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## **Finding Our Way Home: Achieving Policy Goals of NAGPRA**

### **Senate Committee on Indian Affairs Oversight Hearing**

**Mervin Wright, Jr., Tribal Vice Chairman**

**Pyramid Lake Paiute Tribe of Nevada**

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Thank you for holding this hearing on the policy goals of the Native American Graves Protection and Repatriation Act, a Native American human rights law, and for inviting me to testify. My name is Mervin Wright Jr. and I am the Vice Chairman for the Pyramid Lake Paiute Tribe. I have worked with the NAGPRA law for 19 years. In 2009, I was appointed to the NAGPRA Review Committee in my capacity as a traditional practitioner and cultural leader. I am a founding member of the national Working Group on Native American Culturally Unidentified Human Remains and have served on it for 11 years.

I am going to discuss three issues in my testimony today. First, I want to discuss how NAGPRA ought to be interpreted as a federal statute that affirmatively protects tribal cultural rights. Second, I want to highlight a few things gone wrong in the implementation of NAGPRA. Third, I will point to three key issues which must be addressed, in order to correct the problems that have been documented with the implementation of NAGPRA.

## I. How to Evaluate the Statute

The rights protected under the Constitution are those that are considered sacred to values and principles for the law of this land. Just as the right to free speech and religious freedom are, the same protections must be provided for the Indigenous traditions governing life from birth to death and for what is understood as life after death. Congress intended actual repatriation as the foundation of the law as it recognizes and respects the sanctity of burial processes and practices of Native societies and Peoples. The human rights, the civil rights, and the Indigenous rights of Native Peoples were evaluated in enacting the law. Our efforts to satisfy the intention of repatriation, however, have gone ignored through some procedures implementing, administering and managing the law.

We welcome this oversight hearing to evaluate the purpose and requirements to complete the successful repatriations and to discover that repatriations from many collections are becoming more problematic as time passes. To evaluate the statute is take into account the values and the attributes of cultural societies and to accept the responsibilities to respect the ancestral past. It is hoped that this hearing will return everyone to the policy framing by Congress; the policy was enacted in the best possible way, but it has been derailed.

NAGPRA provisions must be applied, interpreted, and implemented consistently with the federal trust obligation to protect Native communities from dominant authority actions that aim to destroy Native cultures. NAGPRA is one of the very few federal laws that affirmatively protects Native culture, tradition, and practices, and is one of the only two repatriation laws that respects our traditional beliefs and practices governing life passages. Native People within the United

States are compelled to conform to the written law as created and developed by federal solicitors, attorneys, and court judges. However, the Indigenous sovereign status over spiritual and cultural responsibilities is not governed by a man-made law; it is rather founded in the natural unwritten law of creation. It is our responsibility to connect our ancestral past to present day society and its institutions of governance. Man-made laws are destined to error and become adjustable to the satisfaction of political constituencies.

For centuries, Native Peoples' burials have been disturbed, desecrated, and destroyed. Since the 1906 Antiquities Act, the federal Government has not adequately acknowledged protecting ancestral burials or the sacred lands for which they are located. The passage of the NAGPRA was an effort to establish a means and purpose for Tribal societies to recover, repatriate, and protect burial items and human remains of our ancestral past. NAGPRA is a law to free Native Peoples from the legalities and regulatory categories as and of United States archeological resources. It is difficult to imagine how this law was the result of a compromising effort on the part of the scientific community, and whatever it compromised in policy, it has undone in dominating the NAGPRA office and regulatory process. The main reason for opposition for complete repatriation is because of repatriations that are occurring. NAGPRA was intended to provide equal protection for Native Peoples and to make a place at the decision table for Native Peoples. More and more, we are not being heard and our voices are being ignored.

Since 1990, much work was completed to achieve the goal of NAGPRA. However there is so much more work to fully achieve the intent of NAGPRA. Native Peoples have lived here in our aboriginal lands for untold generations. To survive onslaughts, we have adapted and adjusted,

but we retain our cultural integrity. Cultural existence is evidenced in our origins and in our modern life. Our ceremonies and practices involving passages and afterlife are sacred. Native People are human beings with human rights, including the right to be buried and stay buried. NAGPRA recognizes that right and is our human rights law.

Our burial traditions are continued to be practiced today as they were long ago; the only difference is the material world of today. Traditional burials (or funerals) are communal while maintaining the principles of honorable memorialized and respectful practices of individuals. Placing cherished precious personal belongings with a person is a practice that reflects upon the person's life and identity. Their items as they are buried with or surrogates for Native People belong to and with the deceased in perpetuity. This is the foundation for sacredness that connects the land to Native Peoples and our relatives.

