

Society For American Archaeology
Text and Section by Section Analysis of S. 110:
Amendments to the Native American Graves Protection and Repatriation Act
February 14, 1997

S.110 Text: Written Consent

1(a) Written Consent Required if Native American Remains Are Excavated or Removed for Purposes of Study.--Section 3(c) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3002(c)) is amended--

- (1) in paragraph (3), by striking “and” at the end of the paragraph;
- (2) in paragraph (4), by striking the period and inserting “; and”; and
- (3) by adding at the end the following:

“(5) in the case of any intentional excavation or removal of Native American human remains for purposes of study, such remains are excavated or removed after written consent is obtained from--

“(A) lineal descendants, if known or readily ascertainable; or

“(B) each appropriate Indian tribe or Native Hawaiian organization.

The requirement under paragraph (1) shall not be interpreted as allowing or requiring, in the absence of the consent of each appropriate Indian tribe or Native Hawaiian organization, any recordation or analysis that is in addition to any recordation or analysis that is otherwise allowed or required under this Act.”.

Proposed NAGPRA Wording: Written Consent

3(c) Intentional Excavation and Removal of Native American Human Remains and Objects.—The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if—

- (1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 (93 Stat. 721; 16 U.S.C. 470aa et seq.) which shall be consistent with this Act;
- (2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;
- (3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); ~~and~~
- (4) proof of consultation or consent under paragraph (2) is shown; ~~and~~
- (5) in the case of any intentional excavation or removal of Native American human remains for purposes of study, such remains are excavated or removed after written consent is obtained from--
 - (A) lineal descendants, if known or readily ascertainable; or
 - (B) each appropriate Indian tribe or Native Hawaiian organization.

The requirement under paragraph (1) shall not be interpreted as allowing or requiring, in the absence of the consent of each appropriate Indian tribe or Native Hawaiian organization, any recordation or analysis that is in addition to any recordation or analysis that is otherwise allowed or required under this Act.

SAA Summary: Written Consent

The revised wording of 3(c) requires the consent of all appropriate tribes or Native Hawaiian organizations prior to any excavation or removal of human remains or cultural items from Federal land for purposes of study, whereas the current wording requires only consultation with appropriate groups. It further seeks to limit recording required by an ARPA permit to forms allowed under NAGPRA.

SAA Analysis: Written Consent

For reasons detailed below, SAA believes that this amendment should be withdrawn. It would severely hamper the ability of Federal agencies to carry out their responsibilities under the National Historic Preservation Act, and would curtail the ability of agencies to remove human remains from archaeological sites that will be destroyed by federally initiated or permitted economic development projects. The development projects themselves would undoubtedly be affected by this provision, and in many cases would be stopped or indefinitely delayed. In states with considerable public land, it is likely that a number of projects would be so affected.

Nearly all excavation or removal of Native American human remains on Federal land is associated with development activities of some sort, e.g., logging, mining, or building roads, military airstrips, dams, or others structures. (Excavation of Native American or Native Hawaiian cemeteries on Federal land purely for the purpose of study is quite rare.) Under the proposed amendment, no Native American graves could be

excavated and removed from the path of development projects without the consent of all appropriate tribes; in many if not most circumstances, such consent is likely to be impossible to obtain. Considerable experience suggests that, for good reasons, most tribal officials are extremely reluctant to consent, in writing, to intentional removal of human remains, particularly in time-constrained situations typical of construction projects. Under this amendment such refusal would halt any public land development project that encounters human remains.

While the words "for purposes of study" might seem to exclude the removal of human remains to save them from destruction by development projects, it appears to us that these words are too inclusive and ambiguous to remedy the problem. To understand this perspective, it is necessary to consider the legal and regulatory context in which Federal agencies deal with archaeological sites that are impacted by development projects. In these situations, agencies are guided by Section 106 of the National Historic Preservation Act (16 U.S.C.470), which requires them to consider the effects of their actions (including permitting or assistance programs) on archaeological and historic sites. Where an agency-initiated or permitted construction project has a substantial impact on an important archaeological site, studies involving recording and excavation are often deemed necessary to mitigate the damage, in order that the development can proceed. The mitigation of project impacts is achieved precisely through the study of the excavated materials in order to recover the information that is being lost through the disturbance or destruction of the site. Furthermore, in many cases it is impossible to determine cultural affiliation without some study.

