

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING ON
“FINDING OUR WAY HOME: ACHIEVING THE POLICY GOALS OF NAGPRA”

TESTIMONY OF

MARK MACARRO
CHAIRMAN
PECHANGA BAND OF LUISEÑO INDIANS

June 16, 2011

Good afternoon, Chairman Akaka and distinguished members of the Committee:

My name is Mark Macarro and I am Chairman of the Pechanga Band of Luiseño Indians, located in Southern California. On behalf of the Pechanga People and our ancestors, we thank you for the opportunity to participate in this oversight hearing on achieving the policy goals of the Native American Graves Protection and Repatriation Act (“NAGPRA”). The protection and proper treatment of our ancestors and their personal items is a responsibility the Pechanga People accepts with pride. Each day our Tribe faces the destruction of and desecration to our cultural resources, including human remains, and constant threats to our sacred and cultural places.

Our People have taken steps to proactively protect these vital components to our heritage, cultural worldview and self governance; however, existing federal (and state) laws simply do not always provide sufficient protection for the resources that are housed in museums and educational facilities, as well as those items which are subject to disturbance every day because of development, both on and off federal lands. It is this constant struggle that we endeavor to succeed in honor of our ancestors. We appreciate the opportunity to provide helpful examples and suggestions for the Committee’s consideration on how we can strengthen NAGPRA to better assist all tribal peoples across the United States in their duty to care for their ancestors and cultural items.

I. INTRODUCTION: “SACRED IS THE DUTY TRUSTED UNTO OUR CARE AND WITH HONOR WE RISE TO THE NEED”

For more than twenty years, the Pechanga Band of Luiseño Indians (“Pechanga Tribe” or “Tribe”) has invested significant resources in our cultural resource protection program. I am proud to say that the result of our efforts include: a state of the art curatorial facility that meets federal standards and which includes both tribal and non-tribal curation staff; a full staff dedicated solely to the identification, preservation and protection of the Tribe’s invaluable and irreplaceable resources both on and off reservation; and technological advancement, including a full-fledged GIS department housing our data and information concerning resources in the Tribe’s traditional territory, which often times surpasses the information and technology of the agencies with management control over tribal resources. In the spirit of cooperation, and in the interest of our cultural resources, the Tribe is able to offer its resources and expertise to assist federal, state and

local agencies in identifying and avoiding impacts to known resources and cultural sites as well as planning for impacts to areas with the potential for unknown resources. To further our duty to our ancestors, we have successfully developed and implemented a professional tribal monitoring program that allows us to have highly trained and skilled tribal representatives work side by side with archaeologists to offer the highest protection to our ancestor's physical and cultural remains.

However, despite the opportunity to achieve these cultural protection milestones under NAGPRA and otherwise, the Pechanga People still face a constant struggle to reclaim, protect and preserve our ancestors and their cultural belongings. The legal framework available to us is insufficient and lacking in many areas. In too many situations NAGPRA and its counterparts do not go far enough to protect these resources, provisions are simply implemented incorrectly, and in some cases, ignored all together. We hope these comments and the examples we provide below will enable the Committee to see the real world challenges faced by the Pechanga Tribe today, as well as other tribal nations across the United States, and will encourage your Committee to take action to make NAGPRA work better for all Indian Peoples.

II. ISSUES, REAL WORLD EXAMPLES AND POTENTIAL SOLUTIONS

To provide the Committee a solid understanding of the practical issues facing the Pechanga Tribe, and many other tribes in the Nation, with regard to NAGPRA, we provide several examples below. We hope the Committee will find these illustrations and accompanying suggestions helpful as the laws and policies are reviewed and changes contemplated.

a. Intentional Excavations and Inadvertent Discoveries

While the Pechanga Tribe has concerns about how NAGPRA is implemented for those remains and items in the possession of museums and educational facilities, we also face day to day issues with current and future disturbance of our ancestor's final resting places and cultural sites. NAGPRA, while focused heavily on the return of items to tribes, also provides for the treatment and disposition of remains and cultural items found on federal (and tribal) lands through intentional excavations and inadvertent discoveries. Below is an example of how we are confronted with the shortcomings of these provisions on a frequent basis as we work closely with one of our neighboring federal agencies.

Example: The Camp Pendleton Conundrum

The Marine Corps Base Camp Pendleton ("MCBCP" or "Base") is located within the Pechanga Tribe's traditional aboriginal territory. The Tribe works very closely with Base staff through consultation and tribal monitoring on permitted development projects that occur within the Base. The Tribe and the Base have programmatic agreements in place, as well as agreements that provide for tribal monitoring to address any cultural resources that are surveyed or uncovered. In addition, the Base has developed on its own a protocol for handling situations governed by NAGPRA and in recent months the Base has engaged the local tribes in reviewing and potentially revising the protocol. However, despite the existence of these types of agreements among Pechanga, MCBCP and other interested Tribes who may have cultural affiliation to the items which will or may be uncovered or excavated during a project, the items are often not returned promptly or

handled expediently. Unfortunately, human remains and cultural items must still go through the lengthy, cumbersome and culturally insensitive process of “Custody” pursuant to 10.6 of the Part 10 Regulations (43 CFR 10.6), which process includes notice, a claims process and publication of the details of disposition of such items, before the final disposition and/or repatriation of the remains and/or items can be carried out.

When tribes and lineal descendants already accepted as the affiliated tribes are involved in a permitted project taking place on federal lands, deference should be given to the agreements between those parties. The Pechanga Tribe has been told by the MCBCP that even though we have agreements in place concerning treatment, disposition and repatriation of items subject to NAGPRA, the Base is not able to transfer custody of those items without going through the entire Custody and Notification process in NAGPRA as those items technically became part of federal collections. This process is both culturally inappropriate and offensive because of the requirement to publish the plans for proposed disposition in newspapers of general circulation and is time consuming, costly and repetitive. The Tribe has to wait months, sometimes much longer, before items are repatriated even though agreements to repatriate have already been reached between the federal agency and the Tribe.

