

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

HEARING

BEFORE THE

**COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE**

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

PUBLIC LAW 101-601

TO PROVIDE FOR THE PROTECTION OF NATIVE AMERICAN GRAVES

**APRIL 20, 1999
WASHINGTON, DC**



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NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

TUESDAY, APRIL 20, 1999

**U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
*Washington, DC.***

The committee met, pursuant to notice, at 9:40 a.m., in room 301, Senate Russell Building, Hon. Daniel K. Inouye (vice chairman of the committee) presiding.

Present: Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUE. Good morning and welcome to this oversight hearing of the Committee on Indian Affairs on the implementation of the Native American Graves Protection and Repatriation Act.

The act has its origins in a legislative proposal that was introduced in 1986 and again in 1987 by Senator John Melcher of Montana.

In February 1987, this committee held a hearing on that measure, and it was then that we learned that the Smithsonian Institution had in its possession approximately 14,500 human remains of American Indians, Alaska Natives, and Native Hawaiians. We also learned at that time that other museums and scientific institutions were also in possession of thousands of Native American human remains, associated funerary objects, sacred items, and objects of cultural patrimony.

Although the evidence presented to the committee was compelling and provided ample justification for the need to enact legislation, the American Association of Museums called upon the committee to forbear from acting so that a process of dialog could be initiated between members of the museum and scientific institution communities, and representatives of Indian country.

That national dialog did proceed, and while it did not yield proposed legislation, as some of the participants had anticipated, the parties did reach agreement on a guiding set of principles. It was those principles that served as the foundation for the act which we consider today.

Along the way there were many interesting discussions, including a struggle on the part of museums and scientific institutions to understand what might be included in the scope of what is viewed as sacred by Native religious and cultural leaders as well as tribal citizens. The concern expressed at that time was that if

Native people were allowed to determine what was sacred, they might deem everything as sacred.

I believe the first remains to be repatriated under the authority of the repatriation provisions of this act were some 200 Native Hawaiian human remains from the Smithsonian Institution. We are advised that since 1992, 400 notices of an intent to repatriate have been published in the Federal Register, covering approximately 300,000 funerary objects, 300 to 400 sacred objects, and 100 to 200 objects of cultural patrimony. In addition, out of the approximately 200,000 Native American human remains, 14,000 have been repatriated.

It would appear that the act, on the whole, is working. But we also know that there have been challenges encountered in the implementation of the act, and we are here this morning to develop a better understanding of those challenges so that we may determine whether there is a need for adjustments in the manner in which the law is being administered, or whether they may require amendment.

[Public Law 101-601 follows:]

PUBLIC LAW 101-601—NOV. 16, 1990

**NATIVE AMERICAN GRAVES
PROTECTION AND REPATRIATION
ACT**

104 STAT. 3048

PUBLIC LAW 101-601—NOV. 16, 1990

Public Law 101-601
101st Congress

An Act

Nov. 16, 1990

[H.R. 5237]

Es

To provide for the protection of Native American graves, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Native American Graves 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

Native
American
Graves
Protection
and
Repatriation
Act.
Hawaiian
Natives.
Historic
preservation.
25 USC 3001
note.
25 USC 3001.

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. Such term does not include the Smithsonian Institution.

(5) "Federal lands" means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971.

(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" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(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. Such term does not include the Smithsonian Institution or any other 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 as 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 unassociated 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, unless the phrase so defined would, as

applied in section 7(c), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects 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.

(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) 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.

25 USC 3002.

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 judgment of the Indian Claims Commission or the United States Court of Claims 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.

Claims.

Regulations.

(b) **UNCLAIMED NATIVE AMERICAN HUMAN REMAINS AND OBJECTS.**—Native American cultural items not claimed under subsec-

tion (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, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971, the appropriate corporation or group. 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. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(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:

“§ 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 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.”

(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.*”

Museums.
25 USC 3003.

SEC. 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.

Federal
Register,
publication.

(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.

25 USC 3004.

(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.

Museums.

(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.

25 USC 3005.

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 the summary pursuant to section 6, 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.

25 USC 3006.

(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) upon the request of any affected party, reviewing and making findings related 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) Any records and findings made by the review committee pursuant to this Act relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 15 of this Act.

(e) 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.

(f) 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.

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

(1) establish such rules and regulations for the committee as may be necessary, and

Regulations.

(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

(h) **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.

(i) **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.**—Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

Museums.
25 USC 3007.

(b) **AMOUNT OF PENALTY.**—The amount of a penalty assessed under subsection (a) shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors—

- (1) the archaeological, historical, or commercial value of the item involved;
- (2) the damages suffered, both economic and noneconomic, by an aggrieved party, and
- (3) the number of violations that have occurred.

(c) **ACTIONS TO RECOVER PENALTIES.**—If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

Courts.

(d) **SUBPOENAS.**—In hearings held pursuant to subsection (a), subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

SEC. 10. GRANTS.

25 USC 3008.

(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.

25 USC 3009.

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, or 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.

25 USC 3010. SEC. 12. SPECIAL RELATIONSHIP BETWEEN 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.

25 USC 3011. SEC. 13. REGULATIONS.

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

25 USC 3012. SEC. 14. AUTHORIZATION OF APPROPRIATIONS.

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

25 USC 3013. SEC. 15. ENFORCEMENT.

Courts.

The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

Approved November 16, 1990.

LEGISLATIVE HISTORY—H.R. 5237.

HOUSE REPORTS: No. 101-877 (Comm. on Interior and Insular Affairs).
CONGRESSIONAL RECORD, Vol. 136 (1990):

Oct. 22, considered and passed House.
Oct. 25, considered and passed Senate; passage vitiated.
Oct. 26, reconsidered and passed Senate, amended
Oct. 27, House concurred in Senate amendments

Senator INOUE. I would like to welcome our witnesses here today and I look forward to your testimony. For the first panel, may I call upon Sherry Hutt of Maricopa County Superior Court of Phoenix, AZ and Rosita Worl, Interim Executive Director, Sealaska Heritage Foundation of Juneau, AK.

STATEMENT OF SHERRY HUTT, MARICOPA COUNTY SUPERIOR COURT, PHOENIX, AZ

Ms. HUTT. Good morning, Senator Inouye. Thank you for the opportunity to come and speak to you about NAGPRA from my vantage point as a writer and lecturer, which has given me the opportunity to learn about the spectrum of views of tribal people, museums, and scientists across the country.

There are two aspects of NAGPRA which should underscore all of our discussions. First, this law was intended to extend equal protection of property rights to Native Americans, and it does just that. It is consistent with well-settled property rights principles which can be applied to most of the issues that have become contentious and that we may discuss today.

This law is internally consistent and unambiguous and as such needs very little tinkering. Any amendment which would upset this balance should be avoided.

This is not a law that pits Native Americans against science. Rather, it is one that acknowledges the property rights of previously disenfranchised groups. The second aspect of this law is that it presents a process to open communication to accomplish repatriation. Where that process runs into snags the review committee is provided for in the law to deal with those disputes.

I want to now briefly address some of the current issues that have been identified that have brought us all here today.

The first issue, which I believe is a key to resolving many of the other issues has been termed the redelegation of authority to implement the act. I have addressed this at length in my written statement.

The national implementation of NAGPRA cannot remain in its current place. It must be housed in a neutral habitat. National implementation as a unit includes drafting regulations, administering grants, publication of required notices, staff support to the review committee, civil penalty enforcement, and to foster use and education of the law.

The placement of NAGPRA implementation in an office devoted to furthering science has compromised its neutrality and has caused a high turn-over rate in staff. The NAGPRA team leader has forestalled much of this controversy by finessing agreements between the parties where he could find commonality and by stressing understanding of the law.

To ensure implementation of this law without disruption, change of location of the team must occur soon and it can occur quite easily. No new agency is required, no new personnel. Rather, this would be an action of the Secretary of the Interior to resite the group.

When we look at some of the other issues as to inventories—there is a question as to whether the National Park Service has abused its discretion in granting extensions to museums for inven-

tory completion—this issue is tied to that apparent conflict of interest, much of which could be solved by the resiting of the team.

As to evidentiary problems, this is one of the very few areas where I think amendment might be appropriate. I agree that the Freedom of Information Act can and has compromised consultation to achieve the goals of NAGPRA. We have seen one pueblo abandon a claim rather than desecrate a religious practice by making it public. In fact—if I might give to your staff—I have prepared a potential amendment to the law with regard to FOIA.

As to the evidentiary part of the law, NAGPRA allows claims to be supported by a variety of types of competent evidence that follows the civil standard of proof. Any amendment to that evidentiary standard I think would be ill-advised because it fits so neatly right now with what we know of the standards of civil proof in law.

As to the publication of notices, the law does not give the administrator of NAGPRA the editorial discretion over the publication of notices. Again, moving the NAGPRA team to a neutral location would resolve what has been perceived as a problem. Funding for a full-time staff member to actually publish the notices might facilitate this happening on a speedier basis.

As to cultural affiliation studies, NAGPRA is silent on study. It is not intended to be an excuse for study or to require study. The whole idea of a peer review group that has come up is one that concerns me because it would seem to invade the museum official or land manager function. We do not have precedent for invading that kind of managerial discretion. We do not need peer approval prior to making a decision. Rather, once a determination of cultural affiliation has been made by a museum official or Federal land manager, if there is a dispute, the elegance of this law is that the review committee, in their collective wisdom, can deal with that. The law is so internally elegant in the way that it deals with this process.

As to NAGPRA regulations dealing with culturally unidentified remains, that is something that I believe needs to be done and will be done. I think many of these other disputes and the questions as to the position of the NAGPRA team has detracted from the energies that might be applied to that necessary regulation that needs to be developed.

One thing that you might consider is that funerary objects known to be associated with individuals—where those individuals are unidentified because they are not culturally affiliated with a group having standing—the burial items should go with the individual with whom they are associated. That is consistent with property law.

As to grants, there have been some thoughts that the grants have been dealt with unfairly. I do not think the statistics on grants would prove that true. In fact, they have been handled rather equitably. In the beginning, the balance may have been in favor of museums struggling to comply with the law, and that balance has shifted to tribes struggling to deal with the repatriation and the logistical aspects of that.

On civil penalties, there has been a lack of civil penalty enforcement. Funding is needed for personnel in the NAGPRA implemen-

tation team to field complaints, monitor compliance, and prepare civil actions to be prosecuted by attorneys in the Office of the Solicitor. An amendment could be considered which would allow for any funds obtained as civil penalty assessments to be retained by the NAGPRA team to fund their enforcement activities.

Finally, there was an issue as to one lawsuit involving what has become known as Kennewick Man. There is no private right to study on the Federal land and only those who meet NAGPRA requirements have standing to claim those remains. I am hopeful that this matter will be resolved in court in a manner that is consistent with this law. You have given the country a consistent law, a necessary law, and one that is balanced. Any amendments to this law should be heavily considered before unbalancing what is currently a very fine and workable law.

Thank you. I reserve any other comments if you have questions. [Prepared statement of Ms. Hutt appears in appendix.]
Senator INOUE. May I now call upon Dr. Worl.

STATEMENT OF ROSITA WORL, INTERIM EXECUTIVE DIRECTOR, SEALASKA HERITAGE FOUNDATION, JUNEAU, AK

Ms. WORL. Thank you, Senator and Dr. Zell.

My name is Rosita Worl and I am currently serving in the capacity of Interim Executive Director of the Sealaska Heritage Foundation. The Foundation's membership includes the Board of Directors of Sealaska Corporation, which is the regional Native corporation for Southeast Alaska and was created under the Alaska Native Claims Settlement Act of 1971. Sealaska is also recognized as a tribe for the statutory purposes of NAGPRA.

Senator I also do sit on the Board of AFN, where NAGPRA is often discussed.

I have been involved with NAGPRA as a board member of the National Museum of American Indians and as a consulting tribal anthropologist to the Central Council of Tlingit and Haida Indians of Southeast Alaska. I have witnessed the benefits of NAGPRA through my participation in ceremonial activities in which cultural objects returned under NAGPRA to clans in Southeast Alaska have been used as they were originally meant to be.

On occasion I have written and discussed various aspects relating to the implementation of NAGPRA with our Alaskan congressional delegation. Thus I was very pleased when I learned that the Committee on Indian Affairs would be holding a hearing on the implementation of NAGPRA, and I am very honored to be here today.

In the interest of time, I will offer a few recommendations. However, before I begin my discussion, I would like to note for the record that Sealaska concurs in concept with the nine recommendations that were outlined in a memorandum dated April 14, 1999 to the chairman and vice chairman of this committee from the minority committee staff in reference to this oversight hearing. I would especially emphasize our wholehearted support for the recommendation to replace the NPS with another administering agency that would not have the inherent conflict of interest which exists in the Office of Archaeologist with the National Park Service. I have written to my delegation about this issue and I know that this specific concern has emerged throughout Indian country. I would

also like to concur with the observations offered so eloquently by my colleague, Sherry Hutt.

My first recommendation is to implement an oversight process that ensures that museums and other entities act on repatriation claims on a timely basis. I do not know if this is the function of the committee or who has this function, but my observation is that it has not been working.

To illustrate the basis of this recommendation, I would like to cite one example which substantiates this recommendation. We have one repatriation claim for over 40 objects of cultural patrimony from the University of Pennsylvania Museum of Archaeology and Anthropology that was initially submitted in September 1995. The clan submitted information to validate its claim. The existence of clans among the Tlingit and their patterns of communal ownership of property are well-established within the ethnographic literature and several legal cases, including the most recent and widely-published *Whale House* decision in the Chilkat Tribal Court.

This repatriation petition was modeled on similar information that other museums have accepted and honored in their return of objects to clans. The University of Pennsylvania Museum, in this instance, continued to request information, including the use and origin of the objects. They then wanted tapes from clan elders. In the third year of the process, another tribe within the community made a claim for the same objects. The first claimant responded by submitting a list with the signatures of all of its members and a resolution stating that the clan would remain with the first claimant. We think that this should have settled the issue.

Although this repatriation was clouded with the conflicting claims, the museum made no attempt to resolve the issue and instead continues to ask for even more information.

We understand that this collection is the centerpiece of the University of Pennsylvania exhibits and the clan views the museum's continuing questions and lack of action over a 4-year period as a delaying tactic.

Recommendation No. 2: Congress should appoint a committee of Native American religious leaders and scholars and representatives from the academic community to define sacred, taking into consideration the social and cultural changes within Native American tribes and the phenomenon of religious renewal. I know the committee, in development of the act, has spent a lot of time on this issue. However, I continue to believe that it is going to continue to be an issue of conflict. I think that we should deal with it right up front rather than have each and every tribe having to redefine sacred, and then how sacred works with religious renewal.

I think there is a problem in not tying these two concepts together in the law well in such a way that I think we are going to continue to have conflicts. Because of the changes that Native Americans have experienced, their religious practices as they once practiced them—before the changes—have changed as a result of the many and dramatic cultural changes. However, I think the core religious beliefs exist, but I think we are going to find some changed situations. My observation is that the museums are going to try to hold tribes to the practices as they were practiced before any of the disruption in the Native community.

Recommendation No. 3: Congress should adopt a policy to ensure the prompt reburial of culturally unidentifiable human remains—the prompt reburial of culturally unidentifiable human remains. I am under the assumption that the evidence that will be required to substantiate claims for culturally unidentifiable human remains will be onerous, costly, and time-consuming. It is my recommendation that Congress should adopt a policy that would automatically return and rebury culturally unidentifiable remains to the site from which the remains were taken. The same sacred and spiritual beliefs surrounding culturally unidentifiable remains apply as they do to culturally identifiable remains.

I am sorry, Senator. I am having a hard time with all these words. It reminds me of the first time when I was trying to explain repatriation to our elders and clan leaders. I had them say “repatriation” continuously. I am having the same problem with this “culturally unidentifiable remains”.

This country has honored all unidentifiable remains of military personnel symbolized so well by the tomb of the unknown soldier and buried them. I believe unknown Native American human remains deserve the same treatment and respect.

Recommendation No. 4: Ensure that all museums and entities which receive Federal funding comply with NAGPRA. We recently learned through a news article in early April that the Stockton Parks and Recreation Department had a Tlingit 46 red cedar totem pole. It had decided to remove, cut into manageable pieces, and to send it to a landfill. We had received no notice from the Parks Service until we found out about it in the newspaper and we immediately contacted them. I do not know how often this occurs elsewhere, but I think there should be some mechanism to ensure that this kind of incident does not happen again.

Recommendation No. 5: Congress should expand NAGPRA to the international level in concert with Federal aid packets to other nations. We have heard disturbing news that Russia has been selling ethnographic pieces from museums to private collectors. Although this information is unsubstantiated, we have reason to believe it is probable.

As you are aware, Russia presumed to own Alaska prior to the United States. During their tenure in Alaska, its representative removed many significant ethnographic objects from Alaska, which we believe should also be returned.

Recommendation No. 6: Amend NAGPRA to exempt private collections donated by private collector museums from repatriation claims. Though this is a very difficult recommendation for myself to make—because I would love to have the opportunity to have access to those collections as well—however, it is my thinking and from discussions I have heard from private collectors, they had once thought about donating their collections to museums, but once NAGPRA was enacted, they decided that they were not going to do that. I think these collections—I would much rather see them in public institutions than forever from the view of Native Americans and the people who need those objects.

Recommendation No. 7:—and I suppose you will hear this often—Congress should appropriate additional funding to fully implement NAGPRA, to support efforts by tribes to conserve and care

for repatriated objects—including the development of tribal museums—to support efforts by museums to engage tribes in museum programs centered on tribal collections including education about tribal collections and in museum practices to preserve and exhibit collections.

Senator I believe that NAGPRA is good public policy. I think it is good public policy that is benefitting both the Indian community and the museums as well. I think we should move forward in it. I think we are finding out that there are some changes that can be made to improve the act, some that may not necessarily require an amendment to NAGPRA, but I do also think that there are going to be some amendments required.

Thank you, Senator.

[Prepared statement of Ms. Worl appears in appendix.]

Senator INOUE. Thank you very much. I appreciate your testimony.

I especially am intrigued by the definition you have given to the act, Judge—elegant and unambiguous. Dr. Worl, I am glad that you believe that this is good public policy.

I would like to ask a few questions.

Judge I interested in your proposal that we appoint or establish an office of a prosecutor and to fund that office from moneys that might be received in enforcement actions.

I can assure you we will look into this very seriously. But where do you think this prosecutor should be located? In the Justice Department?

Ms. HUTT. Actually, I think the Office of Solicitor within the Department of the Interior might take this assignment.

What I was really speaking to is someone within the NAGPRA implementation team who would manage that kind of prosecution, sort of from the client's standpoint, who would both look for violations in an investigative vein, field complaints, and prepare these for prosecution. Then they may be prosecuted as civil actions by officers currently in the Solicitor's Office, Department of the Interior. That is what I was thinking.

So in terms of funding a position, it would be a management of litigation position to ensure that these things are being followed through on and that they are being evaluated.

Senator INOUE. You have noted in your testimony, Judge, that the National Park Service has an archaeologist with the responsibility of administering provisions of NAGPRA, but at the same time has another role of determining the cultural affiliation of objects. You suggest that these duties pose a conflict of interest. How do you propose to address this matter?

Ms. HUTT. The NAGPRA implementation team sits within the Office of Archaeology and Ethnography within the Office of the Departmental Consulting Archaeologists. That office performs many valid functions in the furtherance of science. To have the implementation team housed within that office is where the conflict exists. The only way to deal with that conflict is to take that team as a unit—almost as a line item—and move it to a neutral position, one within the Department of the Interior, but not within an office that has functions which would cause it to be in conflict. I think

the conflicts that have been discussed by some of the individuals who will testify today are very valid concerns of conflict of interest.

Senator INOUE. I suppose you do not have any idea in what bureau or department they should be placed?

Ms. HUTT. Somewhere not within science or Native American concerns. Somewhere, perhaps in museum policy, within the Department of the Interior. I believe that the Secretary needs to make a decision and to resite this in a neutral position where it can deal with policy, where it can deal with NAGPRA implementation without having the same office dealing with NAGPRA compliance also dealing with agency compliance. So it would have to be somewhere closer to the heart of the Secretary.

Senator INOUE. I can assure you that we will be looking into this matter very seriously.

Your suggestions I believe are worthy of consideration by all of us and we will do so. Thank you very much.

Ms. Worl, you have suggested that there are some museums—and you cited one of them—that may be delaying the implementation of this act by just asking question upon question, in one case for 4 years.

How do we resolve that matter?

Ms. WORL. Well, I am not certain, but perhaps with the review committee that has oversight requiring additional reports from museums outlining the receipt of the repatriation request, followed up by certain periods where they are required to report on the progress to the committee. That might be one recommendation, Senator.

Senator INOUE. There will be those in our democracy who will maintain that every effort must be made to make certain that every viewpoint is fully expressed. As a result, in our judicial system, we have appeal upon appeal. One who is found guilty of murder can guarantee himself an additional 15 years of life, or something like that.

But something has to be done because if it is an obvious ploy on the part of organizations to delay something has to be done. I can assure you that we will look into this very carefully.

On the matter of the definition of what is sacred, as I indicated in my opening statement—this has been a matter of great concern to us. What is sacred? How do you propose we define this term?

Ms. WORL. I would have to write another dissertation. Senator, I think there are many ways of interpreting it. I think a problem we are having right now is that people who are in positions of having to define sacred have a world view that is very different from that of Native Americans. I think that even the study—even those who have studied this concept are very restricted. They remain restricted or affected by their own world view. Whereas Native Americans—they also have a very different world view and conception of sacred.

I think that we need—and you need—a body to help us relook at this. Also, the other dimension that I had brought in was the issue of religious renewal because I think there have been changes in Native American religious practices that are the result of the social and cultural changes within their society.

So I see a disjuncture between the definition of sacred as the requirements that Native Americans are required to show, that this is the way it was practiced in the 1700's, but today I might practice it a little differently. So you might have an object that was used in a certain way in the 1600s that is used differently in the present-day period. And the problem with NAGPRA is that it limits or constrains to the way the practices were in the earlier period.

So that is an issue that I think we need to deal with. I think Native Americans are going to become frustrated as they are going to have to try to explain those practices and convince people that the cultural beliefs—that the ideology, that the religious beliefs—remain the same, but the practices may differ, using even the same object.

Senator INOUE. This matter that we are considering this morning was the first major item on my agenda when I assumed the chairmanship of this committee 12 years ago. At that time, I sensed that one of the major problems would be the definition of sacred because all of the attempts made by the committee and the Congress in defining this word were based upon European experiences or European standards.

It would be very simple to identify what is sacred in the Vatican or in a cathedral. But what is sacred in the Black Hills? I would hope that we will be able to get the minds of brilliant people together and come up with something that both worlds can live with. Otherwise this is going to be a cause of contention forever.

I can understand in some sense the feelings in Indian country of what could be considered sacred. But it might be very difficult to convince Europeans of that with their background and experience.

So if you or anyone here has any brilliant proposal to make on how we can address this matter, I would appreciate that very much.

Ms. Worl, you spoke of identifiable and unidentifiable cultural remains or human remains or cultural artifacts. During our consideration of this act—and you may know that the museum that we are looking forward to was given birth because of this matter—as a naive chairman when I learned that there were 14,500 human remains at the Smithsonian, my first question was, Where did they come from? The bulk of it came from the Army. They were collected by soldiers on the field, sometimes fresh from the battlefield. So they were sent to Washington with flesh remaining on them. They were not identified as being Cheyenne or Rosebud or Navajo. They came from this Indian territory.

We are told that as a result, most of the remains that are now in green boxes at the Smithsonian are unidentifiable. So at that time I proposed that we build a grand monument in the center of the national mall, a mausoleum, to provide a permanent resting place for these unidentifiable remains.

But the reaction from Indian country was not what I anticipated. Many tribal leaders and religious leaders very seriously came up and said, "You cannot do that because in my tribe we do not bury the deceased, we place them above ground." Another would say, "In my tribe we do something else." Some Indians would say that they do not want the remains of their people mixed up with the remains of certain other Indian tribes.

So we abandoned that and developed this concept of a living memorial which would also serve as a museum.

How would you propose that the Government of the United States provide the final resting place for these unidentifiable remains? We understand that there are thousands of them.

Ms. WORL. Senator, I would offer two things. I would recommend that they be returned to the location from which they were taken, if that record is there.

Senator INOUE. The only trouble is that they do not know where most of them came from. They may only know that they came from a geographic area, which may cover a territory as large as the Louisiana Purchase.

Ms. WORL. I would suggest that we could do some historical research to find out what wars were going on, what battles were occurring at which time. I think you could do a historical review and try to at least get a general area where the human remains were taken.

The point that I am trying to make is that the same soldiers that were fighting in those fields—if they were American soldiers, they were buried. If they were Native American soldiers, they were brought to the Smithsonian, or elsewhere. My recommendation is to have them returned to those sites.

Senator INOUE. I am with you.

Ms. WORL. If possible. If we are able to learn through the historical records. If not, with my recommendation I am trying to avoid the long studies that have been done on human remains. I am trying to avoid the Kennewick Man. And I am just saying that the overarching policy should be to return the human remains somewhere home.

Senator INOUE. I would like to thank both of you for your obviously well-researched statement and well thought-out recommendations. I can assure you that I will recommend to the committee that every recommendation be seriously considered. And thank you, Judge, for calling our act elegant.

Ms. HUTT. It is, truly.

Senator INOUE. And thank you, Doctor, for considering this a good public policy.

Ms. WORL. Thank you, Senator.

Senator INOUE. Thank you very much.

Senator INOUE. Now may I call upon the second panel, the Chairman of the Three Affiliated Tribes of the Fort Berthold Reservation of North Dakota, Tex Hall; a member of the Board of Trustees of the Confederated Tribes of the Umatilla Reservation of Oregon, Armand Minthorn; a member of the Rosebud Sioux Tribe of South Dakota, Robert Gough; and the Vice President of the National Congress of American Indians, Ernie Stevens, Jr.

Gentlemen, welcome. May I first proceed by calling upon Chairman Hall?

STATEMENT OF TEX HALL, CHAIRMAN, THREE AFFILIATED TRIBES, FORT BERTHOLD RESERVATION, NEW TOWN, ND

Mr. HALL. Good morning, Senator Inouye.

[Remarks given in Native tongue.]

That is your name in our language. Our tribe gave you that name, "One who helps people." I greet you as a relative of our tribe, on behalf of the Mandan, Hidatsa, and Arikara Tribes.

Senator Inouye, I am also the chairman of the Aberdeen Area tribes, which is 17 tribes of North Dakota, South Dakota, and Nebraska, and I represent over 200,000 Native Americans today. I present my testimony on behalf of all those ancestors whose remains still to this day sit on shelves in museums and universities across this country. I want to express my deep concerns regarding the implementation of the Native American Graves Protection and Repatriation Act, otherwise known as NAGPRA.

Since 1985, the Aberdeen Area tribes have been active in the repatriation and reburial of our common ancestors. We brought home and buried more than 2,000 of our ancestors in 1989 alone. Since the inception of NAGPRA law, we have brought home an additional 3,000 of our relatives along with their personal burial property. We have reburied them and returned them to our Mother Earth so they may rest in peace.

We believe our ancestors are suffering. We believe their souls cannot rest. We cannot rest and will not rest until we have brought each and every one of our people home and given them a decent and dignified burial. It is their right.

Tribes from all across this Nation, Senator Inouye, have worked in unity for the passage of NAGPRA along with yourselves so that their ancestors and sacred objects would be returned to us. Yet since 1990 we have watched the steady erosion of the NAGPRA protections granted to tribes. We have followed the activities of the NAGPRA review committee operate on a meager budget. We have spent thousands of dollars sending representatives to NAGPRA meetings where their concerns and questions were ignored and minimized by the committee.

We watched as NAGPRA deadlines for Federal agencies, museums, and universities came and went. We watched as the review committee granted one extension after another to these agencies. We watched as the same committee invented repatriation requirements for tribes. We also stood behind and beside the Minnesota tribes as they sought to obtain written permission from a long list of other tribes before they could bring their relatives home.

They had the full support of the State of Minnesota in their repatriation efforts. Even so, they were delayed for almost a year while they sought to fulfill this extra demand by the review committee.

Four distinct categories of unaffiliated human remains were created by the NAGPRA review committee at their June 1998 meeting. Two of the categories discuss archaeological populations. The committee then attempts to classify whether these unaffiliated human remains are part of archaeological population which is extinct or whether they have living descendants. If it is determined by the review committee that there are no living descendants, science will then be allowed to carry out their experiments on our ancestors.

Senator Inouye, we believe that all unaffiliated human remains taken from our collective homelands are our ancestors. We believe the disposition of these old ones is subject to NAGPRA law. We firmly believe we should be allowed to bring our relatives home,

rebury them, and reunite them with our Mother Earth, where they may finally rest in peace.

When the Federal Register requested comments on the published recommendations for the disposition of our relatives on these so-called unaffiliated remains, our hearts were happy. Under these recommendations, decisions for repatriation or burial will be left in the hands of intertribal regional coalitions, whose joint claims would be based upon their collective aboriginal homelands. But apparently this was not to be, for now we hear talk from the Department of Interior of brokering a compromise between science and tribes.

Members of the committee, these unaffiliated remains are our ancestors, our relatives, and there will be no compromise from tribes on this issue. Tribes can work together. Joint intertribal claims are provided for in the law. To date, we have completed at least six joint intertribal claims and reburial.

Let me list a few incidents which show how the NAGPRA law needs to be changed and corrected.

No. 1, there was a 1995 memorandum of understanding between the Great Plains Region of the Bureau of Reclamation and the Smithsonian. This MOU purports to outline procedures for the transfer of our ancestors and their personal property from the Great Plains Region to the Smithsonian Institute. NAGPRA states that all Federal agencies must repatriate Native remains excavated from lands they manage and which are funded with Federal dollars—no exceptions. This MOU was signed post-NAGPRA. Tribes were not consulted. The Smithsonian has no repatriation deadline. The Smithsonian has no restriction on scientific studies.

This concerns us. The Smithsonian Museum already holds many of our relatives captive in their repositories. The Missouri River survey was an enormous archaeological project carried out with Federal dollars on Federal lands. The remains of many of our ancestors were moved to the Smithsonian and other museums across this country for study during this project and they remain there still. The homelands of the Three Affiliated Tribes and Standing Rock Sioux Tribes now lie beneath the waters of the Garrison dam.

We have given much already to the Missouri River Basin survey. Now we want our relatives returned home for our reburial.

No. 2, is the University of Nebraska and Smithsonian Institute—remains of a body were washed out on a creek in Nebraska. The tribes were not informed. Nebraska tribes were told remains would be buried. We believe this is not so. Remains were spirited off to the Smithsonian Institute. A University of Nebraska professor conducted invasive scientific study on our Ponca, Pawnee, Arikara, and Wichita ancestors. The same professor published his speculated findings in a professional paper entitled "In the Wake of Contact: Biological Responses to Contact."

The same professor obtained Federal grant dollars by stating he had Ponca Tribe's permission for study for the ancestral remains, which the Ponca deny. The same professor amused his students by displaying a baby's skull on his hand and making it talk. The same professor had sole access to a lab where the remains of Omaha ancestors were stored along with Taco Bell wrappers and other trash.

This teacher is telling young people that it is okay to treat our ancestors in this way. We found out because one of his students was married to a tribal person.

No. 3, a NAGPRA review board committee member refers to our ancestors as osteological collections. The same individual states, "There is nothing in the statute or regulations that would prohibit scientific research, new or ongoing, on unaffiliated remains." This is not true. The same committee member casually discusses the latest history of NAGPRA and talks about costs for molecular analyses to be done on our relatives.

The same committee member requested to do DNA research on a Canadian band from White Fish River. When he is refused, he threatens to lift the moratorium on study of their ancestors and to cut off further communication with them.

Senator Inouye, these are our ancestors and our relatives that he refers to. We are not some kind of experiment or collection. We feel extremely uncomfortable having this individual on the NAGPRA review committee and we request his immediate removal from this board.

No. 4, is the request for NAGPRA to relocate from the National Park Service to a more neutral office within the Department of the Interior. NAGPRA requires the Department of the Interior to implement provisions of the law. Interior delegated implementation responsibilities to the National Park Service consulting archaeologists. Today, administrative concerns of NAGPRA are largely concerns of archaeology rather than those for whom the act was intended.

The Hastings bill was introduced to amend NAGPRA and allow for study of unaffiliated remains. The National Park Service stated that the Hastings bill is not necessary because NAGPRA already allows for the study of unaffiliated remains. This is not true.

If the regulatory authority of NAGPRA believes that scientific study can be done on our ancestors, then we need a change, Senator. We are asking for a Federal inquiry into the activities of the NAGPRA review committee. We are asking for an investigation of the MOU between the Bureau of Reclamation and the Smithsonian Institute. And we are asking for a Federal investigation into the activities at the Nebraska State Historical Society and the University of Nebraska at Lincoln.

Senator we are ready to provide you with any information to back up what we are saying—any documentation that you may request.

Senator it has been brought to my attention that there is a resolution passed by the Native Hawaiians that you may or may not be aware of by the Hui Malama I Na Kupuna O Hawwaii Nei. This resolution cites many problem areas in the fair implementation of the act due to an inherent conflict of interest present because of the regulatory authority of the act, because of a person who is with the Department of the Consulting Archaeologists of the National Park Service and whose agency must comply with the act's requirements.

And of the many problems and frustrations we can share, the one we want to draw to your attention is a testimony given to Congress in June 1998 during a hearing regarding the Hastings bill.

As you know, this bill was introduced to amend the act to specifically allow for scientific study of our dead. Among other things that were testified, it was said that the amendment was not necessary since the act already allows for the study of our ancestors who have been placed in the category of tribally unaffiliated. Not only is this untrue, but there is nothing in the act to provide for this or any other type of study.

The last thing, Senator, I want to mention is the South Dakota Mitigation Act. I have been asked by various South Dakota tribes to make brief comments on that. As you are already aware, the South Dakota Mitigation Act was passed in October 1998. The Three Affiliated Tribes have over 700 potential sites that lie within the South Dakota area. The transfer of the lands was to be given to the State of South Dakota.

And of course, when those lands lose their Federal status, the protections of the Federal acts, such as NAGPRA, would not be beneficial for our tribes. Most of those 720 sites that we are talking about are either Mandan, Hidatsa, or Arikara. So a lot of the tribes in the South Dakota area have asked me to request that there is—well, let me just read this.

Prior to the passage of the Mitigation Act under NAGPRA, the cultural resources on these lands associated with the Mandan, Hidatsa, or Arikara are owned by the Three Affiliated Tribes and their protection is a Federal responsibility implemented by the Corps of Engineers. Section 605(a) of the Mitigation Act provides for the transfer of this land to the State of South Dakota and Section 605(h) maintains the Federal NAGPRA provisions and responsibilities are not diminished on the transferred land.

Section 605(h) conflicts with Section 605(a). The Corps of Engineers has no way to protect cultural resources on non-tribal land and non-Federal lands. The tribes have no way to enforce their ownership rights to the resources. Clarification is badly needed and the committee should hold a hearing on ways to ensure that our valuable cultural resources along the Missouri River do not lose their protection under NAGPRA because of the transfer of Federal lands to the State of South Dakota.

Senator that concludes my oral comments and I reserve any questions for later.

Thank you.

[Prepared statement of Mr. Hall appears in appendix.]

Senator INOUE. Thank you very much, Chairman Hall.

May I now call on Trustee Minthorn.

STATEMENT OF ARMAND MINTHORN, MEMBER, BOARD OF TRUSTEES, CONFEDERATED TRIBES, UMATILLA RESERVATION, PENDLETON, OR

Mr. MINTHORN. Good morning, Senator.

My name is Armand Minthorn. I am a member of the Board of Trustees of the Confederated Tribes of Umatilla. I truly appreciate this opportunity to testify on the oversight of NAGPRA today.

Today you have heard and will continue to hear about problems in the implementation of NAGPRA, funding requirements, regulations, and agency compliance. First, I would like to discuss the great strides NAGPRA has made toward assisting Native peoples

make decisions that affect the daily lives of our tribal members. Next I will discuss the problem my tribe has encountered in implementation.

I am not here today to simply point out the difficulties in implementing NAGPRA. I am also here to note the accomplishments NAGPRA has made.

NAGPRA has had the effect of recognizing the significance of tribal beliefs, not just to individual tribal members, but to the Nation as a whole. NAGPRA allowed over 500 distinct tribal cultures to retain their rights to their life ways, a life way which has been taken away by the United States Government through policies and practices for over 200 years.

Under NAGPRA, tribes not only protect the remains of our ancestors, but that by helping our ancestors we improve the well-being of our tribes and communities.

Prior to the enactment of NAGPRA, there was no process, no way tribes could protect their ancestors held by museums and agencies. Tribes were powerless to take care of our ancestors. This conduct continued even over the objections of tribes. This ignored the basic human right that tribes must have a voice in the treatment of our ancestors. NAGPRA ended this and finally established that any system which overlooked this most basic premise of human rights should not be tolerated in a society which values religious freedom and honors individual rights.

Upon enactment of NAGPRA, Senator Inouye stated that past practices toward Indian graves flagrantly violated civil rights of America and her citizens. This was powerful statement. NAGPRA is a civil rights legislation, returning rights to tribes which had been taken away since the earliest days of this Republic.

The National Park Service has been charged with implementing NAGPRA and has instituted programs which have helped tribes implement NAGPRA, including grants to tribes and museums. Grants allow tribes to effectively consult with museums and Federal agencies and pursue repatriation rather than merely being observers to the process. This consultation under NAGPRA, a formal process of negotiation, cooperation, and policy-level decisionmaking between sovereigns is a bilateral decisionmaking process which ensures effective implementation of NAGPRA.

These grants represent a powerful tool for tribes to identify the museums which have NAGPRA items and actively seek repatriation. Today, even with the important first step NAGPRA has made in recognizing the basic human rights of tribes to rebury their ancestors, problems exist with the implementation of NAGPRA.

There have been complaints by the tribes that the National Park Service is underfunded, understaffed, and is currently unable to bring dozens of agencies and hundreds of museums into compliance with a law such as NAGPRA. The Congress can assist the National Parks Service solve this problem by increasing funding for the NAGPRA implementation and specifically to NAGPRA grants.

There has been a great deal of public reaction to the implementation of NAGPRA, much of it negative toward tribes. What is missing from the public debate on NAGPRA is the fundamental recogni-

tion that tribes have a right to ensure their ancestors' graves are protected.

Congress faces many challenges. They should strongly resist any attempts to weaken the protections of Indian graves provided by NAGPRA because any attempts to do so would defeat the purpose of NAGPRA and continue to erode tribal civil rights and human rights.

These are my written comments, Senator. There are many things that I would like to convey personally to this committee that should not be ignored and should not be left out of the picture, many things that the tribes have gone through with sacred human remains. The religious and tribal traditions and culture cannot be ignored. When you look at sacred items, sacred objects, sacred human remains—for a tribe or a people to continue a way of life, these items are needed. These items need to be protected. These items need to have the proper respect they are due.

When a sacred item is affected, it potentially can affect a way of life. When you talk about sacred—when you can look at sacred items and sacred human remains—it cannot be emphasized enough that these remains and artifacts cannot be subject to scientific study. They cannot.

It has been said many times that these artifacts and human remains need to be tested to generate data that will benefit America. I am an American and I am an Indian person. I will not allow my sacred objects or my sacred human remains to be data. They are sacred—period. I will continue to emphasize this, not only with you, Senator, but with all the museums and universities that are continuing to conduct tests on our sacred items and human remains without proper consultation. They are making decisions for me. That is not right.

I would look at solutions or I would look at this committee to very seriously consider compliance and enforcement of compliance—not only with museums and universities, but with Federal agencies.

As an example, you have the Forest Service that does not have a line item budget to implement NAGPRA. As an example, you have the Bureau of Land Management that says, We will come into compliance with NAGPRA 10 to 12 years from now. That is not allowable.

It cannot be emphasized enough, Senator. The tribes' way of life cannot be ignored in decisions with this law. We have tribal unwritten laws that are now coming into conflict with the White man's written law. There needs to be a compromise. There needs to be settlement so that the tribes' way of life can be considered and part of the decisionmaking process.

This is what I bring to you today, Senator, my words from what I have been told from my older people at home. I truly hope that you take not only my words to heart but what you hear today.

Thank you.

[Prepared statement of Mr. Minthorn appears in appendix.]

Senator INOUE. Well, Trustee Minthorn, your position is fully justified. I hope that you will not change your mind. Your stand is morally correct, ethically appropriate, and I hope that we will do this.

It may interest you to know that when we began our debate on this act, in the earliest phase of that debate, I took the position that a law of this nature should not be necessary because it is already the law of the land that to rob a grave is a crime. From the earliest times in our history as a country, if you tried to rob a grave you would have been prosecuted. If you went into a cathedral or a church and stole a crucifix or a painting or a statue, you would be prosecuted. But somehow these laws have not been applied to protect Indian graves and sacred objects. It was at that stage of my naivete when it became apparent that the Government of the United States would resist any move to return these matters. That is when we went full force to get this act together.

We are holding this hearing this morning because the time is always appropriate to have an oversight of measures. There is no such thing as perfect legislation. We know that much as we believe that this is a good measure, it may be far from being perfect in its implementation. That is why this hearing is being convened.

We thank you very much for your statement.

May I now call upon the member of the Rosebud Sioux Tribe, Mr. Gough.

It may interest you to know, Mr. Gough, that when I first became chairman there were several members of the Rosebud Tribe who thought that I was a member of their tribe. They said I look like one. [Laughter.]

STATEMENT OF ROBERT GOUGH, MEMBER, ROSEBUD SIOUX TRIBE NAGPRA COMMITTEE, ROSEBUD, SD

Mr. GOUGH. I remember your visit to Rosebud in 1986 to the Rosebud IHS. I had the pleasure of guiding that tour bus.

Good morning, Senator. I bring you greetings from the Rosebud Sioux Tribe. I have provided copies of photographs along with a full statement and full supporting documentation to my written statement.

Your visit there at Rosebud is very warmly remembered by the Rosebud Lakota.

Just for the record, I am a member of the Rosebud Sioux Tribe NAGPRA Committee. I am not a member of the Rosebud Sioux Tribe. I do not even look like a member of Rosebud Sioux Tribe. [Laughter.]

But I am the attorney for the estate of Tasunke Witko, Crazy Horse, the great Lakota leader. Again, I serve as a member of the NAGPRA Committee for the Rosebud Sioux Tribe. It is indeed an honor to appear before this distinguished committee on behalf of both the estate and the Rosebud Sioux.

I come before you today to address a case of ongoing concern with regard to a lack of compliance with and enforcement of the notification procedures established under NAGPRA. This is a case which involves: A respected, private institution of higher learning, namely, Washington College of Chestertown, Maryland; a buckskin shirt, fringed with human hair, believed to have belonged to Crazy Horse; a lack of compliance by Washington College with either the spirit or the letter of NAGPRA; and a lack of enforcement of the civil penalty provisions by the United States National Park Service for such non-compliance.

It appears from the record on file with the National Park Service that for the past 60 years Washington College has held a collection of Native American artifacts which include a shirt said to be trimmed with human scalp that is purported to have belonged to the famed Lakota leader, Crazy Horse. The estate and the tribe have made repeated attempts to examine the objects and artifacts in this collection of materials and related documentary evidence as to its provenance.

Washington College has knowingly ignored these requests and has proceeded to sell the bulk of this collection, including the shirt, through an auction house in New York City on May 21, 1996 without having either filed a summary or inventory of the collection as required under NAGPRA.

Apparently, Washington College unilaterally decided, based upon expert evidence and advice in a written legal opinion, that they did not need to comply with the requirements of the law. Incredibly, the college presumed on its own and without benefit of input from known and interested Native parties that the objects and artifacts in its Native American collection were not subject to the requirements of the act. Having opted out of any compliance requirements, the college was then free to sell these objects and artifacts through Sotheby's Auction House to the highest bidder.

This sale occurred without proper notice to either the tribe or the estate, who are parties known to Washington College as having an affiliation, association, and interest in this collection. This sale has materially damaged the tribe and estate through a loss of any opportunity to examine, investigate, or potentially repatriate such objects and artifacts.

A matter of particular concern for us today is the critical need for action by the National Park Service in enforcing the civil provisions of NAGPRA. To date, we are not aware of any enforcement proceedings initiated under the civil penalties provisions of the act. We seek a determination that Washington College has failed to comply with NAGPRA and that such failure has ultimately resulted in the sale and subsequent disposal of the collection.

We ask this committee: Where in the law are federally-funded institutions possessing objects and artifacts that may be subject to NAGPRA protection allowed to presume that the Federal law does not apply to them? Where in the law are such institutions excused or exempted from filing appropriate summaries or inventories of their collections based upon their own hardly disinterested determinations that such items are not subject to the act?

Washington College's non-compliance in the sale of its collection without notice to identified interested parties effectively prevents any fair or open determination of what may or may not satisfy the NAGPRA categorical requirements. The position of Washington College only satisfies its self-interest and indeed financial gain. The prospect of an institution evading its legal duty and financially profiting in the sale of human remains, sacred objects, or objects of cultural patrimony is reprehensible and I believe unlawful.

It is precisely this prospect—that is, leaving the question of whether an institution has a duty to comply with Federal law up to that institution's own self-interested discretion—that we find setting a most troubling precedent. Allowed to stand, this prece-

dent will effectively preempt tribal participation and foreclose Federal regulation under the act.

We seek only effective compliance and diligent enforcement of the Federal protections provided under this law. We bring this matter to the attention of this oversight committee at this time in the hope of alerting you to this problem of threshold compliance. Perhaps a suggested remedy might include a technical amendment to require that no sale of any objects or artifacts which may be subject to NAGPRA may occur without a written certification of compliance with the summary and inventory provisions of NAGPRA from the applicable Federal agency. This would provide notice and assurance to the various auction houses and other venues trafficking in Native American objects and artifacts that their participation in such sale would not aid, abet, or promote willful non-compliance with NAGPRA.

To date, as far as we understand, there have been no enforcement actions taken under the civil penalty provisions of the act. But this should not be taken as an indication that there are no problems with institutional compliance. Lack of enforcement in such cases as this means that institutions holding objects and artifacts of significant cultural import can effectively evade the balanced legal protections provided for all parties under NAGPRA.

It may be that the National Parks Service is ill-equipped or ill-disposed to properly carry out the enforcement functions of NAGPRA. The failure of the National Park Service to adequately respond in accordance with the express provisions of the Act further compounds this evasion and denigration of this all too necessary Federal legislation.

On behalf of the estate of Tasunke Witko and the Rosebud Sioux NAGPRA Committee, I thank you for your time and consideration in this matter.

[Prepared statement of Mr. Gough appears in appendix.]

Senator INOUE. I thank you very much, Mr. Gough.

Now may I call upon the Vice President of NCAI, Mr. Stevens.

STATEMENT OF ERNIE STEVENS, JR., VICE PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS, WASHINGTON, DC

Mr. STEVENS. Good morning, sir.

Good morning, Vice Chairman Inouye. My regards to chairman Campbell and distinguished members of the Senate Committee on Indian Affairs who are not here this morning. On behalf of the National Congress of American Indians and our president, Ron Allen, I thank you for the opportunity to present testimony regarding the implementation of the Native American Graves Protection and Repatriation Act, NAGPRA. My name is [remarks given in Native tongue] and I am also known as Ernie Stevens, Jr. I am First Vice President of the National Congress of American Indians and a member of the Oneida of Wisconsin's Business Committee. Joining me this morning is NCAI governmental associate, Brian Stockes, representing our Washington, DC office.

Following NAGPRA's enactment in 1990, Native Americans rejoiced at the prospect that their lost ancestors and sacred objects would be returned after decades of separation and that their sacred

burial sites would now receive some legal protection. As you know, Congress' intent in enacting NAGPRA was to ensure that the Native American human remains and sacred objects retained by the Federal, State, and local governments, universities, and the museum community are returned to the appropriate tribes and our descendants. The law also ensures that burial sites on tribal and Federal lands are properly protected. However, unless those involved in the process maximize the law's mandates and potentials, NAGPRA cannot address the problems it was intended to address.

In order to bring their people home to their rightful resting places, to protect those at rest, and to fulfill the mandates of NAGPRA, Native people have over the years begun to understand both the scope and limitations of the law, its process, and its regulations. At the same time, they are also looking at their own community's needs and goals and how to address their concerns through the NAGPRA review committee.

In 1996, the National Congress of American Indians established a commission on repatriation and burial site protection, which meets during our mid-year and annual sessions, to address the variety of issues involved in repatriation and burial site protection and preservation. The National Congress of American Indians' commission is comprised of nine members from throughout Indian country. Mr. Minthorn is a member of that committee as well.

The formation of this national repatriation and burial sites protection coalition has helped tribes through the sharing of common experiences to work together on the sometimes difficult and complex decisions involved in the NAGPRA process. Over the next few months, the National Congress of American Indians' commission will be developing a survey that will help determine the existence and scope of tribal NAGPRA programs across Indian country.

When discussing NAGPRA and its implementation, the original intent involved in the enactment of this legislation must be always kept in mind. It was enacted to address and correct the standards and behavior of the scientific community which were discriminatory, paternalistic, and a violation of human rights and property rights. It was drafted as a delicate compromise between the scientific community and Indian country, with an understandable emphasis on the perspectives and needs of Native peoples.

Over the last 9 years, many tribal leaders, their staff, elders, and religious leaders have worked to develop programs to deal with the many complex and difficult issues involved in the NAGPRA process. Some tribes have had a lot of experience and have established viable repatriation programs while others may not have had resources to implement this important act.

There are many positive aspects to the law as well as many shortcomings. For many of our member tribes, the task has not only been to identify and address these shortcomings, but also to make the best of what the law already provides.

The following are some of the critical issues and concerns raised by our member tribes with regard to the implementation of NAGPRA.

One of the most important and central issues of concern to tribes is having the resources to develop their own program or system that would assist them in the implementation of NAGPRA and

help them meet their individual cultural and historic preservation goals. For those tribes which have the resources, their programs have incorporated a number of components which you will find in our full written testimony.

Overall, tribal programs have been instrumental in helping tribes meet many of their objectives, which in turn has helped them comply with NAGPRA. By facilitating and ensuring tribal compliance, those in government, museums, and universities will also be held more accountable. The resources and expertise are available, but the tribes must have access to those resources to meet the ultimate goals of NAGPRA.

Since the passage of NAGPRA, activities under the law have intensified in a number of areas, including the completion of summaries and inventories of the remains and objects as well as very successful repatriations. However, while the process is moving forward, many tribes are still finding themselves with very little resources and limited staff available to complete the work necessary to properly fulfill the mandates of the law. Meanwhile, government agencies, museums, and universities—in many cases—have the available resources and staff available to implement the law's requirements.

Despite a continual request since fiscal year 1994 for NAGPRA-related grants of \$10 million, to date the administration has requested and Congress has appropriated only a fraction of that amount, \$2.4 million annually. This funding level is far below the projected amount necessary to successfully comply with the provisions of the Act and well below the \$10 million level.

Mr. Chairman, in order to be equal partners in the NAGPRA process, tribal governments must be provided with sufficient funding, a request which was recently conveyed to this committee during its hearing on the President's fiscal year 2000 budget request.

Another issue of vital concern to our member tribes is the status and viability of the NAGPRA program within the National Park Service under the Department of the Interior. The NAGPRA program plays a critical role in providing much of the funding and technical assistance necessary for tribal governments to carry out the mandates of NAGPRA and its administrative regulations. To place this program under the authority of the departmental consulting archaeologist is clearly erroneous due to the obvious potential for conflict of interest.

The position requires the oversight of a Federal statute, NAGPRA, that mediates museum and archaeological interests with the interests of American Indians, Alaskan Natives, and Native Hawaiians. The National Congress of American Indians believes that the original intent and focus of the law requires that the NAGPRA program be raised to the level and location within the Department of the Interior which will provide for the least amount of bias and accordingly it's staffed with qualified individuals attuned to the objectives and goals of this very important human rights legislation.

The United States must consider the government-to-government relationship and the trust responsibility to Indian tribes and their members concerning the return of goods and remains. The responsibility carries with it the highest fiduciary standards regarding

the conduct of Federal agencies in its treatment of tribes in the area of repatriation.

