

SENATE COMMITTEE ON INDIAN AFFAIRS
Oversight Hearing on the Native American Graves Protection and Repatriation Act
Thursday July 28, 2005, 9:30a.m., 485 Russell Senate Bldg.

Statement of the Society for American Archaeology

Presented by
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Mr. Chairman, the Society for American Archaeology (SAA) thanks the Committee for this opportunity to comment on the proposed amendment to the Native American Graves Protection and Repatriation Act that would modify the definition of "Native American." With more than 6800 members, SAA is the leading organization of professional archaeologists in the United States. Starting in 1989, SAA led the scientific community in working with congressional staff on the language of the Native American Graves Protection and Repatriation Act (NAGPRA). We provided testimony at Senate and House Committee hearings and helped form a coalition of scientific organizations and Native American groups that strongly supported NAGPRA's enactment. Since that time, we have closely monitored its implementation and have consistently provided comment to the Department of the Interior, to the NAGPRA Review Committee, and to this Committee. We urge our members always to work toward the effective and timely implementation of the Act.

Fifteen years ago, I appeared before this committee to present SAA's testimony on S.1980, the bill that became NAGPRA. I think the Committee should be proud of what NAGPRA has accomplished. While we more often hear about the difficult and confrontational cases, repatriations of human remains and other cultural items from both museum collections and new excavations occur routinely. Most of these repatriations result from mutual agreements between tribes and museums and Federal agencies. Consultations mandated by NAGPRA have led to the development of improved understandings between tribal people, museum personnel, and scientists, and many cooperative ventures not required under the law have been successfully pursued.

As an amendment to NAGPRA is contemplated, it is important to remember that the law was explicitly recognized to be a compromise among Native Americans, museums, and scientists. Senator McCain's remarks on the day of Senate passage of NAGPRA make this clear:

The passage of this legislation marks the end of a long process for many Indian tribes and museums. The subject of repatriation is charged with high emotions in both the Native American community and the museum community. I believe this bill represents a true compromise.... In the end, each party had to give a little in order to strike a true balance and to resolve these very difficult and emotional issues. (Congressional Record, Oct 26, 1990, p. S17173)

SAA agrees that the law strikes an appropriate balance between the public interest in the advancement of science and the concerns of Native Americans. We also believe it is absolutely essential that this balance of interests be maintained.

In its "Policy on the Treatment of Human Remains" (originally adopted in 1984) SAA explicitly recognizes the legitimacy of both traditional and scientific interests in human remains and cultural items. Mortuary evidence obtained by study of human remains and funerary objects provides unique information about demography, diet, disease, and relationships among human groups. Funerary objects respectfully displayed in museums (including tribal museums and the National Museum of the American Indian) often provide the most dramatic and informative evidence of the high artistic achievements of past cultures that have long been appreciated by museum visitors. As we saw with the opening of the National Museum of the American Indian and the recent "Hero, Hawk, and Open Hand" exhibition at the Art Institute of Chicago and the St. Louis Museum of Art, this public includes many Native Americans.

SAA understands that, through NAGPRA, Congress intended to enable repatriation of human remains and other cultural items to contemporary Indian tribes and Native Hawaiian organizations that have a reasonably close relationship to the remains or objects, and that in most cases "cultural affiliation" would be the guiding principle defining that relationship. We believe that any amendment should uphold this principle,

which serves as the keystone for NAGPRA's balance of interests among the Native American, museum, and scientific communities and the publics they serve.

The Proposed Amendment

The proposed amendment to NAGPRA (now embedded in Section 108 of S.536) would modify NAGPRA's definition of "Native American" in response to the court rulings in the Kennewick case (*Bonnichsen v. United States*). The 9th Circuit Court held that "the statute unambiguously requires that human remains bear some relationship to a *presently existing* tribe, people, or culture to be considered 'Native American'" (Opinion, February 4, 2004, p. 1596).

In an *amicus* filing with the district court in this case, SAA argued that the interpretation of "Native American" used by the Department of the Interior — the so-called 1492 rule — reasonably carried out Congress's intent:

As defined in NAGPRA, "Native American" refers to human remains and cultural items relating to tribes, peoples, or cultures that resided in the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in the area, and irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian tribes.

SAA further argued (and continues to maintain) that requiring demonstration of a relationship to present-day Native peoples in order to categorize remains or items as Native American is contrary to the plain language of the statute, is inconsistent with a common-sense understanding of the term, and would lead to the absurd result of excluding from the law historically documented Indian tribes that have no present-day descendants.

