

PROVIDING FOR THE PROTECTION OF NATIVE AMERICAN
GRAVES, AND FOR OTHER PURPOSES

OCTOBER 15, 1990.—Committed to the Committee of the Whole House on the State of
the Union and ordered to be printed

Mr. UDALL, from the Committee on Interior and Insular Affairs,
submitted the following

REPORT

[To accompany H.R. 5237]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 5237) to provide for the protection of Native American graves, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Page 1, line 3, strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Native American Grave Protection and Repatriation Act".

SEC. 2. DEFINITIONS.

For purposes of this Act, the term—

(1) "burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) "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.

(3) "cultural items" means human remains and—

(A) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) "unassociated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects

can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

(C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) "Federal agency" means any department, agency, or instrumentality of the United States and shall include, except as may be inconsistent with the provisions of P.L. 101-185, the Smithsonian Institution.

(5) "Federal lands" means any land other than tribal lands which are controlled or owned by the United States.

(6) "Hui Malama I Na Kupuna O Hawai'i Nei" means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) "Indian tribe" shall have the meaning given such term in section 4 of the Indian Self Determination and Education Assistance Act (25 U.S.C. 450b).

(8) "museum" means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items, but does not include any Federal agency.

(9) "Native American" means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) "Native Hawaiian organization" means any organization which—

(A) serves and represents the interests of Native Hawaiians,

(B) has a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and

shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(12) "Office of Hawaiian Affairs" means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American funerary object, sacred object, or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object. The original acquisition of Native American human remains which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains. Nothing in this paragraph shall affect the application of relevant State law to the right of ownership of unassociated funerary objects, sacred objects, or objects of cultural patrimony.

(14) "Secretary" means the Secretary of the Interior.

(15) "tribal land" means—

(A) all lands within the exterior boundaries of any Indian reservation;

(B) all dependent Indian communities;

(C) lands conveyed to, or subject to an interim conveyance of, Native Corporations pursuant to the Alaska Native Claims Settlement Act; and

(D) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

SEC. 3. OWNERSHIP.

(a) NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.—The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act shall be (with priority given in the order listed)—

- (1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or
- (2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—
- (A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
- (B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
- (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgement of the Indian Claims Commission as the aboriginal land of some Indian tribe—
- (1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or
- (2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.
- (b) UNCLAIMED NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.—Native American cultural items not claimed under subsection (a) shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 8, Native American groups, representatives of museums and the scientific community.
- (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.
- (d) INADVERTENT DISCOVERY OF NATIVE AMERICAN REMAINS AND OBJECTS.—(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 Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable. If the discovery occurred in connection with an activity, including (but not limited to) construction, 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. The activity may resume after a reasonable amount of time and following notification under this subsection.
- (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.
- (3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.
- (e) RELINQUISHMENT.—Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

SEC. 4. ILLEGAL TRAFFICKING.

(a) ILLEGAL TRAFFICKING.—Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"SEC. 1170. ILLEGAL TRAFFICKING IN NATIVE AMERICAN HUMAN REMAINS AND CULTURAL ITEMS

"(a) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.

"(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both."

(b) TABLE OF CONTENTS.—The table of contents for chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"1170. Illegal Trafficking in Native American Human Remains and Cultural Items."

SECTION. 5. INVENTORY FOR HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS.

(a) IN GENERAL.—Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or federal agency, identify the geographical and cultural affiliation of such item.

(b) REQUIREMENTS.—(1) The inventories and identifications required under subsection (a) shall be—

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after the date of enactment of this Act, and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8.

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term "documentation" means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

(c) EXTENSION OF TIME FOR INVENTORY.—Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B). The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(d) NOTIFICATION.—(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.

(2) The notice required by paragraph (1) shall include information—

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

(e) INVENTORY.—For the purposes of this section, the term "inventory" means a simple itemized list that summarizes the information called for by this section.

SEC. 6. SUMMARY FOR UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY.

(a) IN GENERAL.—Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

(b) REQUIREMENTS.—(1) The summary required under subsection (a) shall be—

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

(C) completed by not later than the date that is 3 years after the date of enactment of this Act.

(2) Upon request, Indian tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

SEC. 7. REPATRIATION.

(a) REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS POSSESSED OR CONTROLLED BY FEDERAL AGENCIES AND MUSEUMS.—(1) If, pursuant to section 5, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5 or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e), sacred objects and objects of cultural patrimony shall be expeditiously returned where—

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this Act.

(b) SCIENTIFIC STUDY.—If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

(c) STANDARD OF REPATRIATION.—If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such

agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) SHARING OF INFORMATION BY FEDERAL AGENCIES AND MUSEUMS.—Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) COMPETING CLAIMS.—Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.

(f) MUSEUM OBLIGATION.—Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

SEC. 8 REVIEW COMMITTEE.

(a) ESTABLISHMENT.—Within 120 days after the date of enactment of this Act, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7.

(b) MEMBERSHIP.—(1) The Committee established under subsection (a) shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) shall serve without pay but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(c) RESPONSIBILITIES.—The committee established under subsection (a) shall be responsible for—

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) reviewing upon the request of any affected party and finding relating to—

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains 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 remains;

(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this Act;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

(d) RECOMMENDATIONS AND REPORT.—The committee shall make the recommendations under paragraph (c)(5) in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

(e) ACCESS.—The Secretary shall ensure that the committee established under subsection (a) and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

(f) DUTIES OF SECRETARY.—The Secretary shall—

- (1) establish such rules and regulations for the committee as may be necessary, and
- (2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

(g) ANNUAL REPORT.—The committee established under subsection (a) shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(h) TERMINATION.—The committee established under subsection (a) shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

SEC. 9. PENALTY.

(a) PENALTY.—(1) Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the secretary of Interior pursuant to procedures established by the Secretary through regulation. No penalty may be assessed under this subsection unless such museum is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense.

(2) The amount of such penalty shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors—

- (A) the archeological, historical or commercial value of the item involved;
- (B) the damages suffered, both economic and non-economic, by an aggrieved party;
- (C) the number of violations that have occurred.

(3) Any museum aggrieved by an order assessing a civil penalty under this subsection may file a petition of judicial review of such order with the United States District Court for the District of Columbia or for any other district in which the museum is located. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued. The court shall hear such action on the administrative record and sustain the imposition of the penalty if it is supported by substantial evidence on the record considered as a whole.

(4) If any museum fails to pay an assessment of a civil penalty after a final administrative order has been issued and not appealed or after a final judgement has been rendered, the Attorney General may institute a civil action in a district court of the United States for any district in which such museum is located to collect the penalty and such court shall have jurisdiction to hear and decide such action. In such action, the validity and amount of such penalty shall not be subject to review.

(5) Hearings held during proceedings for the assessment of civil penalties authorized by this subsection shall be conducted in accordance with section 554 of Title 5. Subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books and documents. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States. In the case of contumacy or refusal to obey a subpoena served upon any person pursuant to this paragraph, the district court of the United States for any district in which such person is located, resides or transacts business, upon application by the United States and after notice to such person shall have jurisdiction to issue an order requiring such person to appear and give testimony or produce documents, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

SEC. 10. GRANTS.

(a) INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS.—The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

(b) MUSEUMS.—The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6.

SEC. 11. SAVINGS PROVISIONS.

Nothing in this Act shall be construed to—

- (1) limit the authority of any Federal agency or museum to—

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of control over items covered by this Act;

(2) delay actions on repatriation requests that are pending on the date of enactment of this Act;

(3) deny or otherwise affect access to any court;

(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) limit the application of any State or Federal law pertaining to theft or stolen property.

SEC. 12. SPECIAL RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND INDIAN TRIBES.

This Act reflects the unique relationship between the Federal government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

SEC. 13. REGULATIONS.

