

Committee on Resources

Testimony

U.S. House of Representatives
Committee on Resources
Hearing on H.R. 2893
A Bill to Amend the Native American Graves Protection and Repatriation Act
June 10, 1998

Testimony of Society for American Archaeology and Society for Historical Archaeology
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Mr. Chairman, the Society for American Archaeology (SAA) and the Society for Historical Archaeology (SHA) are grateful for the opportunity to comment on H.R. 2893, amendments to the Native American Graves Protection and Repatriation Act (NAGPRA) introduced by Representative Hastings.

SAA and SHA are scholarly organizations strongly committed to the scientific study, interpretation, and preservation of this country's archaeological past. Currently SAA has more than 6000 members and constitutes the largest professional society of archaeologists in the United States; SHA has some 2000 members and is the principal organization for archaeologists who deal with historical periods. Our position on this bill is also supported by the Archaeology Division of the American Anthropological Association.

Let me state at the outset that we support the rights of Native Americans to reclaim human remains and funerary objects in cases where the preponderance of evidence indicates that a cultural affiliation exists with the items in question. We were actively involved when NAGPRA was moving through Congress, we presented testimony, and we lobbied hard for the bill's passage once it reached its final form. We still support NAGPRA and believe that it has done a great deal of good. But no bill is perfect. In 1990, when SAA delivered testimony on NAGPRA to the House Committee on Interior and Insular Affairs, we expressed reservations about certain aspects of the bill, believing that they would lead to problems. In retrospect, we see that these reservations were well founded. That is why we now support H.R. 2893, which addresses some of these problems while at the same time preserving the spirit of compromise embodied in the original law.

As we understand it, H.R. 2893 has three objectives. Let me now discuss these objectives in turn, and explain briefly why we support them.

First and foremost, H.R. 2893 makes explicit and enhances the opportunities for scientific study prior to repatriation. It requires that newly excavated cultural items (human remains, funerary objects, sacred objects, and objects of cultural patrimony) on Federal lands be recorded according to generally accepted scientific standards and that federal agencies retain control over those items for 90 days after the publication of a notice of their discovery in the Federal Register. In addition, it explicitly allows studies of culturally unaffiliated remains and items in order to determine cultural affiliation or to obtain information of scientific, historical, or cultural value. Studies of culturally affiliated remains and items would be permitted only if they could be "reasonably expected to provide significant new information concerning the prehistory or history of the United States," and *only* so long as they did not delay repatriation of items claimed by a

culturally affiliated tribe or Native Hawaiian organization for more than 180 days.

The reason we support these provisions is simple: The archaeological record is a priceless part of our national heritage and it is important that knowledge about the past be brought to light for the benefit of all Americans. NAGPRA is vague on the subject of scientific recording and study. This vagueness leads to tremendous variation in the way the law is interpreted. The resulting confusion often prevents legitimate and important studies from being carried out, and fosters determinations of cultural affiliation that are not adequately based on the evidence required by NAGPRA. The relevant provisions of H.R. 2893 make explicit the need to record basic information when ancient human remains or funerary objects are found, make explicit the appropriateness of conducting studies for determining cultural affiliation, and establish criteria for conducting limited additional studies where cultural affiliation is known. All in all, we believe that the new provisions strike a reasonable balance between the general public interest in a scientific understanding of America's past, and the spiritual concerns of affiliated Native American groups.

The second objective of H.R. 2893 is to eliminate NAGPRA's section 3(a)(2)(C), which awards ownership or control of human remains and funerary objects to tribes that have no demonstrable cultural affiliation, if such remains happen to be found on Federal property that falls within a tribe's "aboriginal land" as adjudicated by the Indian Claims Commission.

We support this change because of our belief that, in the absence of demonstrable lineal descent, cultural affiliation is what gives repatriation claims their legitimacy. The problem with the existing language is that the adjudicated aboriginal lands are mostly based on recent, historic-period territories, and take no account of change through time. Native people have lived on this continent for thousands of years, and they frequently moved. Thus, there is no necessary cultural connection between a modern tribe and ancient remains that happen to be found within its recent territory. And without that connection, repatriation claims, no matter how sincere, have no strong foundation.

Under H.R. 2893, remains and objects now covered by NAGPRA's Section 3(a)(2)(C) would fall into the "unclaimed" category whose disposition will eventually be determined by the Secretary of the Interior. (These regulations have not yet been written, as the Secretary is still awaiting the recommendations of the NAGPRA Review Committee.) The proposed amendment would give the Secretary more freedom to promulgate regulations that apply consistently to *all* Federal lands, and that take cultural connections better into account.

In this context, it is also important to remember that our knowledge of the past is not static, but keeps improving with time. For example, based on recent breakthroughs in DNA analysis as well as accumulating evidence from archaeological research and oral histories, many remains that are now unidentifiable may well be identified in the future. Thus, premature repatriation of culturally unidentified remains or objects runs the strong risk of error, and has some very real disadvantages. Not only does it prevent the group that may be truly affiliated from ever receiving the items, but also it may deprive all other groups, both Native and non-Native, of the opportunity to gain knowledge from these items about the past.

The third objective of H.R. 2893 is a minor change to the wording of NAGPRA's section 3(d) that simply clarifies the disposition of inadvertently discovered cultural items on Federal land. In effect, this change makes unambiguous the fact that the disposition of "inadvertent discoveries" should be governed by NAGPRA's provisions for intentional excavations. We believe this change is uncontroversial and entirely consistent with NAGPRA's original intent.

Finally, we also wish to enumerate some things that H.R. 2893 quite appropriately does *not* do:

- * The amendment does not affect the legal definition of "Native American." We fully agree with the Department of the Interior that anyone who lived here prior to the historically documented arrival of Europeans is a Native American under NAGPRA.
- * The amendment does not change the definition of "cultural affiliation."
- * The amendment does not prevent *any* repatriation to a culturally affiliated tribe that would take place under current law. At most, it could only delay such repatriation by 180 days. And even so, in practice we believe that such delays would happen infrequently.
- * The amendment does not allow studies of remains with identifiable lineal descendants. Such remains are clearly excluded from the scientific-study provisions of this bill.
- * The amendment does not challenge tribal sovereignty, in the sense that its study provisions do not apply to archaeological remains and objects found on tribal lands.
- * The amendment does not require scientific studies or make such studies automatic. Indeed, the bill contains one savings provision that allows museums to deny studies that violate their policies or prior agreements with tribes, and a second savings provision that allows the Secretary of Interior to deny studies whose benefits are outweighed by other considerations.

And last, but not least, the amendment *does* require that the results of scientific studies be shared with the affiliated Native American groups.

In sum, enactment of H.R. 2893 would result in a substantial improvement over the current situation, while at the same time preserving a reasonable compromise between scientific and Native American concerns. For all these reasons, we strongly support H.R. 2893.

Again, thank you for the opportunity to present our views.

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