

TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

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I thank the Committee for this opportunity to testify about the implementation and interpretation of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 *et. seq.* I am especially pleased to have the chance to address the Committee at this time because of the decision of the United States Court of Appeals for the Ninth Circuit in *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004). That decision incorrectly limits the coverage of NAGPRA in a way that is inconsistent with Congress' statutory objectives. In order to preserve the NAGPRA that Congress intended to enact, the Committee may wish to consider a corrective legislation that would eliminate the inappropriate restrictions that the *Bonnichsen* decision improperly places on NAGPRA's operation.

I have not been involved in the implementation of NAGPRA, but I have a strong interest in the subject, having been the facilitator of the Panel for a National Dialogue on Museum/Native American Relations (Dialogue Panel), which reported its findings to the Senate Select Committee on Indian Affairs on February 28, 1990, several months prior to NAGPRA's enactment. The Dialogue Panel had been formed, with the encouragement of the Select Committee, in an attempt to arrive at agreement among traditional tribal leaders, tribal government representatives,

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anthropologists, and representatives of the American museum community regarding what federal legislation might be needed to address the then highly-divisive issue of repatriation to tribes of human remains, funerary and sacred objects, and items of cultural patrimony that were in, or might subsequently come into, the possession of federal agencies or of American museums, universities, archaeologists or anthropologists. Tribes and tribal groups had made repeated requests for the repatriation of many such materials without success or, in some cases, without even receiving a response to their requests. They had often been refused access to materials and even refused information about what materials an agency or institution possessed. Indians had especially strong objections to the destructive analysis of ancestral human remains without the consent of - - or even consultation with - - tribal groups or governments. Resentment had built up in the American Indian community, which considered the disregard for Indian human remains and sacred objects to be a serious violation of Indian human rights. Anthropologists and museums, for their part, feared that mandatory repatriation might result in their loss of access to, or possession of, scientifically important materials. The Dialogue Panel was charged with trying to work through these differences. The Panel was comprised of four museum representatives, two anthropologists, two representatives of tribal governments, three representatives of American Indian organizations, and one traditional tribal leader.

Despite a history of acrimony over repatriation issues, the Panel achieved a remarkable degree of consensus. It unanimously “deplore[d]” the fact that “the human rights of Native American nations and people have been violated in the past through the collection, display and other use of human remains and cultural materials without Native American consent and in ways

inconsistent with Native American traditions and religions.” Those human-rights violations had occurred “in the name of science, non-indigenous religion, economic development and entertainment, as well as in pursuance of commercial grave robbing.” The Panel’s central - - also unanimous - - recommendation was that, while the values of scientific research and public education are important considerations bearing upon repatriation issues, respect for the human rights of Native Americans “should be the paramount principle where claims [for repatriation] are made by Native American groups that have a cultural affiliation with remains and other materials.” Three quarters of the Panel members believed that human rights should also be paramount in determining repatriation issues even when no present-day Native groups have cultural affiliation with materials. The two anthropologist members and the representative of the Smithsonian Institution (also an anthropologist) partially dissented from this recommendation, believing that, in some cases, “scientific and educational values may predominate where cultural affiliation with a present-day Native group does not exist.” And, in what I characterized in testimony to the Senate Select Committee in 1990 as the Panel’s most important procedural recommendation, the Panel unanimously recommended that potentially interested Indian governments and tribal groups be informed of the existence of materials in the possession of institutions and federal agencies and that they be included, as well, in the decisions regarding the treatment and disposition of those materials, including decisions about what scientific examination, if any, should be performed on human remains. On behalf of the Panel, I stated in my testimony the Panel’s strong belief that such a cooperative decisional process would “remove much of the resentment that has built up around these issues” and would also “lead to museums and science that are vastly more informed” than would be the case if tribes continued to be excluded from participation in decisions regarding the classification

and treatment of sensitive cultural materials. Hearing Before the Select Committee on Indian Affairs, U.S. Senate, 101st Cong., 2nd Sess., on S.1021 and S.1980 pp. 36-41, 108-113.

NAGPRA was enacted eight months after the Dialogue Panel's report. Its provisions accord closely with the Panel's recommendations. With regard to the Panel's recommendation that Indians be informed, consulted and included in decisional processes, NAGPRA requires federal agencies and all museums, universities and other institutions receiving federal financial assistance to compile inventories or summaries of all sensitive Native American materials in their possession - - human remains, funerary and sacred objects and objects of cultural patrimony. Tribal governments and traditional Indian religious leaders must be included in this inventory process and are entitled to access to the inventories and summaries after they are completed. Tribes must be notified of the presence of materials with which they have specific cultural affiliation. Repatriation to tribes that are culturally affiliated with materials is mandatory if sought by the affiliated tribe. As to materials not culturally affiliated with any present-day tribe, NAGPRA established a seven-member review committee - - with at least three Indian members - - that is charged with developing a process for disposition of these materials. Consultation with tribes is also required regarding all sensitive Native American materials newly excavated or discovered on federal or tribal lands. Mandatory repatriation rules apply to these materials. Criminal penalties are imposed for trafficking in material obtained in violation of NAGPRA and civil penalties are imposed on museums, universities and other institutions that do not comply with NAGPRA's requirements.