The Secretary shall promulgate regulations to carry out this Act within 12 months of enactment.

SEC. 14. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated such sums as may be necessary to carry out this Act.

PURPOSE

The purpose of H.R. 5237 is to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands. The Act also sets up a process by which Federal agencies

and museums receiving federal funds will inventory holdings of such remains and objects and work with appropriate Indian tribes and Native Hawaiian organizations to reach agreement on repatriation or other disposition of these remains and objects.

BRIEF SUMMARY

H.R. 5237, the Native American Grave Protection and Repatriation Act, achieves two main objectives. The first objective deals with Native American human remains, funerary objects, sacred objects and objects of cultural patrimony which are excavated or removed from Federal or tribal lands after the enactment of the Act.

The Act calls for any persons who wish to excavate such items or other archeological items to do so only after receiving a permit pursuant to the Archeological Resources Protection Act (P.L. 96-96). If any of such remains or objects are found on Federal Lands and it is known which tribe is closely related to them, that tribe is given the opportunity to reclaim the remains or objects. If the tribe does not want to take possession of the remains or objects, the Secretary of the Interior will determine the disposition of the remains or objects in consultation with Native American, scientific and museum groups.

The Act also addresses those cases involving the incidental discovery of such items on Federal land by persons engaged in other activities such as mining, construction, logging or other similar endeavors. When one or more of these items are found in this manner, the activity must

temporarily cease and a reasonable effort must be made to protect the item. Written notification must be made to the Federal land manager in charge and notification must also be given to the appropriate tribe or Native Hawaiian organization if known or easily ascertainable.

Penalties are included for selling, or otherwise profiting from, any Native American human remains, funerary objects, sacred objects or objects of cultural patrimony acquired in violation of this Act.

The second main objective addressed in this Act deals with collections of Native American human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony currently held or controlled by Federal agencies and museums.

Within 5 years of enactment, all Federal agencies and all museums which receive federal funds, which have possession of, or control over, any Native American human remains or associated funerary object (items which are found with a specific body), are to compile an inventory of such remains or objects and, with the use of available information they have, attempt to identify them as to geographical and cultural affiliation. Upon completion of the inventory, the appropriate tribe or Native Hawaiian organization is to be contacted. If it is clear which tribe or Native Hawaiian organization is related to the remains or objects and that tribe or organization wishes the return of the items, they are to be returned.

Instead of an object-by-object inventory, a written summary of unassociated funerary objects (those items which are known to be funerary objects but are not connected to a specific body), sacred objects, and objects of cultural patrimony which are controlled by a Federal agency or museum is to be completed. The summary is to describe the collection, the number of objects in it, and roughly how, when, and from where the collection was received. Following the summary, the appropriate Indian tribe or Native Hawaiian organization is to be contacted and the two sides are to meet to discuss the future disposition of the items in question.

This Act allows for the repatriation of culturally affiliated items as well as any other agreement for disposition or caretaking which may be mutually agreed upon by involved parties.

BACKGROUND

Digging and removing the contents of Native American graves for reasons of profit or curiosity has been common practice. These activities were at their peak during the last century and the early part of this century.

In 1868, the Surgeon General issued an order to all Army field officers to send him Indian skeletons. This was done so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the Indian's cranium. This action, along with an attitude that accepted the desecration of countless Native American burial sites, resulted in hundreds of thousands Native American human remains and funerary objects being sold or housed in museums and educational institutions around the country.

For many years, Indian tribes have attempted to have the remains and funerary objects of their ancestors returned to them. This effort has touched off an often heated debate on the rights of the Indian versus the importance to museums of the retention of their collections and the scientific value of the items.

NATIONAL DIALOGUE ON MUSEUM/NATIVE AMERICAN RELATIONS

In 1988, the Senate Select Committee on Indian Affairs held a hearing on legislation which provided a process for the repatriation of Native American human remains. Several witnesses requested that the Committee postpone further action on the bill to allow the museum community and the Native American community to have an opportunity to enter into a dialogue on repatriation issues. The Committee agreed and, during 1989, the Barry M. Goldwater Center of Cross Cultural Communication of the Heard Museum in Phoenix, Arizona sponsored the Panel of National Dialogue on Museum-Native American Relations.

Several museum professionals, college professors (including archaeologists and anthropologists), and Indian representatives (including tribal and religious leaders) met and discussed various issues surrounding repatriation during this year-long dialogue.

The panel issued a report citing its findings and recommendations. The panel was not unanimous on all recommendations, but all members did agree that much was gained in understanding the views of others.

The panel recommended that all resolutions be governed by respect for the human rights of Native Americans and the value of scientific study and education. The majority believed that "Respect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made. . .".

The Panel was split on what to do about human remains which are not culturally identifiable. Some maintained that a system should be developed for repatriation while others believed that the scientific and educational needs should predominate. The report strongly supported dialogue between museums and Indian tribes during all aspects of both the acquisition of sensitive materials, and repatriation requests. The Panel concluded that Federal legislation on this matter was needed.

NATIONAL MUSEUM OF THE AMERICAN INDIAN ACT

On November 28, 1989, the President signed into Public Law 101-185, the National Museum of the American Indian Act. This law established a museum for the American Indian to be built as part of the Smithsonian Institution. Testimony received during consideration of this legislation revealed that the Smithsonian Institution held thousands of Native American human remains and funerary objects. Several tribes and Native Hawaiians having cultural and historical affiliation with these remains stressed their great desire to have the remains of their ancestors returned to them. After long negotiations between interested parties, provisions were included in the legislation which authorized the repatriation of identifiable remains and funerary objects.

H.R. 1381—NATIVE AMERICAN BURIAL SITE PRESERVATION ACT OF 1989

On March 14, 1989, Representative Charles Bennett introduced H.R. 1381, the Native American Burial Site Preservation Act of 1989. This bill would prohibit excavations or removal of any content from any Native American burial site without a State permit. The bill provides penalties for violation with fines of not more than \$10,000 per violation. The bill provided that anything taken in violation of the legislation would become the property of the United States.

H.R. 1646—NATIVE AMERICAN GRAVE AND BURIAL PROTECTION ACT

On March 23, 1989, Representative Morris Udall introduced H.R. 1646, the Native American Grave and Burial Protection Act. This bill would make it illegal to sell, profit, or transport across state lines any Native American skeletal remains without written consent of the lineal descendants or of the governing body of the culturally affiliated tribe. Penalties of fines of not more than \$10,000 per violation would be assessed.

The bill would require all Federal agencies and instrumentalities to list and identify, within 2 years, all Native American skeletal remains and sacred ceremonial objects in their possession or control. Within 3 years, all agencies would notify appropriate tribes of their findings and, within 1 year of notification, the concerned tribe would decide whether or not it wanted the remains or objects returned. If the items were not acquired with the consent of the tribe or legitimate owner and the item is not needed for a scientific study the outcome of which would be of major benefit to the United States, the items are to be returned. Any museum not in compliance would not be eligible for further Federal funding.

H.R. 5237—NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT

After the negotiations by the museum, Indian and scientific communities were completed, Representative Morris Udall introduced H.R. 5237, the Native American Grave Protection and Repatriation Act, on July 10, 1990. As introduced, this bill states that any Native American human remains, funerary objects, sacred objects, and objects of inalienable communal property that are found on Federal or tribal lands after the date of enactment would be considered owned or controlled by (in this order) lineal descendants, the tribe on whose land it was found, the tribe having the closest cultural affiliation with the item, or the tribe which aboriginally occupied the area.

Anyone who discovered any of the items covered by the provisions of the bill accidentally or through activities such as mining, logging, or construction would have to cease the activity, notify the Federal land manager responsible and the appropriate tribe, if known, and make a reasonable effort to protect the items before continuing the activity.