Mr. Chairman, the proper placement of the NAGPRA program within the Department of the Interior is a very important decision, one which requires the consideration of a variety of issues and perspectives involved in the implementation of the act.

Therefore, pursuant to National Congress of American Indians' resolution MRB-98-102, which is included in our full testimony, we ask that the Senate Committee on Indian Affairs examine the issue of conflict of interest and consider the views and concerns expressed above by our member tribes.

As tribes continue to become familiar with NAGPRA, it has become clear to them that the implementation of the act has not provided those protections which the law had intended. We have a number of concerns with regard to repatriation and burial sites protection, most of which you will find in our complete written testimony. However, I would like to touch on two issues.

To determine cultural affiliation for implementation of the NAGPRA, the law expressly calls for the use of a variety of sources of evidence including tribal history, knowledge, and tradition. However, in many cases archaeologists have exclusively been making these determinations and we take exception.

The need for stronger enforcement by the Department of the Interior and Justice—this requires investigation, prosecution, and the imposition of penalties for violators of the law, including Federal agencies and States.

Last, the National Congress of American Indians would like to take this opportunity to point out the high profile publicity given to the controversy over human remains discovered near Kennewick, WA, which has made it very difficult to discuss the issues involved in the treatment of human remains.

It is unfortunate that some scholars have chosen to introduce the concept of race, which is disavowed by the American Anthropological Association, as a factor in reviewing NAGPRA and making recommendations to amend this act. The *Kennewick* case has shown that there are scholars from throughout this country who do not agree on what factors to use in reviewing the case. However, even if they do finally come to some agreement, Native Americans also have certain knowledge and traditions in a number of areas which must also be considered.

Apparently, there is no burden of proof that scholars must meet before their scientific theories threaten a law which was carefully considered and based upon a broad range of knowledge, while Native Americans are restricted in their claims.

Scientists must also be restrained so that all competing interests will be served, particularly since NAGPRA was passed in 1990 to prevent the discriminatory and high-handed tactics which scholars and scientists had historically shown toward Native Americans. To now accept such principles would be a dreadful step backward.

Remains that are found to be 9,000 years old in North America, such as the *Kennewick* case, should logically be determined as Native American based on a preponderance of evidence now available, including current history—both Indian and non-Indian—anthropol-

ogy, and science. The NCAI supports the Army Corps of Engineers' original decision to repatriate those remains under NAGPRA.

Mr. Chairman, on vacation last week, my daughter pulled this from a stand in a grocery store in Salem, OR and asked me what this was all about. It reminded me of when I was a young man and the teacher told me that I came from the Bering Strait. I went home and told my mother and she quickly corrected me. My mother was one of the first activists in our family and was a member of interactions in Alcatraz and other places throughout Indian country. She told me very directly that that was not the case. At that point, I went back to school and told my history teacher and was promptly excused from the classroom.

Scenes like that were from approximately 30 years ago. Just when we think we are getting someplace, we suffer setbacks. It was very discouraging to have to try to explain history to my 14-year-old daughter. Unfortunately, it takes the history from traditions in our culture to get the most accurate story to our children. This is not an exception.

Mr. Chairman, in order to properly and faithfully carryout NAGPRA's congressional intent and to facilitate its process, the concerns of tribes must be equally weighed and at times given even greater weight. Furthermore, the United States must adhere to its trust responsibility to tribal governments and to Indian people to protect and preserve Native culture and tradition.

Mr. Chairman, this concludes my statement. Thank you for allowing me to present, for the record, the National Congress of American Indians comments regarding the implementation of the Native American Graves Protection and Repatriation Act. I thank you for giving me this time and I assure you that we speak for our tradition and our culture on behalf of our member tribes, and more specifically our tribal elders.

[Remarks given in Native tongue.]

[Prepared statement of Mr. Stevens appears in appendix.]

Senator INOUE. Thank you very much, gentlemen.

It is obvious from listening to your testimony that this committee will have to seriously consider amendments to this act if the present act, as written, does not provide for proper implementation. For example, it was clear in my mind when we enacted this measure that federally funded institutions—whether they be museums or colleges—are covered. Therefore, for any college to suggest that since this is an institution of learning and not a museum, it is therefore out of the act is simply not accurate. If the record shows that they have been receiving Federal funds, I believe they are covered by this law. We will have to look into that.

May I ask all of you general questions and get your viewpoint?

Judge Hutt suggested that an office of a prosecutor be established to prosecute violators of the law and to bring about some sanctions. Apparently, you believe that institutions and individuals in this land have been guilty of conduct, which would be the basis for a cause of action.

Do you believe that we should set up a special office of a prosecutor?

Mr. HALL. Senator, I would agree with that. There are many, many stories that we could talk about in terms of incidents that

have happened. That is why in my testimony I asked for a Federal investigation about practices that we think are violations. I think this would be—the location was being discussed and where that is—I think the Judge was talking about a neutral site. I agree with that, some place where fairness is given.

The whole thing about the Lewis and Clark bicentennial and all the issues and excitement it is creating in 2004, we are seeing incidents of grave robbers throughout North and South Dakota, in the Aberdeen area specifically. We need the protections of the Federal Act and the Federal Government. That is why I raised the issue of the South Dakota Mitigation Act. By transferring the land to the State, we lose the protection of NAGPRA. That is real critical for us. And we were not consulted with that.

I appreciate the comments that the other gentleman here gave about the trust responsibility. Of course, you are one of the strongest advocates, Senator, there is about Federal trust responsibility to Indian tribes. I agree that violations have occurred and that they will be on the increase. We need some independent prosecuting office to do that.

Senator INOUE. Mr. Minthorn.

Mr. MINTHORN. I would concur that there is a need for such an office. If there was an office to enforce compliance with the law, I think such an office is needed. Maybe this would diminish non-compliance by museums and/or universities, as well as Federal agencies. Maybe that would diminish or decrease extensions that have been granted over and over to museums and universities, therefore stopping repatriation.

A final comment for a suggestion would be that if such an office is created, I would strongly urge and suggest that this office be created with tribal input or tribal participation.

Thank you.

Mr. GOUGH. Senator, I sit before you as one holding graduate degrees both in anthropology and in law, and I can tell you that they are very different disciplines. I believe that the National Park Service is ill-equipped and ill-disposed to be able to carry out these enforcement functions under NAGPRA, as I stated in my testimony. It would seem that the suggestions made for placement within the Solicitor's Office, an office that while having an awareness of the issues within the Department of the Interior, also has those special skills to be able to prosecute violations of the law. That may well be an appropriate place—certainly outside the Park Service, would be the comment I would make from my experience.

It is too difficult to balance those two roles. You get into that conflict of interest clearly. We do not need to institutionalize that conflict. I think we can rather easily remedy that with its separation in moving it to, perhaps, the Solicitor's Office.

I would also make one other comment. You solicited comments with regard to the problem of the unidentifiable remains. As a scientist, by definition the "unidentifiable" have little, very limited scientific value in terms of culture, in terms of understanding and interpreting culture.

Your comment about the Louisiana Purchase recalled to mind that the United States did not buy one square inch of property in the Louisiana Purchase. Instead, it purchased the European-held

rights to deal with the tribes in that area. Perhaps calling of a grand council of tribal elders, leaders, spiritual people together to have them resolve what should happen to the remains that have come collectively from that area may be one approach that I think would be consistent with the spirit of the law that you have dutifully crafted.

Thank you.

Mr. STEVENS. Senator, certainly Mr. Minthorn's comments are highly respected in our circles in his capacity as a commission member. In addition, in our testimony we ask for stronger enforcement by the Departments of the Interior and Justice that requires an investigation, prosecution, and imposition of penalties for violators of the law, including Federal agencies and States.

I think that all too often people take this for granted. You see a burial mound and you see some objects and people do not really understand the seriousness of repatriating these situations and helping our people to rest. They think that it is all done.

As an example, right out of college I moved to a town in northern Wisconsin that had a very small Native American population but had several burial mounds near its waterways. The burial mounds were made into a park where children played often. I questioned that and was appalled at that. People just thought it was normal and common. Those were violated long ago and there was probably nothing in them. It was just a normal kind of thing for this community. It was a very nice and beautiful community, but they just did not understand. They were uneducated.

My wife took our three young children down and played in that park on one occasion. In departing from that park, my wife became very ill. She came home and was almost to the point of dizzy. It became an illness that lasted for 3 to 4 days. To us it said that there are still some struggles in our ancestors and those people who have been violated. Until we lay those struggles to rest, they will continue to struggle. This is the way we are going to do it. Until we take a strong position and until we start using prosecution as one of those issues and holding everyone to that standard, I think our ancestors and the spirits of our past are still going to struggle.

Senator INOUE. I thank you very much.

Before I proceed with individual questions, I should point out—so that everything will be above board—I am certain you have noticed that there is no witness from the Department of the Interior. This was a deliberate decision on the part of myself and the committee staff because we are presently working the Interior Department and I did not want this to be a bashing hearing. I must say that over the years the Interior Department has been very cooperative—maybe not fully satisfactory, but I think they are doing their best. I feel that something can be worked out with the National Park Service, with the Archaeologists Office and such. That is why I did not want to have them testify here and look upon this whole proceeding as an Interior bashing exercise. I hope you will understand.

I can assure you that we will carry on this discussion with the Department with vigor. I can assure you with sincerity.

Mr. Minthorn, whatever happened to the person you wanted thrown out of the review board? Is he still on?

Or was that Mr. Hall?

Mr. HALL. Senator, he is still on the committee.

Senator INOUE. Do not mention his name, but is he still on?

Mr. HALL. Right. That is correct.

Senator INOUE. And on this transfer of land, are you still having problems?

Mr. HALL. Yes; we are. The South Dakota Mitigation. That act—is that what you are referencing?

Senator INOUE. Yes.

Mr. HALL. That act that was passed in October—there are two tribes involved with the act. Along with the State of South Dakota, Oregon received excess lands from the Corps. As I mentioned, we have over 720 sites, but we feel that we are going to lose our protection. NAGPRA will not apply. That is why I mentioned those two numbers 605(a) and 605(h) that are conflicting. That does not give us the protections.

Our tribe was real influential as traders along the Knife River in Missouri all the way up and down. In 1804 when Lewis and Clark came we had Knife River flint. So we have pottery from the southwest up in North and South Dakota there. So a lot of our human remains are there. We just feel that with the bicentennial and all those things occurring—and we know of instances of grave robbing today.

If the land is transferred, then we feel that we lose the protections under NAGPRA. We are requesting an oversight hearing. I have several calls from other Sioux Tribes, Pine Ridge, Standing Rock, Crow Creek, et cetera, et cetera. If you have read the papers in South Dakota, they have had demonstrations. There is a camp right now on Lac du Flambeau Island in Pierre, SD. There is an Indian encampment and there are a lot of non-Indian people that have joined the encampment in protest of the South Dakota Mitigation Act.

All they are saying—and that they have asked me to express to you, Senator—is that an oversight hearing be conducted so that those conflicting things within the law can be worked out so that we have the protections under NAGPRA.

Senator INOUE. I noted in your testimony that there were several successful joint tribal reburials. But when this matter was put in the Federal Register, it was opposed. I shall check on this. It seems like the joint proposal has been working, but I will try to find out why Interior opposed this joint tribal reburial proposal.

Mr. HALL. I appreciate that because the tribes are happy with that.

Senator INOUE. Mr. Minthorn, can you give us a memo on your testimony as to what would be needed in funds and staff in the National Park Service to adequately administer this responsibility? You spoke in general terms that the funding was inadequate and the staffing was inadequate. It would help the committee if we could go before the Appropriations Committee and say that we recommend the funding of so much money.

Mr. MINTHORN. As an example, Senator, as was mentioned earlier, I am a member of the NAGPRA review committee. Being on

that committee, I get a lot of concerns stressed to me over and over by tribes, not only in the northwest but throughout the Nation. At the recent meeting in Santa Fe of the NAGPRA review committee, it was very evident that the National Park Service is not only in a very awkward position, but in a very time-consuming position in the sense that you have an agency and staff and resources that are trying to deal with tribes on a national level to make repatriations happen, to listen to cases, to listen to individual tribal members as well as religious leaders, listening to individual tribal governments—there is just not enough time and staff and resources for one group to do that.

There needs to be consideration to either expand or have appropriate staff and resources to accommodate listening to a Nation as well as to over 500 tribes.

Senator INOUE. Thank you very much.

Mr. Gough, whatever happened to those artifacts, the shirt of Chief Crazy Horse?

Mr. GOUGH. As we understand it, it was sold at auction. Sotheby's declines to even tell us who it was purchased by. I believe almost all of the collection was sold with the exception of the bonnet. There was a full-feathered bonnet—eagle feather bonnet—that was labelled as having belonged to Red Cloud that was withdrawn from sale at the auction day because of the eagle feathers. So Sotheby's was at least somewhat sensitive to Federal law.

But with regard to the rest of the collection, they were all put on the auction block and sold.

Senator INOUE. So you have no idea where it is now?

Mr. GOUGH. As I understand it, when we contacted the Park Service, the sale had already occurred—we had tried to see this shirt and this collection several times. We were told that it was going to put out for conservation and we would have to come back at some later point. I wrote a letter in early May saying that I would be coming out to Maryland and Washington, DC and would like to stop by and look at the material. I received a letter after the sale telling me that there was no need for my trip, that these objects were going to be sold at Sotheby's.

When I found that out, I notified the Park Service as well as Sotheby's and Washington College and protested the sale.

As I understand it, a criminal investigation was undertaken in New York, where Sotheby's is located, looking into the matter of whether or not there was a violation of criminal law with regard to the trafficking in human remains because of the human hair attached to the shirts, but that the legal question at that point turned on whether the hair was voluntarily or involuntarily taken, cut, and put on the shirt, and whether or not prosecutors may be able to get a conviction beyond a reasonable doubt of whether or not hair that was cut—with no scalp or flesh attachments—could be proven to a jury beyond a reasonable doubt to be in fact human hair involuntarily taken and therefore human remains.

We contacted the U.S. Attorney's Office in Manhattan to find out what the progress was and what was happening. Periodically we would check to see what the story was. Finally, in one phone call we were told that they had released it 3 weeks ago and that they

were going to notify us that it was to be released for sale. They had let the sale go through.

At this point, we are looking at what other legal options we may have to deal with Washington College for conversion of that property because there are some other legal titles associated with it from the original lenders of that material. We have been in contact with the original lenders of the collection to the museum. We have been able to do quite a bit, but the shirt—for all intents and purposes—is gone at this point and we do not know where that is.

Senator INOUE. During your initial discussions with Washington College, did you advise the National Park Service or the Interior Department of your action?

Mr. GOUGH. We advised not only the National Park Service, but I remember sending a copy of the NAGPRA legislation to Washington College highlighting the appropriate parts indicating that a museum or an institution of higher learning was eligible and that it was a threshold question of—if they have objects that may be subject to the law, they had to follow certain requirements.

So we did provide early notification. That was prior to the expiration date of November 16, 1995 when all of the surveys or inventories were supposed to be in under the law, originally.

Senator INOUE. I thank you very much.

Mr. Stevens, like Ms. Worl, you suggest that the placement of the administrative responsibilities in the hands of the Department's chief Archaeologist creates a conflict of interest. Is that correct?

Mr. STEVENS. Yes.

Senator INOUE. In my statement that I just made, I did not want you to get the idea that I want this office to remain as is and to have the responsibility. We are now presently discussing how to resolve this matter. So I do not know what the outcome will be.

But how do you propose that we address this conflict of interest problem?

Mr. STEVENS. Senator, I do not have the answer to that question today. I really think that we would yield to our commission study to make that recommendation. When you mentioned previously about the potential for bashing or for Interior people to be here, I think that was a good decision on your part. But I think that we have to carefully think this through and be assertive and patient so that we can do what is best for this entire process. That is why we have empowered the commission to make those recommendations. I think that is the direction we would like to go for that recommendation.

Senator INOUE. And then my final question to all of you.

The act called for a 5-year period in which to set up an inventory. I believe 3-year extensions have been granted to about 60 museums. Is 8 years enough to establish an inventory? Or should we extend this further?

Mr. HALL. Senator, my thoughts are that that is enough time. I do not think any more extension should be granted.

The question that you raised about sacred—life is sacred and human remains are sacred. Enough time has been given. We want to bring our ancestors home for proper reburial.

Mr. MINTHORN. I would concur that 8 years is enough time. There should not be any more extensions.

It is true the words that I have heard from my older ones. When traditions are followed, the right things will happen. These museums and universities and Federal agencies hold objects that are part of our traditions and our way of life.

Thank you.

Mr. GOUGH. Senator, I would just say that the materials that we have discussed here today on behalf of the estate were lost after the expiration of the first deadline—after that 5 year time period. What has happened in the last 3 or 4 years—how much else has been lost that we may never be able to retrieve — we cannot even give you an answer. We do not know how much more will be lost with further extensions. That is impossible to say.

Mr. STEVENS. On the technical parts of that, I agree. But I would like to emphasize the pain and suffering in the example I have given you that has directly affected my family regarding this. I think that the pain and suffering continues.

As I assert patience and understanding and assertiveness in this process, I think it has to be within reason. So I think that is more than enough time, if you consider that our ancestors continue to struggle while we do not finalize this process.

Senator INOUE. Gentlemen, once again, I thank all of you for your testimony. I give you my assurance, as a member of this committee, that your recommendations will be placed in the hands of the committee and we will fully consider every one of them.

Thank you very much.

Senator INOUE. Our final panel consists of the President of the Society for American Archaeology of Washington, DC, Professor Keith Kintigh; and the President and Chief Executive Office of Bishop Museum, Honolulu, on behalf of the American Association of Museums, Washington, DC, Donald Duckworth.

Professor Kintigh, welcome, sir.

STATEMENT OF KEITH KINTIGH, PRESIDENT, SOCIETY FOR AMERICAN ARCHAEOLOGY, WASHINGTON, DC

Mr. KINTIGH. Thank you very much.

Senator Inouye, the Society for American Archaeology thanks the committee for this opportunity to comment. SAA is the leading organization of professional archaeologists in the United States. In 1990, the SAA led the scientific community in working on NAGPRA and helped form a coalition of scientific organizations and Native American groups that strongly supported NAGPRA's enactment. We have always urged our members to work toward its effective implementation.

Joining us in this testimony is the American Association of Physical Anthropologists, the leading organization of physical anthropologists in this country, which also supported the passage of NAGPRA.

Senator 9 years ago I stood before this committee to present SAA's testimony on S. 1980, the bill that became NAGPRA. Looking back, I agree with you that the act is largely working, although problems remain. But I think the committee can be proud of what NAGPRA has accomplished. As you mentioned, hundreds of sum-

maries and inventories have been submitted to the tribes, repatriation occurs on a regular basis, and consultation has led to improved understandings among tribal people, museum personnel, and scientists.

However, in the interest of improving the implementation of NAGPRA, we introduce four issues.

First, coordination of the NAGPRA functions by the Departmental Consulting Archaeologist. The Secretary of the Interior delegates responsibility for NAGPRA coordination to the Departmental Consulting Archaeologist, or DCA, who manages the National Park Service's Archaeology and Ethnography Program. For the following reasons we believe that moving this administrative function to a different office would impede rather than enhance the implementation of NAGPRA:

Transfer of NAGPRA coordination functions would require a new, expensive, and redundant administrative unit.

No other administrative unit has the expertise necessary to coordinate NAGPRA. The Archaeology and Ethnography Program has coordinated NAGPRA for 9 years and only the DCA is in a position to articulate NAGPRA with other historic preservation law. And this is becoming increasingly important as the section 3 provisions of NAGPRA—those having to do with inadvertent discoveries and intentional excavations, mostly associated with development on Federal land—are becoming more and more a deep concern to Indian people, especially in the West.

The most serious complaints about NAGPRA coordination result from inadequate funding, as we have heard, not from administrative location. A move in itself will not solve the funding problem. There is just a lot of work that needs to be done.

Contrary to common belief, the Archaeology and Ethnography Program does not determine cultural affiliation. They do not do that even for National Park Service collections. Those determinations are made by the units that actually hold the collections.

I agree with Judge Hutt that allegations that the NAGPRA grant program is unfairly administered are just unfounded and the statistics, I believe, show that.

The NAGPRA review committee has not recommended movement of the NAGPRA functions but has worked with the National Park Service Archaeology and Ethnography Program.

Finally, while Native American groups argue that their interests are not adequately considered, within the scientific community, there is a widespread belief that it is in fact scientific interests that are routinely ignored. But I think together we have to recognize that NAGPRA was a legislative compromise intended to balance legitimate traditional Native American concerns with the scientific community and the broader public interest in our shared American heritage. I think the Departmental of Consulting Archaeologist and his staff have consistently attempted to fairly maintain that balance.

The second issue is that of Federal agency compliance. SAA and AAPA join the review committee, tribes, and museums in expressing dismay about the lack of compliance by some Federal agencies. Most obvious is the failure of some agencies to complete inventories. Where they are made, however, agency determinations of

cultural affiliation are often made without adequate tribal consultation and also without adequate efforts to compile and adequately weigh scientific or traditional knowledge. We ask Congress to employ the means at its disposal to induce or compel agency compliance. While new appropriations are badly needed, punitive measures may also be required.

The third issue is extensions for museums to complete inventories. Interior is apparently planning to arbitrarily deny requests by six museums with very large collections that have asked for extensions to complete their inventories. Where museums have made good faith efforts to comply with the law, denial of extensions is contrary to the objectives of NAGPRA and I believe will place a heavier burden on the tribes to achieve the repatriation that would be just.

The fourth issue is the interpretation of cultural affiliation. Cultural affiliation is a cornerstone of NAGPRA because it provides legitimacy for most repatriation claims. A critical problem is the expansion, in practice, of the statutory definition of cultural affiliation beyond any legally defensible limits. While the law requires evidence demonstrating cultural affiliation, frequently little or no evidence is presented. Procedural shortcuts and distortions of the definitions have already led to problems such as that of the Kennewick Man and have the potential to lead to many more problems, disputes, and ultimately, lawsuits.

In conclusion, we offer five recommendations:

The overwhelming obstacle to the effective implementation of NAGPRA is the lack of funding for ongoing tribal programs, for museum programs which continue as well apart from the inventory process, and for agency repatriation programs. These are all ongoing funding problems that will remain into the foreseeable future.

The committee should discourage the transfer of NAGPRA coordination from the Archaeology and Ethnography Program and move to increase that program's funding.

The committee should forcefully work to bring Federal agencies into compliance with the law.

The committee should encourage the Department of the Interior to reconsider requests for inventory extensions based on a case-by-case evaluation of each museum's efforts to see if they have been in fact in good faith.

Finally, we ask the committee to strive to improve agency and museum adherence to the letter and the spirit of NAGPRA, particularly in making their determinations of cultural affiliation.

We thank you for your consideration and stand ready to work with your committee or other groups within Congress or Native American groups on any amendments that you feel may be required.

Thank you.

[Prepared statement of Mr. Kintigh appears in appendix.]

Senator INOUE. Thank you very much, professor.

Mr. Duckworth.

**STATEMENT OF W. DONALD DUCKWORTH, PRESIDENT AND
CEO, BISHOP MUSEUM, HONOLULU, ON BEHALF OF THE
AMERICAN ASSOCIATION OF MUSEUMS, WASHINGTON, DC**

Mr. DUCKWORTH. Vice Chairman Inouye, it is a pleasure to appear before you in any capacity. In this particular instance, I am honored to be here as President and CEO of Bishop Museum, as you well know, a Hawaii-based not for profit corporation, which includes the Bernice Pauahi Bishop Museum, which is Hawaii's State Museum of Natural and Cultural History. I am presenting testimony on behalf of that institution and on behalf of the American Association of Museums, for which I serve on the Board of Directors.

I have submitted my longer written testimony for the record.

The Bishop Museum is committed to repatriation, as it has been since 1990 when a representative of the institution, Dr. Elizabeth Tatar testified before this committee on behalf of Bishop Museum in favor of the passage of what we now know as the NAGPRA Act.

I would like to comment briefly on our experiences over the past 9 years as we have worked very hard to implement both the letter and the spirit of the law. I would also comment very briefly on the national situation for museums with respect to the law and the activities associated with it.

Since the passage of NAGPRA in 1990, Bishop Museum has repatriated 4,252 Native Hawaiian human remains and funerary objects. This number, the result of NAGPRA-mandated inventories, is nearly double what we were able to estimate as our holdings when we testified in 1990, and they represent all the Native human remains and funerary objects that were retained in our collections by the museum. These inventories were carried out in consultation with Native Hawaiian organizations and verified by Native Hawaiian claimants as part of the repatriation process.

We are pleased to report that we have completed the repatriation under the law of all Native Hawaiian human remains and funerary objects.

In 1990, we estimated the cost of repatriation to be roughly \$388,000. The actual costs are expected to reach \$1 million, most of which have been for personnel costs, including consultation. About 64 percent of the cost has been provided from museum operating funds, the remainder from other various sources, contracts and otherwise.

Before and after the U.S. Navy contracted inventory—which was for a portion of our holdings which were not our property, but held for the U.S. Government, Department of Navy—the process for every inventory, including consultation and repatriation, has been carried out without incident and to the satisfaction of all involved. The number of consultations increased in time to include more members of Hawaiian organizations, elders, and families.

The relationship of the museum to these organizations did and has indeed improved as we had hoped it would at the outset. In some cases, claimants have grown to understand and appreciate the role of the museum as a caretaker and have indeed—after taking the materials repatriated—lent them back to the museum for safekeeping or in some instances withdrawn their initial claims.

The sense of responsibility for all Hawaiian collections items in the museum has clearly grown among these consultant groups.

In addition, as a result of the consultations, the museum has created a special secure area with restricted access that serves as both a storage and a ceremonial area for what Native Hawaiians consider sacred objects, including objects of cultural patrimony.

We would like to emphasize that consultations between Native Hawaiian organizations and the museum have brought about a deep sense of mutual respect, trust, and willingness to resolve issues related to the implementation of the Act, as well as issues that reach outside the jurisdiction of the Act. This relationship took a long time and lot of hard work on the part of all involved to establish and extend. It is very important that the agreements reached by Native peoples and museums be honored and supported in the spirit of the law and that the letter of the law be fulfilled with this spirit.

I would also like to briefly comment on implementation of NAGPRA from the national perspective in relation to museums.

The American Association of Museums represents a broad range of institutions with more than 16,000 members, of which about 11,000 are museum paid staff or volunteers and about 3,000 museums.

In 1994, the American Association of Museums did a survey of 500 of its member institutions, including all of its natural history museums and a selected sample of its art and history museums. Those respondents—a little more than 200—these alone had almost 3.5 million objects which fell under the jurisdiction of NAGPRA and the various NAGPRA categories.

In addition, in October 1990, at the time of passage of NAGPRA, the Congressional Budget Office had estimated NAGPRA implementation to cost museums roughly \$40 million and to tribes and Native organizations \$5 million to \$10 million over 5 years. It would appear now, based on our own experience as well as that of many other institutions—some of which have been alluded to here today—that these estimates are very low and additional resources should be appropriated in order to facilitate the ongoing endeavor.

While the situation with respect to repatriation differs very broadly across the museum community, the data we have indicates that the experience of the Bishop Museum, with many more repatriable items than it could initially estimate, with much higher costs to follow the procedures of NAGPRA than originally anticipated—and in our case most of which we have had to bear from our own limited resources—and with the importance and value of collaboration with Native Americans and Native Hawaiians is in important respects representative of the experience of museums nationally and across the country with the repatriation process.

Before closing, I would like to briefly comment on concerns raised about the appropriateness of continuing to administer the law at the Archaeology and Ethnography Program of the National Park Service.

I can speak only from the experience we have had with the National Park Service at the Bishop Museum and what I know of the experience of other museums in discussing it with colleagues at other institutions. That experience has been generally favorable.

Museums have a general sense that the National Park Service has striven to be evenhanded with all parties to the law. We have not always agreed, but we have felt in our dealings that every effort was being made on their part to provide support for and understanding of the extreme complexity of many of the issues with which we have had to deal.

Thus, if the committee were to consider moving the administration of the law, I am sure that we and other museums would want to be sure that such a step did not proceed without some reasonable assurance that there would be at least equal understanding in a new administrator of the complexities of the law and regulations and of the spirit of cooperation and balance of interests that surrounds the law and regulations.

I am indeed grateful, on behalf of my institution and on behalf of the American Association of Museums, to have this opportunity to appear before you today. I would be more than happy to respond to any questions you may have.

Thank you, and aloha.

[Prepared statement of Mr. Duckworth appears in appendix.]

Senator INOUE. I thank you very much, Dr. Duckworth.

If I may ask general questions for both of you, is it necessary to define the word sacred so that it would be administratively and legally enforceable and understandable by most of us?

Mr. KINTIGH. Senator Inouye, my answer parallels yours, that it is an issue that in 1990 we dealt with. I know the tribal people working on the law dealt with it. It has been very difficult. I am certainly prepared to try—if that is felt to be needed—to work on that some more. As Dr. Worl indicated, she thought that exactly how you do that is not clear.

It certainly has led to problems. I more than agree that alternative world views need to be brought into account, that that is not meant to be a western sense of sacred, that that was not the intent of the law. I do not think it should be interpreted that way. I think the definition attempted to convey that. If that definition is not successfully conveying that, then maybe we do need to work on it.

Mr. DUCKWORTH. In essence, I concur. I think to the extent possible obviously the implementation of the law and the spirit of that implementation is facilitated by a clearer definition. However, the challenge of clarifying the definition so that it spreads over such an enormous array of cultures and circumstances is indeed a challenge.

Senator INOUE. As you know, we have had many instances where museums and archaeologists have disagreed with leaders in Indian country as to whether an item was sacred or was not sacred. This has been one of the major causes of contention between the two communities.

In bringing about a definition, how would you propose we do it? Do you have any ideas? Should we call upon Indian leaders to decide what sacred is? Or should we call upon you people? Or should you leave it up to us? [Laughter.]

Mr. KINTIGH. With all due respect, I probably would not leave it up to the Congress. I would suggest a joint effort to maintain that balance that is in NAGPRA. I would suggest a small group—as small a group as can reasonably represent the diversity—but a

group of people who can sit down and truly talk to one another and try to understand each other's position and come to some better achievement. That would be my best recommendation.

Senator INOUE. I would like to alert all of you that I believe that this is a good recommendation to bring about some definition of sacred. So I would suggest that the archaeologists start thinking, that about three or four of your eminent scientists and museum people do the same, and that Indian country get together and call upon your best minds because time is of the essence. We do not want to bring this about 10 years from now.

You have suggested that the National Park Service and the Archaeology and Ethnography Program is the proper place for the responsible administration of this program or the coordination of activities. On the other hand, testimony from Indian country shows otherwise.

That in and of itself would suggest to me that there must be some conflict. Do you believe that placing this in the hands of the ethnology and archaeology division of Interior or the National Park Service creates a conflict of interest or the appearances of a conflict of interest, Professor?

Mr. KINTIGH. No, sir; I do not. I think that some of the problems are from a lack of understanding about exactly what they do. I think there is a widespread sense that in fact the program is making determinations on cultural affiliation. In fact, as Judge Hutt pointed out, what they do is publish the notices. They are enjoined from even changing in any substantial way the content of those.

I think just as very often tribal cultural preservation programs deal simultaneously with other kinds of historic preservation laws that are affecting ancestral sites and so forth also deal with NAGPRA—that is also the office within the National Park Service that deals with the Archaeological Resources Protection Act, with the National Historic Preservation Act, and other preservation law. I think it makes an awful lot of sense and they have a lot of experience. I think they have been sensitive. Within the staff there are diverse personalities and people with diverse expertise and I think they have attempted to try to achieve a balance within the office of interest and to try as best they can—but probably as best as anyone could—to fairly put those together.

Mr. DUCKWORTH. As I indicated, Senator, from the museum's perspective—and we have not surveyed broadly on this question that has been fairly recently posed for us—I commented primarily from our experience at Bishop Museum. Even though one of the groups with whom we work very, very closely, Hui Malama I Na Kupuna o Hawai'i Nei, were mentioned as having put forth a resolution, our belief is that efforts have been made within the framework of the original law and its intent that the Park Service administered it to the best of their ability.

And while we have not agreed with all of the actions that have occurred and we certainly would like the processing of NAGPRA claims and the inventory and the publishing aspect, which is badly behind, caught up and facilitated more rapidly, that also takes money and staff. I think from our standpoint we view it as having the even-handedness that at least in our specific instance we have

seen over and over again. So it is perhaps premature to judge them ineffective.

On the other hand, if an appropriate location that would void the sense of conflict of interest—surely in activities as complex as these, even the appearance of conflict needs to be of concern to facilitate the overall process—we would have no objection to that.

Senator INOUE. Do you believe that it was clear intention on the part of Congress when we enacted this legislation to cover not just museums, per se, but to cover any institution that receives Federal funds such as colleges and universities?

Mr. KINTIGH. Oh, yes, Senator. I think that is absolutely unequivocal. I do not think there is any question. My own institution has complied.

Senator INOUE. So it is not just for museums?

Mr. KINTIGH. Of course not.

Senator INOUE. However, we have one little problem here. We assess civil penalties for a non-compliant museum or college if they fail to make their inventory of human remains and consult with the appropriate tribes. But this does not extend to Federal agencies. Do you think it should be extended to Federal agencies?

Mr. KINTIGH. I do, sir. I think that Federal agency compliance has been identified across the board as a major problem. The National Park Service has no enforcement authority over Federal agencies, as you know. And to the extent that compliance is out of line, I am not an attorney and I do not know legally how the Congress can—I assume that the presumption was that the Federal agencies would at least obey the law. To the extent that that is not happening, I would like to see whatever means the Congress has to make that happen brought to bear in a fair way.

Mr. DUCKWORTH. If the intent, purpose, and concept of the law itself were noble, then I do not see how you could logically not extend the concept to those that hold by far, I suspect, the largest array of materials that come under the NAGPRA categories. I think it goes without saying that it should be extended to them.

Frankly, Senator, I have never quite understood why, for example, the Smithsonian was separated into separate legislation simply because it was the national museum as opposed to the others of us.

Senator INOUE. The provisions of NAGPRA would cover cultural items found or excavated from Federal or tribal lands. Do you think the coverage should be extended to State lands, county lands, and private lands?

Mr. KINTIGH. Yes, sir; I do. I think that one of the largest problems archaeology faces and a very serious concern that tribal people face is the looting of ancestral sites on private, State, or county land. Currently States have varying provisions protecting State land. In some cases, there are some—and in my own State—fairly weak provisions protecting Indian graves on private land. Those are really in general not very satisfactory. Most of the looting and destruction of these ancestral sites occurs in order to loot the graves. So if Federal protection were extended to private, State, and county lands it would have the effect of extending Federal protection, to a very large extent, over those sites in their entirety as the goal of the looters is by and large the graves.

So I think from the standpoint of preservation, it would be an enormous achievement if we could do that. We raised that question in 1990 and SAA advocated that with congressional staff. I think it was the political realities at that time that we all wanted the bill to pass and the staff felt—I think quite properly—that were that provision included it would not make it through. We have supported that consistently.

Mr. DUCKWORTH. I agree. I agree. I think now with our having essentially completed the repatriation of our materials I think the largest holder of human remains—at least in Oahu, if not the State of Hawaii—is the State Division of Historic Preservation, who have yet to file. I do not even know if they are required to file an inventory.

Senator INOUE. NAGPRA provides for a 5-year time period for the compilation of an inventory. We have provided an extension of 3 years to 58 museums, I believe.

Do you believe that 8 years is sufficient?

Mr. KINTIGH. I believe that in the case of 52 of those, it has been enough and those inventories have been completed. To my knowledge, there have only been six museums that have asked for extensions. As I understand it, most if not all of those are among the museums in the country that have the very largest collections and the very largest jobs to do in those inventories.

I have a personal familiarity with three of those museums and the programs they have undertaken. I also interact with tribal people that have worked with those museums on consultation and working toward repatriation. My sense is that if there has been a good faith effort—and from my knowledge in at least three of those cases—and I am simply not familiar with the others—there has been a good faith effort. Then I think extension should be provided as the law allows but does not require because I think that were that not to happen the museum will simply have to do the inventory in a much more speedy way. The law provides quite a bit of latitude in how much evidence is required, how much consultation is required. It is my experience that the more investigation and work the museum does, the more carefully it consults, the more materials it is able to repatriate.

So if museums are speeded up, and they will have no real alternative—and I think they will be able to do it in a much more rapid way within legal bounds—I think the effect will be that we end up with a much larger proportion of remains in the culturally unidentified category. When remains are placed in that category, then the museum's job—at least in the first instance—is done and then the burden is placed on the tribes to essentially challenge that determination and to bring forth their own evidence.

Where museums have ongoing consultation with tribes to try to work toward figuring out appropriate repatriation, it seems to me the denial of extensions is completely counterproductive to the goals of both the tribes and the museums in doing what the law intends.

Senator INOUE. What is your reaction to testimony that suggests that some of this delay is deliberate?

Mr. KINTIGH. In some cases, it may be. I was at the NAGPRA review committee meeting in Santa Fe in December. In one in-

stance, the Park Service said that they certainly did not have much evidence that one of these museums had been doing very much. They did not know for sure that that was the case, but that was the indications they had at the moment. If that is indeed the case, I am fully in favor of not giving an extension and I think the civil penalties should come into play.

I think that in some cases there may be deliberate attempts—I have no reason to believe that there are deliberate attempts. There may simply be people saying, We do not have the money and we are just not going to do it. I think that is contrary to the law and they should be brought into compliance.

However, I think that many Indian people—for very understandable reasons—are frustrated by the time this has taken. I can understand why people might think that a delay is a consequence of stonewalling when in fact it is a consequence of people trying to do just the opposite, a very deliberate job that takes a lot of time and effort.

Senator INOUE. Mr. Duckworth, do you believe 8 years is enough?

Mr. DUCKWORTH. Understanding from our experience how complex some of these issues are—and our situation is admittedly much simpler than those faced by other institutions who serve many, many different groups, tribes, cultural entities, and what have you within their collections—I think it is risky to be arbitrary about drawing a line. I would emphasize the number of institutions that have met the deadlines and have done so oft times under very, very difficult circumstances.

But I think at the heart of the question, Senator, is where good faith efforts are not demonstrable, I certainly agree that they should be held to the letter of the law and whatever civil penalties are provided for and appropriate. As I said, however, with good faith demonstrable, for some institutions—because of the complexity I have alluded to, the size of the collections which have been alluded to, and the costs which are involved that without support from other sources fall on the hard-pressed operating budgets of the institutions—and contrary to popular belief, most of us do not have monies in excess of our needs and most of our people do not have undelegated time for their activities. So these new responsibilities oft times have proved very burdensome and have diverted institutions from their normal service to their communities and their other responsibilities.

I would be reluctant to say that 8 years is enough for everyone, but I would certainly be quick to say that 8 years is enough for those who have made less than good faith efforts to comply.

Senator INOUE. Both of you have mentioned two words that have caused lawyers and Members of Congress a lot of heartburn—good faith. [Laughter.]

At the present time, for example, this committee is struggling with the determination of good faith as it applies to the Indian gaming laws. What is good faith? The States say that they have exercised good faith and the Indians say that they have not done that.

Do you have any other suggestions other than good faith? [Laughter.]

Mr. KINTIGH. If I might elaborate on the good faith, I would encourage Interior to consult with some of the tribes that are working with those very museums and see if they feel that there has been good faith. I think in many cases you would find that the tribes—and some of those museums have had to consult with more than 100 tribes—that you find the tribes would say that there has been good faith. So even from a tribal judgment of those specifically involved—certainly not in all cases, and not in every instance—but I think you might find that from a tribal perspective you would get good faith.

I think at this point it is appropriate for whatever good faith is for there to be a fairly high standard for that—a higher standard than 3 years ago.

Mr. DUCKWORTH. Almost anything that poses an imponderable for lawyers are well beyond museum directors' ability to cope with.

Senator INOUE. Lawyers make good money on that. [Laughter.]

I wish to thank all of you and all the witnesses. This has been a very good hearing. My only regret is that my fellow committee members are not here. But I hope you will understand that we have a few other problems lurking around the halls, such as Kosovo and the budget and things like that.

The record will be kept open for the next 3 weeks. Your full prepared statements will be made a part of the record. If you have any addenda you would like to provide us or other testimony, please feel free to do so.

With that, the hearing is adjourned.

[Whereupon, at 12:10 p.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF TIM MCKEOWN

Thinking about 25 U.S.C. 3002, there seems to be one other issue that might benefit from amendment. While the statute calls for "grave protection," I think that this section has been interpreted to mandate excavation of Native American graves by requiring the Federal official to go through the "ownership" process in subsection (a). This despite the requirement at 25 U.S.C. 3002 (d)(2) that "the disposition of and control over any cultural items-excavated or removed under this subsection shall be determined as provided for in this section." While the later subsection can, and I believe should, be interpreted to mean that the land manager does not have to go through the disposition and control procedures for items that are not excavated or removed, the *Bonnichsen* case has put everyone on edge. They are excavating all graves to make sure they have enough information to determine disposition.

One possible solution would be to amend 25 U.S.C. 3002 (a) as follows:

(*) in the first sentence, by deleting the words "discovered on" and replacing them with the following: "removed from"

That will bring section (a) in line with section (d).

The other issue that I have heard raised has to do with the notification process related to the disposition of cultural items that are excavated or removed from Federal or tribal lands after November 16, 1990. As it stands, the regulations require the land manager to publish notices in the local newspaper, but not in the Federal Register. This was a purely pragmatic decision done when the regulations were being finalized to keep the cost of notification with the land managing agency. Some have said that all notices should be done in the Federal Register. That is probably a good idea for consistency sake. This might be accomplished by amending 25 U.S.C. 3002 as follows:

(*) after subsection (a)(2), adding the following new subsection as (a)(3): "If the disposition or control over any particular Native American cultural item is determined pursuant to this section, the Federal agency concerned shall, not later than 6 months of the determination, notify the affected Indian tribes or Native Hawaiian organizations. A copy of each notice shall be sent to the Secretary who shall publish each notice in the Federal Register."

This text is based on the similar requirements for inventories at 25 U.S.C. 3003 (d). There may need to be some wordsmithing to fit it in, but I think it should go in as 25 U.S.C. 3002 (a)(3).

PREPARED STATEMENT OF ARMAND MINTHORN, CONFEDERATED TRIBES, UMATILLA INDIAN RESERVATION

Good morning Chairman Campbell, Vice-Chairman Inouye and distinguished members of the Senate Committee on Indian Affairs. I am Armand Minthorn, member of the Board of Trustees for the Confederated Tribes of the Umatilla Indian Res-

ervation. We appreciate the opportunity to testify on the oversight of NAGPRA today.

Today you have heard, and will continue to hear problems in the implementation of NAGPRA, funding requirement, regulations and agency compliance. First I would like to discuss the great strides NAGPRA has made toward assisting Native peoples make decisions that effect the daily lives of our tribal members. Next, I will discuss the problems my tribe has encountered in implementation.

I am not here today simply to point out the difficulties in implementing NAGPRA. I am also here to note the accomplishments NAGPRA has made. NAGPRA has had the effect of recognizing the significance of tribal beliefs, not just to individual tribal members, but to the Nation as a whole. NAGPRA allowed over 500 distinct tribal cultures to retain the rights to their life-ways, a life-way which had been taken away by the U.S. Government through policies and practices over 2 centuries. Under NAGPRA tribes not only protect the remains of our ancestors, but that by helping our ancestors, we improve the well being of our communities.

Prior to the enactment of NAGPRA, there was no process, no way tribes could protect their ancestors held by museums and agencies, and tribes were powerless to take care of our ancestors. This conduct continued even over the objections of tribes. This ignored the basic human right that tribes must have a voice in the treatment of their ancestors. NAGPRA ended this and finally established that any system which overlooked this most basic premise of human rights should not be tolerated in a society which values religious freedom and honors individual rights. Upon the enactment of NAGPRA, Senator Inouye stated that the past practices toward Indian graves flagrantly violated the civil rights of America's first citizens. This was a powerful statement. NAGPRA is civil rights legislation, returning rights to the tribes which have been taken away since earliest days of this republic.

The National Park Service has been charged with implementing NAGPRA, and has instituted programs which have helped tribes implement NAGPRA including grants to tribes and museums. Grants allow tribes to effectively consult with museums and Federal agencies and pursue repatriation rather than merely being observers to the process. This consultation under NAGPRA, the formal process of negotiation, cooperation and policy-level decisionmaking between sovereigns is a bilateral decisionmaking process which insures effective implementation of NAGPRA. These grants represent a powerful tool for tribes to identify the museums which have NAGPRA items and actively seek repatriation.

Today, even with the important first step NAGPRA has made in recognizing the basic human rights of tribes to rebury their ancestors, problems exist with the implementation of NAGPRA. There have been complaints by the tribes that the NPS is under funded, under staffed, and is currently unable to bringing dozens of agencies and hundreds of museums into compliance with a law such as NAGPRA. Congress can assist the NPS solve this problem by increasing funding for NAGPRA implementation, and specifically to NAGPRA grants.

There has been a great deal of public reaction to the implementation of NAGPRA, much of it negative toward the tribes. What is missing from the public debate on NAGPRA is the fundamental recognition that tribes have a right to insure their ancestors graves are protected. Congress faces many challenges. It should strongly resist any attempts to weaken the protections to Indian graves provided by NAGPRA, because any attempts to do so would defeat the purpose of NAGPRA and continue to erode tribal civil rights and human rights.

SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON THE IMPLEMENTATION OF THE
NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

BY

SHERRY HUTT

APRIL 20, 1999

Mr. Chairman and members of the committee, I am Sherry Hutt, a Superior Court judge from Arizona and a White Mountain Apache Tribal Appellate judge, although I am not here to represent tribal interests. I am also a trustee with the Heard Museum and a PhD candidate in Forestry, although I am not here to advocate for museums or for science. Rather, I will draw upon my experience of the last fifteen years in writing and teaching in the area of cultural property law in order to relate to you some perspectives on the implementation of the Native American Graves Protection and Repatriation Act. I am pleased to have been invited to give testimony on the law.

My comments will be divided into two areas. First, I will address NAGPRA and its contribution to the area of cultural property law, and then I will address some of the areas of concern which have arisen and which may yet arise, together with some suggestions for resolution of those issues.

First, this Committee must be commended for its past efforts in providing the citizens of this country with a law which promotes equality of property rights for Native Americans. Such rights were not generally recognized in our society or enforceable in court. This law does not create a special class of persons in Native Americans, but rather guarantees to native people the right to control the disposition of their dead and the burial items of those deceased ancestors, as well as to obtain improperly removed items of sacred property and cultural patrimony. The elegance of this law is that it does not give special rights to Native Americans, Native Hawaiians and Alaska Natives, and therefore does not violate the 14th Amendment. Instead NAGPRA requires that the equal protection of property rights otherwise established in this nation be afforded to Native Americans. This law has become one of the most significant pieces of human rights legislation since the Bill of Rights.

NAGPRA is consistent with, and incorporates within, "otherwise applicable property law" (25 USC 3001 sec. 13). To further the

understanding and application of the law we may draw upon the wealth of established property rights principles. The NAGPRA protected categories are consistent with those types of items for which analogous protection has been assumed for non-Native Americans as part of our common law of property.

The remains of the deceased and their burial items may not be owned or sold in this country and are subject to disposition according to the wishes of the relatives of the decedent. NAGPRA accords this same respect to the remains and burial items of Native Americans. No longer will the human remains and burial items of native people be assumed to be government property when they are located on government land or are in a repository which receives federal funds and which for the most part came into possession of the items after exhumation due to a permit for scientific study or infrastructure improvement activity.

Sacred items, needed for use by traditional religious leaders for traditional practices by present day adherents, and inalienable items of cultural patrimony all receive protection under NAGPRA comparable to the unquestioned protection given to similar items held by non-Native American groups. Sacred items stored in the cave of a medicine man are not free for the taking due to the failure to place them under lock and key any more than ceremonial items left in an unlocked church are available to anyone who may desire them. The cultural patrimony which defines a culture, such as the Wampum belts of the Onondaga Nation, are not available for sale any more than the Liberty Bell or Statue of Liberty would be considered marketable items.

When the law was first passed there was concern expressed that Native Americans would give an expansive definition to "sacred objects" and that all native ethnographic material would be removed from museums. In fact that has not occurred and the narrow definition of the law has become understood as the parameter for protection. A year ago veterans of World War II expressed horror over the treatment of pieces of the U.S.S. Arizona removed and discarded during the construction of the memorial in the Honolulu harbor. They were shocked over the treatment of "sacred" property. I mention this to show that native people are not alone in their concept of sacred as an attribute of special property. The concept of sacred is generally recognized by all people, but is afforded protection only in certain limited circumstances.

There is no provision in NAGPRA which would require the repatriation of a item for which the possessor holds lawful title. The law expressly avoids creating a "taking" of private property to effectuate a public purpose in violation of the Fifth Amendment. Sacred objects may be individually owned and be subject to alienation pursuant to the property laws of a tribe. Items which are now considered to be cultural patrimony may not have been imbued with such distinction at the time they were separated from the group and are not subject to the requirements of NAGPRA. The law requires that federal agencies and those museums which receive federal funds look into their collections and question their lawful title to protected items. Property rights must be established as of the time the protected item was separated from the group. Assumptions of ownership are insufficient, therefore, the removal

of items pursuant to an Antiquities Act or Archaeological Resources Act permit, which assumed government ownership and control, is insufficient to convey title. Lack of regard for Native American property rights may no longer be condoned.

To summarize the law, it may be said that NAGPRA is wholly consistent with American ideas of property rights. In its present form the law is internally consistent and unambiguous in its adherence to prevailing concepts of property law. Quite simply, the law provides a process by which federal agencies and museums which receive federal funds can go about the task of righting past wrongs in a consistent manner. The Congress has rectified past injustice and in so doing has saved agencies and museums considerable effort and expense in devising a management plan which is fair and efficient.

It is my belief that many of the areas of conflict which have been referred to your attention are either the product of a lack understanding or experience with the law, or may be resolved by administrative action in the implementation of the act. There are just a few areas where amendment may refine rather than unbalance that which is an artful compromise.

Previously, amendments to Section 3. Ownership, were proposed, which, if passed, would have disrupted the perfect harmony of NAGPRA with property law. Section 7. Repatriation and Section 3. Ownership each speak to different circumstances and are not interdependent components of the law. Section 7. deals with protected items in the possession of federal agencies and museums which receive federal funds and which have been long separated from the land. A stay of repatriation for items in collections may be obtained in order to complete scientific study of major benefit to the United States. There is no such provision in Section 3. for good reason. Section 3. applies to new discoveries where the disposition of the items is to be determined in the first instance. Ownership in the federal landowner is not presumed. Instead, acquisition is deferred until a determination is made as to ownership rights. If NAGPRA applies then possession goes to the culturally affiliated tribe having standing to receive the human remains and cultural items. If the government were to retain protected items for scientific study, it would be exercising dominion and control. The government would be asserting a property right hostile to the proper owner. The practical effect of such an amendment would be to eviscerate any curative effect of NAGPRA and Section 3. would become mired in ambiguity.

Recently, complex and protracted litigation erupted after the discovery of ancient human remains on federal land. Scientists contend that they are entitled to study the remains prior to agency compliance with NAGPRA. There are several simple responses to the issues raised in the lawsuits. First, there is no right of a private individual to take control of government property for study. Second, only descendants, or those designated as culturally affiliated under the due process provisions NAGPRA, have standing to claim the remains. The federal agency did have the ability to take whatever action it deemed appropriate initially, but upon determining that the remains were those of a Native American further action would be dependent upon receipt of permission from

the individual or tribe with the authority to give approval. The issue raised by NAGPRA is not one of Indians versus science. Rather the issue is one of property rights. Permission pursue scientific research must come from the party with the right to grant it.

There are also agencies and institutions which claim that NAGPRA places burdensome responsibilities on them for compliance. This issue should not concern this committee. Congress has authorized grants to assist in NAGPRA compliance, federal agencies and museums have now had almost nine years to bring their collections into compliance, and the federal curation regulations require a standard of professionalism in collections, which, if adhered to, would facilitate the due process requirements of NAGPRA.

