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S. HRG. 109–297

NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

OVERSIGHT HEARING ON AMENDMENT TO THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

JULY 28, 2005
WASHINGTON, DC

U.S. GOVERNMENT PRINTING OFFICE

22–885 PDF WASHINGTON : 2005

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NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

THURSDAY, JULY 28, 2005

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10:03 a.m. in room 485 Senate Russell Building, Hon. John McCain (chairman of the committee), presiding.

Present: Senators McCain, Akaka, Dorgan, and Inouye.

STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. Good morning.

The oversight hearing today will address the Native American Graves Protection and Repatriation Act, specifically a proposed amendment to the National Graves Protection and Repatriation Act that was included in S. 536, a bill reported by the committee earlier this year.

While other provisions in S. 536 have been acted on by the full Senate, no further action has been taken on the proposed amendment. The amendment, which many involved in the development of NAGPRA say is consistent with the original intent of the law, it would apply NAGPRA to certain human remains regardless of whether a connection can be established between those remains and a presently existing tribe.

The proposed amendment, which was also reported out by this committee during the 108th Congress, and arose from litigation surrounding the discovery of a 9,200-year old skeleton known as the Kennewick Man, has generated considerable controversy in the scientific community. Regardless of whether they agree or disagree with the proposal, most scientists we have heard from objected to the committee not holding a hearing specifically on the amendment to seek the opinions of the range of stakeholders who participated in constructing the delicate compromise that is NAGPRA.

I agree with these critics and stand corrected for not doing this earlier. I look forward to hearing from the witnesses who have joined us today.

[Prepared statement of Senator McCain appears in appendix.]

The CHAIRMAN. Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator DORGAN. Mr. Chairman, thank you very much.

I think you well described the purpose of this hearing. These issues are really very important spiritual issues. Many of us have dealt with them in different ways with our individual tribes. We have passed Federal legislation that has been subject now to a court interpretation of some controversy. I appreciate the fact that you are holding this hearing.

I note we have a Commerce Committee markup at the same time so I know we will have to juggle some of these pieces of testimony, but thank you very much for the hearing.

The CHAIRMAN. Senator Inouye.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Senator INOUYE. I would like to join my colleague in thanking you for holding this hearing. It promises to be a most interesting one. But as noted, we have many conflicts this morning and I find that I will have to be at another meeting, but may I have my statement made part of the record?

The CHAIRMAN. Without objection.

[Prepared statement of Senator Inouye appears in appendix.]

The CHAIRMAN. Our first witness is Paul Hoffman, Deputy Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior. Welcome, Mr. Hoffman. Your complete statement and all written complete statements will be made part of the record. Thank you for coming this morning. This is not only a controversial issue, but in many ways a very fascinating one.

Go ahead, Mr. Hoffman.

STATEMENT OF PAUL HOFFMAN, DEPUTY ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR

Mr. HOFFMAN. Yes, sir; thank you, Mr. Chairman. I am pleased to be here today and to have the opportunity to testify before your committee on behalf of the Department of the Interior regarding the Native American Grave Protection and Repatriation Act, the *Bonnichsen* v. *United States* court decision concerning the disposition of the Kennewick Man remains, and the amendment as proposed in S. 536.

The department opposes amending NAGPRA to alter the decision of the Ninth Circuit Court as proposed in the technical amendments of the Native American Omnibus Act.

The CHAIRMAN. Could I interrupt you, Mr. Hoffman?

Mr. HOFFMAN. Yes, sir.

The CHAIRMAN. Is that in keeping with the Administration's previous position?

Mr. HOFFMAN. This Administration actually never took a position on it. When we took office, this process was being litigated and worked out. We determined at that time to allow the agencies to work this out and to let the litigation proceed in order to hear the

court's opinions and construction of the law. We are compelled by their argument.

NAGPRA was enacted in 1990 to address the rights of lineal descendants, Indian tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects and objects of cultural patrimony. The law directed the Secretary of the Interior to promulgate regulations, provide staff, make grants to assist organizations in their compliance with the law, extend inventory deadlines when those organizations are demonstrating good faith in complying with the law, publish notices of completed inventories and notices of intent to repatriate either human remains or cultural items.

The department has the authority to assess civil penalties for failure to comply and respond to notices of inadvertent new discoveries on Interior lands. Every Federal agency has their own responsibility under NAGPRA to ensure that their agency is in compliance with it, but the national NAGPRA program is administered within the Department of the Interior under the National Park Service.

Some statistics to note, the Congressional Budget Office estimated at the time of the passage of NAGPRA that there were somewhere between 100,000 and 200,000 human remains in collections as of 1990. The NAGPRA program has successfully repatriated 31,093 human remains over the past 15 years and approximately 111,000 human remains have been identified as culturally unidentifiable.

The *Bonnichsen* v. *United States* court decision addressed the question of whether the Kennewick Man remains were Native American under NAGPRA. The U.S. Army Corps of Engineers and the Department of the Interior had determined that the remains were Native American because they predated the arrival of Europeans.

The District Court and the Court of Appeals ruled against the United States, saying to be Native Americans. There must be a general finding that the remains have a significant relationship to the presently existing tribe, people or culture and that the relationship must go:

> Beyond features common to all humanity. Relying only upon the age of the remains that predate European arrival is not sufficient to conclude that the remains are Native American.

This is from the court decision. Also from that decision, congressional intent was:

> To give American Indians control over remains of their genetic and cultural forbears, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people or culture.

I would note for the record that there have been human remains of nearly the same age as the Kennewick Man that both predate Europeans and have been demonstrated to have significant or special relationship to existing tribes, peoples, or cultures.

The amendment in S. 536 would change the definition of "Native American." The term "Native American" would mean of or relating to a tribe, people or culture that is, and the amendment inserts, or was indigenous to any geographic area that is now located within the boundaries of the United States.

We believe that the Ninth Circuit Court of Appeals correctly interpreted the law and the intent of Congress, which was to give American Indians control over remains of their genetic and culture forbears, not over the remains of people bearing no special or significant genetic or cultural relationship to some presently existing indigenous tribe, people or culture. NAGPRA should protect the sensibilities of current existing tribes, peoples and cultures, while balancing the need to learn about past cultures and customs.

By adding the words "or was" to the definition of Native American, the proposed amendment would shift away from this balance.

Thank you, Mr. Chairman. I would be happy to answer any questions.

[Prepared statement of Mr. Hoffman appears in appendix.]

The CHAIRMAN. Thank you very much.

In *Bonnichsen* v. *United States,* the Department of the Interior argued that the Kennewick Man remains met the definition of "Native American" and so were covered by NAGPRA, but today you are testifying that they should not be covered by NAGPRA. You are asserting that the department has not changed its position?

Mr. HOFFMAN. Up until the court decision in *Bonnichsen* v. *United States,* the Department of the Interior had taken the position that if the remains predated European arrival in the Americas, then the remains would be presumed to be Native American. The court interpreted it differently, and we believe provided a compelling argument for a change in that application of the definition.

The CHAIRMAN. Are there remains other than the Kennewick Man's remains that are affected by this court decision?

Mr. HOFFMAN. Potentially. As I indicated, there are a number of remains of approximately the same age as the Kennewick Man. Some of them have been repatriated. I believe they have been repatriated. I know they have been identified as culturally affiliated because of where they were found and objects that were found with those remains that could tie those remains to a specific living tribe, culture or people group.

The CHAIRMAN. The coalition of Indian tribes in the court case sought to prevent scientific study of the remains on the grounds that this was offensive to their religious belief. Now that this decision has made it clear that not all indigenous remains are Native American, how can one establish whether remains are or are not Native American without offending these beliefs?

Mr. HOFFMAN. The challenge in NAGPRA is that, I have been involved in a lot of discussions since my arrival at the Department of the Interior about 3½ years ago, and it seems to me it is about one part law, two parts philosophy, and three parts spiritual issues. Our charge is to deal with the law and what the law says.

How would we deal with future remains or other remains would be that if we could establish a significant or genetic link to an existing living culture, tribe or people group, then those remains would be repatriated. If we cannot, then those remains would not be repatriated.

The CHAIRMAN. Senator Dorgan.

Senator DORGAN. Mr. Hoffman, you are in the process of writing regulations, are you not?

Mr. HOFFMAN. Yes.

Senator DORGAN. Can you give us a status? What is happening? What is the timing of regulations that would implement that section of NAGPRA which established the process for disposition of culturally unidentifiable human remains?

Mr. HOFFMAN. Those regulations have been in process for a number of years and under review for a number of years. I am not familiar with the immediate status of those, but I will be glad to get back to you with that answer.

Senator DORGAN. I never understand what that means when an agency says they have been in process for a number of years. It seems to me that if one undertakes the responsibility of writing a set of regulations, you write them, you put them out for comment, then you implement the regulations. So when did this start and when do you expect to be completed?

Mr. HOFFMAN. I would be glad to get back to you on the actual start date and an estimated completion date. I do not know that off the top of my head. I appreciate what you are saying. Some Administrations advance regs; other Administrations come in and may have a different feeling about those regs and may just choose to let that regulation development stay in abeyance. That is not a pretty story about the process, but it is certainly a real one.

Senator DORGAN. It is a great quicksand out there, isn't it, for the regulatory issues. They just seem to go on and on and on.

Let me ask about attorneys fees awarded under the litigation that my colleague referred to. Is the department paying attorneys fees awarded under that litigation, do you know?

Mr. HOFFMAN. Yes, sir; we are paying approximately $680,000 in attorney fees to the plaintiffs.

Senator DORGAN. And where does that money come from?

Mr. HOFFMAN. That money will be coming from the NAGPRA grant program.

Senator DORGAN. So that is the grant program that we provided funding for? Okay. Well, I also just would observe, I think the chairman was suggesting there seems to be a conflict in the department's previous position on this and current position. I think you have answered the inquiry by the chairman, but I think there is a conflict there.

I appreciate your being here today, Mr. Hoffman.

Mr. HOFFMAN. Thank you.

The CHAIRMAN. Senator Inouye.

Senator INOUYE. Thank you.

Mr. Hoffman, you indicated that you know that to be declared a Native American, those remains must be culturally related to the present tribe or Indian?

Mr. HOFFMAN. To a living tribe, people or culture.

Senator INOUYE. Who has the burden of proof? Is the department the one to say that you are not or do the Indians have the burden of proof of saying we are?

Mr. HOFFMAN. Most remains are in the possession of either Federal agencies or museums or organizations that are studying the remains. They are in collections, if you will. It is under the law, the obligation of the people in possession of the remains to identify whether those remains are culturally unidentifiable or culturally unidentifiable. The normal process is that the department, the

NAGPRA office, then makes the list of culturally identifiable remains available to the public and tribes, Native Hawaiians and other groups can then petition, if you will, to make their case for why they believe the remains are identifiable.

Senator INOUYE. And who determines what remains are culturally identifiable?

Mr. HOFFMAN. In the case of new discoveries, the Federal land manager—if on Federal lands—or the Indian landowner—if on tribal lands—makes the determination as to whether NAGPRA applies and the eventual disposition of the remains. In the case of collections, the Federal agency or museum that receives Federal funds which has control of the items is responsible for making that determination.

Senator INOUYE. So the Department of the Interior does that?

Mr. HOFFMAN. The Department of the Interior would only make that decision if the new discovery was on Interior lands or if the collection was owned by a Federal agency within Interior, or in very limited cases, if the Secretary of another department delegates responsibility to the Secretary of the Interior.

