

## Society for American Archaeology

Statement on S.1980

Native American Grave Protection and Repatriation Act

For the Senate Select Committee on Indian Affairs

May 14, 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 express our support for the general thrust of the draft substitute for S.1980 and to raise a few of our concerns about the bill.

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.

Let me emphasize that we are not here to defend the status quo. Native American concerns must be incorporated into archaeological research strategies and museum collections policies; Native American audiences merit much more attention in museum exhibitions and in scientific reports on archaeological research. Let me also report that significant progress has been made. In the absence of legal requirements for repatriation, good faith negotiations among Native Americans, archaeologists, and museum professionals have often resulted in decisions to repatriate human remains and objects.

With some revision, the draft substitute for S.1980 could be 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 the Committee and to Committee staff for moving so far towards a positive and workable bill.

### What this Legislation Would Accomplish

#### Repatriation

Anthropologists are painfully aware of the fact that repatriation may result in a loss of information about the past. However, where a modern group has a relatively 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.

S.1980 deals effectively with these cases. It requires a finding of cultural affiliation within the context of case by case consideration of

repatriation requests by specific Native American groups. Through its definitions, particularly those of "cultural affiliation" and "Indian tribe," the bill defines an appropriate scope for the bill and properly accepts the responsibility to ensure that human remains or objects that are returned are turned over to the proper group. Finally, the disposition (be it reburial, placement in a tribal museum, or reintroduction into sacred use) of any repatriated remains or objects is determined by the group.

#### Inventory, Identification, and Notification

We strongly support the inventory and identification of museum collections and the notification of affiliated groups that is mandated by S.1980. 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.

We hope that the Committee recognizes the immensity of the task that is required by this legislation and that the Congress is prepared to support it. 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 draft's lengthening of the time available to complete it and the provision for extensions where good-faith efforts are being made.

#### Protection of Native American Sites

Section 4 of S.1980, dealing with ownership of human remains and artifacts has the potential to become an invaluable means of halting the ongoing looting of Native American graves that we all abhor. 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.

There is strong Federal legislation (the Archaeological Resources Protection Act of 1979, as amended) prohibiting looting on Federal and Indian lands; many states have legislation that protects Native American sites of on State lands; and some have prohibited unauthorized excavations of Native American cemeteries on private lands.

Nonetheless, the antiquities market continues to stimulate widespread looting, particularly on private lands. The provisions of this bill should be clarified 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 go, all Native American cemeteries should be protected.

Through the ownership and sale provisions of S.1980 we see the opportunity to attack the market for funerary objects, sacred objects, objects of cultural patrimony and human remains by calling into question the ownership of such items. We strongly support clarification and extension of these provisions. Because it would be so much easier to enforce, elimination of the market for these items by prohibiting their sale and purchase would do far more to protect Native American human remains than all of the other all provisions of this bill and all of the other

antiquities legislation.

#### SAA Concerns About S.1980

In an attachment to this testimony we have outlined a number of specific concerns and suggestions concerning S.1980. I will briefly discuss our major substantive concerns.

#### Remains for which Cultural Affiliation Cannot be Determined

As reflected by other sections of S.1980, 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 improved (DNA-based) methods for determining cultural affiliation are under development, it will soon 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.

However, it should be recognized that even with improved methods of determining affiliation, some human remains will not be identifiable with any modern group, because many groups have become extinct. 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 strongly suggest that references to unaffiliated remains be deleted.

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

Section 4(c)(2) prohibits the disturbance of Native American human remains and objects without the consent of the heirs of the deceased or of the culturally affiliated group. While we are sympathetic with the intent, it is unworkable as it stands.

To the extent that it can be modified to prohibit unauthorized excavation of Native American sites, we are strongly supportive. However, the bill must accommodate the forces of "development," in the forms of road construction, housing developments, and so forth. Nearly all Native American graves now excavated by archaeologists are removed because of imminent destruction. As written, this section would stall construction projects nationwide, with what we can only imagine would be unpleasant political consequences for all of us.

It must also be recognized that 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. This subsection also fails to specify how consent might be obtained where no cultural affiliation can be determined. It needs to be changed to account for the diverse situations

to which it applies. When disturbance is unavoidable, it must in some way allow for development; it should provide for the situations in which cultural affiliation is not evident prior to disturbance; and at as soon as culturally affiliation (if any) can be reasonably determined, the concerns of Native Americans about the treatment and disposition of the remains or objects should be incorporated into the decision-making process.

#### Exclusion of Native American Human Remains and Other Objects from the Definition of "Archaeological Resource"

Notwithstanding any other law, subsection 4(c)(1) removes Native American human remains, funerary objects, sacred objects, and items of cultural patrimony from the definition of "archaeological resource" except for provisions imposing penalties on unauthorized disturbance. While this sounds innocent enough, 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 against Federally authorized excavation, removal, damage, or destruction.

#### Definition of Sacred Objects

While the definition of "Native American sacred object" has been substantially improved over the original version of S.1980, we feel that the definition is still overly broad. To us, this definition embodies an indeterminacy which would hinder the identification of sacred objects.

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.

#### Definition of Legal Title

What is meant by "legal title" has great importance both for the subsection dealing with the sale of artifacts and for the section concerning repatriation. 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. It may be noted that more stringent standards of legal title, which we would support, will both increase the effectiveness of the subsection prohibiting the sale of artifacts and will make it easier for Native American groups to have items repatriated.

#### Conclusion

The Society for American Archaeology sees many strengths in this legislation. We generally support the inventory and repatriation provisions and urge the clarification and strengthening of the sections that will impair the looting of Native American sites and make more difficult the sale of Native American human remains and Native American objects.

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