3(a)(12) has been substantially improved over the original version of S.1980. However, we feel that this definition is still overly broad. It seems that the intent here is to define sacred objects as those items that are in some sense essential for the observance of a religious ceremony, such as a kachina mask. However, the phrase "or which has been employed in the observance of such religious ceremony" would include items whose use in the ceremony is incidental, such as a bowl used to carry stew to the kachinas. This definition then embodies an indeterminacy which would hinder the identification of sacred objects.

Elimination of this final clause, "or which is or has been employed in the observance of such religious ceremony," would improve the definition. However, we are quite open to other suggested improvements.

Sec 4. Ownership

This section has the potential to have a tremendous impact on the ongoing desecration of Native American cemeteries by looters. However, we are uncertain, in several places, of the intent. We believe this important section needs some clarification.

4(a)

As written, this section appears to cover all lands of the United States, not just Federal lands. As such, it seems to extend a measure of Federal protection to some Native American burial sites and some other localities of cultural importance that are on private and state lands. However, it is not entirely clear to us how these provisions could be effectively implemented or enforced on private lands.

If this section were to be restricted to Federal land, then it overlaps with 4(b) and should be combined with it.

This subsection, and 4(b) as well, is incomplete in that it appears to cover all Native American human remains, funerary objects, sacred objects, and items of cultural patrimony, yet there is no provision for the disposition of such items where no affiliation can be established. This omission is important, because if it were included, it might be used to remove the incentive for pothunting of sites for which cultural affiliation is not clear.

4(a)(1) [Delete in p. 9, line 12-13, "or the Native American group"]

"In the case of human remains or funerary objects, the heirs of the Native American who is represented by the remains or who was associated with the funerary objects, or"

In this part we understand "heirs," in the ordinary sense of

the word, to be individuals who are directly descended from another individual. "Native American groups," in this sense cannot be heirs. However, these groups are included under subsection (a)(2).

4(a)(2)(A). [Substitute:]

"the governing body of the Indian tribe which is culturally affiliated with the the Native American who is represented by the remains or who was associated with the funerary objects, or the group with which the sacred objects or items of cultural patrimony were associated."

This suggested revision incorporates the term "cultural affiliation," which is defined in the bill rather than "member" and "originated" which are not. While it is a bit longer, we hope that it may also be clearer.

These revisions to subsection (a) are not intended to change the meaning in any way.

4(a)(3) [Add]

(3) in the case of Native American human remains, Native American funerary objects, Native American sacred objects, items of Native American cultural patrimony for which cultural affiliation cannot be ascertained, in accordance with regulations promulgated by the Secretary of the Interior, after consultation with the Review Committee established in Section 6 of this act.

4(b) It appears to us that repatriation of human remains and objects from Federal lands is adequately dealt with in section 5 since these remains and objects must legally be under the ownership or control of a Federal agency (except those already owned by Native groups). Because the 5 numbers under this subsection are not mutually exclusive, and because many different groups might satisfy an individual criterion, this subsection introduces ambiguity and, in some cases, a contraction with 4(a). We suggest the following changes:

[Omit the final partial sentence of (b) and change the ending portion of the preceding sentence to:]

"...shall be considered to be owned by:"

4(b)(1) [Change to]

"(1) the Native American group, that can show cultural affiliation with such remains or objects, or"

This point subsumes point 4(b)(2)-4(b)(5). In subsection 4(b)(2) of the draft, "aboriginal use," could apply to many groups, and is thus ambiguous. In our view, "aboriginal use" use is not really relevant unless there is "cultural affiliation," anyway. Subsections 4(b)(3) and 4(b)(4) as we

understand them, are equivalent to "cultural affiliation" listed as 4(b)(5).

4(b)(2) [Change to]

"(2) in the absence of a group that is able to show cultural affiliation, the Native American group that has jurisdiction over the tribal land on which such items were discovered."