Anyone who profited in violation of the provisions of the bill would be fined in accordance with title 18, United States Code, imprisoned not more than one year, or both, with the penalty increasing to 5 years for a second violation.

All Federal agencies and museums receiving Federal funds which have control over any of the items covered in the bill would, within 5 years, have to inventory and identify the items, notify the affected tribes and make arrangements to return such items if the appropriate tribe made a request. If the Federal agency or museum shows that the item was acquired with the consent of the tribe or if the item was part of a scientific study which was expected to be of major benefit to the country, the request for repatriation could be denied.

As introduced, this bill established a review committee to be composed of 7 members, 4 of whom were to be from nominations made to the Secretary of the Interior from Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders. The committee's responsibilities would be to monitor the inventory and repatriation activities, review any questions as to the identity or return of any items, arbitrate among tribes any disputes relating

to this Act, and compile an inventory of unidentifiable remains and recommend action for disposition of such remains.

Grants were made available to tribes to assist in the repatriation process and to museums to assist in the inventory and identification process.

LEGISLATIVE HEARING

On July 17, 1990, the Committee held a hearing on H.R. 1381, the Native American Burial Site Preservation Act of 1989; H.R. 1646, the Native American Grave and Burial Protection Act; and H.R. 5237, the Native American Grave Protection and Repatriation Act.

Testimony was presented by professional scientific and museum associations, archaeologists, representatives of individual museums, Indian organizations, Tribal religious leaders, Native Hawaiian representatives, and private art dealers.

Much of the Indian testimony revolved around their rights to the remains and objects held by the museums and the information surrounding the acquisition of such items. Some Indian representatives testified that the spirits of their ancestors would not rest until they are returned to their homeland and that these beliefs have been generally ignored by the museums which house the remains and objects. There was testimony that non-Indian remains which are unearthed are treated much different than those of Indians. The non-Indian remains tend to be quickly studied and then reburied while so many Indian remains are sent to museums and curated.

Testimony received from the scientific community stressed the importance of human remains to scientific study and the need to learn for the future from the past. They expressed concern that if remains are reburied now they will be lost to science forever and not reachable when future study techniques are developed. Most testimony indicated the need for strong legislation to protect burial sites from being looted or desecrated in the future.

Testimony from the museum community stressed the responsibilities which museums have to maintain their collections and concern for liability surrounding repatriation. One witness described a situation where a museum returned Wampum Belts to a tribe. After long negotiations, a mutually agreed upon compromise was implemented whereby the tribe received the belts back to continue their ceremonies and the museum maintained access to the belts for legitimate study and educational purposes. Most agreed that museums needed to become more sensitive to the needs and desires of Native Americans whose remains and objects they house.

Witnesses representing private art dealers testified that Native Americans should not be the sole conservators of their cultural items because all Americans have a right to their history. The Art dealers present denied dealing in human remains per se but did admit that a war shirt in very good condition containing scalp locks could be sold for \$200,000 on the open market.

Discussion and testimony received by the Committee indicated that a process was needed by which Native Americans could gain access to collections housed in museums and Federal agencies.

COMMITTEE AMENDMENT

The Committee adopted an amendment in the nature of a substitute for H.R. 5237. The substitute was developed on the basis of issues and concerns expressed by witnesses at the Committee hearing, questions and positions of Committee Members, correspondence from concerned representatives of the Indian community, the museum and scientific community and the general public, and meetings with Administration officials and other interested parties. A detailed explanation of the substitute is contained in the Section-by-Section Analysis

portion of this report. Certain major substantive changes effected by the substitute are discussed below.

DEFINITIONS

Definitions of several key terms used in the legislation were changed to tighten and clarify their meaning.

In the definition of "cultural affiliation", the requirement that a tribe show a "shared group identity which can be reasonably traced historically or prehistorically" is intended to ensure that the claimant has a reasonable connection with the materials. Where human remains and associated funerary objects are concerned, the committee is aware that it may be extremely difficult, in many instances, for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

The definition of "sacred objects" is intended to include both objects needed for ceremonies currently practiced by traditional Native American religious practitioners and objects needed to renew ceremonies that are part of traditional religions. The operative part of the definition is that there must be "present day adherents" in either instance. In addition to ongoing ceremonies, the Committee recognizes that the practice of some ceremonies has been interrupted because of governmental coercion, adverse societal conditions or the loss of certain objects through means beyond the control of the tribe at the time. It is the intent of the Committee to permit traditional Native American religious leaders to obtain such objects as are needed for the renewal of ceremonies that are part of their religions.

The definition of "Federal agency" includes the Smithsonian Institution "except as may be inconsistent with the provisions of Public Law 100-185". Public Law 100-185 refers to the Act authorizing the addition of the Museum of the American Indian to the Smithsonian Institution. The Committee does not wish to change the agreements reached under the Museum of the American Indian Act with respect to the inventory and repatriation of native American human remains and funerary objects, but does intend that the Smithsonian fulfill the obligations stipulated in H.R. 5237 regarding sacred objects and objects of cultural patrimony. The Committee further intends for the Smithsonian Institution to comply with obligations stipulated in H.R. 5237 with respect to unassociated funerary objects insofar as such obligations do not weaken those stipulated in Public Law 100-185.

The definition of "right of possession" in section 2(13) of the bill was amended to include language providing that nothing in the paragraph is intended to affect the application of relevant State law to the right of ownership of unassociated funerary objects, sacred objects or objects of cultural patrimony. The language was adopted to meet the concerns of the Justice Department about the possibility of a 5th amendment taking of the private property of museums through the application of the terms of the Act. While the Committee did not feel that implementation of the Act would give rise to such a taking, the language was accepted to make clear its intention. The language is not jurisdictional in nature. It does not confer or detract from the existing jurisdiction to determine ownership of an item covered by this Act. Depending upon the circumstances involved, the law which would be applicable by the court of competent jurisdiction could be

Federal, State, or tribal. The definition of the right of possession will supplement any existing law in that respect.

The term "tribal land", as defined in section 2(15), is for purposes of this Act only and may be inapplicable in other circumstances. The Committee does not intend that the definition will be determinative of the status of land owned by Native Corporations pursuant to the Alaska Native Claims Settlement Act for any other purposes than for this Act.

OWNERSHIP

Section 3(d) refers to the inadvertent discovery of Native American remains and objects by persons engaged in an otherwise unrelated activity. Section 3(d)(1) states that, after there has been compliance with the other requirements of the subsection, "The activity may resume after a reasonable amount of time". Although a specific time limit was not added here, the Committee does intend to protect the remains and objects found and does not intend to weaken any provisions of other laws, such as Archeological Resources Protection Act, regarding similar situations.

INVENTORY

Section 5(d) refers to notification of Indian tribes and Native Hawaiian organizations no later than 6 months after completion of the inventory requirements. The Committee intends that tribes and organizations be notified as soon as possible after an inventory is completed. The allowance of 6 months to make the notification was added to assist small museums with very limited staffs.

SUMMARY

Due to the possible high number of unassociated funerary objects, sacred objects, and objects of cultural patrimony, this section is intended to make it easier for the Federal agencies, museums, and institutions of higher education to compile and survey the objects they have in their possession or under their control. It is also intended that there be a shorter time frame for completion of the summary (3 years) than for the item-by-item inventory to permit earlier contact with the appropriate tribe so open discussions can begin.

REPATRIATION

Section 7(b) refers to scientific studies the outcome of which would be of major benefit to the United States. The Committee recognizes the importance of scientific studies and urges the scientific community to enter into mutually agreeable situations with culturally affiliated tribes in such matters.

