

**Society for American Archaeology  
Statement on H.R. 5237, H.R. 1646, and H.R. 1381  
Native American Grave Protection and Repatriation Act  
Native American Grave and Burial Protection Act  
Native American Burial Site Preservation 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**

**Introduction**

Mr. Chairman, the Society for American Archaeology (SAA) is grateful for this opportunity to comment on the bills under consideration here today. The Society for American Archaeology is a scholarly and professional association composed of professional and avocational archaeologists committed to the scientific investigation, interpretation, and preservation of the archaeological heritage of the United States. We acknowledge and respect the diversity of beliefs about, and legitimate interests in, the past and its material remains.

We are not here to defend the status quo: repatriation is often an appropriate and overdue process; Native American concerns must be incorporated into archaeological research strategies and museum collections policies; Native American audiences merit much more consideration in park and museum exhibitions and in scientific reports on archaeological research.

While we understand the desire for legislation on this issue, the Committee should know that repatriation does not occur only when legally mandated. In the absence of any legal requirements, good faith negotiations among Native Americans, archaeologists, and museum professionals frequently result in decisions to repatriate human remains and objects.

Although H.R. 5237 needs significant revision, it can become an important vehicle for the appropriate repatriation of human remains and objects, the enhancement of Native American access to and knowledge about material aspects of their heritage, and the protection of Native American cemeteries from looting. We are grateful to Representative Udall and the Committee staff for moving so far towards a positive and workable bill.

We appreciate the strength and simplicity of the stand for the protection of Native American graves taken in Representative Bennett's H.R. 1381. However, we feel that the more detailed approach taken by H.R. 5237 will be more effective in dealing with these complex issues.

In an attachment to this testimony we outline specific concerns and suggestions concerning H.R. 5237. Here, I will briefly discuss our major substantive concerns.

### Components of the Legislation

#### Repatriation

Anthropologists are painfully aware that repatriation of human remains and objects now held by museums and Federal agencies will result in a loss of irreplaceable information about the past. However, we believe that where a modern group has a reasonably clear cultural affiliation with human remains or objects, that group's desire to control the treatment of its own material heritage should take precedence over the broader scientific and public interests.

Section 6 of H.R. 5237 calls for a finding of cultural affiliation within the context of case by case consideration of repatriation requests by specific Native American groups. However, this section needs clarification to indicate that, if necessary, the repatriation process outlined in subsection (a) is subject to the study provisions of (b) and burden of proof requirements of (c).

Legislation that provides for repatriation must accept the responsibility to ensure that control over human remains or objects is turned over to the proper groups. The key definition in the legislation, that of "cultural affiliation," fails in this regard. As written, it requires the only establishment of a "reasonable relationship ... between ... [an] Indian tribe or Native Hawaiian organization and the Native Americans from which the human remains or other material ... derived." From a scientific perspective, this definition is inconsistent with what we understand to be the legislation's intent. For example, the Apache of the Southwest have strong linguistic, genetic, and cultural relationships with the Tlingit of Alaska, seemingly satisfying the definition, yet we don't believe that a Tlingit group should be able to claim remains of Apaches, or vice versa.

Even more problematic is the definition's "presumption of a cultural affiliation between an Indian tribe or Native Hawaiian organization and human remains or ... objects ... obtained ... from the tribe's or organization's tribal or aboriginal lands." Because of the complex and very long evolutions of modern tribal groups, it is simply not possible to assign a reasonable boundary to the concept of atemporal aboriginal lands. Furthermore, even when an explicit and recent time frame is stipulated, Indian land claims litigation has shown that aboriginal lands of different groups overlap tremendously. In the Southwest, and I suspect nation-wide, it would be typical for a single area to be claimed as aboriginal by several tribes. For example, aboriginal areas of the Hopi, Zuni, and Navajo have substantial overlap.

We cannot accept H.R. 5237's definition and suggest that the definition of "cultural affiliation" used in the draft substitute for S.1980 is preferable. It requires a direct relationship between a present-day Native American group and an identifiable historic or prehistoric group that indicates a continuity of group identity from the earlier to the present-day group. With this definition, the standard for "cultural affiliation" is sufficiently strong that determinations as to the disposition of human remains or objects will be made by the groups with a relationship that is sufficiently strong to be meaningful and that is likely to be stronger than with other related groups.

#### Inventory, Identification, and Notification

We strongly support the required inventory and identification of museum collections and the notification of groups with which remains or objects may be affiliated. It will not only provide Native American groups with the information necessary to develop repatriation requests, it will make available to them a tremendous amount of information about material aspects of their heritage that have been preserved by museums.

However, we hope that the Committee recognizes the immensity of the costly task required by this legislation and that the Congress will be prepared to appropriate the necessary funds. Literally millions of items in the nation's museums must be inventoried and identified. The Society acknowledges the need for a specific deadline for completion of this task, and appreciates the lengthening of the time available to complete it and the provision for extensions where good-faith efforts are evidenced.

However, we are puzzled by the language that seems to discourage study of remains or objects in order to determine their cultural affiliation. Since the time when most of these collections were "documented," knowledge has been developed that would allow further examination (including non-destructive study) to provide more and better information about cultural affiliation. Discouraging additional study will have the effect of diminishing the portion of the remains and objects for which cultural affiliation can be determined. This seems to us to run counter to the goals of the legislation.

