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104TH CONGRESS, 2d Session | SENATE | REPORT 104–356

TO AMEND THE NATIVE GRAVES PROTECTION AND REPATRIATION ACT TO INCLUDE NATIVE HAWAIIAN ORGANIZATIONS AND FOR OTHER PURPOSES

AUGUST 27, 1996.—Ordered to be printed

Filed under authority of the order of the Senate of August 2, 1996

Mr. MCCAIN, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1983]

The Committee on Indian Affairs, to which was referred the bill (S. 1983) to amend the Native American Graves Protection and Repatriation Act to include Native Hawaiian organizations, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 1983 is to amend Public Law 101–601, the Native American Graves Protection and Repatriation Act, in order to clarify certain provisions as they pertain to Native Hawaiian organizations.

BACKGROUND

S. 1983 was introduced by Senator Inouye on July 22, 1996, for himself and Senators McCain and Akaka. S. 1983 amends the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 et seq.) by clarifying three provisions which pertain to Native Hawaiians and Native Hawaiian organizations.

In 1990, the Congress enacted the Native American Graves Protection and Repatriation Act (NAGPRA) to address the growing concern among Indian tribes, Alaska Native villages, and Native Hawaiian organizations regarding the disposition of thousands of Native American human remains and religious objects in the pos-

session of federally-funded museums and Federal agencies. NAGPRA requires museums, scientific institutions that receive federal funds, and Federal agencies possessing such cultural items to compile inventories and written summaries of Native American human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony. NAGPRA further establishes a process governing the repatriation of such items to the appropriate Indian tribes or Native Hawaiian organizations.

Since NAGPRA's enactment, the focus has largely been on the completion of summaries and inventories by museums and Federal agencies of Native American cultural items in their possession and control, and the repatriation of such items. Eight hundred and forty-seven museums and Federal agencies have provided summaries of their collections to Indian tribes and Native Hawaiian organizations. In addition, museums and Federal agencies have published sixty-six statutorily-required Federal Register notices relating to the repatriation of 2,713 human remains, 122,948 funerary objects, 212 sacred objects, and 16 objects of cultural patrimony.

In many respects, Native Hawaiian organizations have been at the forefront of efforts to secure the repatriation of ancestral remains. Hawaiian cultural values require the care and protection of ancestral remains and burial sites. The disturbance and removal of Native Hawaiian ancestral remains from Hawaii continues to be considered one of the highest of offenses. Since the enactment of NAGPRA, hundreds of Native Hawaiian remains have been returned to Hawai'i from over twenty museums in the United States, Canada, Switzerland, and Australia.

Unfortunately, Native Hawaiians have also been among the first native peoples to encounter difficulties and limitations in the Act's implementation, particularly in the context of inadvertent discoveries of Native American human remains. Hawaii's finite and limited land resources, the high level of development activity on these lands, and naturally occurring erosion, have contributed to the frequent discovery of Native Hawaiian human remains. In addition, many of the federal land holdings in Hawai'i, such as military bases and national parks, are located on sandy shorelines that were commonly used by early Hawaiians as burial sites. As a result of these circumstances, Native Hawaiian organizations have experienced the difficulty of implementing NAGPRA's provisions regarding the inadvertent discovery of Native Hawaiian human remains on Federal lands.

On December 6, 1995, the Committee on Indian Affairs held an oversight hearing on NAGPRA. Written testimony was received from Hui Malama I Na Kupuna 'O Hawai'i Nei, a Native Hawaiian organization recognized under NAGPRA, raising a number of concerns regarding the Act's implementation in the State of Hawai'i. An addendum to this testimony was subsequently received by the Committee in April of 1996. The changes to NAGPRA proposed in this bill are designed to address these concerns, namely: the lack of written consent where Native American human remains are excavated or removed for purposes of study; the lack of notification to Native Hawaiian organizations when inadvertent discoveries of Native American human remains are made on Federal lands; and following an inadvertent discovery of Native American human re-

mains, the lack of assurances that the removal of such remains will adhere to the same requirements as an intentional excavation.