SHARING OF INFORMATION

Section 7(d) refers to the sharing of information following the preparation of the initial inventory or summary. Any tribe which may have a cultural affiliation with certain items may request any additional available information needed to pursue a claim under the Act. All tribes which receive notice pursuant to the inventory process or those that should have received notice because of a potential cultural affiliation (regardless of whether the showing of such affiliation would be based upon museum records or non-museum sources) would have standing to request such information.

REVIEW COMMITTEE

One of the responsibilities of the Review Committee is to compile an inventory of culturally unidentifiable human remains and develop a process for their disposition. There is general disagreement on the proper disposition of such unidentifiable remains. Some believe that they should be left solely to science while others contend that, since they are not identifiable, they would be of little use to science and should be buried and laid to rest. The Committee looks forward to the Review Committees recommendations in this area. The Committee concurs with the Justice Department comments that section 7 does not accord binding legal force to the Review Committee's actions. As such, the bill did not have to be amended to conform the appointments procedures for the committee to the Constitution's appointments clause.

PENALTY

The penalty provision of section 9 is not meant to be an exclusive remedy for any disputes which may arise from the implementation or interpretation of the terms of the Act nor to preclude resort of any of the parties to remedies which may be available under other existing law.

SAVINGS PROVISIONS

Section 11(1)(B) preserves the right of all parties to enter into other mutually agreeable arrangements than those provided for in this Act. The Committee encourages all sides to negotiate in good faith and attempt to come to agreements, where possible, which would keep certain items available to all those with legitimate interests.

CONSULTATION

The term "consultation", wherever it appears in the bill, means a process involving the open discussion and joint deliberations with respect to potential issues, changes, or actions by all interested parties.

SECTION-BY-SECTION ANALYSIS

Section 1

This section cites this Act as the "Native American Grave Protection and Repatriation Act".

Section 2

This section contains definitions of various terms used in the legislation.

Section 3

Subsection (a) provides that the ownership or right of control of any Native American human remains, funerary objects, sacred objects or objects of cultural patrimony found on Federal or tribal land after the date of enactment will be under the control of (in this order) lineal descendants, the tribe or Native Hawaiian organization on whose land the item was found, the tribe or Native Hawaiian organization which is the most closely affiliated with the item, or with the tribe or Native Hawaiian organization which is recognized by the Indian Claims Commission as having aboriginally occupied the area.

Subsection (b) provides that the ownership of any item covered under this Act which is not claimed under subsection (a) will be determined by regulations established by the Secretary of Interior after consultation with the review committee established in section 8 of this Act, Native American groups, representatives of museums and the scientific community.

Subsection (c) provides that items covered by this Act can be excavated from Federal or tribal lands if proof exists that a permit has been acquired in accordance with section 4 of the Archaeological Resources Protection Act, that the appropriate tribe or Native Hawaiian organization has been consulted or (in the case of tribal land) consents to the excavation, and if it is agreed that the right of control of any item covered by this Act which is unearthed will be determined in accordance with subsection (a) and (b).

Subsection (d) provides that anyone who discovers any item covered by this Act accidentally, or by an otherwise unrelated activity, on Federal or tribal land shall notify the head of the Federal entity having primary jurisdiction over the land in question and any appropriate tribe or Native Hawaiian organization if known or easily ascertainable. If the item was discovered during an activity such as logging, mining, or construction, the activity must stop and a reasonable effort must be made to protect the item before resuming the activity. This subsection further provides that, if the Federal land managers involved agree, the Secretary of Interior can be delegated the responsibility of such managers with respect to this Act.

Subsection (e) provides that nothing in this section will prevent the governing body of any tribe or Native Hawaiian organization from giving up their rights to any Native American human remains, funerary object or sacred object.

Section 4

Subsection (a) amends chapter 53 of title 18 of the United States Code by adding a new section at the end thereof as follows:

Subsection (a) of the new section provides that any person who knowingly sells, purchases, uses for profit, or transports for sale or profit the human remains of a Native American without the right of possession, as defined in the Native American Grave Protection and Repatriation Act, shall be fined in accordance with title 18 or imprisoned for not more than 12 months or both and, for subsequent violations, fined in accordance with title 18 or imprisoned for not more than 5 years or both.

Subsection (b) of the new section provides any person who similarly deals in Native American cultural items in violation of the Native American Grave Protection and Repatriation Act shall be liable to fines and prison terms similar to those provided in subsection (a).

Subsection (b) of section 4 of the bill amends chapter 53 to add the new section title, "Illegal Trafficking in Native American Human Remains and Cultural Items" to the chapter table of contents.

Section 5

Subsection (a) provides that any Federal agency or museum which has possession of, or control over, any Native American human remains or associated funerary objects is to inventory the items and list the geographic and cultural identity of each.

Subsection (b) provides that the inventory in subsection (a) shall be completed, after consultation with tribal and Native Hawaiian organizational officials and traditional religious leaders within 5 years and shall be made available to the review committee established in section 8. This subsection also uses and defines the term "documentation".

Subsection (c) provides for an extension of time for the inventory deadline if good faith can be shown by a museum.

Subsection (d) provides that, following completion of the inventory, all Federal agencies and museums shall notify the affected tribes or Native Hawaiian organizations of any determinations of cultural affiliation within 6 months. The notice shall include how each item was acquired, a list of the human remains and associated funerary objects which are clearly identifiable, and a list of the tribal origin all items which cannot be positively identified, but, given all information available, can be identified by a reasonable belief. This subsection further stipulates that all notices be sent to the Secretary of the Interior and published in the Federal Register.

Subsection (e) provides a definition of the term "inventory" which is used in this section.

Section 6

Subsection (a) provides that all Federal agencies and museums which possess, or have control over, any Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of the objects.

Subsection (b) provides that the summary be done in lieu of the item-by-item inventory of Section 5 and that it be followed by consultation with tribal and Native Hawaiian officials. The summary is to be completed within 3 years of the date of enactment of this Act.

Section 7

Subsection (a) provides for the return of human remains, associated funerary objects, unassociated funerary objects, sacred objects and objects of cultural patrimony which were identified pursuant to sections 5 and 6. It further calls for all returns to be completed in consultation with the requesting descendent, tribe or Native Hawaiian organization.

Subsection (b) provides that, if an item covered in this Act is needed for a specific scientific study the outcome of which would be of major benefit to the United States, the item may be kept for the duration of the study and returned within 90 days of completion.

Subsection (c) provides that, if a request is made for the return of an unassociated funerary object, sacred object or object of cultural patrimony, the requesting tribe or organization must first make a showing that the Federal agency or museum does not have a right of possession to that

item. If this showing is made, the burden shifts to the agency or museum to show that it does have a right of possession to the object.

Subsection (d) provides that the Federal agency or museum shall share its information with the requesting descendant, tribe or Native Hawaiian organization to assist in making a claim under this section.

Subsection (e) provides that, where there are legitimate competing claims for any cultural item, the Federal agency or museum can retain the item until the requesting parties or the courts decide which requesting party is the appropriate claimant.

Subsection (f) provides that any museum which repatriates items in good faith will not be liable for any claims because of that repatriation.

Section 8

Subsection (a) provides for the establishment, by the Secretary of the Interior, of a committee to monitor and review the implementation of the provisions of this Act.

Subsection (b) provides that the committee shall have seven members, three of whom are to be from nominations submitted to the Secretary of Interior by tribes, Native Hawaiian organizations, and traditional Native American religious leaders with two of those being traditional religious leaders. Three are to be from nominations submitted to the Secretary by national museum organizations and scientific organizations and one who shall be appointed with the consent of the other six. It also provides that the members shall serve without pay but shall be eligible for reimbursement for expenses.