#### **Excavation of Native American Human Remains and Objects**

H.R. 1381 prohibits the excavation of Native American graves on all lands of the United States while Section 3(c) of H.R. 5237 prohibits the disturbance of Native American human remains and objects on Federal and tribal lands without the consent of the appropriate Indian tribe or Native Hawaiian organization. While we strongly support the prohibition of unauthorized excavation and we are sympathetic with the intent of these provisions, we feel that they are unworkable as they now stand.

The bills must accommodate the forces of "development," in the forms of road construction, housing development, and so forth. Nearly all Native American graves now excavated by archaeologists are removed not for pure research purposes but because of imminent destruction. By requiring consent of the "appropriate" group, this section would stall, or sometimes completely stop construction projects nationwide, including much-needed projects on Indian reservations. We can only imagine that this would have unpleasant political consequences for all of us.

It must also be recognized that in the great majority of the cases dealt with by H.R. 5237, the determination of cultural affiliation (which is what we assume would determine the "appropriateness" of a tribe or organization) cannot be accomplished prior to the excavation; one would have to excavate and study the remains or objects in order to determine their affiliation. However, we believe that as soon as cultural affiliation can be reasonably determined, the concerns of the affiliated group about the treatment and disposition of the remains or objects should be accommodated.

#### **Protection of Native American Remains and Objects**

We support H.R. 5237's provisions concerning the discovery of and illegal trafficking in human remains and objects. However, they do not appear to offer any broader protection than is already provided by the Archaeological Resources Protection Act of 1979 except insofar as the remains or objects are less than 100 years old. The discovery provisions require reporting but assign no responsibility to the department secretary or agency head to act on the information.

We are disappointed that the bill has backed away from the courageous stand taken by Representative Bennett's H.R. 1381 and Representative Udall's H.R. 1646, both of which provide broad protection to Native American Human remains regardless of the ownership of the lands in which they were buried.

Despite strong Federal and State laws, the antiquities market continues to stimulate widespread looting, particularly on private lands. An enforceable prohibition of the sale and purchase of these classes of materials (as provided in H.R. 1646) would go a very long way toward the eradication of a commercial antiquities market, thus eliminating much of the incentive for looting. Such a prohibition would do far more to protect Native American human remains than all other provisions of this bill and all other antiquities legislation combined.

Sections 3 and 4 of H.R. 5237 should be revised to make any unauthorized excavation of Native American graves or sacred sites illegal, no matter where it occurs. Just as endangered species are protected wherever they might be, all Native American sites should be protected. (For decades, the Society and its members have worked to stop the looting of Native American sites and has supported legislation that provides severe penalties for pothunting. One of the Society's major initiatives, "Save the Past for the Future" has the prevention of looting as its goal.)

#### **Ownership of Excavated Native American Remains and Objects**

Assuming an improved definition of "cultural affiliation," we would support recognition of the ownership of human remains and objects excavated on Federal and tribal land by the affiliated group. However, the ownership provisions of the H.R. 5237 provide priorities that we feel are inappropriate and would lead to major injustices. In Section 3(a)(2) ownership of human remains and objects is granted to the tribe on whose land the remains or objects are found rather than the tribe with which the remains or objects are most closely affiliated.

This would assert, for example, Navajo ownership of the human remains and objects from several large protohistoric- and historic-period Hopi villages on Antelope Mesa in Arizona. Because there has been so much movement of Indian groups (including movements coerced by the United States) such cases would not be uncommon.

Also, for reasons indicated above, we believe that it is unwarranted and inadvisable to attempt to legislate ownership on the basis of aboriginal lands in cases where cultural affiliation cannot be determined as provided subsection 3(a)(2)(C).

#### **The Disposition of Culturally Unaffiliated Remains**

In several places, H.R. 5237 deals with remains and objects for which no cultural affiliation can be established. While we accept the need to provide for return, on request, of culturally affiliated remains, we believe that it is neither necessary nor appropriate for this legislation to determine the disposition of culturally unidentifiable human remains or objects.

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. We, of course, subscribe to the ethical principle 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 several sections of H.R. 5237, any legislation dealing with repatriation has the responsibility to ensure that when remains or objects are returned, they are transferred to the appropriate individuals or groups. 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.

In the case of unaffiliated human remains and objects, there is, quite literally no one to whom they can be appropriately repatriated. Transfer over such remains or objects to any group would be, in our view, an unwarranted destruction of our human heritage.

It is our impression that the main objective of H.R. 5237 is to provide for the repatriation of remains and objects that are clearly related to modern groups and whose return is desired by those groups. Since there is broad agreement on this and other important issues dealt with by the bill, we strongly suggest that the difficult and highly contentious provisions concerned with unaffiliated remains be deleted.

### Conclusion

The Society for American Archaeology sees many strengths in this legislation. We have also noted problems with several sections and have suggested improvements. In particular, we urge strengthening the sections that prohibit the sale of Native American human remains and objects and outlawing the looting of Native American sites irrespective of land ownership.

With an improved definition of cultural affiliation and elimination of the provisions concerning culturally unidentifiable remains, the Society for American Archaeology would be pleased to support H.R. 5237.

On behalf of the Society, I thank you for this opportunity to testify on this important legislation.