It is now time for Congress to consider funding the position of a prosecutor to evaluate and pursue sanctions for violations of the act under the civil penalties provision (25 USC 3007). One method of funding would be an amendment to the law which would allow the Secretary of Interior to retain the proceeds from an action to assist in funding the administration of NAGPRA compliance.

Another area of potential dispute concerns the determination of cultural affiliation. This concern arises from two areas; the method of determination of cultural affiliation and the level of proof necessary to make the determination. In neither case is amendment to the law warranted. Again, amendment may lead to imbalance in the law and to future controversy. The determination of cultural affiliation is a fact intensive process which is best served by a law which is flexible. NAGPRA provides that evidence to support cultural affiliation for repatriation may be scientific, ethnographic, oral history, or other means. The initial determination is made based on any competent evidence. There is no quantitative threshold in the law, therefore the standard would be within the bounds of reasonable discretion. The decision must not be arbitrary or capricious or emanate from an abuse of discretion. This is the standard which applies generally to the deference given to the decisions of agency officials. The level of proof necessary to resolve a claim in the face of a dispute is a preponderance of evidence. This is the level of proof which applies in courts of law in most civil proceedings. There is no requirement that proof be grounded in scientific study and be established to a "scientific certainty." Such an exacting level of proof is not required by NAGPRA and does not exist in law or science, except as to those concepts so devoid of question that they have become laws of science.

The NAGPRA process now requires that the federal agency official or museum director make a determination of cultural affiliation for each of the human remains and associated burial items in the collection and record their decision on the inventory. There is no requirement that the decision be subject to prior approval or editorial review by some government official or other body. The NAGPRA administrator charged with the publication of inventories does not possess editorial discretion. That the law did not provide such a bottleneck was not a mere oversight. The

NAGPRA administrator may provide guidance for compliance and has in practice included disclaimers on questionable notices where compliance with due process under the law was in doubt, but not where sufficiency of evidence was questioned. Cultural affiliation may be shown by any competent evidence and the law does not set preferences for types of evidence, nor does it set quantitative levels of proof.

Another area of concern related to the determination of cultural affiliation is rooted in an administrative problem, which may be best resolved by administrative action. At present the same office within the Department of Interior which is charged with the responsibility for Park Service compliance with NAGPRA has been assigned the responsibility for the administration of NAGPRA, including staff support to the Review Committee. This dual function is fraught with looming issues of conflict of interest, due to the fault of no one person, but rather due to the irreconcilable differences of interests to be represented. For example, a park may look to the Departmental Consulting Archaeologist (DCA), for assistance in making a determination of cultural affiliation, as well as in other areas of NAGPRA compliance or curation. The DCA is also charged with the administration of NAGPRA, including NAGPRA compliance and the staff support to the Review Committee which will hear any disputes between tribes and federal agencies, such as the National Park Service. This conflict of interest may only be resolved by placing NAGPRA compliance, including NAGPRA grants administration and staff support to the Review Committee, in an area of the Department of Interior which is not also in a position to advocate for tribes or the interests of science. The Secretary has several available options, which may receive support from this committee, but which do not require Congressional action. The DCA may then retain responsibility for NPS compliance and any special duties, such as the current memorandum of agreement between NPS and the Department of Defense, in which the DCA is assisting the Corps of Engineers address NAGPRA issues.

This suggestion is not intended as an attack upon the DCA, whose position exists to further science. The office of Archaeology and Ethnography and the DCA performs many important functions, not the least of which is the mission to educate which has resulted in an exemplary partnership with the Justice Department. Together they train lawyers in the civil and criminal aspects of cultural property law so that they may defend our cultural heritage and prosecute those who violate protection laws such as the criminal provisions of NAGPRA.

Of all of the suggested amendments to NAGPRA which you may consider there are just a few which could enhance the law without disrupting the current balance. One possible action would be to amend the law to allow lands ceded via ratified treaties to be considered as a tribe's aboriginal territory along with those lands identified by decisions of the United States Court of Claims or the Indian Claims Commission (25 USC 3002 (a)(2)(c)), when determining priority of claims under Section 3. Also, some questions have developed in the application of the criminal law, 18 USC 1170 (b), concerning the definition of "obtained." Trafficking in protected

items obtained in violation of the act is a criminal offense. One may obtain items from government or Indian land without permission, or they may obtain items by converting them or withholding them from the repatriation process. Since in the second instance the item may have been initially obtained without criminal activity, it may add clarity to the law to state "obtained or retained" in violation of the act. This omission is not fatal to the success of the law, but may forestall possible challenges.

Finally, the existence of conflicts arising from the NAGPRA process is not a cause for concern. Conflicts will inevitably arise, but the law has a built-in process for dispute resolution, which relies on the collective wisdom of a respected and capable group, the Review Committee. This dispute resolution coalition has the flexibility to fashion creative solutions to the most complex problems, in a manner not possible in the courts. Over time NAGPRA, with the guidance of the Review Committee, will develop its own culture of adherence. Remember, NAGPRA changed the rules after 84 years of doing business without consideration of Native American cultural property rights and will it take more than 10 years for equal protection of the law to become part of the fabric of our culture.

June 3, 1999

Senator Daniel K. Inouye
Vice Chairman
U.S. Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Inouye,

Thank you for inviting me to provide text for possible amendments to the Native American Graves Protection and Repatriation Act. This law has been called a "true compromise" that mediated the interests of Indian tribes, Native Hawaiian organizations, museums, and agencies regarding the disposition or repatriation of Native American cultural items. NAGPRA has largely been successful in clarifying the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations. The following amendments are offered in the spirit of that compromise to clarify the law. Any amendments which would substantively change the law and alter the balance would compromise the success of NAGPRA as a property rights law.

1. Amend Section 3. Ownership to Section 3. Disposition. This term accurately reflects the process mandated by Section 3. In effect the law directs that upon future discovery of protected items the land manager will make a determination of rights to the item. Human remains cannot be owned, but a disposition may be made of protected items which are not to be accessioned by the land management agency. Specifically the amendment would be as follows:

Sec. 3. of NAGPRA (25 U.S.C. 3002) is amended-

- (1) in the title, by deleting the word "OWNERSHIP" and replacing it with the following: "DISPOSITION"
- (2) in paragraph (a), by deleting the words "ownership or control of: and replacing them with the following: "disposition of and control over"
- (3) in paragraph (a) (2) (c), by adding after the words "is recognized by a" the following: "treaty, statute, or"
- (4) in paragraph (c) (3), by deleting the words "ownership and right of control of the" and adding after the words "disposition of" the following: "and control over"

2. The inability of federal agencies to withhold certain information from disclosure has frustrated the purpose of the law. The following new section should be added to the law as

Section 16 of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3014):

"Section 16. AUTHORITY TO WITHHOLD FROM DISCLOSURE

Upon the request of a lineal descendant, Indian tribe, or Native Hawaiian organization, the head of a federal agency may withhold information related to consultation about specific human remains, funerary objects, or objects of cultural patrimony from disclosure to the public if the Federal agency determines that disclosure will:

- (1) be detrimental to the practice of traditional Native American religion by present day adherents; or
- (2) provide public access to information that an Indian tribe or Native Hawaiian organization considers inalienable."

3. Currently the Review Committee is charged with making recommendations for the disposition of culturally unidentifiable human remains, but not the associated funerary objects of those individuals. This is inconsistent with traditional notions of property law. Section 8 (c) of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3006 (c)) is amended as follows:

- (1) in paragraph (5), by adding after the words "culturally unidentifiable human remains" the following: "and associated funerary objects"
- (2) in paragraph (5), by adding after the words "such remains." the following: "and associated funerary objects."

4. Two alterations to the use of civil penalties would further facilitate the act. One suggestion is to allow the Secretary to retain fines collected to fund enforcement and the other would allow the Secretary to give awards to individuals who provide information leading to civil penalties, such as is provided in the Archaeological Resources Protection Act (16 U.S.C. 470gg (a)).

Section 9 of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3007) is amended by adding the following new paragraph:

"(e) Enforcement. Penalties collected under this section will supplement the appropriation bearing the cost of related enforcement activities.

The Secretary may:

- (1) pay to any person who furnishes information which leads to the finding of a civil penalty (except officers or employees of the United States or any State or local government who furnishes information or renders service in the performance of official duties) an amount not to exceed one half of such penalty or \$5000, whichever is less: and
- (2) reduce a penalty if the violator agrees to pay

appropriate restitution to the aggrieved party or parties or may pay to aggrieved parties as restitution an amount not to exceed the amount of the penalty."

5. Section 4 ILLEGAL TRAFFICKING IN NATIVE AMERICAN CULTURAL ITEMS, is divided into two sections, which in practice have no legal distinction and which has caused some confusion in criminal cases. Subsection (a) prohibits trafficking in Native American human remains "without the right of possession." Subsection (b) makes it a crime to traffick in cultural items "in violation of the Native American Graves Protection and Repatriation Act." Subsection (b) may be violated in one of two ways: 1. in contravention of Section 3. OWNERSHIP by removing protected items from federal or Indian land without the right of possession; or, 2. in contravention of Section 7. REPATRIATION by obstructing the repatriation process for a protected item without the right of possession for that item. Therefore in any criminal case the essence of the crime is the trafficking of a protected item without the right of possession.

Sec. 4 (a) ILLEGAL TRAFFICKING--(18 U.S.C. 1170) is amended as follows:

- (1) in the title of sec. 1170, by deleting the words "Human Remains and"
- (2) in subparagraph (a), by:
 - (a) deleting the letter "(a)"
 - (b) deleting the words ", the human remains of a Native American" and replacing them with the following: "any Native American cultural items"
 - (c) deleting the words "those remains" and replacing them with the following: "those cultural items"
- (3) by deleting subparagraph (b)

6. The law may be further amended by adding a civil prosecution component analogous to that in ARPA (16 U.S.C. 470ff), by adding the following new section (25 U.S.C. 3015):

"Sec. 17. CIVIL PENALTIES FOR ILLEGAL TRAFFICKING IN NATIVE AMERICAN CULTURAL ITEMS

(a) Any person who trafficks in Native American cultural items without the right of possession may be assessed a civil penalty by the Secretary. No penalty may be assessed under this section unless such person is given notice and opportunity for a hearing with respect to such violation. Each violation shall be a separate offense. Any such penalty remitted to the Secretary may be mitigated by the Secretary. 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 commercial value of the item, and
- (B) the costs of curation, disposition and reburial.

Such regulations shall provide that, in the case of a second or subsequent violation by any person, the amount of such civil penalty may be double the amount which would have been assessed if such violation were the first violation by such person. The Secretary may agree to reduce the penalty amount if the violator agrees to pay restitution to the aggrieved party or parties. The penalty amount may exceed the amount of restitution.

(b) (1) Any person aggrieved by an order assessing a civil penalty under subsection (a) may file a petition for judicial review of such order with the United States District Court for the District of Columbia or for any other district in which such person resides or transacts business. A such a petition may only be filed with the 30-day period beginning on the date the order making such assessment was issued. The court shall hear such action on the record made before the Secretary and shall sustain his action if it is supported by substantial evidence on the record considered as a whole.

(2) If any person fails to pay an assessment of a civil penalty-

(A) after the order making the assessment has become a final order and such person has not filed a petition for judicial review of the order in accordance with paragraph (1), or

(B) after a court in an action brought under paragraph (1) has entered a final judgment upholding the assessment of a civil penalty, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect such penalty and such court shall have jurisdiction to hear and decide any such action. In such action, the validity and amount of such penalty shall not be subject to review.

(c) Hearings held during proceedings for the assessment of civil penalties authorized by subsection (a) shall be conducted in accordance with section 554 of the title 5 of the United States Code. The Secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid to witnesses in the court of the United States. In 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 found or resides or transacts business, upon publication 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 before the Secretary or to appear and produce documents before the Secretary, or both, and any such failure to obey such order of the court may be punished by such court as contempt thereof."

Thank you for your consideration of the above suggested amendments to the Native American Graves and Repatriation Act. I remain at your service to assist in any manner that you deem appropriate.

Sincerely,

Sherry Hutt

**United States Senate
Committee On Indian Affairs**

Oversight Hearings

**Implementation of the
Native American Graves Protection and Repatriation Act**

Testimony By

Rosita Worl, Ph.D.

Sealaska Corporation

Washington, D.C.

April 20, 1999

Chairman Campbell
Vice Chairman Inouye

My name is Rosita Worl and I am currently serving in the capacity of Interim Executive Director of the Sealaska Heritage Foundation. The Foundation's membership includes the Board of Directors of Sealaska Corporation which is the regional Native Corporation for Southeast Alaska and was created under the Alaska Native Claims Settlement Act of 1971. Sealaska is also recognized as a tribe for the statutory purposes of NAGPRA.

I have been involved with NAGPRA as a Board Member of the National Museum of American Indians and as a consulting tribal anthropologist to The Central Council of Tlingit and Haida Indians of Southeast Alaska. I have witnessed the benefits of NAGPRA through my participation in ceremonial activities in which cultural objects returned under NAGPRA to clans in Southeast Alaska have been used as they were originally meant to be.

On occasion I have written and discussed various aspects relating to the implementation of NAGPRA with our Alaskan Congressional Delegation. Thus I was very pleased when I learned that The Committee On Indian Affairs would be holding a hearing on the implementation of NAGPRA, and I am very honored to be here today.

In the interest of time I will highlight a few issues. However, before I begin my discussion, I would like to note for the record that Sealaska concurs with the nine recommendations that were outlined in a Memorandum dated April 14, 1999 to the Chair and Vice Chair of this Committee from the Minority Committee Staff in reference to this Oversight Hearing. I would especially emphasize our wholehearted support for the recommendation to "Replace the NPS with another administering agency that would not have the inherent conflict of interest which exists in the Office of Chief Archaeologist with the National Park Service." I have written to my Delegation about this issue and I know that this specific concern has emerged throughout Indian Country and in Hawaii. I am also under the assumption that others will speak in-depth on this issue during the course of this Hearing.

1. Recommendation: To implement an oversight process that ensures that museums and other entities act on repatriation claims on a timely basis.

To illustrate the basis of this recommendation, I would like to cite one example which substantiates this recommendation. We have one repatriation claim for over 40 objects of cultural patrimony from the University of Pennsylvania Museum of Archaeology and Anthropology that was initially submitted in September 26, 1995. The clan submitted information to validate its claim. The existence of clans among the Tlingit and their patterns of communal ownership of property are well established within the ethnographic literature and several legal cases including the most recent and widely-published Whale House decision in the Chilkat Tribal Court. This repatriation petition was modeled on similar information that other museums have accepted and honored in their return of objects to clans. The University of Pennsylvania Museum in this instance continued to

request further information including the “use and origin” of the objects. They then wanted tapes from the clan elders. In the third year of the process, another tribe within the same community made a claim for the same objects. The first claimant responded by submitting a list with the signature of all its members and a resolution stating that the clan would remain with the first claimant. Although this repatriation request was clouded with a conflicting claim, the Museum has made no attempt to resolve the issue and instead continues to ask for even more information. We understand that this collection is the centerpiece of University of Pennsylvania exhibits, and the clan views the Museums continuing questions and lack of action over a four year period as a delaying tactic.

- 2 Recommendation: Congress should appoint a Committee of Native American Religious Leaders and Scholars and representatives from the academic community to define “Sacred” taking into consideration the sociocultural changes within Native American tribes and the phenomenon of religious renewal.

I note that the Committee Staff pointed out in its Memo that the NPS views are that there “sacred” should be narrowly interpreted and evidence of alleged sacredness must be submitted to substantiate claims. I believe that this view sets a contentious framework for Native Americans who have taken an opposite position. Many tribes are involved in religious renewal processes and some are finding that conditions have changed dramatically from the environment of their ancestors. All cultural processes, including religion, evolve and Native Americans must also have the ability to change and alter their practices to accommodate current conditions. This is a complex issue, and I would urge this Committee to have a focused and independent review of the definition of sacred and its interrelationship with religious renewal.

- 3 Recommendation: Congress should adopt a policy to ensure the prompt reburial of culturally-unidentifiable human remains.

I am under the assumption that the evidence that will be required to substantiate claims for culturally-unidentifiable human remains will be onerous, costly and time consuming. It is my recommendation that Congress should adopt a policy that would automatically return and rebury culturally-unidentifiable remains to the site from which the remains were taken. The same sacred and spiritual beliefs surrounding culturally-unidentifiable remain apply as they do to culturally-identifiable remains. This country has honored all unidentifiable remains of military personnel symbolized by the “Unknown Soldier” and buried them. I believe Unknown Native American human remains deserve the same treatment and respect.

- 4 Recommendation to ensure that all museums and entities which receive federal funding comply with NAGPRA

We recently learned through a news article in early April that the Stockton Parks and Recreation Department Tlingit has a 46 foot red cedar Tlingit Totem Pole that it had decided to remove, cut it into manageable pieces and send to "a land fill" The provenance of this pole was known, but no contact under NAGPRA had been made with our people At this moment we are trying to determine that status of the totem pole.

5. Recommendation. Congress should expand NAGPRA to the international level in concert with federal aid packets to other Nations.

We have heard disturbing news that Russia has been selling ethnographic pieces from its museums to private collectors Although this information is unsubstantiated, we have reason to believe it is probable As you are aware Russia presumed to own Alaska prior to the United States and during their tenure in Alaska, its representatives removed many significant ethnographic objects from Alaska

- 6 Recommendation Amend NAGPRA to exempt private collections donated to by private collectors museums from repatriation claims.

It is my understanding that private collectors are reluctant to donate their collections to museums since they would be subject to NAGPRA Although I would favor the return of such collections to the original owners, and I would encourage collectors to do so, I am of the opinion that this will not be a widespread practice. I would favor collections in museums rather than in private collections where the respective tribes would be at least able to view the objects

**TESTIMONY OF TEX HALL, CHAIRMAN
THREE AFFILIATED TRIBES
The Mandan, Hidatsa, and Arikara Nations
of the Fort Berthold Reservation
AND
CHAIRMAN, ABERDEEN AREA TRIBAL CHAIRMEN'S ASSOCIATION**

**SUBMITTED TO THE SENATE COMMITTEE ON INDIAN AFFAIRS
AT THE OVERSIGHT HEARING ON THE NATIONAL IMPLEMENTATION OF THE
NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT**

Senator Inouye, Members of the Committee, my name is Tex Hall and I am the Chairman of the Three Affiliated Tribes. We are the Mandan, Hidatsa and Arikara Nations of the Ft. Berthold Reservation in North Dakota. I am also Chairman of the Aberdeen Area Tribal Chairmen's Association, and I present my testimony today on behalf of seventeen Northern Plains tribes. Thank you for the opportunity to offer our comments and concerns regarding the implementation of the Native American Graves Protection and Repatriation Act (NAGPRA).

Our North Dakota tribes, the Standing Rock Sioux, the Spirit Lake Sioux, the Turtle Mountain Band of Chippewa and our people, the Three Affiliated Tribes, have been active in the issues of reburial and repatriation since 1985. We repatriated and reburied more than 2,000 of our ancestors in 1989, then joined a national intertribal coalition to work for the passage of NAGPRA. We have since reburied more than 3,000 additional ancestors, as well as their personal burial property. We fought hard to get this law, and we have worked hard to locate our relatives and bring them home. We did this because our elders told us to; they said our spiritual beliefs tell us our ancestors suffer every day they languish in the scientific repositories of this country. We did it because we *never* forget our dead, we love them, we respect them, and because we believe they, too, should enjoy the self-evident, human right to rest in peace.

Senators, we did not work so hard for the passage of this law so that it would protect the interests and desires of the science and museum industries. Everybody knows this law was passed so our ancestors and our sacred things could come home to us. Everybody knows it was passed at our insistence, and that the museum and science industries opposed it with all of their might and resources. It has always been our understanding that it would protect the rights of the deceased and their descendants.

Yet, since 1990, our tribes have observed the steady erosion of protections to tribes granted by the law, and watched as federal, state and academic personnel circumvented the law to satisfy their personal, vested interests in our ancestors' remains. We monitored the promulgation of regulatory language to implement the Act and watched as the regulatory process was used to substantially alter federal Indian policy. We brought these grievances to the attention of this Committee at the last Oversight Hearing on NAGPRA held on December 6, 1995, but received no assistance with the issues we raised. We have also closely monitored the activities of the NAGPRA Review Committee, spending thousands of precious dollars to send our representatives to meetings where our questions were not answered, our concerns ignored, minimized or manipulated, and where we watched as federal agencies, museums and universities were granted one extension after another with regard to NAGPRA deadlines. Members of the Review Committee were, at the same time, inventing repatriation requirements for tribes, such as requiring the Minnesota tribes to obtain written permission from a long list of tribes before they could repatriate remains. This is documented in the minutes of the January 1998 Review Committee meeting. The Minnesota request, which had the full support of the state, was delayed for almost a year while repeated attempts were made to fulfill this extra-legal demand.

Our Nations are also extremely concerned about a document generated by the NAGPRA Review Committee at their Oregon meeting held in June of 1998, where four distinct categories of unaffiliated Native remains were "created" without precedent in the Act. We have severe problems with these categories, as they are designed to be the foundation upon which science will base its claims to carry out extra-legal studies of our ancestors' remains. Two of the categories discuss "archeological populations," and whether or not they are extinct or have living descendants. Members of the Committee, this term "archeological populations" is completely foreign to our peoples, and comes from a world view and philosophy which has nothing to do with the way we define or see ourselves. *These categories have been created to do nothing more than separate tribes from our claims that all so-called "unaffiliated" Native remains taken from our collective aboriginal homelands are our ancestors. We do not want people who are new to our homelands using their own definitions of us or our histories to separate us from our right to rebury our dead.*

Our only "success" story where the NAGPRA Review Committee is concerned was the Federal Register publication of their recommendation for the disposition of tribally unaffiliated

remains, where decisions for repatriation and reburial would be left in the hands of intertribal, regional coalitions whose joint claims would be based upon our collective aboriginal homelands. **Provided for in the law, joint intertribal claims EMPOWER tribes, and we have done a half-dozen successful joint reburials to prove it, so we worked hard to prevail upon the Review Committee to make this recommendation to Secretary Babbitt, and felt, finally, a sense of hope and fair play when it was published for public comment. But we were told in January of 1998 by National Park Service staff that the recommendation was "dead in the water" because Secretary Babbitt wanted the Review Committee to broker a compromise between tribes and the science industry with regard to the final disposition of our ancestors.**

Members of the Committee, the law does not speak of another compromise to be made on the part of tribes where our tribally unidentifiable ancestors are concerned. Indeed, we are compelled to say again to you that the law was *not passed* to protect the interests of science, it was passed to protect our peoples. But another compromise was almost obtained from tribes *without their even knowing it* with a \$48,000 grant from the Department of Interior, and an exclusive, invitation-only forum was planned, to be comprised of science and museum industry members and a handful of Native individuals. The plan was to hold a dialogue between 25 to 30 people, (half of whom would have no desire to protect tribal interests), come up with a compromise on behalf of over 500 sovereign nations, 95% of whom would be excluded from attending the forum, and forward it to the Review Committee for rubber-stamping before presentation to Secretary Babbitt. *We spoke out against this forum because we viewed it as a manipulative tool to give a voice to the science and museum industries in an issue where they should have none, and the fate of our ancestors would be determined by those who only seek to mistreat, disrespect and exploit our dead. Moreover, any more compromises on the part of tribes would complete the gutting of the law of its protections to tribes, most notably by allowing the Department of Interior to utterly ignore its trust responsibility to Indigenous Nations, who should be the only ones to decide what happens to our own ancestors.* We understand that the organizer of the forum, Martin Sullivan of the Heard Museum, has now withdrawn from the project, but is attempting to get others to accept the grant and move forward with it. *We do not want anyone but our own Nations deciding the fate of our ancestors.* We have already made too many compromises; we do not wish to make anymore. It's someone else's turn to compromise.

Senator Inouye and members of the Committee, I wish I could say that is the extent of the problems we have experienced in trying to get this law to work for us. But it is only the tip of the iceberg. Please listen closely to the following statements, and see if you think the law is being followed.

The Great Plains Region of the Bureau of Reclamation signed a Memorandum of Understanding with the Smithsonian Institution to transfer our ancestors' remains and personal burial property to the ownership of the Smithsonian. NAGPRA is very clear in stating that all federal agencies must repatriate Native remains excavated from lands they manage or which are funded with federal dollars. It does not say it's okay to give them to the Smithsonian, nor does the law make any exceptions to this requirement. This was done post-NAGPRA, and it was done without our knowledge or permission. We were not consulted, and therefore had no opportunity to protect our interests or those of our relatives. The Smithsonian Institution has no repatriation deadline, nor do they have to meet restrictions on scientific studies, destructive or not. When we reacted to this shocking news, Terry Zontec and Myra Geisen of the BOR told us they didn't see why we were getting so upset at them, because the National Park Service and the U. S. Army Corps of Engineers had done the same thing. These ancestors' graves were all robbed during the Missouri River Basin Survey, an enormous archeological project paid for by federal dollars, carried out on federal lands, and which was conducted as a precursor to flooding us out of our homelands. When asked for copies of the legal contracts NPS signed with the Smithsonian to give away our deceased relatives, Frank McManamon of the NPS denied any knowledge of them. Michael Trimble of the U.S.

Army Corps of Engineers, although he said he would not be surprised if such an agreement existed between his agency and the Smithsonian, failed to respond to our tribal request to investigate the matter and to forward any related documents. Please investigate this shocking footnote to the loss of our beloved bottomlands, and ensure that all federal agencies fulfill their responsibilities.

We ask this of you because when we inquired about filing a NAGPRA grievance on this matter, we were told by the NPS that it didn't matter WHO inventoried the remains, just so that they were inventoried. This is the regulatory authority for the Act making statements like this, Senator Inouye, and we need your assistance and intervention.

We also have documents which show that, rather than follow state law and rebury a 4,000 year-old body which washed out of a creek on state lands in Nebraska, the remains were shipped to Douglas Owsley of the Smithsonian on the pretense that he would establish tribal affiliation of the remains for the State. Not only did Owsley predictably fail to do so, but in a letter reporting this speculative "finding," he added a request that the remains be transferred to the Smithsonian for accession into its collections, and included a form for this purpose. This was done post-NAGPRA, without the knowledge of affected tribes, and *the Nebraska Indian Affairs Commission was told that the remains were reburied!* We have not been able to ascertain where the remains are, if they were inventoried pursuant to state and federal law, nor if they were added to the Smithsonian's collections. You may recall that Mr. Owsley is one of the plaintiffs in the lawsuit brought to prevent the repatriation of Kennewick Man to a coalition of Washington tribes. You may not know, however, that Mr. Owsley purchased the airplane ticket of Jamie Chatters, the anthropologist who first examined Kennewick Man and a fellow plaintiff, so that Chatters could deliver Kennewick Man to the Smithsonian. The U.S. Army Corps stopped Mr. Chatters at the airport and prevented him from leaving the state with the remains. When attorneys for the tribal claimants in the case contacted the Smithsonian to complain about Owsley's actions in the case, they were told that nothing could be done because (a) Owsley was acting on his own personal time and money and (b) he is such a renowned scientist that they pretty much leave him to his own devices. A quick review of the documents we have provided in this case, however, show that Owsley used his position at the Smithsonian to obtain those remains. It's no longer personal, Members of the Committee, and our Nations do not believe that an individual's professional reputation should be used as a personal exemption to obeying the law.

There are other instances where Mr. Owsley attempted to obtain ancestral remains taken from lands within the state of North Dakota, for which we are also prepared to provide documentation. We also have written documentation where Mr. Owsley asked a museum curator at the University of Nebraska-Lincoln to look the other way while he examined remains taken from Bureau of Reclamation lands but which were off-limits to everyone but Reclamation personnel. We fear for our ancestors, Members of the Committee, because nearly every institution where we have completed NAGPRA consultations, we are told that Douglas Owsley of the Smithsonian Institution has been there first. He has made a specialty of studying our Northern Plains tribes, and we are afraid to find out how many more of our relatives have been spirited away from the NAGPRA process. We want you to investigate all allegations of Owsley's attempts to fulfill his own agenda in complete defiance of NAGPRA.

Also, Senators, we wish to tell you of a situation at the University of Nebraska-Lincoln, where Professor Karl Rhinehard conducted post-NAGPRA, destructive, invasive scientific study of Ponca, Pawnee, Arikara and Wichita ancestors. He extracted DNA from the remains of our relatives, and he did this in violation of the law and without our knowledge or permission. We know he did this because he published his speculative findings in a professional paper in one instance, *In the Wake of Contact: Biological*

Responses to Contact, and openly defied the Ponca tribe's position of no scientific study of their remains in another. Incredibly, Rhinehard also lied to promote his illegal, immoral and unethical research agenda to obtain a federal grant by stating that he actually had the Ponca's permission to conduct this type of study on their relatives! You may have read media reports of this professor's exploits, where he put a little Native baby's skull on his hand, and made it "talk" and say inane things to make his students laugh. He also had sole access to a lab where the remains of an Omaha ancestor were found in a drawer with Taco Bell wrappers and other trash, and he is suspected of removing soft tissue remains from an official NAGPRA inventory and from the boxes themselves, before the rest of the remains were turned over to the Poncas for reburial. The Poncas were led to believe they had received all the remains of their relatives. A coalition of fifteen Great Plains tribes seeks a federal investigation into these allegations, since a state investigation (conducted by colleagues of Rhinehard's who hired him to do forensic murder studies) failed to result in charges against him. Moreover, instead of sanctioning Rhinehard for his actions, UNL gave him tenure. We are compelled to wonder if acts of this nature are occurring elsewhere, given the pervasiveness of the regrettable attitudes of the science and museum industries we are forced to work with. We fear there are many more tragic stories like this one that just have not come to light yet. The University of Nebraska at Lincoln, however, is a site where a series of acts of professional misconduct, immoral and unethical research and criminal behavior have been carried out without sanctions being brought by any institution or agency. We want you to assist us in opening a federal inquiry into the matter, since no one has acted on our request.

Members of the Committee, we also wish to inform you of a situation where a sitting member of the NAGPRA Review Committee attempted to extort ancient Native DNA from the Whitefish River First Nations Band Reserve in Ontario, Canada. After telling the Whitefish River people that his institution, the University of Michigan, did not have to return ancestral remains stolen from an ancient island burial site in their aboriginal homelands, Professor John O'Shea informed Whitefish River they could not repatriate them because (a) they were not related to the remains despite the fact that they came from a burial site used by the band for many centuries and (b) the U of MI was not required, under NAGPRA, to repatriate them to a tribe outside the United States.

But then O'Shea had an idea, and he made them an offer: give me your written permission to extract DNA from these ancient remains and you can have them back, even though we said you're not related to them, and even though the law prevents us from repatriating to you. The Band members actually went home, took a vote on the issue, and the people's answer was a resounding "NO!" O'Shea's reply is in the documentation accompanying this testimony, which essentially expressed his disappointment that the Band could not be more cooperative, since it forced him to (1) keep their ancestors' remains, (2) lift the moratorium on study of the remains he had instituted, and (3) closed the door on any further communications with his university regarding their ancestors' remains.

Members of the Committee, our Nations wish to stand in support of the Whitefish River First Nation Band of Ojibwe, and we ask that you do so also. We have included for your review excerpts from the Master's Thesis of Thomas Bron, published by the University of Michigan in 1998, which documents the history of this shocking situation. We feel this case very clearly demonstrates the distressing lengths to which Dr. O'Shea is willing to go to serve his own scientific interests. We also attach for your review correspondence from Dr. O'Shea to the University of Nebraska-Lincoln, in which he makes known his feelings regarding the University's moratorium on study of Native remains, which were perceived as threats by that University. Our Nations feel extremely uncomfortable in

having to entrust this individual to make any kind of recommendation regarding a fair and ethical disposition of our ancestors' remains and burial property, and therefore call for his immediate removal from the NAGPRA Review Committee.

Finally, Members of the Committee, we wish to address the subject matter of the resolution passed by the Native Hawaiian group known as Hui Malama I Na Kupuna O Hawaii Nei. This resolution cites many problem areas in the fair implementation of the Act due to an inherent conflict of interest present because the regulatory authority of the Act, Frank McManamon, Departmental Consulting Archeologist of the National Park Service, is an archeologist whose agency must comply with the Act's requirements. Of the many problems and frustrations we could share about working with McManamon, the one we want to draw to your attention is the testimony he gave to Congress in June of 1998 during a hearing regarding the Hastings Bill. This bill, as you know, was introduced to amend the Act to specifically allow for scientific study of our dead, among other things. McManamon testified that the amendment was not necessary, since the Act already allows for study of our ancestors who have been placed in the category of tribally unaffiliated. Not only is this untrue, but there is nothing in the Act to provide for this or any other type of study.

Members of the Committee, our Nations regard this statement as nothing more than McManamon assigning himself powers and authorities he does not have, such as the power to reinterpret language in the Act. NAGPRA specifically states the following, ***"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."***

McManamon was actually heard to say, at the January 1998 meeting of the Review Committee, that the above statutory language came about to protect museums from being forced to carry out studies on our ancestors that they didn't want to do. We were shocked to hear this because our tribes fought very hard to get that precise language in the law to protect our interests, not those of the museums. Our Nations view McManamon's reinterpretation of the law as a blatant move to make available for destructive, invasive studies our ancestors' remains who have had the misfortune to find themselves placed in the "unaffiliated" category, not to mention the four "subdivisions" referenced in the Review Committee's document entitled "Draft Principles of Agreement." We fear, and rightly so, that he has been working all along to gain for his colleagues unhindered access to Native skeletal remains, bone collagen, DNA and other data that is not provided for in the Act. A consideration of the billions of dollars to be made from the patenting and marketing of Native DNA and DNA by-products fills us with fear, for we see what we are up against in trying to protect our ancestors' ancient remains. If this type of destructive study were to be allowed without our knowledge or permission on Native remains we can legally make joint intertribal claims to, Members of the Committee, why did we bother passing a law to protect the interests of tribes, who are opposed to any type of scientific study of their ancestors? When the regulatory authority for the law can make broad and sweeping changes just by saying, "This is true because I said so," our Nations believe we have a very serious problem. We are relying on you to see that all trust responsibilities pursuant to NAGPRA are fulfilled.

Senator Inouye, Members of the Committee, we close our testimony by stating that, in the nearly fifteen years our Northern Plains tribes have been active on this issue, we have never asked for anything unreasonable. We do not now ask for anything that is not accorded any other citizen of this country: the right to rest in peace, our Nations' right to protect our deceased relatives, and the right to grant or deny our consent to the gathering and collection of Native DNA, skeletal samples and other methods of scientific research and inquiry which are currently carried out without our knowledge or consent. To carry out any form of research on any person in this room would require your signature or that of your next of kin. No such permission has been granted by our Nations, yet we and our ancestors continue to suffer from the total lack of respect, dignity and ethics consistently shown us by those who seek to exploit us. No Native Nation, moreover, has ever ceded by treaty or any other instrument the contents of our ancestors' burials, and there is nothing in any law which allows federal employees to transfer ownership in fee title of human remains.

We therefore ask for a federal inquiry into the activities of the NAGPRA Review Committee, particularly where treatment and disposition of our so-called "unaffiliated" ancestors' remains are concerned. We ask for a federal investigation into the activities of the Nebraska State Historical Society, the Douglas County Sheriff's Office of that state, the University of Nebraska-Lincoln and Professor Rhinehard, Douglas Owsley of the Smithsonian Institution and the Bureau of Reclamation, the National Park Service and the Corps of Engineers. **Put simply, we ask you to make the law work the way Congress intended: to protect the rights and interests of our Native Nations and our ancestors, and not those of the industries that have caused us so many tears and heartbreak.** We stand ready to provide you with information, documentation and any other assistance you may need to get to the truth of the horrific stories we have shared, and we thank the entire Committee for the opportunity to send a good voice to you today.



MANDAN, HIDATSA, & ARIKARA NATION

Three Affiliated Tribes • Fort Berthold Indian Reservation

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June 4, 1999

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The Honorable Senator Daniel K. Inouye
United States Senate
Committee on Indian Affairs
Washington, DC 20510-6450

Dear Senator Inouye.

Once again, we greet you as a relative and hope this finds you in good health and spirits and enjoying life. Thank you for the opportunity to provide information regarding the national implementation of the Native American Graves Protection and Repatriation Act (NAGPRA). You have requested more information regarding the NAGPRA Review Committee's re-classification of our ancestors who have been deemed to be tribally unidentifiable, or culturally unaffiliated

According to our teachings, there is no such thing as culturally unaffiliated Native remains, since we believe that we are related to all that lives, and this teaching includes peoples of other indigenous Nations. Some relationships are closer than others, of course, but our oral histories teach us not only who our relatives are, but where we lived, with whom we shared our aboriginal homelands, and when we occupied certain lands and territories. Our teachings regarding the ancient remains taken from our collective aboriginal homelands tell us we have a responsibility to each ancestor, no matter when they lived or died. Our teachings also tell us that subsequent curation and scientific study has caused grievous spiritual abuse and suffering to our ancestors. It is for these reasons that we have been fighting for the return of all remains, and any deviation from our original instructions concerning their treatment will have a devastating impact on their spiritual peace and rest. We also believe the four new subdivisions of the unaffiliated remains created by the Review Committee will have the effect of preventing the most ancient remains from being returned to the Earth and thus to their rest, and we offer the following reasoning for this position.

As you know, the NAGPRA Review Committee generated a one-page document which lists four Draft Principles of Agreement regarding the final treatment and disposition of all so-called unaffiliated remains in the possession and control of those agencies and institutions affected by NAGPRA. The document has now been expanded to five pages, based upon Frank McManamon's understanding of

Hon. Senator Daniel K. Inouye
 Page 2
 June 4, 1999

of legislative intent when NAGPRA was passed. To answer your questions regarding the creation of subdivisions of the unaffiliated remains, we offer the following response to each of the proposed subdivisions.

I. NON-FEDERALLY RECOGNIZED TRIBAL REMAINS

Put simply, NAGPRA does not provide for the categorization of non-federally recognized tribal remains as "culturally unaffiliated." This is, in fact, a contradiction in terms. These remains are culturally affiliated, they just happen to be affiliated with Nations which either do not want or have federal recognition. No directive by Congress has been given to authorize the Review Committee to make this distinction. The rights of these Nations to care for and protect their ancestors, already not recognized under NAGPRA, are further ignored by the Review Committee's self-authorization to re-categorize them. Placing these ancestral tribal remains in the "unaffiliated" category is an insult to these Nations and severely affects any chance they may have at repatriation and reburial. The Review Committee's suggestion that other, federally-recognized tribes could act in concert with non-federally recognized tribes to make joint claims of these remains may be one solution to this problem. We suggest, however, that talks with representatives of non-federally recognized tribes who wish to repatriate begin immediately to determine exactly what they want.

II. "ARCHEOLOGICAL POPULATIONS" DEFINED AS EXTINCT OR AS LACKING CLEAR DESCENDANCY EVIDENCE

Initially described as "archaeological populations," these two groups of so-called unaffiliated remains have the fundamental problem of being defined strictly by a paradigm that is foreign and offensive to Native peoples. To explain our opposition to this paradigm, we submit that we have our own oral histories, our own understanding of not only where our peoples come from, but who we are related to and who are not. Since the advent of the Western disciplines of anthropology and archaeology in our homelands, however, we have had nothing but trouble from the practitioners of these disciplines.

We have been re-defined, misunderstood, misinterpreted and stripped of our true identities, as well as our right to define ourselves, by the same disciplines who claim to be experts on our people. Since the emergence of the Bering Strait theory (which has never been proven to be fact, it is still just a theory) that claims all of our indigenous Nations immigrated here from Asia via an imaginary land bridge, we have struggled to maintain our own identities, histories and cultures. The very essence of our identities - our oral histories and stories - *are tens of thousands of years old*, yet they have been relentlessly

Hon. Senator Kaniel K. Inouye
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displaced and relegated to the realm of myth by theories posited only in the last one hundred years.

We have seen, over and over again, that Western society does not understand our values, our culture, or our history, nor has any serious effort been made, in our experience, to understand or accept our Nations *on our terms*. Everything and everyone must be explained from a Western, "scientific" perspective, a perspective which consists mostly of speculation and conjecture, with very little proof, and which leaves no room for our values or worldview. Dominant society's, and more specifically, the science community's, steadfast refusal to understand Native Nations from the way we understand ourselves is the reason we are discussing the painful issue of whether or not we should be allowed to claim our relatives' bodies and burial property for reburial.

We resist the categorization of our ancestors' remains as "archaeological populations," because it negates our ability and right to define or describe our own peoples based upon our own history, customs and values. According to our teachings, there is no such thing as an "archaeological population." That is a Western notion that has nothing to do with us. They are simply our ancestors, and they, too, deserve the self-evident human right to rest in peace, no matter where they lived, when they lived or died, or their questionable value to science.

We also resist this re-naming of our relatives because it is purely and simply a construct invented by an industry that has consistently shown it does not want us to reclaim or rebury our dead, particularly our most ancient dead. Should this re-categorization of our dead be allowed, what next can tribes expect to happen? An official policy that all unaffiliated remains classified as "archaeological populations," will continue to be controlled by those very industries who have abused, mistreated and violated them, who do not love them, nor feel gratitude to them, as we do? Or will a milder compromise be struck, one in which the science and research community is allowed to study the "archaeological populations" for a set period of time, after which we might be allowed to rebury our dead? Will tribes be forced to live with compromises like this, simply because our ancient ancestors purportedly defy speculative attempts of a foreign, irrelevant process to establish tribal identity? A process which, we might add, denies not only our own self-identity but another process already in the law which allows for joint claims to all so-called "unaffiliated" remains by a tribal assertion of shared group identity, based on a preponderance of the evidence. (We would respectfully recall, at this time, that, on April 20th, our Nation testified that we are unable to make any further compromises regarding our ancestral remains.)

Hon. Senator Daniel K. Inouye

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Senator, we also resist this re-categorization of our ancestors because there is no proof that any tribes are extinct, only the suppositions of anthropology and archeology. Our Nations' representatives have, over the years, traveled long distances and met with many other Indigenous Peoples whose oral histories reflect times in which other Nations have been absorbed by their own for a variety of reasons. Our own elders and historians confirm that this is so. *Moreover, we have yet to hear an Indigenous account of a Nation of people that has become extinct, leaving no descendants or relatives.* It is not within our worldview that entire Nations just disappeared off the face of the earth as our opponents assert simply because they do not have access to the facts, as we do with our own histories. It is, however, within our histories that we lived with and absorbed one another's peoples and cultures since earliest times. It is quite a leap to make the claim of tribal extinction based purely on the archeological record, the interpretation of which remains the subject of furious debates within the profession itself.

We Native peoples know what the truth is, however, and the truth is that stronger, more stable Nations frequently took in, cared for and intermarried with the remnants of Nations decimated by disease, warfare or genocide. And because we believe that we are all related, there is no such thing as an "extinct archeological population," or an "archeological population" for which the descendants are unknown. One must ask oneself the following question: "Unknown to whom? The industry which wants to exploit Native dead and thinks it can do so by separating Native Nations from their claims to ancient remains by asserting there are no descendants, or the Native peoples themselves, who know precisely where they come from, who they're related to, and have known these things for tens of thousands of years?"

Senator Inouye, we reiterate that all issues associated with the so-called "unaffiliated remains" can be resolved through the consensus-based decisions of regional, intertribal repatriation coalitions, who can establish a shared group identity pursuant to existing statutory language to ancient remains taken from shared aboriginal homelands. A grand council of representatives from each regional coalition can address, through consensus, what should be done with ancestors for whom nothing is known. And it will not be necessary then to insult Native Nations with the creation of subdivisions of their ancient dead, as it is obvious we can take care of our own, based on our own values and original instructions.

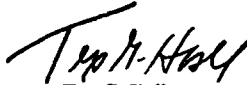
Hon. Senator Daniel K. Inouye
Page 5
June 4, 1999

Finally, Senator, it is our Nation's belief that the re-categorization of the tribally unaffiliated remains is *nothing more than an attempt to restage a public debate that the science and museum industries lost nearly a decade ago*, when the hard work of a lot of people, with yourself at the helm, produced the Native American Graves Protection and Repatriation Act. The continued attempts to exert control over our ancestors' remains and burial property by people who have no moral or legal claim to them is the only thing that prevents their reburial and eventual resumption of peace and rest. We sincerely believe the creation of the "new" categories of our ancient ancestors is a bold attempt to separate us from our claims to our dead and their burial property, and their significance should not be underrated or misunderstood.

We feel, as a sovereign tribe, that we have the inherent right to rebury our ancestors' remains, based on our culture, history, and teachings that we feel are the original intent of NAGPRA. And anything less compromises our sovereign right to form our own decision about our history.

We thank you once again, Senator Inouye, as our relative, for the opportunity to participate in these very important discussions, and we stand ready to provide further information if needed.

Sincerely,



Tex G. Hall
Chairman
Three Affiliated Tribes

cc: Hon. Kent Conrad
Hon. Byron L. Dorgan

DEN BERTHOUSE CAMPBELL, COLORADO, CHAIRMAN
BONNIE S. PICTAYNE, HAWAII, VICE CHAIRMAN

FRANK MURPHY/ALABAMA
JOHN H. HICKMAN/ARIZONA
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JOHN F. TUCKER/MISSOURI
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JEFF CONRAD/NORTH DAKOTA
KERRY FELD/NEVADA
DANIEL S. AKAKA/HAWAII
PAUL WELLETONE/MINNESOTA
BRYAN L. COUGHLIN/NORTH DAKOTA

PAUL MOOREHEAD,
MAJORITY STAFF DIRECTOR/CHIEF COUNSEL
PATRICIA M. BELL,
MINORITY STAFF DIRECTOR/CHIEF COUNSEL

United States Senate

COMMITTEE ON INDIAN AFFAIRS

WASHINGTON, DC 20510-8450

www.indian.senate.gov

May 17, 1999

The Honorable Tex Hall
Chairman
Three Affiliated Tribes
HC 3, Box 2
New Town, ND 58763

Dear Chairman Hall,

Thank you for your participation in the April 20th Oversight hearing on the Native American Graves Protection and Repatriation Act ("NAGPRA" or "Act"). Due to time constraints, the following question was not addressed at the hearing. Could you please review this question and send a written response to the Committee on Indian Affairs by Friday, June 4th? The question is as follows:

ISSUE: NAGPRA REVIEW COMMITTEE CLASSIFICATION OF UNAFFILIATED REMAINS

Your testimony states that the NAGPRA Review Committee has defined four distinct categories of unaffiliated remains that are not listed in the Act itself.

Question: What is the significance of those definitions and what would their effect be on repatriation efforts?

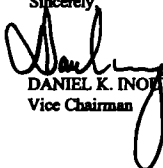
Please send your response to the Committee at the address below or fax your response to (202) 228-2589.

Senator Daniel K. Inouye
Vice Chairman
U.S. Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington DC 20510

I appreciate your attention to this matter.

...

Sincerely,



DANIEL K. INOUE
Vice Chairman

BEN HIGHTSHORSE CAMPBELL, COLORADO, CHAIRMAN
DANIEL E. ROUVE, MINNAPOLIS, VICE CHAIRMAN

FRANK BRUNSON/MIAMI, ALABAMA
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DANIEL E. ARAGA, NEVADA
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SYRON L. DORGAN, NORTH DAKOTA

PAUL MOOREHEAD,
MAJORITY STAFF DIRECTOR/CHIEF COUNSEL
PATRICIA M. ZELL,
MINORITY STAFF DIRECTOR/CHIEF COUNSEL

United States Senate

COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510-6460

www.indian.senate.gov

May 5, 1999

Mr. Bill Billeck
Repatriation Office
Department of Anthropology
National Museum of Natural History
Smithsonian Institution
Washington D.C. 20560-0138

Dear Mr. Billeck,

Thank you for your April 22, 1999 letter and the enclosed copy of your letter to Chairman Tex Hall of the Three Affiliated Tribes addressing concerns he raised at the Committee's April 20 oversight hearing on the Native American Graves Protection and Repatriation Act. In view of the significance of these concerns, I am taking the liberty of including your correspondence and the attached Memorandum of Understanding between the Smithsonian Institution and the Great Plains District of the Bureau of Reclamation in the printed record of the hearing.

Sincerely,



DANIEL K. ROUYE
Vice Chairman



Smithsonian
National Museum of Natural History

99 APR 28 PM 1:13

Bill Billeck
Repatriation Office
Department of Anthropology
National Museum of Natural History
Smithsonian Institution
Washington, DC 20560-0138

April 22, 1999

The Honorable Daniel K. Inouye
United States Senate
Washington DC 20510

Dear Senator Inouye,

The attached letter was sent Chairman Tex Hall of the Three Affiliated Tribes to address concerns he raised during his testimony before the Senate Committee on Indian Affairs at the Oversight Hearing on the National Implementation of the Native American Graves Protection and Repatriation Act. The attached letter clarifies the nature of the Memorandum of Understanding between the Smithsonian Institution and the Great Plains District of the Bureau of Reclamation and we feel that we are in full compliance with the National Museum of American Indian Act.

Sincerely,

Bill Billeck
Repatriation Office



Smithsonian
National Museum of Natural History

Bill Billeck
Repatriation Office
Department of Anthropology
National Museum of Natural History
Washington, DC 20560-0138

April 22, 1999

Chairman Tex G. Hall
Three Affiliated Tribes
Fort Berthold Reservation
New Town, ND 58763

Dear Chairman Tex G. Hall,

During your testimony on April 20, 1999, to the Senate Committee on Indian Affairs at the oversight hearing on the implementation of the Native American Graves Protection and Repatriation Act, 25 U.S.C. §3001 ("NAGPRA"), you spoke about a Memorandum of Understanding ("MOU") between the Great Plains Region of the Bureau of Reclamation and the Smithsonian Institution. I would like to address your concerns about this MOU. I have attached a copy of the MOU in which the Smithsonian agrees to share information with the Bureau of Reclamation on human remains and funerary objects that are in the collections at the Smithsonian.

No human remains or funerary objects were transferred from the Bureau of Reclamation to the Smithsonian after the enactment of either the National Museum of the American Indian Act, 20 U.S.C. §80q et seq., ("NMAI Act") or NAGPRA. The human remains and funerary objects covered under this MOU were never in the possession of the Bureau of Reclamation. Since they were collected from the period of the 1940s to the 1960s, they have always been in the possession of the Smithsonian. The human remains and funerary objects covered under the MOU appear to have been obtained during joint Smithsonian and National Park Service sponsored archaeological excavations on lands that are now administrated by the Bureau of Reclamation

Under the National Museum of American Indian Act of 1989, 20 U.S.C. §80q et seq., ("NMAI Act") it is the Smithsonian's responsibility to inventory, identify, and repatriate the remains in its collections. Under the MOU with the Bureau of Reclamation, the Smithsonian agreed to provide information on the presence or absence of human remains and funerary objects in the Smithsonian collections from the lands administrated by the Bureau of Reclamation. The Smithsonian also reaffirmed its obligation under the NMAI Act to inventory and repatriate Native American skeletal remains and funerary objects in the Smithsonian's collections.

The staff at the Repatriation Office at the National Museum of Natural History has provided

information on all of the human remains and funerary objects in the Museum to Native Americans across the country. A summary of the ethnological objects and an inventory of the human remains and archaeological objects have been sent to all federally recognized tribes as well. Human skeletal remains and funerary objects of the Mandan and Hidatsa tribes have been repatriated to the Three Affiliated Tribes by the Smithsonian. I am currently in the process of completing a report on the human remains and funerary objects of the Arikara. The report identifies the number of human skeletal remains and funerary objects, where they were obtained, who obtained the remains, and why the remains are thought to be affiliated with the Arikara, rather than with other tribes. I look forward to working closely with the representatives of the Three Affiliated Tribes for the repatriation of the Arikara human remains and funerary objects, as in the previous repatriation of Mandan and Hidatsa remains to the Three Affiliated Tribes.

If you have any questions, or need any additional information, please contact me.

Sincerely,

A handwritten signature in black ink that reads "Bill Billeck". The signature is written in a cursive, flowing style.