Solution: Deference to Agreements

Since its passage, the consultation process under NAGPRA has resulted in, for the most part, a positive relationship between the Tribe and MCBCP, as well as other federal agencies. However, as is so often the case with legislative attempts to “right wrongs,” the *application of the law* in a practical and real world manner often conflicts with how the law was originally conceived. The example above demonstrates how the intent of NAGPRA was to not only return those remains and cultural items to their rightful peoples, but also to develop strong relationships among, in particular, federal agencies through the consultation and treatment provisions of the law. However, as we have discovered, that intent is hampered by the law itself because even when the Tribe and federal agency can reach an agreement, the return of items is slow and cumbersome, resulting in further disrespect to those remains and resources and affected tribal peoples.

To address this “conundrum” we propose that the Intentional Excavation and Inadvertent Discovery sections of NAGPRA be amended to include provisions giving deference to previously reached agreements concerning treatment and repatriation where all the relevant and appropriate parties are involved in a permitted project. This could be in the form of a written Plan of Action concerning the remains and items subject to NAGPRA or other agreements that address the pertinent issues. We believe that this will ensure that the final disposition of items happens in a more timely and respectful manner. In addition, such a provision will also aid in honoring the confidentiality issues important to tribes, including details concerning the resources’ identity and disposition and in some cases, location.

Solution: A More Tribally Inclusive Approach

Because of the experiences of the Pechanga Tribe, we believe that the NAGPRA sections covering intentional archaeological investigations and inadvertent discoveries must encompass a more inclusive and broader approach to the treatment of the remains and cultural items still in their

final resting places, yet facing potential or certain disturbance and destruction by future development activities.

For example, the processes outlined in NAGPRA itself and its implementing regulations should include actual government-to-government consultation concerning the excavations and the potential discoveries resulting from such proposed work. We understand that other federal laws are designed to cover such consultation, but they fall short because they ultimately only cover items and places that are determined to be “historic properties” or “significant” sites or have significance to archaeologists – classifications which are “terms of art” with respect to their governing law and which classification we note often conflicts with tribal world reviews regarding these resources. Many of the individual items that are excavated do not meet those narrow definitions and thus encompass a group of culturally significant items over which some agencies argue affiliated tribes have no control and no legal right to be included in the decisions concerning their final treatment and disposition.

Although NAGPRA is primarily concerned with the repatriation of existing collections housed at federally assisted institutions, it does contain sections concerning ground-disturbing activities on federal land and how such activities affect tribal sacred resources. NAGPRA is intended as a human rights law to address the return and tribal control over Indian Tribes’ own cultural resources that have been taken away from tribes through human rights violations committed against tribal people, including inhumane treatment, grave desecration and the loss of land through force.

Presently a gap exists in federal law which can result in tribes’ inability to control the destiny of their own cultural resources. Pechanga has worked on numerous projects where federal law has failed to protect the resources and further has failed to allow the Tribe’s expert opinion to play a determining role in the ultimate disposition of the resources. In many cases, it is hard to state that the cultural finds were “inadvertent” when the Tribe told the agency that the project area held cultural significance to the Tribe even if it was not able to pinpoint the exact location or precise nature of the resources at the time of the project’s environmental review. The Tribe’s first preference for such resources is *in situ* preservation instead of excavation. Still today, twenty years after the passage of this human rights law, many of our places are written off as “non-significant” and the resources are destroyed or left as orphaned collections with cultural resource management firms or other curatorial institutions.

To address this problem, we believe NAGPRA should contain provisions specifically calling for tribal consultation and including a requirement of reaching treatment agreements that meet the satisfaction of the affiliated tribes. The law should also address the ability for tribes to set a preference that the sites and items themselves be avoided and stay protected and preserved so that the issue of repatriation never has to be reached. The present status of the law seems to still encourage excavation and arguably actually forecloses certain options for the affiliated tribes concerning final disposition of the items. For example, the sections are written to assume that items uncovered will be excavated and removed from the place from which they were found. Pechanga takes great steps in always seeking to preserve in place human remains and sacred items in addition to other cultural resources. Unless the law requires avoidance as the preferred alternative, we fear the continued destruction of our cultural resources will result. We believe that NAGPRA intended

to right the wrongs of the past while also avoiding additional wrongs in the future. Protecting these resources *in situ* is the best way to achieve that morally correct goal.

As stated above, many of these individual items and sites are not covered under other federal (or state) laws so they are left with no protection or tribal input as to their disposition. We respectfully suggest that NAGPRA be expanded to provide deserving protections for sites subject to intentional excavation and inadvertent discovery on federal lands, which would include mandatory government-to-government consultation with encouraged outcomes, a preference for preservation and avoidance of cultural and sacred sites, and the deference to tribes to determine the significance and ultimate disposition of the sites and resources.

Solution: Defining Consultation

The issue of proper consultation is not a new concern expressed by tribal people vis-à-vis NAGPRA. In fact, speakers raised certain consultation issues during the 2009 House hearings on NAGPRA. The issue with proper consultation arises in many contexts under NAGPRA, including those situations identified above and below.

While we will not endeavor to provide an exact definition of consultation here, in our experience, certain key points regarding consultation should be included in such a definition. For example, in 2004, California adopted a definition of consultation under a traditional cultural places protection law (generally known as SB 18): Consultation “means the meaningful and timely process of seeking, discussing and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance.” While not perfect, there are several key components to this definition that we believe provide guidance for both federal agencies and institutions subject to NAGPRA.

The Pechanga Tribe urges the Committee to consider creating a definition of “consultation” with input from both tribal governments and federal agencies. We are confident that this will ensure strong guidance for both parties and in turn, will serve to more effectively and efficiently meet the intent and requirements of NAGPRA.

Further, another component to this solution is developing consultation protocols and best practices that will assist federal agencies in meeting their consultation duties. While some agencies may have developed their own internal protocols, having a standard to meet will ensure that consultation is effective across the board and vary less from agency to agency. To borrow again from state law, the Governor's Office in California has developed consultation guidelines for local agencies to properly consult under SB 18 (noted above) and have made these readily available through training sessions and posting them on the state website. We are sure there are other workable examples available as well, but this is one potential resource the Committee could consider in advancing consultation protocols.

