**STATEMENT OF SUZAN SHOWN HARJO, PRESIDENT, THE MORNING STAR INSTITUTE, FOR THE OVERSIGHT HEARING ON THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT, BEFORE THE COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, WASHINGTON, D.C., JULY 14, 2004**

Mr. Chairman, Mr. Vice Chairman and Members of the Committee on Indian Affairs, I thank you for calling this oversight hearing on the American Indian Religious Freedom Act of 1978, P.L. 95-341.

The Act states: "…henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

A quarter century later, many of our sacred places are as endangered as they have ever been; many of our sacred objects remain out of our reach and control; and our freedom to worship in our traditional ways is impeded by federal and federally-permitted actions.

**Policy to Preserve and Protect Native American Religious Freedom**

The American Indian Religious Freedom Act turned 25 on August 11, 2003. Two months later, Arizona State University's College of Law held a gathering of Native American people who worked to achieve the Act's passage and to further its policy promise. Our reflections on the past quarter-century and our calls for future action, including much of this testimony, are contained in the journal, *Wicazo Sa Review.*

Today, there is every reason to both celebrate the American Indian Religious Freedom Act and to complete its unfinished agenda. In AIRFA, Congress and the President stated plainly that the policy of the United States is to preserve and protect Native American traditional practices and religious freedom. This was necessary in 1978 because Native Peoples were still suffering the ill-effects of sorry policies of the past intended to ban traditional religions, to neutralize or eliminate traditional religious leaders and to force traditional religious practitioners to convert to Christianity, to take up English and to give up their way of life.

Even though the federal Civilization Regulations that first criminalized traditional religious expressions in the 1880s were withdrawn in the mid-1930s, laws and practices impeding Native Americans' free exercise of traditional religions persisted. Native sacred objects continued to be confiscated and graves looted. Those stolen in earlier times filled federal, state and private collections, as well as museums and educational institutions in Europe. Native sacred places continued to be desecrated and damaged. Those annexed during the formal "Civilization" period remained in non-Native governmental and private hands, and Native people risked stiff fines and imprisonment for fulfilling religious mandates at those sites.

Native traditional people organized a national coalition in 1967 to gain protections for sacred places and ceremonies, to recover Native human remains and sacred objects and to promote respect for Native people and rights in general society. As the coalition achieved returns of important sacred places and legal protections for the use of feathers and other sacred objects, it sought broad policy to remove the federal barriers standing in the way of Native American traditional religious expression. When AIRFA was signed into law, it was greeted with relief, elation and hope by traditional American Indian, Alaska Native and Native Hawaiian people. After generations of traditional Native religions being driven underground or to extinction, and traditional practitioners being stigmatized as outlaws, AIRFA was lauded as a needed and welcome policy.

**Policy to Consult with Native Traditional Religious Leaders**

In sharp contrast to the religious suppression policies, AIRFA established the policy of federal agencies consulting with Native traditional religious leaders on proposed actions regarding Native traditional religious matters. This is an ongoing policy and the context for similar consultative requirements in subsequent federal laws and regulations.

Over the past 25 years, many lawyers, both for and against Native traditional interests, have ignored this consultative policy requirement of AIRFA. Governmental agents often overlook it, inadvertently or deliberately, when taking or approving actions affecting traditional religions. Some consult only with tribal governmental leaders or employees, to the exclusion of traditional religious leaders. Some even conduct sham consultations by making a record without seriously considering the information or conclusions of the traditional experts who are being consulted. This occurs most egregiously at present with respect to those developmental decisions that would damage or destroy sacred places. Sadly, some tribal governmental agents engage in these practices, too, and many Gucci-gulch lobbyists and federal staffers in Washington, D.C. keep a watchful eye on laws and regulations that would interfere with development plans at sacred places.

Part of the continuing religious freedom agenda is to assure that agents at all governmental levels comply with the consultative policy requirement under AIRFA. It is essential that governmental agents implement the Executive Orders on Indian Sacred Sites (1996) and on Consultation and Coordination with Indian Tribal Governments (1998), as well as other federal mandates, with the understanding that consultation with traditional religious leaders, not solely with the secular leadership, is a required part of tribal consultation when dealing with those Native Peoples with living traditional religions. For those Indian nations that are theocracies, it makes sense for their traditional governments to have sole standing. For the other 99 percent that are not theocracies, it is nonsensical to recognize the secular entities and not recognize the traditional religious entities and practitioners.

**AIRFA's One-Year Review and Report to Congress**

AIRFA required the President to direct federal "departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices."