Bill Billeck
Repatriation Office

cc: Senator Daniel Inouye

Agreement No. 5-AG-60-05670

MEMORANDUM OF UNDERSTANDING
between
SMITHSONIAN INSTITUTION
and
US DEPARTMENT OF THE INTERIOR
GREAT PLAINS REGION OF THE BUREAU OF RECLAMATION

This Memorandum of Understanding (MOU) is entered into by and between the Department of the Interior (DOI), Great Plains (GP) Region of the Bureau of Reclamation (Reclamation), whose address is PO Box 36900, Billings, MT 59107-6900, and the Smithsonian Institution, a trust instrumentality of the United States established by Act of Congress in 1846, whose address is 1000 Jefferson Drive, Washington, DC 20560.

WHEREAS, the Native American Graves Protection and Repatriation Act (25 USC Section 3001) enacted November 16, 1990 (hereinafter "NAGPRA"), requires Federal agencies to inventory and, if cultural affiliation is established, repatriate certain Native American skeletal remains and other objects in their possession or control; and

WHEREAS, Reclamation is an agency of the DOI, an executive branch agency which is subject to the requirements of NAGPRA; and

WHEREAS, the Smithsonian Institution is exempt from coverage under NAGPRA, but the National Museum of Natural History has adopted as its policy the inventory and repatriation provisions of NAGPRA with respect to cultural patrimony and sacred objects; and

WHEREAS, the Smithsonian's statutory obligation to inventory and repatriate Native American skeletal remains, associated and unassociated funerary objects, arises under the National Museum of the American Indian Act (hereinafter "NMAI Act"), 20 USC Section 80q et seq.; and

WHEREAS, the Smithsonian has possession and/or control over sizable collections of Native American materials resulting from archeological investigations either sponsored by Reclamation or related to Reclamation projects within the area presently managed by the GP Region, which the Smithsonian has maintained, cared for and, in most instances, accessioned in the same manner as it has the remainder of the Smithsonian's collections; and

WHEREAS, because the Smithsonian Institution contends that these collections legally fall under the scope of the NMAI Act, but the GP Region of DOI is unclear whether the collections fall under the NAGPRA responsibilities of the GP Region of DOI or the NMAI

Act responsibilities of the Smithsonian Institution, the parties desire to enter into and into an understanding prescribing repatriation responsibility for these collections.

NOW THEREFORE, IN CONSIDERATION OF THE MUTUAL PROMISES SET FORTH HEREIN, THE PARTIES AGREE AS FOLLOWS:

1. **Collections.** The collections subject to this MOU consist of Native American materials, including Native American skeletal remains, associated and unassociated funerary objects, sacred objects, and items of cultural patrimony, originally excavated on GP Region's lands and transferred to the Smithsonian Institution pursuant to permits, regulations, understandings, and other agreements, formal or informal, whereby samples of excavated materials were deposited in the national collections. In most cases, no written documentation exists to describe the precise nature of the transfer to the Smithsonian. However, the parties agree that all materials in the collections resulting from archeological investigations either sponsored by Reclamation or related to Reclamation projects within the area presently managed by the GP Region, including without limitation, materials permanently transferred to the Smithsonian and those placed on long-term, permanent or indefinite loan, also shall be covered by this MOU. Any materials placed on short-term loan, for which there is a written loan agreement specifying a time-period, shall not be subject to this MOU unless the parties mutually agree in writing.
2. **Inventory.** The collections subject to this MOU shall be inventoried by the Smithsonian Institution in accordance with its statutory obligations to inventory Native American skeletal remains, associated and unassociated funerary objects, pursuant to the NMAI Act, and in accordance with the policy of the National Museum of Natural History voluntarily to comply with the inventory and repatriation provisions of NAGPRA for funerary objects, sacred objects, and items of cultural patrimony (with the exception of the deadline).
3. **Coordination.** The Smithsonian Institution and the GP Region will inform each other by writing of all collections and repatriation claims that apply to this MOU. In addition, each agency will supply the other with a copy of the repatriation case file pertaining to these collections.
4. **Contact with Tribes.** As part of its inventory activities, the Smithsonian will be in contact with members of the appropriate tribes, including any individual or tribe that has submitted a repatriation request.
5. **Repatriation.** Upon completion of the inventory, if the Smithsonian determines that any of these materials should be repatriated, the Smithsonian shall assume full responsibility for final documentation and repatriation of such materials. The Smithsonian shall notify the GP Region of its decision, provide the GP Region a copy of any final reports issued and, if a reburial ceremony is scheduled, advise the GP Region of the date, time, and place of such event.
6. **Alternative Procedures.** In the event both parties determine that special circumstances exist to justify assumption of inventory and repatriation responsibility by the GP Region for

certain materials in the Smithsonian's possession and control, the parties may agree in writing to a modification of this MOU.

7. **Duration.** This MOU shall be in effect either for five years from the date of final signature, or until all collections subject to this MOU have been inventoried; and if appropriate, repatriated, whichever comes first. This agreement may be terminated prior to the expiration date by any party hereto upon 30 days written notice to the other party after the parties have applied the conflict resolution procedure in stipulation number eight.

8. **Conflict Resolution.** In the event the parties disagree over the terms of this agreement, the parties shall first attempt to resolve such conflict informally through negotiation. If agreement cannot be reached, the matter shall be submitted to the Regional Director of the GP Region and the Director of the National Museum of Natural History for resolution. If the Regional Director and the Director are unable to reach agreement, the matter shall be submitted to the Commissioner of Reclamation and the Secretary of the Smithsonian Institution for final resolution.

9. **Required Clauses.** During the performance of this agreement, the participants agree to abide by the terms of Executive Order 11246 on nondiscrimination and will not discriminate against any person because of race, color, religion, sex, or national origin.

No member or delegate of Congress, or resident Commissioner, shall be admitted to any share or part of this agreement or to any benefit arising from it. However, this clause does not apply to this agreement to the extent that this agreement is made with a corporation for the corporation's general benefit.

10. **Key or Responsible Personnel.** The following people will be responsible for monitoring the activities in this agreement:

Bureau of Reclamation, Great Plains Region - Terry Zontek

Smithsonian Institution, Repatriation Office - Bill Billeck

AGREED:

FOR THE SMITHSONIAN INSTITUTION

By Robert Hoffman
Robert Hoffman, Acting Provost

Date: 15 April 1995

FOR THE GREAT PLAINS REGION

By Neil Stessman
for Neil Stessman, Regional Director

Date: 1/31/95

Agreement No. 5-AG-60-05670

MEMORANDUM OF UNDERSTANDING
between
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and
US DEPARTMENT OF THE INTERIOR
GREAT PLAINS REGION OF THE BUREAU OF RECLAMATION

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Bureau of Reclamation, Great Plains Region - Terry Zontek

Smithsonian Institution, Repatriation Office - Bill Billeck

AGREED:

FOR THE SMITHSONIAN INSTITUTION

By Robert S. Hoffman
Robert Hoffman, Acting Provost

Date: April 15 1995

FOR THE GREAT PLAINS REGION

By Neil Stessman
for Neil Stessman, Regional Director

Date: 1/31/95

DOUGLAS COUNTY SHERIFF DEPARTMENT
 CRIME AGAINST PERSON CASUALTY

Page 1 of 2 pages

Dial Control	Detective Assigned 5240	Time Dispatched 1307	Time On-Call 1307	Date 26 OCT 93	SR No D90938	
<input type="checkbox"/> Homicide <input type="checkbox"/> Suicide <input type="checkbox"/> Suicide (Attempt) <input type="checkbox"/> Overdose	<input type="checkbox"/> Robbery <input type="checkbox"/> Death-Accidental <input type="checkbox"/> Death-Natural <input type="checkbox"/> Child Neglect/Abuse	<input type="checkbox"/> Assault-Felony <input type="checkbox"/> Assault-Misd <input type="checkbox"/> Sexual Assault	<input type="checkbox"/> Theft-Extortion <input type="checkbox"/> Disturbing the Peace <input type="checkbox"/> Bomb Threats <input type="checkbox"/> Kidnapping/Abduction	<input type="checkbox"/> Intimidation/Phone <input type="checkbox"/> Sickness <input type="checkbox"/> Animal Bite <input checked="" type="checkbox"/> Other - DEATH INVEST.		
Victim (Name-Last,First/Middle) (or Business) DOE, JOHN/JANE		Res. Address/City/State		Phone		
Occupation/Student		Bus. Address/City/State		Phone		
Ext.						
D.O.B.		Race	Sex	Driver Lic. No./State		
Social Security No.						
Reported By (Name-Last, First, Middle) FELDHUS, CHRISTINE M.		Res. Address 1324 S. 162 STREET		Res. Phone 333-6014		
		Bus. Address NONE		Bus. Phone N/A		
Occurred: (Day/Date/Time) UNKNOWN		Reported: (Day/Date/Time) THE 26 OCT 93 / 1307 HRS				
Location Occurred: (Street & No.) APPROXIMATELY 100 YARDS NE OF 1805 S. 100		Dist. C4	Location Report Taken (Streets & No.) 100 YARDS NE OF 1805 S. 100 ST 04		Dist. 04	
Extent of Injury DECEASED		Type of Force Used: UNKNOWN		Instrumentality <input type="checkbox"/> Hands <input type="checkbox"/> Gun <input type="checkbox"/> Knife <input type="checkbox"/> Blunt <input checked="" type="checkbox"/> Other: UNKNOWN		
If Gun Used (Make/Caliber/Serial No.) UNKNOWN		Victim Attended At NOT ATTENDED		Victim Attended By N/A		
Victim Transported <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No To county morgue		Victim Condition DECEASED		Disposition of Body COUNTY MORGUE		
Pronounced Dead By NOT PRONOUNCED		Approx. Time of Death UNKNOWN		Cause of Death UNKNOWN		
Coroner/County Attorney Present at Scene NO				Per Orders Of C.F.B.		
Hold Placed <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Autopsy Order <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes/By Whom		Next of Kin Notified <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Suspects <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Witness <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No				
Scene Processed: Photo <input checked="" type="checkbox"/> Criministics Officer Assigned		C.I.B. Notified YES		Detective on the Scene JACKSON 5240		
Other Reports (Specify) <input type="checkbox"/> Impound <input checked="" type="checkbox"/> Property <input type="checkbox"/> Rights/Statement <input type="checkbox"/> Inv. Supp <input type="checkbox"/> Other		Reference Other SR Nos				
Property/Evidence Held <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		Property Report Made By SAEGH		S. 816		
Narrative: (Details of Investigation) ON THE 26 OCT 93, 1307 HRS., DEP WHEELER MET SGT. DURICH TIEGH, SAEGH AND FELDHUS AT J. STERLING MONTON ELEMENTARY. DEP WHEELER WAS ADVISED UPON ARRIVAL THAT FELDHUS SON FELDHUS, KYLE (9YOA) AND HIS FRIEND JORDAN, ANDY (9YOA) HAD FOUND A BONE ON THE WEST BANK OF THE PAPER CREEK APPROXIMATELY 100 YARDS NORTH-						
Case Status/Detective Bureau Only <input type="checkbox"/> Arrest <input type="checkbox"/> Exception <input type="checkbox"/> Open <input type="checkbox"/> Unfounded <input checked="" type="checkbox"/> Closed		Prepared By Sgt. M.K. Doty 5-224		Signature Reporting Officer/Serail No. D.P. ST. WHEELER 5249		
		Report Typed By		Signature Reporting Officer/Serail No. DEP ST WHEELER 5249		

(ALL INFORMATION TO BE PRINTED OR TYPED/BLACK INK)
 (Use Reverse Side For Narrative)

Page 2 of 2 pages

Narrative (Details of investigation)

SR No:

D90939

EAST OF N. STELLING MONTON ELEMENTARY. FELDHER STATED THAT THE BONES FOUND THE BONE ON THURSDAY, OCTOBER 9, 1993, BETWEEN 1715-1830 HRS. BUT DID NOT REMOVE IT. THE FOLLOWING MORNING ON FRIDAY, OCTOBER 9, 1993, BETWEEN 0830-0900 HRS. FELDHER ACCOMPANIED HER SON TO THE SITE AND RETRIEVED ONE (1) OF TWO (2) BONES BOTH BONES WERE 14-16" LONG AND APPEARED TO BE PART OF A LEG.

FELDHER LED DET. WHEELER, SGT. DUKER, AND SAILIN THROUGH A WOODED AREA EAST TO THE PAPER CREEK TO A 5'X5' SLAB OF CONCRETE APPROXIMATELY 20'-25' WEST OF THE TOP OF THE WEST BANK. ALL PARTIES THEN DESCENDED THE WEST BANK ABOUT 15' DOWN AND THEN PROCEEDED TO TRAVEL ABOUT ANOTHER 135'-140' NORTH ALONG THE CREEK BED. IT WAS THERE APPROXIMATELY 20'-25' FEET FROM THE CREEK BED AND 15'-20' FROM THE TOP OF THE WEST BANK THAT THE SECOND BONE WAS FOUND. FURTHER EXAMINATION OF THE WEST BANK REVEALED WHAT APPEARED TO BE A HUMAN SKULL AND SEVERAL OTHER BONES. THE REVEALED BONES WERE PLACED INTO BAGS PROPERLY BY SAILIN AND THE SCENE WAS PHOTOGRAPHED. THE CRIMINAL INVESTIGATION BUREAU WAS ADVISED AND AT 1419 HRS. THE SCENE WAS TURNED OVER TO DET. JACKSON.

FELDHER STATED THAT THE REASON SHE HAD WAITED SO LONG TO REPORT THE INCIDENT WAS THAT SHE HAD BEEN OUT OF TOWN.



NEBRASKA STATE HISTORICAL SOCIETY
 1500 R STREET, P.O. BOX 82554, LINCOLN, NE 68501-2554
 (402) 471-3270 Fax (402) 471-3100 Museum Fax (402) 471-3314

October 27, 1993

Mr. Stephen M. Provost
 Acting Executive Director
 Nebraska Indian Commission
 P. O. Box 94981
 Lincoln, Nebraska 68509-4981

Dear Mr. Provost:

I am writing in regard to human skeletal remains recently discovered in Douglas County, Nebraska. I was contacted by the Douglas County Sheriff's Office which removed a small portion of the skeleton in order to eliminate the possibility of the remains being related to a recent homicide. The remains are those of a Native American who lived prior to 1900, although tribal affiliation cannot be determined at this time. A physical anthropologist will make further examination and attempt to determine the tribe, although it is unlikely that he will be able to make a specific tribal affiliation.

The Douglas County Sheriff's Office will contact you when the examination is complete in order to make arrangements for reburial and comply with the Unmarked Human Burial Sites and Skeletal Remains Protection Act.

If you have any questions or concerns, please give me a call at (402)471-4789.

Sincerely,

Rob Bozell
 Curator of Anthropology

RB:men



NEBRASKA STATE HISTORICAL SOCIETY

1500 R STREET, P.O. BOX 82554, LINCOLN, NE 68501-2554
 (402) 471-3270 Fax (402) 471-3100 Museum Fax (402) 471-3314

November 30, 1993

Mr. Stephen M. Provost
 Acting Executive Director
 Nebraska Indian Commission
 P. O. Box 94981
 Lincoln, Nebraska 68509-4981

Dear Mr. Provost:

I am writing you regarding two matters involving human skeletal remains.

- 1) The human remains discovered in Douglas County in October were examined by our office and Dr. Karl Reinhard (UNL). Karl and I agree the remains are pre-20th century Native American although a tribal affiliation is impossible to determine.

Through a communication slip, these remains have been re-interred by Douglas County Officials prior to the consultation I promised in my October 27th letter. I apologize for any inconvenience.

- 2) Our office was contacted on November 22, 1993, by the Nebraska State Patrol regarding fragmentary human skeletal remains discovered in Webster County. Our examination indicated they are those of a pre-European contact Native American but tribally anonymous. Details are offered in the attached letter. These remains have been returned for eventual reburial. I have asked Webster County officials to wait at least 30 days to rebury the remains in the event your office has any comment. If you would like to comment, please contact Sheriff Jim Disney, Webster County Sheriff's Office, 641 North Cedar, Red Cloud, Nebraska 68970, by January 1, 1994.

Thank you for your continued cooperation in these matters.

Sincerely,

Rob Bozell
 Curator of Anthropology

Enclosure

RB:mm

STATE OF NEBRASKA



E. Benjamin Nelson
Governor

COMMISSION ON INDIAN AFFAIRS
PO Box 94981
Lincoln, Nebraska 68509-4981
Phone (402) 471-3475
FAX (402) 471-3392

December 28, 1993

Mr. Rob Bozell
Curator of Anthropology
NE State Historical Society
1500 R Street, P.O. Box 92554
Lincoln, Nebraska 68501-2554

RE: HUMAN SKELETAL REMAINS OF OCTOBER 1993 AND NOVEMBER 1993

Dear Rob:

Thank you for your letter of November 30, informing this office of the disposition of the human remains discovered in Douglas County in October, as well as the fragmentary skeletal remains discovered in Webster County in November.

As always, we appreciate your help in the identification process. The lack of consultation on the Douglas County discovery in October is noted. It is not a problem we would want to see crop up again; as I am sure neither your office nor the County Sheriff's office does either.

Please let us know, Rob, if we may be of further assistance to you. Again, your help is very much appreciated.

Sincerely,

Stephen M. Provost
Interim Executive Director

RECEIVED JAN 03 1994



Richard A. Roth — Douglas County Sheriff

225 NORTH 115TH STREET
 OMAHA, NEBRASKA 68154-2520
 PHONE 402-444-6641

D 90938

February 23, 1994

Mr. David Hunt
 Dept. of Anthropology
 National Museum of Natural History
 Washington, D.C. 20506

Dear David,

On 26 October 93, the skeletal remains of a human were discovered in a developed area of western Douglas County. The remains had washed out of a creek embankment during a period of flooding, and many of the bones were recovered including a complete skull.

The remains were examined by Dr. Carl Reinehart who is an anthropologist at the University of Nebraska at Lincoln. Dr. Reinehart stated that in his opinion the remains were those of an Indian male, approximately 20 to 25 years of age who had lived between the years 1750 to 1840, and was probably a descendant of the Ponca, Omaha or Otoe Indian Tribe. Dr. Reinehart further stated that the individual had excellent upper body strength determined from the positioning on the bones where the muscles were attached. Dr. Reinehart also discovered what appeared to be trace amounts of okra on the face of the skull in the area between the upper lip and the nose. More okra was discovered on the interior of the skull on the interior jawbone.

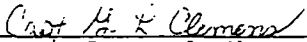
At this time a tribal affiliation cannot be determined, and in accordance with state law the remains will be interred at county expense. Other individuals have examined the remains and believe they may be substantially older than Dr. Reinehart's estimate. To avoid any chance that we would be destroying something of historical interest, we are sending you photographs of the remains. If, after examining the photos enclosed you determine you would like to examine the remains, we would be more than happy to make them available to you. If not, we will dispose of them in accordance with state law. Several samples of carbon were also located with the bones, and these also could be made available to you. Due to budget constraints, the University of Nebraska was unable to conduct any tests, however we have retained additional samples if you are interested.

It should be noted that the remains were discovered approximately 19 feet from the surface. This particular area was used for a dike along the creek, and approximately 10 to 16 feet

of fill dirt was brought in to the area in the late 1960's. The remains appeared to have originally been buried approximately 2 to 4 foot deep. The burial site was extremely difficult to examine as it was still 15 feet to the current creek level, so extensive examination of the area was not possible. No articles of clothing or burial items were discovered, however part of the grave had already washed away before the remains were discovered.

Thank you for your time and interest in this matter. If I can be of further assistance to you, please do not hesitate to call.

Sincerely,



Captain Gregory L. Clemens
Criminal Investigation Bureau
Douglas County Sheriff's Department
225 No. 115th St.
Omaha, Nebraska 68154
(402) 444-6638

D90938



National Museum of Natural History · Smithsonian Institution
786-2501

WASHINGTON, D.C. 20560 · TEL. 202-

MRC 112

Gregory L. Clemens, Captain
Criminal Investigation Bureau
Douglas County Sheriff's Department
225 North 115th St.
Omaha, Nebraska 68154

March 1, 1994

Dear Capt. Clemens,

After reviewing the photographs enclosed in your letter of February 23, 1994, Dr. Douglas Owsley was particularly interested in a closer examination of the pictured skull as well as the rest of the skeleton. This cranium is unique in its noticeable robusticity and we are curious to the build physical features and stature of this individual presented in the postcrania.

The state of preservation was suggestive of either prehistoric or very early historic period but until further investigation Doug would not want to suggest any specific tribal affiliations. Both Doug and myself have worked with Carl Reinhart on skeletal material excavated from Nebraska or in the holdings of the Nebraska State Historical Society and Doug specializes in skeletal populations of Plains Native Americans.

With the completeness of the cranium, we believe that through craniometric discriminant analysis we may be able to discern the tribal affiliation, in conjunction with the interpretation of the other skeletal features, the associating carbonized material and the remnant ochre on the bones. Our hope is to help with the possible identification of this individual's ethnic origin so you may be able to return the remains to the appropriate Native American nation.

For our investigation, we request a have the remains sent to our laboratories at the National Museum of Natural History as a loan transfer, and the remains will be returned to you after this examination. Based on Dr. Owsley's busy schedule, we would request a loan period of a several months. If a return date in June or early July would be too long, please let us know, otherwise we will make the loan time for approximately three (3) months. Also, if you could enclose the carbonized material or at least some samples for examination and possible dating analysis.

Please send the remains to my care to the below address, and I will secure them in our storage facilities during the loan period. We are anxious to examine this individual and to aide you in possibly affiliating these remains to a living tribal group.

Sincerely,

A handwritten signature in black ink, appearing to read "David R. Hunt". The signature is fluid and cursive, with a long horizontal stroke at the end.

David R. Hunt, Ph.D.
Collections Mgmt./Physical Anthro.

Department of Anthropology/MRC 112
National Museum of Natural History
Smithsonian Institution
Washington, D.C. 20560

cc: Douglas W. Owsley, Ph.D.



D90938

National Museum of Natural History · Smithsonian Institution
786-2501

WASHINGTON, D.C. 20560 · TEL. 202-

MRC 112

Gregory L. Clemens, Captain
Criminal Investigation Bureau
Douglas County Sheriff's Department
225 North 115th St.
Omaha, Nebraska 68154

March 24, 1994

Dear Capt. Clemens,

Today at 11:05am I received your package containing human skeletal material identified on the bags as D90938. This collection of remains has been given the National Museum of Natural History Registration No. 400205 for tracking purposes. I have turned over the package to Dr. Douglas Owsley to be examined by him. The results of his investigation will be sent to you within the next few months.

Thank you for sending the materials. We hope to be able to aid you in identifying the remains to a more specific ethnic affiliation if at all possible. The remains are in good condition and will be well cared for during their stay here.

If you have any questions or concerns, please feel free to contact myself (202) 786-2501 or Dr. Owsley (202) 786-2554 or by FAX (202) 357-2208.

Sincerely,

David R. Hunt, Ph.D.
Collections Mgmt./Physical Anthro.

Department of Anthropology/MRC 112
National Museum of Natural History
Smithsonian Institution
Washington, D.C. 20560

cc: Douglas W. Owsley, Ph.D.

D90938



NATIONAL MUSEUM of
NATURAL HISTORY
SMITHSONIAN INSTITUTION

13 April 1994

Mr. Richard A. Roth
Sheriff, Douglas County
c/o Captain Gregory L. Clemens
Criminal Investigation Bureau
225 North 115th Street
Omaha, NE 68154-2520

Dear Mr. Roth:

Attached is Part I of our report on the human skeletal remains (2SD09C02) sent to the Smithsonian Institution, Department of Anthropology, for analysis. Measurements have been sent to Professor Richard L. Jantz, University of Tennessee, for comparison with the Plains craniometric data base, which should yield information relevant to tribal identification. A second report will follow on Dr. Jantz's findings.

If there are questions, or if any of the findings of the initial report need further elaboration, please give me a call at (202) 786-2553.

Thank you for the opportunity to examine this skeleton.

Sincerely yours,

Douglas W. Owsley

Douglas W. Owsley
Curator/Forensic Anthropologist

Attachment

cc: Dr. David Hunt
Dr. Richard Jantz

PART I, REPORT ON SI94-03 (25D09002) (Douglas County, Nebraska)

The Smithsonian Institution received human skeletal remains recovered from Douglas County, Nebraska, for analysis and, if possible, tribal identification. The bones represent a single individual and include the following:

- skull
- mandible
- right and left clavicles
- right and left scapulae
- manubrium
- left humerus
- left radius
- left ulna
- left first and second ribs
- eight left ribs (from 3-11)
- right first and second ribs
- two right ribs (from 3-11)
- atlas
- axis
- cervical vertebrae 3-7
- thoracic vertebrae 2-10
- left femur
- left tibia
- three hand phalanges
- two metacarpals

Because of postmortem breakage, several of these elements are only partial. Fractures of the ribs might be perimortem. All bones are in a good state of preservation. Their color is yellow to brown, with areas of black discoloration (typical of Native American, Plains burials). Red staining, probably ochre or cinnabar, is visible on the lingual surface of the body of the left mandible and on the proximal head of the left humerus, but no other stains or modifications of the bones are present.

Sex

Based on the following cranial and postcranial traits, sex is male:

- prominent supraorbital ridges
- low, sloping forehead
- very large zygomata
- well-defined temporal lines
- moderately developed mastoid processes and nuchal crest
- large mandible, with a fairly acute gonial angle, squared mental eminence, and wide ascending ramus
- large maxillary and mandibular teeth

The postcranial skeleton is robust, with fairly well-developed muscle attachment sites. The size of the joint surfaces is moderate to large, and the bone is dense, particularly that of the femur (left). The innominates are not present.

Age

The estimated age of the individual is 22-26 years at death (scored on skeletal inventory as code 21, i.e., 20-24 years). The thoracic vertebrae show remnants of billowing. These findings, together with complete closure of long bone epiphyses and complete tooth eruption and root development, are consistent with an age of 22-26 years. Other features of the skeleton, however, suggest that the individual might be slightly older. The cranial sutures exhibit beginning to intermediate stages of closure, dental wear ranges from initial to moderate stages, and slight arthritic lipping is present on the distal femur.

Race

The cranial characteristics associated with Native Americans that are present in this individual include a rounded skull,

pronounced zygomata, the shape of the palate and nasal aperture, an edge-to-edge bite, flat anterior wear on dentition, and shovel-shaped incisors.

Stature and Muscle Attachment Sites

The formula of Trotter (1970) for estimating maximum living stature from the humerus yields an estimated height of 5'4"-5'6". (The maximum length of the tibia was not used in stature estimation because of recently discovered discrepancies in Trotter's formula associated with this bone [Jantz et al. 1994].)

The skeleton displays relatively well-developed muscle attachment sites, suggesting that the individual was probably active and muscular. At the attachment site for the costoclavicular ligament, the right clavicle shows a deep cortical excavation. The left clavicle shows irregularity at this location, but it is not as pronounced as that on the right. Both the left ulna and radius have a sharp interosseous margin, with the left ulna also displaying slight enthesophytosis (bony osteophytes at muscle attachment sites) at the ulna tuberosity and supinator crest (insertion sites of the brachialis and supinator muscles). A noticeable indentation is also present on the left radius at the attachment site for the pronator teres. Other well-developed muscle attachment sites are present on the femur (well-developed linea aspera and the tibia (pronounced soleal line).

Dentition

All teeth are present and show little evidence of decay. Small carious lesions are present on the occlusal surfaces of three

mandibular and three maxillary molars. The buccal surface of the maxillary right central incisor has an antemortem ship. Calculus deposits are present on maxillary and mandibular teeth, showing a build-up around the circumferences of the individual teeth. There is no abscessing, nor any noticeable resorption of the alveolar bone. The maxillary incisors, particularly the lateral ones, are shovel-shaped.

Pathology

Slight arthritic changes are present on the margin of the joint surface of the left distal femur, but no other evidence of arthritic lipping is evident on the postcranial skeleton.

Both scapulae display an ununited acromial tip (os acromiale). Mann and Murphy (1990) classify this trait as familial; it has also been associated with labor involving muscles of the shoulder.

Additional Observations

Without submitting a sample for radiocarbon dating, it is difficult to estimate the exact date of burial, although I tend to think that it occurred in the prehistoric period. We have examined a number of historic period burials from eastern Nebraska in recent years. This skeleton is not as well-preserved as is generally the case for 18th and 19th century burials. Moreover, many historic period Native American burials have stains from the presence of associated copper or brass trade artifacts, although none are present on this skeleton. Also, the level of dental wear is more advanced than is usually seen in young adult males during the

historic period, suggesting that the burial dates to the prehistoric period.

The next step in the evaluation of this skeleton is now under way. Measurements of the skull have been sent to Dr. Richard Jantz of the University of Tennessee for statistical comparison with data for prehistoric and historic population samples from the Central plains. Dr. Jantz has a large data base from this region, and the analysis may shed light on the tribal affiliation and antiquity of the burial.

As soon as we receive the results of the craniometric comparative study, we will send you Part II of our report describing these findings.

References

- Jantz, R.L., D.R. Hunt, and L. Meadows
- 1994 Maximum Length of the Tibia: How Did Trotter Measure It?
American Journal of Physical Anthropology 93:525-528.
- Mann, R.W. and S.P. Murphy
- 1991 Regional Atlas of Bone Disease. A Guide to Pathologic and Normal Variation in the Human Skeleton. Springfield, IL: C.C. Thomas.
- Trotter, M.
- 1970 Estimation of Stature from Intact Limb Bones. In T.D. Stewart (ed), Personal Identification in Mass Disasters. Washington, DC: Smithsonian Institution (pp. 71-83).



NATIONAL MUSEUM of
NATURAL HISTORY
SMITHSONIAN INSTITUTION

July 24, 1994

Mr. Richard A. Roth
Sheriff, Douglas County
c/o Captain Gregory L. Clemens
Criminal Investigation Bureau
225 North 115th Street
Omaha, NE 68154-2520

Re: Follow-up Report on SI94-03 (25D09002) - human skeleton
found in a creek embankment in western Douglas County.

Dear Mr. Roth:

As reported in my recent phone call, a small sample of bone collagen was submitted for radiocarbon dating and the cranial measurements were analyzed by Professor Richard Jantz of the University of Tennessee. These steps were taken because the skeleton appeared to be quite ancient. The results of the radiocarbon test indicate an age of almost 4,000 years (3,720 years Before Present). Dr. Jantz's comparisons showed similarity with prehistoric remains rather than with the historic period Omaha, Ponca, or Pawnee. The results of the craniometric classification analysis and of the radiocarbon dating of the remains preclude close affiliation with any contemporary Native American tribal unit.

Because the skeleton dates to the Archaic period (which is extremely rare in Nebraska), I would like to retain these remains for possible accession into the National Museum's human skeletal collection. A release form is enclosed for your signature. I have also contacted Mr. Rob Bozell of the Nebraska State Historical Society, so that he is aware of the results of our examination. I greatly appreciate the opportunity to examine this interesting and important set of remains. Please give me a call if you have any questions or if I can be of further assistance.

Sincerely yours,

Douglas W Owsley

Douglas W. Owsley
Forensic Anthropologist
(ph 202-786-2553)

cc: Mr. Rob Bozell, Curator, Nebraska State Historical Society

DEDICATED TO UNDERSTANDING THE NATURAL WORLD AND OUR PLACE IN IT

John M. O'Shea, Re: nagpra conversations.

To: "John M. O'Shea" <joshea@umich.edu>
 From: "Thomas P. Myers" <tpm@uminfo.uml.edu>
 Subject: Re: nagpra conversations.
 Cc: John Wilson, Priscilla Geew, James Bates
 Bcc:
 X-Attachments:

Dear John,

I do not quite understand how I have failed to make myself clear. We believe that our refusal to allow new research on culturally unaffiliated materials conforms to the letter of the law. Your lectures and threats will not persuade me or the university that we should break the law. I am certain that our attorney will be willing to change his opinion if new facts make it clear that it is appropriate to do so. I do believe that he would be most interested in the opinions of other attorneys, particularly those of the Department of the Interior.

You sign yourself as a Member of the NAGPRA Review Board, Dept of the Interior. Surely it would be most appropriate for Department attorneys to issue opinions in support of your statements. If they have done so, where are they published and why are they not automatically circulated to NAGPRA coordinators across the country? If they had been, I would have immediately forwarded them to the University attorney and we would all be on the same page.

Please note the comments that I have made in the body of your text. I am disappointed that you feel it is more appropriate to make assertions and threats than to present evidence.

At 12:25 PM 4/17/98 -0400, you wrote:

>Dear Tom,

> Russell has been forwarding me some of the conversations he's been
 >having with you re: research access to osteological collections. In light
 >of the discussions I was going to give you a call next time I was in
 >Lincoln visiting family to see if I could help clarify some of these
 >issues, but maybe this is a quicker way to offer some assistance.
 > There is nothing in the nagpra statute or regs to prohibit scientific
 >research, new or ongoing, on culturally unidentified remains. Indeed, it
 >is the emerging legal opinion in the Department of Interior that the
 >Secretary probably does not even have the authority to write regulations
 >that would do so. Culturally identified remains are a different story.

Our lawyer reads it differently. Obviously, he is open to argument from another attorney. It would be helpful if you could point to the opinions that have been issued. I am certain that the university attorney would be glad to consider them. This is really no easy. It is only necessary to demonstrate to our attorney that he should revise his opinion.

> In terms of the legislative history, the clause that is referenced in
 >the nagpra policy statement you sent to Russell, was inserted at the
 >request of the American Museum Association so that museums would not be
 >required to pay for state of the art kinds of molecular analyses to

Printed for "Thomas P. Myers" <tpm@uminfo.uml.edu>

1

>determine affiliation (this was a reaction to the wording in the national
>museum of the american indian act which was then binding on the
>Smithsonian Institution.
> So, Nebraska can obviously have a policy that is more
>restrictive than nagpra, but it cannot be justified or blamed on nagpra.
>At the same time, it would seem a little difficult to justify the
>existence of a museum or its collections if legitimate scientific research
>is banned.

I'm sorry, I take offense at that. This museum and this university believe that they are complying with the letter of the law on advice from the university attorney. Obviously, an attorney's opinion is only an opinion but until there is case law, that is all that any of us have to go on.

This would certainly have to be taken into consideration when
>evaluating requests for outside research or collection funding, etc.

That sounds a great deal like a threat.

> Anyway, if I can be of any help in clarifying these issues either
>later in the summer or earlier, please let me know. I would equally be
>happy to speak to the University's lawyers, or put them in touch with
>their counterparts here at Michigan.

John Wilms is the University attorney. His email address is:
John_Wilms@UNCA/UNEBR@UNebMail.UNeb.EDU. I'm sure he will be looking forward to hearing from you. No doubt he will be interested in the opinions of Michigan's attorneys that pertained the kinds of research in the Michigan collections that have been undertaken. I am sure that he would also be interested in attorney's opinions that pertained similar research at other institutions. Of course, our attorney may persuade the Michigan attorneys, and others, that they are mistaken. Can we expect copies of these opinions early next week?

>
>Best regards,
>John O'Shea
>Curator, Great Lakes Archaeology, University of Michigan
>Member, NAGPRA Review Board, Dept of the Interior
>
>
>

**OUR ANCESTORS TALK AMONG US:
INDIGENOUS KNOWLEDGE IN INTERNATIONAL REPATRIATION**

By

Thomas A. Biron

A THESIS

**Submitted to Dr. David Dwyer
Michigan State University
in partial fulfillment of the requirements
for the degree of**

MASTER OF ARTS

Department of Anthropology

1998

processing. To reiterate briefly for contextual purposes, the repatriation process began when one of the UMMA professional staff (Dr. Greenman) exhumed grave contents from *Wah Wah Skin Ah Gah* in 1938 and deposited them in the UMMA. In response, Esther Jacko (1982) visited the museum's current director, Dr. John O'Shea. After the NAGPRA law was passed, Dr. O'Shea responded to another visit saying that he would be willing to return the remains if WRFN would give permission to the UMMA to conduct DNA research on the remains. To explain the purpose of the DNA research, Director O'Shea visited WRFN in January 1996 and invited members of the WRFN repatriation committee to Ann Arbor to demonstrate the process. The DNA research demonstration took place at the UMMA in March, 1996. The WRFN repatriation committee then returned home and conducted a survey of community members (April/May 1996) about whether they should grant permission to the UMMA for this research. The WRFN community rejected the UMMA proposal by a measure of more than 2 to 1. Dr. O'Shea responded in the following manner.

**Dr. John O'Shea's official UMMA response
to the WRFN denial to conduct DNA research**

Chief Leona Nahwegahbow
 Whitefish River First Nation
 Birch Island
 Ontario POP 1A0
 CANADA
 August 8, 1996

Dear Chief Nahwegahbow:

I am grateful for your letter of 17 July, although I am saddened by its content. On behalf of the Museum and the University of Michigan I have gone as far as I possible can to accommodate your wish that the human remains and burial artifacts be returned to Wardrope Island. We have offered to return all of these materials even though we are under no legal

Meaning: Designation of human remains as materials no longer depicts ancestral human remains as understood by the WRFN community; legal requirements are prioritized with documentary and archaeological evidence cited to counter the WRFN claim, meaning this type of evidence is acceptable as answers to cultural affiliation questions for the UMMA while the WRFN evidence is not acceptable.

III. Authoritarian persona: I simply can go no further without jeopardizing my own ethical responsibility to future generations.

Meaning: Dr. O'Shea assumes full authority for decision making. He alone is obligated by his professional and personal ethics to protect an otherwise unidentified group he calls "future generations" from the WRFN community.

IV. Assertion of Power: I must conclude, therefore, that the present negotiations are at an end.

Meaning: I have the ultimate decision making power.

V. UMMA authority determines cultural affiliation: While this also brings to an end our voluntary moratorium on access to the collection, please be assured that the human remains from Wardrope Island will continue to be treated with care and respect, and that requests for research access will be evaluated for scientific merit and appropriateness using the same high standards that are applied to all such requests in the museum.

Meaning: I will use my power to determine cultural affiliation.

1. I have power to grant your wish.
2. Scientific interests are legitimate. I am a scientist; you are not.
3. I determine the beginning and end of these negotiations.
4. I impose and end the moratorium on research on these human remains.

Dr. O'Shea added structural power to his view of the situation. In this perspective *Wah Wah Skin Ah Gah* grave contents (human remains) are valued only as scientific materials. The functional component of this power structure is his rationale that the only applicable knowledge is scientific. In support of this assumption he declares that he has sound

over a situation than others involved (WRFN). This meaning is evidenced in the above text by the following assertions of power:

- The UMMA has the power to make such bargains (DNA for return of remains).
- The UMMA has the unilateral power to say when the negotiations are over, claiming in the process that failure to settle otherwise is the fault of the WRFN.
- The UMMA has the power to return these remains if they wish, despite the ethical problems that this will create for them.
- The UMMA has the power to return these remains if they wish even though they have sound evidence that they do not belong to WRFN.
- The UMMA has the power to possess the remains of Indians while Indians do not have the power to possess the remains of archaeologists.
- The UMMA has the power to conduct research on the remains of Indians while Indians do not have the power to do the same to the remains of archaeologists.
- The UMMA has the power to claim that they have sound evidence to disprove the WRFN claim on these remains without having to offer such evidence.

It is important to note that none of the above assertions of power appear overtly in the UMMA text. To do so would appear terribly blunt. The test of the validity of such assertions, however, is not that it is said directly in the text, but that they are necessary to make the claims in the text. Thus, when Dr. O'Shea says: "I must conclude, therefore, that the present negotiations are at an end," his claim cannot be made without asserting power (presumption #1 above).

This method of analysis has identified the meaning of authority from the standpoint of author. Another indicator of meaning in the use of power is defined by contradiction.

Contradiction of the "Un-Said"

One of the most important aspects in the analysis of texts, when it comes to the issue

It is true that ignorance of the law is no excuse, but the failure of the UMMA to recognize this law for the past sixty years can be seen as clear evidence of power usage. The facts of this case show that the University of Michigan representatives prefer to “subscribe” to the laws of the land as opposed to obeying them.

Is conflict resolution possible when the issues are considered unequivocal? Specifically, when scientific knowledge is deemed of greater value to the future than indigenous knowledge. The next chapter continues analyzing the University of Michigan’s formal responses to the WRFN’s requests to stop research and repatriate their ancestors remains.



HUI MĀLAMA I NĀ KŪPUNA 'O HAWAI'I NEI
 (GROUP CARING FOR THE ANCESTORS OF HAWAI'I)

November 25, 1998

Department of the Interior
 National Park Service
 Departmental Consulting Archaeologist
 1849 C Street, NW, Room NC340
 Washington, D.C. 20240

Attn: Dr. Francis McManamon

Attached is a copy of an important resolution passed unanimously by the Board of Directors of Hui Mālama i Nā Kūpuna O Hawai'i Nei on October 24, 1998. Although its subject matter pertains directly to you, we are entrusting that you will maintain the highest level of objectivity, and honor our request to provide the said resolution and this cover letter to the NAGPRA Review Committee for consideration at its meeting of December 10-12, 1998 in Santa Fe, New Mexico. We intend to send representatives to the meeting to respond to any questions the Committee might have relating to the concerns raised therein.

Balance is an important value in our culture. Due to recent actions by yourself including those identified in the resolution, as well as your recent representations at the Mōkapu meeting to attach conditions to the consideration of a joint NAGPRA repatriation application that went beyond the scope of NAGPRA, we are compelled to voice our serious concern for the lack of balance in terms of Native American interests. These actions highlight the conflict of interest, and the imperative need to relocate the NAGPRA Program to a more neutral office within the Department of Interior

He leo wale no

(Simply a voice, only a voice),

Kūnani Nihipali
 Po'o

Post Office Box 190 Hale'iwa, Hawai'i 96712-0190



HUI MĀLAMA I NĀ KŪPUNA 'O HAWAI'I NEI
 (GROUP CARING FOR THE ANCESTORS OF HAWAI'I)

RESOLUTION 98-002

WHEREAS, Hui Mālama I Nā Kūpuna O Hawai'i Nei was founded to protect the sanctity of *iwi kūpuna* (ancestral Native Hawaiian remains) and ensure their proper return to *ka 'āina* (the land) through the practice of traditional values, spiritual beliefs, and practices;

WHEREAS, Hui Mālama I Nā Kūpuna O Hawai'i Nei continues to invoke *nā kūpuna* for *'ike* (knowledge), *ikaika* (strength), *akamai* (intelligence), *maopopo pono* (true understanding), *'ike pāpālua* (avenues of communication), and *mana* (good energy) through *pule* (prayer);

WHEREAS, the Native American Graves Protection and Repatriation Act hereinafter, "NAGPRA", is a federal statute that specifically identifies and authorizes Hui Mālama I Nā Kūpuna O Hawai'i Nei to exercise authorities such as consultation and repatriation of cultural items specified in the statute;

WHEREAS, NAGPRA requires the Secretary of Interior to implement the provisions of NAGPRA by delegating statutory duties and responsibilities to an entity within the Department of Interior and that the Secretary of Interior delegated NAGPRA implementation responsibilities to the Departmental Consulting Archaeologist within the National Park Service;

WHEREAS, as the nation's chief archaeologist, the Departmental Consulting Archaeologist, is required to implement a federal statute that mediates archaeological and museum interests vis-a-vis those of Indian Tribes and Native Hawaiian Organizations, including Hui Mālama I Nā Kūpuna O Hawai'i Nei;

WHEREAS, the National Park Service is therefore in the position to both implement the NAGPRA process, including promulgating administrative regulations, and to comply with the administrative regulations for its own collections that contain cultural items included in NAGPRA, which represent an inherent conflict of interest;

WHEREAS, the NAGPRA administrative regulations largely reflect the concerns of archaeology, rather than Native people, a reflection of the fact that the program is under the authority and direction of the Departmental Consulting Archaeologist and that the imbalance in favor of archaeology and against Native interests will only continue to worsen, as demonstrated by the following cases: Kennewick Man, the University of Nebraska, Bandelier National Park, Wyoming State Museum, and the University of California Berkeley;

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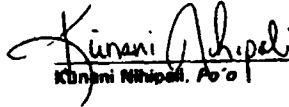
Page Two

WHEREAS, in order to cure the conflict of interest, Hui Mālama I Nā Kūpuna O Hawai'i Nei strongly urges the separation of the Departmental Consulting Archaeologist from all NAGPRA implementation activities including, but not limited to, the promulgation of regulations, monitoring compliance, publishing Federal Register notices, providing staff support to the NAGPRA Review Committee, awarding grants, assessing civil penalties, and providing technical assistance, to a neutral agency within the Department of Interior,

NOW THEREFORE BE IT RESOLVED that the Board of Directors of Hui Mālama I Nā Kūpuna O Hawai'i Nei strongly urge the separation of all NAGPRA implementation activities from the Departmental Consulting Archaeologist to a neutral agency within the Department of Interior, in order to better provide equity and fairness to the NAGPRA implementation process, and to balance the interests of Native people and archaeology. IN ADDITION, the Board of Directors of Hui Mālama I Nā Kūpuna O Hawai'i Nei directs that this resolution be provided to the Secretary of Interior, the National Park Service, the Hawai'i congressional delegation, the Office of Hawaiian Affairs, the island burial councils, interested Native Hawaiian Organizations, Indian tribes, Tribal organizations, including the Tribal Historic Preservation Officers Organization, and Alaska Native Corporations, for support and to urge the Secretary of Interior to act in accordance with this resolution.

CERTIFICATION

The foregoing Resolution was duly adopted at a Board of Directors meeting held in Honolulu, Hawai'i on the 24th day of October, 1998, with the required quorum present by a vote of 4 FOR, 0 AGAINST.


Kinani Nihupali, Po'o

ATTEST:


Kalekoe Ka'eo, Secretary/Treasurer

The NAGPRA Review Committee
c/o Archeological Assistance Division
National Park Service
Box 37127, Suite 210
Washington DC, 20013-7127
Comments received by October 15,
1996 will be considered by the
committee at its next scheduled
meeting. For additional information,
please contact Dr. Francis P.
McManamon at (202) 343-4101.
Note: We will not accept any comments in
electronic form.

Enclosure
Dated: August 14, 1996.
Valette Carnova,
Acting, Departmental Consulting
Archeologist,
Deputy Chief, Archeology and Ethnography
Program.

**Draft Recommendations Regarding the
Disposition of Culturally Unidentifiable
Human Remains**

Introduction

The Native American Graves
Protection and Repatriation Review
Committee is charged under section 8
(c)(5) of the Native American Graves
Protection and Repatriation Act
(NAGPRA) with "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."

The committee issued a draft set of
recommendations for guidelines
regarding disposition of culturally
unidentifiable human remains for
public comment and review. One
hundred twenty nine Indian tribes,
Native Hawaiian organizations,
scientific organizations, Federal
agencies, individuals, and museums
responded to this draft. Based on these
responses, the committee concluded
that disposition of a significant portion
of Native American human remains
listed as culturally unidentifiable for
purposes of NAGPRA may possibly be
decided through regulatory action. The
committee believes that decisions
regarding disposition of a small number
of generally very ancient human
remains will require amendments to
NAGPRA by Congress.

**Proposed Regulatory Language and
Methods for Disposition of Culturally
Unidentifiable Human Remains**

By clarifying and defining the
meaning of the statutory term, "shared
group identity," the committee believes
it is possible to decide disposition of
many human remains presently
classified as "culturally unidentifiable."

under NAGPRA. If "shared group
identity" is interpreted to recognize that
in several circumstances more than one
Indian tribe or Native Hawaiian
organization may share identity with
prehistoric human remains or human
remains associated with an earlier group
then many of the problems regarding
disposition of culturally unidentifiable
human remains may be resolved.

"Shared group identity" has not, to
date, been defined in statute or
regulation. The term is central to the
definition of "cultural affiliation" and
thus is at the core of NAGPRA. By
statute, "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
identified earlier group." There is
nothing in this language to preclude
more than one Indian tribe from
establishing cultural affiliation through
shared group identity to an earlier
group. There are, in fact, many instances
in which multiple Indian tribes claim or
may show shared group identity. Thus,
the committee proposes to define
"shared group identity" to include the
possibility of a relationship between
more than one present day Indian tribe
or Native Hawaiian organization and an
earlier historic or prehistoric group.

The committee, therefore, proposes
the following definition for "shared
group identity."

Shared group identity means a relationship
between a present day Indian tribe or tribes
and an earlier group based on: (1) direct
historical links and/or (2) a combination of
geographical, temporal, and cultural links.
Geographical, temporal, and/or cultural links
may be established through biological,
archaeological, linguistic, folkloric, oral
traditional, or other relevant information or
expert opinion [see section 7 (a)(4) of the
Act]. This definition provides for the
possibility of more than one Indian tribe or
Native Hawaiian organization establishing
cultural affiliation with a prehistoric or
earlier group. At the same time, it employs
language and concepts already well
established within the framework of
NAGPRA.

Several points support this approach.
It is likely that a substantial number of
human remains will be classified as
culturally unidentifiable. Many
museums and Federal agencies
recognize that while it may not be
possible to affiliate individual human
remains with a single Indian tribe, it is
often possible to narrow the field to a
few Indian tribes who are culturally
affiliated with the human remains based
on a preponderance of the evidence.
The high number of human remains
listed as culturally unidentifiable may

**Draft Recommendations Regarding the
Disposition of Culturally Unidentifiable
Human Remains and Associated
Funerary Objects**

AGENCY: National Park Service, Interior.
ACTION: Notice and Request for
Comments.

Section 8 (c)(5) of the Native
American Graves Protection and
Repatriation Act (25 U.S.C. 3001 et seq.)
requires the Review Committee to
recommend specific actions for
developing a process for the disposition
of culturally unidentifiable Native
American human remains. The
committee has given this matter great
thought and has developed the enclosed
draft documents outlining their
positions. The enclosed documents are
intended for wide circulation to elicit
comments from Indian tribes, Native
Hawaiian organizations, museums,
Federal agencies, and national scientific
and museum organizations.

Anyone interested in commenting on
the committee's draft recommendations
should send written comments to:

also reflect a lack of consistency regarding the use of the term "Indian tribe." For example, a set of human remains may be identified as "Sioux" while lacking a more precise identification linking them with one or another or several Sioux tribes. Finally, many cases in recent years provide a foundation for narrowing the number of individual human remains that are considered culturally unidentifiable. Specifically, in cases of prehistoric remains, there are several avenues for present day Indian tribes or Native Hawaiian organizations to establish shared group identity with prehistoric groups. For example, an Indian tribe or Native Hawaiian organization may not be able to establish an unbroken historical connection with a particular prehistoric culture, but may be able to establish shared group identity based on clear geographical and temporal ties to the area and time of the earlier group coupled with additional evidence, such as oral histories and other cultural traditions and lifeways.

Implementation of NAGPRA under this approach would be relatively straightforward and simple. Indian tribes, or tribes working at their discretion, in cooperation with museums or Federal agencies or other relevant experts, will be responsible for developing identifications of shared group identity with specific prehistoric cultures or earlier groups. Once an Indian tribe or tribes, or an Indian tribe and a museum or Federal agency, has compiled information establishing cultural affiliation based on shared group identity with a prehistoric culture or earlier group, they will notify the National Park Service of their claims. The National Park Service will compile a list of all human remains that have been initially identified as culturally unidentifiable. This list will be submitted to the committee and to Indian tribes. Guidelines for repatriation, as provided in existing NAGPRA statutes and regulations, will apply. Indian tribes may request repatriation, based on their claims and based on agreements among claimants regarding proposed disposition of such human remains. Museums or Federal agencies will evaluate and act upon the claims, as outlined in NAGPRA statutes and regulations. The proposed process will be further simplified in practice since several Indian tribes have already established regional or cultural associations based on shared group identity with human remains in the possession or control of museums and Federal agencies.

Issues Requiring Amendments to NAGPRA by Congress

1) Non-Federally Recognized Native American Groups: The definition of "Indian tribe" used in NAGPRA limits participation in the NAGPRA process to Indian tribes who are currently recognized as tribes by the Bureau of Indian Affairs. Many Native American groups are not presently Federally recognized through accidents of political rather than cultural history. While mechanisms have been developed to provide some access to NAGPRA for non-Federally recognized Native American groups, the committee recommends that the Secretary urge Congress to amend NAGPRA to provide a means whereby legitimate, non-Federally recognized Native American groups may participate in NAGPRA.