Example: Sacred to the Tribe, But Not NAGPRA

In addition to the above situation, it has been our experience with permitted projects on federal lands outside our reservation that the scope of items covered under the intentional excavation and inadvertent discoveries sections of NAGPRA is too narrow. Further, the definitions under NAGPRA are too constrained as they fail to account for some items that are sacred to tribes, yet do not meet the stringent, narrow definition in the law.

Shortly after NAGPRA was enacted, the Pechanga Tribe was involved in a reservoir project where a local water district was the lead agency and the project subject to NAGPRA. Although this area was known and accepted to be an area where tribal cultural sites and resources existed, not all of the areas were designated as significant sites or historic properties under the applicable laws. As such, many of the cultural items were not preserved and were instead excavated and removed from the property. When the Tribe attempted to repatriate the items, the water district refused to convey all the items to the Tribe, even though the items were all culturally related to one another. The district ultimately only turned over the items that it alone determined met the definitions set forth in the NAGPRA.

This poses several concerns for the Tribe. First, the definition and process leaves the determination of what falls under NAGPRA to agencies and employees who are not tribal members, who often do not have expertise in cultural resources issues and who do not, and cannot, know the meaning, importance and sacred nature of such items to the tribes. NAGPRA certainly attempted to incorporate tribes in many ways; however, the real world experience of tribes under NAGPRA demonstrates that these measures can fall short of their mark. Tribal interpretation of their resources must be given deference over non-tribal interpretation.

Second, the definition of “Sacred objects” requires that these items have significance or function in the continued observance or renewal of such ceremony (25 USC §3001, Section 2(3)(C)). This threshold can be difficult to meet in California as the tribes in our state suffered some of the greatest genocidal efforts in North America at the hands of the federal and state governments and private citizens, which is further evidenced by the vast number of unrecognized tribes in the state. It is well documented that tribes were forbidden by laws, institutions and the larger community from practicing their religion or speaking their language for a significant length of time. As such, tribes are only in recent years in a position to revitalize their cultural practices and language, but sadly, many practices have been lost. This fact does not take away the significance and sacredness of items to the Tribe, however.

One example of items the Tribe knows to be housed in a curatorial facility that we consider “ceremonial” or culturally significant, yet which is not used today is known as fire rock. This rock is gathered from one specific location on the MCBCP property known as Tóotakut (TOWT-ah-coot) which translates from Luiseño into English as “rock fire.” The resource is only derived from this single location and is unique because of its glowing quality. Although not everything is known at this time about this resource, what we do know through a combination of anthropological information as well as our place-name information is that it was important to the ancestors and utilized in a ceremonial nature. Because of its importance to the Tribe, we should be able to

repatriate these items; however we are precluded from doing so because of the too narrow interpretation of “Sacred object” under NAGPRA.

A further concern of the Tribe is that there are a number of cultural items that are never afforded the opportunity to be repatriated because they do not fall within any of the five categories under the NAGPRA. Examples of such resources would be those items used on a day to day basis by our ancestors or items that may not have a presently known religious, sacred or ceremonial importance. However, it is the belief of the Pechanga People that they were once the cultural property of tribes and tribal individuals and thus, the tribes should be afforded the ability to repatriate these items and/or have a more prominent role in the determination of their ultimate disposition.

Further, because these items assist the Tribe in furthering its history and culture, we believe they are vital components to our People and deserve the same respect as those items which carry known religious and ceremonial significance. Additionally, this example demonstrates how what is “sacred” to one tribe varies and thus, it is possible there are over 560 tribal world views as to what is culturally important and which should be returned to tribes. As the law exists now, these items are left in both legal and spiritual limbo, which is neither the culturally or ethically appropriate result.

Solution: Broadening the Definitions

As this example demonstrates, there are several issues with the implementation of NAGPRA and how its definitions can be interpreted to prevent repatriation of certain items that we believe should be returned to tribes. One potential amendment we suggest is to provide guidance on how to determine what is “sacred,” which for the reasons expressed above must include tribal input.

A second revision would include changes to the definition of “Sacred objects” to account for the historical atrocities and trauma suffered by the Nation’s Indian Peoples, which has resulted in a disconnection between traditional uses and contemporary tribal peoples. We suggest revising the definition of sacred objects to include such objects that while may not be used in the present day for whatever reason can still be returned to the Tribes and treated properly. We encourage the Committee to work with tribal governments to expand this definition in a way that would accommodate this situation.

Finally, we suggest that the definition of “cultural items” be expanded to include cultural resources that are not covered by other definitions in NAGPRA. As we note above, it is the Pechanga Tribe’s belief that items not currently covered by the law may still be important to the Tribe. These resources were the cultural property of their ancestors. The Tribe is able to learn more and revitalize components of their history and culture that have been diminished or lost because of historical pressures and circumstances through the return and study of these items. In fact, the resources expended by the Tribe in cultural resource protection efforts have directly benefited the Tribe in numerous ways: We have been able to expand our knowledge of Luiseño language, history and cultural practices directly through the study and use of these objects and we continue to benefit by virtue of our efforts at ethnographic and other research. To deny the return of

these items because they do not fit under a narrow interpretation of a definition contained in NAGPRA denies the tribes the right to protect and further their histories and cultural practices.

b. Avoiding Repatriation

Unfortunately, there is a clear example in California that highlights a plethora of issues with the implementation of NAGPRA. The problems confronting California Tribes implicates concerns for other tribes, including Pechanga, as the pressures for denying repatriation by large universities (and museums) are growing and we fear could be used for denial of future claims. In this example, there are issues with how the term “culturally affiliated” is being interpreted; how “culturally unidentifiable” is being used to avoid return of remains and cultural items; how science is valued more than tribal knowledge by faculty reviewers; how the make-up of state and campus NAGPRA review committees works to deny rightful repatriation claims by tribes; the lack of accountability for the often deplorable treatment of ancestral remains and associated cultural items by museums and institutions; and the absence of standard practices regarding such treatment and chain of custody issues.