Senator INOUYE. Now, you have indicated that there are 111,000 culturally unidentifiable remains.

Mr. HOFFMAN. Yes, sir.

Senator INOUYE. What happens if this bill passes? What is the impact?

Mr. HOFFMAN. If this bill passes, things would go on largely as they have been proceeding since the passage of the act.

Senator INOUYE. And you believe that your amendments will resolve this matter?

Mr. HOFFMAN. Mr. Chairman, our position is we are opposed to the amendment. I am guessing it is the belief of those who are proponents of the amendment that it will resolve the matter. We believe that there needs to be an appropriate balance between not offending the sensibilities of these existing living cultures, tribes and people groups and the need to be able to study some remains further in order to determine whether they are affiliated or what the origins are or how it led to the establishment of people in the North American continent, specifically the United States.

Senator INOUYE. Mr. Chairman, I have many other questions. May I submit them later?

The CHAIRMAN. Without objection.

Senator INOUYE. Thank you very much.

The CHAIRMAN. Thank you very much, Mr. Hoffman. We will continue to work with you and we hope that you will have a report for Senator Dorgan about the process.

Mr. HOFFMAN. Yes, sir; I will. Thank you very much.

The CHAIRMAN. Thank you very much.

Our second panel is Paul Bender, professor of law at Arizona State University College of Law; Walter R. Echo-Hawk, senior staff attorney, Native American Rights Fund; Patricia Lambert, American Association of Physical Anthropologists at Utah State University; Paula Barran, an attorney for Barran and Leibman in Portland, OR, accompanied by Alan Schneider, director of friends of America's Past; Professor Keith Kintigh, Society for American Archaeology in Tempe, AZ; and Van Horn Diamond of Honolulu, HI.

We will begin with our old friend, Paul Bender. Welcome back.

STATEMENT OF PAUL BENDER, PROFESSOR OF LAW, ARIZONA STATE UNIVERSITY COLLEGE OF LAW

Mr. BENDER. Thank you, Senator. And thank you for your leadership in this whole project from the beginning of the statute.

I am here because I was a facilitator of the dialog panel which I think you recommended should be convened. That dialog panel, Mr. Echo-Hawk was on the panel, came up with a consensus about what the statute should contain. The Ninth Circuit decision is just wrong about the definition of "Native American." The reason it is wrong is because it failed to understand that NAGPRA has two principal purposes.

One is repatriation, but to me, and I think to the panel the more important one was consultation, admitting Indian tribes into the consultation process so that, for example, when you discover old remains in a building project, you have to notify tribes and consult with tribes about whether they are affiliated. Under the Ninth Circuit decision, there would be no consultation, or there wouldn't have to be any consultation. The museum that had remains or people who discovered remains could just make the decision that, hey, there is no present day tribe that is affiliated and go on and treat them as if they were not Native American.

The term "Native American" is meant to be tremendously inclusive in order to permit the tribes to engage in consultation about whether they are culturally related to a present day tribe, and that the repatriation standard is what the Ninth Circuit said the Native American standard was.

The repatriation standard is whether there is a relationship with a present day Indian tribe, but materials are Native American before you make that determination because if it is determined that they are not affiliated with a present tribe, the statute says those remains or the fate of those remains is in the hands of the review committee that the statute set up. The review committee is explicitly told to compile an inventory of culturally unidentifiable human remains that are in the possession or control of Federal agencies or museums, and recommend specific actions for developing a process for disposition of such remains.

If unidentified remains or unaffiliated remains are not Native American remains, this provision has absolutely no meaning because culturally unidentified material would not be Native American and would not go before the committee. I think that illustrates what is wrong with the Ninth Circuit's interpretation. It focused on repatriation. It said, hey, we should not repatriate things unless they are related to a present day tribe.

That is generally true under the statute, but the important thing is that before you decide whether they are affiliated, you have to consult with tribes and with a review committee. The Ninth Circuit decision just strikes that completely from the statute.

The consultation part of the statute was to me the more important part. The thing that struck me in the dialog panel was that the principal anger of the tribes over many years was the failure to consult. Museums would have things and would say we know what they are; we are not going to talk to you; we are not even

going to let you see them. When they consulted, generally there was an agreement about whether they were related to a tribe and what should be done with them. It was the failure to consult, the failure to admit Indians into the process of deciding whether they were Native American, whether they were related to a present day tribe, whether they ought to be repatriated.

The statute carefully set up a two stage process. First, you consult and then you make a decision. If the decision is that they are not related to a present day tribe, then they go to the review committee. The review committee is supposed to decide what happens to them. The Ninth Circuit seemed to think that the only thing the statute was for was to repatriate.

That is just not true. Under the Ninth Circuit decision, that whole consultation part of the statute would be canceled because you would dig up a skeleton; you would say, hey, do I think this is related to a present day tribe? No. Therefore, I can go ahead and destroy it, throw it away.

The statute meant to say when you dig up and old skeleton, you stop and the statute says you have to stop, and you consult with the appropriate tribes. Through that consultation process, you try to decide whether they are repatriatable remains. It is really important to have the tribes involved in that.

It is also really important to have the tribes, even if you decide that the remains are not affiliated with a present day tribe, it is really important to have Indians involved in the decision in the review committee about what should happen to these old remains. The review committee contains Indian representatives.

The Ninth Circuit decision just throws that out and acts as if the only question is, are these repatriatable. So a museum with remains or a museum with any cultural objects could say, well, we do not think there is a present day tribe that is related to these so we don't have to tell anybody about them.

Well, they have made the decision that they are not affiliated. The whole point was they were supposed to inform tribes so that they could consult with them about whether they were affiliated. That is the part of the process that the Ninth Circuit decision leaves out.

If you change the statute the way the amendment proposes, you would not change the repatriation standard at all. It remains exactly the same. What you would change is the need to bring Indians into the process of deciding whether they are affiliated and if so, who they are affiliated with. I think that is really important to do.

[Prepared statement of Mr. Bender appears in appendix.]

The CHAIRMAN. Thank you very much.

Why do you think the Administration opposes?

Mr. BENDER. I haven't got the slightest idea. They were right the first time. They clearly understood that indigenous meant any indigenous people prior to the Europeans' arrival; any indigenous materials like that were under NAGPRA. Why they have changed their mind about that, I do not know.

The CHAIRMAN. Welcome, Mr. Echo-Hawk.

STATEMENT OF WALTER R. ECHO-HAWK, SR., SENIOR STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND

Mr. ECHO-HAWK. Thank you, Mr. Chairman. Good morning, members of the committee, Senator Inouye and Senator Dorgan.

It is a pleasure to be back before the committee to discuss today's subject. I am familiar with the issue today by virtue of my work since 1986 on repatriation issues. I was a member of the panel that was referred to in Professor Bender's testimony. I worked closely with the committee, gave testimony on NAGPRA and worked with the staff in the development of NAGPRA on behalf of Native clients.

Subsequent to that, I have worked on the implementation of the statute by representing tribes in repatriation claims. I also participated in the *Bonnichsen* case as counsel to amicus parties to try to effectuate the statute and ensure that it was properly interpreted by the court. So I am familiar with today's issues.

My written testimony is in the record. I will just briefly summarize it and I would like to address myself, time permitting, to the comments made by the Administration, which I feel are a very sad retreat from its earlier position. I would like to introduce for the record the brief that was submitted by the United States in the *Bonnichsen* case where it supported very strongly the definition of Native American as including all indigenous Native people indigenous to the United States and their regulations implementing NAGPRA.

So it was very sad for me today to see the Department of the Interior break its word that it gave to the Ninth Circuit. I think when it comes to a human rights matter, we lose credibility when the Department says one thing to one branch of the Government and then the opposite to another branch. So if I may, I would like to introduce the United States' brief into the record of this hearing, if I may.

The CHAIRMAN. Without objection. It will be made a part of the record.

Mr. ECHO-HAWK. Thank you, Mr. Chairman.

[Referenced document appears in appendix.]

Mr. ECHO-HAWK. Today, I represent a working group of prominent Native Americans who are concerned with unknown Native American dead, those dead who are currently listed as not being culturally affiliated or having any known descendants. According to the testimony of the Administration, there are 111,000 of these unknown dead. My clients are concerned about their fate and their proper disposition, and particularly those provisions of NAGPRA which expressly pertain to their classification, their treatment and their disposition.

I fully agree with the very sound legal analysis provided by Professor Bender regarding the impact of *Bonnichsen* on NAGPRA. The court's interpretation was incorrect for the reasons that he gave in his testimony. I would just simply add two things in my written testimony on that point, on the correctness of the opinion.

It is very telling that the court did not cite any direct legislative history concerning section 3001(9), the definition of "Native American" to support its narrow restrictive holding. And the reason why, Mr. Chairman, is that there is no direct legislative history behind

that section. The reason why is there was no debate, there was no argument, or no controversy concerning that section at the time it was crafted.

All of the parties, everyone who worked on the legislation, including myself, logically assumed that NAGPRA would apply to any Native Americans that are indigenous to the United States. That is the reason why there are special statutory sections that deal with these individuals, these unknown individuals. That is why the Secretary of the Interior promulgated regulations on that assumption and took the position it did in *Bonnichsen,* because we were all under that assumption, and the court undercut the scope of it.

And second, it is very telling that the court even recognized that there is a disparate coverage now for Native American and Native Hawaiian. The court said we do not have this threshold showing for Native Hawaiians because Congress used different language, using geographic criteria. But I know that Congress did not intend to have broader coverage for Native Hawaiians than Native Americans.

So the Ninth Circuit decision is wrong. It nullifies various provisions in the statute that are referenced in my testimony. It restricts the coverage of the statute seriously. So I earnestly urge the committee to continue working on this problem to get us back on the path that was established by all of us in 1990. I think we were all well pleased with the work that was done then and considered it landmark, consensus human rights legislation.

As a practitioner of Federal Indian law for 30 years, I have had occasion to study the history of Federal Indian law, Mr. Chairman. I have seen, and I think scholars will agree with me, and Senator Inouye I have heard him as well, that there has been far too much abrogation of Indian treaty rights and Indian rights in the history of our great Nation. It is within the power of Congress to ensure that its human rights measures enacted for Native Americans are not abrogated by other branches of the Government.

That is what occurred in the *Bonnichsen* case. I think we just witnessed the Department of the Interior in today's hearing attempt to abrogate the statute as well, retreating from its position. That is very sad to see. I thought those days were past. So I just respectfully say and urge the Committee in the name of the national honor to uphold this human rights statute and ensure that our intent is effectuated.

I thank you for the opportunity again to be here, and I pledge any assistance to work with the committee as we continue to look at this serious impairment of the NAGPRA objectives that has resulted.

Thank you.

[Prepared statement of Mr. Echo-Hawk appears in appendix.]

The CHAIRMAN. Thank you very much.

Ms. Lambert.

STATEMENT OF PATRICIA M. LAMBERT, AMERICAN ASSOCIATION OF PHYSICAL ANTHROPOLOGISTS, UTAH STATE UNIVERSITY

Ms. LAMBERT. I am here representing the American Association of Physical Anthropologists. We want to thank you for the opportunity as well to present testimony before the committee. I will read this to make sure I get it right.

The American Association of Physical Anthropologists is the largest professional society devoted to the study of physical anthropology in the United States. We were part of the coalition of Native American and scientific groups that worked for the passage of the Native American Graves Protection and Repatriation Act. We continue to support the key goal of ensuring that culturally affiliated federally recognized tribes are allowed to make decisions regarding the disposition of their ancestral remains.