However, in that same filing, SAA argued that Kennewick man should *not* be repatriated to the claimant tribes because this individual did not meet the statutory standard of cultural affiliation. On this point, Judge Jelderks agreed, stating in his Opinion and Order (August 30, 2002, p. 57):

The Secretary's decision does not meet this standard [cultural affiliation]. The present record does not provide a sufficient basis from which the Secretary could identify the "earlier group," or show that the Kennewick Man was likely part of that group, and establish by a preponderance of the evidence a relationship of shared group identity between the present-day Tribal Claimants and that earlier group. The Secretary has not articulated an adequate rationale for such conclusions. Consequently, even if the Secretary's conclusion that the remains are "Native American" had been correct, the decision to award these remains to the Tribal Claimants could not stand.

The proposed amendment would have the effect of reversing the court's decision on the definition of "Native American," thereby restoring the *status quo ante*. It would not, however, affect the court's findings on the matter of cultural affiliation. The intended effect of the amendment is to make NAGPRA's language consistent with what Congress, SAA, and — to our knowledge — all other involved parties understood "Native American" to mean back in 1990.

Analysis of the Consequences of the Amendment

The Chairman's characterization of the S.536 as a "technical" amendment (*Congressional Record*, March 7, 2005, p. S2148) implies that it was not intended to dramatically alter the implementation of the Act as it is now interpreted. Statements from the committee staff have confirmed that the intended consequences of the proposed amendment are minor. Indeed, the following analysis indicates that the predictable effects of the amendment would be minor.

For NAGPRA to apply to remains or objects, *in all cases*, those remains or objects must satisfy the definition of "Native American." That is, however, only the first step in the repatriation process. In most cases, repatriation will be mandated under NAGPRA only if there is also a finding of cultural affiliation with

a present-day Indian tribe or Native Hawaiian organization (the exceptions are discussed below). In NAGPRA:

A “cultural affiliation” means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group. (Section 2(2))

Human remains or objects that are culturally affiliated comprise only a subset of the remains or objects that would meet the definition of “Native American,” under either the Kennewick courts’ interpretation or the proposed amendment. Because “cultural affiliation” is the more restrictive standard, *to the extent that repatriation is contingent on a showing of cultural affiliation*, the proposed definitional change should have absolutely no effect on the remains and objects that could be repatriated.

Thus, to see the logical effects of this amendment, we need to look to the circumstances within NAGPRA in which repatriation can occur *in the absence of a finding of cultural affiliation*.

- First, throughout the Act, a finding of cultural affiliation is not required where repatriation of human remains and associated funerary objects is to a lineal descendant. We take this to be unproblematic. *Any* return of human remains or associated funerary objects to lineal descendants is a reasonable disposition.
- Second, in Section 3(a)(2)(A), a finding of cultural affiliation is not required for human remains or other cultural items found on Indian land since November 16, 1990. A claim made by the Indian tribe on whose land the remains or objects were discovered has priority over that of a culturally affiliated tribe. Even if the remains or objects were not subject to NAGPRA (i.e., if the definition were not changed), the tribe would likely still have control over the remains or objects under other laws, so this exception is again unproblematic.
- Third, in Section 3(a)(2)(C), a finding of cultural affiliation is not required for remains or other cultural items that lack cultural affiliation but that were discovered since November 16, 1990 “on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe.” If there is no claim with a higher priority, the tribe aboriginally occupying the land (or a more closely related tribe) can claim such remains or items. Here the proposed amendment would extend the possibility of repatriation to those human remains or objects that are found on legally recognized aboriginal lands and that would not meet the judicial interpretation of “Native American” but would satisfy the definition as amended, i.e. remains that would be Native American under the amendment but for which no relationship to a present-day tribe people or culture can be shown. As NAGPRA’s language was being negotiated in 1990, SAA argued that these remains and items should be required to meet the standard of cultural affiliation in order for repatriation to be mandated. However, SAA accepted the language that appears in the statute as a part of a compromise on the language of the Act and we are prepared to stand by that compromise. Thus, we do not object to the amendment on these grounds.

Summary

Consistent with SAA’s long-standing position on the meaning of “Native American,” SAA supports the proposed amendment. Our analysis of its predictable effects suggests that the amendment would serve to maintain NAGPRA’s balance of interests, in combination with responsible and balanced regulations that are consistent with the letter and the spirit of the law.

SAA is grateful for this opportunity to provide the Committee with our perspective. We also greatly appreciate the careful and balanced approach that the committee is taking toward NAGPRA.