Example: The Case of the La Jolla Ancestors

The repatriation of the ancestral human remains dug up from the University of California, San Diego (“UCSD”) campus in the mid-1970s in an archaeological excavation is an ongoing concern being actively pursued by the Kumeyaay Nation of San Diego County, California. Pechanga supports those efforts. The handling and treatment of those remains by archaeologists, scientists, museums and the University of California across 40 years, demonstrates many of the problems with how NAGPRA is being implemented today. Meanwhile, the University of California system continues to hold the remains and grave goods of many tribal ancestors, including those of the Luiseño People. This must change.

In brief summary, the Kumeyaay made a claim for these ancestors many years ago: first by the Viejas Band of the Kumeyaay Nation around 1996 and then subsequently by the Kumeyaay Cultural Repatriation Committee (“KCRC”) around 2006. The mission of the KCRC is to protect and preserve ancestral remains, sacred lands, sacred objects and funerary objects under NAGPRA for today and future generations. KCRC is unique in that it is comprised of 12 Kumeyaay tribes of San Diego County: Barona, Campo, Cuyapaipe, Inja-Cosmit, Jamul, La Posta, Manzanita, Mesa Grande, San Pasqual, Santa Ysabel, Sycuan, and Viejas, all working together cooperatively to achieve their goal of repatriation.

Initially, UCSD denied they even had collections that may be subject to NAGPRA. Finally, in or around 2006, the campus realized that it did in fact have possession of collections subject to NAGPRA, although it was not necessarily clear where they were located, due to the remains’ undocumented chain of custody. The journey of those remains from their final resting place to labs, museums and the Smithsonian, then back across the country to California - some in a Staples box, others in a Chicken Breast strip fritters box, clearly having not been properly curated, with some shellacked, others falling out of their un-bagged wrappings, others with fresh breaks and glued pieces – demonstrated a failure to handle these human beings and their belongings in a culturally appropriate manner, and which was unacceptable and disgraceful.

Following the most recent claim by KCRC, UCSD convened a campus NAGPRA Working Group around 2007, not having appointed one before. As a result of this unfamiliarity and no guidelines to fall back upon, ultimately this Working Group, which exists today with the same composition, lacked balance: The Committee Chair is married to the scientist who originally dug up the graves and another scientist who participated in the original dig also sits on the Committee. No Committee members have specialized expertise in the burial or other cultural practices of the Kumeyaay; nor are there any tribal representatives, despite that request having been made by the Kumeyaay.

Not surprisingly, that Working Group, stacked against repatriation of these ancestors from the start, issued a majority report in which they found that cultural affiliation could not be established, essentially because the remains, dating to approximately 9,500 years old, were “too old” to establish such affiliation in their view. However, as the Group’s minority report pointed out, this finding ignored the many lines of evidence that did support a finding of cultural affiliation, which evidence was accepted by a different UC campus in 2001 regarding other Kumeyaay claims from the same general area.

Unfortunately, the UC system is set up such that campus recommendations flow to a system-wide NAGPRA Committee comprised of one appointee from each of the campuses with collections subject to the law. It should be noted that two Native Americans may be appointed to this committee by the UC Office of the President from nominations made by campuses. When the La Jolla remains were considered by this system-wide committee in 2011 for repatriation under the new CUI rule, one tribal member was from a non-federally recognized California tribe and the other from a federally-recognized tribe outside of California. Again, missing was the direct world-view and strong political voice of knowledgeable, federally-recognized California, tribes. This begs the question of why the committee did not seek to include members of federally recognized tribes in California and further, whether they made any attempt to do so.

While the recommendations from this Committee were split, the notes from that meeting show that scientists, both within and external to the committee, were trying to put up new obstacles to the repatriation of these ancestors. These individuals were changing their arguments from “they are too old” to be Kumeyaay to “they are too old to be Native American.” However, by its own actions, UCSD has treated the human remains as Native American: UCSD submitted the human remains in its NAGPRA inventory in 2008, submitted that inventory to the UCSD NAGPRA Working Group, had several interactions with the NAGPRA Designated Federal Officer and met with the Kumeyaay, all demonstrating that UCSD continued to treat the remains as Native American. We understand no new evidence to the contrary was provided to the committee.

It should also be noted that the UCSD property where the remains were excavated was designated a sanctified cemetery by the state Native American Heritage Commission in 2008 and listed on the National Register of Historic Places under Criterion D (archaeology) in 2008 and Criterion A (tribal values) in 2009. Moreover, subsequent research performed on the remains by a qualified researcher of native descent published in 2010, found evidence in the female ancestor of a tooth with prominent shovelings, a physical trait still present in modern day Native American populations. Further, KCRC has been recognized as the Most Likely Descendant under California

state law to repatriate more recent bone found at the *same* UCSD site. The system-wide committee's meeting notes do not indicate that it considered any of that information when debating whether the remains should be repatriated. Unfortunately, this situation raises more questions than answers. How much more demonstration of cultural linkage can a tribe provide? What is a reasonable effort to make a tribe demonstrate its cultural affiliation? How do we balance the "requirements" of science and the view of tribal peoples to come to a fair and just result? We hope that going forward, this Committee can assist us with finding clear and workable answers to these and many other questions raised by our testimony.

Other arguments from scientists on the system-wide committee were that tribes from outside the Kumeyaay aboriginal territory may want to claim these so-called CUI remains. This argument was advanced even though the Kumeyaay territory was recognized by the State of California in 2002 via Assembly Joint Resolution 60, which proclaimed the territory stretched from the Pacific Ocean into the desert and down into Baja California, including the property at issue, and even though no other tribe has stepped forward over all these years to make such a claim. Why was there so much focus by elements of the committee on cultural affiliation when the remains were being considered for repatriation under the CUI rule? Again, this example raises concerns with NAGPRA itself and the new CUI rule as well.

Just in the last month, the UC Office of the President, upon review of the system-wide committee's decision, appropriately deferred to the campus' determination regarding the remains' Native American origin and authorized UCSD to continue to proceed under NAGPRA. If the campus elects to continue to follow NAGPRA, the UC President further listed certain "directions" and "recommendations" for how UCSD should accomplish this.