During the NAGPRA negotiations, it was our understanding that the term "Native American" encompassed both modern and ancient indigenous groups, including the many earlier archaeologically documented cultures that have disappeared and thus are not culturally affiliated with any modern federally recognized tribe.

The Ninth Circuit Court's ruling in the case of Kennewick Man makes it clear that the current NAGPRA definition of "Native American" does not reflect this commonsense understanding of the term. We consequently do not object to the insertion of "or was" into the current definition to clarify its meaning.

However, we do have a concern about the timing of the proposed amendment. It is impossible to judge the effects of the proposed change in the absence of regulations regarding the disposition of culturally unidentifiable human remains. This apparently minor word change in the definition of "Native American" could have profound legal ramifications at odds with the intent of NAGPRA depending on how the regulations are worded.

NAGPRA has been a success because of the careful way it was crafted to balance the disparate interests of many different groups of Americans in archaeological remains. NAGPRA's specific instructions regarding the composition of the review committee makes this balance of interests very clear.

The key to the compromise that allowed so many different groups to support NAGPRA's passage resides in the concept of cultural affiliation. NAGPRA provides culturally affiliated tribes with the right to reclaim the remains of their ancestors where lineal descent or relationship of shared group identity can be clearly established, based on the preponderance of a broad range of different types of evidence.

However, when a reasonably close relationship between human remains and a modern federally recognized tribe cannot be established, NAGPRA permits human remains to be retained for scientific study. In this way, NAGPRA balances the undisputed right of close relatives to decide about the disposition of their ancestral remains, against the rich array of historical insights that can be derived through scientific study for all Americans.

The troubling aspect of the *Kennewick* case in our opinion is not the fact that the Secretary of the Interior considered the Kennewick remains to be those of a Native American. Instead, it

derives from the Secretary's lack of adherence to the statutory definition of "cultural affiliation," which is a "relationship of shared group identity which can be reasonably traced between a present day Indian tribe and an earlier identifiable group."

We also feel there was a lack of appreciation for the balance which is at the heart of NAGPRA.

Such attempts by the DOI to extend the concept of cultural affiliation to encompass very ancient remains with no demonstrable relationship to any modern tribe makes us apprehensive about the way the amendment you are currently considering will interact with pending draft regulations dealing with culturally unidentifiable human remains because the proposed amendment will bring very ancient remains like Kennewick Man under the purview of NAGPRA by defining them as Native American.

We want to remind the committee that NAGPRA neither instructs nor provides authority for mandatory mass repatriations of culturally unidentifiable human remains to culturally unaffiliated groups. It does not say that anywhere. However, it seems likely, based on the position the DOI took in the *Kennewick* case, that the proposed regulations will attempt to do just that.

Given these concerns, we hope that you will consider delaying the passage of the proposed amendment until regulations dealing with culturally unidentifiable human remains are promulgated. We look forward to your assistance in making sure that any regulations dealing with such collections balance the absence of a relationship of shared group identity against the value of these remains to all Americans as a source of information about our collective past.

Culturally identifiable remains have enormous scientific value for learning about life in distant times. They also have provide insights for modern day medical and forensic concerns. I would be happy to elaborate on that.

In summary, we support the spirit of the proposed amendment and withhold our full support only because the legal ramifications of this change in statute cannot be fully assessed in the absence of regulations dealing with the disposition of culturally unidentifiable human remains.

Thank you.

[Prepared statement of Ms. Lambert appears in appendix.]

Senator DORGAN [presiding]. Ms. Lambert, thank you very much.

The Chairman had to go down to the Commerce Committee which is downstairs to offer an amendment on a markup. He will be back, at which point I will go down and offer my amendment on the markup of another bill, so we are having to juggle in this manner, but Senator McCain will be back in a bit.

Next, let me call on Paula Barran, attorney at Barran and Leibman, Portland, OR, accompanied by Alan Schneider, Director of Friends of America's Past in Portland, OR.

Ms. Barran, thank you very much for being here.

STATEMENT OF PAULA BARRAN, ATTORNEY, BARRAN AND LEIBMAN, LLP; ACCOMPANIED BY: ALAN L. SCHNEIDER, DIRECTOR, FRIENDS OF AMERICA'S PAST

Ms. BARRAN. Thank you, Senator. I appreciate the opportunity to be here, as does Mr. Schneider.

We are the attorneys who handled the *Bonnichsen* v. *United States* case from almost the moment that the skeleton of the Kennewick Man was discovered in the Columbia River 9 years ago this week. We are continuing to handle it today.

I must say that I very much disagree with Professor Bender's analysis of the Ninth Circuit and its opinion in that case. I argued the case before the Ninth Circuit, and before that Mr. Schneider and I briefed the case, and before that we tried the *Kennewick Man* case, and before that we consulted or attempted to consult with the Government.

One of the problems that we ran into, in addition to some very shameful treatment by the government in this case, which I will elaborate on briefly, one of our issues was not that the Department of the Interior and the Army Corps of Engineers was consulting with the tribes. We thought that was wonderful and that was the way the statute was intended to be.

Our problem was that the moment that skeleton was seized by the Army Corps of Engineers, our clients, who were the most distinguished physical anthropologists in this country, were literally shut out of that process. We were told by the Government that it was our job to figure out what to tell them, but they were not going to talk to us. They were not going to tell us what they were finding.

But they also ridiculed us and they ridiculed our clients, people who have written the books about the prehistory of this country. I found that treatment to be a terrible thing to experience as an American.

Nine years ago this week, the Kennewick Man skeleton was discovered and he is magical; 2 weeks ago, the scientific team finally ended its first round of investigation into that skeleton. I tell you, what they are discovering is just a magical wonderful part of the peopling of the Americas. It was 8,000, 9,000, 10,000, maybe longer, many, many years ago, people walked this land.

They walked the continental United States and they were not American Indians as we know those people today. They are different. Kennewick Man is different. There are a handful of ancient skeletons and they have the capacity to tell us so much about the prehistory of this country.

But we have so very little to work from. One of the reasons that Kennewick Man sparked the battle that he did is the incredible value of an almost complete 9,000 year old skeleton with a spear point in his hip, a tall man, five foot ten inches or so, who lived to a very, very ancient age, 9,000 years ago, more than 500 generations before the pyramids. This man walked our country and he was not an American Indian as we know it today.

But the Army Corps of Engineers seized that skeleton and immediately announced its intention to "do exactly what the Umatilla have requested us to do," which means to rebury that skeleton with no opportunity to find out what he meant and what he could tell us.

I mentioned that we have very, very little to look on to understand the prehistory of this country. It is a little bit like trying to understand all of Shakespeare by reading two sonnets in the balcony scene from Romeo and Juliet. There was a culture here many, many millennia ago, and we deserve as Americans to understand that.

What you are looking at today in this proposed amendment, which I think has a misnomer of a technical amendment. It is not. It is a sweeping change. You are going to take those ancient cultures and you are going to stamp them with the stamp that says you are Native American as we understand that today, and we are not ever going to let you tell us the story of what it was like so long ago.

I think you have been told today and you have been told as this statute has developed and as these proposed amendments have been developed that they will not make any change; they will go back to the original intent of NAGPRA. We came here today out of Oregon, where I do not think any sane Oregonian would leave in the summer, because we wanted to talk to you about the drastic changes that these proposed amendments are going to make.

The first step that happens when you are looking at a skeleton is to make a determination whether or not it is Native American. Once that happens, there are very, very severe consequences to that decision.

The second analysis is whether or not that Native American skeleton is culturally affiliated. That is a very important structure, we think, because the consequences of calling something "Native American" means that skeleton, and I am going to just talk about remains because that is what we had in Kennewick Man, that skeleton can be automatically turned over to people who have no relationship to it simply because you called it "Native American."

There is a form under NAGPRA, under the graves statute, of automatic ownership. That can happen, for example, if the Department of the Interior promulgates regulations that will just give over these ancient remains without proof of a relationship. But there are also provisions in the statute that automatically give over ownership based simply on geography.

So for example, if you find ancient remains, 9,000 years old, and you find them on land that was declared in some ancient court case to have been aboriginal, it will automatically be turned over to people who have no need to show that they have a demonstrable connection. So that is the first consequence of calling something "Native American."

The second consequence, and this is one that we very, very much experienced during the Kennewick Man battle and the *Kennewick Man* litigation, once you say something is Native American, the only people who can make a claim for those remains are people who are today Native American. We were told repeatedly after the Kennewick Man skeleton was discovered that because our scientists were not Native American, they had no right to even be heard on what would happen to that skeleton, even though as it turned out that skeleton bears no relationship whatsoever, including from the government's own study team, no relationship whatsoever to modern day Native Americans.

He is different. His closest affinities are Polynesian or the Ainu of Japan, the prehistoric ancestors of the Ainu of Japan.

Let me give you a hypothesis of what might happen and what we might discover here. Suppose, just suppose for 1 moment that this land was originally settled by people who came up from the south, from Central America or South America or Mexico and they moved into what is now the continental United States, and then they were pushed back out, but they had for a while a thriving culture. And then later, many, many centuries later they came back.

What you would be doing is to say, your remains, those ancient people whose ancestors were ancestral to Hispanic populations, are not Native American and their ownership is being transferred to claiming Indian tribes when that is a totally different culture. And you are saying, you don't matter to us. Your culture does not matter to us; 12 percent of our population in this country today is Hispanic, and that is not an unlikely consequence of what we might discover.

I also mentioned earlier in my remarks that the Government acted most shamefully in this case. I want to give you a couple of examples of that so you will understand why we came here and why this was so important, and why we battled in court for years and years and years over the right to study this skeleton.

The first thing that we noticed when we were finally given access to the administrative record is that an employee of the Department of the Interior, just an employee, not a policy setter, was writing memoranda about how he wanted to suppress thought on how this country might have been peopled. Now, I think that is terrifying, to have an employee in a government agency start telling people that he wanted to control these remains so that we could not find anything out because he did not like a particular theory that science was advancing.

Senator DORGAN. Would you submit that for the record? I assume that is part of your argument.

Ms. BARRAN. Yes, sir; it is part of the administrative record and I would be happy to.

Senator DORGAN. Would you submit it? Thank you.

Ms. BARRAN. The second thing that happened is in April 1998, this body, the Senate and the House of Representatives passed a bill. That bill was to forbid the destruction of the Kennewick Man discovery site. It was passed. It was sent to the White House for signature. And then unfortunately, you took an Easter recess and as soon as Congress closed down for the weekend, the Army Corps of Engineers' helicopters took off and dumped tons of rubble over the Kennewick Man discovery site. They ruined it. We will now never know what was buried there.

And one of the things that we are starting to see from this first scientific study of the skeleton is he might have been intentionally buried there, but we will never have the opportunity. That was an astonishing act from the Army Corps of Engineers to be so openly defiant of Congress.

The third thing that happened was this level of appeasement. We never walked into court wanting to fight with the tribes with whom we have incredible respect. Our clients study their culture. But we did walk into court saying that our clients, our scientists should be

treated fairly in this process and we all, as Americans, should have the right to learn about Kennewick Man. But we saw memorandum after memorandum saying if we get the right answer the first time, we will not even allow anybody to study. We will do what the tribes want us to do with this incredible skeleton, this most incredible skeleton.

