

June 7, 2001

The Honorable Darrell Steinberg
California State Assembly
State Capitol
Sacramento, CA 95814

Dear Assembly Member Steinberg:

I am writing to you as President of the Society for American Archaeology (SAA), a Section 501(c)(3) organization that was founded in 1934 and is incorporated in the District of Columbia. With more than 6800 members, SAA is the leading professional organization of archaeologists in the United States. Among the Society's primary objectives is advocacy for the protection of archaeological resources and promotion of research on the archaeology of the Americas. I am writing to you today concerning AB 978, the proposed California Native American Graves Protection and Repatriation Act. If passed, this bill will create conflicts not only between a federal and a state law, but also among Native Americans, museums, agencies, scientists, and the interested public. It will also pose serious problems of implementation and enforcement.

SAA has, for over a decade, led the scientific community in national discussions about the repatriation of Native American human remains and objects of importance to contemporary Native American tribes. In 1990, SAA was the primary scientific organization involved in the negotiations among Native American organizations, museums, and Congress that resulted in the landmark consensus represented by NAGPRA, the 1990 Native American Graves Protection and Repatriation Act. Although each party to these discussions had to compromise, there was a strong sense that *NAGPRA should reasonably balance Native American interests with those of the scientific community and the broader public*. SAA provided testimony at Senate and House committee hearings on NAGPRA and helped form a coalition of scientific organizations and Native American groups that, once the compromise had been reached, strongly supported NAGPRA's enactment. Since NAGPRA's passage SAA has closely monitored its implementation and has consistently provided comment to the NAGPRA Review Committee, to the Department of the Interior, and to other agencies. SAA has twice testified at hearings of the Senate Committee on Indian Affairs on the implementation of NAGPRA. SAA has consistently and strongly urged its members to work toward the effective and timely implementation of the Act.

Predictably, our concern about AB 978 arises from its conflict with NAGPRA, despite its stated intent to be consistent with that federal legislation (Section 8011b), and from provisions of the bill that would confuse, and therefore slow, the repatriation process and would increase, rather than decrease the conflict and tension among archaeologists, museums, agencies, and Native Americans that NAGPRA sought to resolve. In our view, AB 978 will work against the principles of reasonable compromise that Native American organizations, museums, SAA, and Congress carefully considered in developing NAGPRA. These concerns are dealt with in turn below. Many of them stem from the use in AB 978 of key NAGPRA terms and concepts but with different definitions that contradict the letter and spirit of NAGPRA.

Conflict in Definition: Sacred Objects

AB 978 differs substantially from NAGPRA in its definition of *sacred objects*. NAGPRA defines these as, "Specific ceremonial objects needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present-day adherents." AB 978 defines

them as “Specified sacred or ceremonial objects which are needed by the culturally affiliated tribe,” describing a category vastly broader than NAGPRA envisions and would permit. AB 978 differs in less dramatic but significant ways in its definition of *objects of cultural patrimony* and *funerary objects*. These categories together constitute a large part of the material that is subject to repatriation. At minimum this will cause confusion because the same terms are defined differently. In practice, it will cause AB 978 to conflict with NAGPRA in many contexts that will hinder the repatriation process, neutralize the intended effect of AB 978, and produce discord between museums, agencies, scientists, and Native Americans.

Finally, it is worth noting that since the present bill uses different standards and definitions than NAGPRA *all inventories would need to be redone at enormous cost* – a conservative estimate would be several tens of millions of dollars for the state. If the bill were consistent with NAGPRA the existing federal inventories would suffice.

Conflict in Definition: Cultural Affiliation

AB 978 also differs fundamentally from NAGPRA with respect to the definition of *cultural affiliation*. As does NAGPRA, AB 978 (Section 8012e) defines *cultural affiliation* as “a relationship of shared group identity that can reasonably be traced historically or prehistorically.” However, AB 978 differs from NAGPRA by including “nonfederally recognized” Indian tribes as potential claimants. By failing to clearly define what is meant by a nonfederally recognized Indian tribe, AB 978 creates a situation that will result in confusion for museums attempting to implement the law and needless conflicts between federally recognized and nonfederally recognized tribes with competing claims. Further as in NAGPRA, under AB 978 (Section 8012e) *cultural affiliation* is established, “when the preponderance of the evidence, based on geographical, kinship, biological, archaeological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion, reasonably leads to such a conclusion.”