2) Culturally unidentifiable associated funerary objects: NAGPRA, as currently framed, does not provide for repatriation of culturally unidentifiable associated funerary objects. The committee recommends that the Secretary urge Congress to amend NAGPRA to provide for a means for Indian tribes or Native Hawaiian organizations to repatriate associated funerary objects along with human remains when several Indian tribes have established cultural affiliations and joint agreements for disposition of such human remains and their associated funerary objects, as outlined in the section above.

Conclusion

The committee believes that the steps outlined above provide viable solutions to otherwise complex and vexing problems. Comments from the field were valuable in helping the committee pursue a very different set of potential solutions from those offered in the first draft. We look forward to receiving additional comments and suggestions prior to making our final recommendations to the Secretary of the Interior regarding disposition of culturally unidentifiable human remains.

Draft Recommendations for the Disposition of Human Remains Culturally Affiliated with Non-Federally Recognized Native American Groups

The Native American Graves Protection and Repatriation Review Committee is charged under section 8 (c)(5) of the Native American Graves Protection and Repatriation Act (NAGPRA) with "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."

In the course of holding meetings across the United States and hearing public commentary from many groups and individuals, the review committee has come to recognize that there are different kinds of remains that may be classified as "culturally unidentifiable" under the definitions and requirements of NAGPRA. One particular subgroup are those remains that are culturally affiliated with Native American groups which are not formally recognized by the Bureau of Indian Affairs (BIA) as "Indian tribes". Examples of such non-Federally recognized Native American groups might include groups recognized by individual States; ones that were once recognized by the BIA but for various reasons no longer have such recognition, or ones that have applied for BIA recognition but have not yet been reviewed or approved. (This list is intended to give examples only, and it not meant to be inclusive or definitive.) In these cases, the remains are only "culturally unidentifiable" because the definition of "Indian tribe" has been interpreted by the Department of the Interior to mean only those groups that have received formal recognition by the BIA. The review committee believes that it may be necessary to amend the statute in order to fully enfranchise these non-Federally recognized Native American groups with all rights and responsibilities accorded by NAGPRA to Federally recognized Indian tribes. In the absence of such an amendment, the review committee recommends that general guidelines can be added to the current regulations which will encourage non-Federally recognized Native American groups to work cooperatively with museums, Federal agencies and Federally recognized Indian tribes and allow for the repatriation of culturally affiliated human remains and associated funerary objects.

The review committee has reviewed four cases to date involving non-Federally recognized Native American groups and has made recommendations to the Secretary of the Interior to approve the repatriation of human remains to these groups. Two of these cases—the Robert S. Peabody Museum of Archaeology at Phillips Academy repatriation to the Mashpee Wampanoag and the Hood Museum of Art at Dartmouth College repatriation to the Abenaki Nation—have been completed with the required Notices of Inventory Completion published in the *Federal Register*. Until such time as the statute is amended to provide full standing to

non-Federally recognized Native American groups, the review committee recommends the following five step process:

a. Museums and Federal agencies that believe they possess human remains culturally affiliated with non-Federally recognized Native American groups are encouraged to notify these groups and work with them to reach agreement on possible repatriation of those human remains. Museum and Federal agencies should use the statute and regulations to assess the potential cultural affiliation of non-Federally recognized Native American groups with specific human remains. Determinations should be based on a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion [25 U.S.C. 3006 (c)(4)].

b. Non-Federally recognized Native American groups are encouraged to work with museums and Federal agencies to reach agreement on possible repatriation of human remains.

c. In discussions over the possible repatriation of human remains to non-Federally recognized Native American groups, the group and the museum or Federal agency holding the human remains are encouraged to consult with all Federally recognized Indian tribes who may have an interest in the geographic area from which the remains originated.

d. When agreement is reached to repatriate human remains to a non-Federally Native American group, this agreement should be submitted to the review committee for consideration. The review committee will then review the facts and circumstances of the case and make a recommendation on the repatriation to the Secretary of the Interior. If the Secretary agrees with the recommendations, he will recommend to the museum or agency to proceed with the repatriation.

e. If the decision is made to proceed with the repatriation, a Notice of Inventory Completion will be published in the *Federal Register*, with a waiting period of 30 days prior to the actual repatriation of the human remains.

These five steps are intended to provide a general process for non-Federally recognized Native American groups to work cooperatively with museums and Federal agencies to repatriate human remains with which they share group identity. They should not be interpreted as introducing new compliance requirements for museums and Federal agencies. The review committee believes that the above

observations and recommendations provide viable solutions to otherwise complex and vexing problems. Public comments were invaluable in helping pursue a very different set of potential solutions from those offered in the first draft. The review committee looks forward to receiving additional comments and suggestions prior to making final recommendations to the Secretary of the Interior regarding the disposition of cultural unidentifiable human remains.

[FR Doc. 96-21105 Filed 8-19-96; 8 45 am]

BILLING CODE 4310-70-P

DRAFT PRINCIPLES OF AGREEMENT

June 26, 1998

1. The legislative intent of NAGPRA is made clear by the statute itself; it is the Native American Graves Protection and Repatriation Act.
 - The statute mandates the disposition of all Native American human remains and cultural items excavated or discovered on Federal lands after November 16, 1990.
 - The statute clearly mandates the review committee to develop recommendations for the disposition of all culturally unidentifiable human remains in Federal agency and museum collections, although the disposition of these remains is not specified in the statute.
 - While we realize that the current legal standing of associated funerary objects places them beyond the review committee's charge, the committee recommends that they be included in the NAGPRA process.
2. Federal agency and museum officials must make a decision as to whether all Native American human remains are related to lineal descendants, or culturally affiliated with a present day, Federally-recognized tribe, or are culturally unidentifiable. This determination must be made through a good faith evaluation of all relevant documentation and consultation with any appropriate Indian tribe or Native Hawaiian organization. A determination that human remains are culturally unidentifiable may change as additional information becomes available.
3. Culturally unidentifiable human remains are no less deserving of respect than those for which cultural affiliation can be determined. Culturally unidentifiable human remains can be subdivided into at least four categories:
 - those which lack sufficient information on context,
 - those which are affiliated with non-Federally recognized Indian groups,
 - those which are associated with an archeological population but for which the past archeological population has no associated present-day tribe ["extinct" population],
 - those which are associated with an archeological population but cannot be affiliated with a present-day tribe due to time depth or other factors.These different reasons for determining human remains to be culturally unidentifiable suggest that there may be more than one way in which appropriate disposition decisions can be made.
4. Through its actions at the January 1998 meeting, as well as through decisions made by the previous committee (i.e. the Ticut site case), the review committee has begun to recommend a process for disposition of culturally unidentifiable human remains. It is our intent to continue refining these existing models for disposition while actively seeking other models for disposition.

HEALTH

Genetic Imperialism

Are Scientists Exploiting Native DNA?

By Korey L. Capozza

SIX YEARS AGO, A SCIENTIFIC VENTURE WAS launched by a consortium of international scientists who, with U.S. federal funding, are seeking to extract and codify indigenous genetic material across the globe. Called the Human Genome Diversity Project (HGDP), and spearheaded by hundreds of scientists, this mammoth endeavor would spend millions of tax-payer dollars and the involvement of dozens of tribes across North America.

The HGDP represents a new wave in medical research that focuses on Indian communities. With the goal of discovering the genetic underpinnings of all humanity, such projects may result in the wholesale commercialization of Native American ancestry.

The HGDP singled out several hundred indigenous tribes across the globe as prime targets for research. These ethnic groups were selected on the basis of their genetic uniqueness and high risk of cultural extinction. The Cheyenne, Shawnee, Shoshone, Cherokee, Navajo, Plains Apache, and Winnebago tribes are just a few of the Indian groups listed by the HGDP as priority subjects.

The project's scientists have stressed the urgency of expediting sample collection from these tribes, referred to as "isolates of historic interest," given that their distinct DNA will likely disappear in the near future with the trends of migration and racial inter-breeding.

Once the intent of the HGDP became public, the outcry from Native groups was deafening.

"Why the tremendous interest in saving the genes of indigenous people and not the people themselves? Who really stands to benefit from this endeavor?" asked Debra Harry, a Faluts Indian, and coordinator of the Indigenous People's Coalition Against Biopiracy.

Some Native Americans object to the purpose of research projects like the HGDP which intend to uncover the "truth" about native ancestry without taking into account indigenous cultural beliefs.

Theories about Native American origins have been a source of contention between scientists and native groups for decades. A central purpose of the HGDP would be to map the migration patterns of the continent's first peoples. For Native Americans, such research is not only irrelevant but offensive to their culture. Traditional religion among North American

Indian groups explains native origins through a creation myth.

HGDP organizers state in their Internet fact sheet that, "all human groups seem to be interested in their origins; many are interested in scientific evidence about those origins."

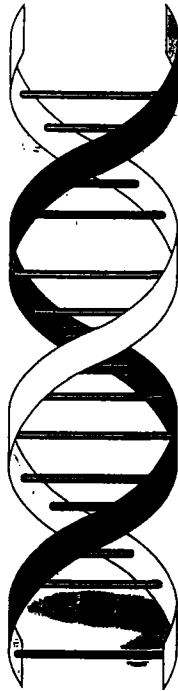
This assumption — that Natives have the same interests as scientists in finding out about their ancestry — is a major stumbling block between the two interest groups. Indians are, in fact, increasingly dubious of Western scientific explanations about their ancestors. For years Western science taught that the first Americans were of Asian ancestry and migrated to the North American continent across the Bering Strait.

Today, however, that theory is being called into question by mounting anthropological and genetic evidence that suggests migration most likely occurred before the last ice age. As Western science continues to reinvent human history, natives are learning to ignore scientific theories that reduce native ancestry to a pile of numbers and computer-generated theorems.

The contemporary battle over "Kennewick Man", an ancient skeleton found on Umatilla Indian territory is a classic example of how scientific and Native interests are often at odds. The 9,300-year-old remains were claimed by scientists as an essential link in the investigation of early American ancestry. The Umatilla, however, claimed Kennewick Man as an ancestor that should be returned to his rightful grave without further study.

The subsequent court battles highlighted the frustration genetic scientists have with Native indifference to their search for scientific discovery and the bitterness felt by many tribes towards the scientists' arrogance and disrespect for their culture.

"A religious stance about these issues is problem-



atic. What do you do with remains that are 1000 years removed from their ancestors?" asks Robson Bonnichen, director of the Center for the Study of the First Americans at Oregon State University. The fate of Kennewick Man is still pending a Supreme Court decision.

Native American cynicism about western scientific endeavor is not without cause. In recent years the pharmaceutical "gold rush" has brought scientists in search of money-making natural and gene-based cures to the remotest regions of the globe.

These gene "game-hunters" are patenting and commercializing indigenous cell lines. What may have seemed like material for a far-fetched science fiction movie just 10 years ago is today a frightening reality. In 1993, the U.S. government applied for U.S. and world patents on the cell line of a 26-year old Guayami Indian woman from Panama. It was only after a powerful lobby from international human rights groups that the U.S. Secretary of Commerce withdrew the patent application.

A major problem with gene sampling is that federal and international regulation is glaringly absent. "Open access to DNA samples and sharing worldwide is a monster to monitor and enforce," Harry said. Though DNA donors often consent to participate in a research project, they are seldom informed of how their genetic material could be used in the long run.

Indigenous people's cell lines are currently preserved in tissue banks across the country where researchers, including pharmaceutical companies, can easily access them. The Conell Institute, a U.S. tissue bank, for example, has cell lines from Pima, Pueblo and Cheyenne Indian donors. The institute is also a partner in the HGDP and maintains a policy of open access to interested researchers.

"The Pima's have been studied for over 30 years," said Harry. "Their DNA is probably in every DNA lab in the country." Commercial exploitation of indigenous genetic samples could happen without any tribe being aware of it.

"What do we do with the cell lines that are already out there and how do we determine if they were collected with the permission of the Indian donor?" asked Frank Dukepo, a Hopi Indian geneticist at the University of Northern Arizona.

The implications of such research will have far-reaching implications. Cell lines contain information about the human history of not just an individual but his/her tribal ancestors as well.

Critics of the HGDP pointed out that the project would have no benefit, medical or otherwise, to native people. Organizers of the international project stated in their proposed research guidelines that, "researchers should actively seek ways in which participation in the HGDP can bring benefits to the sampled individuals and their communities."

Later, the organizers admitted that medical research would be expensive and difficult without medical records.

"It's a lie used to coerce people to participate in the research," Harry said. "HGDP is not set up to do medical research — there can be no medical benefit to the communities," said Harry. The ethical protocol outline by the HGDP was seen by Native Americans as deeply offensive. "The Indian community saw it as 'How the White Man will do research on Indians,'" said Dukepo.

With Native groups in North America mobilizing to confront exploitative genetic research, scientists are turning to the Third World where opposition is less organized.

In 1994, a group of scientists affiliated with the National Institutes of Health applied for a patent for cell lines derived from Solomon Islands and Papua New Guinea natives which contained DNA from the HTLV-I virus.

Later that same year, scientists from the Samuel Lunenfeld Research Institute in Toronto partnered with Sequana Therapeutics (now called Aysis Pharmaceuticals), a biomedical company in California, to search for the asthma gene among the inhabitants of Tristan de Cunha, a small island in the south Atlantic ocean. It took researchers two years to convince the residents to participate. Now with samples in hand, Aysis pharmaceuticals is racing to patent an asthma drug derived from Tristan de Cunha's natives. Aysis has also expressed interest in sampling the Pima of Northern Arizona who have a high incidence of obesity and diabetes. Aysis hopes to isolate the genes that cause these illnesses and develop profit-generating drugs.

In 1993, the president of the World Council of Indigenous Peoples came forward to condemn the patenting of indigenous human life at the General Agreement on Trade and Tariffs conference in Geneva.

By 1997, the Human Genome Diversity Project was the target of wide opposition and was found to be seriously flawed in its research approach by the National Research Council. Today, the HGDP has come to a halt as a coordinated initiative and has become an oft-cited example of "how not to plan a research project."

Organizers of the project say that they hope to get back into full swing after some time to take stock and gather forces. "It is still unclear where funding for the HGDP might come from. We hope this will be clarified in the coming year," says John Moore, chairman of the North American Committee for the HGDP.

The HGDP, however, is just one of several genetic research projects that may threaten Native American genetic privacy.

Unlike the HGDP, which was high-profile and international in scope, other research efforts are much smaller but perhaps more insidious. The National Institutes of Health, for example, has a mirror campaign called the Environmental Genome Project that few groups have even noticed.

"Clearly NIH is... the one we should be worried about," said Dukepo. A second HGDP is reportedly underway at the Field Museum in Chicago. The HGDP may be dead as a coordinated effort but individual researchers that had identified themselves with the HGDP are receiving funding for their individual projects," said Hope Shand, biopiracy coordinator for the Rural Advancement Foundation International. One of these projects is being conducted at the University of Oklahoma where researchers are trying to outline a protocol for conducting research in Indian Country. The protocol will be based on the responses of the Apache tribal government.

It's clear that Indian communities need to be informed about the potential risks associated with participation in genetic research. Some tribes may find that such research will ultimately benefit the community.

"I see some positive aspects that might result from this. I try to see both sides," said Dukepo.

It may be difficult for scientists, government entities and Indian communities to find common ground in this arena given the history of deceit that has characterized relations among the three parties in the past.

"Indians don't hold informed consent in any regard because it's just like a signed document like all of the other broken treaties in history," said Dukepo. As researchers continue to court Native Americans, tribal authorities are waging up to the potential impact genetic research will have on Indian people. "Both sides need enough information about this so that they can come up with decisions that are well thought out," Dukepo said. "We must live with these decisions for a long time." □

Why the tremendous interest in saving the genes of indigenous people and not the people themselves?

**UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS**

**OVERSIGHT HEARING ON
THE NATIVE AMERICAN GRAVES PROTECTION
AND REPATRIATION ACT**

**Washington D.C.
April 20, 1999**

**Statement of:
Robert P. Gough, Attorney at Law
P.O. Box 25
Rosebud, South Dakota 57570**

**On Behalf of
The Estate of Tasunke Witko
and
The Rosebud Sioux Tribe NAGPRA Committee**

Good morning. My name is Robert Gough and I have the privilege of being the attorney for the Estate of Tasunke Witko, or Crazy Horse, the great Lakota leader. I also serve as a member of the Rosebud Sioux Tribe's NAGPRA committee. It is indeed an honor to appear before this distinguished committee on behalf of both the Estate and the Rosebud Sioux.

I come before you today to address a case of ongoing concern with regard to a lack of compliance with, and enforcement of, the notification procedures established under the Native American Graves Protection and Repatriation Act. This is a case which involves:

- A respected, private institution of higher learning, namely, Washington College of Chestertown, Maryland;
- A buckskin shirt, fringed with human hair, believed to have belonged to Crazy Horse;
- A lack of compliance by Washington College with either the spirit or the letter of the Native American Graves Protection and Repatriation Act; and
- A lack of enforcement of the civil penalty provisions by the U.S. National Park Service for such non-compliance.

COMPLIANCE IS A CRITICALLY IMPORTANT THRESHOLD ISSUE

The Native American Graves Protection Act was initially designed:

- to provide a procedure within which the rights of ownership of Indian, Alaska Native, and Native Hawaiian (Native American) human remains and artifacts, including funerary objects, religious artifacts, and objects of cultural patrimony, found on Federal or tribal lands could be clarified;
- to establish criminal penalties for the sale, purchase, or transport of Native American human remains or cultural artifacts without a legal right of possession;
- to direct federal agencies and museums receiving federal assistance to identify the geographic and tribal origins of human or cultural artifacts in their collections, and to require the return of the remains or artifacts to the appropriate tribe or Native American organization upon request;
- to establish a Department of Interior advisory committee to review the identification and repatriation processes for Native American human remains and cultural artifacts held by federal agencies and federally assisted museums; and, finally,

- to establish civil penalties for museums failing to comply with requirements of this act.

During the congressional hearing on the proposed NAGPRA legislation held May 14, 1990, distinguished members of this committee recognized the important human rights issues at stake in the legislation which outlined "a process that provides the dignity and respect that our Nation's first citizens deserve" (Senator John McCain), and that as proposed, NAGPRA provided a cross-cultural "lesson in etiquette, in manners, about how people treat each other. If you read this report, it is almost a rule book on how you treat others with respect" (Senator Conrad).

However, for these goals of dignity and respect to be realized, compliance with the threshold provisions of the act must be ensured. Our concern today raises the crucial question of initial compliance by federally funded institutions in submitting the required summaries or inventories. Institutional compliance with the initial disclosure notifications must be ensured so that interested Native American tribes and descendants can participate in the federally outlined process and review those objects and artifacts held by museums and other such institutions. Museums simply can not unilaterally pre-determine that particular objects or artifacts fall outside the specific NAGPRA categories and thus exempt themselves from compliance with the process. The mandatory language of Section 10.8 (a) of the act is abundantly clear:

(E)ach museum that has possession or control over collections which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony **must complete a summary** of these collections based upon available information held by the museum. Federal agencies are responsible for ensuring that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution. (Emphasis added).

No proper determination of the applicability of the categorical provisions of the act can occur without institutional compliance with the threshold notice provisions.

This is a critical procedural concern, for without institutional compliance in providing the required summaries and inventories, Native participation and federal regulation are pre-empted and the entire process is rendered ineffective. Without initial compliance, based either upon the good faith cooperation of the subject institution, or upon the diligent enforcement by the federal agency charged with carrying out the requirements of this law, all subsequent provisions of this balanced and diligently crafted act are rendered hollow.

It appears from the record, on file with the National Park Service, that, for the past 60 years, Washington College has held a collection of Native American artifacts, including

a shirt said to be trimmed with "human scalp" and purported to have belonged to the famed Lakota leader, Crazy Horse. The Estate and Tribe have made repeated attempts to examine the objects and artifacts in this collection and related documentary evidence as to its provenance. Washington College has knowingly ignored these requests and has proceeded to sell the bulk of this collection, including the shirt, through Sotheby's Auction House in New York City on May 21, 1996, without having filed either a summary or inventory of their collection, as required under the Native American Graves Protection and Repatriation Act.

Apparently, Washington College unilaterally decided, based upon "expert advice" and a written, legal opinion, that it did not need to comply with the requirements of federal law. Incredibly, the College presumed on its own and without the benefit of input from known and interest Native parties, that the objects and artifacts in its Native American collection were not subject to the requirements of the act. Having opted out of any compliance requirements, the College was then free to sell these objects and artifacts through Sotheby's Auction House to the highest bidder.

We would ask this committee: Where in the law are federally funded institutions possessing items which may be subject to the Native American Graves Protection and Repatriation Act, allowed to presume that federal law does not apply to them? Where in the law are such institutions excused or exempted from filing the appropriate summaries or inventories of their collections based upon their own – hardly disinterested – determination that such objects and artifacts in their collections are not subject to the act?

WASHINGTON COLLEGE AND THE CRAZY HORSE SHIRT

We note that Washington College would appear to be an institution of higher learning, pursuant to 45 CFR Section 10.2(3). And further, pursuant to 45 CFR Section 10.2(3), we understand that Washington College, like most such institutions, has received federal funds after November 16, 1990, and no doubt continues to benefit from federal support.

Since long before the passage of the Native American Graves Protection and Repatriation Act, this College, name for the first President of the United States, has had possession or control over a collection, called the "Albee Collection", which contains Native American objects and artifacts which may be subject to the act, pursuant to 45 CFR 10.8(a), namely, unassociated funerary objects, sacred objects, or objects of cultural patrimony, or pursuant to 45 CFR 10.9, human remains and associated funerary objects. Washington College has failed to comply with the timely filing of either a summary or inventory, as required by the law.

Further, such failure has resulted in the sale of the Albee Collection without proper notice to the Tribe or Estate, who are parties known to Washington College as having

an affiliation, association and interest in the collection. This sale has materially damaged the Tribe and the Estate through the loss of any opportunity to examine, investigate, research or potentially repatriate such items.

The matter of particular concern to us today is the critical need for action by the United States National Park Service in enforcing the civil provisions of NAGPRA. To date, we are not aware of any enforcement proceedings initiated under the civil penalty provisions of the act. We seek a determination that Washington College has failed to comply with NAGPRA, and that such failure has ultimately resulted in the sale, and subsequent disposal, of the Albee Collection by the College.

We have requested that the Secretary of the Department of the Interior and the National Park Service make an official determination of non-compliance and assess the appropriate civil penalties, pursuant to 45 CFR Section 10.12, to hold Washington College accountable for its failure to provide a summary and/or inventory by November 16, 1995 or any time thereafter, prior to its sale of the Albee Collection on May 21, 1996.

We first brought this matter to the attention of the National Park Service in writing on June 4, 1996, and have followed-up with letters to the Secretary of the Department of the Interior on June 11, 1997 and a then again on June 25, 1998, with copies to our congressional delegation, and finally, by way of personally appearing before the NAGPRA Review Committee at their meeting convened on December 10, 1998, in Santa Fe, New Mexico. To date we still have no word as to any agency action or determination in this matter.

BACKGROUND INFORMATION

While there are many issues involved in this case, I would like include a statement prepared by Ms. Amanda Burt, a paralegal with Rudnick, Wolfe, Epstein, and Zeidman, of Washington D.C., who provided some background information in this matter to the NAGPRA Review Committee in Santa Fe, on December 10, 1998.

From Ms. Amanda Burt's December 10th presentation:

Good afternoon. I would first like to thank the Review Committee for the opportunity to express our concerns in this forum. Specifically, we are here to address the question of Washington College's compliance with the procedural provisions of NAGPRA, as well as the National Park Service's intended course of action in this matter.

For the record, my name is Amanda Burt. I am currently a paralegal with the law firm of Rudnick, Wolfe, Epstein & Zeidman in Washington, D.C. I am also a 1993 graduate of Washington College.

Most people in this room are probably not familiar with Washington College. As I am well-acquainted with Washington College, I thought it would be helpful to provide some background information about the school. It is located in Chestertown, on Maryland's Eastern Shore and is a private liberal arts institution of approximately 1,000 students. For its part, Chestertown is a small, quiet community comprised of Chesapeake Bay watermen, farmers, retirees, and, for nine months out of the year, college students. Chestertown is not the kind of place that immediately comes to mind as being a "flashpoint" for Native American issues. And yet, this is absolutely crucial to understanding why this case is so important – especially where future instances of non-compliance with NAGPRA are concerned.

For approximately 60 years, Washington College possessed the Albee Collection, a sizeable assemblage of Native American artifacts, most notably of which included a beaded and fringed shirt attributed to legendary Lakota warrior, Crazy Horse, in addition to a headdress said to have belonged to Chief Red Cloud. Interestingly, the placard next to the Crazy Horse shirt proclaimed that it was "trimmed with human scalp."

The Albee Collection would likely have gone unnoticed were it not for a visit to the college in 1992 by the Cheyenne poet, Lance Henson. Henson, who had been invited to the College to read from his poetry, literally stumbled across the Albee Collection – housed in two shabby trophy cases in an obscure corner of Washington College's library. I have provided photographs for your reference. Aware of NAGPRA, Henson raised the question of the College's rightful ownership of the collection.

At the time, I was working for the student newspaper, The Washington College Elm. I wrote a story about Henson's "discovery" and his concern, especially in light of the recently enacted federal repatriation law, that the artifacts should be returned to the appropriate tribes. Since that time, I have been working together with members of the Crazy Horse family and the Estate to obtain more information about the shirt.

Sadly, the Albee Collection – including the Crazy Horse shirt – were sold at Sotheby's in May, 1996, due, in large measure, to Washington College's failure to comply with the requirements of NAGPRA. Although attributed in the auction preview catalogue to an "Important Plateau Man," the shirt sold for a price tag of over \$200,000 – more than ten times what similar shirts are worth, in dollars.

Today, the question of Washington College's compliance with NAGPRA still remains unanswered. The National Park Service's failure to make a determination in this matter sends the unfortunate message that other institutions like Washington College do not have to comply with the law because they will not be held accountable for their actions, or lack thereof.

Thus, for approximately the past 60 years, Washington College has had in its possession various objects and artifacts, including a so-called "scalp shirt" believed to have been owned and worn by Crazy Horse, i.e. *Tasunke Witko*. They also held a double-train eagle feather headdress attributed to Red Cloud, along with numerous other items from the estate of Captain Albee.

EFFORTS TO OBTAIN COMPLIANCE

On November 7, 1995 and again on May 12, 1996, on behalf of the Estate of *Tasunke Witko* and the Rosebud Sioux Tribe NAGPRA Committee, I contacted Washington College to obtain more information about the Albee Collection, including the Crazy Horse shirt and was directed to Mr. Alexander "Sandy" Jones, Chairman of the Washington College Legal Affairs Committee. I informed Mr. Jones that I represented the Estate of *Tasunke Witko* and the Rosebud Sioux Tribe NAGPRA Committee. I advised him that the certain objects and artifacts in the Albee collection may be subject to NAGPRA. I provided him with a copy of the repatriation act, with what I believed to be the relevant sections marked and highlighted. We made no formal request for repatriation at this time, and sought only to examine the objects, artifacts and any documentation of its provenance.

My initial request to view the objects and artifacts was denied on the grounds that the shirt was not presently on campus, as it was undergoing appraisal and conservation at an undisclosed location, and my follow-up request was denied because the collection had been sold at auction in New York City. It would appear that sometime after being appraised of the appraisal and potential market value of the collection, Washington College decided to profit from its sale rather than comply with the procedural requirements of NAGPRA. This decision of Washington College, made with full knowledge of Native interest in the collection, is shameful and unworthy of the name of its "founding father."

Since that time, Washington College has unilaterally taken the position that it had no duty to comply with the requirements of NAGPRA. The College's position is apparently based upon three grounds:

- That Washington College is not a museum.
- That the objects and artifacts in its possession did not fall within the objects covered by NAGPRA, pursuant to 43 CFR 10.2(d).
- That Washington College held good title to the Albee Collection.

We need not concern ourselves with the third point concerning the issue of title, at this time, as that matter is subject to separate litigation.

As to the claim that Washington College is not a museum, and therefore, not subject to compliance with the requirements of NAGPRA, this is purely a question of semantics. While Washington College may not be a museum in the generally accepted meaning of that word, Washington College is not relieved from its obligation to comply with applicable federal law or the specific definition of museum provided under NAGPRA.

In his June 8, 1998, letter to Dr. Francis P. McManamon, of this Committee, in his capacity as Director of the Archeological and Ethnology Program of the National Park Service, Mr. John Toll, President of Washington College, states initially that:

"Although we are not required to respond to your inquiry, we hope that our response will refute the allegations made by Mr. Gough and will foreclose the need for further action."

President Toll provides no reason, nor offers any grounds upon which to base his belief that Washington College is not required to respond. However, on several occasions in the past, Washington College has claimed that it is not a museum. For example:

- In a letter to the attorney for the Estate of Tasunke Witko, dated May 19, 1996, Mr. Alexander "Sandy" Jones, Chairman of Washington College Legal Affairs Committee, states that:

"The Board of Visitors and Governors received a formal written legal opinion that the artifacts in the 'Albee Collection' are...held with good title by Washington College, and that they are exempt from the provisions of 25 U.S.C. 3001, et seq! Relying thereon, the Board requested and received an appraisal from Sotheby's and entered into a contract with Soteby's (sic) to have the collection photographed, displayed, exhibited, cataloged, advertised and sold at public auction. As of this date all of this has been accomplished in a highly professional manner, except for the sale itself which has long been scheduled and will be held at Sotheby's New York auction house on May 21, 1996."
- In a February 13, 1995, letter to Dr. Arnold Krupat, at Sarah Lawrence College, who was an editor for the Smithsonian Series of Studies in Native American Literatures, Mr. Alexander "Sandy" Jones writes, referring to the Albee Collection, that:

"These contributions were not solicited by Washington College which is not and never has been a 'museum' in the generally accepted meaning of that word. However, the college at its expense provided space, vault storage, display cabinets constructed in accordance with Smithsonian specifications, security and insurance."

Jones further states in the same letter, that:

"The college, which does not purport to be a museum, did what it could reasonably be expected to do under the circumstances ..."

It is of interest to note that in the Sotheby's sale catalogue of Tuesday, May 21, 1996, a photograph of lot item # 172 described as "A Small Plains Dance Ornament" from the "Albee Collection" is shown with an apparently well-worn label tag proclaiming: "Washington College Museum."

In any case, Section 10.2 (3) defines the term "museum" as follows:

Museum means any institution or State or local government agency (including any institution of higher learning) that has possession of, or control over, human remains, funerary objects, sacred objects, or objects of cultural patrimony and receives Federal funds.

We contend that Washington College is included in any applicable definition of the term "museum" under NAGPRA.

In his response to Dr. McManamon, with regard to the National Park Service inquiry as to whether Washington College has completed a summary or an inventory under 10.8 or 10.9, President Toll admits that Washington College has done neither. Further, Washington College denies refusing to have repatriated any "Native American items" in violation of 43 CFR 10.10, and denies that it has sold any "Native American items" in violation of 43 CFR 10.12(b)(i).

As grounds for these denials, President Toll expresses Washington College's position as follows:

"(I)t has consistently been the position of Washington College that the Native American items in its possession did not fall within the categories of Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony within the meanings outlined by 43 CFR 10.2(d)."

This has been the consistent position of the College. The Jones' 1995 letter to Dr. Krupat concludes with the remark that:

"It (Washington College) should then seek expert advice to the Board concerning the condition and value of the Indian artifacts and its responsibility, if any, under the Native American Graves and Repatriation Act of 1990, as amended, and its regulations. Armed with this information the Board will make a determination of its proper course of action."

Our concern today is precisely with this kind of self-interested self-exclusion — clearly practiced by Washington College — from the requirements of NAGPRA. Institutions

cannot be allowed to by-pass or ignore Native input in a determination of NAGPRA applicability. Without compliance prior to any sale of objects or artifacts, there is no way of assessing the validity of Washington College's claims under the NAGPRA regulations.

Again, Section 10.8 (a) provides that:

(E)ach museum that has possession or control over collections which may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony must complete a summary of these collections based upon available information held by the museum. Federal agencies are responsible for ensuring that these requirements are met for all collections from their lands or generated by their actions whether the collections are held by the Federal agency or by a non-Federal institution.

Washington College's non-compliance and sale of its collection, without notice to identified interested parties, effectively prevents any fair and open determination of what may or may not satisfy the NAGPRA categorical requirements. The position of Washington College only satisfies its own self-interest and financial gain. The prospect of an institution evading its legal duty and financially profiting from the sale of human remains or sacred objects or objects of cultural patrimony is reprehensible and unlawful.

The collection remained in the possession of Washington College throughout most of the century. The placard in the College's display case provides all the basic information needed to complete a summary under 10.8(c). This is not a case of lack of information or lack of adequate funding necessary to complete the required summary. Further, Washington College can not and does not claim ignorance of the existence of the Native American Graves Protection and Repatriation Act, or of its the requirements, amendments or regulations. Consequently, Washington College cannot be allowed, in its own self-interest, to claim a presumed exemption from its responsibility to comply with those requirements and regulations of the Native American Graves Protection and Repatriation Act.

CONCLUSION AND RECOMMENDATIONS

The past and present position of Washington College essentially stands for the following proposition:

That any institution, which acknowledges receipt of federal funds, and which has Native American objects and artifacts in its possession, may unilaterally choose whether it wishes to comply with or opt out of the

summary or inventory requirements of the Native American Graves Protection and Repatriation Act, based upon its particular self-interest, privately obtained expert advice, undisclosed legal opinions, or other financial determinations made at the sole discretion of that institution's board of directors.

It is precisely this prospect – that is, leaving the question of whether an institution has a duty to comply with federal law up to that institution's own self-interested discretion – that we find setting a most troubling precedent. Allowed to stand, this precedent will effectively pre-empt tribal participation and foreclose federal regulation under the act.

In closing, we have sought the assistance of the NAGPRA Review Committee in moving the Secretary of the Department of the Interior and the National Park Service to make a determination regarding Washington College's admitted non-compliance with the procedural provisions of NAGPRA. Further, we have asked that the Secretary and the National Park Service to assess appropriate civil penalties against Washington College for its failure to complete a summary and/or inventory by November 16, 1995, and prior to its sale of the Albee Collection, on May 21, 1996 and for the subsequent sale.

Now, we do not to bring this matter before you for resolution of these issues on the merits of the case. We are willing to proceed through appropriate administrative and judicial channels. We seek only effective compliance with, and diligent enforcement of, the federal protections provided under the law.

We bring this matter to the attention of this oversight committee at this time in the hope of alerting you to this problem of threshold compliance. Perhaps a suggested remedy might include a technical amendment to require that no sale of any objects or artifacts which may be subject to the provisions of NAGPRA can occur without a written certification of compliance with the summary and inventory provisions of NAGPRA from the applicable federal agency. This would provide notice and assurance to the various auction houses and other venues trafficking in Native American objects and artifacts that their participation in the sale of such items would not aid, abet or promote willful non-compliance with the Native American Graves Protection and Repatriation Act.

To date, there have been no enforcement actions taken under the civil penalty provisions of the act, but this should not be taken as an indication that there are no problems with institutional compliance. Lack of enforcement in such cases as this means that institutions holding objects and artifacts of significant cultural import can effectively evade the balanced legal protections provided for all parties under NAGPRA. It may be that the National Park Service is ill-equipped or ill-disposed to properly carry out the enforcement functions under the Native American Graves Protection and Repatriation Act. The failure of the National Park Service to adequately

respond in accordance with the express provisions of the act further compounds the evasion and denigration of this all too necessary federal legislation.

On behalf of the Estate of Tasunke Witko and the Rosebud Sioux Tribe NAGPRA Committee, I thank you for your time and consideration of this matter.

Respectfully submitted this 20th day of April, 1999.



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May 17, 1999

The Honorable Senator Ben Nighthorse Campbell
The Honorable Senator Daniel Inouye
Senate Indian Affairs Committee
Washington, DC

RE: NAGPRA and Unidentified Human Remains

Dear Senator Nighthorse Campbell and Senator Inouye:

First, may I thank you again on behalf of the Estate of Tasunke Witko and its administrator, Mr. Seth H. Big Crow, Sr., and of the Rosebud Sioux Tribe NAGPRA Committee for the privilege of providing testimony and comment at the April 20 Senate Indian Affairs Committee Oversight Hearing on NAGPRA, particularly in regard to the threshold compliance problem involving Washington College and the George Albee Collection of Plains objects and artifacts, including the shirt held out to have belonged to Tasunke Witko, Crazy Horse.

For the record, along with my oral testimony transcript, I am enclosing copies of five pages from the Sotheby's catalogue of the May 21, 1996 sale, entitled: "Fine American Indian Art" which present "an important group of Plains beadwork and regalia, from a Northeastern Educational Institution."

Second, in response to the questions posed by Senator Inouye to the panel on which I participated with regard to the definition of "sacred" as applied in the Native American Graves Protection and Repatriation Act, and the separate question of "unidentified human remains" held by the Smithsonian Institution, I would like to take this opportunity to expand upon the comments made at the Oversight Hearing.

With regard to the definition of "sacred", I will refer you to a brief commentary by Mr. Sebastian (Bronco) LeBeau, Preservation Officer of the Cheyenne River Sioux Tribe, which accompanies this letter. I would point out that his comments are echoed in the beliefs held by traditional spiritual leaders at Rosebud and among the other Lakota, Nakota and Dakota communities.

With regard to the issue of "unidentified human remains" held by the Smithsonian Institution, while cultural affiliation or association may not be apparent, it would appear that the vast majority of these remains can, in fact, be identified at least as to the general geographic area of their origin. Such remains are revered by most tribes as "Unknown Ancestors" for which the present generation has the sacred duty of repatriation, the duty to bring rest to their spirits and to bring their earthly remains back to their homelands.

As to those human remains coming from the area included within the so-called Louisiana Purchase, I would suggest that the Senate Indian Affairs committee consider the establishment of a special Commission composed of Native representatives from various tribes across the Nation,

and from boards, organizations and committees with broad knowledge and expertise in the area of repatriation. This Commission would convene a "Grand Council" of tribal leaders from those tribes and nations which are, or have been historically, associated with that territory. This Grand Council could convene in a centrally located place within the Louisiana Purchase territory and could include traditional, spiritual and governmental leaders, who would come together as the present day caretakers and relatives of those "Unknown Ancestors" to discuss and determine their proper deposition.

This Grand Council could deliberate as to whether a single site, one or more regional site or a national site for the reburial of these Unknown Ancestors would be most appropriate. The site or sites could be on reservations lands, or on some federally protected land to be dedicated to the Unknown Ancestors, with title placed in trust for participating tribes. Perhaps, an abandoned Fort in Oklahoma, perhaps, a national grassland where members of the Buffalo Nation could stand as guardians, could serve as an appropriate tomb for these Unknowns. Those tribes and nations uncomfortable with assuming a responsibility for remain not known to be of a direct and immediate relation to them, could allow those other tribes and nations willing to accept such responsibility. The Commission would assist a group designated by this Grand Council to oversee the repatriation in a timely manner with appropriate ceremony. The Commission could be established by making a special appropriation to the Smithsonian Institution to be administered for these expressed purposes.

This repatriation activity could be accomplished and ceremonially concluded by the bicentennial of the Louisiana Purchase in 2003. This federal repatriation would appropriately mark the occasion with respect to the "Unknown Ancestors" who have walked these lands before the coming of the Europeans to North America and with honor to the best values and ideals for which this Republic stands.

I am sure that most of the tribes and nations located within or associated with the so-called Louisiana Purchase area stand ready to assist the Smithsonian Institution in displaying the high moral leadership necessary in developing a process which might be applied elsewhere in the United States by the Smithsonian and by other institutions with "unidentified human remains" of known geographical origins. As we enter the New Millenium, I can think of no better way to celebrate the best in America than by reconciling our debt, through a federal repatriation, to those "Unknowns" who were here before us and whose earthly remains are in our hands.

I again thank the committee for the privilege of addressing these important issues.

I remain,

**Ernie Stevens, Jr., First Vice President
National Congress of American Indians
Testimony on the Implementation of the Native American Graves
Protection and Repatriation Act (NAGPRA)
before the Senate Committee on Indian Affairs
April 20, 1999**

I. Introduction

Good morning Chairman Campbell, Vice-Chairman Inouye and distinguished members of the Senate Committee on Indian Affairs. On behalf of the National Congress of American Indians (NCAI) and NCAI President W. Ron Allen, thank you for the opportunity to present testimony regarding the implementation of the Native American Graves Protection and Repatriation Act (NAGPRA).¹ My name is Ernie Stevens, Jr. and I am First Vice-President of NCAI and a member of the Oneida of Wisconsin Business Council. NCAI remains dedicated to advocating aggressively on behalf of the interests of our 250 member tribes on a myriad of issues including the protection and preservation of Native culture and tradition. We also remain dedicated to the exercise of tribal sovereignty and the continued viability of tribal governments.

In November 1990, NAGPRA was passed by Congress and signed into law by the President. NAGPRA is considered "remedial" legislation in that it provides a legal basis for the return of human remains, grave goods, and objects of cultural patrimony. Following NAGPRA's enactment, Native Americans rejoiced at the prospect that their lost ancestors and sacred objects would be returned after decades of separation, and that their sacred burial sites would now receive some legal protection. As you know, Congress' intent in enacting NAGPRA was to ensure that Native American human remains and sacred objects retained by the federal, state, and local governments, universities, and the museum community are returned to the appropriate tribes and/or descendants. The law also ensures that burial sites on tribal and federal lands are properly protected. However, unless those involved in the process maximize the law's mandates and potentials, NAGPRA cannot continue to remedy the problems it was intended to address.

Indian people see the return of their ancestors and sacred objects as a return of their cultural and spiritual foundations, which is the very heart of Indian nations. In order to bring their people home to their rightful resting places, to protect those at rest, and to fulfill the mandates of NAGPRA, Native people have over the years begun to understand both the scope and limitations of the law, its process, and regulations. At the same time, they are also

¹ Pub. L. 101 - 601

looking at their own community's needs and goals and how to address their concerns through the NAGPRA Review Committee.

In 1996, NCAI established a Commission on Repatriation and Burial Sites Protection which meets during our Mid-Year and Annual sessions to address the variety of issues involved in repatriation and burial sites protection and preservation. The Commission was formed in 1996 to conduct investigations, hold hearings, issue reports, advocate appropriate legislation, articulate positions on repatriation and burial sites protection, and represent NCAI in appropriate forums, such as the NAGPRA Review Committee meetings. The NCAI Commission is comprised of nine members from throughout Indian Country. The formation of this national repatriation and burial sites protection coalition has helped tribes, through the sharing of common experiences, to work together on the sometimes difficult and complex decisions involved in the NAGPRA process. Over the next few months, the NCAI Commission, will be developing a survey which will help determine the existence and scope of tribal NAGPRA programs across Indian Country.

When discussing NAGPRA and its implementation, the original intent involved in the enactment of this legislation must always be kept mind. It was enacted to address and correct standards and behavior of the scientific community which were discriminatory, paternalistic, and a violation of human rights and property rights. It was drafted as a delicate compromise between the scientific community and Indian Country, with an understandable emphasis on the perspectives and needs of Native peoples. Overall, NAGPRA is human rights legislation signed into law in order to provide a legal avenue for tribes to right some of the wrongs committed against them in the past and the present.

II. Critical Issues in the Implementation of NAGPRA

Over the last nine years, many tribal leaders, their staff, elders, and religious leaders have worked to develop programs to deal with the many complex and difficult issues involved in the NAGPRA process. There are a variety of issues and concerns to tribal leaders and others in the implementation of NAGPRA which arise out of a multitude of different experiences and a broad spectrum of involvement with the law. Some tribes have a lot of experience and have established viable repatriation programs, while others may not have the resources to implement this important Act. There are many positive aspects to the law, as well as many shortcomings. For many of our member tribes the task has not only been to identify and address these shortcomings, but also to make the best of what the law already provides. The following are some of the critical issues and concerns raised by our member tribes with regard to the implementation of NAGPRA. Mr. Chairman, we appreciate your interest in and concern over this important process and we encourage the Committee to address the following concerns to ensure that tribes are able to fully implement the important provisions contained within NAGPRA.

A. Tribal Programs

One of the most important and central issues of concern to tribes is having the resources to develop their own program or system that would assist them in the implementation of NAGPRA and help them meet their individual cultural and historic preservation goals. For those tribes which have the resources, their programs have incorporated the following components, which generally allow them the ability to:

- (A) provide an authoritative source of tribal law and customs;
- (B) provide the expertise needed to analyze information such as summaries and inventories; in many cases, the information provided is often very vague;
- (C) facilitate involvement by traditional religious leaders and other cultural authorities;
- (D) hold consultations with governmental agencies, museums, and universities;
- (E) conduct independent investigations;
- (F) fully assert their claims to certain remains and objects;
- (G) determine proper treatment of repatriated items;
- (H) resolve intra-tribal disputes; and
- (I) preserve and protect those remains and items still at rest.

Overall, tribal programs have been instrumental in helping tribes meet these objectives, which in turn, has helped them comply with NAGPRA. By facilitating and ensuring tribal compliance, those in the government, in museums, and in universities will also be held more accountable. The resources and expertise are available, but tribes must have access to those resources to meet the ultimate goals of NAGPRA.

B. Funding and Resources

Since the passage of NAGPRA, activities under the law have intensified in a number of areas, including the completion of summaries and inventories of remains and objects, as well as a variety of successful repatriations. However, while the process is moving forward, many tribes are still finding themselves with very little resources and limited staff available to complete the work necessary to properly fulfill the mandates of the law. Meanwhile, government agencies, museums, and universities, in many cases, have the available resources and staff available to implement the laws requirements.

Under Section 10 of NAGPRA, the Secretary of the Interior is authorized to provide grant funds to Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations to assist them in the repatriation of human remains and cultural items. Museums are also eligible to receive grants under this section. Most funded proposals emphasize collaboration: tribes working with tribes; tribes working with museums; and museums working with other museums. The funds are usually divided equally between tribes and museums, but have proven to be inadequate. Despite a continual tribal request since FY1994 for NAGPRA related grants of \$10 million², to date, the Administration has requested and Congress has appropriated only a fraction of that amount - \$2.4 million annually. This funding level is far below the projected amount necessary to successfully comply with the provisions of the Act and well below the \$10 million level. Mr. Chairman, the protection and return of our ancestors and their sacred objects is of vital concern to our member tribes. In order to be equal partners in the NAGPRA process, tribal governments must be provided with sufficient funding, a request which we recently conveyed to this Committee during its hearing on the President's FY2000 budget request.

C. NAGPRA and the National Park Service

Another issue of vital concern to our member tribes is the status and viability of the NAGPRA Program within the National Park Service under the Department of Interior. Over the years our member tribes have expressed a number of concerns regarding this program and its overall role in the implementation of the law. Many feel that keeping the NAGPRA Program within the National Park Service unbalances the delicate compromise originally struck during the drafting of NAGPRA; thereby, subjecting tribes to undue pressure in the name of science, based on the needs of the museums, the agencies, and the states. Furthermore, to place this program under the authority of the Departmental Consulting Archaeologist is clearly erroneous due to obvious potential for conflict of interest. This position requires the oversight of a federal statute, NAGPRA, that mediates museum and archaeological interests with the interests of American Indians, Alaska Natives, and Native Hawaiians.

The NAGPRA Program plays a critical role in providing much of the funding and technical assistance necessary for tribal governments to carry out the mandates of NAGPRA and its administrative regulations. NCAI believes that the original intent and focus of the law requires that the NAGPRA Program be raised to a level and a location within the Department of Interior which will provide the least amount of bias, and accordingly it staffed with qualified individuals attuned to the objectives and goals of this very important human rights legislation. This includes staff who understand the perspectives of all the parties involved and who have a clear understanding of all applicable cultural and historic

² NCAI and the Museum community have continuously pointed out this need when providing testimony to the Senate Committee on Indian Affairs and both the House and Senate Interior Appropriations Subcommittee.

preservation laws, such as the Archeological Resources Protection Act, the National Historic Preservation Act, and others.

The United States must consider the government-to-government relationship and the trust responsibility to Indian tribes and their members concerning the return of goods and remains. This responsibility carries with it the highest of fiduciary standards guiding the conduct of federal agencies in its treatment of tribes in the area of repatriation. Mr. Chairman, the proper placement of the NAGPRA program within the Department of Interior is a very important decision. One which requires the consideration of variety of issues and perspectives involved in the implementation of the Act. Therefore, pursuant to the attached NCAI Resolution # MRB-98-102, we ask that the Senate Committee on Indian Affairs examine the issue of conflict of interest and consider the views and concerns expressed above by our member tribes.

1. Deadlines and Extensions

Under NAGPRA, the deadline for completion of inventories of human remains and associated funerary objects in museum and federal agency collections was November 16, 1995. Although agencies and museums were to have completed their inventories by this date, Section 5(c) of the law authorizes the Secretary of Interior to extend the inventory time requirements for museums that have made good faith efforts to complete their inventories by the statutory deadline. In 1996, 58 extensions were granted by the Secretary to various museums, institutions, and agencies to complete their inventories. Subsequently, six institutions have again applied for extensions beyond the one granted to them in 1996, causing further delays in the overall process. The continued granting of extensions raises concerns by our member tribes, leaving them wondering if the Park Service, who is in charge of providing the recommendations for extensions, are as serious as they should be about enforcement of the law. A total of 109 Notices of Intent to Repatriate have appeared in the *Federal Register*, representing 15,262 individual remains, 39,935 unassociated funerary objects, 780 sacred objects, and 479 objects of cultural patrimony (281 have been designated both sacred objects and objects of cultural patrimony). The Department of Interior has estimated that approximately 200,000 individual remains require repatriation under NAGPRA.³

2. The Final Rule

On December 4, 1995 final regulations implementing the statute were published in the *Federal Register*. On January 3, 1996 those regulations went into effect. The rule established procedures for protecting and determining the disposition of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony that are intentionally excavated or inadvertently discovered on federal or tribal lands. It also establishes procedures for conducting summaries and inventories and repatriating human

³ This excludes those remains in possession of the Smithsonian Institution.

remains, funerary objects, sacred objects, and objects of cultural patrimony in museum or federal agency collections. The final rule was drafted by the Departmental Consulting Archeologist for the Secretary of the Interior, in consultation with the NAGPRA Review Committee, as directed by Section 8(c) (7) of the Act. However, a number of tribes have expressed concern over the drafting of these regulations, including the consultation process, and the fact that it was overseen by the Departmental Consulting Archeologist instead of a more neutral authority.

D. Other Implementation Issues of Concern to Tribes

As tribes continue to become familiar with NAGPRA, it has become clear to them, implementation of the Act has not provided those protections which the law intended. Listed below are some of the concerns expressed by NCAI's member tribes:

1. Repatriation

(A) the NAGPRA Review Committee's upcoming recommendation on the disposition of culturally unidentifiable human remains and funerary objects⁴;

(B) the lack of binding legal obligations for the Smithsonian Institution to summarize, inventory or return sacred objects and objects of cultural patrimony. Although the Smithsonian has adopted an internal policy regarding these objects, some have expressed concern that without that legal obligation tribes are left with no real assurances;

(C) if a tribe cannot or does not choose to immediately repatriate remains or objects held by an agency, museum, or university, that tribe *may* enter into an agreement on the "handling" of such items; however, the agency, museum, or university is not *required* to enter into such agreements;

(D) while NAGPRA completely prohibits all trafficking in Native American human remains and does prohibit the trafficking in funerary objects, sacred objects, and objects of cultural patrimony, the prohibition of the objects only applies to wrongful acquisitions after the date that NAGPRA was enacted, leaving auction houses, and others who have acquire these items before this date, open for the sale of our cultural heritage ; and,

⁴ The issue of unaffiliated is also a topic which still remains outstanding within the regulations and is now before the NAGPRA Review Committee. NCAI supports the position that in many cases the issue can be resolved through tribal "consortiums". It has been shown that tribes in most cases do not compete over remains, but rather they work to find solutions based on consensus. The Review Committee is expected to support this position.

(E) in determining cultural affiliation for the implementation of NAGPRA, the law expressly calls for the use of a variety of sources of evidence, including tribal history, knowledge, and tradition⁵; however, in many cases, archeologists have exclusively been making these determinations.