The last thing that happened was a level of astonishing insult from these agencies. We stood in Federal court in Portland, OR and listened to a Department of Justice attorney call these scientists "savagers of Indian heritage." We listened to them. We heard them calling Dr. Owsley who sits here today from the Smithsonian Institution a "paleo-cowboy." One of the NAGPRA officials told Mr. Schneider here that he didn't want to let a bunch of old bones get in the way of doing other important business.

The Department of the Interior and the Army Corps of Engineers did that under the current statute. So we ask you to think about what they will do if you give them broader powers under this new definition.

The last effect that I think you will see is what is a hamstringing of education in this country. Senator, I have earned five university degrees. I have earned three of them in this country. Until this case, I would stack my experience up against anything that any other country can give us. But now, anthropology departments are starting to send their Ph.D. candidates out of this country to do their study because they cannot have access to the remains that they need to complete their studies.

If you pass this amendment, if you pass this bill, you might as well shut down paleoanthropology studies in American universities. Our scholars of tomorrow will be trained by foreign scientists who are trained elsewhere, if we train them at all. I find that to be a very, very sad outcome.

So when I was flying across the country yesterday, I was thinking a lot about being an American and what it has always meant to me, and what it meant to me during this litigation and what it meant to me to have a judicial system that could rein in the overweening pride and hubris of these Government agencies that we had to do battle for so many long years.

I was reminded that when this country was formed, even people like Thomas Jefferson, who was no mean scientist in his own right, remarked that we would not ever be afraid to follow truth wherever truth will take us. I ask this committee to please don't prove him wrong.

[Prepared statement of Ms. Barran appears in appendix.]

Senator DORGAN. Ms. Barran, thank you very much for your testimony.

You know Mr. Bender, is that right?

Ms. BARRAN. I do not. I have met Mr. Bender for the first time today.

Senator DORGAN. We will probably have a chance during the question and answer session to exchange views, since you described Mr. Bender's views. I appreciate very much the opportunity to have conflicting sets of interests and views here so the committee can evaluate them. Both of you expressed them very well, as did the other witnesses.

Professor Keith Kintigh, the Society for American Archaeology in Tempe, AZ is with us. Professor Kintigh, why don't you proceed with your testimony.

STATEMENT OF KEITH W. KINTIGH, SOCIETY FOR AMERICAN ARCHAEOLOGY

Mr. KINTIGH. Thank you, Mr. Chairman.

The Society for American Archaeology thanks the committee for the opportunity to comment on the proposed amendment. Fifteen years ago, I appeared before this committee to present SAA's testimony on S. 1980, the bill that became NAGPRA. SAA represented the scientific community in shaping NAGPRA's compromise among Native Americans, including Mr. Echo-Hawk, museums and scientists. SAA helped form a coalition of scientific organizations and Native American groups that strongly supported NAGPRA's enactment.

Since that time, SAA has closely monitored NAGPRA's implementation and consistently urges our 6,800 members always to work toward its effective implementation. We believe that any amendment should uphold NAGPRA's central principle that repatriation is a remedy provided to Indian tribes that are reasonably closely related to human remains or objects. Under NAGPRA, in most cases cultural affiliation is the legal standard for closeness of relationship that must be achieved.

The proposed amendment would modify the definition of "Native American" in response to judicial rulings that the statute requires that human remains bear some relationship to a presently existing tribe, people or culture in order to be considered Native American.

In our amicus filing in the *Kennewick* case, SAA agreed with DOI's earlier position on the broader meaning of "Native American," arguing that requiring demonstration of a relationship to modern Native Americans is contrary to the plain language of the statute and would absurdly exclude historically documented Indian tribes that have no present-day descendants.

However, in that same amicus filing SAA argued, contrary to DOI's position, that Kennewick Man should not be repatriated to the claimant tribes because he did not meet the statutory standard of cultural affiliation. On this point, Judge Jelderks agreed, stating "the Secretary's decision does not meet this standard." "As a consequence," the judge continued, "even if the Secretary's conclusion that the remains are Native American had been correct, the decision to award these remains to the tribal claimants could not stand." I continue to think that SAA got it right in its amicus brief.

The proposed amendment would have the effect of reversing the court's interpretation, thereby restoring the status quo ante for the definition of "Native American." The amendment would not affect the court's findings on cultural affiliation. The amendment thus would make NAGPRA's language consistent with what the Congress, SAA, NARF, and to our knowledge all the other involved parties understood "Native American" to mean back in 1990. I agree completely with Mr. Echo-Hawk that it was uncontroversial at that time.

In our analysis that I will briefly outline, we indicate that the predictable effects of the amendment would be minor, in keeping

with the committee's characterization of it as a technical amendment.

For NAGPRA to apply, human remains or objects must satisfy the definition of "Native American." However, that is only the first step. In most cases, repatriation under NAGPRA occurs only if there is also cultural affiliation, a relation of shared group identity with a present day Indian tribe. Culturally affiliated human remains or objects are a subset of the remains or objects that would meet the definition of "Native American" either under the Kennewick court's interpretation or the proposed amendment.

Thus, to the extent that repatriation is contingent on a showing of this more restrictive standard of cultural affiliation, the proposed definitional change would have absolutely no affect on the remains and objects that could be repatriated.

In order to see the logical effects of the amendment, we must then look to three circumstances in which repatriation can occur in NAGPRA without a finding of cultural affiliation. First, cultural affiliation is not required for repatriation to lineal descendants. We take this to be unproblematic because any repatriation to lineal descendants is a reasonable disposition.

Second, cultural affiliation is not required for repatriation of human remains or other cultural items found on Indian lands since NAGPRA's enactment. However, even in the absence of an amendment, the tribe controls the remains or objects under other law. This exception is therefore also unproblematic.

Third, the proposed amendment would extend the possibility of repatriation to those ancient human remains or objects for which no relationship to a present day tribe can be shown if they were discovered since NAGPRA's enactment on Federal lands that are legally recognized as the aboriginal lands of a tribe.

When NAGPRA's language was negotiated in 1990, SAA argued that the standard of cultural affiliation should also apply to these remains. However, as part of a compromise, SAA accepted the language that appears in the statute and is prepared to stand by it.

In summary, consistent with our longstanding position on the meaning of "Native American," the Society for American Archaeology supports the proposed amendment. Our analysis of its predictable effects suggests that the amendment would, in combination with responsible and even-handed regulations, serve to maintain NAGPRA's balance between the public interest in the advancement of science and the very real concerns of Native Americans.

SAA is grateful for the balance shown by the committee as it addresses NAGPRA, and again thanks you for the opportunity to provide you with our perspective. We would be happy to help the committee in any way possible as it pursues this issue.

[Prepared statement of Mr. Kintigh appears in appendix.]

Senator DORGAN. Professor, thank you very much.

Our final witness is Van Horn Diamond from Honolulu, HI. Mr. Diamond, thank you and you may proceed.

STATEMENT OF VAN HORN DIAMOND, HONOLULU, HI

Mr. DIAMOND. Aloha and thank you, Senator Dorgan, for this chance to talk with you about NAGPRA and the Native Hawaiian, specifically the need to further the enabling of the Native Hawaiian

family, called Ohana, to meet its prime societal responsibility and family duty, the care for, custody and reverence to ancestral remains and artifacts.

Please note this testimony is from the Diamond Ohana. We are recognized under NAGPRA as a Native Hawaiian organization. We do not speak for the Hawaiian people, nor are we experts to speak ex cathedra. But we have had interface with other Native Hawaiian organizations, especially families. Therefore, our remarks reflect our conversations with them, and to the extent applicable, our hands-on learning about NAGPRA and how it works in Hawaii as we observed and personally experienced.

Before continuing, it is important for us to affirm our support for and endorsement of S. 536, section 108. The two amendments enables Native Americans ways to have standing and enhance further the connection to ancestral remains and artifacts. No scientific curiosity should have singular license to indigenous remains and artifacts. Not all knowledge resides in Western scientific methodologies, modalities and even eschatology.

The Native Hawaiian family Ohana situation is somewhat similar to the Colville Tribes connection to the Kennewick Man, and the Fallon Paiute-Shoshone Tribe in Nevada to its 10,000 year old man. Ancestral remains and certain artifacts were buried secretly to protect from and deter desecration both physical and spiritual.

Consequently, it is the family's oral traditions, genealogy, history and geographic presence, including how a descendant is named which connects the present generation with its predecessors, especially our ancestors. But often, the specific tie as to who is buried and where they lay, these facts sometimes die with whomever it was passed on to in prior generations.

Consequently, the lineal definition within NAGPRA's administration rules does not readily and most often not enable the Hawaiian family from achieving its lineal descendant status. The alternative is therefore the NAGPRA definition of the Native Hawaiian organization. But it is a catch-all definition, wherein all categories of Native Hawaiian organizations can be placed. Most are and were community-based nonprofit agencies. This exists because when NAGPRA came to be there was no Hawaiian Native government.

The majority of the participating Native Hawaiian groups were not the Hawaiian family. But in the 2004 and 2004 timeframe, this fact has changed. Families are now trying to assume and fulfill their responsibility, their duty. However, there are some community-based entities suggesting the restriction as to who is a Native Hawaiian organization to the disadvantage of the Native Hawaiian family. The consequence is no lineal descendant, no Native Hawaiian organization, therefore no family ability to participate.

Our preference, therefore, is to recommend, if it is doable, to give the Native Hawaiian family its standing separate from the lineal descendants and Native Hawaiian organizations. If this cannot be, to ensure that under the Native Hawaiian organizations, the Native Hawaiian family standing is protected from excisement to fulfill their prime duty and responsibility.

One thing that came to mind as I was listening to Mr. Bender is that under NAGPRA our experience is that prospective claimants, as well as those that are recognized, have the right to inspect

the items. Clearly, the presumption then is that there is going to be confer and consultation with whomever is the repatriator. I would also think that under 106 there is a definition about culturally relevant communication. I would suggest to parties that want to have scientific inquiry that they affirm that by their participation and behavior.

[Prepared statement of Mr. Diamond appears in appendix.]

Senator DORGAN. Mr. Diamond, thank you very much.

Mr. DIAMOND. Thank you.

Senator DORGAN. The testimony that all of you have presented is very interesting testimony and has some conflict, as you have heard it. I think probably a starting point is that all of would agree that Indians, Alaska Natives, Native Hawaiians, and others have suffered great injustices at the hands of the Federal Government, Federal agencies, museums, and other institutions that have removed the remains of their ancestors. I recall some years ago being involved with respect to the Smithsonian that as warehousing massive amounts of Indian remains in their basements and their warehouses. I became very interested in that.

I want to tell you just one other story of interest. It relates only tangentially to this. I was walking down in the hallway of this building about 4 years ago and I saw a historical document in a little display about Senate history. It was a historical document about something called the Congressional Cemetery, which really is not owned by or supported by the Congress, but it is called the Congressional Cemetery. It is not very far from this building.

It said that there were Senators and Congressmen buried there from decades past in the past century. It also said there were some Indians buried there. I said to myself, let's find out if there are Indians from our region buried there and why and how it happened.

So I had my staff do some research. And sure enough, there was a man named Scarlett Crow buried there. He is from the Sisseton-Wahpeton Tribe, which is partly in North Dakota. I decided to find out what had happened to Scarlett Crow. He came out to Washington, DC with I think six or eight other Indians from his tribe, I believe it was 1862, to negotiate a treaty. He was found dead under the Occoquan Bridge. The death certificate said suicide and they buried him over here in the Congressional Cemetery in a far corner.