The first item is for some "expert" to reanalyze whether the items found in the dig and listed on the draft inventory are really funerary objects (the Kumeyaay have consistently said they are). This perhaps illustrates the concern the Native American Rights Fund and others have expressed to the NPS during review of the CUI rule regarding the section that potentially allows for the the separation of grave goods from human remains.

The UC President's second recommendation is for the campus to revise its NAGPRA notice of inventory completion to acknowledge that given the old age of these remains, there is some division among "experts" on whether they meet the legal definition of Native American. That this would even be proposed in handling the repatriation under the CUI rule indicates the need for a technical fix to the NAGPRA definition of "Native American" so that tribes can be assured that scientists will not try and get a "second bite" at blocking repatriation – first denying cultural affiliation, then denying their "Indian-ness" at all – presumably so that these ancestors can continue to be treated as scientific property against the express legislative intent of NAGPRA and the expressed desires of tribal communities.

The third and fourth recommendations by the UC President appear linked: if UCSD elects to consult more broadly with tribes outside of the aboriginal territory of the Kumeyaay, as suggested by scientists on the system-wide committee, AND if additional tribes are determined aboriginal to the La Jolla area, then UCSD would need to revise its inventory and provide additional notices. If there are no competing claims, then the campus would be authorized to dispose of them to the

Kumeyaay. This recommendation, stemming from elements of the state-wide Working Group, to essentially re-open consultation seems to be from the old-school playbook of trying to divide Indians in the hope that they may fight amongst themselves and therefore make no progress either as individual tribes or collectively. Again, this is the same theme we see in our earlier and later examples with permitted projects and consultation wherein too much process aimed at putting the burden on tribes thwarts the spirit and intent of the NAGPRA.

Meanwhile, it appears that the UC scientists, still unhappy about the original NAGPRA statute and its preponderance of the evidence standard, and perhaps even unhappier regarding the CUI rule, are taking their concerns to the media in a manner most offensive to tribal peoples: labeling tribal claimants as “lobbyists,” calling their religious beliefs “myths” and going as far as to say that in trying to repatriate these ancestors, “the University of California favors the ideology of a local American Indian group over the legitimacy of science.” They attack UC administrators who appear to be making legitimate efforts to finally repatriate the remains and grave goods under the new rule, including one administrator who was recently awarded the National Medal of Science by President Obama, in prominent publications such as *Science*. They essentially assert that the only legitimate way to place a claim under NAGPRA is by biological evidence, meaning, submitting the ancestor and the claimant to DNA analysis, what to them appears to be the only form of acceptable proof, of “scientific certainty” – a standard that was expressly rejected in the promulgation NAGPRA. Efforts to avoid repatriation have gotten out of control in California and we urge the Committee to help ensure that such efforts stop.

The degree of resistance to repatriation in some parts of the UC system is high, as demonstrated by the vocal opposition by certain faculty, many of whom have documented personal and professional conflicts of interest, but this only proves what tribes already knew: the need for a strong NAGPRA continues to be great. The need to make technical revisions to NAGPRA at its twenty year anniversary, to ensure that its original intent is being implemented in the field, also appears necessary.

Solutions: Clarifications, Revisions and Adopting New Provisions

To fix the issues outlined in the testimony and examples above, we respectfully recommend your Committee discuss the following improvements to NAGPRA and its implementation:

Clarifying “Native American” under NAGPRA:

Making a technical amendment to the definition of “Native American” in NAGPRA, such as the “or was” fix (““Native American” means of, or relating to, a tribe, people, or culture, that is **or was** indigenous to **any geographic area that is now located within the boundaries of** the United States”) so that the letter of the law and spirit of NAGPRA regarding cultural affiliation can be more fully achieved.

Amend Culturally Unidentifiable Rule:

Revision of section 10.11(c)(4) of the 2010 NAGPRA CUI final rule that may allow for the separation of burial goods from human remains thereby allowing the holding repositories to keep

these objects as their property. To allow these items to be separated from the ancestral remains is a spiritual violation of the highest order and should not be allowed.

Adopting Best Practices for Review Committees:

The review of best practices for the population and operation of state and institutional NAGPRA review committees: If such formal committees are warranted, mandate parity and accommodation of the world view of knowledgeable tribal people, and meaningful penalties, such as the retraction of federal funding if the institutions are out of compliance. It is likely these committees are going to be in the spotlight more and more given the new CUI rule and that little guidance currently exists. This oversight hearing is an excellent opportunity to begin considering how we can strengthen NAGPRA and revise the CUI rule as needed.

In addition, mandatory inclusion of Native Americans on these review committees should be explored. Preferably, these should include a tribal person from a tribe located in the region of the claimant tribe when possible. This will ensure that the tribal world view is given parity with that of the scientific perspective. We urge the Committee to consider adopting such requirements as part of the best practices for these review committees.

Protection of Tribal Sacred Places:

As has been discussed so often, we encourage the Committee to consider the possibility of Congress creating a cause of action to protect tribal sacred places, many of those which include items and places of cultural patrimony (such as Origin Areas), burials, grave goods and ceremonial items. Unless tribes can sustain lawsuits, it is unlikely that they can achieve a truly meaningful seat at federal, state and local negotiation tables. Moreover, if tribes are unable to save sites in the field, it only furthers the cycle of wrongs leading to laws like NAGPRA and creates additional repatriation issues, as discussed above.

Adopting Treatment Standards and Accountability Provisions:

This example, and the others we touched on above, demonstrates the often deplorable conditions in which our tribal ancestors are kept by some Universities and curatorial facilities. Our ancestors deserve to be treated respectfully and with dignity until they are returned to their rightful tribal groups and laid to final rest once again. In addition to the best practice standards identified for the review committees, we urge the Committee to also consider adopting standards for the treatment of remains and cultural items still in the possession of these institutions, in consultation with tribes and other affected parties.

c. Cultural Patrimony

Objects of cultural patrimony, which NAGPRA defines as objects that have “ongoing historical, traditional, or cultural importance central to” tribal groups is another area of the law which we urge the Committee to review. As the example below demonstrates, what should be considered cultural patrimony is changing as technology advances.