Any professionally responsible excavation and removal of human remains in the context of such an archaeological mitigation project can thereby be considered as having been done for purposes of study, even if the overwhelming majority of the effort is devoted to the excavation of broken and discarded artifacts, and the remains of structures, hearths, storage pits, etc. The excavations would be for purposes of study even if the human remains that are encountered are removed primarily so they will not be destroyed by the development project, and even if they receive only basic recordation and documentation before being turned over to a related tribe or Native Hawaiian organization for reburial, as is often the case. We believe that the language of S. 110 could make the removal of human remains in the context of such archaeological mitigation projects virtually impossible without written consent. Furthermore, we believe that in practice, the amendment will require advance written consent if human remains are even suspected of being present in sites that will be affected by an agency initiated or permitted development project.

This requirement is far more constraining than the current consultation procedure and represents an enormous expansion of NAGPRA's scope. It will have a significant effect on Federal agencies' ability to discharge their responsibilities under Section 106 of the National Historic Preservation Act. Furthermore, we believe that it will frequently result in indefinite delays and the complete stoppage of Federally funded or permitted development projects. Recent history has shown that such events (e.g., western U.S. bans on logging due to the Mexican spotted owl) can generate a large backlash of public sentiment. We believe that a similar backlash would be created if development projects were stopped by the proposed NAGPRA amendment, and that this would be harmful to the broader interests both of Native Americans and of historic preservation.

Further, the "written consent" component of Section 1(a)(5) presupposes that there exist either "lineal descendants" or an "appropriate Indian tribe or Native Hawaiian organization." There are many parts of the United States where this is simply not the case. Where human remains are simply too ancient for connections with any present-day Indian tribe to be credibly determined, or where there are no modern descendants, it does not appear that there would be any appropriate tribe. Even where there are modern tribes with a demonstrable relationship to past cultures, the looseness of the term "appropriate" could extend the need for consent beyond the culturally affiliated tribe to a possibly large number of less closely related tribes, thus compounding the difficulty of obtaining consent and diluting the authority of the culturally affiliated tribe.

While we are unable to foresee all the effects of the final paragraph of section 1(a), it appears to be intended to restrict study of the human remains and objects removed under an ARPA permit. Currently, studies done under ARPA are subject to permit stipulations established by the responsible Federal agency after consultation with appropriate Indian tribes or Native Hawaiian organizations. These permit stipulations are intended to ensure that appropriate standards for excavation are maintained. We believe that this permitting process is increasingly responsive to the concerns of Native groups, and recommend that remaining problems be addressed through ARPA regulations or changes in agency procedures, rather than through this proposed amendment to NAGPRA. The proposed amendment would, in effect, amend ARPA, and would alter the Federal land manager's authority with respect to the issuance of ARPA permits. The proposed amendment would also give veto power over particular studies to any of a potentially large number of "appropriate" Indian tribes or Native Hawaiian organizations. In some cases, this might conflict with the desire of the most closely related

tribe or organization to have certain studies carried out by an organization that is doing research under an ARPA permit.

SAA Analysis Recommendation: Written Consent

The amendment should be withdrawn.

S.110 Text: Requirements for Inadvertent Discoveries

(b) Requirements for Inadvertent Discoveries.--Section 3(d) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3002(d)) is amended--

(1) in paragraph (1)--

(A) in the first sentence, by striking “with respect to Federal lands” and inserting “with respect to those Federal lands”;

(B) by inserting after the first sentence the following: “In any case in which a Federal agency or instrumentality receives notice of a discovery of Native American cultural items on lands with respect to which the Federal agency or instrumentality has management authority, the appropriate official of the Federal agency or instrumentality shall notify each appropriate Indian tribe or Native Hawaiian organization. The notification required under the preceding sentence shall be provided not later than 3 business days after the date on which the Federal agency or instrumentality receives notification of the discovery.”; and

(C) in the last sentence, by inserting “, and, in the case of Federal lands, the appropriate official of the Federal agency or instrumentality with management authority over those lands notified each appropriate Indian tribe or Native Hawaiian organization by the date specified in this paragraph,” after “that notification has been received,”; and

(2) in paragraph (2), by adding at the end the following new sentence: “Any person or entity that disposes of, or controls, a cultural item referred to in the preceding sentence shall comply with the applicable requirements of subsection (c).”.

