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SENATE

{ REPORT
104-350

TO AMEND THE NATIONAL MUSEUM OF THE AMERICAN INDIAN ACT TO MAKE IMPROVEMENTS IN THE ACT, AND FOR OTHER PURPOSES

AUGUST 2, 1996.—Ordered to be printed

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

REPORT

[To accompany S. 1970]

The Committee on Indian Affairs to which was referred the bill (S. 1970) to amend the National Museum of the American Indian Act to make improvements in the Act, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSES

The purpose of S. 1970 is to make certain amendments to the National Museum of the American Indian Act of 1989, and for other purposes.

BACKGROUND

On July 18, 1996, Chairman McCain, joined by Senators Inouye, Thomas, and Campbell as original cosponsors, introduced S. 1970, a bill to make certain amendments to the National Museum of the American Indian Act. This legislation amends the Act to apply the same requirements for the identification and repatriation of Native American unassociated funerary objects, sacred objects, and objects of cultural patrimony to the Smithsonian Institution that are currently applied to other museums under the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*).

S. 1970 was developed at the request of the Smithsonian Institution and is entirely consistent with the Smithsonian's current administrative practices. The bill includes provisions that incorporate

the Smithsonian's administrative deadline of December 31, 1996 for the completion of written summaries of all unassociated funerary objects, sacred objects, and objects of cultural patrimony in its possession. The bill also adopts the Smithsonian's administrative deadline of June 1, 1998 to complete an inventory of Native American human remains and funerary objects in its possession.

The possession of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony by various Federal agencies, museums, and private collectors has been a very contentious issue for Indian tribes, tribal organizations, and Native Hawaiian organizations for many years. Native Americans, not unlike other Americans, feel that the remains of their ancestors and the objects buried with them are sacred and rightfully belong under the protection and control of their descendants. Under the National Museum of the American Indian Act (20 U.S.C. 80q, *et seq.*), the Congress established a process for the inventory, identification, and repatriation of Native American human remains and associated funerary objects. This Act was a critical first step in facilitating thoughtful dialogue between museums and Indian tribes regarding the proper treatment of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony. Under this Act, the Smithsonian Institution was the first museum to establish a process for the repatriation of Native American human remains and funerary objects, which vested certain statutory rights in Indian tribes and their members.

Since the passage of the Act, the Smithsonian Institution has worked to meet the mandates of the National Museum of the American Indian Act regarding the repatriation of Native American human remains and funeral objects. In certain areas the administrative policies of the National Museum of the American Indian and the National Museum of Natural History exceed the requirements of the National Museum of the American Indian Act. Since 1991, the Museum of Natural History has adopted the categories and repatriation provisions described in Native American Graves Protection and Repatriation Act as museum policy. Under that policy, the Museum has inventoried a substantial part of its collection of Native American human remains and returned hundreds of human remains to Native American communities.

To date, the Museum of Natural History has repatriated 1,500 Native American human remains and is in the process of repatriating the remains of another 1,000 Native American individuals. In addition, the museum has provided basic inventory data to more than 30% of the eligible Indian tribes and tribal organizations in the United States. Some recent examples of the successful repatriation of Native American human remains and funerary objects by the Museum of Natural History include the return of 14 individuals to the Cheyenne and Arapaho tribes in Oklahoma, which included several victims of the Sand Creek Massacre, the return of 19 individuals to the Northern Cheyenne tribe of Montana, the return of Chief Smoke of the Oglala Lakota to his family in South Dakota, and the return of Chief Puffing Eyes of the Two Kettles Lakota to his family in South Dakota. In addition, the Museum has a number of cases in progress involving the Makah Tribe of Washington, the Arapaho Tribes of Wyoming and Oklahoma, the Confed-

erated Tribes of Warm Springs of Oregon, the Shoshone-Bannock Tribe of Idaho, the San Carlos Apache Tribe and the Yavapai-Apache Tribes of Arizona, the Devil's Lake Sioux of North Dakota and the Yankton Sioux Tribe of South Dakota, as well as tribes located in Oklahoma, Washington, Oregon, Alaska, Montana, North Dakota, Minnesota, Michigan, Connecticut, Arizona, and California.

The National Museum of the American Indian has developed a substantive repatriation policy that is independent of the policies of the Museum of Natural History and that exceeds the requirements of the Native American Graves Protection and Repatriation Act in order to facilitate the identification and repatriation of any Native American human remains and objects in its collections. Under its 1991 repatriation policy, the National Museum of the American Indian has prepared and distributed both the summary of ethnographic materials and the inventory of human remains and funerary objects within its entire collection to all of the 557 Federally-recognized Indian tribes. The Museum's summary exceeds the requirements of Native American Graves Protection and Repatriation Act by not only including sacred objects and objects of cultural patrimony, but it also includes religious and ceremonial objects, and objects that are owned in common.