Example: The Collision of Law and Intellectual Property

Recently the Pechanga Tribe became aware that Luiseño traditional tribal songs held in a collection at the National Anthropology Archives Holding (“NAA”), an arm of the Smithsonian, were going to be digitized and made available to the public in this format. These songs were originally recorded as part of a project organized by the American Bureau of Ethnology wherein a federal government agency employed various anthropologists and ethnologists, including John P. Harrington (which focused on southern California) to document and record aspects of tribal culture throughout the United States. Pechanga did not learn of this action to digitize its ceremonial songs through an official communication by the federal institution. While the Tribe appreciates the transition and updating of certain data to current technological preferences, digitizing these songs without proper processes in place regarding the confidentiality and use of the songs violates the sanctity of tribal cultural property.

Eventually, Pechanga was asked regarding our preferences for the treatment of these important resources by the NAA, but only because the Tribe proactively sent in written correspondence regarding our concerns. It was conveyed to the NAA that the Tribe’s position is that none of the songs should be digitized or distributed to the public because they concerned death and burial, but in particular there were three (3) songs that were highly private in nature because they concerned very sacred practices. Ultimately, the NAA decided to go ahead and digitize all of the songs into an MP3 format except those three (3) that we identified as being particularly sensitive – a result the Tribe considers to fall short of culturally appropriate treatment for these items of Cultural Patrimony.

This is not a situation that is or will be unique to Pechanga. The project conducted by the American Bureau of Ethnology focused on tribes in various areas of North America and there are recordings concerning the culture of various tribes throughout the country in the holdings and presently available on the website database or through a public records request. It is our understanding that many tribal songs are available in a digital MP3 format, which can either be readily downloaded from a website or which can be sent to a requesting party for a fee. To our knowledge all of these actions were taken without appropriate consultation with the tribes to which this cultural property belongs.

Solution: Contemporizing the Law

This situation exemplifies the necessity to clarify the current law with regard to “Items of Cultural Patrimony” as defined in NAGPRA to include not only physical objects, but also intellectual property like that described above. This is a critical point, as it often is the case that it is the song, belief or use of the item itself, and not necessarily its tangibility, that makes the object sacred. In addition, in the case of the Pechanga example, it seems as though these songs may not only be Items of Cultural Patrimony, but also Associated Funerary Objects. Thorough government-to-government consultation concerning the nature of such intellectual property and repatriation of such items should be required under NAGPRA. When these songs were recorded by professional such as Harrington it was never the intent of the informants that they would be widely distributed for unknown uses. Many of these pieces of cultural property were held in private collections and only inadvertently were transferred to these public federal institutions subjecting them to

categorization as public property. This is another serious gap in the law concerning tribal authority over their cultural properties and must be remedied as technology is quickly changing and these private and very culturally sensitive items are now more at risk of abuse and confidentiality violations.

d. Complaint Process and Resources Issues

While the Pechanga Tribe has not itself faced issues with the complaint process and how it is implemented, we are aware that there are simply too few resources to adequately address complaints coming before the National Review Committee. This is particularly daunting when we consider the kinds of cases that the Committee may be reviewing. Using the La Jolla example above under item (b), it is clear that these cases are very complex, with large amounts of documentation and varying forms of evidence. We understand that there is only one person to review all complaints regarding NAGPRA violations and that there is currently a backlog of such complaints. We respectfully suggest that the Committee seek information on how many complaints are outstanding, the length of time it takes to review and assess complaints and determine how many more resources (financial and personnel) are needed to ensure complaints are adequately reviewed and timely resolved.

An additional concern is that the Review Committee only hears disputes at its quarterly meetings, which means that tribes have to wait months to have their matters addressed. In particularly complex cases, this could span over several meetings to ensure that tribes are able to present the Review Committee with all the available evidence. This further stalls the repatriation process and prevents our tribal ancestors and their belongings from appropriate and respectful treatment.

In addition to assessing the state of the complaint process and the needs of the staff in resolving timely complaints involving compliance under NAGPRA, we further suggest that the Committee consider reviewing the National Review Committee's needs. The information gathered will enable the Committee to have a solid understanding of the current needs and concerns not only of the tribes, but also of the Review Committee and associated staff.

As all of the examples we provide herein demonstrate, working together to accomplish the goals of NAGPRA is an essential component to successful repatriation, treatment and consultation. The first step in this process is determining the needs of all parties and we believe the assessments suggested here will be a great stepping stone to bring us closer to achieving the policy goals of the law.

e. Regional and Local Museum Compliance

Much of the focus on NAGPRA has involved compliance and repatriation issues with larger museums and educational facilities. Yet, there is another set of museums, and potentially smaller educational facilities that are subject to NAGPRA yet have little or no funding to complete inventories and/or repatriate items to the culturally affiliated tribe. To compound this problem further, these smaller institutions are simply so understaffed and underfunded that they do not even have the resources to apply for grants to administer NAGPRA. As such, tribes are unaware (and in

many cases, the facility itself may not even be aware) of what is in the collections of smaller museums that may be subject to NAGPRA's repatriation provisions.

In our experience, this means that our ancestors and their belongings are still sitting, forgotten, in boxes, on shelves and are subject to continued disrespect and ill treatment. The end result is that either these items will never be returned to their proper place or tribes themselves must expend significant resources to discover these collections, often catalogue and inventory them themselves and at their own expense and initiate the return of these items to a place of final rest and respect. Below is an example the Pechanga Tribe experienced recently and would like to share with the Committee to illustrate this real and largely invisible problem.

Example: The "Lost" Collections

In February and March of 2008, staff from the Pechanga Cultural Resources Department visited a local county museum to view the "Temeku" collection that was excavated in the early 1950s. This collection relates to one of the most significant cultural places of our Tribe, a village area on the National Register of Historic Places since 1973, and a part of the Luiseño Ancestral Origin Landscape. Staff confirmed that this particular museum did receive some federal grant money and as such, was subject to the provisions of NAGPRA. Sadly, our staff discovered that the collection had never been catalogued since the excavation, some nearly 60 years later.