I got a copy of the Alexandria, VA police records and saw that when they investigated the death of Scarlett Crow, this fellow who was in Washington, DC from the Wahpeton-Sisseton Tribe in the 1860's, when they investigated his death, the police investigators said that he was said to have committed suicide by hanging, but in fact he was lying next to his robe that was carefully folded next to his body, and the branch from which he said he would have hung himself would not have held a 6-year old child. These are the police investigators.

It seems to me it was just a cursory review of whatever records were available, this man was killed, which probably was not too unusual back in the 1860's when people from tribes came here, and then he was put in a small grave over here. I notified the Sisseton-Wahpeton Tribe with all the relevant information about this man named Scarlett Crow who came to Washington, DC, I am sure with

great intentions, with his tribal members, of negotiating a treaty with the Federal Government and ended up being killed under the Occoquan Bridge.

It is very unlikely he committed suicide; very likely he was killed. And the investigation was stopped and they put suicide on the death certificate and buried him in a corner of the cemetery.

So my acquaintance with all of these issues is not only going over to the Congressional Cemetery and investigating that, but working with the tribe to think through the issue of burial grounds and the building of a bridge, a whole range of issues, working with others in my service in both the House and the Senate with respect to the issue of the Smithsonian and other institutions that have picked up remains of Native Americans and warehoused them.

This is a very emotional issue and it is a spiritual issue. I find it really intellectually interesting, obviously, to hear the different views today. It is difficult. It is not an easy issue to deal with because you are dealing with spiritual issues here.

So let me ask the question, let me start with Ms. Barran and Mr. Bender. I assumed that you probably knew each other and were longstanding advocates on different sides of this issue. Ms. Barran, you expressed disagreement with Mr. Bender. Let me have Mr. Bender respond to your disagreement and then let's have a discussion about that.

Mr. Bender.

Mr. BENDER. Yes; the reason, we have not met I think is because I have not been an advocate on this issue. My contact with it really stopped when the legislation was approved. I testified before the committee prior to the legislation's enactment in my capacity as a facilitator for national dialog. I have not been involved. My point here is that the Ninth Circuit decision is an erroneous construction of the statute as I understood it at the time it was enacted. The statute was a compromise, as everybody has said.

A couple of things in response to what Ms. Barran said. Scientific people are not excluded from the process of deciding what should be done with unaffiliated remains. The review committee contains seven members. Three of them are Indians and three of them are nominated by museums and the scientific community. That is the way the scientific community is guaranteed a consultation with regard to remains that are not connected with a present day tribe. Those remains are to be disposed of in a way that the review committee says and the review committee has a very substantial scientific representation.

But what the Ninth Circuit has done, and if you don't change the Ninth Circuit decision what is going to happen is not that scientists are going to be excluded, but that Indians are going to be excluded from the process because there are three Indians on that committee also. That is the chance of the Indian community to have some say in what should happen to these prehistoric remains that are not affiliated with any current tribe.

If the Ninth Circuit decision is correct, Indians will not be involved in that process. The most important thing that NAGPRA did was to include Indians in the process. For example, when museums are told to do an inventory, this is the inventory section, Section

3003, they are told to do an inventory of Native American things and tell the tribes what they have.

If unaffiliated remains that are unaffiliated with a current tribe are not Native American, they won't even tell the tribes they have them. That is wrong. That is exactly contrary to what everybody at the time wanted NAGPRA to do. It wanted NAGPRA to include Indians in the process, not to exclude them.

So that is the basic problem with the Ninth Circuit decision. Reversing the Ninth Circuit decision does not exclude scientists because they are included in the review committee.

Senator DORGAN. Ms. Barran.

Ms. BARRAN. As you can see, I am ready to go here. Let me tell you what that guarantee meant to us 9 years ago. I think that will give you a sense of why the Ninth Circuit was outraged, why the Federal District Court for the District of Oregon was outraged, and why that court ultimately concluded that the Government had acted in bad faith and was consistently biased.

Nine years ago, on July 26, the Kennewick Man skeleton was discovered. His remains were collected by an anthropologist, Dr. Chatters. Dr. Chatters initially thought that the remains may very well have been a Caucasian settler of the area until he saw the stone spear point in the hip bone of the skeleton, and until an early radio carbon dating showed that he was incredibly old, 9,000 years old. Dr. Chatters was in immediate consultation with Dr. Owsley at the Smithsonian, who is one of the world's experts in these ancient remains.

The Army Corps of Engineers got wind of it, learned of the discovery because Dr. Chatters had to obtain a permit to excavate the remains. They seized the skeleton. From that point forward, the Government clamped down its lid on everything that was happening. Our clients did not march into court just because they wanted to get themselves involved in an almost decade-long legal battle, but they started writing letters saying, let me explain what this means; let me tell you what it means to find an almost complete 9,000 year old skeleton in this country.

Not only were they rebuffed, they barely had an acknowledgment that they had even written. They attempted to discuss this issue with the Government, but were closed out. Then the Army Corps of Engineers started creating the documents that we later saw as the administrative record. I am going to quote directly from the Army Corps of Engineers: "I told him," referring to one of the tribal representatives, "we will do what the tribes decide to do with the remains, but we will not involve ourselves in that decision. I assured him that we were working under the assumption the decision will be what the Umatilla have asked for."

One of the claims that we brought ultimately in the *Kennewick Man* litigation was a denial of due process to our clients. One of the issues in the court decision was a finding by the Federal District Court at the trial court level and later affirmed by the Ninth Circuit, not that it was wrong to consult with the tribes, but that it was wrong to close us out of the process because the skeleton was not Native American to begin with. This is an ancient person from possibly Polynesia who came to these shores. He is not ancestral to current day tribes.

So when we finally concluded at the trial court level, sort of the middle part of this process, the trial court actually wrote that the administrative record from these Government agencies, the Army Corps of Engineers and subsequently the Department of the Interior, establishes that the agency was consistently biased, acted with obvious disregard for even the appearance of neutrality, and predetermined the outcome of critical decisions, including the ultimate disposition of the remains.

They jumped to a decision without even knowing what they had. Our battle with the government has never been over an effort to exclude the tribes from this process. But we had an anthropological treasure found in this country and it was going to go back into the ground without ever allowing us to teach anything.

Senator DORGAN. Ms. Barran, I do not want you to re-argue the case. I appreciate your comments.

Let me ask Mr. Echo-Hawk, and I think from what I have learned from the witnesses, including Ms. Barran, I think that there is a default position assumed in some of the testimony here that human remains should be, shall be or will be considered tribal, indigenous people as a kind of default position. If that is the case, especially with the proposed amendment, if that is the case, then if tomorrow someone finds the remains of a person that was judged to be living 12,000 years ago, a scientific treasure trove of information about human life then, would because of cultural issues and other concerns, would there be a preclusion of the study of those remains?

Mr. ECHO-HAWK. Not necessarily, Senator. If the amendment goes forward to preserve the original intent of Congress, it would simply mean that person would be deemed to be a Native American and subject to the provisions of the act, the input, the consultation, the protective procedures. It would not mandate his repatriation at all because any tribal claimant would have to establish that it is culturally affiliated with those remains.

Senator DORGAN. Can I just stop you at that moment? Just for a second, save your thought.

Ms. Barran is saying that in fact consultation was prohibited in the scientific direction by the government agencies. You support consultation in both directions, I assume, and so does Mr. Bender. Is that correct?

Mr. BENDER. Yes.

Senator DORGAN. Let Mr. Echo-Hawk finish. I just wanted to make that point. The consultation issue is really important in this discussion.

Mr. ECHO-HAWK. Exactly. I think it is built into the act on all sides, and no one is intended to be excluded.

Now, I cannot comment on the facts of the particular *Kennewick* case, whether the particular Federal officials may have abused or acted improperly with regard to the particular facts of that case. Their conduct, however, has nothing to do with the statute or its coverage. And I am not here today to overturn the outcome of that case, because the court did hold that the tribal claimants were unable to prove their cultural affiliation with those remains, and we are not here today to overturn that outcome, but merely to restore the coverage that everyone thought we had on the statute.

That coverage in 15 years since the date of NAGPRA, has not emptied our universities. It has not emptied the collections of human remains. For example, you mentioned earlier that at the Smithsonian, in 1989, they had 18,000 remains. Congress enacted very similar repatriation provisions, requiring that those that any culturally affiliated remains be repatriated. Well, here we are 15 years later and there are still 15,000 remains in the Smithsonian. So it has not emptied the collection.

My fundamental problem with some of what has been said today is I think that the scientific community is overstating some of their fears and concerns, because we simply have not had that experience in the United States of having absurd outcomes under the statute and we have not emptied, like there are hundreds of thousands of remains that are still on shelves under the statute.

So I think that many of these concerns are overstated and not reflected in our actual experience in 15 years.

Senator DORGAN. Ms. Lambert, if I might ask you if or was, two words, were amended to the statute, is it your contention that that would largely preclude you from being consulted, from being a part of this process? Is that what your testimony is?

Ms. LAMBERT. No.

Senator DORGAN. Okay. Explain it if you would.

Ms. LAMBERT. In fact, we really have no problem with the amendment, depending on the wording of the regulations for culturally unidentified human remains. I think one of the interesting things about the Ninth Circuit Court decision is that it showed that a commonsense interpretation is not necessarily the same as a legal interpretation. We certainly agree with the commonsense interpretation, and if you look at the literature by those of us who study the past here, you will find "Native American" everywhere. And so I do not think you would find disagreement at that level.

However, when you change statutory language, you change legal ramifications and what we are saying is that we cannot really assess what this minor little word change is going to do without being able to see what the regulations are for culturally unidentifiable human remains, because they do change the purview of NAGPRA.

So on the one hand, we support the amendment and we agree and we acknowledge that it was a commonsense understanding at the time and everybody agreed about it. However, because the Ninth Circuit Court decision has pointed out the difference between that sort of common understanding and legislative language and legal meaning, we would like to ask that this amendment be postponed until we can see what the actual on the ground ramifications are going to be, and we cannot see that until the regulations are out. They should be out soon.

Senator DORGAN. Who knows where the remains of the Kennewick Man are now? Who has possession of those remains?

Ms. BARRAN. They are being curated and are presently stored at the Burke Museum at the University of Washington. They are under the control of the Army Corps of Engineers, which was the agency that had responsibility for the Federal land where the remains were found. They were found sort of partially submerged in the Columbia River, and that is land under the authority of the

Army Corps of Engineers. So the Army Corps has authority over them.

Senator DORGAN. Mr. Bender.

Mr. BENDER. Senator, could I say something about the timing that Ms. Lambert is talking about? If the Ninth Circuit's interpretation of the statute were to stand, those regulations could not be promulgated because if the Ninth Circuit's interpretation stands, remains that are not affiliated with a present tribe are not Native American materials, and the review committee and the regulations that the department is supposed to adopt are regulations only for Native American things.

So I understand the feeling that you do not want to do things unless you know what the regulations are going to have, but I think the right thing to do is to change the statute back to its original intention; let the regulations be promulgated and consult in the promulgation, because if you do not do that, then the promulgation of regulations would be ultra vires because it would be about stuff that is not Native American. The committee's authority is only to deal with Native American things.

Senator DORGAN. Well, we have some other questions. Dr. Kintigh, I appreciate your being with us today. I understand you were involved, or at least the American Association of Physical Anthropologists, the Society for American Archaeology, they were both involved in the discussions that led to the enactment of NAGPRA. I assume there was some belief then about what the specific language meant or did not mean, particularly with respect to the term "Native Americans."