AIRFA also required the President to "report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action." Over 50 federal agencies participated in the one-year consultation and review process, and the President's report was delivered to Congress in August of 1979.

During the review period, numerous federal agents objected to Native American Church peyote ceremonies being characterized in the President's report as a traditional religion, arguing that the use of peyote by American Indians was a relatively new phenomenon and did not constitute a religion. The counter-argument prevailed -- that its practitioners believed they were practicing a religion and one their ancestors had practiced so for a century and more -- and ceremonial use of peyote was included as a traditional Native religion. Later litigation over peyote use by one Indian and one non-Indian resulted in a 1989 Supreme Court decision that weakened religious freedom law nationwide and left Native American Church members clinging to an Indian exemption to a regulation prohibiting the use of peyote. At the urging of the Justice Department, Congress amended AIRFA in 1993 to codify the drug regulation and provide for peyote use by Indian members of the Native American Church.

As part of the initial review, Indian inmates were afforded greater access to traditional religious counseling, sweat lodge ceremonies and use of feathers and other sacred objects, but religious liberty for Native people in prisons has not yet been achieved. During the review year and the following one, federal agencies entered into agreements with Native Peoples to provide access to certain sacred places and objects, and to return or jointly manage others. In negotiating these agreements, the agencies accommodated Native traditional religious interests, even in those cases involving national security interests at military facilities.

In some cases, the process began during the review period, but did not conclude until years or decades afterward. One example of this is Kaho'olawe, a former Naval bombing range in Hawaii, where Native Hawaiian people were willing to risk injury and death from unexploded ordinances in order to conduct traditional ceremonies. In mid-1979, the Secretary of the Navy made the Naval stations aware of the requirements of the religious freedom law and pledged to "cooperate with Native traditional religious leaders in an ongoing effort to ensure the free exercise of religious rights while at the same time ensuring the safety of all personnel and the completion of its military mission." A subsequent law set up the Kaho'olawe Island Reserve Commission and required the Navy to conduct a munitions cleanup. Kaho'olawe is now safe and, in 2003, was formally transferred to Hawaii.

**Protection of Native American Sacred Places**

Over the quarter-century life of AIRFA, numerous traditional and customary areas have been returned or protected through co-management agreements. Most of these sacred places are naturally-formed churches – lands and waters where people go to pray for the good day, the precious earth, the blessing waters, the sweet air and peaceful life for all living beings the world over. While some are being protected, others have been damaged or destroyed, and far too many are under attack today.

Each White House and Congress over the past 30 years has returned some Native sacred places, from Taos Blue Lake in the early 1970s to Washoe Cave Rock today. It is equally true that each Congress and administration has opposed lawsuits and a statutory cause of action to protect and defend Native sacred places. Ten years after the passage of AIRFA, the Supreme Court held that neither the Indian religious freedom law nor the First Amendment protected a Native sacred place in California against a Forest Service logging road, and invited Congress to enact a protective cause of action. That was 16 years ago and Congress still has not enacted a cause of action that allows us to defend our sacred

places through legal processes available to all other people in the United States who want to protect their places of worship.

Indian traditional and tribal leaders tried from 1989 to 1995 to get a legislative cause of action, but Interior politicos, Justice lawyers and White House pollsters opposed it. Native leaders then negotiated a substantive agreement on sacred lands, which was changed unilaterally within the administration to a weak restatement of the AIRFA policy. For all its faults, however, the 1996 Executive Order on Indian Sacred Sites did remind federal agencies of their continuing obligations to protect sacred places and did result in some sites being returned and otherwise protected.

The high court's 1988 ruling started a development rush that has increased in intensity over the past 16 years, and federal, state and private developers are ignoring or flaunting laws that could and should be used to protect sacred places. Today, over 50 sacred places are being threatened by development, pollution, poisons, recreation, looting and vandalism.

At the end of 2002, traditional and tribal leaders, practitioners and advocates who are among the most knowledgeable on these issues developed clear, concise lists of essential elements and objectionable elements for public policy on Native sacred places. Topping the list of objectionable elements is any law that tries to define or limit the sacred. The topmost essential element is a cause of action to defend sacred places in court and to serve as incentive for serious negotiations for the return, co-management or protected status of sacred places. Also a high priority is policy respecting traditional religious tenets and tribal law prohibiting disclosure of confidential and private information about the sacred.

Following those guidelines for essential and objectionable elements would not only keep faith with the people who reached consensus on these matters, but would honor the many people who sacrificed to save sacred places and the legions who were murdered and confined for trying to pray at sacred places.