2. Burial Protection

(A) there are a number of "reactive" provisions within NAGPRA regarding burial protection⁶. However, there is a real need to develop broader language, as well as some pro-active strategies for burial protection enforcement, such as the following:

- (1) the establishment of a burial site designation program or database for all lands: tribal, federal, state and local, with the consideration of secrecy, privacy and preservation always in mind;
- (2) the establishment of a national program, working in conjunction with the tribes, to monitor possible violations; and,
- (3) stronger enforcement by the Departments of Interior and Justice. This requires the investigation, prosecution, and imposition of penalties, for violators of the law, including federal agencies and the states.⁷

⁵ Section 7(a)(4) of NAGPRA states:

"Where cultural affiliation of Native American human remains and funerary objects has not been established...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."

⁶ 25 U.S.C. 3002(c) (2)

⁷ Since state governments receive federal funds they are required to comply with NAGPRA. There are a number of states currently in violation of the law, including Missouri, Maryland, Tennessee, and Virginia. Missouri is currently in violation over the construction of a highway which receives funds from the Federal Highway Administration. The State of Maryland has yet to contact those federal and state recognized tribes which could claim the remains and items in possession of the Maryland Historic Trust. In July of 1998, the Eastern Band of Cherokee contacted the State of Tennessee, a state which they have been trying to work with for a number of years, in order to address a burial site issue. They received no response for three months, and once they did receive a response, the state said that they would examine the issue. They have received no further response to date. The State of Tennessee also repatriated remains and objects to non-federally or state recognized groups. Virginia has also recently repatriated remains to a non-recognized group with no lineal descendants.

3. Smithsonian Institution

While the Smithsonian Institution was not included under the provisions NAGPRA, the Museum Act of 1989⁸ requires the Smithsonian, in consultation with Indian tribes and traditional Indian religious leaders, to inventory human remains and funerary objects in its possession or control for return to Native peoples. As this Committee continues its oversight of the implementation of NAGPRA, NCAI also encourages the Committee to examine the implementation of this law as well.

III. NAGPRA, Kennewick and Sound Science

Lastly, NCAI would like to take this opportunity to point out the high profile publicity given to the controversy over human remains discovered near Kennewick, Washington which has made it very difficult to discuss the issues involved in the treatment of human remains. It is unfortunate that some scholars have chosen to introduce the concept of race, which is disavowed by the American Anthropological Association (AAA), as a factor in reviewing NAGPRA and making recommendations to amend this Act. The "Kennewick" case has shown that there are scholars from throughout the country that do not agree on what factors to use in reviewing this case. However, even if they do finally come to some agreement, Native Americans also have certain knowledge and traditions in a number of areas which must also be considered. Apparently, there is no "burden of proof" that scholars must meet before their scientific theories threaten a law which was carefully considered and based upon a broad range of knowledge, while Native Americans are restricted in their claims.

In the "Kennewick" case, there are scholars who have laid claim to primacy in the use of these remains in defiance of established knowledge by using outmoded theories. However, the AAA has clearly stated that race cannot be determined scientifically. By not requiring some standard to be met by any scholar or scientist making a claim to use human remains, the effects will be devastating for both Native Americans and the scientific community. Currently, Native Americans are restricted in their claims by a number of provisions within the law, including aboriginal occupancy. Scientists must also be restrained so that all competing interest will be served, particularly since NAGPRA was passed in 1990 to prevent the discriminatory and high-handed tactics which scholars and scientists had historically shown towards Native Americans. To now accept such principles would be a dreadful step backwards.

Remains that are found to be nine thousand years old in North America, such as the "Kennewick" case, should logically be determined as Native American based on the preponderance of evidence now available, including current history (both Indian and non-Indian), anthropology, and science. NCAI supports the Army Corps of Engineers' original

⁸ P.L. 101 - 185

decision to repatriate those remains under NAGPRA, although flawed administratively, as a proper decision, supported by such accepted knowledge and standards.

IV. Conclusion

Mr. Chairman, in order to properly and faithfully carry out NAGPRA's congressional intent and to facilitate its process, the concerns of tribes must be equally weighed and at times given even greater weight. Furthermore, the United States must adhere to its trust responsibility to tribal governments and Indian people to protect and preserve Native culture and tradition. NCAI commends this Committee for providing the opportunity for tribes to convey their concerns, suggestions, and recommendations regarding this important legislation aimed at protecting the traditions of native peoples. As tribes continue to implement this Act, new obstacles and opportunities will be encountered and embraced. Through further discussion, adequate funding and refinement of NAGPRA, proper compliance and enforcement of this Act can be ensured.

Mr. Chairman, this concludes my statement. Thank you for allowing me to present for the record the National Congress of American Indians' comments regarding the implementation of the Native American Graves Protection and Repatriation Act. I will be happy to answer any questions which you may have at this time.

* * * *

NATIONAL CONGRESS OF AMERICAN INDIANS



RESOLUTION # MRB-98-102

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PHOENIX AREA
Ivan Makhl
Salt River Pima-Maricopa

PORTLAND AREA
Henry Cagay
Lummi Nation

SACRAMENTO AREA
Ceryl A. Seldner
Tule River Reservation/Wiyot

SOUTHEAST AREA
A. Bruce Jones
Lumbee Tribe

EXECUTIVE DIRECTOR

JoAnn K. Chase
Mandan, Hidatsa & Arikara

Title: Complaint against National Park Service for Breach of Trust and Conflict of Interest in Administering PL 101-601

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution, and

WHEREAS, the National Congress of American Indians (NCAI) is the oldest and largest national organization established in 1944 and comprised of representatives of and advocates for national, regional, and local Tribal concerns; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of NCAI, and

WHEREAS, PL 101-601, "The Native American Graves Protection and Repatriation Act", (NAGPRA) was designed to protect our ancient villages, occupation and burial sites, and

WHEREAS, it was never our intent to have the National Park Service administer NAGPRA, and

WHEREAS, the National Park Service has violated the spirit of NAGPRA by giving more money to colleges and universities than to tribes, creating unfair regulations, and

WHEREAS, recently the National Park Service has been guilty of giving money to excavate our sacred sites and mounds

NOW THEREFORE BE IT RESOLVED, that NCAI does hereby direct staff to cooperate with the Repatriation Commission in preparing and filing a complaint against the National Park Service for breach of trust and conflict of interest in administering PL 101-601.

CERTIFICATION

The foregoing resolution was adopted at the 1998 55th Annual Session of the National Congress of American Indians, held at the Myrtle Beach Convention Center in Myrtle Beach, South Carolina on October 18-23, 1998 with a quorum present.



W. Ron Allen, President

ATTEST:

Lela Kaskalla, Recording Secretary

Adopted by the General Assembly during the 1998 55th Annual Session held at the Myrtle Beach Convention Center in Myrtle Beach, South Carolina on October 18-23, 1998.

NATIONAL CONGRESS OF AMERICAN INDIANS



June 4, 1999

EXECUTIVE COMMITTEE

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Assiniboine/Sisseton Tribe

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Ojibwa Nation of Wisconsin

RECORDING SECRETARY
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Navaho People

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Oglala Sioux

ALBUQUERQUE AREA
Joe A. Garcia
Orlando Orvengoh
San Juan Pueblo

ANADARCO AREA
Garry McAdams
Wichita & Affiliated Tribes

BILLINGS AREA
Earl Old Persons
Blackfoot Tribe

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Sah Arava Pima-Maricopa

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Cheryl A. Sullivan
Tule Lake Reservation/Wyoak

SOUTHEAST AREA
A. Bruce Jones
Lawton Tribe

EXECUTIVE DIRECTOR

JoAnn E. Chase
Hauden, Hideloo & Arthur

Senator Daniel K. Inouye
Vice Chairman
U.S. Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Re: Final Regulations Implementing NAGPRA

Dear Vice Chairman Inouye:

On behalf of the National Congress of American Indians (NCAI), I am writing in response to your question regarding the final regulations implementing NAGPRA. In your letter you state that "tribes have expressed concern about these regulations and have suggested that the regulations be redrafted". As outlined in our testimony, a number of our member tribes have expressed concern over the drafting of these regulations, including the consultation process, and the fact that the drafting was overseen by the Departmental Consulting Archeologist instead of a more neutral authority. Such oversight obviously could have had the potential for conflict of interest.

The process involved in drafting these regulations requires the consideration and mediation of museum and archeological interests with the interests of American Indians, Alaska Natives, and Native Hawaiians. Clearly, placing such an important task under the sole authority of the Departmental Consulting Archeologist was a mistake. Consequently, some of the resulting language has left many tribes with the impression that the final regulations are inherently flawed. The following are two specific examples of those flaws:

Under Section 11 of NAGPRA it states,

"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, ..."

1301 Connecticut Avenue NW, Suite 200, Washington, DC 20036 202.468.7767 fax 202.468.7787

However, under Section 10.9 (e)(6) of the regulations it states,

"Museums or Federal agencies must retain possession of such human remains pending promulgation of Section 10.11 unless legally required to do otherwise, or recommended to do otherwise by the Secretary."

This obviously contradicts the law and the original intent of Congress. Although Section 10.11 refers to the issue of unaffiliated remains and objects, which is currently being considered by the NAGPRA Review Committee, museums and federal agencies are not required to retain possession as stated in the regulations.

Also under Section 10.2 (d)(3) of the regulations it states,

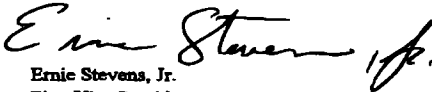
"While many items, from ancient pottery sherds to arrowheads, might be imbued with sacredness in the eyes of an individual these regulations are specifically limited to objects that were devoted to a traditional Native American religious ceremony or ritual and which have religious significance or function in the continued observance or renewal of such ceremony."

This statement limits an already clear and established definition, as well as the ability for a potential claim by a tribe, Native Hawaiian organization, or individual.

Again, these are but two examples of flaws within the regulations which cause concern for our member tribes. In light of our statement before the Committee and with further examination of the final regulations we would agree that the regulations should be reconsidered in consultation with tribes and under the oversight of an authority uncompromised by personal or professional interests.

Thank you for your consideration of this very important matter and all your efforts on behalf of Indian people. If you have any questions please contact me or Brian Stockes of our staff at (202) 466-7767.

Sincerely,



Ernie Stevens, Jr.
First Vice President

SENATE COMMITTEE ON INDIAN AFFAIRS
Oversight Hearing:
Implementation of the Native American Graves Protection and Repatriation Act

Tuesday, April 20, 1999, 9:30 a.m., 485 Russell Senate Bldg.

**STATEMENT OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY AND
 THE AMERICAN ASSOCIATION OF PHYSICAL ANTHROPOLOGISTS**

Keith W. Kintigh, Ph.D., SAA President

Mr. Chairman, the Society for American Archaeology (SAA) thanks the Committee for this opportunity to comment on the current state of NAGPRA implementation. SAA is the leading organization of professional archaeologists in the United States. Starting in 1989, SAA led the scientific community in working with congressional staff on the language of NAGPRA. We provided testimony at Senate and House Committee hearings and helped form a coalition of scientific organizations and Native American groups that strongly supported NAGPRA's enactment. Since that time, we have closely monitored its implementation and have consistently provided comment to the Department of the Interior and to the NAGPRA Review Committee. We urge our members always to work toward the effective and timely implementation of the Act. We are joined in this testimony by the American Association of Physical Anthropologists, which is the leading organization of physical anthropologists in the United States and which also supported the enactment of NAGPRA.

On behalf of the scientific community, we address four major issues: (1) maintenance of NAGPRA coordination functions within the National Park Service's (NPS) Archeology and Ethnography Program; (2) problems with federal agency compliance; (3) extensions for museums that are making good-faith efforts to complete their inventories; and (4) problems associated with the implementation of the Act's definition of cultural affiliation.

Nine years ago, I stood before this Committee to present SAA's testimony on S.1980, the bill that became NAGPRA. Reflecting on the last nine years, I think that, despite the problems that remain, the Committee should be proud of what NAGPRA has accomplished.

- o Over a thousand museums and federal agencies submitted summaries to tribes, and over 700 have submitted inventories.
- o Repatriations of human remains and cultural items, from both museum collections and new excavations, occur regularly. Most of these repatriations result from mutual agreements between tribes and museums and agencies.
- o Consultations mandated by NAGPRA have led to the development of improved understandings between tribal people, museum personnel, and scientists. Many cooperative ventures not required under the law have been successfully pursued.

In the interests of improving NAGPRA's implementation, we now turn to a brief discussion of the four issues.

1. Coordination of NAGPRA Functions by the Departmental Consulting Archeologist

The Secretary of the Interior has delegated responsibility for NAGPRA coordination to the Departmental Consulting Archeologist (DCA) who is manager of the NPS Archeology and Ethnography Program. Some have suggested that this policy should be reconsidered in light of what has been characterized as a conflict of interest by the DCA. In our opinion, any such move is inadvisable as it would impede and delay rather than enhance and accelerate the implementation of NAGPRA.

- Transfer of the NAGPRA coordination functions from the Archeology and Ethnography Program would require development of a new, expensive, and redundant administrative unit.
- A move outside of the Department of the Interior would require an amendment to the law, fostering new uncertainty and delay.
- The Archeology and Ethnography Program has nine years of experience in coordinating NAGPRA and works extensively with archaeologists, Native Americans, and museums in the context of satisfying its other legal responsibilities.
- No other administrative unit, either inside or outside the Department of the Interior, has the expertise necessary to coordinate NAGPRA, and only the DCA is in a position to facilitate the critical articulation of NAGPRA with closely related historic preservation law.¹
- The most common and most serious complaints about the NAGPRA coordination function, including those voiced by the Review Committee, tribes, and museums, are a direct consequence of inadequate staffing and funding; they are not due to the location within NPS.² Without additional funding, the DCA simply cannot satisfy all of the responsibilities assigned by the Secretary in a timely way.³ A move would not resolve the critical funding crisis.
- The argument that the DCA has an inherent conflict of interest is not as straightforward as it might seem. Certainly, some Native American groups have argued that their interests have not been adequately taken into account. However, I can assure you that within the scientific community there is a widespread conviction that scientific interests are routinely ignored. In these contexts, we must remember that NAGPRA was a legislative compromise intended to *balance* the legitimate concerns of American Indians and Native Hawaiians with the interests

¹ The expertise that permits this articulation is becoming increasingly important because of the urgency of repatriation issues associated with new excavations and inadvertent discoveries covered by NAGPRA Section 3 and by other federal law.

² In a November 13, 1998 letter to Secretary Babbitt, NAGPRA Review Committee chair Tessie Naranjo conveyed the Committee's unanimous sense that the Program has not been given adequate funds or staff to accomplish the tasks it has been assigned.

³ For example, NPS has completed processing inventories from only about a third of the 733 institutions that have submitted inventories. Of the 1032 NAGPRA summaries received by NPS by 30 November 1998, only 38 are in the database intended as a clearinghouse for information and only 57 of 733 inventories are in the database.

of the scientific community and the broader American public in our shared American heritage. The DCA has consistently attempted to maintain the critical balance that NAGPRA requires.

- Although there is considerable misunderstanding of this point, the Archeology and Ethnography Program does *not* have a decision-making role in the determinations of cultural affiliation, even within the National Park Service. These determinations are made by the museums and the federal entities that hold the collections, not by the DCA.⁴
- The Archeology and Ethnography Program serves a *staff* function to the Review Committee. The Review Committee reports on its activities and in its advisory role *not* to the DCA but directly to Congress and to the Secretary. The DCA has a duty to execute Review Committee decisions, and provides the necessary staff and expertise to do so.
- Since its creation, the NAGPRA Review Committee has worked intensively with the Archeology and Ethnography Program staff. The Review Committee has *not* recommended that the NAGPRA functions be moved.⁵
- Allegations that the NAGPRA grant program is unfairly administered, favoring museums over tribes, are unfounded. Documentation provided the Review Committee indicates that as of November 30, 1998, tribes have received 57 percent of the grants and 61 percent of the money awarded.⁶

2. Federal Agency Compliance

SAA and AAPA join the NAGPRA Review Committee, NCAI, tribes, and museums in expressing our dismay over the lack of compliance of some federal agencies with the plain requirements of NAGPRA. For example, despite the statutory requirements that agencies complete their inventories in five years (by November 1995), a representative of a key federal agency testified to the NAGPRA Review Committee that it would take decades to complete its inventories. Further, the lack of timely completion of inventories by a number of agencies is not the only compliance problem. Agency determinations of cultural affiliation are often made without adequate consultations with tribes and without reasonable efforts to compile and weigh either scientific or traditional sources of evidence.

As NAGPRA provides no enforcement provisions affecting agencies, we would ask Congress to employ the means at its disposal to induce or to compel agency compliance. While some appropriations are needed, punitive measures also may be required. In pursuing this objective,

⁴ If the DCA had such authority, we would not expect the dramatic inconsistency that is seen in the cultural affiliations of closely related materials that are held by different institutions.

⁵ In the November 13, 1998 letter to Secretary Babbitt mentioned in a previous footnote, Review Committee chair Tessie Naranjo strongly praised the dedication and professionalism of the NPS Archeology and Ethnography Program staff and noted its role in the successful implementation of NAGPRA.

⁶ Tribes received 116 grants for \$6.5 million, while museums received 89 grants for \$4.2 million. Further, most of the museum grants include funding to pay tribal expenses for consultation.

the Committee should ensure that agencies do not achieve compliance with NAGPRA at the expense of other critical cultural resource programs.

3. Extensions for Museums to Complete NAGPRA Inventories of Human Remains and Associated Funerary Objects

The Department of the Interior is evidently considering or has decided upon a blanket denial of the six museum requests for extensions for the completion of inventories. SAA and AAPA believe that denial of extensions to those museums that have very large collections and have demonstrated a good-faith effort⁷ to comply with the law would be contrary to the objectives of NAGPRA. Such a decision would damage productive cooperative arrangements that have developed between tribes and these museums. It also seems unduly harsh in light of the federal agency problems highlighted above.

When inventories are done with care and thorough consultation, museums are able to assign cultural affiliation to remains that, with a less intensive effort, would be deemed "culturally unidentifiable." Given the latitude provided by the law, it seems inevitable that blanket denial of extensions would lead to more remains being placed in the immensely troublesome "culturally unidentifiable" category. In this eventuality, a much larger burden is placed on a tribe to challenge the museum's finding and to show that a preponderance of the evidence supports its cultural affiliation. Further, by cutting short ongoing consultations, such a denial would do a disservice to both the tribes and the museums. However, we would suggest that it is appropriate at this point for the Department to set a relatively high standard for what constitutes a good-faith effort.

To this testimony we have attached a 6 April 1999 letter to Secretary Babbitt presenting, in a more complete form, SAA's assessment of the need for inventory extensions and SAA's argument of why a blanket denial is not a productive response to understandable Native American frustrations.

4. Cultural Affiliation and the Issue of Joint Affiliation

Cultural affiliation is a cornerstone of NAGPRA because it provides the legitimacy for most repatriation claims. A critical problem in NAGPRA implementation is the widespread expansion, by both agencies and museums, of the statutory definition of cultural affiliation beyond legally defensible limits. Further, while the law requires evidence demonstrating cultural affiliation, agencies and museums often offer little or no evidence or argument supporting their determinations. The evidentiary problem has three components: (1) insufficient consultation with tribes and consideration of traditional evidence they can offer; (2) inadequate attention collecting readily available scientific evidence; and (3) a lack of thoughtful deliberation of this evidence to arrive at a sound determination of cultural affiliation.

In a April 13, 1999 letter attached to this testimony, SAA asked Secretary Babbitt to undertake a legal review of the issue of joint affiliation by broad collections of tribes. Our letter discusses the linkage between the scope of "cultural affiliation" and the issues surrounding the disposition of "culturally unidentifiable" human remains. Pending that review, we ask for a

⁷ This would include an active staff effort dedicated to the inventory completion, a strong record of consultation with tribes, and submission of completed inventories to tribes and of Notices of Inventory Completion to NPS.

suspension of actions that involve determinations of joint affiliation with a diverse group of modern tribes. Following that review, we ask that NPS provide more oversight and issue written guidance on determinations of cultural affiliation and joint affiliation in order to foster better compliance with the law. We also would encourage the Senate Committee to take whatever steps it believes would be helpful to encourage better conformance with the law. We suggest that procedural shortcuts and indefensible interpretations of the definitions have already led to problems such as that of the "Kennewick Man," and have the potential to lead to many more problems in the future.

Conclusion

In conclusion, we offer five recommendations.

1. As you have heard in the past, the overwhelming obstacle to the effective implementation of NAGPRA is the lack of funding for ongoing tribal, museum, and agency programs to deal with repatriation issues.⁸ These costs will continue indefinitely into the future. We ask that the Committee attempt to address this very serious problem.
2. The Committee should discourage the transfer of NAGPRA coordination functions from the NPS Archeology and Ethnography Program. Instead, the Committee should use its influence to increase staffing and funding for this Program's NAGPRA functions.
3. We ask that the Committee apply the means at its disposal to bring federal agencies into compliance with NAGPRA.
4. The Committee should encourage the Department of the Interior to consider requests for inventory extensions based on a case-by-case evaluation of whether the museum has made a good-faith effort to comply.
5. Finally, as it considers the broader aspects of NAGPRA implementation, we ask that the Committee devote considerable attention to improving both agency and museum adherence to the letter and the spirit of NAGPRA, particularly with respect to determinations of cultural affiliation.

SAA and AAPA thank you for your consideration of our comments on the implementation of NAGPRA.

⁸ A particular problem is the complete lack of federal support for tribal implementation of Section 3 (new excavations and inadvertent discoveries) repatriation issues.



SOCIETY FOR AMERICAN ARCHAEOLOGY

April 6, 1999

Honorable Bruce Babbitt
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240

Re: Museum Requests for Extensions for NAGPRA Inventories

Dear Secretary Babbitt:

On behalf of the Society for American Archaeology (SAA), I am writing to urge the Department to grant extensions for the completion of inventories required under the Native American Graves Protection and Repatriation Act (NAGPRA) to those museums that have demonstrated a good-faith effort to comply with the law.

The Society for American Archaeology (SAA) is the leading organization of professional archaeologists in the United States. Starting in 1989, SAA led the scientific community in working with congressional staff on the language of NAGPRA and helped form a coalition of scientific organizations and Native American groups that strongly supported its enactment. Since that time, SAA has closely monitored its implementation and has consistently provided comment to the Department of the Interior and to the NAGPRA Review Committee. We urge our members always to work toward the effective and timely implementation of the letter and the spirit of the Act.

Through the inventory process, museums, in consultation with tribes, assess the cultural affiliation of human remains and associated funerary objects with modern tribes. When a culturally affiliated tribe is identified, repatriation can occur upon request of that tribe. While Congress felt that the completion of these inventories was an issue of considerable urgency, it also felt strongly that these inventories must be done carefully with full consultation of the tribes in order that the appropriate tribe be identified. For museums with extensive collections that have taken their responsibilities under the Act seriously, this has represented an enormous undertaking (requiring the expenditure of large amounts of staff time and money). In providing for extensions, Congress recognized that, even with a concerted effort, it might not be possible for all of the inventories to be done within the statutory deadline.

We recognize that some tribes have expressed frustration with the delay. However, to arbitrarily deny extensions to museums that have been working hard toward the completion of their inventories would be counterproductive to the intent of NAGPRA as well as to any goal of repatriation. When inventories are done carefully and with thorough consultation, museums find it is possible to assign cultural affiliation to remains that, with a less intensive effort, would be deemed "culturally unidentifiable." If no culturally affiliated tribe is identified during the inventory process, repatriation on request cannot occur. Instead, a very much larger burden is placed on a tribe to challenge the museum's finding and to show that a preponderance of the evidence supports its affiliation. Given the latitude provided by the law, it seems inevitable that blanket denial of extensions would lead to more remains being placed in the problematic "culturally unidentifiable" category. Further, by cutting short ongoing and productive consultations, such a denial would do a disservice to both the tribes and the museums.

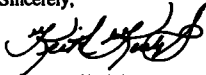
In making your decision, we suggest that you consider three additional points.

- At its last meeting in Santa Fe, the NAGPRA Review Committee, twice discussed the issue of extensions. The committee seriously entertained a recommendation that extensions be denied only in cases where a museum's good faith could reasonably be questioned. After some discussion, the committee failed to endorse a recommendation by a coalition of tribes that all extensions be denied. The sense of the committee seemed to be that if a good-faith effort was demonstrated, extensions should be granted.
- Both testimony to the NAGPRA Review Committee and formal findings of the committee have made it abundantly clear that, by far, the largest inventory compliance problems lie with a number of federal agencies (including units within the Department of the Interior). Concerns with compliance are most productively directed at these agencies rather than at museums that are making a good-faith effort to comply with NAGPRA.
- Despite a statutory requirement that the Department issue regulations for NAGPRA within one year, regulations were issued more than five years after enactment—indeed, after the statutory deadline for inventories had passed. Thus, the museums' already-difficult task of completing the inventories was further complicated by their uncertainty concerning the inventory requirements that would appear in the Department's regulations.

SAA strongly supports the implementation of the letter and the spirit of NAGPRA and believes that at this point, it is appropriate for the Department to set a relatively high standard for what constitutes a good-faith effort. However, we believe that where museums have been working very hard to complete the inventories in a conscientious manner, to categorically deny requests for extensions would be contrary to the objectives of NAGPRA and damaging to productive cooperative arrangements between tribes and these museums.

Thank you for your consideration of our thoughts on this issue. Please contact me if we can provide any further information.

Sincerely,



Keith W. Kintigh
President

cc: Mr. Donald Barry, Assistant Secretary, Fish and Wildlife and Parks
Mr. Robert Stanton, Director, National Park Service
Dr. Francis P. McManamon, Departmental Consulting Archaeologist



SOCIETY FOR AMERICAN ARCHAEOLOGY

April 13, 1999

Honorable Bruce Babbitt
 Secretary of the Interior
 U.S. Department of the Interior
 1849 C Street NW
 Washington, DC 20240

Re: Request for Legal Review of Critical Issues in the Implementation of NAGPRA

Dear Secretary Babbitt:

On behalf of the Society for American Archaeology, I am writing to request that you initiate a legal review of three problematic issues whose clarification is critical to the proper implementation of the Native American Graves Protection and Repatriation Act (NAGPRA). These issues are: cultural affiliation by multiple tribes, culturally unidentifiable human remains, and scientific study.

The Society for American Archaeology (SAA), the largest organization of professional archaeologists in the United States, has, for more than 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 with Native American organizations, museums, and Congress that resulted in the landmark consensus represented by NAGPRA. Although each party to these discussions had to compromise to reach a consensus, there was a general sense that Congress intended that NAGPRA would reasonably balance Native American interests in the past with those of the scientific community and the broader public.

With the intent of maintaining the balance struck by NAGPRA, SAA has consistently provided comment to the Department and to the Review Committee regarding the development of regulations and the implementation of NAGPRA. We continue to support NAGPRA and have, from the beginning, strongly urged our members to work towards its effective and timely implementation.

Since NAGPRA's passage, we have been alarmed to see an increasing divergence between the actual practice of NAGPRA implementation by federal agencies and museums and what we believe to be plainly required by the letter and spirit of the Act. Recent events indicate that unless this trajectory is reversed, the Act will be thoroughly undermined and the consensus compromise destroyed.

We ask that you conduct an internal legal review of a limited number of central issues. Implementation of the findings of such a review by the Departmental Consulting Archaeologist (in his delegated oversight role over NAGPRA) would do much to restore a balance among Native American, scientific, and public interests in the past.

SAA's concerns about NAGPRA focus on three issues: cultural affiliation, culturally unidentifiable human remains, and scientific study. It is these issues that we request be reviewed. Our principal concerns follow below.

1. Cultural Affiliation. Because "cultural affiliation" must be demonstrated in order for repatriation of museum and agency collections to occur and before many newly excavated or inadvertently discovered remains and funerary objects can be returned to claimants, the concept of cultural affiliation is a cornerstone of NAGPRA. Under the Act, a finding of cultural affiliation requires that a preponderance of

recognized tribe and an identifiable earlier group. The most important problem that has arisen in NAGPRA implementation is the widespread extension, by both agencies and museums, of the statutory definition of cultural affiliation beyond any legally defensible limits.

Over-broad cultural affiliations are most often effected using a concept of "joint affiliation," in which an identifiable earlier group is said to be culturally affiliated with many federally recognized tribes. Although NAGPRA does not explicitly recognize joint affiliations, we believe this is a sensible and legally defensible concept in limited circumstances, most clearly in cases where a single, well-defined group has been divided, usually as a result of government action, into more than one administratively distinct recognized tribe. The Apache tribes in Arizona are an excellent example.

However, joint affiliation is now being used in ways that clearly extend beyond the statutory definition of cultural affiliation. Using this strategy, joint affiliation is asserted between a prehistoric cultural group that may be thousands of years old with a broad collective of tribes that may be very different or even traditional enemies. This argument has been used to broaden the concept of cultural affiliation to the point that all remains become "culturally affiliated," which is clearly inconsistent with the definition employed by the statute. We recognize that in such cases the tribes involved in the consortium may agree that proposed repatriation is appropriate. Under NAGPRA, such agreement is not enough. Cultural affiliation provides the legitimacy to repatriation claims. While the law requires evidence demonstrating cultural affiliation, agencies and museums often offer little or no evidence supporting such claims. Frequently in these cases, substantial scientific evidence clearly indicates a lack of a traceable "relationship of shared group identity." Under the law, where this scientific evidence constitutes a preponderance of the evidence, this evidence must prevail.

In this context, it must be remembered that a key feature of NAGPRA is the repatriation of remains and objects *culturally affiliated with modern tribes*. Despite the wishes of some tribal, agency, and museum personnel, the Act simply cannot be read to authorize or mandate the repatriation of all human remains and objects.

To address our concerns, we respectfully request that: (1) the Department undertake a legal review of NAGPRA's definition of cultural affiliation in order to refine the legally acceptable limits of joint affiliation; (2) NPS issue written guidance reflecting counsel's advice regarding the appropriate application of joint affiliation; and (3) that until such guidance is issued, NPS suspend further *Federal Register* publication of NAGPRA Notices of Inventory Completion that utilize joint affiliation (particularly those that involve large consortia of tribes).

2. Culturally Unidentifiable Human Remains. The illegal broadening of the concept of cultural affiliation bears directly on treatment of so-called culturally unidentifiable human remains-- those that cannot be culturally affiliated with any tribe. NAGPRA's discussion of these remains is brief and consists exclusively of assigning the NAGPRA Review Committee the task of "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." When NAGPRA was drafted, Congress intentionally held the unidentified remains in abeyance because they represented a particularly problematic issue on which a consensus regarding appropriate disposition had not been achieved. Congress hoped that experience in the process of repatriation of affiliated remains would result in a more informed approach for dealing with unaffiliated remains that, subsequently, could be embodied in law.

Despite our belief that culturally unidentifiable remains were exempted from repatriation under NAGPRA, based on the statute's only relevant language quoted above and the legislative history, the NAGPRA regulations state: "Section 10.11 of these regulations will set forth procedures for disposition of culturally unidentifiable human remains of Native American origin." They also state "Museums or federal agencies must retain possession of such human remains pending promulgation of Sec. 10.11 unless legally required to do otherwise, or recommended to do otherwise by the Secretary."

As a result of this language, federal agencies and museums are requesting, with dramatically increasing frequency, your permission to repatriate culturally unidentifiable human remains to tribal consortia. While tribes may believe that repatriation is the appropriate disposition, these requests are generally made in the absence of any apparent effort to consult with other affected constituencies--in particular, the archaeological and broader scientific community. We believe that routine, case-by-case approval of requests for repatriation of culturally unidentifiable human remains to tribal consortia under this logic undermines the Review Committee's efforts to develop the recommendations required by the statute and circumvents both the consensus on which NAGPRA was based and the plain language of the law. When legislation addressing such a difficult and emotional issue results from a consensus compromise, the resulting law is fragile and the compromise must be carefully maintained for it to be successful.

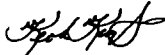
Thus, we would ask that your legal review include consideration of whether NAGPRA provides authority to effect repatriation of culturally unidentifiable human remains or whether Congress intended that further legislation was required. Pending the results of this review, we ask that you withhold approval of all such requests.

3. Scientific Study. The final issue that concerns SAA is scientific study. In practice, it is not uncommon that newly excavated, especially inadvertently discovered, remains are repatriated in the absence of basic documentation to assess issues of cultural affiliation. While the law does not explicitly address scientific study, NPS acknowledged, in testimony before the House Committee on Resources on the Hastings amendment (HR 2893), that scientific study is not prohibited under NAGPRA and that such scientific documentation and analysis are implicitly required under current law, such as the Archaeological Resource Protection Act. NPS stated that written guidance on this issue would be forthcoming, but thus far it has failed to appear. We ask that NPS move expeditiously to issue this urgently needed guidance.

In sum, SAA believes that through substantial good-faith efforts, the scientific and Native American communities achieved, in NAGPRA, a legislative compromise on the issue of repatriation. This carefully crafted compromise has been undermined by some federal agencies and museums, which are stretching the law beyond recognition. We believe that the legal review requested above is urgently needed and is warranted by the circumstances. Following that review, we would urge that NPS provide more oversight and issue written guidance to foster full compliance with the law. Pending the outcome of this legal review, we ask that you place a moratorium on all repatriations to tribal consortia when those affiliations are not based on clear demonstrations of affiliation.

Thank you for your consideration of our request.

Sincerely,



Keith W. Kintigh
President

cc: Mr. Donald Barry, Assistant Secretary, Fish and Wildlife and Parks
Mr. Robert Stanton, Director, National Park Service
Dr. Francis P. McManamon, Departmental Consulting Archeologist
NAGPRA Review Committee Members



SOCIETY FOR AMERICAN ARCHAEOLOGY
OFFICE OF THE PRESIDENT

June 3, 1999

The Honorable Daniel K. Inouye
Vice Chairman
US Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington DC 20510

Re: Additional Question Regarding the Scope of the Term "Cultural Affiliation"

Dear Senator Inouye:

In your letter of May 17, you ask that I review an additional question following from the April 20 NAGPRA oversight hearing. I am pleased to have this opportunity to respond.

ISSUE: SCOPE OF CULTURAL AFFILIATION

Your testimony asserts that agencies and museums complying with NAGPRA have expanded the statutory definition of cultural affiliation.

Question: What harm do you see in a broad interpretation of "cultural affiliation"?

Answer: The concern that SAA expressed was with interpretations of "cultural interpretation" that are clearly inconsistent with the letter and spirit of the Act. We believe that the definition of cultural affiliation lies at the very crux of the balance struck by NAGPRA between Native American and Native Hawaiian interests in the past and the interests of science and the broader public in our shared American heritage. We believe that cultural affiliation, in the sense defined in the statute, is precisely what gives repatriation claims their legitimacy. The definition provided by the Act attempts to specify the nature and strength of the relationship that must obtain between the human remains or cultural items and a modern tribe or Native Hawaiian organization in order for traditional claims to outweigh scientific ones. To the extent that the definition is disregarded and "cultural affiliation" is assigned to relationships that cannot possibly meet the statutory standard, then the balance provided by the Act is lost and we believe that the interests of science and the public suffer.

I would like to be clear that I am not asserting a priority of either scientific claims or scientific evidence over traditional claims and traditional evidence; I am asking only that both traditional and scientific interests be balanced within the framework provided by NAGPRA. To support a finding of cultural affiliation, NAGPRA requires that there be a relationship of shared

Keith W. Kintigh • President

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group identity that can be reasonably traced between a modern tribe or Native Hawaiian organization and an identifiable earlier group. We understand this to mean that there must be an earlier group that had a self-conscious identity something akin to that of a modern tribe *and* that this identity, in some reasonable sense, persists into the present. This straightforward reading of the definition clearly admits a quite substantial range of relationships, and reasonably specifies those cases that we believe Congress intended to remedy.

By the same token, that definition excludes some relationships as too weak to qualify as "cultural affiliation." The expansions of the definition to which we object appear to equate a very general, but unspecified, sense of "cultural relationship" with the statutory definition of "cultural affiliation." In an extreme case, we even have a museum inventory assigning "cultural affiliation" to remains for which it is unable to assign a cultural, temporal, or even racial designation. We believe that if the Congress had intended "cultural affiliation" to mean "any cultural relationship" it would have said so, and that the statutory definition of cultural affiliation is absolutely crucial to preserving the balance that has allowed the scientific community to support the bill and to continue to work towards the effective implementation of the act.

In many cases, there are clearly identifiable earlier groups, but the agency or museum fails to develop the evidence that would link this earlier group with a modern tribe, instead taking the shortcut of assigning "cultural affiliation" with a large and diverse collective of tribes. In other cases, the museum or agency may see a reasonably strong relationship with one tribe and assign cultural affiliation without adequately considering whether there are another tribes that might have stronger claims under the law. In these cases, and others in which the agencies and museums fail to do an adequate job of assessing the evidence, it is the interests of the rightful claimants that are ignored, as well as those of science and the public.

Thus overly broad interpretations of cultural affiliation fail to protect the strong interests of tribes in making sure that human remains and cultural objects rights are returned to the proper group. It was certainly my sense that when NAGPRA was debated Congress was quite concerned that the process insure that where there is repatriation, that it be to the right group. When there is inadequate attention to the evidence required by the definition, the legitimate rights to repatriation of individual (and particularly, smaller) tribes are easily subjugated to political and economic expedience. It is just this problem that led to the dispute heard at the last Review Committee meeting between the Hopi Tribe and Chaco Canyon National Historic Park. The Hopi Tribe presented a strong case that its interests were seriously compromised by Chaco Canyon National Historic Park's failure to compile and assess both the scientific and traditional evidence relating to cultural affiliation as required by the statute.

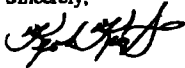
In order for cultural affiliation to be implemented as envisioned in the statute, a process for the disposition of culturally unidentified human remains must be in place. As you know, developing recommendations for the disposition of culturally unidentified human remains is an issue to which the Review Committee has already devoted much attention and which is now its highest priority. Much of the stretching of the definition of cultural affiliation appears to be an attempt to effect repatriation where no legal process is now available. However, repatriation is an important and irreversible decision. Just as Congress did not rush to judgment on how to solve that difficult problem, agencies and museums should wait for the establishment of legal process to deal with human

remains for which the strength of relationship does not meet the statutory standard of cultural affiliation.

Finally we should note that it is often the case that the scientific and public interests go essentially unrepresented in NAGPRA's repatriation process. Unfortunately, it frequently appears to be the case that the goals of expedience and cost avoidance take the priority over thorough consultation with the tribes and over reasoned assessments of the available scientific, historical, and traditional evidence. NAGPRA inventories published in the Federal register are not in any way reviewed with respect to the adequacy of the evidence collected or the reasonableness of the affiliations decided. While NAGPRA provides tribes with an administrative ability to contest determinations of affiliation, the only recourse of the scientific community is to the legal system.

SAA would be the first to agree that lawful application of the definition of cultural affiliation is a challenging task, because of the need to assess fairly the different forms of evidence and to reasonably interpret the definition's concepts of "shared group identity," "identifiable earlier group," and "reasonably traceable." We also believe that it is a vitally important job that must be carefully addressed by the agencies and museums charged with making the determinations. Because we believe that the problem lies not so much in the definition, but in plainly unreasonable applications of it, we have asked the Secretary of the Interior to issue guidance on this topic (we included a copy of our letter to the Secretary with our original testimony) and would welcome any assistance the Committee can provide in promoting compliance with the law in making determinations of cultural affiliation.

Sincerely,



Keith W. Kintigh
President



Statement of
W. Donald Duckworth, Ph.D.
President and CEO
Bishop Museum
and
Member of the Board
American Association of Museums

On the Native American Graves
Protection and Repatriation Act
(P.L. 101-601)

Presented to the
Committee on Indian Affairs
U.S. Senate
April 20, 1999

Mr. Chairman and members of the Committee: I am W. Donald Duckworth, Ph.D., President and CEO of the Bishop Museum in Honolulu, Hawai'i, presenting testimony on behalf of my institution and on behalf of the American Association of Museums, for which I serve on the Board of Directors.

In 1990, the Native American Graves Protection and Repatriation Act, "NAGPRA," became law (P.L. 101-601). NAGPRA is remedial legislation enacted by Congress to ensure that Native American remains, funerary and other objects retained by the federal government and by the museum community are returned in accordance with the law to appropriate tribes and Native American organizations for reburial or other proper care.

The Bishop Museum is committed to fulfilling both the letter and spirit of NAGPRA. I would like to take this opportunity to comment on the Bishop Museum's experiences over the last nine years as it has worked to fulfill both the letter and spirit of NAGPRA, and then to comment on the national situation for museums with respect to NAGPRA.

Bernice Pauahi Bishop Museum was founded in 1889 by Charles Reed Bishop, a businessman from Glens Falls, New York, as a memorial to his wife, Princess Bernice Pauahi Bishop, the last of the Kamehameha line of ruling chiefs. Since its inception 110 years ago, the Museum has been dedicated to the preservation, perpetuation and interpretation of the natural and cultural history of Hawai'i and the Pacific. The Museum's role in the Hawaiian community has always been a very special one. The Museum preserves and cares for 1,470,000 collection items that represent the rich and wonderful legacy of Native Hawaiian culture and that tell the story of those who care for the land and each other, respect the spiritual forces of nature, and create things of great beauty and skill. Caring for these collections is a great responsibility guided by professional standards, legal requirements and cultural sensitivity. We carry out this responsibility with Native Hawaiians for their benefit and the benefit of all the people of Hawai'i, past, present and future.

In 1990 Bishop Museum presented testimony to this distinguished committee in favor of the passage of NAGPRA. At that time we estimated that Bishop Museum retained 2,590 Hawaiian remains and funerary objects. We also pointed out that repatriation and consultation with Native Hawaiian organizations were not new to us. We had repatriated Native Hawaiian human remains prior to the passage of NAGPRA and were in the process of repatriating human remains at the time NAGPRA was enacted. We noted that the Bishop Museum was dedicated to serving the Native Hawaiian community and actively sought ways to improve its relationship with this community. We saw NAGPRA as one such way to ensure greater and more meaningful involvement of the Native Hawaiian community in the Museum's future.

Since the passage of NAGPRA in 1990, Bishop Museum has repatriated 4,252 Native Hawaiian human remains and funerary objects. This number, the result of NAGPRA mandated inventories, and nearly double what we were able to estimate in 1990, represents all the Native Hawaiian human remains and funerary objects that were retained by Bishop Museum in its collections. These inventories were carried out in consultation with Native Hawaiian organizations and verified by Native Hawaiian claimants as part of the repatriation process. We are pleased to report that we have completed the repatriation under the law of all Native Hawaiian human remains and funerary objects.

In 1990, we estimated the cost of repatriation to be \$388,500. The actual costs are expected to reach \$1,000,000, most of which will have been for personnel costs, including consultation. About 64 per cent of the cost was provided by Museum operating funds. The remainder was funded by a contract from the U.S. Navy, a contract from the Office of Hawaiian Affairs (discontinued after nine months' work following consultation with Native Hawaiian organizations), and a grant from the National Park Service (NPS).

A substantial part of the costs were due to an inventory conducted under a U.S. Navy contract, which required background historical research, summaries of existing research conducted on the human remains, and a detailed inventory of a large number of human remains by a physical anthropologist. The contract was begun a few months after the enactment of NAGPRA and completed a few months after the National Park Service published the preliminary proposed guidelines. Consultation with Native Hawaiian organizations was minimal.

Shortly after the completion of the inventory and report, the Museum and the Navy were sued by Hui Malama I Na Kupuna o Hawai'i Nei (Hui Malama), a Native Hawaiian organization named in NAGPRA. Hui Malama contended that new research was conducted on the remains as part of the inventory and that the resulting report contained material that was offensive to both the ancestors that were represented by the remains and their present day descendents. Bishop Museum was subsequently released with prejudice from the suit. Ultimately the court decided in favor of the Navy. As a result of this inventory and report, the Museum lost funding for an inventory of Hawaiian remains from the island of O'ahu, the second largest collection in the Museum. The costs of the lawsuit were substantial to the Museum and Hui Malama, both in terms of funds and emotional health. The lesson learned was that consultation was at the core of NAGPRA and that there never could be enough of it.

Before and after the U.S. Navy contracted inventory, the process for every inventory, including consultation and repatriation, was carried out without incident and to the satisfaction of all involved. The number of consultations increased in time to include more members of Hawaiian organizations, elders and families. The relationship of the Bishop Museum to these organizations did in fact improve as we had hoped. In some cases, claimants grew to understand and appreciate the role of the Museum as a caretaker and loaned back the repatriated objects for safekeeping, or withdrew their claims. The sense of responsibility for all Hawaiian collections items in the Museum

grew among these consultant groups. As a result of these consultations, the Museum created a special, secure area with restricted access that serves as both a storage and ceremonial area for what Native Hawaiians consider are sacred objects, including objects of cultural patrimony.

In 1998, Bishop Museum was awarded a National Park Service (NPS) grant after two previous proposals were rejected. The grant was for the Museum to work with a Native Hawaiian organization to prepare inventories of unassociated funerary objects. The Museum asked Hui Malama to participate in the project and Hui Malama agreed. We chose to work with Hui Malama because of their widely recognized expertise in the implementation of NAGPRA, their understanding of the proper treatment and disposition of Native Hawaiian human remains and funerary objects, and the need for the Museum to seek resolution to long term problems in our relationship with Hui Malama and other Hawaiian organizations. Two uniquely qualified individuals were hired by the Museum to prepare inventories of unassociated funerary objects, and carry out consultations and repatriation. The Bishop Museum is grateful to NPS for giving us this opportunity, for we have all come to better understand what it takes to properly care for cultural heritage, what the spiritual basis for repatriation is, and how to treat the remains and sacred objects with respect.

We would like to emphasize that consultations between Native Hawaiian organizations and the Museum have brought about a deep sense of mutual respect, trust, and willingness to resolve issues related to NAGPRA and those that are outside of NAGPRA. This relationship took a long time and much hard work on the part of all involved to establish. It is very important that the agreements reached by Native peoples and museums be honored and supported in the spirit of NAGPRA and that the letter of the law be fulfilled with this spirit.

I would also like to comment on NAGPRA from the national perspective. American Association of Museums (AAM) represents the broad range of museums, from aquaria, art and history museums to natural history museums and zoos, with more than 16,000 members, of which about 11,000 are museum paid staff or volunteers and about 3,000 are museums. A 1994 AAM repatriation survey of 500 of its member institutions included all of its natural history museums and a selected sample of its art and history museums. The survey response rate was 43.6%. Of those responding, 76% of the natural history museums, 43% of the history museums and 23% of the art museums had Native American objects. Those respondents--a little more than 200--alone had almost 3.5 million objects which fell into NAGPRA categories, and that did not include 15 responding natural history museums, including 3 large institutions, which could not, at that time, give an accurate estimate of their NAGPRA-related holdings.

In contrast, in October 1990, at the time of the passage of NAGPRA, the Congressional Budget Office had estimated NAGPRA implementation costs to museums of only \$40 million and to tribes and Native Hawaiian organizations of \$5-10 million over 5 years, assuming that museums and federal agencies held between 100,000 and 200,000 Native American remains and that the cost to inventory and review each remain

would be \$50-150. Those estimates now appear to be very low in light of our experience since that time. As a result, viable tribal and museum requests for the NPS grants authorized under NAGPRA continue to exceed available funds by a large margin. In addition, museums cannot repatriate to the tribes until appropriate notices go into the *Federal Register*, and there is currently a backlog of about 150 such notices at the NPS, about a year's work, due to lack of staff to process them. While I know that it is not in the purview of this Committee to set the annual appropriations levels for the repatriation grant program and for staffing to administer the law, I believe that you would want to be aware of these constraints.

Let me add that Native peoples and museums generally, not just the Bishop, have discovered that the exchange of data required under NAGPRA is yielding new information that helps us all. In the process of identifying sensitive cultural items, museums have learned much more about their entire collections. Delegations of elders and religious leaders have supplied valuable new insights about many objects in the repositories they have visited, and in turn they are discovering items of immense interest to their own tribes, the existence of which had been unknown in recent generations. Few items in these categories are being sought for repatriation; it is simply that access to the collections has led to much better mutual understanding and exchange of knowledge. While the repatriation process will eventually end as the transfer of materials is completed, the long-term relationships created between museums and tribes, and the more accurate and respectful exhibits and education programs that are the fruit of those relationships, will continue.

In brief, then, while the situation with respect to repatriation differs very broadly across the museum community, the data we have indicates that the experience of the Bishop with many more repatriable items than it could initially estimate; with much higher costs to follow the procedures of NAGPRA, most of which it has had to bear itself; and with the importance of, and the value of, collaboration with Native Americans and Native Hawaiians, is in important respects representative of the experience of museums nationally with the repatriation process.

Before closing, I would like to comment briefly on concerns that have been raised about the appropriateness of continuing to administer NAGPRA at the Archaeology and Ethnology Program at the National Park Service. I can speak only to the experience we have had with the NPS at the Bishop, and what I know of the experience of other museums. That experience has been mostly favorable. Museums have a general sense that the NPS has striven to be even-handed with all parties to the law. Some elements of the regulations are still not completed, and some of the publication of notices necessary to the repatriation process have been delayed, but we understand that that is due to lack of funds for staff. Museums have generally appreciated the NPS staff's expertise on the law and regulations and their breadth of information. We have seen them as partners with all the parties to the law in making the repatriation process work, and we appreciate their grant program, from which the Bishop and many other museums and Native peoples have benefited.

Thus, if the Committee were to consider moving the administration of the law, museums would want to be sure that such a step did not proceed without some reasonable assurance that there would be at least equal understanding in a new administrator of the complexities of the law and regulations, and of the spirit of cooperation and balance of interests that informs the law and regulations.

Thank you for the opportunity to testify on this issue. I would be happy to respond to any questions you might have.

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

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SENATE COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING ON

THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

APRIL 20, 1999

STATEMENT OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

BY

JERRY FLUTE, EXECUTIVE DIRECTOR

AND

JACK F. TROPE, COUNSEL

I. INTRODUCTION

Mr. Chairman and members of the Committee. The Association on American Indian Affairs, Inc. (AAIA) is a 77 year old national non-profit citizens' organization headquartered in South Dakota and dedicated to the preservation and enhancement of the rights and culture of American Indians and Alaska Natives. The policies of the Association are formulated by a Board of Directors, all of whom are Native Americans. AAIA was actively involved in the negotiations which resulted in the enactment of the Native American Graves Protection and Repatriation Act (NAGPRA) and is fully cognizant of the reasons for various provisions in NAGPRA and how they were developed. It has continued to be actively involved in promoting the proper implementation of the Act, including assisting with specific repatriations of human remains and cultural items.

NAGPRA was bipartisan legislation unanimously passed by the Congress and supported and actively promoted by both Republican and Democratic legislators, including then-Reps. Udall, Campbell, Young, Rhodes and Richardson and Senators McCain, Inouye and Domenici. Senator Inouye cogently summarized the testimonial background and intent of NAGPRA in his floor statement at the time of Senate passage as follows:

When the Army Surgeon General ordered the collection of Indian osteological remains during the second half of the 19th Century, his demands were enthusiastically met not only by

Army medical personnel, but by collectors who made money from selling Indian skulls to the Army Medical Museum. The desires of Indians to bury their dead were ignored. In fact, correspondence from individuals engaged in robbing graves often speaks to the dangers these collectors faced when Indians caught them digging up burial grounds...In light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century. Even today, when supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony, the wishes of native Americans are often ignored by the scientific community...[T]he bill before us is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights...

[136 Cong. Rec. S17174 (daily ed. Oct. 26, 1990)]

As Senator McCain restated it, NAGPRA was intended to "establish a process that provides the dignity and respect that our Nation's first citizens deserve." 136 Cong. Rec. S17173 (daily ed. Oct. 26, 1990).

The evidence is that NAGPRA has had a significant and positive impact. It has allowed Indian tribes and Native Hawaiian organizations to commence the process of repatriating their ancestors and sacred cultural items. It has led to new cooperative relationships between museums, scientists and Native Americans based upon respect.

Thus, AAIA urges you to use caution in considering whether NAGPRA should be amended. Certainly the law has its flaws and in this testimony we will provide a number of recommendations as to how NAGPRA might be improved. However, given the proposal to limit the application of NAGPRA advanced by Rep. Hastings in the last Congress, it is important that the Committee proceed in a manner which will ensure that such harmful provisions are not included in any bill that might be considered.