Subsection (c) provides for the responsibilities of the committee which shall be: to choose a chairperson; to monitor the inventory process; to review upon request any findings relating to the identification or return of any items covered by this Act; to facilitate the resolution of any disputes among or between tribes, Native Hawaiian organizations, lineal descendants, Federal agencies, or museums; to compile an inventory of unidentifiable human remains and recommend actions for their disposition; to consult with tribes and Native Hawaiian organizations on anything that affects them; to consult with the Secretary of the Interior in developing regulations to carry out this Act; and to make appropriate recommendations regarding the future care of cultural items to be repatriated.

Subsection (d) provides that the committee shall make its recommendations regarding unidentifiable human remains in consultation with tribes, Native Hawaiian organizations, and museum and scientific groups.

Subsection (e) provides that the Secretary of the Interior will ensure that committee members have reasonable access to the items under review and all relevant materials.

Subsection (f) provides that the Secretary of the Interior shall establish rules and provide staff for the committee.

Subsection (g) provides that the committee submit an annual report to Congress.

Subsection (h) provides for the termination of the committee following certification to Congress by the Secretary of the Interior that its work is finished.

Section 9

Subsection (a), paragraph (1), provides that any museum that fails to comply with the requirements of the Act shall be assessed a civil penalty by the Secretary. No such penalty is to be assessed unless the museum has been given adequate notice and opportunity for hearing and each violation is to be a separate offense.

Paragraph (2) provides that the penalty to be assessed shall be determined by regulations promulgated under this Act taking into consideration the value of the item involved, damages suffered, and the number of violations.

Paragraph (3) authorizes the judicial review of any penalty assessed under this subsection by the Federal district courts.

Paragraph (4) provides that, if any museum fails to pay such a penalty after final administrative or judicial action, the Attorney General may initiate appropriate action to collect such penalty.

Paragraph (5) establishes powers and procedures for administrative actions to determine, assess and collect such penalties.

Section 10

Subsection (a) provides for grants to tribes and Native Hawaiian organizations to assist in the return of items covered in this Act.

Subsection (b) provides for grants to museums to assist in the inventory and summary requirements in this Act.

Section 11

Section 11 provides that nothing in this Act should be understood as limiting the authority of any Federal agency or museum to return any items covered in this Act or to stop or limit any other agreements which can be made regarding the disposition of such items. It further provides that this Act should not delay any current actions regarding the return of items. This section provides that this Act does not intend to restrict access to any court or limit any rights of individuals, Indian tribes, or Native Hawaiian organizations. It also states that it is not meant to limit the application of any State or Federal law pertaining to theft or stolen property.

Section 12

Section 12 recognizes the special relationship between the Federal government and Indian tribes and Native Hawaiian organizations.

Section 13

Section 13 provides that the Secretary of the Interior shall promulgate regulations to carry out this Act within 12 months.

Section 14

Section 14 appropriates such sums as may be necessary to carry out this Act.

The cost and budgetary analysis of H.R. 5237, as evaluated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 15, 1990.

Hon. MORRIS K. UDALL
*Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 5237, the Native American Grave Protection and Repatriation Act, as ordered reported by the Committee on Interior and Insular Affairs, October 10, 1990. CBO estimates that enactment of this legislation would cost the federal government between \$20 million and \$50 million over five years, assuming appropriation of the necessary funds. The range of total estimated costs is wide primarily because of uncertainty about the cost of compiling an accurate inventory of Native American human remains.

H.R. 5237 would regulate ownership, trade and disposition of Native American remains, burial objects, and objects of sacred or cultural significance. Human remains of funerary objects found on federal land would be returned to the most closely affiliated tribes, permits would be required for excavation of remains found on federal or tribal lands, and it would be illegal to trade in Native American remains of funerary objects.

H.R. 5237 also would require that federal agencies and museums that receive federal funding create inventories of Native remains and associated burial objects, notify tribes of their holdings and return objects to tribes upon request. The bill would require that inventories be completed within five years of enactment. Agencies and museums also would be required to summarize their holdings of other objects covered by the bill. A review committee would be established to oversee the process of repatriation, mediate disputes and review museums' progress in completing inventories. The bill would authorize the appropriation of such sums as are necessary for grants to assist museums in compiling inventories and to assist tribes in pursuing their claims. Although no funds are specifically authorized for federal agencies that have collection of remains and other objects, the estimated costs to these agencies (primarily the Department of the Interior and the Department of the Army) are included in this estimate. The largest federal collectors, the

Smithsonian, is already covered by similar provisions in the National Museum of the American Indian Act.

The main costs from enactment of H.R. 5237 would be the cost to federal agencies of preparing the inventories required by the bill and the cost of grants to museums to assist them in carrying out inventories. To some extent, the total cost is discretionary—the more funds made available, the more accurate and comprehensive will be the information collected by museums. This estimate represents the cost of compiling an initial inventory based on existing information. Two variables determine the cost: the number of remaining and associated objects and the cost

to inventory each object. This estimate assumes that museums and federal agencies hold between 100,000 and 200,000 Native American remains that would have to be reviewed.

The cost of preparing an accurate inventory of the original and tribal affiliation of human remains can vary considerably depending on the information already available, the amount of research needed to accurately determine tribal affiliation and the contentiousness surrounding individual pieces. There is considerable disagreement about the nature of the inventory required by H.R. 5237, and widely varied estimates of costs. Based on the experience of museums that already have repatriated remains, we assume costs of \$50 to \$150 per remain, or a total cost of between \$5 million and \$30 million over five years, for museums to provide tribes with the basic information required by the bill. This estimate includes the costs of an inventory of museums' collections, as well as a review of existing information to determine origin. More extensive studies costing up to \$500-\$600 per remain would be necessary to determine the origin of some of the remains; however, such studies generally are not required by H.R. 5237. If museums were required to identify all of their holdings definitively, the costs of this bill would be significantly higher than the \$30 million estimate.

H.R. 5237 also would require an inventory of burial objects associated with the human remains, and a summary by each museum of their holdings of unassociated funerary objects, sacred objects or culturally important objects. CBO estimates that these inventories and summary studies would cost museums about \$10 million over 5 years.

Finally, H.R. 5237 would provide grants to tribes to assist them in the repatriation of the remains and objects covered in the bill. This effort could include assistance in pursuing tribal claims as well as assistance in repatriating the remains. CBO estimates costs of \$5 million to \$10 million over five years for these grants.

As operators of about one-third of all museums, state and local governments could face costs from enactment of H.R. 5237. Assuming appropriation of adequate amounts by the federal government, however, these costs would be covered by federal grants made available under the bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marta Morgan, who can be reached at 226-2860.

Sincerely,

ROBERT D. REISCHAUER,

Director.

INFLATIONARY IMPACT STATEMENT

Enactment of H.R. 5237 would have no significant impact on inflation.

OVERSIGHT STATEMENT

No specific oversight activities were undertaken by the Committee and no recommendations were submitted to the Committee pursuant to rule X, Clause 2.

COMMITTEE RECOMMENDATIONS

The Committee on Interior and Insular Affairs, by voice vote, approved the bill and recommends its enactment by the House, as amended.

EXECUTIVE COMMUNICATIONS

The Committee requested a report from the Department of the Interior on a similar bill, H.R. 1381, by letters dated June 19, 1989, and February 27, 1990, and on H.R. 1646 by letter dated February 27, 1990. No reports on these bills were received at the time of the filing of this report. Comments on H.R. 5237 from the Army Corps of Engineers, the Department of Justice and the Department of the Interior follows:

Executive communications received on this legislation are as follows:

DEPARTMENT OF THE ARMY,
Washington, DC, August 31, 1990.

Hon. MORRIS K. UDALL,
*Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This office is responding to your letter of July 13, 1990 requesting the views of the Army Corps of Engineers on H.R. 1381, 101st Congress the "Native American Burial Site Preservation Act of 1989", H.R. 1646, 101st Congress, the "Native American Grave and Burial Protection Act", and H.R. 5237, 101st Congress, the "Native American Grave Protection and Repatriation Act".