Here we suggest "tribal land," as defined as more inclusive than than "reservation." As we understand it, our suggested point (2) would obtain in the absence of this law and thus may be unnecessary.

4(c)

4(c)(1) Either this subsection should be deleted or the provisions of law being overridden should be explicitly stated so we know what, exactly, is the effect. While we have not researched this point thoroughly, we fear that an unintended effect of this subsection might be to exclude Native American human remains and these classes of items from Federal protection (for example, in the Historic Preservation Act) against Federally authorized excavation, removal, damage, or destruction (e.g. road construction, housing developments).

4(c)(2) While we are sympathetic with the intent, this subsection is unworkable as it stands.

Nearly all authorized excavations of Native American graves are a result of "development" of various sorts. In the great majority of these cases, the determination of cultural affiliation cannot be done prior to the disturbance; one would have to excavate and study the remains or objects in order to determine the affiliation. The subsection thus poses a problem without a solution, how do you obtain consent without knowing the affiliation.

This subsection also fails to specify how consent might be obtained where no cultural affiliation can be determined. Were this section enacted as it is, it would be a major impediment to Federal and State agencies and private concerns engaged in or permitting development, who could be expected to bring great pressure to bear against the bill.

We see two underlying aspects of this subsection, both of which we strongly support. The first is the protection of Native American burial sites and the second is the incorporation of Native American concerns into decisions about the disturbance of burial sites (where it is preventable) and the determination of the disposition of remains that are disturbed.

We note that as it is written, this subsection affects burials on both Federal and non-Federal lands and as such, could be used to protect Native American burial sites. We

suggest the following substitute, along with a modification of subsection 4(d)(2) to have its penalties extend to this subsection as well:

"(2) Notwithstanding any other provision of law, no person may excavate, or remove Native American human remains or funerary objects unless such activity is conducted pursuant to a permit issued under the Archaeological Resources Protection act of 1979 as amended, a State permit consistent with the regulations promulgated under this act, or a permit issued under this act."

To follow this, there needs to be a section providing for incorporation of Native American concerns into decisions about avoidable disturbance of graves and where, disturbance is unavoidable, a process for the assessment of cultural affiliation, notification of culturally affiliated Native American groups, and a determination of the disposition of the remains and objects. Section 120 of proposed S.1579 introduced by Sen. Fowler may provide some guidance on this point.

There also may need to be a section authorizing the Secretary of the Interior to issue permits, under specified conditions under this act.

Finally, there needs to be a section that deals with the accidental disturbance of human remains. Something like the following might work:

"(?) Persons discovering or disturbing Native American human remains or funerary objects through inadvertence, including disturbance through construction, mining, logging, agricultural activity, or any other activity shall, upon discovery of such human remains or funerary objects, cease the activity causing the disturbance, make a reasonable effort to protect any remains or funerary objects goods disturbed or discovered, and report, at the earliest possible time, such discovery or disturbance in writing to the State Historic Preservation Officer, as defined in the Historic Preservation Act of 1966, of the State in which the remains or grave goods are situated."

"(?) It shall be a complete defense to prosecution under this section if the defendant can prove, by a preponderance of evidence, that the alleged acts were accidental or inadvertent, that reasonable effort were made to protect any human remains or funerary objects disturbed or discovered, and that the accidental disturbance or discovery was properly reported."

4(c)(3)(A) This section appears to be superfluous in that that all remains and objects (except those already owned by a Native group) excavated under the authority of a Federal law or permit are subject to the ownership or control of a Federal agency. Thus, repatriation requests should be satisfied through the provisions of section 5. However if this subsection is to remain, we suggest:

[Modify page 11 line 13:]

"provide for the repatriation, upon request, to the culturally affiliated Native...."

This makes clear that repatriation would not be forced on any group, who like the Zuni tribe might choose not to request repatriation. It also specifies that the appropriate group is that with which there is cultural affiliation.