LEGISLATIVE HISTORY

S. 1983 was introduced by Senator Inouye, for himself and Senators McCain and Akaka, on July 23, 1996, and was referred to the Committee on Indian Affairs.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on July 30, 1996, the Committee on Indian Affairs ordered the bill reported, with the recommendation that the Senate pass the bill, as reported.

SECTION-BY-SECTION ANALYSIS

Sec. 1(a). Written consent required if Native American remains are excavated or removed for purposes of study

Section 1(a) amends section 3(c) of NAGPRA by adding a new subsection to address the issue of written consent, where Native American remains are excavated or removed for purposes of study Subsection (c) of NAGPRA currently provides that the intentional removal or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal is permitted only if an Archaeological Resources Protection Act permit is obtained, if proof of consultation, or in the case of tribal lands, of consent, is obtained from the appropriate tribe or Native Hawaiian organization, and if the ownership of such items has been determined. Section 1(a) of this bill would add an additional requirement in instances where Native American human remains are intentionally excavated or removed for purposes of study by requiring written consent from lineal descendants, if known or readily ascertainable, or each appropriate Indian tribe or Native Hawaiian organization.

The Committee recognizes the importance of consulting with lineal descendants and the appropriate Indian tribes or Native Hawaiian organizations where Native American human remains are intentionally excavated or removed for purposes of study. The Committee notes that, according to Native Hawaiian traditions, the care and protection of ancestral remains and burial sites are, first and foremost, a family matter. As such, the interests of lineal descendants in the disposition of the remains of their ancestors should take precedence over those of any Native Hawaiian organization.

The Committee has also been apprised that some of the activities conducted during the course of a study or physical examination of human remains, such as the taking of photographs, or the taking of bone samples for purposes of radio-carbon dating, are considered by some as so egregious or offensive that they constitute desecration. Therefore, in instances where the remains are intentionally removed for purposes of study, the Committee intends that written consent first be obtained, from lineal descendants, if known or readily ascertainable, and the appropriate Indian tribe or Native Hawaiian organization. The Committee expects that the individual

or entity proposing to remove the remains will exercise good faith efforts in ascertaining the lineal descendants.

Sec. 1(b). Requirements for inadvertent discoveries

Section 1(b) of the bill pertains to requirements for inadvertent discoveries. Subsection 1(b)(1) amends section 3(d)(1) of NAGPRA to clarify that notification to the appropriate Native Hawaiian organizations is required when Native American human remains are inadvertently discovered on Federal lands. As currently worded, section 3(d)(1) does not require notification, written or otherwise, to Native Hawaiian organizations when Native Hawaiian remains are inadvertently discovered on Federal lands. Such notice is only required when the discovery occurs on Hawaiian homelands. This is clearly not consistent with the Congressional intent of this section, as evidenced by the following text from the House Committee report: "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."* (H. Rept. 101–877, pg. 17) (italics added). Subsection 1(b)(1) of the bill would make clear that notification must be made, not only to the head of the appropriate Federal entity, but also to the appropriate Indian tribe or Native Hawaiian organization.

The Committee notes that this proposed notification requirement is also consistent with the NAGPRA regulations, promulgated by the Department of the Interior, which became effective on January 3, 1996. Following an inadvertent discovery on Federal lands, 43 CFR Part 10, Subpart B, Section 10.4(d)(1)(iii) requires that the responsible Federal agency official notify by telephone, with written confirmation, the appropriate Indian tribes or Native Hawaiian organizations, no later than three days after the notification of the discovery.