In 2002 and 2003, this Committee held a series of oversight hearings on Native American Sacred Places. Witnesses from throughout Native America testified about the threats to sacred places and the need for legislation to protect them. After the most recent hearing in that series, on June 18, 2003, the Chairman asked The Morning Star Institute three follow-up questions about a cause of action to protect Native American sacred places. For the Committee's convenience, those questions and our responses are included here:

1. Q: *Your testimony is very straightforward in that, more than any other element, it urges that Federal legislation be crafted to include a cause of action to assist in the protection of Sacred Places. In the absence of such a provision, please describe the history of efforts to work collaboratively with agencies, states, and local communities to protect Sacred Places.*

In the first years after the American Indian Religious Freedom Act of 1978 was approved, there were successful negotiations with federal agencies for land returns, for access and use agreements and for other administrative protections of Native American sacred places.

For example, in 1979, the Secretary of the Interior saved a 120-acre parcel of Bear Butte land in South Dakota from development by purchasing it from a private owner (who gave the Cheyennes the right of first refusal), taking it into trust and conveying it to the Cheyenne & Arapaho Tribes of Oklahoma for all those Indian nations who use Bear Butte for traditional cultural purposes. Between 1978 and 1980, Native Americans achieved numerous access and use agreements regarding sacred places on federal lands. Some of these involved difficult national security and safety issues, most notably Coso Hot Springs in California and Kaho'olawe in Hawaii, both in Navy firing, testing and munitions storage areas.

During the remainder of the 1980s, there was little administrative activity to protect Native American sacred places. In 1989, the Supreme Court ruled in a case that pitted a Forest Service logging road against a Native American sacred place in California that AIRFA did not provide a cause of action to protect Indian sacred sites, citing a 1978 House floor statement by AIRFA sponsor Rep. Morris K. Udall that it had "no teeth." That statement had been forced by Rep. Thomas S. Foley on behalf of the Forest Service as a condition of House passage precisely so that Native Americans would not be able to sustain litigation in defense of sacred places.

In the years since the Supreme Court's decision, most Native American efforts to achieve protections for sacred places have not been successful because the federal agencies know that Congress has not backed up the policy promise of AIRFA and that the agencies cannot be taken to court under that law for failing to protect sacred places.

This was only reinforced by the 1995 Executive Order on Indian Sacred Sites, which did not provide a cause of action and even undercut AIRFA by excluding the traditional religious leaders of federally-recognized tribes and by excluding non-federally-recognized tribes and Native Hawaiians altogether. The federal agencies then knew that the President had not put any teeth into the AIRFA policy and, in fact, had further defanged it.

With rare exceptions, successive administrations since the 1980s have been increasingly uncooperative in administrative efforts to protect Native American sacred places. Today, we see dozens of known sacred places that are facing damage and destruction, mostly from the federal government itself. Until Congress amends AIRFA to create a cause of action to protect sacred places, the policy promise of the United States to preserve and protect Native American religious freedom will remain unfulfilled.

2. Q: *With regard to the issue of Sacred Places and confidentiality, if a discrete area cannot or will not be identified, what methodologies can the Federal government employ that will provide the kind of Sacred Place protection that you desire without rendering large swaths of acreage unusable in terms of other activities such as recreation and the various extractive industries?*

The federal government has vast territory to use for its own purposes and to dedicate for recreation and commercial development. Native American sacred places involve only a miniscule portion of that territory.

For the most part, the sacred places were put in the public domain because they were sacred, at a time when the policy of the United States was to ban Indian traditional religions, to confiscate sacred objects and to keep Indians from going to traditional and customary places of worship. As a result of that policy, most of the traditional Indian religions are extinct now and more sacred places have been destroyed than preserved. Under current United States policy to preserve and protect traditional religious sites, the remaining Native sacred places should be returned to or jointly managed by Native Americans or otherwise protected against damage.

The federal government already isolates areas for Christian religious purposes solely, by disallowing any recreation or development on or near churches on federal lands. The Christian religious leaders and practitioners do not have to detail their ceremonies or open them to the public; do not have to allow recreators to climb up the walls of their churches or developers to mine inside them; and do not have to disclose any private or confidential religious information in order to gain protections for religious use of their sacred places.

The administration, in the hearing of June 18, agreed to new law for federal agencies to protect Native American confidential religious information. The AIRFA should be amended for this purpose.

Pending congressional action, there are myriad ways that the agencies can protect Native American confidential religious information. They can use their scientific exemptions under FOIA to protect this information from disclosure. They can use their own administrative rules, procedures and processes to protect this information. For example, the Federal Energy Regulatory Commission has protected religious information from public disclosure by holding all materials under seal in perpetuity.