We note that there is considerable overlap between subsections (a), (b), and (c) of this section and with the provisions of section 5. That is, a set of remains or objects from Federal land could be subject to provisions of all these sections and subsections.

4(d)

While we support this subsection in its present form, this subsection could be reworked in such a way that it would have an enormous impact on preventing the disturbance of Native American burial sites. This could be strengthened, by the incorporation of cultural affiliation, sacred objects, and objects of cultural patrimony:

"(B)[new] in the case of human remains or funerary objects for which the heirs of the Native American who is represented by the remains or who was associated with the funerary objects cannot be ascertained, or in the case of Native American sacred objects or objects of Native American cultural patrimony

"(1) the governing body of the Indian tribe which is culturally affiliated with the the Native American who is represented by the remains or who was associated with the funerary objects, or the group with which the sacred objects or items of cultural patrimony were associated.

"(2) an appropriate Native Hawaiian organization.

"(C) [old (B)]"

Whether or not the suggested changes are made, we are uncertain what would constitute "legal title." Does this term cover our mutual intent to stop trafficking in these items, or could it be defined to do so.

Section 5. Repatriation

Whether or not Native American groups request repatriation of human remains and appropriate objects as a result of the inventory, identification, and notification mandated by this section, a tremendous amount of information of importance for their heritages will be made available to those groups.

Many important changes have been made in this section. the lengthening of the time for the inventory and the possibility of extensions shows a recognition of the scope of this important

undertaking.

5(a)(1) [Modify page 13, line 12-14:]

"...Native American sacred objects, objects of Native American cultural patrimony, Native American human remains, and Native American funerary objects."

This is a minor point but it seems to us that the use of "including" muddies the definitions of these terms.

5(a)(2)(A) [Modify page 13, line 20:]

"...with appropriate Native American government..."

5(a)(4)(B) [Modify page 14, line 23:]

"...as being culturally affiliated with that Native American..."

[Modify page 15, line 1-4:]

"...likely than not that the items or human remains are culturally affiliated with the Native American group."

To use a defined term "cultural affiliation" rather than "associated" and "originated"

5(b) covers repatriation by Federal agencies, while 5(c) covers Federal agencies and museums. 5(c) stipulates more fully the repatriation process. We believe that 5(b) can be deleted without significant effect. Failing that, the provisions for essential scientific study should be included in 5(b) and Federal agencies should be removed from 5(c).

5(c)(1)

We are unclear as to the practical meaning of "legal title." We believe that this bears some consideration and possible definition in order to clarify this term within the bill.

Section 6. Review Committee

6(a)(1) [Change page 19, line 2:]

"restoration" to "repatriation."

6(a)(2) [Modify page 19, line 6"]

"...appointed by the Secretary from..."

6(a)(3)(B)(i) [Modify page 19, line 18:]

"the identity or cultural affiliation of human remains..."

6(a)(3)(D) This section appears to have an ambiguous wording. I believe that the intent is that the committee is responsible for

compiling an inventory, and recommending specific actions. However, it is possible to read this that the committee is responsible for compiling, recommending, and implementing a process. Assuming the former reading is the correct one, at a minimum, the intent should be clarified.

We feel that the proposed compilation of the inventory is impractical for this committee. A consideration of the issue of unaffiliated remains will probably be more productive after the other provisions of this bill are carried out.

While we would strenuously object to a mandate for implementing a process for the transfer of all unaffiliated remains, we also believe that it is unwise for the committee to concern itself with this issue, as discussed in our comments on 2(b)(4), above. The inventory, identification, notification, and repatriation provided for in Section 5 involves tens of millions of objects and will occupy many years. If this must be dealt with, let's do it later, and get on with the more urgent business of dealing with the affiliated remains about which there is so much immediate concern.

Section 7. Grants

7(a)(2) [Modify page 23, line 13:]

"...required under section 5 and in documenting human remains and objects to be returned as required under section 5."

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.

Should there be a provision for authorization of additional monies to Federal agencies to cover these same expenses?