Was it your sense that they were only referring at that point to presently existing tribes?

Mr. KINTIGH. No; I think I agree with Mr. Echo-Hawk that at the time everyone took the definition of "Native American" to be self-evident. It was essentially what DOI argued in the *Kennewick* case. It was people we think of, just loosely speaking, people we think of as Indians today and then pre-Colombian all the way back. I think that was the sort of common sense understanding of "Native American" at the time. I think that is what we thought. As far as I know, that is what Congress and everybody else thought.

However, as other speakers have also pointed out, the notion that there is a separation between what is considered to be Native American and what is repatriatable under the Act, and what is repatriatable largely depends upon this definition of "cultural affiliation." So much of the discussion, including ones I had directly with Mr. Echo-Hawk, had to do very much with setting that standard for cultural affiliation.

I think what Congress' intent was to deal with those human remains and cultural items that are reasonably closely related to present day tribes, but it did that at the stage of cultural affiliation, not at the stage of deciding what is Native American.

I agree with Mr. Bender that it would affect this whole consultation process and that certainly a benefit of NAGPRA and certainly an intent of NAGPRA was to enhance that consultation. I think it has been quite successful.

Senator DORGAN. Let me say this has been a really interesting discussion. I did want to point out, Ken Davis is over here, the

chairman of the Turtle Mountain Tribe in North Dakota. Chairman, thank you for being with us today.

This has been an interesting discussion and one of great importance to a lot of people. We understand that and no one would minimize the importance of repatriation of human remains. I have talked to tribal leaders at great length about this. There is a backdrop here in which this discussion takes place, and part of it is described by Mr. Echo-Hawk. There were times in this country when Indian bodies were collected on the battlefield and sent back to Washington for study, and then end up as a set of bones somewhere in a basement. That is a pretty shameful thing to have had happen.

I was involved with respect to the repatriation legislation that Mr. Echo-Hawk described a bit ago. I was involved in that precisely because this country did some things that were very shameful and we needed to make amends for that and try to repatriate the remains to those tribes. I regret it has not gone quite as smoothly or as quickly as many of us would have liked.

Chairman McCain, as I indicated to you, went down to the Commerce Committee to offer an amendment. As is always the case wherever Chairman McCain is, controversy follows. [Laughter.]

He seldom ever offers milquetoast amendments, so my guess is that his amendment has provoked a substantial amount of discussion. I, by the way, have left my proxy to vote against Senator McCain's amendment because we happen to disagree on this Amtrak issue. [Laughter.]

But I am going to be offering an amendment on another bill that is being marked-up just following Senator McCain's amendment. My expectation and his was that he was going to be back before we completed this hearing, but obviously this discussion of his is taking more time in the Commerce Committee than he expected.

Let me on behalf of our committee pledge to you that we intend to look seriously at all of these issues. We thank all of you for traveling, in many cases great distances, to come to testify before this committee. The hearing is a hearing we held because we think 2 words or 100 words, this is important. Words have meaning and consequence.

This is not just some academic or ethereal debate. It is a debate that has great spiritual and cultural and historical significance for the first Americans. It also has significance for our scientific community, and that is why we wanted to have an opportunity to have an exchange of views.

I thank you very much for being here today and this hearing is adjourned.

[Whereupon, at 10:55 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

Thank you Mr. Chairman. I commend the committee for holding this hearing on this very important issue for all Native Americans.

Around 1987, I learned that museums and scientific institutions throughout this land had thousands of Native American human remains and sacred objects in their collections that were being held for the purposes of scientific research, all without the knowledge and consent of Native Americans. In order to address this atrocious situation, facilitated dialog was initiated between Native Americans, museums, and scientific institutions.

Eventually consensus was reached, and in 1990 the Native American Graves Protection and Repatriation Act [NAGPRA] was enacted into law to provide that ancestral remains, funerary objects, sacred items, and objects of cultural patrimony be repatriated to Indian tribes, Native Hawaiian organizations, and individual Native American descendants.

This act has empowered Native Americans by mandating involvement in both the discovery and repatriation process and by requiring tribal notification, consultation and inclusion in the decisionmaking process. This inclusion fosters respect for Native people, Native traditions, and Native belief systems and protects the dignity of the human body after death in congruence with local Native practices.

Controversy has arisen surrounding the so-called "Kennewick Man." Whose remains were found in Washington State and are now available for scientific examination, due to the fact that a direct cultural affiliation could not be established. Even though direct cultural affiliation could not be established, that does not mean that he is, and was, not Native American.

Native Americans evolved in the same manner that other people evolved. Although some tribes were forcefully moved from their lands, other tribes remain in the same area that they have historically been located. Their oral tradition evidences this fact.

Similarly, in Hawaii, remains are often identified through oral traditions, history, and geographic location. It should also be known that iwi or bones and remains of a person are very sacred in Hawaiian culture, so sacred that some of them have been secretly buried to protect them from desecration. I would like extend a special welcome Van Horn Diamond who will be testifying to that effect today.

I want to thank Chairman McCain and Vice Chairman Dorgan for allowing Mr. Diamond to testify today. This is an important issue for him—so important, that when he was invited 2 weeks ago, he immediately decided to postpone serious medical treatment in order to be here today. Mr. Diamond thank you for coming today.

I look forward to the testimony today, and working with members of the Indian Affairs Committee to devise a policy that reflects the concerns of Native people as well as the concerns of other involved groups.

Once again, thank you Mr. Chairman.

PREPARED STATEMENT OF MERVIN WRIGHT, JR., MEMBER, NATIONAL WORKING GROUP ON CULTURALLY UNIDENTIFIABLE HUMAN REMAINS

My name is Mervin Wright, Jr., a GIS Specialist for the Pyramid Lake Paiute Tribe of Nevada and I am a member of the National Working Group on Native American Culturally Unidentifiable Human Remains.

Thank you for the opportunity to submit written testimony for this Oversight Hearing on the Native American Graves Protection and Repatriation Act [NAGPRA]. I commend the committee for its attention to the concerns of Native American People about section 108 of NAGPRA, the definition for Native American. NAGPRA's statutory definition was re-defined restrictively in the Ninth Circuit Court ruling in *Bonnichen* v. *United States,* 357 F.3d 962 (2004). The impact of the ruling undermines indigenous existence on this land prior to the United States becoming a country.

As a field practitioner of repatriation, I know that certain provisions of NAGPRA are meeting the intentions of Congress when it enacted NAGPRA into law. The Ninth Circuit *Bonnichsen* decision turned the Congressional intent of NAGPRA on its head and ignored the legislative intent of the definition. The Court inserted its own intent into the law by rewriting it. Many scientists working in the field of repatriation see the *Bonnichsen* ruling as a victory because now the NAGPRA definition of Native American does not have to include anything older than 500 years.

When NAGPRA began to be implemented it presented a new set of circumstances for tribes, agency officials, museum officials, and scientists. Scientists and agency officials were not fully prepared for having the obligation to return human remains that were either lawfully or unlawfully excavated. Tribes were also placed in the precarious situation of having to perform an obligation for actions never imagined by cultural and traditional rules. Nevertheless, tribes understand the rightful place of our dead and there is respect for the sanctity of the ancient burial rites of our ancestors. When scientists realized that they may not be able to test their theories on ancestral Indian human remains, they searched for ways to prevent repatriation. One way was to use the affiliation procedures in NAGPRA, along with their theoretical hypotheses, and to define ancient indigenous existence they create astounding conclusions for what they think.

The definition of "Native American" must be clearly understandable so that NAGPRA is correctly interpreted by everyone involved with repatriation efforts. History tells that canons of statutory construction require courts to construe statutes broadly for the benefit of Indian tribes. Because courts are normally the final option for dispute resolution, courts should not have the authority to make judgments about what Native people see as the natural laws of creation. Regardless of who has authority over Federal "property," the application of the definition must be based on ultimate respect for a living being, a life before ours, the continuity of a culture, and a matter of understanding that human beings are created equally and should have undisturbed internment.

Bonnichsen is not an isolated situation when it comes to interpreting the meaning of Native American. Applying the definition is directly connected to the determination of cultural affiliation. In at least two cases in Nevada, ancient human remains were involved in "new scientific studies" without the consent of the two affected tribes. In 1994, 29 sets of human remains were taken from the Nevada State Museum [NSM] to the University of California at Los Angeles for radiocarbon testing. Once the ages of the remains were determined, the two oldest sets of human remains were automatically categorized as "unaffiliated." In 1996, the NSM and the Nevada Bureau of Land Management [BLM] convened a meeting to obtain tribal consent for such findings. After conducting their destructive analyses, they reached their troubling conclusions that somehow these human remains were another "people" and thus not affiliated. Physical sciences such as geology and archaeology tell another story of human existence and certain evolutionary changes over time. Repatriations have occurred for human remains that range in age from historic to prehistoric. Some agency and museum officials have reasonably come to accept the traditional knowledge and oral histories of Native Indian People.

On the other hand, tribes have suffered setbacks at the hands of scientists who have exaggerated theories and used their interpretation of NAGPRA to deny repatriation of certain human remains. A clear definition of Native American will enable a fair application of the law, and there will be a clearer understanding of prior existence for the history of this country. Tribes have done all they can to avoid confrontation on these issues. The matter of repatriating human remains is not instituted, nor is it provoked by Indigenous People.

Unfortunately, because scientists do not know as much as they want to know, human remains are categorized as "culturally unidentifiable" to prevent repatriation

and to support their continued career endeavors. The scientific community does not realize that their theories will never tell the complete story of evolution. Some of their unanswered questions will remain absolutely unsolved forever. Theoretical conclusions will be as close as they will get to discovering the truth of ancient life on the North American Continent. Science is not absolute. Existence of human life for at least 40,000 years on this continent supports the traditional knowledge of indigenous People. There have been challenges to the NAGPRA, but only to the extent that science cannot agree with the definition and the conditional requirement imposed by the law for repatriation.

In light of Bearing's theory, ancient civilizations date farther back into time as sites are discovered in the southern hemisphere, in Central America and South America. As science attempts to discover the origins of man, it cannot apply racial tendencies through technology, there is no such thing as racial science. To believe a pure race for the colors of man-kind originated from Africa, each race must embrace the fundamental principle supporting evolutionary understandings. Science has conflicted with moral understandings of traditional and indigenous populations around the world. It is only when a People agree with scientific application of scientific theories do scientists set out with their "discovery." It is an exaggeration of the truth.

The Native people of this land are connected to it, and it is our home no matter who occupies it. Indian people have never been told that we are no longer care-takers of the land. We have never been told in the sense outside from or from above the written laws of man. The belief and faith system of traditional and cultural knowledge rests in the hands of our Creator, all mighty God.

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

OVERSIGHT HEARING ON THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

July 28, 2005

WRITTEN TESTIMONY OF FRIENDS OF AMERICA'S PAST

INTRODUCTION

Thank you for the invitation to appear before this Committee and to provide both written and oral testimony on the amendment that has been proposed to Section 2(9) of the Native American Graves Protection and Repatriation Act ("NAGPRA").

We are attorneys in Portland, Oregon and are appearing here today on behalf of Friends of America's Past ("FAP") which is a nonprofit organization dedicated to promoting and advancing the rights of scientists, teachers, students and the public to learn about America's past. Mr. Schneider is a founder of FAP and a member of its Board of Directors. Since its creation in 1998, FAP has been a resource for teachers, students, government agencies, scientists, journalists and other parties seeking relevant information about NAGPRA and other federal and state laws, and due investigation of the past. FAP maintains an internet website (www.friendsofpast.org) that posts documents and other materials relating to NAGPRA and the Kennewick Man litigation.