For another example, in mapping the California Desert Plan in the 1970s, the Bureau of Land Management worked with Indian traditional religious leaders and practitioners to isolate areas of sensitivity. Within these ink-blotted areas of sensitivity were sacred places. By using this method, the BLM could plan around these areas and could use the remainder of its vast territory for other purposes. At the same time, Native Americans did not reveal exact locations of sacred places or violate other religious tenets regarding confidentiality and non-disclosure.

The problem with leaving this matter to the discretion of federal agencies is that private religious information is at the mercy of the agency personnel who happen to be involved, and this shifts over time. When they want to cooperate, they can find all sorts of policies and authorities for doing so. When they do not want to cooperate, they can find any number of excuses for that.

3. Q: *There is often disagreement between and within tribes regarding which tribe has rights to certain sacred places, and what ceremonies can be performed there. Certainly, the Federal government is not in a position to be the arbiter of such disagreements. Can you provide the Committee with some ideas on workable solutions to who will determine who can exercise rights to sacred places under any legislation Congress may adopt?*

In order to avoid intruding into private religious matters and in order to avoid Establishment Clause entanglement problems, Congress should not try to resolve inter or intra tribal religious disputes.

Congress did create a dispute resolution mechanism in the Native American Graves Protection and Repatriation Act. Under the NAGPRA mechanism, if Native parties have competing claims over human remains, sacred objects or cultural patrimony, the museum or repository that has possession of the claimed objects or remains keeps them until the Native parties arrive at a solution. This puts the onus on the Native parties and provides a strong incentive for them to resolve their conflict, instead of having outsiders decide.

The experience under the NAGPRA mechanism may have proven so burdensome or unworkable for Native Americans that other types of mechanisms should be considered, but it is one that can be examined against a backdrop of more than a dozen years of experience.

This concern about in-fighting should not be used to deter or delay legislation. I do not know of a single instance where traditional religious leaders or practitioners have been at an impasse with each other over the protection or recovery of a sacred place. Each Native traditional religion has its own dispute resolution mechanism for dealing with internal and external conflicts.

For example, traditional religious practitioners of some 30 Native nations use Bear Butte for religious purposes and have managed to do so peacefully for millennia. There is no history of Indian versus Indian conflict at Bear Butte, even though two or more Indian nations have been at war or in conflict otherwise. It has long been understood that weapons and harsh words are to be left on the ground before entering the sanctuary of that holy mountain. On the other hand, there is a history of 150 years of conflict between Indians and non-Indians who have tried to damage Bear Butte, which with the Committee is familiar.

Disputes have arisen between traditional religious practitioners and the secular tribal governments when tribal leaders have wanted to develop sacred places for non-religious purposes. Only a very few tribes today are theocracies, and they would not act against their own religious interest. Tribal governments for the other 99 percent are secular entities. Any new law should make clear that tribal governments, like any other government, should not be allowed to damage or destroy Native American sacred places.

There are simple ways to avoid these conflicts in sacred places legislation.

First, the legislation must make clear that those with standing are: 1) the Native American tribal citizens who practice the traditional religions that hold the places to be sacred and 2) the Native nations, clans, societies, towns, kivas or moieties when they are acting on behalf of their traditional religious practitioners.

Second, the legislation must include conditions on the use of a sacred place that is to be returned, co-managed or otherwise protected, to assure that the area will be used solely for traditional and customary purposes and will not be used for recreational or resource development or commercial purposes.

**Return of Native American Human Remains and Cultural Patrimony**

AIRFA laid the groundwork for federal museums returning Native human remains and sacred objects, and led to the repatriation laws in 1989 and 1990.

The first major gains in the national Native repatriation movement were made during the six months following AIRFA's enactment. The heads of the military museums decided in 1979 that it was in keeping with the new law to return requested Native human remains, sacred objects and cultural patrimony in their collections. Scientists from the Smithsonian Institution disagreed with that decision and attempted to change it. Failing that, they claimed that the Smithsonian was a private, educational entity, rather than a federal agency with a duty to comply with AIRFA. That notion was overruled by the White House and the Office of Management and Budget, and the Smithsonian became one of the 50-plus federal agencies reviewing policies under AIRFA.

After the AIRFA review, however, Smithsonian scientists resisted returning any Native human remains or cultural property. Bowing to national Native and congressional pressure in the mid-1980s, new institutional leadership directed an inventory of Native human remains in their collections. The accounting – 18,500 Native human remains, together with 4,500 Indian skulls from the U.S. Army Surgeon General's "Indian Crania Study" in the late-1880s -- stunned people in Indian country and in general society. Native people and members of Congress began developing repatriation law in earnest. At the same time, Native Americans were preparing dozens of lawsuits to recover Native human remains, funerary objects and cultural property.