Proposed NAGPRA Wording: Requirements for Inadvertent Discoveries

3(d)(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after the date of enactment of this Act shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to those federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971, the appropriate corporation or group. **In any case in which a Federal agency or instrumentality receives notice of a discovery of Native American cultural items on lands with respect to which the Federal agency or instrumentality has management authority, the appropriate official of the Federal agency or instrumentality shall notify each appropriate Indian tribe or Native Hawaiian organization. The notification required under the preceding sentence shall be provided not later than 3 business days after the date on which the Federal agency or instrumentality receives notification of the discovery.** If the discovery occurred in connection with an activity including (but not limited to) mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, **and, in the case of Federal lands, the appropriate official of the Federal agency or instrumentality with management authority over those lands notified each appropriate Indian tribe or Native Hawaiian organization by the date specified in this paragraph.,** the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section. **Any person or entity that disposes of, or controls, a cultural item referred to in the preceding sentence shall comply with the applicable requirements of subsection (c).**

SAA Summary: Requirements for Inadvertent Discoveries

The amendments to Paragraph (1) add a new sentence requiring that when there are inadvertent discoveries of cultural items on Federal land, each appropriate Indian tribe or Native Hawaiian organization must be notified in a timely way. NAGPRA’s permission for the activity that resulted in the discovery to resume 30 days after notification of the agency is now conditioned on timely notification of the tribes.

The amendments to Paragraph (2) make it clear that once discovered, the inadvertent discoveries are to be treated the same as intentional excavations, with respect to ownership, removal, and consultation. If the law is amended to require advance written consent prior to the excavation or removal of human remains, then under this modification, the written consent provisions would apply to the removal of human remains inadvertently encountered on Federal or Indian land during construction projects or otherwise.

SAA Analysis: Requirements for Inadvertent Discoveries

SAA sees the proposed changes as completely appropriate clarifications of NAGPRA’s intent.

However, it may be noted that the amendment introduces a different notification standard for Federal as opposed to Indian lands. The existing sentence 1 makes it clear that when an inadvertent discovery is made on tribal or Alaska Native Corporation lands, it is only the appropriate (not each appropriate) Indian tribe or corporation that must be notified.

Because NAGPRA clearly does not presuppose the existence of an “appropriate” tribe or Native Hawaiian organization [see NAGPRA 3(c)(2)], SAA believes that the wording would be clarified if in proposed (b)(1)(B) and (b)(1)(C) the phrase “each appropriate (if any) Indian tribe or Native Hawaiian organization” were substituted for “each appropriate Indian tribe or Native Hawaiian organization”.

Also, while the term “appropriate tribe” appears in 3(c)(2), this term is neither defined nor explained in the Act.

SAA Recommendation: Requirements for Inadvertent Discoveries

SAA strongly supports a clarification of NAGPRA's intent that Indian tribes or Native Hawaiian organizations be notified in a timely manner of any inadvertent discoveries of related Native American cultural items and that once made, the inadvertent discoveries are to be treated the same as intentional excavations. SAA suggests that "appropriate Indian tribe or Native Hawaiian organization" be more clearly defined, either in NAGPRA itself or in its regulations.

S.110 Text: Review Committee

(c) **Review Committee.**--Section 8(c)(5) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3006(c)(5)) is amended--

- (1) by inserting “and associated funerary objects” after “culturally unidentifiable human remains”; and
- (2) by striking “for developing a process for disposition of such remains” and inserting “for developing a process for the disposition of the remains and associated funerary objects”.

Revised NAGPRA Wording: Review Committee

8(c) The [Review] committee ... shall be responsible for—

- “(5) compiling an inventory of culturally unidentifiable human remains **and associated funerary objects** that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of ~~such~~ **the** remains **and associated funerary objects.**”

SAA Summary: Review Committee

The responsibilities of the NAGPRA Review Committee are extended by asking it to compile an inventory of funerary objects associated with culturally unidentifiable human remains and also by asking it to include associated funerary objects when they make recommendations for specific actions for developing a process for disposition of culturally unidentifiable remains.