The purposes of the bills are to protect Native American burial sites on Federal lands from excavation and vandalism; to prevent the interstate sale of Native American remains; and, in the case of H.R. 1646 and H.R. 5237, to provide a mechanism by which cultural resources can be returned to their native tribe.

The Department of the Army shares your concern for the protection of Native American burial sites; however, these three bills, in our view, are problematic for a number of reasons.

First, many of the provisions in the bills overlap with the provisions of the Archaeological Resources Protection Act (ARPA), which already has a framework in place for the protection of Indian cultural resources. In the ARPA, the term "archaeological resource" would encompass Native American burial sites, as the term means "any material remains of past

human life or activities which are of archaeological interest. . . .". 16 U.S.C. 470bb. This Act authorizes Federal land management agencies to provide permits to persons for the purpose of excavating or removing archaeological resources on public lands. The Act provides that if a permit issued could result in harm to or destruction of any religious or cultural site, the Federal land manager must notify any Indian tribe which may consider the site as having religious or cultural importance. 16 U.S.C. 470cc(b), (c). To avoid duplication of existing law and confusion to program managers, additional protection to Native American burial sites should be framed as amendments to the ARPA.

In addition, we are concerned that some of the provisions in the bills are untenable and conflict with the ARPA. For instance, H.R. 1381 would prohibit the excavation of Native American burial sites, except as permitted by States under State law. This provision conflicts with section 4 of the ARPA, which provides for Federal permits for excavation of archaeological resources. We believe that jurisdiction for permits to excavate or remove Indian remains properly rests with the Federal Government. The Federal government has a fiduciary obligation to ensure that in the execution of laws that protect Indian property, full effect is given to that purpose. Moreover, there is an established rule of construction of the law that Congress' actions towards Indians are to be interpreted in light of the special relationship and special responsibilities of the Government towards the Indians. In our view, to transfer permitting authority to States would usurp the Federal Government's duty to ensure that the law be carried out for the benefit of Indians. Moreover, this provision raises jurisdictional questions as to whether a State can issue permits for activities on Federal property.

H.R. 1626 and H.R. 5237 also contain provisions that would prohibit excavation of Native American remains without notice to and consent of the affiliated Indian tribe or organization. From our perspective, these provisions create an impossible burden for Federal land managers. Whenever possible, the Army Corps of Engineers consults with cultural descendents when human remains and associated items are identified, and we enter into agreements with descendent tribes when sites are likely to contain human remains. Nevertheless, there are circumstances when cultural descendants may not be present or identifiable. By requiring consent from an affiliated tribe before any excavation could take place, these provisions could virtually stop the progress of any Corps project. Essentially, we oppose the overly strict requirements in these two bills, and would favor a balanced approach that would allow for a reasonable effort on the part of Federal land managers to consult with cultural descendents before an area was excavated.

Finally, you requested that the Corps include the current number of Native American skeletal remains and funerary objects in its possession or control and the policy regarding those items. At the present time, the Corps does not have an accurate number of those items for you. However, the Corps is currently revising its regulations on curation and collections management that would require all Corps offices to conduct inventories of curated cultural

and human remains. When the regulation is further developed, the Corps will be able to proceed on a project by project basis to conduct the necessary inventories.

Sincerely,

ROBERT W. PAGE,
Assistant Secretary of the Army (Civil Works).
C. EDWARD DICKEY,
*Acting Principal Deputy Assistant Secretary
(Civil Works).*

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, September 17, 1990.

Hon. MORRIS K. UDALL,
*Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This letter presents the views of the Department of Justice on two related bills: H.R. 5237, the "Native American Grave Protection and Repatriation Act," and H.R. 1646, the "Native American Grave and Burial Protection Act."

H.R. 5237 and H.R. 1646 are similar in substance. Both would protect and provide for repatriation of Native American human remains, objects associated with those remains, and other sacred objects. H.R. 5237 would also protect and provide for repatriation of a fourth category of objects—"inalienable communal property"—defined to include items "having historical, traditional, or cultural importance central to the Native American group or culture . . ." H.R. 5237, § 2(6).¹

On the policy goals and efficacy of these bills, we defer to the federal agencies responsible for administration of Native American programs, particularly the Department of the Interior. As to the legal issues involved, however, we believe that both bills would raise concerns under the Takings Clause of the Constitution. U.S. Const., Amend. V (" . . . nor shall private property be taken for public use, without just compensation"). We first discuss a Takings Clause issue common to the repatriation provisions in both H.R. 5237 and H.R. 1646. We then discuss three further matters unique to one or the other bill.

1. *Repatriation.*—Both H.R. 5237 and H.R. 1646 would call upon private museums to return protected objects upon request from a Native American tribal body affiliated with the particular object. H.R. 5237, § 6(a)(1) and (b)(1); H.R. 1646, § 6.² The precise procedures

¹A third bill—H.R. 1381, the "Native American Burial Site Preservation Act of 1989"—would prohibit excavation of a Native American burial site. H.R. 1381, § 3. The Department of Justice has no comments on this legislation.

²The term "museum," as used in either bill, would clearly encompass private museums. See H.R. 5237, § 2(9) ("museum" means "any person, State, or local government agency . . . that receives Federal funds and has possession of, or control over" protected objects); H.R. 1646, § 3(7) ("museum" means "any museum, university, government agency, or other institution receiving Federal funds which possesses or has control over any Native skeletal remains or ceremonial objects").

for repatriation differ between the two bills. Under H.R. 5237, requests addressed to private museums would turn upon the results of an inventory of Native American objects that the museum itself would be required to complete. H.R. 5237, § 6(a)(1). Only if a private museum establishes the origin of a particular protected object as part of the required inventory may a request for repatriation of that object be made. *Id.* By contrast, H.R. 1646 would not require private museums to conduct inventories, *see* H.R. 1646, § 5 (only federal agencies and instrumentalities must conduct inventories), nor would it make requests for repatriation to any type of museum dependent upon the results of any inventories.

The two bills also differ concerning the grounds upon which a private museum may refuse a request for repatriation. Under H.R. 5237, a private museum would need to show "by a preponderance of the evidence that [it] has right of possession to [the requested] remains or objects." H.R. 5237, § 6(c)(1). H.R. 5237 would define "right of possession" to mean "possession obtained with the voluntary consent of an individual or group that had authority of alienation." H.R. 5237, § 6(d). Under H.R. 1646, a private museum need not grant a request for repatriation if the object sought was "acquired with the consent of the tribe or the Native American owners of such items" or, in the case of skeletal remains, is "indispensable for the completion of a scientific study, the outcome of which would be of major benefit to the United States." H.R. 1646, § 6(1) and (2).³

Under either bill, any museum that fails to comply with the relevant repatriation provisions would be ineligible to receive federal funding during the period of non-compliance. H.R. 5237, § 6(f); H.R. 1646 § 6. The Supreme Court has recognized that Congress—as part of its spending power—has broad authority to place conditions upon the receipt of federal funds. *See South Dakota v. Dole*, 107 S. Ct. 2793, 2796 (1987). In so doing, Congress may seek to accomplish objectives not otherwise within its Article I powers. *Id.* (upholding the withholding of federal highway funds to induce States to adopt uniform drinking ages, "even if Congress may not regulate drinking ages directly"). Without extensive elaboration, however, the Court has noted that such conditions may not be used to induce "activities that would themselves be unconstitutional." *Id.* at 2798 (citing authorities).