The respect a society places upon their dead is set in the highest regard of societal customs; this is common in all cultures and societies. The desecration and vandalism in modern day cemeteries creates outrage toward those who conduct such blasphemous acts. The treatment of ancestral burials in the same manner is no different. The mere act of a kind thought, a kind gesture, and sincere feelings expressed is the prayer blessing over the spirit and soul that provides the traveling journey to the afterlife. The same act is applied to the entire family and community as they participate in a burial practice (or funeral). To disturb the dead at rest and their treasures and/or surrogates is to interrupt their journey in their afterlife, and to do the deceased and their relatives, their moieties, their community and their tribes and nation's irreparable harm. The ability to connect these common traditional principles to the philosophical

network of a legal bureaucracy rests upon officials that can digest the tenants of tribal and federal laws.

## **II. What is Going Wrong**

The Government Accountability Office issued reports in 2010 and last month. The reports are disturbing because they identify what has gone wrong. (1) The GAO documents the harms caused in the past. Every detail is reported in the GAO report. There are regulatory requirements that prohibit and restrict the successful repatriation of tribal burial collections. These requirements are restrictive by the nature of their ambiguity and the legal interpretation of such loopholes. Be it constrained financial resources, the lack of staff support, or the lack of motivation; to see that so much time pass without adequate response is unacceptable. (2) The failure of museums and agencies to comply with NAGPRA demonstrates the seriousness that noncompliance is not a priority of the Federal Government. To engage in consultation, for example, is just now finding a policy document that will require meaningful consultation to make a decision.

The Department of Interior reports that it is in total compliance with the consultation requirements for the principles of government to government responsibility. At the heart of the repatriation implementation is the matter of control. (3) The merits of consultation have not provided a meaningful exchange resulting in mutual decisions for parties to experience satisfaction. The principles of property law and common law are those that have been made up to deal with present day situations. The ancestral burial collections are not that which can be administered or managed by bureaucratic proceedings. This is a disconnected critical attribute

that creates the disguise of impossibility for successful repatriation. The lack of action is present because the authorities that govern specific responsibility condone noncompliance. The current transparency policy and the Government Performance and Reporting Act (GPRA) should be applied for ultimate disclosure of all activities that would demonstrate the federal government's ability to assure compliance.

(4) The term "culturally unidentifiable" is a term that was made up as a place holder in the legislation. In fact, it was a compromise forced to be accepted to allow the legislation to move forward. The term is a buzzword that has taken on a new set of circumstances that can be used quite loosely; it means whatever the bureaucrat believes it to mean. It is a term that cannot be supported with scientific certainty. In fact, most of the people and things in this category can be identified, if only the tribes have the same information the repositories have. At one point, the NAGPRA office was going to promulgate a rule that all culturally unidentified human remains were the property of the holding repositories. Our working group sounded the alarm in Indian Country and we forced the NAGPRA office to set up the information data system which exists now, and increasing numbers of the human remains are being identified. However the NAGPRA office has declared that the funerary items of the deceased Native Peoples are the property of the holding repositories, which is discussed later in this testimony.

Traditionally, tribal customs and oral teachings take Native origins to time immemorial. Although the NAGPRA law has its place for oral traditions, the bureaucracy has convoluted the procedures to include and involve so much unsupported hypothesis that the term becomes a complicated network of reality in the minds of federal officials.

No deceased person or one who was responsible for burial rites by Native communities at the beginning when the collections of Native burials started in the early stages of this country has ever given consent to disturb and desecrate burials with a purpose of permanent removal. There is no permission form, no last will and testament, or no transfer of title that can be made a part of the formal legal process. It is just not possible in the customs of Native traditions.

Tribal nations have relied upon oral traditions; as it is real to acknowledge our existence today. The traced steps back in time are supported by the cultural continuity since time immemorial. Just as the 9,000 plus years' burial items were removed from Grimes Point in Nevada, it was those same items that are still used today by present day Paiute People. After 1990, the collection became "culturally unidentifiable." The decision to categorize it was done isolated from any consultation process without permission to affiliate collections to this category.

Since 1990, burial collections in museums and institutions are frozen and have increased immensely because of this "new category" and there seems to be no effort to control how "culturally unidentified" collections will cease. The number of human remains currently stands at approximately 125,000, while burial items amount to approximately 875,000. This number has increased two and three fold as the process for developing the regulations directing the disposition of these items. It should be noted that there is a small but powerful group of Non-Native scientists who are trying to prove that non-Natives were here before Native Peoples and our ancestors and lands are really theirs. That wrongheaded notion is behind this current effort to hold on to what could be their "evidence."