S. 1970, THE NATIONAL MUSEUM OF THE AMERICAN INDIAN ACT
AMENDMENTS OF 1996

S. 1970 would require the Smithsonian Institution to apply the same method for repatriation of Native American unassociated funerary objects, sacred objects, and objects of cultural patrimony and the same standard for repatriation that are in the Native American Graves Protection and Repatriation Act. In addition, the bill includes language, requested by the Smithsonian Institution, to permit the Smithsonian Institution to exceed the requirements of the Act. The bill amends the National Museum of the American Indian Act to add definitions for the terms "inventory" and "Native Hawaiian Organization." Finally, the bill increases the membership of the special committee for repatriation by adding two traditional Indian religious leaders. It is not the intention of the Committee that the expansion of the Special Committee by two members and its additional responsibility for unassociated funerary objects, sacred objects and objects of cultural patrimony in the Museum of Natural History should alter or interfere with the sole authority of the Board of Trustees of the National Museum of the American Indian concerning repatriation activities of that museum. The Committee does not intend the expansion of the Special Committee to result in a reduction in the work effort of the Museum of Natural History to carry out its responsibilities under the Act. Finally, the Committee recognizes that the additional responsibilities authorized under these amendments will require additional resources to continue the significant progress that has been made in the repatriation of Native American human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony.

S. 1970 is intended to amend the National Museum of the American Indian Act to ensure that the requirements for the inventory,

identification, and repatriation of Native American human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony in the possession of the Smithsonian Institution are being carried out in a manner consistent with the Native American Graves Protection and Repatriation Act.

LEGISLATIVE HISTORY

S. 1970 was introduced by Senator McCain, for himself and Senators Inouye, Thomas, and Campbell, on July 18, 1996, and was referred to the Committee on Indian Affairs.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on July 24, 1996, the Committee on Indian Affairs ordered the bill reported without amendment, with the recommendation that the Senate pass the bill as reported.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section cites the short title of the Act as “the National Museum of the American Indian Act Amendments of 1996”. It also provides that any reference to amendment or repeal in this Act shall be considered to be references to the provisions of the National Museum of the American Indian Act. (20 U.S.C. 80q, *et seq.*)

SECTION 2.—BOARD OF TRUSTEES

This section amends section 5 of the National Museum of the American Indian Act by changing the reference to “an Assistant Secretary” of the Smithsonian Institution to “a senior official” of the Smithsonian.

SECTION 3.—INVENTORY

This section amends section 11 of the National Museum of the American Indian Act to require the inventory conducted by the Secretary of the Smithsonian Institution to be completed not later than June 1, 1998. It also defines the term “inventory” as it is used in the Act.

SECTION 4.—SUMMARY AND REPATRIATION OF UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY

This section amends the National Museum of the American Indian Act by establishing a new section 11A. Section 11A requires the Secretary of the Smithsonian Institution to develop a written summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony held by the Smithsonian, based upon available information and consistent with the requirements of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3004). The summary must be completed by December 31, 1996.

Subsection (b) requires the Smithsonian Institution to expeditiously return any Native American unassociated funerary object, sacred object, or object of cultural patrimony where the cultural affiliation has been established in the summary prepared by the

Smithsonian, or where a requesting Indian tribe or Native Hawaiian organization can show its cultural affiliation with the items by a preponderance of the evidence, and the requesting Indian tribe or Native Hawaiian organization, or by a member of the tribe or organization. The Smithsonian shall expeditiously return any such object to any direct lineal descendent of the owner of the object.

Subsection (c) sets out the standard of repatriation under the Act. It provides that 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 and can make a prima facie showing that the Smithsonian Institution did not have the right of possession of such object, then the Smithsonian must return such object unless it can prove that it has the right of possession of such objects.

Subsection (d) provides that any museum of the Smithsonian Institution which repatriates an item in good faith shall not be liable for any claims of fiduciary duty, public trust, or violations of applicable law that are inconsistent with the provisions of this Act.

Subsection (e) provides that nothing in this Act shall be construed to prevent the Secretary of the Smithsonian Institution from making an inventory or preparing a written summary or carrying out the repatriation of objects under this Act in a manner that exceeds the requirements of this Act.

Section (f) defines the term "Native Hawaiian Organization" as the term is used in this Act.