This limitation upon the power of Congress to condition the receipt of federal funds would arguably be implicated by H.R. 5237 and H.R. 1646. Although we have identified no authorities that speak directly to the relationship between the spending power and the Takings Clause, we believe that a strong argument could be made that Congress may not exercise the spending power to accomplish an uncompensated taking of private property, as such action would contravene the Constitution. *Cf. Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (state commission may not, absent just compensation, condition a permit to rebuild house upon transfer of easement to the public across owner's property).

By its terms, the Takings Clause provides that "private property" shall not be taken for "public use" absent the payment of "just compensation." U.S. Const., Amend. V. We discuss first the "private property" requirement.

Both bills would also permit requests for repatriation to be made to federal agencies and federal museums. H.R. 5237, § 6(b); H.R. 1646, § 6. This aspect of the two bills does not implicate the Takings Clause, as the property in question is that of the United States and, hence, may be repatriated by Congress. U.S. Const., Art. IV, § 3, cl. 2 (power of Congress to dispose of "Property belonging to the United States").

³By contrast, H.R. 5237 would permit only federal agencies and federal museums to refuse a request on scientific grounds. *See* H.R. 5237, § 6(b).

Both H.R. 5237 and H.R. 1646 recognize that a private museum need not return a protected object acquired with the consent of a person or tribe with authority to transfer that particular object. H.R. 5237, § 6(d); H.R. 1646, § 6(1). There may, however, be other means by which a private museum might have acquired a property interest in a protected object.

For example, the Antiquities Act of 1906 provides that a permit shall be required for "excavation of archaeological sites" on federal lands. 16 U.S.C. § 432. As a condition for receipt of a permit, the applicant must provide for "permanent preservation [of excavated objects] in public museums." *Id.* A private museum open to the public would have a strong argument that protected objects duly obtained in the past pursuant to such federal permits constitute museum property. Apart from laws concerning federal lands, property interests may be recognized by state law as well. For example, a private museum might have purchased protected objects that were accidentally discovered in the course of construction work or other excavation upon private land.

As currently drafted, however, H.R. 5237 and H.R. 1646 do not appear to exclude from repatriation objects acquired other than through the consent of the relevant Native Americans. Section 6 of H.R. 1646 states that only "the tribe or the Native American owners of [protected] items" may consent to their acquisition. The equivalent provision of H.R. 5237 refers more broadly to "consent of an individual or group that had authority of alienation," but the examples that follow this statement are restricted to consent involving Native Americans. H.R. 5237 § 6(d). The language of both bills would appear to exclude consent by a governmental or private landowner that leads—by design or by accident—to the discovery of Native American artifacts that are later transferred to a private museum. In short, consent by the United States to excavation on federal lands (or, alternatively consent by a private landowner to excavation on his property) may confer a property interest in the objects discovered but would not appear to protect a private museum from the repatriation requirement. The bills thus may affect private property and thereby call into play the Takings Clause.

This problem could be resolved by an amendment to exclude private museums—and, hence, private property—from repatriation. Alternatively, the provisions under which a private museum may decline repatriation might be broadened to exempt all objects in which the museum has a property interest cognizable under federal or state law. Similar legislation introduced in the Senate, for example, would permit a museum to refuse repatriation if it has "legal title" to the requested object. *See* S. 1980, § 5(c)(1). Either revision, however, would reduce—perhaps significantly—the number of protected objects that would be returned to Native Americans.

Absent such revisions, further issues would arise under the "public use" and "just compensation" requirements of the Takings Clause. The courts generally will defer to Congress' determination of what constitutes a "public use" of private property. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). The Government "does not itself have to use property to legitimate the taking," *id.* at 224; transfers of property from one private party to another have been upheld when designed by the legislature to further a public purpose, *see, e.g., id.* Here, however, Congress has inserted no findings in either H.R. 5237 or H.R. 1646 to explain how the transfer of protected objects from private museums to Native American tribes will advance the public good. Should Congress wish to reach private property through these bills, it would be advisable that such findings be included.

Finally, the Takings Clause requires that "just compensation" be paid for the taking of private property. The absence of a compensation procedure in either H.R. 5237 or H.R. 1646 would not prevent a private museum from obtaining compensation in the event that a taking is effected by either bill. Under the Tucker Act, a private museum may seek such compensation in the Claims Court. 28 U.S.C. § 1491(a) (jurisdiction to resolve claims against the United States based upon

the Constitution). The payment of compensation to private museums would increase the cost of repatriation legislation. Absent such payments, however, the conditioning of federal funding upon consent to an uncompensated taking—as we have explained—may well be an unconstitutional exercise of the spending power.

2. *Ownership Provision of H.R. 1646.*—As currently drafted, section 4(c) of H.R. 1646 would implicate the Takings Clause. That section would declare that "[a]ny grave goods or sacred ceremonial objects found on public or tribal land shall be deemed to be owned by the tribe" associated with those objects. To avoid the implication that this section would transfer ownership of objects found in the past such that compensation would be due to the previous owners, we recommend amendment of this section to apply only to objects "found after the date this Act becomes law." Such an amendment would clarify that section 4(c), like the protections for Native American artifacts elsewhere in section 4, will have only a prospective application.

3. *Appointment of Review Committee in H.R. 5237.*—Under section 7 of H.R. 5237, the Secretary of the Interior would be required to establish a "review committee" that "shall be composed of 7 members, 4 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders." H.R. 5237 § 7(b)(1). The committee shall, *inter alia*, "review[] upon the request of any affected party any finding relating to" the identification of a protected object or the return of such an object. H.R. 5237, § 7(c)(2)

As drafted, the bill would not accord binding legal force to the committee's review. Should Congress intend otherwise, section 7(b)(1) of the bill would need to be amended to conform the procedures for appointment of the review committee to the Constitution's Appointments Clause. *See* U.S. Const., Art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 126, 141 (1976) (officials exercising "significant authority pursuant to the laws of the United States" must be appointed pursuant to the Appointments Clause). While the Appointments Clause permits Congress to vest the appointment of "inferior Officers" in the President alone, we do not believe that it sanctions limitations upon the power of appointment by reference to a fixed list of nominees, because such a requirement would permit the creator of the list—here, Native American organizations—to share in the appointment power.

4. *Access Requirement of H.R. 5237.*—Section 7(e) of H.R. 5237 also concerns the review committee. This section would require the Secretary of the Interior to "ensure" that the committee will have "full and free access" to any protected objects necessary for their review. In its current form, the language of section 7(e) might implicate the Takings Clause in particular situations. A court will ask whether the particular intrusion "unreasonably impair[s]" the economic value of private property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). In this "ad hoc inquiry," the court will regard several factors as "particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

Here, a requirement of "full and free" access might be read broadly to authorize the sequestration of protected objects that would otherwise be part of a major exhibition in a private museum. Although the result would turn largely upon the particular facts, a private museum would have a substantial argument that such an intrusion constitutes a taking and, thus, must be accompanied by the payment of just compensation. To avoid such a situation, we recommend

amendment of section 7(e) to provide merely for "reasonable access" to protected items by the review committee.

Sincerely,

BRUCE C. NAVARRO,
Deputy Assistant Attorney General.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, October 2, 1990.

Hon. MORRIS K. UDALL,
*Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This is to provide you with our views on H.R. 5237, the "Native American Grave Protection and Repatriation Act".

We support the goal of H.R. 5237, but would oppose it unless amended as we suggest below. In addition, we oppose provisions in the bill that would authorize open-ended and unlimited grants to tribes and museums involved in the repatriation process. H.R. 5237 also raises serious constitutional problems that must be satisfactorily addressed prior to enactment. We defer to the Department of Justice for an analysis of the legal issues associated with this bill, which has been previously provided to the Committee.