Unfortunately, AB 978 (Section 8014b) subsequently singles out geographical location as constituting, by itself, a reasonable basis for determining cultural affiliation: “If the geographical location of the origin of the item can be ascertained, then a reasonable belief as to cultural affiliation shall be established and evidence shall only be required in cases where there are competing claims.” This is in fundamental conflict with Section 8012e of the proposed legislation and is in fundamental conflict with NAGPRA. NAGPRA’s definition of cultural affiliation requires (1) an “identifiable earlier group,” (2) a present-day Indian tribe, and (3) a relationship of shared group identity that can be reasonably traced between them. Geographic evidence is useful only insofar as it bears on establishing this shared group identity. In relatively recent periods, geographic proximity to a modern group may have substantial value as evidence establishing shared group identity. Knowledge of historic period relationships, however, makes clear that cultural identities can change quite rapidly due to population movement, conflict, and the coalescence of once-distinct groups. As the separation in time between a present-day tribe and an earlier group increases, the ability of geographic proximity to inform on shared group identity, and hence, cultural affiliation, declines. As stated in Enclosure 3 accompanying U.S. Secretary of the Interior Bruce Babbitt’s recent decision that the remains of Kennewick Man are culturally affiliated under NAGPRA, “The existence of earlier human groups in the same geographic location as the historic period ancestors of the present-day tribes does not automatically indicate cultural affiliation between the former and the latter” (see web site <http://www.cr.nps.gov/aad/kennewick/>). *Because AB 978 makes geographical location a sufficient basis for establishing cultural affiliation, in direct conflict with NAGPRA, it will frequently be impossible to comply with both statutes.* This will bring Native Americans, museums, agencies, and scientists into conflict that did not previously exist.

Another major shortcoming of the bill is that, unlike NAGPRA, it makes no provision for cases

in which Native American human remains lack cultural affiliation, that is, cases in which the remains are culturally unidentifiable. If cultural affiliation is to be based on the weighing of evidence, then the bill must accommodate the logical, indeed likely, possibility that there will be instances where the evidence is insufficient to make a determination. Again, this omission would certainly become the source of confusion and conflict with NAGPRA.

Conflict of Definition: Preponderance of Evidence

AB 978 and NAGPRA differ still further in defining the process through which *preponderance of evidence* is established. In disputes between a tribe requesting repatriation of objects from an individual, agency, or museum, AB 978 (Section 8016g) requires that the tribe's evidence of cultural affiliation be presumed valid and resolves any ambiguities or uncertainties in favor of the tribe. Section 8014b similarly requires that evidence presented by a tribe be presumed to establish cultural affiliation, and that agencies or museums prove beyond a reasonable doubt that the tribe's evidence is incorrect. Both sections are in direct conflict with NAGPRA's standard of proof.

Under NAGPRA, oral tradition, other forms of tribal knowledge, and all other categories of evidence are weighed and evaluated to establish a preponderance of evidence bearing on the actual relationships between an earlier group and a present-day tribe. SAA acknowledges the essential importance of oral tradition and tribal knowledge in establishing cultural affiliation, and is in full agreement with Section 8016h of AB 978 that tribal oral histories, documentations, and testimonies shall be afforded the same evidentiary weight as archaeological studies and documentation. SAA concurs with the approach in Enclosure 3 of Secretary Babbitt's Kennewick letter (cited above), which advocates "use of the oral tradition information as sources of historical information," and which points out, however, that "traditions may or may not remain stable over long periods of time." Quoting directly from Native American scholar Roger Echo-Hawk, Enclosure 3 describes an approach in which it is necessary "to evaluate the historical information in a given oral tradition by measuring its content, where possible, against other relevant data about the past" (Echo-Hawk 2000, *American Antiquity* vol. 65, p. 272). This does not single out oral tradition and other forms of tribal knowledge for special scrutiny, but recognizes that these categories of evidence, like all others, are subject to evaluation. Again, these differences in definition will frequently make it impossible to comply with both AB 978 and NAGPRA, causing endless confusion and, again, bringing Native Americans, museums, agencies, and scientists into conflict.

Eligibility for Repatriation

AB 978 requires repatriation to nonfederally recognized tribes where a relationship of shared group identity can be demonstrated between such tribes and an identifiable earlier tribe or group. This is direct conflict with NAGPRA, which permits repatriation only to federally recognized tribes.