At the time our staff visited the museum, the collection was stored in 16 archival boxes that were packed solid to the brim. In addition, there were also some larger loose pieces that were stacked haphazardly on some shelves. When our staff began looking through the archival boxes, they found that the contents of all of the bags excavated from the unit levels had never been separated into their appropriate assemblages, i.e., lithics, pottery, and bone. Pechanga staff identified several pieces of what very likely appeared to be cremated human bones, that were mixed with lithics and other materials. Our staff completed a preliminary catalog at that time, which consisted of 1,122 bags of single and mixed artifacts.

In February of 2010, tribal staff returned to the museum in order to do a comprehensive inventory and to separate the unit/level bags into their proper assemblages. This was completed in June 2010 with the help of four interns from a local college. It is important to note that the Tribe, at its own expense and utilizing its own over-extended resources assisted the museum in this regard even though this responsibility mandated by federal law falls on the museum. When the inventory was completed, there were a total of 6,644 artifact bags containing either single artifacts or multiple artifacts of the same assemblages from the same unit/level.

The curator of the museum's anthropology department was grateful to have the Tribe complete the inventory and sorting of the artifacts as they have always lacked the staff and funding to complete those tasks, even though required by NAGPRA. Further, because the staff had not been able to complete an inventory, they were unaware that they had human remains in the collection.

We further discovered that this particular museum has nearly 150 collections from Luiseño sites in Riverside County that have never been catalogued. Over the next few years, the Tribe intends to work on inventorying and cataloguing these collections as well. Unfortunately, most of

these collections are located in an offsite warehouse without any kind of climate control, which further endangers the human remains and cultural items in the possession of the museum.

This is only one example, and the Tribe has grievous concerns that many more situations like this exist across the Nation. This threatens both the policy and intent of NAGPRA as small institutions do not even have the resources to apply for federal monies to complete inventories under NAGPRA. Which in turn results in either the remains of our ancestors and their belongings sitting in boxes, on shelves, in rooms lacking proper climate control continues the disrespectful treatment of these human beings. Testimony given before the House in 2009 by Brenda Shemayme Edwards, Chairwoman of the Caddo Nation of Oklahoma, reminded us all that these are not objects. These are people, human beings, deserving of respect and dignity. Sadly, under the current federal scheme, many of our ancestors are invisible and may never be returned home for proper treatment and back to a final resting place, which all of us deserve as a fundamental human right.

Solution: Increased Funding and Access to Funding

While NAGPRA does provide funding for museums to complete inventories of their collections, the above example demonstrates how difficult it can be for small, underfunded museums to actually comply with the law. The first step to addressing this problem (which the Tribe suspects is a prevalent one) is to identify those museums who fall under NAGPRA and who have not completed inventories. Certainly, if an institution received federal funds there should be a record of that and these facilities can be identified through auditing those records.

Once smaller institutions are identified, additional technical assistance should be provided so that staff can submit grant requests. This will assist these facilities in retaining additional staff to catalog and inventory collections that presently sit unknown, in boxes and sometimes under terrible conditions and can then ultimately be returned to their people and a final place of rest. Without additional funding, these ancestors and cultural items will remain lost, or as the case with Pechanga, tribes will have to expend their own limited resources to fulfill the duties of the institution and remedy a problem that is not of our creation. We do not believe either result comports with the spirit, intent and policy of NAGPRA.

f. Unrecognized Tribes and NAGPRA

Federal laws such as NAGPRA that offer protections to the Nation's Indian Tribes do so because of the unique government to government relationship that exists between Tribes and the federal government. Pechanga intimately understands the plight of the many unrecognized tribes across the United States, especially because of the historical situation in California described earlier in this testimony. Unfortunately, the Tribe has at times found itself in the uncomfortable position of being placed in the middle of the distinctive challenges in which non-federally recognized tribes find themselves with respect to NAGPRA.

We understand that the National NAGPRA Review Committee has determined that in some instances, the involvement of unrecognized tribes may provide additional information not otherwise available to the Committee. Further, the Committee has determined that in some situations, repatriation of human remains and cultural items may be effected to such tribes. In fact,

unrecognized tribes are occasionally listed on the Federal Register notice for the completion of an inventory and may submit claims for repatriation of items. Additionally, we have encountered federal agencies inviting unrecognized tribes to participate in consultation on projects and instances where inadvertent finds of human remains have occurred. While alone not problematic, the inclusion of such groups poses unique challenges to the recognized tribes that are rarely discussed.

With respect to repatriation, we have not yet faced a situation where the Tribe sought the return of human remains and cultural items and were confronted with a competing claim by an unrecognized tribe. However, we see that this could be an obstacle, particularly in California where there are over 50 unrecognized tribes. It is unclear how the National NAGPRA Review Committee would handle a situation where there were such competing claims because their discretion to involve unrecognized tribes is not governed by the statute or its regulations. As such, if the Review Committee intends to continue efforts to involve and repatriate to such tribes, there needs to be some governing process that would address competing claims from recognized tribes.

Furthermore, Pechanga has been requested on numerous occasions by non-recognized tribes, institutions and agencies to facilitate or “sponsor” repatriation of collections that are either culturally affiliated with a non-recognized tribe or categorized as culturally unidentifiable. This puts the Tribe in an awkward position of responsibility that is unreasonable – spiritually, culturally and politically. Although the Tribe has the resources and expertise to assist in this regard – which is why we have been called upon to do so – the Tribe cannot validate or take a position on the cultural affiliation or existence of a non-recognized tribe. These sorts of requests and situations have vast implications beyond the repatriation effort at hand and can be used for purposes other than the protection of human remains and cultural items under NAGPRA.

Although Pechanga does not want to see any cultural resources left orphaned and unrepatriated, we are of the position that it was never the intent of this federal law to place additional burdens on recognized tribes because of the problem of unrecognized tribes created by the federal government. We often find ourselves in uninvited situations which force us, a federally recognized tribe, to take positions with great political repercussions and further potentially causing great divide in our tribal communities, both recognized and not. We should not be asked to make determinations as to the validity or the ability of a non-recognized tribe to handle such repatriation or cultural resources management issues, but unfortunately this gap in the law has resulted in just that situation.