SECTION 5.—SPECIAL COMMITTEE

This section amends section 12 of the National Museum of the American Indian Act by increasing the membership of the Special Committee to seven, including two members who are traditional Indian religious leaders.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate for S. 1970, as calculated by the Congressional Budget Office is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 2, 1996.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1970, the National Museum of the American Indian Act Amendments of 1996, as ordered by the Senate Committee on Indian Affairs on July 24, 1996. CBO estimates that enacting this bill would result in no significant cost to the federal government. Because enacting S. 1970 would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

S. 1970 would set a deadline of June 1, 1998, for completing an inventory of Indian human remains and Indian funerary objects in the possession or control of the Smithsonian Institution. The bill

also would require the Secretary of the Smithsonian to develop, by December 31, 1996, a written summary of unassociated funerary objects (objects placed with human remains at the time of burial), sacred objects, and objects of cultural patrimony held by the Smithsonian. Further, if an Indian tribe, Native Hawaiian organization, or individual could prove that any of these objects should be returned to them, the Smithsonian would be required to do so. Finally, the bill would add two members to the special committee to monitor the inventory, identification, and return of such objects. Each member receives payment from the Smithsonian for travel and transportation, as well as a daily rate of pay for each day of committee-related work. CBO estimates that these activities would cost the Smithsonian Institution less than \$250,000 in each of fiscal years 1997 and 1998, subject to the availability of appropriated funds.

This bill contains no private-sector or intergovernmental mandates as defined in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4) and would impose no costs on state, local, or tribal governments.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Rachel Robertson.

Sincerely,

JUNE E. O'NEILL, *Director.*

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI 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. 1970 will create only *de minimis* regulatory or paperwork impacts.

EXECUTIVE COMMUNICATIONS

The Committee received the following executive communication from the Honorable I. Michael Heyman, Secretary of the Smithsonian Institution regarding S. 1970:

SMITHSONIAN INSTITUTION,
Washington, DC, July 26, 1996.

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

DEAR MR. CHAIRMAN: I would like to take this opportunity to comment on S. 1970, a bill to amend the National Museum of the American Indian Act, and for other purposes. This bill will formally render the Smithsonian's repatriation activities analogous to the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §3001 et seq. The Smithsonian supports this bill as reported by the Committee.

S. 1970 is a culmination of policies and practices that have been in place for many years at the National Museum of the American Indian (NMAI) and the National Museum of Natural History (NMNH). Both museums have worked diligently to develop individual repatriation policies which parallel many of the requirements

established under NAGPRA and, in some instances, exceed NAGPRA.

As the Smithsonian has stated for the record, NMNH has adopted NAGPRA's categories and repatriation provisions as policy since 1991. Pursuant to that policy, NMNH already has inventoried a substantial part of its collections of human remains, consulted extensively with Native American Tribes, and returned hundreds of human remains. It has virtually completed its summary of ethnographic materials. This legislation sets forth in statutory language the Smithsonian's commitment to meet mutually agreed upon deadlines for completion of an inventory of human remains and funerary objects and the summary of ethnographic materials in NMNH.

NMAI already has completed and distributed to tribes a comprehensive inventory of human remains, funerary objects and ethnographic materials. In accordance with the NMAI's repatriation policy, which was passed by the Museum's Board of Trustees in 1991, the summary also includes the broader categories of religious and ceremonial objects and communally owned Native American property. This legislation specifically authorizes the National Museum of the American Indian and the Smithsonian's other museums to continue to exceed the statutory requirements of NAGPRA and the NMAI Act with respect to repatriation activities.

We welcome the Committee's interest in the Smithsonian's repatriation activities and we look forward to continuing success in our efforts to carry out the important purposes of the National Museum of the American Indian Act.

The Smithsonian supports Senate passage of S. 1970, as ordered reported.

The Office of Management and Budget advises that there is no objection to this report from the standpoint of the Administration's program.

The Administration advises that it has no objection to the submission of this report.

Sincerely,

(For I. Michael Heyman, Secretary).

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. 1970 will result in the following changes in 20 U.S.C. § 80q, *et seq.*, with existing language which is to be deleted in black brackets and the new language to be added in italic:

* * * * *

20 U.S.C. 80q-3(f)(1)

(1) Membership.

Upon the expiration of the terms under subsection (e) of this section, the Board of Trustees shall consist of—

(A) the Secretary of the Smithsonian Institution;

(B) **[an Assistant Secretary]** *a senior official* of the Smithsonian Institution appointed by the Board of Regents; and

(C) 23 individuals appointed by the Board of Regents from a list of nominees recommended by the Board of Trustees.

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20 U.S.C. 80q-9

80q-9. Inventory, identification, and return of Indian human remains and Indian funerary objects in the possession of the Smithsonian Institution.

(a) Inventory and Identification.

(1) The Secretary of the Smithsonian Institution, in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes, shall—

【(1)】 (A) inventory the Indian human remains and Indian funerary objects in the possession or control of the Smithsonian Institution; and

【(2)】 (B) using the best available scientific and historical documentation, identify the origins of such remains and objects.