Ms. Barran's practice includes complex litigation which involves the interpretation and application of federal and state laws and administrative regulations. Mr. Schneider advises scientists, government agencies, and other parties on the interpretation and application of federal

and state laws as they relate to archeological sites and objects. We were privileged to represent eight scholars in litigation that arose after the 9,000 year old Kennewick Man skeleton was discovered nine years ago. As you may be aware, that skeleton was seized by the U.S. Army Corps of Engineers for the purpose of giving it to a coalition of Amerindian groups that had no cognizable link to the remains. Earlier this month, after years of litigation, the plaintiffs-scientists finally began their studies of the skeleton. The immense media interest in their studies highlights the importance of these matters to the American people, and their strong interest in understanding how this land of ours was originally settled by people. See articles and editorials cited in Relevant Publications. But it is not just in this country that Kennewick Man captures such interest. The whole world is watching these developments with deep interest.

We are presenting this written testimony and appearing in person to express our opposition to the proposed amendment and to describe to you the sweeping and catastrophic changes this proposed legislation would have. We urge this Committee to support the rights of the American people to study, learn and understand the past. We are not alone in opposition to the proposed amendment. Many people from all walks of life, ethnic affiliations and geo-political backgrounds also oppose this attempt to expand the types of human remains and objects covered by NAGPRA. Attached are letters and statements from some of them. If the proposed amendment is accepted, NAGPRA will be expanded far beyond the boundaries of what is reasonable, and you will have removed from the national patrimony ancient cultures and heritages that should be a source of pride for all Americans. Such actions will impoverish future generations and seriously harm education in this country.

THE COMPROMISES WHICH LED TO THE ENACTMENT OF NAGPRA

NAGPRA was originally conceived and presented as legislation that sought to balance the interests of Amerindians, museums, scientists, archeologists (including amateur archaeologists) and the public. In its present form, the law requires a two step analysis. First, remains or objects are to be evaluated to determine whether they are "Native American" as defined in the statute. The law defines Native American as "of or relating to a tribe, people or culture that is indigenous to the United States." It is that definition that the proposal would amend.

If human remains or cultural objects are determined to be Native American, the statute treats them very differently from other antiquities or archeological resources. For example, and this is by no means exhaustive, if remains are determined to be Native American, only a very small subset of people (i.e., Amerindians, Native Hawaiians and Alaska Natives) have a right to claim them or can have a voice in what happens to them. Once that occurs, the law also defines how the remains or objects are to be disposed. That disposition may be determined on the basis of lineal descent or cultural affiliation. In some cases, however, tribes may be allowed to claim remains or objects simply because they happened to be found on land that the tribe once occupied. Mechanisms also exist, and others are being discussed, for giving culturally unidentifiable remains to regional coalitions of tribes. All of that happens merely because something is classified as Native American.

NAPRA was never intended to cover all remains regardless of age. The focus of the hearings and debates in 1989 and 1990 make it clear that the concerns of Congress were to reunite

Amerindians and other modern Native Americans with the remains and cultural items of their family members, ancestors and other kin. See Ryan Seidemann letter. It was not the intent of Congress to allow tribes to claim things that have no verifiable connection to living Amerindians.

THE DISCOVERY OF THE 9,200 YEAR OLD KENNEWICK MAN

The Committee's members may have some familiarity with the Kennewick Man skeleton because of its great significance in NAGPRA jurisprudence, and the great attention that the lawsuit has received in newspaper and other media reports here in the United States and internationally.

In 1996 two college students stumbled on a portion of a skeleton. After the bones and fragments were collected, it became apparent that Kennewick Man was a discovery of substantial importance. The skeleton does not look like present day Amerindians. It also does not look like any other existing human population. If you had to determine what group it does resemble most closely, you would look to Polynesians or the prehistoric ancestors of the Ainu of Japan. Even those resemblances, however, are faint. Kennewick Man's remains are 9,200 years old. Few human lineages last that long. Indeed most lineages do not succeed in reproducing themselves over a span of 500-1000 years. See Brace et. al. letter. Kennewick Man is separated from the modern world by almost 500 generations.

The skeleton presents other intriguing puzzles. There is a spear point imbedded in its hip. We do not know whether it got there by accident (a form of prehistoric "friendly fire") or by design.

That latter possibility—perhaps even likelihood—may mean that Kennewick Man was unrelated to the people who made the projectile point. Perhaps he strayed, intentionally or by mistake, into the territory of a competing group and paid a price for his transgression.

During the litigation over the skeleton, the Army Corps of Engineers buried the discovery site under tons of rubble. Now we will never know what might have been found in that same area. So we do not know and can never know what group Kennewick Man belonged to, or what that group called itself. We do not even know where Kennewick Man spent most of his lifetime. The location where the skeleton was found is not particularly distant from Canada. Kennewick Man could have taken a summer's stroll from British Columbia to Washington.

We know very little about people who lived 9,200 years ago in Kennewick Man's time. We can not identify how many different groups lived in a region, or their size. We know nothing about their political organization or their interactions, or their languages, religious beliefs or social customs. We do not know if Kennewick Man has any living descendants. If he does, they may not be Amerindians. They could as easily be Hispanics.

Many misinformed people have commented that if only the scientists had tried to talk the issues through with the government, it might not have possible to avoid a lengthy and costly lawsuit over the skeleton's fate. We would like the Committee to understand that long before these scholars ever thought of initiating litigation, they contacted representatives of the Army Corps and asked for an opportunity to examine the skeleton before it was given to the tribes. These requests were rebuffed. The Corps took the position that the skeleton was Native American

solely because of its age, and because it was Native American the scientists had no right to study it. Representatives of two agencies ultimately became involved in the controversy, the Department of the Interior and the Army Corps. It would be a kindness to describe their conduct as "overzealous." Eventually, a federal court would conclude that these agencies acted in bad faith. They very simply abused their authority under the law.

Skeletons from this country as complete and as old as (or older than) Kennewick Man are rare. You can count them on the fingers of one hand. Parts have been found of another dozen or so skeletons of this antiquity; in some cases, the parts are only a few fragments of the lower body. A few more have been in Canada and Mexico. The situation is only slightly better with respect to skeletons that are somewhat more recent in age (5000 to 9000 years old). Most of the skeletal remains of this age that have been found in the United States are incomplete. Less than one hundred of those that have been securely dated are complete (or nearly complete).

These ancient skeletal remains are irreplaceable. Archaeological sites and artifacts can tell us something about where ancient people lived, what they ate, what tools they made and the places they visited. But they cannot tell us who the people were who made the tools and used the sites. Only the remains of the people themselves can tell us who they were, where they may have come from, who they were related to and whether they have any living descendants. Without study of the remains themselves we will never be able to solve the great mystery of the peopling of the Americas. See George Gill and Richard Jantz letters. Through DNA analyses, even fragments can provide important information. To destroy ancient skeletons like Kennewick Man and others that may be found in the future is akin to burning a library. Once the knowledge contained in the

books (or in this case, the bones) has been destroyed, it will be lost forever and can never be replaced.

THE CONSEQUENCES OF THE PROPOSED AMENDMENT

Some of the members of this Committee may be laboring under the misconception that the proposed amendment is merely a technical correction of the statute which will have few consequences in the treatment of ancient remains. Nothing could be further from the truth. Instead, it will make a sweeping change to NAGPRA, make it virtually impossible to learn more about the earliest inhabitants of this land, and will seriously prejudice this country in its efforts to maintain an educated public including in post-secondary education.

NAGPRA presently requires a small burden to be met before remains or cultural items are deemed to be Native American. As you will recall from the preceding discussion, categorizing remains or cultural items as "Native American" has significant consequences because they are then treated in an entirely separate way, i.e., placed off-limits to non-Indians and now subject to claims by tribes that may have no cultural affiliation or other connection to the remains or objects. In other words, once something is called Native American, there are severe and sometimes overwhelming impediments to learning anything more about them.

NAGPRA presently requires that something must be "of or related to a tribe, people, or culture that is indigenous to the United States" before it will be considered Native American and consequently subject to the statute. This requirement means there must be some reasonable proof of a connection to either a presently existing tribe or to living indigenous peoples or their

culture generally. You will note that the term "indigenous" is nowhere defined in the statute. The dictionary definition of the term and Congress' use of the word "is" suggest that what it originally intended was that we look to see whether the tribe, people or culture were born or arose here and continue to this day.

You are now being asked to adopt an amendment that would change NAGPRA's definition of Native American to make it applicable not only to people and things that are now indigenous to this country, but also to anything that was indigenous to the United States at any time in the past no matter how long ago. In other words, all prehistoric remains and cultural items found on federal land would be subject to the law. Even remains as old as Kennewick Man, or even older, would become Native American by definition. Scientists would have no right to study them, and they could be given to tribal claimants to whom they have no biological or cultural connection. This is no small change.

We presently know very little about the earliest inhabitants of this country. See Richard Jantz letter. But one thing we do know is that the processes that brought them or their ancestors to the New World, and what happened to them after they got here, is much more complicated than once believed. See D. Gentry Steele letter. It is entirely possible, if not probable, that some of these early colonizing groups eventually became extinct. See Brace et. al. letter. In addition, if an ancient group does have living descendants, those descendants may be residing today in Canada, Mexico, Central America or other parts of the world outside the United States.

If you pass the proposed amendment, you will forever block study of ancient people who have no relationship to living Amerindians. You will have done so by arbitrarily saying that they are Native American. We do not use the word "arbitrarily" to be disrespectful to the Committee. But it is arbitrary to assume that everyone whose skeleton is found in this country was an ancestor of modern Native Americans. See Brace et. al, Cleone Hawkinson and Ronald Mason letters.

This amendment will deprive all Americans of the opportunity to learn more about the early prehistory of this country. It will be bad for educators, students, Amerindians who want to learn more about their heritage, and everyone who values knowledge of the past. It will be particularly harmful to the education of forensic scientists and anthropologists in this country. See George Gill letter. Already many anthropology graduate students are choosing to conduct their original research outside the United States because NAGPRA even as presently written is impeding their studies. It affects their research not because of what the law actually says, but because overzealous agency and museum officials are overinterpreting the law. Very few graduate students possess the financial backing to engage in a nine year legal battle with the United States. If you pass this amendment, more and more physical anthropologists and forensic scientists will go elsewhere for their training. The scientists of the future will inevitably be taught by foreign schools, and foreign-trained scientists will become the faculty of the future.

THE PROPOSED AMENDMENT DOES NOT DESERVE

THE COMMITTEE'S APPROVAL

You will hear, if you have not heard already, many pleas and excuses for altering NAGPRA in the manner now being proposed.

We urge the Committee to look beyond the rhetoric, and to consider carefully what this amendment would do to the country's prehistoric heritage. No principled reason can be offered for giving to one segment of society control over ancient skeletal remains and objects to which they are unable to prove any close or unique connection.

You may have been told that this extension of NAGPRA's reach is insignificant because human remains or cultural items could not be given to a tribe without proof of cultural affiliation. If you read the statute and check to see what is already happening, you will see that this claim is not true. The Secretary of the Interior has been given the authority to approve federal agency and museum dispositions of culturally unaffiliated remains. This authority has already been used to allow hundreds of unaffiliated remains to be transferred from public museums to tribal collections, and many of them were as much as 5,000 – 8,000 years old. See Cleone Hawkinson letter. Some were remains known to be European or African-American. Moreover, as previously noted, remains found on aboriginal lands can be turned over to tribes for disposition even when there is no demonstrable connection.

