



SOCIETY FOR AMERICAN ARCHAEOLOGY

## Questions and Answers Regarding HR 2893 Testimony

*Prepared by the Committee on Repatriation  
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Because NAGPRA is a very complex and sometime vague piece of legislation it is not always straightforward to understand. This makes it particularly difficult to evaluate the effects of the proposed amendment, H.R. 2893. To assist with this, the SAA Committee on Repatriation has prepared the following questions and answers about H.R. 2893. We hope that they will serve to clarify the effects of the bill, and to stimulate discussion on the principles involved.

*Q: While it may not be perfect, NAGPRA appears to be working. Why has SAA reopened this issue?*

A: SAA did not initiate this legislation. It came from Representative Doc Hastings of Washington in whose district the Kennewick skeleton was found. As we understand it, his purpose in introducing this legislation was to remedy what he sees as a general problem with NAGPRA that was exemplified by the inability of scientists to study the ancient Kennewick remains that have great scientific importance. SAA has analyzed the amendment and supports it because it would enhance the opportunities for scientific studies and bring NAGPRA closer to SAA's policy without undoing the important and positive effects of NAGPRA.

*Q: What is SAA's policy?*

A: The [full text](#) is on the SAA web site, but it basically recognizes the legitimacy of both scientific and Native American interests in the material remains of the past, and calls for a case by case balance of scientific and traditional values, where scientific value is associated with the ability to contribute systematic knowledge and traditional value is indicated by strength of cultural or biological relationship.

*Q: Does H.R. 2893 destroy NAGPRA, as has been charged?*

A: No, but it does shift the terms of the compromise somewhat; that, of course, is its intent. SAA helped win the passage of NAGPRA, believes that it has accomplished important objectives, and continues to support it. SAA would fight the elimination of NAGPRA or any bill that fundamentally destroys the compromise of public and traditional interests that NAGPRA establishes. The Hastings bill does not in any way diminish the ability of any tribe to obtain repatriation of affiliated human remains or other cultural items.

*Q: But isn't scientific recording and study, which are facilitated by the bill, contrary to the intent or spirit of NAGPRA?*

A: Not at all. While NAGPRA was intended to remedy legitimate grievances of Native Americans, it was always viewed as a compromise that recognized both Native American interests and those of the public, as represented by the scientific, museum, and educational communities. The legislative history is crystal clear on that point. NAGPRA does not forbid or discourage study. It does say that the NAGPRA should not be construed as an authorization for new studies. That phrase was added, at least in part, to make clear that NAGPRA would not result in large costs to the federal government for additional studies. At the time it was widely believed that an Office of Management and Budget (OMB) assessment that the legislation would entail any substantial expense to the Federal government would have killed the bill, regardless of its merits.

*Q: Why is any change in NAGPRA desirable?*

A: There are several answers here. We'll get into some of the issues in subsequent questions, but one reason is to simply clarify some aspects of the law. The implementation of the law, particularly section 3 dealing with ongoing excavations on federal lands, has been inconsistently implemented by Federal agencies. By clarifying the intent of Congress, the bill can lead to a more consistent implementation and help keep procedural issues out of the courts.

Another reason is to make the scientific community more of a partner in the implementation of the NAGPRA. Now, most aspects of NAGPRA are implemented by museums and federal agencies in which scientific interests are often not well represented.

*Q: The recording and study provisions that apply to ongoing excavations on Federal land the addition of subsection f to section 3 refer only to "cultural items." Does that mean human remains are not included?*

A: No. NAGPRA's definition of cultural items includes human remains, funerary objects, sacred objects, and objects of cultural patrimony.

*Q: For ongoing excavations on Federal land, H.R. 2893 requires reasonable recording "according to generally accepted scientific standards." What does that mean?*

A: That should be clarified by the regulations, but would probably mean measured drawings, photographs, and measurements of remains and objects. All or very nearly all of these excavations are also covered by ARPA (the Archeological Resources Protection Act) and ARPA permit requirements stipulate basic recording anyway. Partly for this reason, we believe that this basic recording is already being done most of the time.

*Q: If it's being done anyway, why not just leave it alone?*

A: As the Kennewick case illustrates, it isn't always being done and because of the unevenness of agency implementation of section 3, we think NAGPRA should be clear on this.

*Q: Would this recording requirement apply to existing pre-1990 museum collections?*

A: No, none of the amendment's changes to section 3 of NAGPRA affect the existing museum collections. Section 3 applies only to ongoing excavations on Federal lands.

*Q: For these ongoing excavations, don't the recording and study provisions erode tribal sovereignty in the sense that they deprive tribes of control over remains and items found on their land?*

A: No. The amendment explicitly exempts from the recording and study provisions all human remains and items from ongoing excavations with lineal descendants or that come from tribal land. While this exemption is legally clear-cut, it is stated in a way that makes it easy to miss. The language of the proposed section 3(f) exempts from study items whose ownership or control is established under 3(a)(1) and 3(a)(2)(A) which are, in fact, items with lineal descendants and items found on tribal lands, respectively.