II. PROBLEMS WITH NAGPRA

A. Use of NAGPRA to delay, interfere with or prevent repatriation

NAGPRA specifically provides that "[n]othing in the Act shall be construed to limit the authority of any Federal agency or museum to return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals" 25 U.S.C. 3009(1)(A). This was placed in NAGPRA to make clear that NAGPRA

was meant to facilitate repatriation of cultural items in addition to whatever repatriations would otherwise take place. It was never the intent of Congress that NAGPRA would in any way be used to limit, frustrate or delay repatriation.

Yet certain regulations have been drafted and policies developed in a manner designed to make repatriation more difficult, particularly in the case of so-called "culturally unidentifiable human remains" and embedded cultural items, as well as issues pertaining to scientific analysis. Moreover, certain proposals by the Society of American Archaeologists would exacerbate these problems.

1. "Culturally unidentifiable" remains

NAGPRA provides that the NAGPRA Review Committee will compile an inventory of culturally unidentifiable remains and recommend "specific actions for developing a process for such remains." 25 U.S.C. 3006(c)(5). Nowhere in the Act, however, is repatriation of such items prohibited or even discouraged pending the Review Committee's recommendations. Indeed, as noted, the savings clause quoted above makes clear that the Act is not to be interpreted as limiting authority to repatriate.

Nonetheless, in its regulations, the Department of Interior has included a requirement that "[m]useums or Federal agencies must retain possession of [culturally unidentifiable] human remains pending promulgation of [regulations] unless legally required to do otherwise, or recommended to do otherwise by the Secretary. Recommendations regarding the disposition of culturally unidentifiable human remains may be requested..." 43 C.F.R. 10.9(e)(6). As a result of this regulation, agencies and museums who have reached agreements with tribes or tribal consortia on repatriation of culturally unidentifiable remains have been required to submit these agreements to the NAGPRA Review Committee and Department of the Interior for review and significant and onerous procedural requirements have been imposed before repatriation could go forward in some cases. Although repatriation of culturally unidentified human remains has taken place, substantial delays have occurred.

Amazingly, the SAA recommends that the Secretary of Interior go even further and withhold future approval of such requests. They are highly critical of recent approvals by the Review Committee of requests by federal agencies and museums to repatriate culturally unidentifiable human remains to tribal consortia. In short, they want to interpret NAGPRA as prohibiting repatriation of any remains absent a strict legal showing of cultural affiliation. This turns NAGPRA into a statute that is a barrier to repatriation agreements between tribes and agencies regarding specific remains. It is a proposal that must be rejected.

Most tribes believe that culturally unidentified remains should be reburied in order to allow the spirits of their ancestors to rest in peace. To allow NAGPRA to serve as a barrier to repatriations is a distortion of the Act.

Congress should consider explicitly amending NAGPRA to make clear that voluntary repatriations can take place outside of NAGPRA by adding a sentence to the Savings Clause stating that "Notwithstanding any law to the contrary, a museum or federal agency may voluntarily repatriate any item in its possession of Native American origin to an Indian tribe, Native Hawaiian organization or Native American individual without violating this Act, unless the museum or federal agency has reason to know that the item is culturally affiliated with another Indian tribe or Native Hawaiian organization or that a lineal descendant may have a valid claim to the item."

More generally, Congress should consider mandating that "ultimately, decisions about what happens to the remains of Native American individuals from anywhere in the United States and associated funerary objects should rest in the hands of Native Americans." This was the recommendation of the NAGPRA Review Committee in 1995 as to culturally unidentifiable human remains, 60 Fed.Reg. 32163 -- a recommendation which has not been adopted to date because of objections by certain segments of the scientific community.

2. Embedded remains

The Department of Interior has adopted regulations specifying the steps which federal agencies must take when cultural items are discovered on federal land. These regulations require agencies to develop written action plans addressing the planned care, handling and treatment of such cultural items, as well as the planned archeological recording and analysis of items and reports to be prepared. 43 C.F.R. 10.5(e). There is no time limit for repatriating such items to Indian tribes, Native Hawaiian organizations or lineal descendants who have the right to ownership or control of such items pursuant to 25 U.S.C. 3002.

If fully implemented, these regulations have great potential to delay repatriation of embedded items which are unearthened and permit study of such items over the objections of tribes or individuals with the right to assert ownership or control. This is contrary to the intent of Congress in enacting this statute.

For example, the statute specifically provides for a 30 day cessation of activity when cultural items are discovered as part of another activity, such as construction, mining, logging or agriculture. 25 U.S.C. 3002(d)(1) and (3). As stated in the legislative history, this was done so as to "provide a process whereby Indian tribes and Native Hawaiian organizations have an

opportunity to intervene in development activity on Federal or tribal lands in order to safeguard Native American human remains, funerary objects, sacred objects and objects of cultural patrimony...[and to afford] Indian tribes or Native Hawaiian organizations...30 days in which to make a determination as to appropriate disposition for these human remains and objects." S. Rep. No. 473, 101st Cong., 2nd Sess. (1990) at 13; see also 136 Cong.Rec. S17176 (daily ed. Oct. 26, 1990) (statement of Senator John McCain).

Clearly, these provisions were designed to provide those with ownership or control rights with the ability to make expeditious decisions about the handling of any imbedded cultural items which were unearthed. Yet the regulations allow for an extended process with considerable analysis before items are transferred to the rightful claimants. The Department of the Interior justifies these requirements by asserting that they are required by the Archeological Resources Protection Act (ARPA). An ARPA permit is required for excavation under NAGPRA. 25 U.S.C. 3002(c)(1). Not only does ARPA not explicitly include such requirements, however, but incorporating all of ARPA's requirements into a NAGPRA excavation was never intended. Indeed, one of the central ARPA requirements -- preservation of the unearthed items in an appropriate institution -- is completely contrary to NAGPRA's ownership and control rules. Rather, the ARPA permitting requirement was adopted simply as a convenience -- to ensure that only qualified people excavate sites without creating an entirely new permitting system for NAGPRA.

Notwithstanding these regulations, some agencies are expeditiously repatriating unearthed cultural items to tribes making claims, consistent with the intent of NAGPRA. Rather than being praised for such actions, however, they have been criticized for failing to scrupulously analyze such items before repatriating them.

To the contrary, we believe that such actions should be encouraged and are more consistent with NAGPRA's intent than are the regulations. Moreover, we believe that once a Indian tribe, Native Hawaiian organization or lineal descendant with ownership or control rights has been identified that the consent of the tribe should be required before any analysis or study takes place.

In this regard, we would bring to the Committee's attention a letter which was submitted in 1990 as part of AAIA's NAGPRA testimony by Dr. Emery Johnson, former head of the Indian Health Service, in which he discussed a similar issue which arose during his tenure at IHS. In Dr. Johnson's own words:

When we established the policy that the Indian Health Service would not participate in any research that had not been formally approved by the tribal governments, concern was

expressed by researchers that important research efforts would be foreclosed. That concern was unfounded. What did occur was that researchers were forced to design their research protocols to be more sensitive to cultural and human rights concerns and to present their proposals to the Native American community involved for approval. Important medical research continues to be carried out in Indian communities -- but with the informed consent of the tribal governments and of the individuals involved.

Likewise, informed consent of those that tribes/organizations/individuals with ownership or control rights should be required before any study or analysis of human remains or cultural items takes place.

Thus, we propose amendments to NAGPRA similar to those proposed in S. 110 in 1997. Specifically, we suggest that 25 U.S.C. 3002(c)(1-4) be amended to read as follows:

"(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archeological Resources Protection Act of 1979 which shall be consistent with this Act and shall not be interpreted to allow or require recording or analysis of any excavated human remains and cultural items unless the consent of the appropriate Indian tribes, Native Hawaiian organizations or lineal descendants are obtained;

(2) such items are excavated or removed after consent of the appropriate (if any) Indian tribes, Native Hawaiian organizations or lineal descendants;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) and such items shall be expeditiously returned to the appropriate Indian tribe, Native Hawaiian organization or lineal descendant upon request; and

(4) proof of consent under paragraph (2) is shown."

Subsection (d)(2) of 25 U.S.C. 3002 should also be amended to read:

"(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 any such cultural item shall adhere to the applicable requirements of subsection (c)(1), (3) and (4). Except where appropriate consent is obtained or the activity giving rise to discovery cannot be completed without disturbing the sites which have been discovered, imbedded sites containing cultural items shall be maintained in situ."

If Congress is unwilling to go so far as to require tribal consent for excavations on federal land, it should at least make clear that the ARPA permit requirement should not be interpreted to require recording and analysis in all cases.

3. Scientific study of cultural items in the possession of museums and federal agencies

Similarly, in the case of items currently in the possession of museums and agencies, restrictions should be placed upon scientific study. Where cultural affiliation has been established, no study should be allowed in absence of informed consent.

Moreover, AAlA is aware of and concerned about destructive DNA analysis of human remains that has been taking place. Many traditional Native religions view such DNA analysis as destructive of the body, spirit and soul of the deceased and inconsistent with the expedited and complete repatriation of such items.

Thus, we recommend that 25 U.S.C. 3005(b) be amended by adding the following sentence at the end of that section:

"No scientific study shall be commenced once the cultural affiliation of cultural items has been established without the consent of the culturally affiliated Indian tribe, Native Hawaiian organization or (where applicable) lineal descendants."

We also recommend that all destructive testing of human remains be prohibited until the issue of the disposition of such remains has been fully resolved.

B. Other statutory issues

1. Claims based upon aboriginal title

Claims of ownership or control of imbedded cultural items based upon aboriginal land occupancy is limited to tribes with Indian Claims Commission and United States Court of Claims judgments. 25 U.S.C. 3002(a)(2)(C). This was done in order to provide some certainty as to which federal lands would be covered by NAGPRA. Yet, inadvertently, this section left out other tribes which have easily measurable and equally valid claims of aboriginal occupancy to a specific area, but who did not pursue litigation in either of the specified forums. Tribes with ceded lands and tribes with land claims which were resolved through legislative enactments are two examples where aboriginal land occupancy may have been formally recognized in a legal document. The statute should be changed to allow for an ownership or control claim to be made by any tribe who can demonstrate that a specific aboriginal occupancy area for the tribe has been established through legal means other than Indian Claims Commission or Court of Claims litigation.

2. Canadian and Mexican tribes

A number of tribes are located on both sides of the international border of either the United States and Canada or the United States and Mexico. The policies of the Smithsonian Museum of Natural History, for example, specifically recognize this fact and state that "[e]fforts are made to coordinate requests from groups in Canada and Mexico whose membership occupies both sides of the international border with their United States counterparts." NAGPRA should be amended to include Canadian and Mexican tribes, at least where there is a relationship between such tribes and Indian tribes in the United States.

3. Confidentiality

Unlike ARPA and the National Historic Preservation Act (NHPA), NAGPRA does not include a provision on confidentiality. Indeed, at least one case has held that NAGPRA inventories are subject to the Freedom of Information Act. Yet, information about traditional religious practices which might be revealed in an inventory or as part of a claim may be very sensitive. A confidentiality clause should be added to NAGPRA similar to that in the NHPA allowing for information to be withheld if disclosure would "(1) cause a significant invasion of privacy; (2) risk harm to the cultural item; or (3) impede the practice of traditional Native American religions." See 16 U.S.C. 470w-3 which is a similar provision in the NHPA.

4. State and private lands

The issue of grave sites located on state and private lands has been of frequent concern in the last ten years. Many projects have destroyed such grave sites. Congress should consider expanding the reach of NAGPRA to such lands whenever there is any federal involvement with a project. This would be similar to the NHPA which is triggered by any federal undertaking. 16 U.S.C. 470f. Undertaking is defined in the NHPA to include any "project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including--(A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license or approval; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 16 U.S.C. 470w(7).

Thus, we recommend that a subsection be added to 25 U.S.C. 3002 providing that "This section shall also apply in the case where Native American cultural items are excavated or discovered as part of a Federal undertaking as defined by section 301(7) of the National Historic Preservation Act (16 U.S.C. 470w(7))." Of note, adding this section to the imbedded sites section of NAGPRA brings this part of the Act into congruence with the repatriation sections

of NAGPRA which extend coverage to private museums if they have received federal funding. 25 U.S.C. 3001(8).

5. The Takings Clause

Congress should eliminate the Takings Clause exception to the "right of possession" definition in NAGPRA. 25 U.S.C. 3001(13). In general, the right of possession definition is based upon the principle that a museum or agency may retain a culturally affiliated cultural item only where it has been obtained through a consensual transfer by an individual or entity with the authority to transfer the item in question. The Takings exception, however, opens the door for claims by museums asserting that they have obtained legal title to sacred objects or cultural patrimony simply by reason of their long-term possession of the items. Although no claim has yet been denied on this basis, the Takings argument has been raised in litigation and we are aware that museums have specifically commissioned legal research on this issue. The Takings Clause is a time bomb would have the potential of seriously undermining the intent of NAGPRA and it should be eliminated.

C. Funding

The lack of adequate funding has greatly impacted upon the implementation of NAGPRA. There have been substantial delays in publishing Federal Register repatriation notices and implementing NAGPRA Review Committee decisions at least in part because of the lack of adequate federal staffing. The civil penalties section of the Act has yet to be significantly implemented for the same reason.

Similarly, tribes need resources to be able to adequately evaluate summaries and inventories, establish cultural affiliation and physically repatriate items. Yet, the amount appropriated for tribes each year falls far short of the estimated \$10 million/year need.

We urge the Committee to seek additional funding for both of these purposes and to provide that any civil penalties collected under NAGPRA be used solely for NAGPRA-implementation purposes.

D. Transfer of NAGPRA implementation functions from the Office of the Departmental Consulting Archeologist

For most of the last eight and a half years, we believe that the Office of the Departmental Consulting Archeologist has made a good faith effort to implement NAGPRA and there have been numerous positive actions taken in this regard. However, many of the outstanding issues of NAGPRA implementation are likely to directly impact how archeology itself will evolve in the 21st Century in this country. As indicated in the first part of this testimony, those issues with the most significant implications for

archeologists have been among the most problematic of the implementation issues to date. Thus, given that the potential for a conflict of interest has never been greater than at the present, we believe that it would be beneficial to place NAGPRA implementation functions either outside of the Department of the Interior or within a portion of the Interior Department that does not have direct land management or archeological duties.

E. Definition of "sacred objects"

We are aware from the testimony at the hearing that the issue of what is a "sacred object" is an issue which is of concern to the Committee. Although we currently have no recommendations relevant to changing the definition, we would emphasize one very positive aspect of the current definition which we believe must not be changed -- namely, the part of the definition which recognizes that Native American traditional leaders are the individuals who determine whether the object is needed for ceremonial use. This requirement means that federal agencies and museums must consider what is sacred from the perspective of the traditional religious practitioner, as opposed to that of a non-practitioner, such as a professor or anthropologist.

III. The National Museum of the American Indian Act

The 1996 amendments to the NMAI Act were technically flawed and the Committee may want to take this opportunity to fix that Act. For example, the original Museum Act provided for the repatriation of unassociated funerary objects to Indian tribes simply upon a showing of cultural affiliation. 20 U.S.C. 80q-9(d). The 1996 amendments subjected the repatriation of unassociated funerary objects to the "right of possession" rule in NAGPRA, 20 U.S.C. 80q-11A(c), but did not repeal the original section allowing for repatriation simply upon a showing of cultural affiliation. The amendments also required a summary of unassociated funerary objects, but did not repeal the original requirement that an inventory of these objects be done, 20 U.S.C. 80q-11A(a). We prefer that the original provisions remain intact.

There are also subtle differences between the repatriation section in the 1996 Museum Act amendments and the NAGPRA sections from which it was derived. These reflect some confusion in the NAGPRA statute, as well as confusion in the Museum Act, as amended. Under NAGPRA, unassociated funerary objects are repatriated (subject to right of possession rules) when they have been identified as culturally affiliated through the summary process, 25 U.S.C. 3005(a)(2), or based upon tribal proof of cultural affiliation, 25 U.S.C. 3005(a)(4). In the case of sacred objects and cultural patrimony, repatriation occurs (again subject to right of possession rules) when cultural affiliation is shown pursuant to a summary, 25 U.S.C. 3005(a)(2), or upon a tribal showing that the sacred object or item of cultural patrimony was previously owned or

controlled by the tribe or a member thereof (subject to the rights of the lineal descendants of such a member), 25 U.S.C. 3005(a)(5). This last section of NAGPRA does not mention cultural affiliation. The Museum Act amendments require repatriation of unassociated funerary objects, sacred objects and cultural patrimony (subject to right of possession rules) if cultural affiliation is shown through the summary or based upon tribal proof that the items are cultural affiliated and were previously owned or controlled by the tribe or its members, 20 U.S.C. 80q-11A(b). Thus, the Museum Act provision, based upon the somewhat inconsistent NAGPRA provisions, appears inadvertently to establish a two step requirement for repatriation of unassociated funerary objects, sacred objects and cultural patrimony, as opposed to the one step "variable" approach of NAGPRA. This can be corrected by changing the word "and" to "or" in 20 U.S.C. 80q-11A(b).

In addition, in the case of Native Hawaiians, the 1989 Act left repatriation of human remains and funerary objects up to negotiated agreements between the Office of Hawaiian Affairs (OHA), Hui Malama I Na Kupuna O Hawai'i Nei (Hui Malama) and the Smithsonian, 20 U.S.C. 80q-11(a)(2) and (3), whereas the 1996 amendments imposed NAGPRA-type legal standards upon repatriation of unassociated funerary objects, sacred objects and cultural patrimony. 20 U.S.C. 80q-11A(b) and (c). It may be that this inconsistency is acceptable to the Native Hawaiian community and we defer to their wisdom in this regard. However, it may be an issue that should be discussed with OHA and Hui Malama.

Finally, the 1996 Museum Act amendments provided no definitions of "sacred objects" and "cultural patrimony". Moreover, there is only one definition of "funerary object" in the Museum Act, 20 U.S.C. 80q-14(4), rather than separate definitions for "associated" and "unassociated" funerary objects, even though the new amendments made this distinction an important one.

IV. Conclusion

AAIA welcomes the interest of this Committee in continuing to actively oversee the implementation of NAGPRA. We hope that this testimony will be useful to you and thank you for the opportunity to submit it for consideration.

Testimony of Harold Miller, Chairman

Crow Creek Sioux Tribe

Before the U.S. Senate Committee on Indian Affairs

Hearing on the Native American Graves Protection and Repatriation Act

April 29, 1999

Chairman Nighthorse Campbell and Committee members, my name is Harold Miller. I serve as Chairman of the Crow Creek Sioux Tribe of South Dakota. We reside on our 240,000 acre Reservation along the Missouri River in central South Dakota.

The Army Corps of Engineers constructed the Fort Randall dam on the Missouri River in 1958-59 and the Big Bend dam in 1962. These projects inundated the Missouri River bottomland, where the Crow Creek Tribal communities were located. Over one-third of the families on the Reservation were relocated from their homes - many of them twice, for the development of large reservoirs on the Missouri River. The wooded bottomlands on our Reservation were destroyed, along with the water, timber, forage and mineral resources that sustained our Tribe.

This committee passed legislation that was ultimately enacted by Congress, the Crow Creek Sioux Tribe Infrastructure Development Trust Fund Act of 1996 (P.L. 102-575), which established a \$27.5 million trust fund to assist our Tribe in overcoming the devastating impacts of the Fort Randall and Big Bend dams. Section Five of this Act provides for the expenditure by the Tribe of revenues from the Trust Fund, for specified purposes, including "Cultural preservation programs." It is through this authorization that we undertake cultural resources protection activities on our Reservation.

We have identified inventoried cultural resources, and upon the construction of a suitable location for them on our Reservation, we shall repatriate these resources. We have surveyed the cultural resources on our Reservation, and are developing a plan for their protection.

There are many significant cultural and historical sites on the Crow Creek Indian Reservation. The survivors of the Minnesota Uprising of 1963 were brought to Fort Thompson. Just south of Fort Thompson along the Missouri, the Crow Creek battle site remains an extremely valuable cultural resources site, with human remains and artifacts. We remain concerned with the protection of these valuable cultural resources.

As a signator Tribe of the Fort Laramie Treaty of April 29, 1868, we are also concerned with the on-going protection of cultural resources associated with our Tribe but located outside of the boundaries of our current Reservation. Title VI of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, was known as the S.D. Mitigation Act. This budget rider transfers up to 200,000 acres of Corps of Engineers project lands along the Missouri River to the state of South Dakota. It also transfers certain Corps lands to two Indian Tribes, and provides federal wildlife funding to the state and two Tribes.

This legislation seriously threatens NAGPRA rights of the Crow Creek Sioux Tribe and the Great Sioux Nation, of which we are a member. It was added to the FY 1999 budget in virtual secrecy, without a hearing and without adequate consideration of its impacts to Dakota burial sites along the Missouri.

The Mitigation Act seriously impacted very important rights of our Nation, under NAGPRA. I am asking this Committee to reconsider this issue as you develop needed amendments to NAGPRA.

The land to be transferred to South Dakota is presently administered by the Corps of Engineers. It contains over 700 listed native cultural sites, most of which are associated with the Great Sioux Nation.. When the federal government dammed the Missouri, human remains, funerary objects and other cultural artifacts layered along the banks. These objects remain protected by NAGPRA, as long as the land remains in the hands of the federal government.

Under the S.D. Mitigation Act, up to 200,000 acres of federal land are to be transferred to the state of South Dakota. This land is outside of the present-day Reservations, but it is within the boundaries established for the Great Sioux Reservation in Article 2 of the 1868 Fort Laramie Treaty. Some of it is within the original boundaries of the Crow Creek Reservation, prior to the Surplus Lands Act of 1907. Consequently, the right to ownership and repatriation of remains under NAGPRA applies to this land.

Under the S.D. Mitigation Act, there shall be no federal land manager to monitor unearthing of remains. There shall be no federal presence whatsoever on the land. As discussed above, under state law, the cultural resources on state land are deemed the property of the state. Without question, the protections for the Crow Creek Sioux Tribe and Great Sioux Nation under NAGPRA and implementation of repatriation rights are seriously threatened.

Under the federal scheme that is currently in place, the federal land manager is responsible for determining if there is an excavation, and for the notification, mitigation and repatriation requirements. There is no comparable state official authorized to carry out these functions. Consequently, there is no way for the Tribes to enforce their rights under federal law upon the state, if the land transfer is enacted.

The Crow Creek Sioux Tribe has suffered tremendous losses due to the Missouri River dams. We lost our most valuable land, our families lost their homes, and our economic resources were destroyed. Perhaps most important, the grave sites of many of our relatives are now lost forever. They become unearthed through wave action on the Missouri River.

Native American human remains get unearthed along the banks of the Missouri both on our Reservation and along the river outside of our boundaries. The land they get unearthed upon is federal land that is currently subject to NAGPRA protections.

These protections are threatened by the transfer of this federal land to the state of South Dakota, contained in Title IV of the Omnibus Appropriations Act of October, 1998. Up to 200,000 acres of land, most of it Sioux Nation Treaty land and some of it land that was within the original Crow Creek Sioux Reservation boundaries, shall be transferred to the state. There was no hearing on this provision; it was passed last year as a budget rider. There was inadequate consideration of its impacts on Native American human remains and cultural resources. This Committee should fully consider the need to re-assert full NAGPRA protections on the Sioux Nation land along the Missouri River, lost under Title VI of the 1999 budget bill.

Executive Director:
Richard Bad Moccasins

Member Tribes:
Arapaho & Sioux Tribes of
Fort Peck, Poplar, Montana

Chayenne River Sioux Tribe,
Eagle Butte, South Dakota

Chippewa Cree Tribe,
Box Elder, Montana

Crow Tribe
Crow Agency, Montana

Crow Creek Sioux Tribe,
Fort Thompson, South Dakota

Flandreau Santee Sioux Tribe
Flandreau, South Dakota

Fort Belknap Tribe,
Harlem, Montana

Kickapoo Tribe in Kansas,
Horton, Kansas

Lower Brule Sioux Tribe,
Lower Brule, South Dakota

Northern Chayenne Tribe,
Lame Deer, Montana

Oglala Sioux Tribe,
Pine Ridge, South Dakota

Omaha Tribe,
Walkhill, Nebraska

Ponca Tribe of Nebraska,
Niobrara, Nebraska

Prairie Band of Potawatomi,
Mayetta, Kansas

Rosebud Sioux Tribe,
Rosebud, South Dakota

Sac & Fox Nation of Missouri,
Reserve, Kansas

Santee Sioux Tribe,
Niobrara, Nebraska

Sisseton-Walsheton Dakota
Nation, South Dakota

Spirit Lake Tribe,
Fort Totten, North Dakota

Standing Rock Sioux Tribe,
Fort Yates, North Dakota

Three Affiliated Tribes,
New Town, North Dakota

Turtle Mountain Band of
Chippewas, North Dakota

Winnebago Tribe of Nebraska
Winnebago, Nebraska

Yankton Sioux Tribe
Marty, South Dakota

Mni-Sose Intertribal Water Rights Coalition, Inc.

P.O. Box 2890, 514 Mt. Rushmore Road
Rapid City, South Dakota 57709-2890

Testimony of Richard Bad Moccasins, Executive Director

Mni Sose Inter-Tribal Water Rights Coalition, Inc.

Before the U.S. Senate Committee on Indian Affairs

Hearing on the Native American Graves Protection and Repatriation Act

April 30, 1999

Chairman Nighthorse Campbell and Committee members, my name is Richard Bad Moccasins. I serve as Executive Director of the Mni Sose Inter-Tribal Water Rights Coalition, Inc. I am also an enrolled member of the Crow Creek Sioux Tribe, and as a Tribal member I am personally, as well as professionally, concerned with the protection of our ancestors' remains.

The Mni Sose Inter-Tribal Water Rights Coalition consists of 23 Indian Nations located in the Missouri River basin, working together to protect our water rights, natural resources and Tribal sovereignty. Mni Sose appreciates the focus provided by the Committee on Indian Affairs on the important cultural resources protection issues provided by the Native American Graves Protection and Repatriation Act (NAGPRA).

The Indian Nations of the Missouri River basin vary as much as the landscape itself. The Blackfeet Nation is located high in the Rocky Mountains near the Missouri's headwaters. The Chippewa-Cree Tribe of the Rocky Boys Reservation, and the Arapaho and Gros Ventre Tribes of the Fort Belknap Indian Reservation are located high on the central Rocky Mountain plateau of north central Montana, surrounded on the south and west by mountain ranges and free-flowing rivers.

Further downstream along the Missouri River, the Three Affiliated Tribes of the Fort Berthold Reservation and the various Tribes of the Great Sioux Nation lost land and riparian resources upon the construction of the six earthen dams on the main stem of the Missouri River. Downstream from these projects, the important water resources of the Winnebago, Omaha, Sac and Fox, Kickapoo and Pottawatomi Nations have been developed and utilized for barge traffic and the navigation industry.

Historically, our Tribal communities established camps and communities along the Missouri River and its tributaries. We relied on the water, shelter and riparian resources in the riverine environment to survive. Our ancestors are buried along these rivers from Montana's Milk River, all along the nearly 2,000 mile Missouri River main stem, to Kansas' Republican River.

Federal water development projects throughout the Missouri River basin affect these burial sites. The free-flowing Missouri River has been completely destroyed above Sioux City, Iowa, by the U.S. Army Corps of Engineers. The Corps constructed six massive earthen dams, turning the main stem of the Missouri into a series of reservoirs. These dams are collectively referred to as the Missouri River basin Pick-Sloan project.

The scholar and best-selling author, Vine Deloria, Jr., an enrolled member of the Standing Rock Sioux Tribe, has described Pick-Sloan as "the singlemost destructive act ever perpetuated on any tribe by the United States." Pick-Sloan caused more damage to Indian land and resources than any other public works project in American history. Approximately 350,000 acres of Indian land were taken by the Corps of Engineers for this project.

**Indian Lands Taken For
Missouri River Reservoir Construction**

<u>Reservation</u>	<u>Reservoir</u>	<u>Acres Taken</u>
Fort Berthold	Garrison	154,912
Standing Rock	Oahe	55,994
Cheyenne River	Oahe	99,548
Lower Brule	Big Bend	14, 958
Lower Brule	Fort Randall	7,997
Crow Creek	Big Bend	6,416
Crow Creek	Fort Randall	9,149
Santee	Gavins Point	593
Total Acreage Taken		349,566

The 349,566 acres of Indian land taken for Pick-Sloan represents 23 percent of the 1,499,759 acres impacted by the main stem dams, reservoirs and transmission lines. In addition, miles of artificial navigation channels were constructed across the Omaha and Winnebago Indian Reservations. Although the impact due to the construction of the main stem dams cannot be reversed, the continuing effects these projects have had on the Native American cultural resources can and should be addressed.

Author Michael Lawson has described Pick-Sloan's impacts as follows:

The shaded bottom lands provided a pleasant living environment with plenty of wood, game, water and natural food resources. The trees along the Missouri and its tributaries were a primary source of fuel and lumber for the tribes and (provided protection)... from the ravages of winter and the scorching summer heat. The gathering and preserving of wild fruits and vegetables was traditional facet of Plains Indian culture. The numerous types of herbs, roots, berries and beans that grew in the bottom lands added bulk and variety to the diet, and were used for medicinal and ceremonial purposes.

The wooded bottom lands also served as shelter and feeding grounds for many species of wildlife, and hunting and trapping were important sources of food, income, and recreation for the tribes. The loss of bottom land grazing areas crippled tribal livestock operations, once the primary industry on many reservations. Artificial shelters had to be built to replace the natural resources of the old habitat. Stock raising thus became far more difficult, expensive, and risky.

The Pick-Sloan projects damaged every aspect of reservation life. Abruptly the tribes lost the basis for their subsistence and had to develop new ways of making a living in a cash economy. The relocation of the agency headquarters and largest communities on Fort Berthold, Cheyenne River, Crow Creek and Lower Brule disrupted federal and tribal services, and tipped the social, economic, and religious fabric of the well-integrated tribal life. It was especially onerous for the Indians to excavate their cemeteries and private burial grounds and to relocate their ancestors' remains.

Michael M. Lawson, Dammed Indians - Pick-Sloan Plan and the Missouri River Sioux, University of Oklahoma Press (1982).

We rely on the rights of repatriation under Native American Graves Protection and Repatriation Act (NAGPRA) to ensure the protection of our ancestors' remains, which get unearthed by wave action resulting from the operation of dams and irrigation projects throughout the Missouri River basin. We are concerned with the impact of federally-operated water projects throughout the Missouri River basin. It is the federal government itself whose activities are resulting in the unearthing of Native American human remains and funerary objects on our reservations and aboriginal lands.

The Corps of Engineers is presently conducting an Environmental Impact Statement on the Missouri River Master Water Control Manual. The Corps released a Preliminary Revised Draft in July, 1998. The PRDEIS illustrates that the Corps of Engineers fails to comply with NAGPRA and the National Historic Preservation Act in its Missouri River operations.

In the PRDEIS, the Corps recognized the existence of "historic properties" along the reservoirs. The Corps identifies 158 sites at Fort Peck, 676 at Lake Sakakawea and 945 at Lake Oahe. Data for the sites at Lake Sharpe, Lake Frances Case, and Lewis and Clarke Lake has not been provided. In the assessment of alternatives for system operations, the Corps identifies the impacts on those sites that are impacted by fluctuating lake levels.

Nevertheless, the entire framework for these analyses is flawed, for several reasons. First, there is a substantial amount of information in this area which the COE does not possess. This results from the inadequate consultation between Corps archaeologists and the basin's Indians, for over 30 years. In addition, for those sites which have been identified, there is a concern that the COE does not properly identify the significance of the sites.

For example, a site was recently discovered on a Reservation along the Missouri River. The site included a ring of objects, which the Corps identified as a tipi ring, with no cultural significance. The Indian representatives properly identified the site's historic use and significance. It was a sacred area, utilized for fasting and visions. The Corps of Engineers had failed to properly identify a site which holds substantial religious and cultural significance to the people on whose Reservation the site is located. In the Corps' scheme of reservoir regulations, it would have entirely overlooked this area, and managed the water resource and COE project lands without conferring any consideration on the need to protect it.

Second, there has been inadequate generally consideration on the impact of the system operations on those sites in the fluctuation zone. These sites are very, very important to our people. Yet, they are treated no differently than, say, a marina, in the regulation of the reservoirs.

Third, there is no assessment in the PRDEIS of the need to manage COE project land in a manner beneficial to our cultural sites and graves. The management of the project lands should be integrated with the management of the water resource, for the protection of these sites. The current management scheme fails to do so. For example, at the confluence of the Missouri and Grand Rivers on the Standing Rock Indian Reservation, the Oahe project resulted in the formation of an island. There is an important cultural site on this island. Directly adjacent to this site, the Corps has leased a tract of land to a private, non-Indian developer. In addition, the Corps has developed the ironically-named Indian Memorial Recreation Area, directly adjacent to the culturally significant area.

Ultimately, the water and land management schemes must be integrated for the protection of Indian remains and cultural resources. The protection of these sites must be a priority of an integrated management scheme. Numerous treaties, NAGPRA and the

Archaeological Resources Protection Act of 1979 (16 USC 470aa-470ll) require such protection. The alternatives outlined in the PRDEIS fail to elevate this issue as a priority, thereby violating treaties and federal law.

Finally, the COE's long term model for operation of the system purports to incorporate the "value" of our ancestors remains and cultural objects into a computer model for alternatives for system operations. This preposterous notion must be rejected. Instead, the COE must work in close coordination with the Tribes to identify the culturally significant areas, and establish models for reservoir regulations that will protect them.

This Committee should hold the Army Corps of Engineers accountable for its on-going violations of NAGPRA and NHPA, in its Missouri River operations.

These cultural resources along the Missouri River are generally located on Corps of Engineers-held land, above the reservoirs of the Missouri River. These lands are scheduled to be transferred out of federal status, under Title VI of the Omnibus and Emergency Appropriations Act of 1998. I urge the Committee to ensure that NAGPRA protections remain in place for any land that loses its federal character, under this provision.

In sum, the Indian Tribes of the Missouri River basin have been substantially and detrimentally impacted by Corps of Engineers and Bureau of Reclamation water projects. The destruction of Native grave sites is perhaps the most onerous of the injuries we have suffered. Yet the operation of these projects, especially the Corps of Engineers' dams on the Missouri River, continues to unearth Native human remains and funerary objects. Although the Corps cooperates with repatriation, it takes no action to mitigate the damage to these resources in the on-going operation of these dams. The Corps Preliminary Revised Draft EIS for Missouri River operations, released in July, 1998, gives no indication that the Corps is prepared to change its "business as usual" attitude. Without doubt, urgent Congressional action is needed to remedy this.

Chief Seattle explained the importance of our ancestors' graves - "To us the ashes of our graves are sacred and their resting place is hollowed ground." Yet one noted commentator, Suzan Shown Harjo has opined that, notwithstanding NAGPRA, "Native holy places are being desecrated and threatened to a greater extent now than at any time in the past."

The Mni Sose Water Rights Coalition looks forward to working with the Senate Committee on Indian Affairs to ensure that we reverse this desecration.

Statement of Charles W. Murphy, Chairman
Standing Rock Sioux Tribe
Before the U.S. Senate Committee on Indian Affairs
Hearing on the Native American Graves Protection and Repatriation Act
April 29, 1999

Introduction

Chairman Nighthorse Campbell and committee members, my name is Charles W. Murphy, and I serve as Chairman of the Standing Rock Sioux Tribe. Standing Rock is a signatory of the Treaty of Fort Laramie of April 29, 1868. Under the Fort Laramie Treaty, all of present-day South Dakota west of the Missouri River is recognized as the Great Sioux Reservation. Our present Reservation along the Missouri River in central South Dakota and North Dakota is small tract within our vast treaty territory.

The Missouri's east bank is the eastern boundary of our treaty territory. Under the Native American Graves Protection and Repatriation Act, all native human remains and funerary objects located within the Treaty boundaries are deemed to be owned by the Sioux Nation, with a right of repatriation.

The protection of cultural resources is a priority of the Standing Rock Sioux Tribe. We have established the Standing Rock Tribal Historic Preservation Office, one of only a few Tribal cultural offices in the United States that is recognized by the Secretary of the Interior as possessing the legal status of a State Historic Preservation Office, under the National Historic Preservation Act.

The Standing Rock THPO is responsible for repatriating the human remains, funerary objects and other cultural resources that have been inventoried at museums and that have been uncovered on the federal or Tribal lands within the Great Sioux Reservation boundaries. This has involved considerable coordination with museums and federal agencies, consultation with our religious leaders, the transfer of remains and ceremonies for their repatriation. We take these tasks very seriously.

**Construction of Oahe Dam and Reservoir on
the Standing Rock Indian Reservation**

In 1958, the Corps of Engineers built the Oahe Dam and Reservoir, on our Reservation. This dramatically altered the Reservation landscape. The Missouri River, in whose wooded bottomlands our Tribal communities were located, was transformed from a healthy free-flowing river to a large reservoir. The wooded riparian area, upon which we relied for wood, forage, and water, were

destroyed. In Public Law 85-915, the Congress authorized the taking by the Corps of engineers of 56,000 acres of the most valuable land on our Reservation, for the site of Oahe Reservoir.

Literally overnight, the economic resources upon which we survived were destroyed. A welfare economy arose, with food stamps, fuel assistance and welfare payments replacing hunting and fishing, wood burning and ranching on our Reservation. Most important, perhaps, the Corps of Engineers failed to relocate the cemeteries in our communities. They were unearthed by Oahe Reservoir, and now they wash up on its shores, on federal land along the Missouri River.

Author Michael Lawson explained the suffering we have experienced, as follows -

The shaded bottom lands provided a pleasant living environment with plenty of wood, game, water and natural food resources. The trees along the Missouri and its tributaries were a primary source of fuel and lumber for the tribes and (provided protection)...from The ravages of winter and the scorching summer heat. The gathering and preserving of wild fruits and vegetables was traditional facet of Plains Indian cultures. The numerous types of herbs, roots, berries and beans that grew in the bottom lands added bulk and variety to the diet, and were used for medicinal and ceremonial purposes.

The wooded bottom lands also served as shelter and feeding grounds for many species of wildlife, and hunting and trapping were important sources of food, income, and recreation for the tribes. The loss of bottom land grazing areas crippled tribal livestock operations, once the primary industry on many reservations. Artificial shelters has to be built to replace the natural resources of the old habitat. Stock raising thus became far more difficult, expensive, and risky.

The Pick-Sloan projects damaged every aspect of reservation life. Abruptly the tribes lost the basis for their subsistence and had to develop new ways of making a living in a cash economy. The relocation of the agency disrupted federal and tribal services, and tipped The social, economic, and religious fabric of the well-integrated tribal life. It was especially onerous for the Indians to excavate their ancestors' remains.

Michael M. Lawson, Dammed Indians - Pick-Sloan Plan and the Missouri River Sioux, University of Oklahoma Press (1982).

The construction of the Oahe Dam on our Reservation, and the other Missouri River dams, is a major NAGPRA issue for the Standing Rock Sioux Tribe and the Great Sioux Nation. There were Indian communities at Standing Rock and all along the Missouri River in what is now South

Dakota. The construction of the dams - and the failure of the Army to properly relocate the burial sites when they destroyed our communities, results in an abundance of Native American human remains, funerary objects and other cultural resources associated with the Standing Rock Sioux Tribe and Great Sioux Nation - embedded in the banks of the Army Corps of Engineers lands above the Missouri River reservoirs.

Under NAGPRA, all human remains, funerary objects and associated cultural resources unearthed on the approximately 280,000 acres of Corps of Engineers lands along the Missouri River in South Dakota, are owned by the Great Sioux Nation, with the right of repatriation to the Tribe from which it is determined to have originated. 25 U.S.C. §3002. Many of these objects have Arikara origins, in which case they are repatriated with the Three Affiliated Tribes of Fort Berthold.

Standing Rock and our fellow North Dakota Tribes have a Memorandum of Agreement with the Corps of Engineers for repatriation of remains and cultural resources found on Corps lands in North Dakota. The MOA contains procedures, protocols and timelines for repatriation. It has been utilized by the Corps of Engineers for guidance for repatriation in South Dakota, as well. The present-day Standing Rock Reservation is located in both North Dakota and South Dakota.

However, in 1998 the Congress gutted NAGPRA protections for Native human remains and cultural resources along the Missouri River in South Dakota. Title VI of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, was known as the S.D. Mitigation Act. This budget rider transfers up to 200,000 acres of Corps of Engineers project lands along the Missouri River to the state of South Dakota. It also transfers certain Corps lands to two Indian Tribes, and provides federal wildlife funding to the state and two Tribes.

This legislation seriously threatens NAGPRA rights of Standing Rock and the Great Sioux Nation. It was added to the FY 1999 budget in virtual secrecy, without a hearing and without adequate consideration of its impacts to Lakota burial sites along the Missouri.

The Congress seriously impacted very important rights of our Nation, under NAGPRA. I am asking this Committee to reconsider this issue as you develop needed amendments to NAGPRA.

Impacts of S.D. Mitigation Act on NAGPRA

The land to be transferred to South Dakota is presently administered by the Corps of Engineers. It contains over 700 listed native cultural sites, most of which are associated with the Great Sioux Nation. When the federal government dammed the Missouri, human remains, funerary objects and other cultural artifacts layered along the banks. These objects remain protected by NAGPRA, as long as the land remains in the hands of the federal government.

The Native American Graves Protection and Repatriation Act (NAGPRA) provides for a strong federal role in the protection of native cultural resources on *federal* lands. 25 U.S.C. §3001 et seq. Under NAGPRA, Native American human remains and funerary objects that are unearthed on federal lands, automatically are deemed to be owned by the Tribe with which they are associated.

There may be no intentional excavation, and inadvertent discoveries must be reported to the federal agency and Tribe. 25 U.S.C. §3002(c) & (d). No additional excavation or similar activity may be resumed without full protection of the resources. The objects must be immediately transferred to the custody of the Tribe, which is empowered to perform repatriation. 25 U.S.C. §3002(c). The federal land manager is responsible for enforcing this

Similarly, under the Archaeological Resources Protection Act of 1979, 16 U.S.C. §470aa et seq., no person may excavate or remove native archaeological resources on federal lands, without a permit from the applicable federal land manager. As with NAGPRA, the federal land manager is entrusted with protection of native cultural resources through the permitting process. This is generally designed to limit excavations by archaeologists.

The National Historic Preservation Act requires federal agencies to limit the impacts of their actions on historic properties. 16 U.S.C. §470a et seq. This statute applies to "federally assisted undertakings" 16 U.S.C. §470f.

All Corps of Engineers activities under the current Missouri River operations constitute federal undertakings under the act. Under 16 U.S.C. §470a(d), "The Secretary (of interior) shall establish a program to assist Indian Tribes in preserving their particular historic properties....(and to do so) in such a manner as to ensure tribal values are taken into account." Indeed, the Congress accepted these values as the principles underlying NAGPRA.

South Dakota state law provides for certain historical preservation. State law prescribes criteria for the State Historical Preservation Board in determining "Heritage areas" S.D.C.L. 1-19A-26. These criteria include the existence of a "historic preservation plan," accessibility of the site for visitors, whether the site shall "contribute to the economic welfare of this state," whether "it is identifiable to the visiting public," etc. *Id.* Native values are not listed for consideration.

South Dakota law confers discretion to the state board for mitigation of cultural resources -

The state historical society board of trustees, upon notification or determination that scientific, historical, or archaeological data including relics and specimens, is or may be adversely affected, shall, after reasonable notice to the responsible department, institution or agency conduct or cause to be conducted a survey and other investigations to recover and preserve or otherwise protect such data, including analysis and publication, which in its opinion should be recovered in the public interest.

S.D.C.L. §1-20-23.

Under state law, mitigation is discretionary. Under any circumstances, the information is public. Moreover -

All such information and objects deriving from state lands shall remain the property of the state and be utilized for scientific or Public education purposes.

S.D.C.L. §1-20-25.

Under state law, there is no distinction between archaeological resources and native cultural resources. These resources are state-owned and public dissemination of information is required.

Under federal law, notification to the Tribe is required, mitigation is mandatory and ownership is vested with the Tribe. 25 U.S.C. §3002(c) & (d), 16 U.S.C. §470f. Significantly, under federal law sensitive information may be withheld from disclosure. 16 U.S.C. §470w-3.

Under the S.D. Mitigation Act, up to 200,000 acres of federal land are to be transferred to the state of South Dakota. This land is outside of the present-day Reservations, which were established in the Act of March 2, 1889. However, this land is within the boundaries established for the Great Sioux Reservation in Article 2 of the 1868 Fort Laramie Treaty. Consequently, the right to ownership and repatriation of remains applies to this land.

Section 605(h) of the S.D. Mitigation Act provides the "Notwithstanding any other provision of this Act, the following provisions of law shall apply to land transferred under this section. . . national Historic Preservation Act... Archaeological Protection Act... (and) Native American Graves Protection and Repatriation Act "

However, it is very unclear how this section shall be implemented. The land is to be transferred to the state of South Dakota. There shall be no federal land manager to monitor unearthing of remains. There shall be no federal presence whatsoever on the land. As discussed above, under state law, the cultural resources on state land are deemed the property of the state. Without question, at best the protections for the Sioux Nation under NAGPRA and implementation of repatriation rights are seriously threatened.

The most insurmountable issue involves removal of the responsible federal land manager. Under the federal scheme that is currently in place, the federal land manager is responsible for determining if there is an excavation and for the notification, mitigation and repatriation requirements. There is no comparable state official authorized to carry out these functions. Consequently, there is no way for the Tribes to enforce their rights under federal law upon the state, if the land transfer is enacted.

Let there be no question that South Dakota law provides nowhere near the protections conferred by federal law on important native cultural resources. South Dakota law, which shall apply to the transferred lands, shall lead to the desecration and public dissemination of sensitive information about native cultural resources along the Missouri River.

Prior to the passage of the Mitigation Act, under NAGPRA the cultural resources on these lands that are associated with the Great Sioux Nation, and their protection is a federal responsibility, implemented by the Corps of Engineers. However, the Mitigation Act provides for the transfer of this

land to the state of South Dakota. I am respectfully requesting the Committee on Indian Affairs to give serious consideration to the diminishment of NAGPRA protections for the Great Sioux Nation, contained Title VI of the 1999 Appropriations Act, and to redress this grave injustice in the process of developing amendments to NAGPRA.



Oglala Sioux Tribe

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Testimony of Harold D. Salway OGLALA SIOUX TRIBE

Before the U.S. Senate Committee on Indian Affairs

Hearing on the Native American Graves Protection and Repatriation Act

April 30, 1999

Chairman Nighthorse Campbell and Committee Members:

My name is Harold D. Salway. I serve as President of the Oglala Sioux Tribe. We are one of Seven Council Fires of the Great Sioux Nation, and as such we have a rich cultural history. Some of the most prominent events in American history, such as the defeat of Custer at the Little Big Horn, and some of the saddest and darkest, such as the Massacre at Wounded Knee, have involved our ancestors and our Tribe.

Our current homeland, the nearly 4 million acre Pine Ridge Indian Reservation, is home to some of the most valuable cultural resources in America. Our reservation is a small part of the Great Sioux Reservation, recognized in the Treaty of Fort Laramie of April 29, 1868. The Great Sioux Reservation consists of 80 million acres from the Missouri River westward to Wyoming. The Black Hills of present day South Dakota was the spiritual center of our homeland and historically, our camps moved throughout our aboriginal homeland, resulting in valuable Oglala Lakota cultural resources from the Powder River in Wyoming to the Missouri River is what is now South Dakota.

NAGPRA Testimony: April 30, 1999 - Page Two.

We rely on the rights of repatriation under the Native American Graves Protection and Repatriation Act (NAGPRA) to ensure that we receive repatriation of our ancestors remains that have been taken and confiscated by museums, and the protection of our ancestors' remains throughout our aboriginal territory.

The Oglala Sioux Tribe has been very active repatriating human remains and associated funerary objects. There has been repatriation of 43 of our ancestors, whose remains were disinterred and located at the Smithsonian Museum. We have also received 2 sets of funerary objects from the Heard Museum in Phoenix, Arizona. These objects were misidentified by archaeologists at the Heard Museum, and were being displayed as certain ceremonial objects, when in fact they were tools of one of our traditional societies, the Kit Fox Society.

The Oglala Sioux Tribe serves as the lead project sponsor for the Mni Wiconi Water System, a rural water supply system serving three Indian Reservations and a non-Indian water district. In this capacity, we have performed Class I and Class II surveys of hundreds of square miles of the Great Sioux Nation, providing for protection and mitigation of sacred and ceremonial areas and cultural resources.

The Tribe has enacted a Repatriation Ordinance, incorporating our NAGPRA rights and repatriation policies and procedures into Tribal law. We have entered into a Government-to-Government Memorandum of Agreement with the Cheyenne River Sioux Tribe, Rosebud Sioux Tribe and the Santee Sioux Tribe, for mutual cooperation and assistance in identifying Lakota remains and funerary objects at museums and within our 1868 Treaty boundaries.

NAGPRA Testimony: April 30, 1999 – Page Three.

As Tribal President, I am concerned with the continuing exploitation of Native American cultural resources. NAGPRA should be protected to ensure that Indian Tribes have a statutory right of first refusal upon the sale of cultural objects associated with that Tribe.

This is a very important issue for the Oglalas. Because of our prominent role in American history, museums and collectors throughout the world have obtained human remains, cultural objects and artifacts of our Tribe. NAGPRA should be amended to ensure that Tribes, such as the Oglalas, have a right of first refusal to acquire these cultural resources when they are sold or transferred. The U.S. Department of State should be provided authority to assist the Tribes with inventorying native cultural resources in museums and collections in foreign countries and provide for their repatriation.

Significantly, however, in some respects the Oglalas have had more cooperation on repatriation with foreign collectors than with museums in the United States. For example, a Ghost Dance shirt was recently returned to our Tribe from a county in Scotland, notwithstanding a legal mandate. Our cultural resources shall be enhanced through better education and reconciliation efforts.

Instead, we too often suffer local ill-will on these types of issues. The retention of Indian names and mascots for school and professional sports teams remains hurtful. Perhaps NAGPRA Amendments could authorize the Department of Justice, in cooperation with the Tribes, to investigate the impacts of Indian logos and mascots by sports teams throughout the United States.

NAGPRA Testimony: April 30, 1999 - Page Four.

As a signatory Tribe of the Fort Laramie Treaty of April 29, 1868, we are also concerned with the on-going protection of cultural resources associated with our Tribe, but located outside of the boundaries of our current Reservation. I am particularly concerned with the continued applicability of NAGPRA along Sioux Nation aboriginal lands along the Missouri River.

Under the 1868 Fort Laramie Treaty, Title VI of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for 1999, was known as the South Dakota Mitigation Act. This budget rider transfers up to 200,000 acres of Corps of Engineers project lands along the Missouri River to the state of South Dakota.

This legislation seriously threatens NAGPRA rights of the Oglala Sioux Tribe and the Great Sioux Nation. It is unclear how human remains and cultural objects, associated with the Oglala Lakota that are unearthed along the Missouri River, shall be treated on land that is to be transferred to South Dakota under this amendment.

This provision was added to the FY-1999 budget in virtual secrecy, without a hearing and without adequate consideration of its impacts to Lakota burial sites along the Missouri. The Mitigation Act seriously impacted very important rights of our nation, under NAGPRA. I am asking this committee to reconsider this issue as you develop needed amendments to NAGPRA.

The land to be transferred to South Dakota is presently administered by the Corps of Engineers. It contains over 700 listed native cultural sites, most of which are associated with the Great Sioux Nation and the Oglala Lakota Tribe. The U.S. Army established the Whetstone Agency along the Missouri River in the

NAGPRA Testimony: April 30, 1999 - Page Five.

1860's in an attempt to relocate our band away from the Powder River and Black Hills. Consequently, many of our ancestors are buried along the Missouri. When the federal government dammed the Missouri in the 1950's, human remains, funerary objects and other Native American cultural artifacts layered in the banks above the reservoirs. These objects remain protected by NAGPRA, as long as the land along the river remains in the hands of the federal government.

The Great Sioux Nation claims this land as part of the 1868 Treaty claim. There is a title dispute to this land, but without question it is located within our aboriginal territory and NAGPRA presently applies to this land.