One issue the Tribe was recently confronted with involves the inclusion of unrecognized tribes in consultation processes with federal agencies and their participation in monitoring and the treatment of remains and cultural items discovered through intentional excavation and inadvertent discoveries. In recent months, it has become known to Pechanga that projects on MCBCP have included participation by unrecognized Tribes, to the exclusion of Pechanga and other federally recognized tribes whose ancestral territory encompasses the Base.

This poses several issues, one being that group consultation is generally not considered government to government consultation and violates not only NAGPRA, but other federal laws such as the National Historic Preservation Act. The second issue these “group” consultations create is that the information we share is not confidential and so the Tribe has to choose whether to offer

the information we have in this setting, or expend further resources to attend another individual meeting with appropriate staff. Fortunately, MCBCP has been willing to also meet with Pechanga tribal representatives on an individual basis in addition to the group consultation, but the Base is nevertheless still conducting the “group” consultations. We note as well that in our experience, other state and local agencies conduct similar consultations, which raises the same implications.

Secondly, as you are aware, NAGPRA requires the agency to consult with federally recognized tribes who are or may be culturally affiliated to the remains and items. The inclusion of non-recognized tribes during these consultations necessarily forces the recognized tribes to work with and validate or invalidate and oppose the positions of non-recognized tribal groups. The non-recognized tribes are allowed to offer treatment and disposition preferences that may or may not be congruent with those of the federally recognized tribes. Again, this situation places federally recognized tribes in the position of either having to forgo their own treatment preferences in favor of those made by non-recognized tribes and/or potentially pitting tribes against one another. Neither outcome is fair for the tribes and certainly creates difficulties for federal agencies responsible for completing consultation and determining the treatment and disposition of remains and cultural items.

As mentioned above, a further consideration is that, unfortunately, given their status as non-recognized tribes, it is unclear whether such tribes have the resources and infrastructure in place to repatriate and act as caretaker for these items. This is illustrated by the requests from such groups for Pechanga to act as an “umbrella” or facilitator for repatriation efforts.

Further complicating this landscape is that the Pechanga Tribe has been asked by federal agencies to “umbrella” or support unrecognized tribes in monitoring efforts. Unfortunately, the Tribe was asked to do this during a group consultation in front of other recognized and unrecognized tribes. This request places the Tribe in a very awkward position and because of the Tribe’s sovereign status, we do not believe the request should have been made by the agency. Again, while we understand that federal agencies wish to include these groups because they may have information, we believe that consultation with federal agencies should be between individual recognized tribes and that agency. This issue points to another reason why a definition of consultation and guidelines would be helpful to agencies who find themselves in a region where both recognized and non-recognized tribes are located.

Again, it is unjust for a law that is supposed to be aimed at upholding basic human and tribal rights to force tribes into a situation where they are potentially pitted against one another and ask them to assume unrequested responsibilities which can implicate a tribe’s cultural and political positions. Moreover, recognized tribes should not be put in a position of commenting on and/or validating a non-recognized tribe’s political situation as a tribal entity.

Solution: Defining Consultation

As these issues demonstrate, the Committee should embark on specifically defining Indian tribes so that it is clear which tribes can participate and how they will participate without forcing tribes to become involved in the political and private business of other tribes. Another suggestion to addressing this issue would be to add in a definition of “consultation” to NAGPRA and its

governing regulations. We respectfully refer the Committee to the consultation suggestion under item (a), above. We believe that adopting a definition of consultation and preparing guidelines or protocols will help alleviate concerns regarding proper and meaningful consultation between tribal governments and federal agencies and institutions subject to NAGPRA.

III. IMPLICATIONS OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ON NAGPRA

In addition to the concerns expressed by the Pechanga Tribe in this testimony, we further see that issues arising under NAGPRA implicate the United Nation's Declaration on the Rights of Indigenous Peoples. Because the United States has announced its support for the Declaration, and earlier this month this Committee considered the domestic implications of the declaration on the rights of indigenous peoples, this is a timely consideration for the Committee. NAGPRA has always been considered human rights legislation and in turn, is certainly legislation which intended to protect the rights of tribal peoples in the United States with regard to the return and treatment of their ancestors and cultural resources.

Of particular relevancy are Articles 11 and 12 of the Declaration. Specifically:

Article 11:

- 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*
- 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*

Article 12:

- 1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.*
- 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.*

These provisions implicate many of the issues raised in our testimony, as well as testimony provided by others to the House during the 2009 hearings. In addition to the suggestions we have

provided on how to begin remedying the gaps and shortcomings of NAGPRA, we urge the Committee to think about how clarifications, revisions, amendments and implementing regulations can be drafted to not only address concerns raised by tribes, but to also acknowledge these provisions of the Declaration. In so doing, we believe that the Committee will find a respectful and culturally sensitive balance that weighs the interests of all parties that work together on a daily basis to affect the policy goals, intent and letter of NAGPRA.

IV. CONCLUSION

Chairman and members of this Committee, on behalf of the Pechanga People, we extend our appreciation for this opportunity to testify on achieving the policy goals of NAGPRA. Respecting and protecting our tribal ancestors, their grave goods and final place of rest is so important to all of Indian Country. We support NAGPRA, and also support strengthening NAGPRA, so it can better meet the needs of all Tribal People. In addition, as the recent GAO report indicates, repatriation efforts at the Smithsonian raise many of the same implications and issues presented in our testimony regarding NAGPRA. We urge the Committee to also consider fixes for the repatriation process under the NMAI Act of 1989.

In addition to the concerns we have expressed above, the Pechanga Tribe, based on its own experience in trying to protect the Luiseño Ancestral Origin Landscape from Granite Construction's proposed Liberty Quarry, and from its conversations with so many other Tribal Leaders across California and elsewhere, respectfully urges this Committee to hold Oversight Hearings on the protection of Tribal Sacred Places at its earliest opportunity. There is much unfinished business and a real sense of urgency to preserve what remains of our sacred areas for Our People.

I am happy to answer any questions whenever the time is appropriate. Thank you.

Mark Macarro
Tribal Chairman
Pechanga Band of Luiseño Indians
(951) 770-6000
www.pechanga-nsn.gov