*Q: What is the justification for deleting the paragraph dealing with repatriation from aboriginal lands?*

A: SAA always saw this as a somewhat anomalous paragraph in NAGPRA. While this paragraph has a rather narrow legal application, explaining this gets a bit complicated. As currently worded, NAGPRA's "ownership" provisions of section 3 set up a hierarchy of claimants for remains and items excavated since 1990 from federal and tribal land. First are lineal descendants; second are tribes owning the land on which the items were found, if Indian lands are involved; and third are culturally affiliated tribes. Then, fourth, tribes have custody or ownership of items found on lands that have been adjudicated by the U.S. Court of Claims (in the Indian Land Claims cases) as the aboriginal territory of that tribe. This fourth case explicitly provides for the repatriation of remains and items to tribes that have no affiliation with the remains or objects because if there were an affiliation, the items would be properly claimed under the third provision. These aboriginal territories are generally aboriginal only in the rather unusual sense that they reflect mid 19th century land use. In many cases, the scientific evidence would indicate that there is no recognizable cultural or biological relationship whatever with the group entitled to the remains or objects under this fourth provision. (E.g., much of the Mimbres area is established as the aboriginal Apache territory.)

*Q: So, does that mean that remains and objects from those lands could never be repatriated?*

A: No. Elimination of that paragraph would have the effect of moving those remains and items into the category of "unclaimed" items that are covered by the final level in the ownership hierarchy (by section 3(b)). The Secretary of the Interior is directed to promulgate regulations (with the advice of the Review Committee) for the disposition of unclaimed remains. While that has not yet been done, it seems reasonable that strength of relationship (even if weaker than cultural affiliation) will play into the way in which those determinations are eventually made; that seems to us preferable with respect to SAA policy.

*Q: What are the changes to NAGPRA's section 3d supposed to accomplish?*

A: As we understand it (from discussion surrounding Senator Inouye's bill, S.110), Federal agencies are always not treating inadvertent discoveries of human remains and cultural items in the course of their eventual excavation (that is, following the discovery) as directed by section 3(c) which covers intentional excavations. SAA's (and as far as we know, everyone else's) understanding at the time of NAGPRA's passage was that inadvertent discoveries would be archaeologically recovered under an ARPA permit as intentional excavations governed by section 3(c). This appears to be only a clarification and so far as we know is uncontroversial.

*Q: Does NAGPRA now provide for study at all?*

A: Yes, but only in cases where the item is "indispensable for the completion of a specific scientific study the outcome of which



would be of major benefit to the United States." It has not been established what, exactly, that means.

*Q: Do the suggested revisions to that language solve any problems?*

A: Clearly, they make more studies possible because the standard is not so stringent. Importantly, they permit studies in order to help establish cultural affiliation, which, of course, may lead to repatriation. However, unlike NAGPRA's current language under which study, if permitted, could go on indefinitely, the amendment would impose a 180 day time limit on study if the remains or objects are claimed and would exempt remains or items with lineal descendants and newly excavated remains or items from tribally owned lands.

*Q: The study provisions H.R. 2893 would add to section 7 seem awfully strong. Doesn't this give scientists too free a hand?*

A: Of course, opinions will vary on this point. Section 7 does impose different standards for study depending on the status of the remains or objects. If the remains or items are unaffiliated, they may be studied to help establish affiliation or "to obtain scientific, historical, or cultural information." If the remains are affiliated, the study must meet a higher standard of being "reasonably expected to provide significant new information concerning the prehistory or history of the United States." Further, if the affiliated tribe requests return of the item, all such study may not delay repatriation by more than 180 days after the item is made available for study.

*Q: Won't it be awfully expensive for museums and agencies to undertake all these studies?*

A: No, this provision simply says that if certain conditions are met, the items may be studied which means that scientists must be provided with reasonable access to the items for purposes of the study. The burden is completely on the scientists to work within the available time frames, and to come up with any necessary funding. As a consequence, we believe that this right to study will be invoked only rarely and where the scientific value is high.

*Q: Does that mean all remains and items covered by NAGPRA would nonetheless be subject to this sort of study, if requested?*

A: No. First, the studies must meet the appropriate standard. Also there are exceptions where museums and federal agencies may deny studies.

*Q: What grounds would a museum have for denying a study?*

A: It can decide that the study does not meet the appropriate standard. Probably more importantly, it can deny a study if that study would violate its policies or prior agreements.

*Q: What sort of study might violate a museum's policies?*

A: A museum might have a policy that says that all requests for study of its collections must be approved by a curatorial council which weighs the benefits and liabilities of any study. For example, such a council might decide that because of the possibility of damage, a proposed study of a fragile textile is not warranted by the expected benefit. That would be sufficient grounds for denying a study.

*Q: What if a museum has already determined the cultural affiliation of a collection of items and consultation with the affiliated tribe has led to an agreement that the museum can continue to hold the collection so long as the tribe has the ability to deny or approve any study of it? Does the amendment require the museum to permit study regardless of the tribe's reaction?*

A: No. This is where the prior agreements come in. In this case, a museum would deny access for study if the tribe objects, because such a study would violate its prior agreements. By the way, SAA considers this a very important exception both because it is important not to undermine the working relationships between tribes and museums and because such cooperative arrangements can benefit both tribes and the scientific community and should not be discouraged.