NAGPRA thus respects the human rights of American Indians by providing a comprehensive

system for (1) involving American Indians in decisions about the characterization, treatment and disposition of sensitive materials; (2) giving Indian tribes important repatriation rights with regard to materials to which they are affiliated; and (3) involving the Indian community in decisions about the policies that should apply to the treatment and disposition of unaffiliated materials. Unfortunately, the Ninth Circuit's decision in *Bonnichsen v. United States* seriously undermines the scope of Congress' broad remedial purpose. The decision construes the central provision of NAGPRA -- the provision defining the materials to which NAGPRA applies -- in a way that is not only plainly incorrect as a matter of statutory interpretation, but that frustrates NAGPRA's important human rights objective of including Indian governments and groups in decisions about whether materials are Indian-related and about the treatment and disposition of such materials.

The *Bonnichsen* case involved human remains discovered on federal lands near the shore of the Columbia River outside of Kennewick, in the state of Washington. The remains, sometimes referred to as Kennewick Man, are more than 8,000 years old. Four Indian tribes from the area in which Kennewick Man was found invoked NAGPRA, seeking control of the remains so that they could immediately be re-buried. NAGPRA provides for this transfer of control if the remains are either affiliated with a requesting tribe or found on a tribe's current reservation or aboriginal lands. 25 U.S.C. 3002 (a) (2). The four tribes' request was opposed by a group of scientists seeking to analyze the remains. After lengthy consideration of the issues, the Secretary of the Interior decided that NAGPRA required transfer of the remains to the tribes for re-burial. The scientists then brought suit in federal court to challenge the Secretary's decision. The Ninth Circuit panel ultimately reversed the Secretary, holding that NAGPRA did not require or even permit tribal control of

Kennewick Man's remains.

The Ninth Circuit's decision was based on its startling holding, not that the remains of Kennewick Man did not meet NAGPRA's repatriation standards, but that NAGPRA *had nothing whatever to say* about the disposition to be made of Kennewick Man because his remains did not fall under NAGPRA at all. NAGPRA establishes procedures and rules regarding the treatment to be accorded to "Native American" remains, funerary and sacred objects and items of cultural patrimony. NAGPRA defines the term "Native American" for these purposes as "of, or relating to, a tribe, people, or culture that is indigenous to the United States." Most people, including the Secretary of the Interior, have read this coverage provision as including, not only materials relating to present-day Indian tribes, but also materials relating to indigenous people who inhabited the area that is now the United States before the arrival of European explorers and settlers. Under that understanding, very old remains like those of Kennewick Man are covered by NAGPRA because 8,000 year-old Kennewick Man was almost certainly indigenous to the area in which he was found - - i.e., he was not a tourist or explorer from a far-off place. In the Ninth Circuit's view, however, materials - - including remains - - are "Native American" for NAGPRA purposes - - and thus are covered by NAGPRA and subject to its rules and procedures - - only if they are shown to "bear a significant relationship to a *presently existing* tribe, people or culture." (emphasis added). It is not sufficient in the Ninth Circuit's view that the materials relate to indigenous inhabitants of the United States; they must relate to *current* indigenous inhabitants. The court found that no relationship of a present-day tribe to Kennewick Man had been established. As a consequence, NAGPRA's provisions were completely inapplicable to Kennewick Man and the plaintiffs were free to conduct

scientific studies of the remains - - including cranial, dental and DNA studies, and “diet analysis” -
- without any consultation with the tribes seeking reburial and without reference to any NAGPRA
procedures or standards.

In holding that a relationship to a present-day Indian tribe must be established before NAGPRA’s procedures, rules and standards can be applied to any materials, the Ninth Circuit panel made a serious error of statutory construction. Proof of a relationship to a present-day Indian tribe is, it is true, often important *under* NAGPRA - - a tribe, for example, does not have a right to mandatory repatriation of remains or funerary objects held by a museum, university or federal agency unless it has a “cultural affiliation” with these remains or objects. NAGPRA, however, was clearly not intended by Congress to be wholly inapplicable unless a relationship of materials to a present day tribe is first established. On the contrary, NAGPRA has important provisions that *expressly* apply to materials when those materials *cannot* be shown to be related to a present-day tribe. The Ninth Circuit panel’s interpretation is flatly - - and dangerously - - inconsistent with these provisions.

The provision of NAGPRA involved in the Kennewick Man case is a good illustration of how, contrary to the Ninth Circuit’s view, NAGPRA was intended by Congress to apply to indigenous materials even when no relationship with a present-day Indian tribe has been established. Section 2 of NAGPRA (25 U.S.C. 3002) governs the ownership of Native American cultural items that are excavated or discovered on federal or tribal lands. In the case of human remains and associated funerary