(2) *The inventory made by the Secretary of the Smithsonian Institution under paragraph (1) shall be completed not later than June 1, 1998.*

(3) *For purposes of this subsection, the term “inventory” means a simple, itemized list that, to the extent practicable, identifies, based upon available information held by the Smithsonian Institution, the geographic and cultural affiliation of the remains and objects referred to in paragraph (1).*

(b) Notice in case of identification of tribal origin.

If the tribal origin of any Indian human remains or Indian funerary object is identified by a preponderance of the evidence, the Secretary shall so notify any affected Indian tribe at the earliest opportunity.

(c) Return of Indian human remains and associated Indian funerary objects.

If any Indian human remains are identified by a preponderance of the evidence as those of a particular individual or as those of an individual culturally affiliated with a particular Indian tribe, the Secretary, upon the request of the descendants of such individual or of the Indian tribe shall expeditiously return such remains (together with any associated funerary objects) to the descendants or the tribe, as the case may be.

(d) Return of Indian funerary objects not associated with Indian human remains.

If any Indian funerary object not associated with Indian human remains is identified 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, the Secretary, upon the request of the Indian tribe, shall expeditiously return such object to the tribe.

(e) Interpretation.

Nothing in this section shall be interpreted as—

(1) limiting the authority of the Smithsonian Institution to return or repatriate Indian human remains or Indian funerary objects to Indian tribes or individuals; or

(2) delaying actions on pending repatriation requests, denying or otherwise affecting access to the courts, or limiting any procedural or substantive rights which may otherwise be secured to Indian tribes or individuals.

(f) Authorization of appropriations.

There is authorized to be appropriated \$1,000,000 for fiscal year 1991 and such sums as may be necessary for succeeding fiscal years **[to carry out this section]** *to carry out this section and section 11A.*

80q-9a Summary and repatriation of unassociated funerary objects, sacred objects, and cultural patrimony.

(a) *Summary.*

Not later than December 31, 1996, the Secretary of the Smithsonian Institution shall provide a written summary that contains a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony (as those terms are defined in subparagraphs (B), (C), and (D), respectively, of section 2(3) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001(3)), based upon available information held by the Smithsonian Institution. The summary required under this section shall include, at a minimum, the information required under section 6 of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3004).

(b) *Repatriation.*

Where cultural affiliation of Native American unassociated funerary objects, sacred objects, and objects of cultural patrimony has been established in the summary prepared pursuant to subsection (a), or where a 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, then the Smithsonian Institution shall expeditiously return such unassociated funerary object, sacred object, or object of cultural patrimony where—

(1) the requesting party is the direct lineal descendant of an individual who owned the unassociated funerary object or sacred object;

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

(3) the requesting Indian tribe or Native Hawaiian organization can show that the unassociated funerary object or sacred object was owned or controlled by a member thereof, provided that in the case where an unassociated funerary object or 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.

(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 Smithsonian Institution did not

have the right of possession, then the Smithsonian Institution shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) Museum Obligation.

Any museum of the Smithsonian Institution 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 fiduciary duty, public trust, or violations of applicable law that are inconsistent with the provisions of this Act.

(e) Statutory Construction.

Nothing in this section may be construed to prevent the Secretary of the Smithsonian Institution, with respect to any museum of the Smithsonian Institution, from making an inventory or preparing a written summary or carrying out the repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony in a manner that exceeds the requirements of this Act.

(f) Native Hawaiian Organization Defined.

For purposes of this section, the term "Native Hawaiian organization" has the meaning provided that term in section 2(11) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001(11)).

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20 U.S.C. 80q-10

80q-10 Special committee to review the inventory, identification, and return of Indian human remains and Indian funerary objects.

(a) Establishment duties.

Not later than 120 days after November 28, 1989, the Secretary of the Smithsonian shall appoint a special committee to monitor and review the inventory, identification, and return of Indian human remains, and funerary objects under section 11 of this title and unassociated funerary objects, sacred objects, and objects of cultural patrimony under section 11A. In carrying out its duties, the committee shall—

- (1) with respect to the inventory and identification, ensure that fair and objective consideration and assessment of all relevant evidence;
- (2) upon the request of any affected party or otherwise, review any finding relating to the origin or the return of such remains or objects;
- (3) facilitate the resolution of any dispute that may arise between Indian tribes with respect to the return of such remains or objects; and
- (4) perform such other related functions as the Secretary may assign.

(b) Membership.

The committee shall consist of **[five]** 7 members, of whom—

- (1) **[three]** 4 members shall be appointed from among nominations submitted by Indian tribes and organizations; **[and]**
- (2) at least 2 members shall be traditional Indian religious leaders; and

[(2)] (3) the Secretary shall designate one member as chairman.

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