*Q: This seems to provide museums quite a lot of latitude in approving or denying study of their collections?*

A: It does.

*Q: What about federal agencies? On what grounds can they deny access for studies?*

A: Federal agencies must provide clear and convincing evidence to the Secretary of the Interior that the potential scientific benefit of the study is outweighed by curatorial, cultural, or other reasonable circumstances. (This avenue of appeal is also available to museums.)

*Q: What are curatorial concerns?*

A: These would be considerations, like those pertaining to the textile in the museum example presented above, where potential scientific or curatorial liabilities of the study clearly outweigh the expected benefits.

*Q: Would a federal agency or museum be required to permit studies of remains or objects very closely related to a modern group?*

A: If there are lineal descendants, the remains or objects would automatically be excluded. In other cases of very close relationship we would expect that the Secretary would find that cultural considerations clearly outweigh the scientific benefits so the study would be denied. Also museums might well have policies that would forbid such studies.

*Q: Why shouldn't Federal agencies be given the same latitude as museums to deny access for study?*

A: One reason that might be given is that museums and federal agencies have structurally quite different relationships to the remains and objects covered by NAGPRA. Generally, a central part of the mission of a museum is the preservation and interpretation of the archaeological record; thus museum decision-makers generally have policies that pertain to these issues and the remains and objects in question, as well as an interest in developing and maintaining relationships with tribes or Native Hawaiian organizations. Federal agency decision-makers under NAGPRA, on the other hand, are often land managers whose responsibilities reflect economic or development considerations.

*Q: If properly justified, would the amendment allow studies to go on indefinitely?*

A: For remains or objects that have been appropriately claimed by a culturally affiliated tribe, study cannot delay repatriation for more than 180 days after access is provided for the study. If the items are unaffiliated or have not been claimed there is no time limit on study, but as soon as the culturally affiliated tribe claims the remains, they would be subject to the 180 day limit. If cultural affiliation is established as a consequence of study, the amendment requires notification of the affiliated tribe within 90 days, and again, once a claim is made repatriation could not be delayed for more than 180 days after access for study was provided.

*Q: Couldn't one study after another be used to circumvent the 180 day limit?*

A: No. The language says that "Study of a cultural item under this paragraph shall not be permitted to delay return of the item for more than 180 days after the item is made available for study..." Since it says "Study" rather than "A study", the limit would apply to all study.

*Q: Are destructive studies permitted by the amendment?*

A: The amendment is silent on this issue. However, the exceptions for studies based on museum policies, prior agreements, curatorial, and cultural concerns would certainly prohibit many destructive studies, if they are permitted at all.

*Q: Wouldn't supplying the results of the scientific studies to culturally affiliated tribe put an extra burden on the museum or agency, and ultimately, on the scientists performing the study?*

A: Yes. The responsibility of the scientific community to make the results of their work known to the public, and especially the interested Native American public, is firmly embedded in the SAA Principles of Archaeological Ethics.

*Q: What are the objections to this amendment and how would you answer them?*

A: One objection is that the removal of the aboriginal lands provision in section 3 will delay repatriations that could occur under present law. This is true, but we would prefer to see the Review Committee and the Secretary develop a repatriation procedure that is more sensitive to cultural relationships.

A second objection is that any additional delay in repatriation is unacceptable, that museums and agencies have had these items long enough. While we are sympathetic to that argument, the additional delay imposed by the amendment is relatively short. Given that we expect relatively few studies to take place under this amendment, that the minimum delay now in NAGPRA is 30 days, and that relatively few repatriations are executed within 180 days in any case, we would hope that the negative impact would be small and the scientific benefit of the amendment would be substantial.

A third objection is that any study is offensive to some native people and should not be permitted. The objection is a serious one and lies at the crux of the tradeoff between the public interests in the past and the desire of many Native Americans to control the remains and cultural items. This amendment seems to us a reasonable compromise between these interests, but it is ultimately a philosophical question and will not seem reasonable to others. We hope that in evaluating this question, it will be kept in mind that repatriation to culturally affiliated tribes is not limited by this amendment and that the delays to repatriation are much



shorter than many scientists would prefer.

*Q: So SAA is firmly behind the Hastings Amendment?*

A: SAA supports the bill as a well crafted compromise that remedies problems with NAGPRA. Nonetheless SAA is actively seeking to identify problems the bill might create and to explore and understand objections to the bill from a wide range of interest groups. If necessary, SAA will seek appropriate changes.

*Q: What happens next? Will there be hearings on H.R. 2893?*

A: The bill was referred to the House Resources Committee. Representative Hastings staff is working to set up a hearing in the spring of 1998.

*Q: What should I do if I support the bill?*

A: Communicate your opinions to Congress. You should say how the amendment would affect your state and should directly ask your Representative to let you know whether he or she has decided to become a co-sponsor.