These protections are threatened by the transfer of this federal land to the state of South Dakota, contained in Title IV of the Omnibus Appropriations Act of October 1998. Up to 200,000 acres of land, most of it Sioux Nation Treaty lands shall be transferred to the state. There was no hearing on this provision; it was passed last year as a budget rider. There was inadequate consideration of its impacts on Native American human remains and cultural resources. This committee should fully consider the need to re-assert full NAGPRA protections on the Sioux Nation land along the Missouri River, lost under Title VI of the 1999 budget bill.

Thank you very much for the opportunity to submit this testimony for the committee's record on this important issue.

CRST Commentary

May 14, 1999

Senator Daniel Inouye
Senate Indian Affairs Committee
Washington, D.C.

RE: NAGPRA Oversight Hearing comments.

Dear Senator Inouye:

The Cheyenne River Sioux Tribe is honored to provide the following commentary to the Honorable Senator Daniel Inouye, of Hawaii, and the Senate Indian Affairs Committee for review and consideration.

Definition of "Sacred Object":

The Tribe believes that the definition of "sacred object" as defined by the statute and regulatory language implementing NAGPRA is far too narrow a definition and that it fails to adequately serve tribal needs concerning the repatriation of objects that possess this quality. The experience of the Tribe in seeking to repatriate sacred objects from museums has proven in case after case that non-Indians lack the necessary ethnocentric cultural relevance to grasp why an object is sacred to our cultural group. Compounding this problem is the inability of non-Indians to approach repatriation from any other vantage than their own ethnocentric cultural viewpoint. And that is the paradox that many Indian tribes themselves must face, as their own NAGPRA representatives consult with museums for the return of sacred objects.

The definition of sacred means – *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*. The very construction of the sentence itself – defining what constitutes the criteria for sacred objects -- demonstrates just how ethnocentrically rooted in the non-Indian society the law itself is. The use of adjective word "specific" at the beginning of the sentence imposes a restrictive measure on Indian people because it hinders and oftentimes prevents Indians from placing many sacred objects into this category. One people's needs are not being served when another people attempt to define what is or is not sacred to our culture and, unfortunately, the wording of the definition of sacred objects drives this point home.

The implication in the definition implies that we, Indian people, may only repatriate those objects that non-Indians believe are sacred to us, and not what is truly sacred to us. As such this forces many Indian tribes into confrontational consultations with museums. Too often tribal NAGPRA representatives are kept busy debunking and refuting anthropological interpretations of what constitutes a sacred object among their particular cultural group rather than simply being able to correctly identify an object and present the necessary justification for an objects return. The fact that museum personnel are oftentimes in possession of pre-conceived notions of what types of objects may or may not be sacred to any particular repatriating tribal group, is an unexpected circumstance of repatriation.

Due to the sentence structure of the definition and the inclusion of the adjective "specific" preceding the noun "ceremonial", Indian people are limited in identifying our sacred objects. The reason for that limitation pertains to the non-Indian ethnocentric perception of what

CRST Commentary

physically constitutes ceremonial activity. Unfortunately for Indian people, non-Indians, and particularly Christians, attribute ceremonial activity as being more of a shared group activity like going to church. Exasperating the matter is the fact that non-Indians believe in a extremely regimented religious dogma where anything spiritual is strictly structured and regulated by church officials. The sanction of a ceremonial activity, therefore, can only be done through the officiating church leader who is overseeing the activity. Without such a regulating official representing a church, Christians, on an individual basis, lack the ability and church sanction to label any personal spiritual expressions, physical or mental, as constituting a religious ceremony. Thus, the use of the term "religious leader" is also unnecessarily limiting to the Lakota understanding of "sacred" in this context, and its replacement by the term "practitioner" would be more culturally appropriate. To truly serve the tribal need and allow all Indian tribes the opportunity to reclaim their sacred objects **remove** the word "*specific*" from the definition. Secondly, **insert** the following definition for the word ceremony – ***Ceremony is defined as any form of spiritual expression that is sanctioned by the particular cultural group that is consistent with their traditional belief system.*** These two changes in the language will easily rectify matters and contribute greatly to advancing repatriation efforts on behalf of all Indian people.

Unidentified Human Remains:

The Tribe now directs its commentary to the issue of "unassociated/unaffiliated human remains" which are held by and in control of the Smithsonian Institution and considered "unidentified." To facilitate a satisfactory resolution to affiliating these ancestors to one or more cultural groups and at the same time empowering Indian people to bring home these ancestors and bury their remains and set their spirits at ease is easy to accomplish. Remember that "cultural affiliation" does not mean that there is a physical affiliation shared between various cultural groups. If Indian cultural groups believe that they are related to each other because this is part of their overall spiritual belief and worldview then that is a "cultural perception and practice" that they have a right to utilize in affiliating themselves to any human remains. And that is the essence of cultural affiliation. The concept of shared group identity is never based exclusively upon the simple physical similarities or characteristics that are shared between group members. Only identifying a racial affiliation is based upon shared physical characteristics, not cultural affiliation. True cultural affiliation to any particular group of people is based upon shared spiritual beliefs and language and behaviors and social practices.

This sense of true cultural affiliation is evident in every society that ever developed anywhere in the world. For example, in the Old World people divided themselves off between each other based upon different belief systems, different languages, and different social customs. However, they all shared one common trait with each other regardless of whether or not they acknowledged their shared trait...and that is the racial factor. Everyone in the Old World was white. There were no black people living there. There were no yellow people living there. And there were no red people living there. How they determined which cultural group of people that they belonged to was based upon shared beliefs, a shared language, shared behaviors, and shared social practices. Yet here in this country it is forbidden for Indian people to claim a shared group identity to human remains unless it can be shown to the descendants of these very same white people that our skulls measure out in the same circumference as theirs do.

All cultures develop, grow, reach an apex and then die out. But the single driving constant in that process is this. All cultures develop from a spiritual belief concerning mans creation and mans relationship to his fellow man revolving around this one basic "shared"

CRST Commentary

principle. *We are all related.* Why? Because we are human beings and what separates us from each other is never based exclusively upon what color our skin is. In this country that consideration only enters the equation four times and those times are colored Black, Red, Yellow and White. After that separation between people depends exclusively upon spiritual beliefs, the spoken language, acceptable behaviors and social practices. Only White people divided themselves off from other cultural groups along racial lines. And where racial intolerance grew from was based on they're own ethnocentric spiritual beliefs that promoted religious intolerance and this only reinforced their racial bigotry.

America is called the Great Melting Pot. Where people from all over the world have come to make a living and secure a future for their families. Every baby that is born within the exterior boundaries of the United States of America is automatically a citizen of this country. How arrogant to assume that the Native people of this country can not tell a white man to whom they are related too. The irony in repatriation when any Indian tribes seeks to bring home ancestors for re-burial is that non-Indians overlook the obvious and most glaring evidence that all tribes and tribal groups have presented as the basis for making a cultural affiliation to the ancestors. And that is we are related to the ancestors because in our stories our ancestors tell us that we are. So what more do the Indian people need to prove to the white men? When an Indian applies for a job he or she must check a box that groups him or her with all other Indian people that can be found still surviving in this country. And it makes no difference to the white man if the Indian is Lakota, Iroquois, Salish, Navajo, Creek, Cheyenne, Cherokee, or Apache. To the white man we are all Indian. We are different from white people, and therefore we are one and the same to them. So why can't the non-Indian give us back our ancestors?

The paradox of being Indian in this country is best summed up in the following statement. Strictly from a cultural affiliation viewpoint of sharing certain cultural practices, behaviors, language, and similar spiritual beliefs. No one can argue against the fact that Lakota Indians are culturally related to Apache Indians in 1999 because we share the same culture of being Americans. For that matter we are now culturally related to every color of persons living in this country. The funny thing is though, my cranium, does not measure the same as that of an Apache.

I am,

Sebastian (Bronco) LeBeau
 Preservation Officer
 Cheyenne River Sioux Tribe
 PO Box 590
 Eagle Butte, South Dakota 57625

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Property of a California Private Collector

□ 164

A Pair of Metis-Sioux Beaded Hide Half Leggings, each three-quarter length, sewn in numerous opaque and translucent shades of glass beadwork against a blacked hide ground with a column of stylized foliate elements, centering a pair of confronted birds, trimmed with printed calico cloth; remains of silk ribbon edging. Lengths 17½ in. (44.1 cm)

cf Penney, et al., 1992, p. 176, no. 104

\$2,000-2,500

Property of a New Jersey Private Collector

□ 165

A Pair of Plains Beaded Hide Ceremonial Moccasins, each finely sinew sewn in dark blue, greasy yellow and translucent red and green against a white lazy-stitched glass bead ground, with stacked confronted triangles around the foot, terpeded triangles encircling the ankle, a light blue field enclosing terpeded diagonal bars on the sole; tin cone and red horsehair pendants on the forked tongues, trimmed with red cotton cloth. Lengths 10½ in. (26.7 cm.)

\$2,000-3,000

See illustration in color plate with lot 145

□ 166

A Pair of Southern Plains Beaded and Fringed Hide Moccasins, each with hard sole and glass beadwork overall, a row of tin-cone feathers against a red-dyed ground along the top flanks with a pair of crosses against a green ground; black cotton cloth trim on the ankles. Lengths 10½ in. (26.5 cm)

\$2,000-3,000

See illustration in color plate with lot 145

Property of a New York Private Collector

□ 167

A Pair of Plains Beaded Hide Moccasins, probably Cheyenne, each with hard sole, vertical heel seam and drawstring through the high cuff, decorated with yellow ochre pigment, finely sinew sewn in white, yellow, pink, dark blue and translucent red; and cobalt blue glass seed beads, with a rectangular element containing a Makese cross and bar design. Lengths 9½ in. (24.1 cm.)

\$2,500-3,500

See illustration in color plate with lot 145

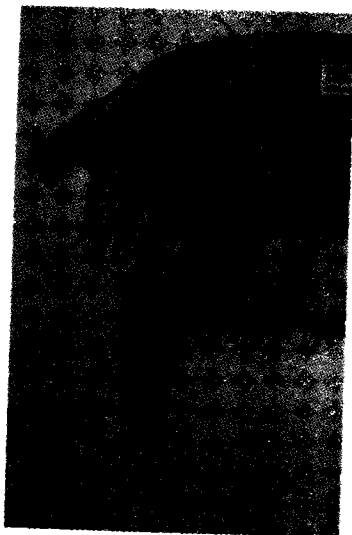
WASHINGTON COLLEGE Albee Collection
Property of a Northeastern Educational Institution

pale
shades
engels
ic bor-
louble

◆ □ 168

An Important Plateau Man's Beaded and Fringed Hide War Shirt, finely-tanned, of poncho form with open sides and partially sewn sleeves, decorated to the midsection with black pigment, overlaid across the shoulders and down each arm with buffalo hide strips, each sinew sewn in tiny glass seed beads in yellow, green, pink and three shades of blue against a light blue flat bead ground, with a sparse pattern of rectangular panels enclosing cross-like motifs formed by a checkered design, rectangular tabs on

-1,000



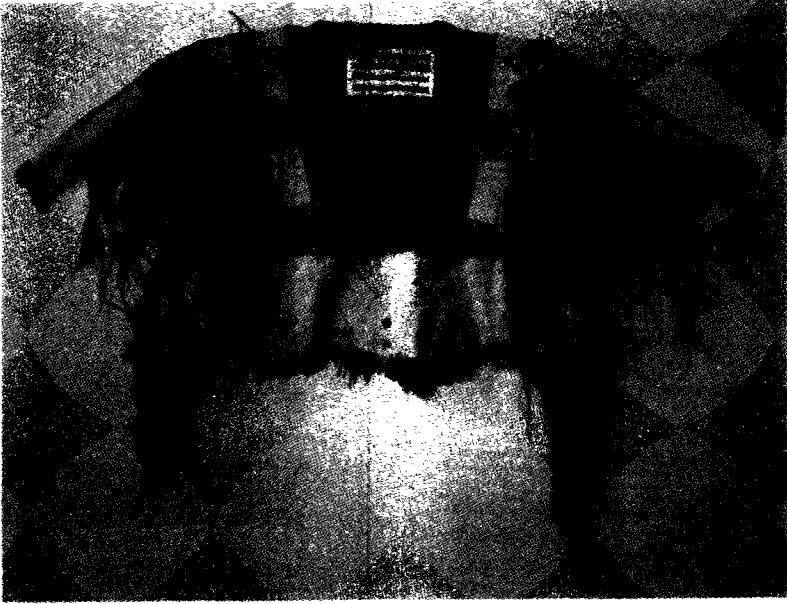
the neck stitched with linear designs in white glass beads against red-dyed hide grounds, decorated with rows of quill-wrapped human hair pendants, additional pendants of worn white animal fur wrapped on twisted cotton cord and bound with sinew and human hair, and two of pale blue-dyed horsehair (one plaited), the fringe cut shorter along the sides and hem, longer on the sleeves and on the extended flaps showing traces of fur; traces of feathers, sinew seams. Width across the arms 65½ in. (1.66 m.)

Provenance:

Presented by General R.S. Mackenzie to General H.W. Lawton and given to Captain George Emerson Albee in the field of battle.

The present lot and numbers 147-149, 169-173, 277, 281 and 381, were collected by George Emerson Albee, probably before 1870, and donated by his widow between 1930 and 1930. An entry in a local bulletin (October, 1930) states the following: "Mrs. Fredrika Strong Albee, has already given the College a revolutionary musket, now in the Albee Room, which was part of the valuable collection of guns, pipes and Indian relics belonging to her late husband, Captain George Em. Albee. Captain Albee presented the Connecticut Historical Society with the major part of his collection of Indian relics. The Captain played a prominent part in the Indian Wars and at one time was a fellow soldier with William Cook, later known as Buffalo Bill. The friendship formed on the frontier lasted a lifetime and many of the relics are reminders of stories which closely connect the two men."

George E. Albee joined the United States Infantry in 1867 and later received a Congressional Medal of Honor in January of 1894, for an incident which occurred at Brans River, Texas, October 26th, 1890, in which he "attacked with two men a force of eleven Indians, drove them



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the neck stitched with linear designs in white glass beads against red-dyed hide grounds, decorated with rows of quill-wrapped human hair pendants, additional pendants of worn white animal fur wrapped on twisted cotton cord and bound with sinew and human hair, and two of pale blue-dyed horsehair (one plaited), the fringe cut shorter along the sides and hem, longer on the sleeves and on the extended flaps showing traces of fur; traces of feathers, sinew seams. *Width across the arms 63 1/2 in. (1.66 m.)*

Provenance

Presented by General R.S. Mackenzie to General H.W. Lawton and given to Captain George Emerson Albee in the field of battle.

The present lot and numbers 147-149, 169-173, 277, 284 and 381, were collected by George Emerson Albee, probably before 1870, and donated to his widow between 1930 and 1930. An entry in a local bulletin (October, 1930) states the following: "Mrs. Fredricka Strong Albee, has already given the College a revolutionary musket, now in the Alumni Room, which was part of the valuable collection of guns, pikes and Indian relics belonging to her late husband, Captain George Emerson Albee. Captain Albee presented the Connecticut Historical Society with the major part of his collection of Indian relics. The Captain played a prominent part in the Indian Wars and at one time was a fellow scout with William Cody, later known as Buffalo Bill. The friendship formed on the frontier lasted a lifetime and many of the relics are reminders of stories which closely connect the two men."

George E. Albee joined the United States Infantry in 1867 and later received a Congressional Medal of Honor in January of 1891 for an incident which occurred at Brazos River, Texas, October 28th, 1869, in which he "attacked with two men a force of eleven Indians drove them

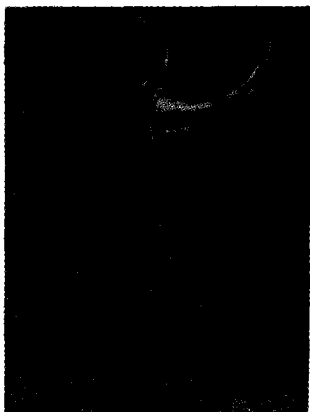
from the hills, and reconnoitered the country beyond." In a letter to the General of the U.S. Army dated June 1st, 1916, Albee (the retired Captain, U.S. Army) corrected the information stating that the incident occurred in September, 1869 while he was in command of detachments from "B" and "E", 9th Cavalry, with an expedition commanded by Captain Henry Carroll. He continues in the letter to state the following: "Gen. J.J. Reynolds commanding Dept. of Texas under date of Jan. 21, 1872, said that I had been especially conspicuous for the number of Indian expeditions in which I had been engaged, later on in 1874, when the Comanches, Kiowas and southern Cheyennes broke out and Gen. Mackenzie's expedition was being organized I was in Wisconsin on sick leave of absence, but I volunteered, and as I was so familiar with the region in which the expedition was to operate my services were accepted by Gen. Augur and I joined General Mackenzie at Fort Concho, and was out with him during the six months consumed in his movements, a portion of the time in command of his Indian Scouts, and was several times under fire in actual contact with the enemy."

In another letter, dated September, 1908, he states the following: "I was with the expedition against Comanches and Kiowas in the Staked Plains in September 1869, and received a Brevet for gallantry in the action of September 16th, 1869. I was with the Expeditions against the Comanches and Kiowas in the Staked Plains in October 1869 and of October 28th and 29th, 1869. The first expedition was commanded by Captain Henry Carroll, 9th Cavalry, and second expedition was commanded by Major John M. Baron, 9th Cavalry. I was also with Gen. R.S. Mackenzie's Expedition against Comanches, Kiowas and southern Cheyennes in the Staked Plains during the winter of 1874 and 1875. The Post records of Fort Clark and Fort Concho for 1868-1871 would probably show that during those years I took part in many smaller scouts besides those already specified."

\$60,000-90,000



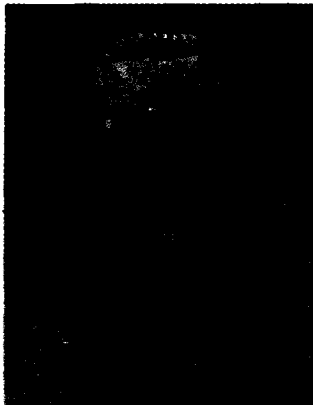
169



170

□ 169

- ◆ A Plains Cloth and Hide Dance Headdress, composed of a hide cap, decorated with yellow ochre pigment on the interior, a pair of red and black-painted animal horns secured to the sides, and white and bright blue glass beadwork on the headband, and long trailer behind, composed of a hide panel ornamented with green pigment, and a panel of red wool trade cloth, rows of cut and full black feathers applied overall. *Greatest length 36 in. (91.4 cm.)*



171

Provenance

Presented by H W Lawton to George Emerson Albee (see lot 138)

\$8,000–12,000

□ 170

- ◆ An Plains Cloth and Hide Dance Headdress, composed of a coarse hide cap, overlaid on the front with a hide headband, sinew sewn with a bar and zigzag pattern in white and dark blue glass beads, a pair of oversized steerhorns secured at the sides, a cluster of feathers and dyed horsehair on the crown, a hide "trailer" panel attached behind, overlaid with a (recycled?) panel of red tradecloth with remains of silk ribbon appliqué, decorated with long tufts of gray and purple-dyed horsehair. *Approximate length 34 in. (86.4 cm.)*

Provenance:

Collected by George Emerson Albee (see lot 138)

\$7,000–9,000

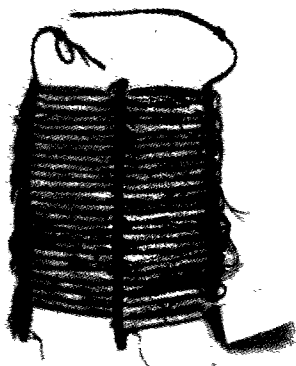
□ 171

- ◆ A Southern Plains Hide Dance Headdress, decorated with a beaded headband, sinew sewn in white and yellow over a deep blue glass bead ground, with a circle and zigzag pattern, a surmounted pair of carved wood horns at each side, one side painted in black, the other in dark green, and short strips of furred hide (much of the fur worn away) overall on the head, trimmed with a row of long white animal fur pendants wrapped with red tradecloth along the back, surmounted by a tapering porcupine crest, possibly a later addition, sinew sewn with similar imagery in white against a bright blue background, a row of eagle feathers inserted along the top, (now removed); ochre pigment on the cap, green pigment on the crest, native repairs. *Approximate length with pendants 22½ in. (57.2 cm.)*

Provenance:

Collected by George Emerson Albee (see lot 138)

\$6,000–9,000



172



173

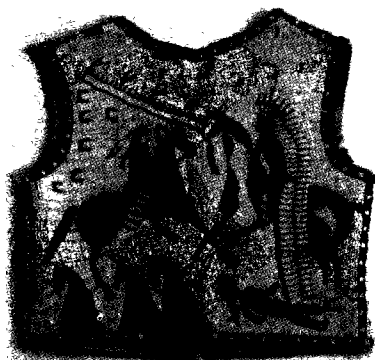
◆ □ 172

A Small Plains Dance Ornament, in the form of a breast-plate, composed of two columns of finely carved white stone(?) tubular pendants, strung horizontally between three thick hide strips, trimmed with cylindrical blue glass beads, hide fringe along the perimeter, twisted hide at the neck. Length $9\frac{1}{2}$ in. (25.1 cm.)

Provenance:

Collected by George Emerson Albee (see lot 168). A label accompanying this piece attributes it as Comanche, "Captured on Brazos River, Texas, October, 29, 1869".

\$1,200-1,800



174

◆ □ 173

An Unusual Southern Plains Fringed Hide Jacket, in an elongated style, composed of numerous panels of finely tanned skin thread-sewn together, decorated with a sparse area of glass beadwork stitched in an atypical diagonal style at the back, trimmed with numerous panels of finely-cut fringe, much of it twisted, and rows of tin cone "rattles", a series of domed metal buttons at the front for closure, remains of red mineral pigment, black pigment above the hem, cloth lining on the sleeves. Length $32\frac{1}{2}$ in. (82.6 cm.)

Provenance:

Collected by George Emerson Albee (see lot 168)

\$6,000-9,000

END OF WASHINGTON College

Property of an Arizona Private Collector

□ 174

A Sioux Pictorial Beaded Hide Child's Vest, sinew sewn in green, yellow, two shades of blue and translucent red against a white lazy stitched glass bead ground, with pairs of American flags on the front panels, pairs of tips in the lower fields, five-pointed stars with steel bead centers on the shoulders, the reverse decorated with a pair of confronted equestrian figures, possibly counting coup, one wearing a trailer bonnet and holding a feathered lance, aiming his bow and arrow at the other, a trio of horses and a dead warrior in the foreground, a series of horseshoes on the left field, a blue border of small rectangles overall; beaded button for closure. Length $13\frac{1}{2}$ in. (34.3 cm.)

\$12,000-15,000



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011

May 4, 1999

Senator Ben Night Horse Campbell
Chairman,
Senate Committee on Indian Affairs
838 Hart Senate Building
Washington, DC 20510

Re: Oversight Hearing, Implementation of NAGPA

Dear Senator Night Horse Campbell,

Hau Kola!

As a quick introduction and purpose of this letter, I am Jhon Goes In Center, an enrolled member of the Oglala Lakota Nation. Presently, I am in the private sector of business as well as being significantly involved with NAGPRA issues. I am on the Board of Trustees at the Denver Art Museum and have been professionally and personally involved with the implementation of NAGPRA. A unique blend has taken shape as a result of my involvement and therefore I am submitting a proven concept that meets the spirit of NAGPRA. Hopefully you can consider this concept that will be of importance in your assessment of where NAGPRA is and what can assist the processes of NAGPRA.

The enclosed information is a formal paper that has been formally presented at the Museum Computer Network Conference in Santa Monica last September as well as most recently at a world renowned Geographic Information Systems Symposium called GIS'99 in Vancouver, British Columbia, Canada. Interesting enough, my close colleague and co-author, Mr. Bryan Marozas, an enrolled member of the Bad River Band of Ojibway, presented this concept to the National Review Committee during the Sante Fe NAGPRA National Review Committee meetings last December. Shortly there after I presented this concept to Dr. Timothy McKeown of the National Park Service in Washington. McKeown's comments were that he liked the concept and application and that the Park Service would implement it if it became a recommendation of the National Review Committee. Therefore, I do believe this application provides a solution for the repatriation of Culturally Unidentified human remains. As we both know, this issue is in the forefront of what the Native people are most concerned with in the context of NAGPRA. In all instances, this concept has been reviewed by museum professionals and Native practitioners of NAGPRA and is well received. We will be presenting this concept again at the American Association of State and Local Historical Society's Annual Meeting in Baltimore this coming September. Also, I reference Ms. Barbara Sutteer, the Native American Liaison for the National Park Service. She too sees the relevance of this concept.

This concept was borne out of a perception of actual needs and perceptions that leans toward the side of Native people's concepts of synthesizing cultural data. This also shows how museum information can be better presented in a format that identifies a sense of cultural affiliation through geography while making their data more accessible to researchers and the general public. Perhaps this concept will stand to make a point as well to keep in place the references to Native geography that the proposed amendments to NAGPRA that are being overlooked. I have highlighted for your convenience key phrases for your perusal of the formal paper. Our addresses are attached to the concept paper and we stand ready to talk further with you.

Sincerely,

56-249

Responsible Implementation and Application of GIS Technology

GIS with a vision ...



Looking for the next computer
(a GIS application circa 1970)

Use of GIS in
Cultural Issues

The Role of Spatial Information in the Assessment of Cultural Affiliation

Marozas, Bryan A., GIS Coordinator, BIA - Albuquerque Area Office, P.O. Box 26567, Albuquerque, New Mexico 87125, USA, Phone: (505) 786 3334, Fax: (505) 786 1453, e-mail bryan_marozas@mail.bia.gov

Goss In Center, Jhon, President, Innovative GIS Solution, Inc., Suite 300, 2000 S. College Ave., Fort Collins, Colorado 80525, USA, Phone: (970) 490 5800, Fax: (970) 490 2300, e-mail: jgic@innovativegis.com

Thirteenth
Annual
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on Geographic
Information
Systems



Abstract

The historical aspect of the "Access to Americas" project discusses the accessibility and sharing of information relevant to the Native American Graves Protection and Repatriation Act (NAGPRA). In support of this effort, this paper addresses a set of information that is available, yet seldom used, by the cultural heritage information community. It is the premise of this paper that spatial information can be utilized to assist in the assessment of cultural affiliation. Since human remains and associated funerary artifacts can be geo-referenced, it is possible that ancillary sets of spatial information, such as aboriginal territories, reservation boundaries and cultural event sites, may be utilized to discover a relationship between unidentified human remains, funerary artifacts and cultural affiliation.

Introduction

Determining the cultural affiliation of prehistoric remains is often a difficult task for both archaeologists and Indian people. Archaeologists attempt to identify cultural affiliation based upon geographic location and the content of the archaeological record. Tribal people trace ancestry through oral information about occupancy and movement throughout a territory. In an attempt to help both archaeologists and Indian Tribes/Native Hawaiian Organizations to work together, this paper will discuss the role of spatial information in the assessment of cultural affiliation. It will also discuss the role of the Native American Graves Protection and Repatriation Act (NAGPRA).

The role of spatial information in NAGPRA procedures seems to be under-emphasized and remains unexplored even though Section 5, "Inventory for Human Remains and Associated Funerary Objects," calls for a determination of geographic and cultural affiliation. Museum inventory lists often provide only a geographic reference for human remains as a Cartesian coordinate, reference

to a Township and Range grid, a provenience or a State. In this format the lists of geographic references provided to Indian Tribes and Native Hawaiian organizations for unknown human remains are of limited utility and will not enable a Tribal community to make a determination of cultural affiliation. However, the geographic references for unknown human remains do have utility and cultural relevance when they are placed on a map and associated with geographic reference features such as aboriginal territory, reservation boundaries and cultural event sites. When the geographic locations of human remains are delivered to a Tribal community in map format, the Tribal community has a valuable set of functional data which can be used to place the location of the human remains in context. This is especially true when the geographic information is presented in a format that allows the Tribal community to overlay the geographic information with an archaeological record. This would allow the Tribal community to determine the utility of the data they have over to Tribal communities by displaying the locations of unidentified human remains in map format.

It seems logical that maps of originally occupied lands or aboriginal territories should be a necessary part of burial site protection and the repatriation of human remains and funerary objects. In fact, the collection, display and analysis of the following types of relevant spatial information could significantly aid the entire process of assessing cultural affiliation.

- Tribal aboriginal territories (including: traditional land use areas, originally occupied lands, historic resource use areas);
- Tribal ceded lands (including: delineation and quantification of lands taken and delineation/quantification of off-reservation resources);
- Reservation boundaries;
- Reservation land ownership/tenure;
- Federal (including National Park boundaries), State, County and Municipal administrative boundaries;
- Historic maps prepared by Indian people;
- Treaties;
- Oral histories;
- Census records;
- Archaeological sites;
- On and off reservation traditional land use and resource harvesting locations; and
- Significant event sites, i.e., shrines, battlefields.

Each of these sources of spatial information can be used to assess or establish spatial relationships between unclaimed human remains and tribal communities.

Spatially Assisted Ethnographic Research

The efficiency of the entire NAGPRA process would be improved if the above types of spatial information were collected and used to supplement the ethnographic research required to assess cultural affiliation. Since human remains and associated artifacts can be geo-referenced to a real-world coordinate system (i.e., UTM or State Plane), it is possible that basic cartographic overlay methods can be utilized to examine the relationship between the location of the human remains and other relevant geographic features such as aboriginal territories, reservation boundaries, etc. For example, a basic map overlay operation may allow a tribal community to discover that unknown human remains fall within a mapped aboriginal territory or a reservation boundary or within a certain proximity to a cultural event site. The tools to facilitate the map overlay process and conduct proximity analysis can conveniently be found in Geographic Information Systems (GIS) which can inventory, manage and analyze many disparate types of spatial information.

As a case in point, the authors developed a GIS application designed to use aboriginal territories in the determination of cultural affiliation for unknown human remains. The premise of the application is that the simple cartographic overlay process of displaying the locations of burials without a cultural affiliation, with judicially determined aboriginal boundaries, would allow tribal and academic researchers to make an initial determination of possible cultural affiliation. To demonstrate this process, unknown burial sites that had easting and northing coordinates in UTM projection zone 12 and zone 13 were selected from the ARGUS database of the Colorado Historical Society (CHS), Office of Archaeology and Historic Preservation. The ARGUS file is not in a fixed field format. Although the file is comma delimited, there are numerous textual comments filling most of

the columns. Thus, CHS staff were required to perform several processing steps to produce a simple ASCII file containing the site identification numbers and geographic (x,y) coordinates for the unknown burial locations.

After the authors received the ASCII file, additional editing steps were required to produce a file acceptable for use with the Arc/Info GIS software. The result of this experience led to the realization that there is a need for museum database standardization as well as a requirement for a flexible data management environment which enables SQL functions on museum databases.

Using the Arc/Info GIS software, the site identification numbers, eastings and northings for each file record were used to generate two point layers in the GIS. The point layer in UTM zone 12 and the point layer in UTM zone 13 were then projected to the Albers Equal Area projection and appended into a single layer. Next, the points were displayed with the boundaries of the west-central United States in the Albers Equal Area projection. The source for the state boundaries is the United States Geological Survey (USGS) 1:2,000,000 scale Digital Line Graph.

Basically, this is a simple map overlay operation which allows the tribal community to identify in which state the unknown burials are located. Since the source for the points was the State of Colorado, it was not surprising for all the points to fall within the state line. However, this operation might be valuable for files from museum collections in which a state or province is unknown.

Next, the points and state boundaries were displayed with a polygon layer delineating the "Judicially Established Indian Land Area." The 1:2,000,000 scale USGS source map delineating exclusive tribal land occupancy adjudicated by the Indian Claims Commission (ICC) as of 1978 was automated and inserted into a GIS by the Bureau of Indian Affairs Geographic Data Service Center, Lakewood, Colorado. The layer is in the Albers Equal Area projection, and each polygon contains the following attribute information: Claim Name (Tribe/Band), Owners (Tribe/Band), ICC Docket number, Indian Title date and ICC citation.

Aboriginal Territory Identified by the Indian Claims Commission

The aboriginal territory boundaries used in this example delineate areas of "Indian Title" adjudicated during the Indian Claims Commission (ICC). The Indian Claims Commission operated between 1946 and 1978 and received all claims which sought compensation for lost title lands. However, for a tribe to obtain compensation, they had to prove "Indian Title." Indian title "refers to the possessory right of an Indian tribe to occupy and use the area of land it has traditionally used" (Yarborough 1978, p. 128).

The geographic area of Indian title was reconstructed in the ICC by combining testimony from witnesses such as ethnologists and archaeologists who presented evidence which helped establish extent, length and type of land use. Thus, the court manufactured Indian title (areas of indigenous occupancy). During the ICC process a boundary had to be established and exclusive land use zones charted on a map so that areas could be calculated. Interestingly, the boundaries had to document exclusive occupan-

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cy even though several tribes may have jointly used an area. The effect of this rule was that some tribes were not compensated for their entire aboriginal territory and that many areas could not be claimed by any tribe because they were actually joint use lands.

Although the ICC-derived zones of exclusive use and occupancy do not really coincide with a tribe's true aboriginal territory, these boundaries can be considered to be a fair approximation of the aboriginal territory.

For example, in Figure 1 we see that sites of the unknown burial locations in Colorado fall within the aboriginal territory of the

Cheyenne and Arapaho Tribes. When the locations of these human remains are plotted as graphic form and displayed with judicially established aboriginal boundaries, the Cheyenne and Arapaho Tribe can rapidly make a determination as to whether or not they are interested in these remains.

Once a Tribe uses the map overlay process to identify unknown human remains of interest, the site identification numbers can be used to begin the process of searching for additional information to support a cultural affiliation. However, since these are unknown human remains, the museum inventory databases offer few clues for cultural affiliation. For example, the site documentation for unknown burial location 5DA105, in the Cheyenne/Arapaho aboriginal territory, identifies cultural affiliation as "unknown."

In this case, using the map overlay process to make the initial determination of cultural affiliation as Cheyenne/Arapaho becomes significant. Perhaps additional support for a Cheyenne/Arapaho cultural affiliation could be established by examining the spatial proximity of the human remains to Cheyenne or Arapaho encampments identified in the archaeological record or other cultural event sites.

In addition to a lack of information on cultural affiliation, museum records often lack geographic coordinates which can be used to place unknown burial locations within an aboriginal territory. In order to demonstrate the above map overlay process, only unknown burial locations with geographic coordinates (x,y) were selected from the CHS ARGUS files. The remaining records in the CHS ARGUS files either do not have geographic coordinates or the documentation provided geographic location information in terms of a grid reference system (i.e., Townships, Ranges and Sections). Obviously, it is difficult to define the position of a point using a grid reference system. However, Public Land Survey grids can be overlaid with aboriginal territory boundaries so that those unknown burial locations, identified by a specific Township, Range and Section, can be correlated with an aboriginal territory.

Clearly, the lack of cultural affiliation and geographic reference information in museum records is a hindrance to the determination of cultural affiliation. However, an effort to standardize museum records to include geographic positions will do much to enhance Tribal efforts in determining cultural affiliation. Once museum databases are standardized, the attribute information in the GIS can also be enhanced.

For example, information on the cultural affiliation of human remains can be added to the map graphic provided to the Tribal community. In Figure 1, two sets of human remains fall within the Navajo aboriginal territory. For these sites the cultural affiliation has already been determined to be prehistoric Pueblo. If the known cultural affiliation was added to the map or the feature attribute table for a GIS layer, the utility of the map for Tribal communities would be increased.

Of course, additional research will have to be conducted to authenticate cultural affiliation. If Tribes, Museums and Government agencies wish to use the methodology outlined above to assist in determining the cultural affiliation of unknown burial sites, they must take into consideration the fact that the boundaries of aboriginal territories manufactured by the ICC and delineated in the 1978 "Indian Land Areas Judicially Established" map are only a fair approximation of the aboriginal territories perceived by tribes. As noted by Irene Sutton, only rarely did the boundaries of "adjudicated claims coincide with those of tribal claim areas" (Sutton 1985, p. 129).

For some Tribes, the 1978 "Indian Land Areas Judicially Established" map cannot be used at all because the Tribe did not receive an adjudication of their original occupancy area. For example, in Figure 1, eleven of the Colorado burial locations fall in an area that appears to be the aboriginal territory of the Ute. However, according to the ICC, the area labeled as Ute did not receive an "adjudication of original occupancy" (Yarborough, 1978, Map legend). Research reveals that the Southern Ute claim was "dismissed with prejudice" because the case had been settled elsewhere. Thus, the area shaded as Ute in Figure 1 was not adjudicated to any tribe. Since many of these unknown burial locations would traditionally be within the aboriginal territory of the Ute, as well as many other Tribes, the process of overlaying burial locations should be continued one step further by re-defining and automating, for insertion into a GIS, tribally defined versions of aboriginal territories. Since the ICC did not define "Judicially Established Indian Land Areas" for the Southern Ute and Ute Mountain Ute, the Tribes cannot re-delineate their aboriginal territories. Nevertheless, it is possible for the Ute Tribes to define aboriginal territories as they see fit.

Rather than making decisions based upon the court contrived boundaries of the "Judicially Established Indian Land Areas," Tribes have the opportunity to re-delineate aboriginal territories from their own perspective. Importantly, the ability of the GIS to overlay and intersect disparate data sets will benefit Tribes in their endeavors to re-delineate aboriginal territories.

Re-delineation of aboriginal territory boundary lines may begin with mapping: a.) event sites related through oral histories; b.) watersheds; and c.) extent of traditional resource use areas. Mapping may also include information obtained from historic maps or the integration of the boundary lines presented by ethnographers as testimony in the ICC before the court-adjusted boundary lines.

As long as all the different boundary lines are adjusted to a

common datum, the GIS can also be enhanced. For example, information on the cultural affiliation of human remains can be added to the map graphic provided to the Tribal community. In Figure 1, two sets of human remains fall within the Navajo aboriginal territory. For these sites the cultural affiliation has already been determined to be prehistoric Pueblo. If the known cultural affiliation was added to the map or the feature attribute table for a GIS layer, the utility of the map for Tribal communities would be increased.

Aboriginal Territories Re-defined by American Indian Tribes

The process outlined above should only be considered for use in making an initial determination of cultural affiliation. Of course, additional research will have to be conducted to authenticate cultural affiliation. If Tribes, Museums and Government agencies wish to use the methodology outlined above to assist in determining the cultural affiliation of unknown burial sites, they must take into consideration the fact that the boundaries of aboriginal territories manufactured by the ICC and delineated in the 1978 "Indian Land Areas Judicially Established" map are only a fair approximation of the aboriginal territories perceived by tribes. As noted by Irene Sutton, only rarely did the boundaries of "adjudicated claims coincide with those of tribal claim areas" (Sutton 1985, p. 129).

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As long as all the different boundary lines are adjusted to a

standard base map before automation, the abilities of the GIS can be used to combine the different boundary lines into an acceptable new aboriginal territory boundary. In other words, it is possible to map, automate and enter into the GIS various versions of Tribal aboriginal boundaries from different sources. Once residing in the GIS, the boundaries can be displayed and overlaid with one another, or overlaid with resource utilization zones. Through a comparative analysis process, the most logical boundary can be determined.

After a redefined aboriginal territory has been agreed to, the boundary line can be overlaid with resource use zones, reservation boundaries and administrative boundaries such as state and county lines. Maps resulting from the overlay process could be used in the burial protection and repatriation process to visualize Tribally defined aboriginal territories.

Regardless of the source, re-delineating aboriginal territories will probably result in a variety of different boundary lines. Importantly, these new boundary lines will extend beyond the ICC defined aboriginal territories into the "Judicially Established Indian Land Areas" of other Tribes. Thus, the process of defining or re-delineating aboriginal territories should be of interest to most tribes in North America, especially in those regions where many tribes are identified as historically occupying the same territory. A tribally initiated re-delineation of aboriginal territories would be especially critical in determining which tribes have affiliation with or responsibilities for burial sites or cultural items in overlap zones. Again, the abilities of the GIS to overlay disparate data sets would allow Tribes to visualize and measure the overlap between tribally defined aboriginal territories.

In situations where it is difficult to determine the tribal affiliations of cultural materials, museums could assist Tribes in the process of defining or re-delineating aboriginal territories by providing technical support such as mapping and research. Through such an effort, museums take NAGPRA beyond the legislative requirement and actually provide the Tribal communities with functional data.

Land Cession Areas

The Indian Claims Commission utilized two types of maps. The first type of map, as described above, was used to establish Indian title claims. The second type of map used by the Indian Claims Commission was the 1899 Royce map. The Royce maps documented land cessions based upon Treaties and Executive Orders. The Royce maps only recorded prominent geographic features and simply drafted lines in locations where the "terrain and drainage were hardly known or in the absence of survey grids" (Sutton 1985, p. 112). For the ICC, the Royce maps were only pertinent to cases regarding claims for recognized title lands and had little impact on litigation establishing Indian title or claims of original occupancy.

It would be possible to automate the boundary lines on the Royce maps in order to produce a ceded lands layer. Once the layer was automated, it could be used for comparative analysis purposes in the re-delineation of aboriginal territories or development of alternative versions of aboriginal territories.

Reservation Boundaries

Overlaying the locations of human remains with a reservation boundary that falls within the same Tribe's aboriginal territory will help to support claims of cultural affiliation. In fact, the

reservation map overlay process is not even necessary for the assessment of cultural affiliation.

It is important to note that the reservations established for some Tribes are not within their own aboriginal territories. In these cases it may be helpful to overlay reservation boundaries with the locations of unknown human remains. Such overlays will be important for establishing responsibilities and protocols when human remains located in one Tribe's aboriginal territory are found on another Tribe's Reservation.

Although the example displayed in Figure 1 does not illustrate such a coincidence, it is possible, for example, that unknown human remains can be recorded for a location within both the Ute Mountain Ute Reservation and the Navajo aboriginal territory. Obviously, illustrating these locations on a map would be important if the Navajo, Ute Mountain Ute and Pueblo Tribes were interested in making a determination of cultural affiliation. Such a map would rapidly convey information to the Navajo and Pueblo Tribes and promote the establishment of dialogues with the Ute Mountain Ute tribe regarding the responsibility for the human remains.

Historic Indian Maps

Historic maps prepared by Indian peoples on birch-bark and other materials will play a significant role in the NAGPRA process. Obviously, these maps are difficult to find. However, we believe that an effort should be made to locate such maps and determine their utility in the identification of cultural affiliation. In addition, we would like to conduct research into the possibility of using a GIS to simultaneously display current cartographic representations of landscapes used by Indian people and proto-historic and historic maps of the same locations actually produced by Indian people.

Oral Spatial Information

Traditional indigenous ecological knowledge is often in an oral format similar to oral histories. Since the indigenous ecological knowledge held by Indian people is spatial in nature, it is possible that it can be translated into map form and put into a GIS for: 1.) land use planning purposes, 2.) protection of traditional and cultural resources, and 3.) preservation of traditional ecological knowledge.

Oral histories are spatial in nature since they contain vast information on land use and event sites. If it were possible to translate the oral land use information into a map form to be inserted into a GIS, the spatial information from oral histories could be used in the NAGPRA process of determining cultural affiliation.

The incorporation of traditional land use information into a GIS is a topic that has not yet been thoroughly researched. We are interested in conducting research which examines how indigenous oral information, which is of a spatial nature, can be translated into a map format, automated, and used in a GIS. Modern cartographic representations of a landscape used by indigenous peoples are suitable for the translation of oral spatial information. New mediums for representing space will have to be developed because there is a polarity between how indigenous peoples represent space and the Euro-American icons of spatial representation. Any research into incorporating oral histories into map form will have to take this fact into consideration.

Treaties

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Treaties contain spatial information that should be examined for relevance to NAGPRA. We believe that treaties should be included in the list of source documents relevant to determining the tribal affiliation of cultural items.

Relevance of Research

In order to understand the relevance of the aforementioned application project, an actual review of the application was presented to the Office of Archaeology and Historic Preservation (OAHP) staff at the Colorado Historical Society where it was met with much enthusiasm and a commitment to go forward with more data. The authors commend CHS for its forward thinking in being proactive rather than reactive toward the principles of NAGPRA. Significantly, a 1:2,000,000 scale plot of the map featured in Figure 1 was presented to the Cheyenne Tribe of Oklahoma by the CHS Archaeological Information Specialist should they consider submitting a claim for the unclaimed human remains that once resided in their traditional territory.

In an attempt to further explain the relevance of the research to Tribal members and museum staff, the authors developed an automated application which demonstrates the simple cartographic overlay process discussed in this paper and a query of the attribute database for the unknown human remains used in the overlay process. The application and 1:2,000,000 scale plot of the map featured in Figure 1 were also presented to members of other Tribes involved with NAGPRA. The demonstration and opportunity to view the map resulted in comments indicating that the previously unclear museum data was now clear and understandable and, most importantly, recognizable to Tribal elders who have the responsibility of making determinations of cultural affiliation in their respective communities.

With sincere interest, the authors suggest that the information guidelines for the Native American Graves Protection and Repatriation Act (NAGPRA) should be evaluated and standardized to incorporate appropriate information technologies. NAGPRA mandates a process of dialogue and negotiation between affected Museums, Federal Agencies and federally recognized Tribes and Native Hawaiian Organizations. Significant milestones have been passed since the signing and implementation of NAGPRA. The appointment of the National Review Committee and funding for Tribes and Museums to start the consultation process were both critical to the implementation of NAGPRA. An all-important timeline for the Museums and Federal Agencies to send their artifact collection inventory summaries to all Federally recognized Indian Tribes and Native Hawaiian Organizations was mandated and completed by November 16, 1993. Two years from this date, the additional inventories and summary of human remains, associated and unassociated, and culturally unidentifiable funerary objects were sent to Tribes for their review and determination. Another significant event occurred on July 7, 1994 when Secretary of Interior Bruce Babbitt announced the first awards for 41 out of 220 submitted proposals from Museums and Tribes to be funded by the Act. The Secretary praised the 41 projects as "exemplifying the type of partnership between museums and Indian Tribes that is mandated by the Act."

Such statements support the timeliness and importance of the Geographic Information System application discussed herein. This application was developed to augment the intent of the law and to facilitate the insurance of ongoing relationships that have been developing since the funding of competitive and collaborative proposals. In adhering to the regulations of the Act, the most important criteria that Indian Tribes and Native Hawaiian Organizations have to meet are the affiliation prerequisites required to enter into the claims process. Only after this initial step are the claimants able to submit an intent to repatriate human remains, associated and unassociated funerary objects, objects of cultural patrimony and sacred objects. As in every disputable case, the preponderance of evidence resides with the Indian Tribe or Native Hawaiian Organization to prove cultural affiliation. The authors of this research suggest that a GIS may be utilized to present a visible and efficient way to procure and organize the information needed to meet the stringent requirements of the Act.

Individuals responsible for establishing affiliation to human remains and artifacts, may experience difficulties understanding the numerous similarities sent to them from museums throughout the country. The process of establishing any kind of affiliation would most easily be undertaken by referencing geographic areas such as aboriginal ancestral territory, Treaty land or Sacred and Cultural event sites. The importance of Tribal negotiations and claims cannot be overlooked during this process. Therefore, a map of geo-referenced museum data would circumvent the hardships of Tribal elders and Tribal Cultural committees and greatly assist them to understand and synthesize museum documentation. It is the authors' belief that

The ongoing dialog between Indian Tribes/Native Hawaiian organizations and museums indicates that the disposition of human remains is of the highest priority. Sacred objects and funerary objects are also very important. The topic of human remains is sensitive and emotional for Indian Tribes/Native Hawaiian Organization delegations. Clearly, an innovative approach and presentation of information products generated by a museum or Federal agency would go a long way to instill the intent and spirit of the law as well as establish and maintain reciprocal relationships.

The authors respectfully present an application that facilitates and expedites the processes of NAGPRA with the geographic presentation of geo-referenced museum data. As citizens of their respective Tribes, the authors have considerable experience and sensitivity in understanding both the museum and Indian perspective and have taken the initiative to promote this application on behalf of Native peoples and museums. The geographic representation of museum data, not only benefits Indian Tribes in their repatriation claims, but also helps museums to better understand their data. As cultural, historical and educational institutions, most museums already have missions that guide their role in society. In the 1991 report, *Excellence and Equity*, the Chair of the American Association of Museums Task Force on Museum Education, Bonnie Pirman, wrote about such a mission in referencing the title of the task force's report. "The title links two concepts - excellence and equity. By giving these concepts equal value, this report invites museums to take pride in their traditions as stewards of excellence and to embrace the cultural diversity of our

nation as they foster their tremendous educational potential. Both elements—excellence and equity—must be imbedded in everything we do if museums are to serve a rapidly changing world in a meaningful way.” With such statements and directives, every cultural institution can eventually implement and incorporate information technology as a mean to fulfill its mission. Information and data standards beyond the mandate of any law will ultimately assist any progressive museum toward better communication with its partners and clients.

The authors acknowledge certain individuals and institutions for their support and insights. Truly this GIS application is a manifestation and complement of experiences, skills and importance, the collective world-views that portray an effort to provide a solution to a problem.

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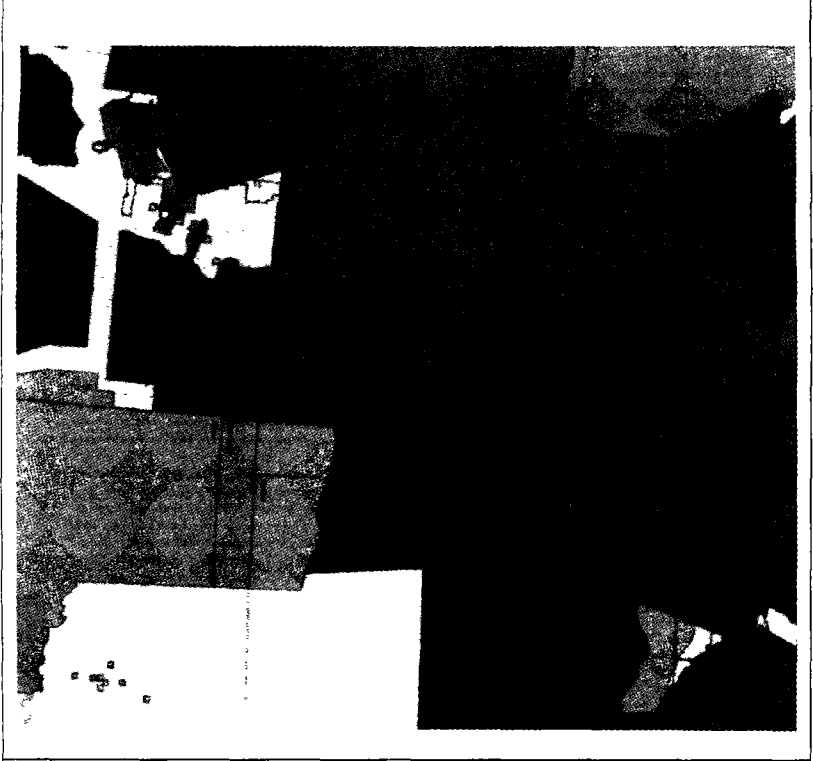
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His diverse experience and involvement has him participating on many boards locally, regionally and internationally. Such are the External Advisory Board for the Environmental Policy Institute for the College of Natural Resources at Colorado State University in Fort Collins, the Denver Art Museum and the Western American Indian Chamber in Denver, Colorado

Goes In Center is an active member of the American Indian Science and Engineering Society and is a member of the Faculty and Aboriginal Programs Advisory Council for the Banff Centre of Management in Banff, Alberta, Canada. There he teaches and advocates technology transfer processes for First Nations and Native American people



**Tribal Aboriginal Territories
and
Unclaimed Burials in the State of Colorado**

- Sacabans
- D'AV
- Shaw
- Pawnee
- Cheyenne & Arapaho
- Kiowa
- Archaic
- Pueblo
- Navajo
- Hopi
- Ute
- Reservation Boundary



1:50,000 Scale



This map was prepared by the U.S. Geological Survey, Denver, Colorado, under contract to the U.S. Department of the Interior, Bureau of Land Management, Denver, Colorado, 1988.