

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 recent decision of the United States Court of Appeals for the Ninth Circuit in *Bonnichsen v. United States*, 357 F.3d 962 (9<sup>th</sup> 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, 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 Institute (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 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, 101<sup>st</sup> Cong., 2<sup>nd</sup> 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, are entitled to access to the inventories and summaries after they are completed, and 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 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 objects, those materials are to go to any "lineal descendants" of the individual whose remains or associated objects are discovered or excavated, if such lineal descendants exist. If there are no lineal descendants, the materials are to go to the Indian tribe on whose land the materials were discovered or to the tribe that has the closest cultural affiliation with the materials. The statute then provides (25 U.S.C. 3002 (a) (2) (C)) that, "*if the cultural affiliation of the objects*

*cannot be reasonably ascertained,*” the materials are to be under the control of the tribe that has been found to have aboriginally occupied the area where the objects were discovered. NAGPRA thus expressly and unquestionably establishes a statutory rule for the disposition of materials whose “cultural affiliation . . . cannot be reasonably ascertained.” Yet the Ninth Circuit panel, by holding that NAGPRA applies to materials only if the materials have been shown to bear a relationship to a present-day tribe, would interpret NAGPRA as being wholly inapplicable to such materials. When a statute expressly establishes rules for the disposition of certain materials, it cannot be a correct interpretation of that statute to read it as being inapplicable to those materials.

NAGPRA’s repatriation provisions also expressly deal with materials that cannot or have not been shown to have a relationship to a present-day tribe. Section 8 of NAGPRA (25 U.S.C. 3006 (c)) establishes a review committee and directs that committee to compile an inventory of “culturally unidentifiable human remains” that are in the possession of federal agencies, museums, universities, and other covered institutions. The Committee is to recommend “specific actions for developing a process for disposition of such [culturally unidentifiable] remains.” If the Ninth Circuit’s view that NAGPRA applies only to materials with an established “significant relationship” to a present-day tribe were correct, this provision would make absolutely no sense. NAGPRA certainly would not establish a committee to consider how to dispose of “culturally unidentifiable” remains, if NAGPRA does not apply to such remains.

The Ninth Circuit was thus plainly wrong to require a showing of a significant relationship to a present-day Indian tribe before materials can be deemed covered by NAGPRA. NAGPRA



applies to all indigenous American materials, whether or not a specific relationship to a present-day Indian tribe has been established. That does not mean that all American indigenous materials are subject to mandatory repatriation. They are not. All American indigenous materials are, however, subject to NAGPRA's important provisions requiring consultation with tribes and regarding the classification and treatment of indigenous materials and the inclusion of Indians in determining the procedures to be established under NAGPRA for disposition of unaffiliated materials.

I cannot emphasize too strongly the importance of applying NAGPRA to indigenous American materials regardless of whether they have been shown to be culturally affiliated with a present-day Indian tribe. That statutory coverage is extremely important in accomplishing NAGPRA's fundamental human-rights objectives. Remember that one of the serious abuses that led to the enactment of NAGPRA was the refusal of many agencies, institutions and scientists to give Indians information about materials in their possession, and their related refusal to permit Indians to participate in deciding whether materials in their possession were in fact Indian, whether they were affiliated with a present-day tribe, and how materials should be treated or disposed of depending upon the answers to those questions. Whether particular materials are Indian or related to a present-day tribe or tribes is a question upon which there is often no certainty. Opinions may differ widely, especially between scientists and tribes. Prior to NAGPRA, institutions and scientists frequently answered those questions for themselves, without informing tribes of the existence of indigenous materials, obtaining tribal input, or in any way consulting with Indians or tribes about the cultural affiliation of those materials. The decision about how to classify and treat the materials was thus often made without any Indian participation.

A principal purpose of NAGPRA was to recognize the human right of American Indians to participate in these decisions, which have enormous cultural and religious importance to Indian people. NAGPRA accomplishes this purpose by requiring institutions and scientists to make information available to tribes about indigenous American materials in their possession and to consult with tribal governments and traditional leaders about how to classify and treat those materials. See 25 U.S.C. 3003, 3004. The consequence of interpreting NAGPRA's definition of "Native American" in the way that the Ninth Circuit panel does is that institutions and scientists would be free to make their own decision about whether such a relationship exists and, if they unilaterally decide - - without Indian input - - that no relationship exists, to ignore NAGPRA altogether - - to fail to inform tribes about materials and to fail to consult with them before making decisions about whether materials are Indian-related and decisions about how to treat materials in light of the evidence - - or lack of evidence - - of Indian affiliation. That is exactly the kind of exclusionary process that the Dialogue Panel unanimously deplored and that NAGPRA unquestionably sought to change. The term "Native American" in NAGPRA must be given a broad definition in order to insure that the information-sharing, consultation and participatory decision-making that NAGPRA requires take place as Congress intended.