H.R. 5237 would establish criminal penalties for anyone selling or transporting Native American skeletal remains without the consent of the heirs of the deceased or the tribe which is culturally affiliated with the remains. The bill would also establish ownership of grave goods found on public or tribal lands. It would require Federal agencies having possession of Native American skeletal remains or ceremonial objects (1) within five years to inventory them and determine tribal origin; and (2) within six months to notify each tribe of the items in the agency's possession or control. Tribes would be provided an opportunity to decide if they wished the items returned, and Federal agencies would be required to return them unless they are obtained with the consent of the tribal entity, or are indispensable for study. Similar requirements for return of such items would be levied on any museum which receives Federal funds. A review committee would be established to monitor and review the implementation of the inventory and identification process required by this bill.

In March of this year, Secretary Lujan directed the National Park Service to develop a new policy and revise an existing guideline on the treatment of human remains and funerary objects. The National Park Service already has been informally reviewing the current policy and guidelines at the staff level for over a year. This informal review has included meetings with representatives of Indian groups, as well as with archaeological and museum groups. The specifics of the Interior policy and guidelines remain to be defined following more detailed consultation with Indian, archaeological, museum, and other interested groups. However, we have identified certain basic principles that we would need to see incorporated in any legislation which we would support.

Secretary Lujan wants a more sensitive treatment of archaeological human remains, funerary objects, sacred objects, and objects of Native American cultural patrimony by managers on Interior lands. He wants other Federal, State and local agencies that look to the Secretary of the Interior for guidance to adopt similar sensitive approaches. However, the Secretary has indicated that he wants to affirm the right of each tribe to determine the treatment that is afforded human remains and associated objects that are affiliated clearly with that Tribe. This right is central to the purpose of H.R. 5237.

Although the Federal government legally owns human remains, it is our position that the government should have only stewardship responsibilities for human remains and other cultural items which should be held in trust for culturally affiliated groups who can establish rights to their ownership and for the scientific and educational benefits derived from some of these cultural items.

We recognize the legitimate interests of contemporary Native Americans, tribes and tribal components, including extended family groups, in making a claim. Therefore, in cases where human remains and associated funerary objects can be linked to contemporary Native Americans and a claim is made and substantiated, the culturally affiliated group should determine ultimate disposition.

We further believe that in cases where human remains and associated funerary objects can be linked to contemporary Native Americans, justifiable scientific and humanistic studies may be undertaken with the permission of the acknowledged kin group or tribal representatives who will decide about the appropriate conditions of study and final disposition of the human remains and associated funerary objects.

Under present policy, in cases where human remains and associated funerary objects cannot be linked to contemporary Native Americans or when a claim is not made, the Federal government would maintain its stewardship role, providing the opportunity for future evaluation whenever additional evidence of cultural affiliation is forthcoming and claims are made. In this area, however, the outcome of Secretary Lujan's policy review is not yet certain. We support the effort to stem the removal of these cultural items from their resting places by looting and inadvertent modern disturbances and to halt the trafficking in these items.

We believe that H.R. 5237 would largely incorporate these basic principles. However, the following amendments would be necessary in order for us to support this bill.

In cases where human remains and associated funerary objects cannot be linked to contemporary Native Americans, or where a claim has not been made, we believe it is appropriate for the Federal government to maintain its stewardship role over these remains, but provide the opportunity for future evaluation of cultural affiliation if future claims are made. Therefore, we recommend section 3(a)(2)(B) be changed to read, "in the Indian tribe or Native Hawaiian organization which is affiliated with such objects or remains and which, upon notice, states a claim for such objects or remains."

We believe it would not be proper to use aboriginal occupation as the sole criteria for establishing affinity where no affinity to contemporary groups can be established. In some cases this criterion will be reasonable, in other cases it will not. Therefore, we recommend section 3(a)(2)(C) be deleted.

We agree that the Secretary of the Interior should develop regulations for the treatment and disposition of items that are determined to be unaffiliated with any modern Native American

entity. The stewardship role over these items can result in a wide variety of treatments, ranging from museum curation of remains and objects to reburial. If the regulations contemplated in section 3(b) of the bill (providing procedures to be followed in determining proper treatment for unclaimed items) are intended to provide such broad authority, report language establishing this intent is necessary.

In order for repatriation or continued government stewardship of cultural items to operate effectively, inventories of present collections in Interior and other Federal agencies are needed. In order to ensure that cultural items are returned to the appropriate Native American entity, it will sometimes be necessary to gather evidence of relatedness, which would include appropriate combinations of forensic, ethnographic, archaeological, and archival information. Therefore, we recommend that section 5(b)(2), dealing with inventory requirements, be amended to allow for additional studies where necessary to ensure a correct determination of affinity. We want to ensure, to the best of our ability, that remains and objects are returned to the correct contemporary groups and those that stay under Federal stewardship are identified properly.

The time and costs for Federal agencies and curation facilities could be substantial. Federal agencies will need to begin evaluating collections for which they have responsibility in order to develop plans and cost estimates. The new regulations on curation of Federal archaeological collections (36 CFR 79), which will become effective on October 12, 1990, will be helpful for agencies beginning to organize their efforts. Scheduling for the repatriation of human remains and associated funerary objects must be realistic. Therefore, we recommend that Federal agencies have available the same provisions for extension of the time requirements for completing their inventories as museums are provided in section 5(c).

Although we believe that many human remains and funerary objects will be identified with affiliated groups through the inventory required by the bill, we are not confident that the broader categories of "scared objects" and "objects of cultural patrimony" could be treated along these same lines. These terms and the concepts they represent are too broad and unformulated to include within this legislation.

We have had experiences with legislation where the definitions embodied concepts that were too broad to be dealt with effectively by the agencies that had to implement the law. During the mid-1960s the concepts of adaptive use and rehabilitation of historic structures were similarly broad, and only by working on the concepts and learning the necessary limits of use and rehabilitation through trial and error during the 1960s and 1970s were we able to produce the standards and guidelines that direct much of this work today. A similar period of development concerning the identification, treatment, and use of Native American sacred objects and cultural patrimony would provide the same grounds for developing useful and widely accepted standards and guidelines.

Tribal preservation programs working in consensus and consultation with Federal agencies and national preservation programs, would resolve issues of ownership, control, or possession of sacred objects and cultural patrimony. We expect the appropriate concepts, relationships, and procedures concerning sacred objects and cultural patrimony will emerge during the next few years as Tribes, agencies, and other interested organizations work within

the existing framework on these issues. We urge that decisions about stronger legislation concerning sacred objects and cultural patrimony be postponed until this process has occurred.

We would support the creation of a review committee as contemplated by this bill. However, this committee should be purely advisory in nature. Therefore, the review committee should be limited to providing oversight and facilitation of the repatriation process. Accordingly, at a minimum, we recommend deletion of section 7(c)(4), which would require the review committee to compile an inventory of identifiable human remains that are under the control of each Federal agency or museum.

In conclusion, the Department of the Interior is very concerned that archaeological human remains, funerary objects, sacred objects, and objects of Native American cultural patrimony are treated with the respect and sensitivity which they deserve. However, we would oppose H.R. 5237 unless amended as we described above including serious constitutional problems and new, open-ended, unlimited grant programs. We look forward to working with the Congress and the affected groups to ensure that we indeed live up to our responsibilities in this area.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's programs.

Sincerely,

SCOTT SEWELL,
Deputy Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

CHAPTER 53. INDIANS

Section 1151. Indian country defined

* * * * *
-. *Illegal Trafficking in Native American Human Remains and Cultural Items*

§ 1151. Indian country defined

* * * * *
SEC. -.ILLEGAL TRAFFICKING IN NATIVE AMERICAN HUMAN REMAINS AND CULTURAL ITEMS.-

(a) Whoever knowingly sells, purchases, used for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains, as

provided in the Native American Grave Protection and Repatriation Act, shall be fined in accordance with this title, or imprisoned not more than 12 months, both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.

(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both.

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