In order to slow down the process and gain political leverage, the repositories with large collections of Native human remains and cultural patrimony lobbied Congress for another study, the National Dialogue on Museum/Native American Relations (1988-1990). After two meetings, Native people quietly postponed their participation in the Dialogue -- in order to achieve the historic repatriation agreement with the Smithsonian -- and returned to the study once the repatriation agreement had been enacted at the end of 1989 as a provision of the National Museum of the American Indian Act. The Smithsonian leadership had opted to go forward with plans to acquire the new museum and to avoid litigation by settling on a repatriation process. Scientists who were opposed to repatriation redoubled their efforts to stop further repatriation law.

The Dialogue Report was presented to the Senate in January 1990. It reflected the repatriation law that applied to the Smithsonian and recommended new law extending that agreement to all federal and federally-assisted collections. Some of the scientists who participated in the Dialogue were so incensed by the Dialogue Report's use of the term "human remains" for what they called "our resources" that they disassociated themselves by name in a footnote from the use of the term. Their objection was that "human remains" implied that international standards of human rights and burial rights applied to dead Native Americans and their relatives. These scientists did not believe that these rights attached to "specimens," "bones" and "grave goods."

The Native American Graves Protection and Repatriation Act of 1990 became law eleven months after the 1989 repatriation provision was enacted. As with the 1989 law, Congress enacted NAGPRA as human and civil rights policy for Native Americans, and as pre-settlement of myriad lawsuits Native Peoples were on the verge of filing. Congress chose to establish a Native American policy and processes for the return of Native human remains, funerary items, sacred objects and cultural patrimony, rather than to leave it to the courts to decide repatriation policy on a piecemeal basis.

Certain scientists who opposed national repatriation policy have worked to frustrate the repatriation processes and delay repatriations until they can conduct further studies on human remains in their collections. Many are trying to hide the identity of human remains which are the subjects of their studies and to classify them as unidentifiable, in order to avoid repatriating them. Some federal scientists are abetting this effort by attempting to create new regulations to make the unidentified Native human remains the property of the repositories where they now reside.

Others have turned their attention to dismantling repatriation law through the courts. One group has pursued litigation, pitting what they see as a scientific right to conduct destructive studies of the Ancient One, popularly known as Kennewick Man, against the federal government and several related Indian tribes, who want to rebury him. Since the 2003 AIRFA gathering at ASU, the Ninth Circuit Court of Appeals has upheld a district judge's ruling that the scientists can go forward with studies, meaning that they can carve up, drill holes in and scrape away at the Ancient One.

The February 2004 decision upholds wrong-headed notions that the Ancient One is not Native American within the meaning of NAGPRA and does not have to be repatriated, that NAGPRA is not Native American policy, that a Native American coalition cannot jointly claim him and that federal-tribal consultation constitutes ex parte communication that somehow violates the scientists' due process. The tribal coalition is seeking a rehearing.

The main policy achievement of the repatriation laws is the recognition that Native Americans are human beings and no longer archeological resources. Ironically, the Ninth Circuit ruling denies the humanity of the Ancient One, holding that archeological resources law applies, that he is an archeological resource and that archeologists can have at him. Unless the courts reverse these rulings, this aspect of NAGPRA will become part of AIRFA's unfinished agenda and Congress will have to revisit and clarify repatriation law.

**Conclusion**

While much progress has been made under AIRFA and its follow-on legislation, there is much to do in order to fulfill AIRFA's promise to preserve and protect Native American religious freedom. AIRFA provided a policy context and incremental process for subsequent action. This has worked well in those areas where Congress has taken specific action – with respect to ceremonial use of peyote, for example. It has not worked well in those areas where Congress has not acted. The failure of Congress and five administrations to create a cause of action for sacred places protection is the most glaring item on AIRFA's unfinished agenda.

The overarching work that needs to be done under AIRFA is to educate Americans who teach and shape public opinion to learn and tell the truth about the history of suppression of Native American religions and religious freedom rights. Judges, policymakers and those who implement and enforce laws need to be educated about the onslaught of weaponry and laws that denied the religions and the very humanity of Native Peoples, and how that onslaught has diminished, but not ended. Only when they understand what brought us to this juncture will they appreciate that, because the federal government has used its vast power to do ill, it is necessary for it to take remedial actions in the direction of justice.

That is a fitting way to recognize AIRFA's anniversary and an honorable way to begin its next 25 years.