### **III. What Should Be Done**

Issue 1: Instead of trying to agree to the conditional terms of Native Peoples' customs, traditional law, and oral tradition, the Federal Government promulgates regulations that are aimed to force the disposition of Native burial collections. Unfortunately the interim rule issued on March 15, 2010 fails to accomplish the goal of Native American repatriation. The proposal regarding funerary objects is arbitrary, capricious, and is contrary to the law. It will never accomplish a complete and successful repatriation. A traditional burial is inclusive of everything in the funerary process, as well as everything in the ground or in caves or on scaffolds at the site, and NAGPRA recognizes this. Tribes were never included in the development of the rule but the scientific community was included and tribes are forced to accept the rule. The Department of Interior conducted "horse trading" with the rule; in the end the Tribes could receive the human remains while the museums keep the funerary objects, which they can sell or trade or deal away, irrespective of the policy goals of repatriation laws, which is to return people and things to their cultural context. In the case of surrogates, they are ignoring that these are the very human beings in our traditions and in the federal law. In the case of other funerary items, they are ignoring the wishes and rights of the deceased and their loved ones, which goes against laws governing such matters for all other people. Congress was clear that funerary objects are to be repatriated and there is no law that authorizes separation.

The 2010 rule must be withdrawn, reversed and/or amended in order to clarify that all of the cherished items and objects are to be included in any burial collection that qualifies under the rule. To leave it as is allows and promotes disrespectful practices in the name of an honorable act. It creates a public policy that grave-robbing of objects is acceptable; it conflicts with longstanding principles of property law; it suggests there is a different right of possession for

objects and the people that were unearthed together; it suggests there is a different right of possession based on whether objects are “culturally unidentifiable.” The sacred law of burials cannot separate human remains from the funerary objects and burial items. This is true for all peoples and should be so for Native Peoples. The Administration’s interpretation differs widely from what Congress intended and from NAGPRA’s policy goals.

In NAGPRA, the United States was trying to do the right thing and make up for a long history of grave-robbing and other bad acts. There are those who continue to thwart NAGPRA’s policy goal of doing the right thing and twist the law in order to continue bad practices. In the Kennewick case in the 10<sup>th</sup> Circuit, the definition of Native American was pushed to extremes, in order to keep NAGPRA from applying and to recategorize us as archeological resources. The definitional term “that is” was interpreted to mean that anything older than 1776 is not Native American. The policy of NAGPRA for Native Peoples is inclusive for time frames prior to 1776. The Tribes have proposed the technical amendment to the Native American definition in NAGPRA to include two words, “or was,” after the present day literal interpretation of the two words, “that is.”

This situation forces a set of circumstances that places Native history into a realm of becoming absurd, even to the point of calling our history “prehistory” and “pre-Columbian.”. The technical amendment to the law was proposed in the past only to be held up by the previous Administration in three sessions of Congress. On the eve before the hearing on this technical definition “fix,” Secretary Gail Norton reversed her position of support and objected to the amendment. This stalemated the process. At this time, the Administration has not expressed

opposition, but has yet to release its position to support the technical amendment. Congress has the remedy to enact the technical amendment as it has been presented over the past ten years.

Issue 2: This technical fix is straightforward and it is not understood why the federal government would not be supportive to this change. It is reasonable, logical, and rational. At this time, it is a reasonable expectation that the Administration supports this clarification with this proposed technical fix. It has not moved because the Interior officials say that Congress has to ask their views, and the past representatives of this Committee have said they cannot move the amendment because the Administration opposes it. I urge the Committee to ask the Administration's views on the technical amendment and to get past this stalemate.

Issue 3: Native burials and the funerary process transforms the ground to hallowed ground, unlike all other people in America, Native Nations are unable to bring legal court action to protect sacred places. The sanctity in burial sites and their locations are situations that requires formal acknowledgement to support the protection of any such burial that may lie in certain areas or specific locations. Native Peoples are the only peoples in the United States that do not have a door to the courthouse to protect our sacred sites. The United States must ensure that all people, including Native Peoples are treated equally under the United States laws and enact a statute creating a right of action for Native Americans to protect our sacred places, too.

In times where consultation on sacred sites in line of a construction project may have occurred normally forces mitigation for a project to be completed. Tribal objections are only considered in the decision to proceed. In instances where a site is identified prior to

construction, anthropological and archeological theories supersede oral tradition and cultural knowledge, and Native Peoples' views and voices are ignored.

The United States is being asked to assist and support American citizens that are seeking equal protection and fair application of its laws. We do not understand why we are being denied. Together, we can move in the right direction if we keep our eyes on the policy goals.

If you have any questions, I will be happy to address them. Thank you.