SAA Analysis: Review Committee

SAA believes the amendment proposes a significant extension of NAGPRA that is unwise at this time. Because of the complexity of the problem, Congress was unable to include in NAGPRA a satisfactory way to dispose of culturally unidentifiable human remains. In 8(c)(5) it asks the Review Committee to figure out how many of these remains there are and where they are held and to develop recommendations on specific actions that need to be taken to develop a process for disposing of these remains. In NAGPRA, Congress instructs the Review Committee to carry out certain explicitly defined tasks with respect to culturally unidentifiable human

remains, but does not instruct it to consider associated funerary objects as a part of these tasks. This reflects Congress' greater concern for the human remains than for the associated funerary objects, and its intent to limit the Review Committee's work in this area to the human remains.

Under NAGPRA, Federal agencies and museums were required to provide the Department of the Interior with inventories of human remains and associated funerary objects, including culturally unidentifiable human remains and their associated funerary objects. The majority of these inventories have been completed. Although NAGPRA also assigns the task of compiling an inventory of unidentifiable human remains to the Review Committee, it is not clear that having the Review Committee actually compile this information again will provide any benefit over what has already been done.

Finally, the interpretation of 8(c)(5) is already contested. NAGPRA charges the committee with "recommending specific actions for developing a process for disposition." Despite this oblique wording, the Review Committee and Department of the Interior appear to believe that this paragraph provides the authority for the Department of the Interior to draft regulations that would bring about the disposition of the culturally unidentifiable remains while SAA and many museums believe that it authorizes them only to make recommendations about such a process.

SAA Recommendation: Review Committee

SAA believes that the Review Committee has before it a tremendous amount of important work that it is well positioned to accomplish and that further extending its responsibilities is not advisable. Because of the problems with 8(c)(5), SAA recommends that 1(c) of S. 110 be replaced by

"(c) **Review Committee.**--Section 8(c) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3006(c)(5)) is amended

"(1) by striking (5); and

"(2) by renumbering (6) through (9) as (5) through (8) respectively."

which would eliminate 8(c)(5) from NAGPRA and would leave the review committee to pursue its many other important responsibilities.

S.110 Text & Revised NAGPRA Wording: Enforcement

(c) **Enforcement.**--Section 9 of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3007) is amended by adding at the end the following:

"(e) Enforcement.--

"(1) In general.--Subject to paragraph (2), the amounts collected by the Secretary as penalties under this section shall be used to supplement the amounts made available by appropriations for conducting enforcement activities related to this section.

"(2) Authority of secretary.--In carrying out enforcement activities related to this section, the Secretary may--

"(A) pay any person who furnishes information that leads to the assessment of a civil penalty under this section (other than an officer or employee of the Federal Government or a State or local government (including a tribal government) who furnishes or who renders service in the performance of official duties) the lesser of--

"(i) half of the amount of the civil penalty; or

"(ii) \$1,000; and

"(B) reduce the amount of a civil penalty that would otherwise be assessed under this section if the violator against whom the civil penalty is assessed agrees to pay to the aggrieved parties involved an aggregate amount of restitution not to exceed the amount of the reduction."

SAA Summary and Analysis: Enforcement

(e)(1) The Secretary of the Interior is directed to use NAGPRA penalties to supplement funds appropriated for the enforcement of NAGPRA.

(e)(2)(A) The Secretary of the Interior has the authority to reward individuals (other than those providing such information in an official capacity) for providing information that leads to a civil penalty.

(e)(2)(B) The intent of this sentence appears to be to reduce the amount of a NAGPRA civil penalty that would otherwise be assessed by the amount that the violator agrees to pay to the aggrieved parties. However, the wording is sufficiently obscure that we are not sure that the wording in the bill actually accomplishes this intent. In particular, it seems that it is the reduction that should not exceed the restitution, not the restitution that should not exceed the reduction, as stated.

SAA Recommendation: Enforcement

SAA supports the proposed changes in order to enhance the enforcement of NAGPRA. However SAA recommends rewording (e)(2)(B) as follows:

“(B) reduce the amount of a civil penalty that would otherwise be assessed under this section by an amount not to exceed the aggregate amount of the restitution if the violator against whom the civil penalty is assessed agrees to pay restitution to the aggrieved parties involved.”.