Subsection 1(b)(2) of the bill clarifies subsections 3 (c) and (d) of NAGPRA by ensuring that the requirements of subsection 3(c) regarding the intentional excavation and removal of Native American human remains and objects are applied in such instances where the intentional excavation or removal follows an inadvertent discovery. In at least one instance in Hawai'i, a Federal agency interpreted NAGPRA as not requiring compliance with section 3(c), which requires the issuance of a permit pursuant to the Archaeological Resources Protection Act of 1979, even though the Native American human remains were intentionally excavated for purposes of removal, on the basis that such remains were inadvertently discovered. Subsection 1(b)(2) would amend section 3(d)(2) of NAGPRA by adding a clarifying sentence which provides that: "Any person or entity that disposes of or controls any such cultural item shall adhere to the applicable requirements of subsection (c)."

The Committee notes that subsection 1(b)(2) of the bill is consistent with the applicable NAGPRA regulation, which mandates compliance with the requirements and procedures relating to intentional archaeological excavations when human remains, funerary objects, sacred objects or objects of cultural patrimony are removed

following an inadvertent discovery on Federal lands. (43 CFR Part 10, Subpart B, Section 10.4).

The Committee believes that the amendments proposed in S. 1983 are consistent with the original purpose, spirit, and intent of NAGPRA, and are necessary in order to strengthen and clarify the existing law. While the amendments are designed to address concerns specifically raised by Native Hawaiian organizations as to the implementation of NAGPRA in the State of Hawai'i, the Committee recognizes that changes proposed by these Amendments will also benefit Indian tribes.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S.1983, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 6, 1996.

Hon. JOHN MCCAIN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1983, a bill to amend the Native American Graves Protection and Repatriation Act to provide for Native Hawaiian organizations, and for other purposes, as ordered reported by the Senate Committee on Indian Affairs on July 30, 1996. CBO estimates that enacting this legislation would have no effect on the federal budget. Because enacting S. 1983 would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

S. 1983 would clarify the intent of the Native American Graves Protection and Repatriation Act by requiring written consent from lineal descendants or from the appropriate Indian tribe or Native Hawaiian organization if Native American remains are intentionally excavated or removed for purposes of study. Further, the bill would require notification to the appropriate Indian tribe or Native Hawaiian organization if Native American human remains are inadvertently discovered on federal lands, or if Native American human remains and objects are removed following an inadvertent discovery.

S. 1983 contains intergovernmental and private-sector mandates as defined in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4), because it would impose additional requirements on any state or local governments or private-sector entities that fund projects that result in the discovery of Native American remains. CBO estimates that these mandates would impose no significant costs on state, local, or tribal governments, or on the private sector.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Rachel Robertson (for federal costs); Marjorie Miller (for the impact on state, local, and tribal governments); and Amy Downs (for the private-sector impact).

Sincerely,

JUNE E. O'NEILL, *Director.*

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1983 will have only de minimis regulatory or paperwork impacts.

EXECUTIVE COMMUNICATIONS

The Committee has not received any executive communications from the Administration on S. 1983.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the enactment of S. 1983 will result in the following changes in 25 U.S.C. 3001 et seq., with existing language which is to be deleted in black brackets and the new language to be added in italic:

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION

25 U.S.C. SECTION 3002

SEC. 3002. OWNERSHIP.

* * * * * * *

(c) INTENTIONAL EXCAVATION AND REMOVAL OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.—

* * * * * * *

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this sections; **[**and**]**

(4) proof of consultation or consent under paragraph (2) is shown**[**.**]** *and*

(5) in the case of any intentional excavation or removal of Native American human remains for purposes of study, such remains are excavated or removed after written consent is obtained from—

(A) lineal descendants, if known or readily ascertainable; or

(B) each appropriate Indian tribe or Native Hawaiian organization.

(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**]**. *With resp1ect to tribal lands, such notification shall be provided to each appropriate Indian tribe or Native Hawaiian organization,* and, in the case of lands that have been selected by an Alaska Native Cor-

poration or group organized pursuant to the Alaska Native Claims Settlement Act of 1971 (43 U.S.C.A. sec. 1601 et seq.), the appropriate corporation or group * * *

(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. *Any person or entity that disposes of or controls any such cultural item shall adhere to the applicable requirements of subsection (c).*

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