All parties to NAGPRA agreed that this restriction was problematic, since many nonfederally recognized groups throughout the United States, and especially in California, can demonstrate a shared group identity with an identifiable earlier group. Unfortunately, the authors of NAGPRA were unable to solve the very thorny problem of how to go about identifying these nonfederally recognized groups, and thus resorted to the imperfect solution of restricting repatriation only to federally recognized groups. AB 978 delineates no process for identifying appropriate nonfederally recognized groups, yet requires repatriation to them. Because of this, AB 978 and NAGPRA will be in almost constant conflict. And despite its apparent attempt to address the interests of all Indian groups, AB 978 proposes a review board dominated by federally recognized tribes that excludes nonfederally recognized tribes from voting.

Conservative estimates suggest that half of California is properly within the sphere of these nonfederally recognized tribes. By including these tribes in the repatriation process ambiguously and without defining a reasonable process for identifying them, AB 978 will create severe confusion and conflict within the Native American community itself and between Native Americans, museums,

scientists, and agencies. NAGPRA restricts itself to federally recognized tribes in part because Congress thought it only fair to museums *and* Native Americans that the universe of potential claimants be known to prevent interlopers from making the repatriation process unworkable.

Repatriation of Traditional Objects

AB 978 requires the repatriation of *traditional objects*, defined as, “Any object or item deemed by the affiliated tribe to be integral to their customs and traditions” (Section 8012f.4). This definition is so broad that it could be construed to include almost any object currently housed in a museum, regardless of its original use or its original maker’s intentions. In the absence of a more precise or restrictive definition, this provision could be easily abused and has great potential for creating conflict. Stewardship of collections for the purpose of creating and advancing knowledge for present and future generations is a public trust responsibility that is basic to the mission of museums throughout the United States. AB 978 would permit the wholesale withdrawal of Native American collections from museums, and, thus, from the public trust. It is obvious that this would irreparably impair the ability of museums to inform California’s citizenry about the cultural heritage of their state. It is perhaps less obvious, but equally true, that the piecemeal withdrawal of traditional objects as defined in AB 978 would destroy the integrity, and thus the interpretive and scientific value, of collections whose various parts must be viewed as a whole to be understood properly.

Because NAGPRA was constructed as a compromise between the interests of Native Americans, scientists, and the public, it limits repatriation to human remains, funerary objects, objects of cultural patrimony, and sacred objects. NAGPRA holds that these categories are of such overriding importance to Native Americans that the interests of scientists and the public, though substantial, should be set aside. In requiring the repatriation of an additional category so broadly defined as “traditional objects,” AB 978 at once diminishes the special importance of human remains, funerary objects, objects of cultural patrimony, and sacred objects to Native Americans and ignores the educational and scientific value of the traditional objects that museums preserve and protect as a trust responsibility.

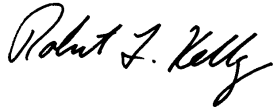
Summary

The major difference between NAGPRA and AB 978 is that NAGPRA seeks common ground and compromise between the interests of Native Americans, museums, scientists, and the public, while AB 978 as presently written does not. The Native American community, the museum community, the scientific community, and the public at large each have a major stake in cultural resources. Scientific interests in human remains and material culture derive from their ability to tell us about our Nation’s and our human heritage. There is enormous public interest in understanding the original peopling of the Americas and the history of Native American groups. Important medical research will continue to benefit from the study of ancient human remains. The study of Native American human remains and culture, along with those from cultural groups within and beyond the Americas, is essential to these and many other important efforts. SAA does not suggest that public interests necessarily outweigh those of tribes. Rather, since 1986, it has been SAA’s position that Native American interests in repatriation must be taken into account and balanced with public interests in scientific study. The weight accorded traditional Native American interests should depend on the strength of their relationship to the human remains and the weight accorded scientific and museum interests should depend upon the ability of the remains to contribute to scientific and public understanding of the past. SAA supported NAGPRA in 1990 and has continued to support NAGPRA because we believed that it achieved a reasonable balance of competing interests.

NAGPRA was obviously intended to address important concerns of Indian people, but it did so with a clear recognition that museum, scientific and public interests were also at stake and could not be ignored. It was neither Indian legislation, museum legislation, nor scientific legislation — it was

compromise legislation. AB 978 will re-divide and separate the diverse communities that NAGPRA brought together in reconciliation. Our national experience has shown that a lasting solution to the complex and emotionally charged problem of repatriation can only come through the kind of delicately balanced and carefully considered compromise represented by NAGPRA. For this reason, SAA is strongly opposed to AB 978 as currently written. SAA urges that AB 978 be revised to make it compatible with NAGPRA.

Sincerely,

A handwritten signature in cursive script that reads "Robert L. Kelly". The signature is written in black ink and is positioned below the word "Sincerely,".

Robert L. Kelly
President