Similar considerations apply to newly-discovered or newly-excavated material, as in the case of Kennewick Man. Here also NAGPRA requires consultation with tribes and tribal groups regarding the identity and possible Indian affiliation of all indigenous American materials found on federal or tribal land. NAGPRA also requires the temporary cessation of construction and similar activity in order to protect discovered indigenous materials that may turn out to be Indian-related.

See 25 U.S.C. 3002 (c) and (d). If the Ninth Circuit panel's interpretation of "Native American" were to prevail, however, the discoverer of pre-Columbian remains or other materials could make a unilateral decision that the materials have no "significant relationship" to a present-day tribe, fail to report the discovery, fail to permit tribal consultation or input, and even proceed to destroy the materials, even though an Indian tribe or tribes would have sought repatriation or preservation if they had been informed of the discovery. That is precisely what NAGPRA intended to prohibit.

The Ninth Circuit panel's narrow interpretation of "Native American" also has negative human-rights consequences for unaffiliated materials. Unaffiliated indigenous materials are not subject to mandatory repatriation under NAGPRA. NAGPRA, however, contains important provisions regarding the treatment of these materials. If they are excavated or discovered after NAGPRA's enactment, they are to be disposed of "in accordance with regulations promulgated by the Secretary [of the Interior] in consultation with the review committee established under Section 8 [of NAGPRA, 25 U.S.C. 3005], Native American groups, representatives of museums and the scientific community." 25 U.S.C. 3002 (b). Indians are thus plainly intended to participate in determining the treatment to be given to unaffiliated materials. The Ninth Circuit panel, however, has held that unaffiliated materials are not "Native American" materials at all for NAGPRA purposes. If so, NAGPRA's required Indian participation would not apply. The same would be true of culturally unidentifiable remains already in the possession of institutions or federal agencies. As noted above, NAGPRA establishes a review committee, with substantial Indian representation, to recommend "specific actions for developing a process for disposition of such remains." By excluding these materials from NAGPRA, the Ninth Circuit panel would deny Indians the right to

participate in the decision about how these unidentifiable materials are to be treated. NAGPRA clearly intended otherwise.\*

There are several different kinds of corrective amendments that would reverse the Ninth Circuit's serious mistake. In reaching its decision, the Circuit panel principally relied on the fact that NAGPRA's definition of "Native American" employed the present tense in referring to materials relating to a "tribe, people or culture that *is* indigenous to the United States." The words "that is" could be removed from the definition or the words "or was" could be inserted after the words "that is," thus making it clear that relationship to a present-day tribe need not be established for indigenous American materials to be "Native American" for NAGPRA purposes. Alternatively, the more lengthy - - but substantively similar - - definition adopted by the Secretary of the Interior could be substituted for the present definition of "Native American." That definition would read:

Native American means human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian tribes.

A third approach would be to add, at the end of the present definition, a sentence reading: "A

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\* The Ninth Circuit decision is also inconsistent with NAGPRA provisions that (1) assign ownership of indigenous materials found on tribal land to the tribe on whose land they are found and (2) assign ownership to tribes recognized as aboriginally occupying the land on which materials are found. See 25 U.S.C. 3002 (2) (A) and (C) (1). Neither of these provisions requires a showing of any cultural affiliation. Congress intended in these provisions to recognize the responsibility that tribes ordinarily feel for remains found on land that they occupy. The Ninth Circuit panel would, in effect, remove these two provisions from the statute since, under the panel's interpretation, tribes could not obtain repatriation of materials found on their land without proving affiliation with those materials.

relationship to a present-day Indian tribe or group is not required to be established for indigenous materials to be Native American within the meaning of this Act.”

There are, I am sure, many other possibilities. I would be glad to work with Committee staff in considering these and other proposals and in addressing other statutory amendments that are, or may become, necessary. It is extremely important that NAGPRA be able to continue to serve its vital human-rights objectives.