Adoption of this amendment will be seen as a green light by overzealous agency officials who have their own agendas. The Kennewick Man case illustrates how serious these threats can be. The Army Corps of Engineers had barely learned of the skeleton's age before they began telling the tribes that they would do whatever the tribes wanted with the remains. And they made clear to the scientists that they did not intend to let "a bunch of old bones" – as one Army Corps official put it - get between them and accomplishing other tasks they considered to be more

important. So Kennewick Man's remains became a political pawn. The situation will only get worse if this amendment is passed. Few scientists can overcome Agency barriers to study. Not only is the legal battle exhausting, it requires resources that most scientists lack and exposes them to possible retribution. Pressure may be brought on their institutions to force them to withdraw from the litigation, to cut back on their research funding or to punish them in other ways. Such incidents occurred in the Kennewick Man litigation.

You may also be told that NAGPRA is human rights legislation and this amendment will do nothing more than support those rights. The proposed amendment does exactly the opposite. It is not a human right to control the disposition of remains over which one has no connection. We ask that you consider the grave disrespect that you will do to ancient cultures if, by the stroke of your legislative pens, you make it possible to eliminate knowledge of their existence. To do so is a form of cultural genocide. See Alison Stenger letter. It imposes on ancient people the beliefs, name and culture of persons with whom they have nothing in common, and who may be descendants of ancient enemies – enemies who may have caused the other people to become extinct. Before you vote on this amendment to NAGPRA, we ask you to consider the consequences to the dead. Do they not have a right to have their stories told and preserved for future generations to learn from?

The amendment cannot be justified on the grounds that it is intended to promote respect for the dead. Not all people have or had the same culture or beliefs about human remains that some Amerindian tribes do. In fact, not all existing Amerindians share those beliefs. See letter of Ethnic Minority Council of America. Many believe that gathering and preserving information

about the dead—who they were, and what they did—is one of the highest forms of respect. Such belief systems are well-documented in many other parts of the world where information about early prehistoric peoples is better known than here. It is wrong to assume that the proposed amendment respects the wishes of these dead since we do not know what the wishes of those persons were. If you pass this amendment you will be subjecting ancient remains to the burial rituals and religious beliefs of people they never knew. Those beliefs and rituals may be very different from what they may have wanted.

Nor can you suggest that this is simply an extension of tribal sovereignty. Many of the remains in question will be those found outside of tribal reservations. Kennewick Man, for example, was found on land managed by the Army Corps of Engineers - federal land that is public land, not tribal land. Nor should tribal sovereignty be an issue here in any event. Kennewick Man has no cognizable link to any modern day tribe. None. The trust relationship that exists between the United States and recognized Native American tribes has no application to such ancient remains. They are not something unique to modern tribes, but are the cultural patrimony of everyone in this country. Present legislation already gives Amerindians the right to claim remains and cultural items that once belonged to them or their members.

Supporters of the proposed amendment may also claim that it does nothing more than restore NAGPRA to the form originally intended by the people who drafted the statute's text. If that was their original intent, they went to great efforts to keep it to themselves. Congress and the American public were not told in 1990 that NAGPRA would apply to nine or ten thousand year old remains that have no known connection to present-day Amerindians. Nor were they told that

the statute would be used to stop scientific study of remains and objects that predate now existing tribes by thousands of years. Such results were not suggested by the words of the statute, and no reference was made to these important issues in the House and Senate reports on NAGPRA. Even the title of the law, the Native American Graves Protection and Repatriation Act, suggests that its scope would be limited to things that are really Native American.

You may also be told that the bill will not significantly affect scientific research. That too is untrue. Many overzealous federal agencies and museums take the position that NAGPRA prohibits study of skeletal remains and cultural items for research purposes, even in cases where they cannot be culturally affiliated to a specific tribe. That was the position taken by the agencies and government attorneys in the Kennewick Man case, and was one of the reasons why scientists had to resort to an expensive and time consuming lawsuit to gain access to study this important new discovery. Passage of this bill will inevitably generate more controversies of this kind, and it will encourage even more extreme interpretations of NAGPRA. One example is the argument that all information relating to remains and objects covered by NAGPRA belongs exclusively to potentially interested tribal groups and can only be released with their consent. Such claims were made in the Kennewick Man case.

Many critically important skeletons will be forever lost if this bill becomes law. Examples, include: Spirit Cave Man, a nearly complete 9,400 year old skeleton from Nevada; the partial skeletal remains of Arlington Woman, more than 11,000 years old; several crania from the Midwest thought to be at least 8,000 years old. Dozens of other remains in federal, state, and museum collections that are more than 5,000 years old would also be lost. Like Kennewick Man, their connection (if any) to modern American Indians cannot be determined.

THE PROPOSED AMENDMENT IS DETRIMENTAL TO

EDUCATION IN THIS COUNTRY

This amendment will affect countless scholars in their capacities as teachers. Without access to ancient remains and cultural items, teachers cannot teach their students what may have happened in this country before written history. Not so very long ago the Supreme Court reminded all of us that education is one of the "transcendent imperatives of the First Amendment" and that we should be on guard against even well-intentioned measures that operate to suppress individual thought, expression and creative inquiry.

The Kennewick Man litigation and the examples it gives of overzealous government agencies should serve as a warning of how easily NAGPRA, even in its present form, can be misapplied. From the beginning, the agencies promised the claiming tribes that they would get the "right answer" so they could put a stop to any scientific study of the skeleton. They expressed their desire to suppress certain theories about how the Americas were settled. In other words, two federal government agencies decided that their views and the views of the claiming tribes were so important that they had a right to suppress free thought by other Americans. For the same reason, the Army Corps destroyed the skeleton's discovery site and whatever information it contains even though both the Senate and the House had passed legislation to prohibit any tampering with the site. We would hope that these kinds of warnings would be staggering to you. This country has always held itself out as the one place in the world where totalitarian thought control does not happen. The proposed amendment is the ultimate form of thought control. It would make paramount one view of the past, and would prevent scholars from obtaining information that might support other, more accurate interpretations of prehistory.

You have the power to write words that affect how we and future generations will perceive the world. Please do not steal the past. It belongs to the scholars of today and the scholars of tomorrow, and to all people everywhere.

We urge your careful consideration of this amendment. We ask you to reject it.

Respectfully submitted,

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on behalf of Friends of America's Past

List of Attachments
Testimony of Friends of America's Past

A. Biographical Data

1. Barran, Paula, Summary of Biographic Information
2. Schneider, Alan, Summary of Biographic Information

B. Opposition Letters

1. Brace et al., letter dated June 17, 2005 to Senator John McCain
2. Colorado Archaeological Society, letter dated July 21, 2005 to the Senate Committee on Indian Affairs
3. Ethnic Minority Council of America, letter dated July 15, 2005 to Senator John McCain
4. Gill, letter dated July 15, 2005 to Senator John McCain
5. Jantz, letter dated July 19, 2005, to Senate Committee on Indian Affairs
6. Hawkinson, letter dated July 19, 2005 to Senator John McCain and Senate Committee on Indian Affairs
7. Mason (and Custred), letter dated July 20, 2005 to Senator John McCain
8. Seidemann, letter dated July 1, 2005 to Alan Schneider
9. Steele (and Carlson) letter dated July 20, 2005 to Senator John McCain
10. Stenger, letter dated July 14, 2005 to Senate Committee on Indian Affairs

Selected Publications
Testimony of Friends of America's Past

Magazine and Newspaper Articles

Please refer to the publisher's website or other authorized sources for text of these articles.

1. ABC News.com, February 2, 2000
2. American Archaeology, Summer 2005, Fall 2004, Summer 2004
3. Archaeology, November/December 2002
4. Arizona Daily Star, July 10, 2001
5. Associated Press, June 28, 2005, April 7, 2005, February 16, 2005, September 30, 2004, August 18, 2004
6. Barnes Review, September/October 2001
7. BBC News (UK Edition), July 21, 2004
8. Billings Gazette, April 19, 2001
9. Bulletin (Australia), October 17, 2000
10. Bulletin (Bend, Oregon), April 8, 2005
11. Chicago Tribune, June 28, 2005
12. Christian Science Monitor, June 21, 2001
13. CNN.com/Law Center, August 31, 2002
14. Columbian, July 13, 2001, July 9, 2001
15. Contra Costa Times, July 22, 2005
16. Corvallis Gazette Times (Corvallis, Oregon), August 10, 2001
17. Denver Post, October 1, 2002
18. Discover, June 2004
19. Economist, July 16, 2005

20. Fox News.com, July 8, 2000

21. Hartford Courant, April 27, 2003

22. Houston Chronicle, June 11, 2003

23. Independent News (UK), December 3, 2002

24. Independent Online (Missoula Independent), March 22, 2001

25. Los Angeles Times, October 1, 2000

26. Mammoth Trumpet, March 2003, December 2002

27. National Geographic, December 2000

28. National Review Online, April 14, 2005

29. Nature, July 7, 2005, April 14, 2005

30. Newsweek, July 20, 2005

31. New York Times, July 19, 2005, July 19, 2004, February 5, 2004

32. Oregonian, July 11, 2005, July 6, 2005, June 22, 2005, April 10, 2005, September 10, 2003

33. Press-Enterprise, September 26, 2000

34. Register Guard (Eugene, Oregon), October 25, 2002, August 31, 2002

35. Science, June 24, 2005, October 8, 2004, July 30, 2004, February 13, 2004

36. Scientific American, September 2000

37. Seattle Post-Intelligencer, July 11, 2005, July 6, 2005

38. Seattle Times, July 11, 2005, July 6, 2005

39. Spring Hill Review, October 2001

40. Tri-City Herald, July 15, 2005, July 11, 2005, June 20, 2005, October 1, 2004

41. Tucson Citizen, August 11, 2001

42. USA Today, June 30, 2005, April 20, 2004, October 1, 2002

43. Washington Post, September 17, 2004

44. Washington Post Online, May 30, 2001

45. Weekly Reader (Senior Edition), October 25, 2002

Editorials

Please refer to the publisher's website or other authorized sources for text of these editorials.

1. Arizona Republic, October 15, 2004

2. Cape Cod Times, August 25, 2004

3. Dallas News (Texas), August 22, 2002

4. Democrat-Herald (Albany, Oregon), July 18, 2004, October 4, 2001

5. Denver Post (Colorado), October 2, 2002

6. Denver Rocky Mt. News (Colorado), October 13, 2004, September 27, 2000

7. National Post Online, October 28, 2000

8. National Review Online, April 14, 2005

9. Otago Daily News (New Zealand), February 19, 2004

10. Seattle Times (Washington), April 4, 2005, July 22, 2004, July 21, 2004, September 5, 2002

11. Tri-City Herald (Washington), July 20, 2005, September 4, 2002

12. Washington Times, April 27, 2001

SUMMARY OF BIOGRAPHICAL INFORMATION
Paula A. Barran

My educational background is as follows. I earned a B.A. in 1971 from the College of William and Mary, an M.A. in 1973 from Cornell University, a Ph.D. in 1976 from the University of British Columbia, an LLB in 1979 from Osgoode Hall School of Law, York University, and an M.B.A. in 1991 from the University of Oregon.

I am admitted to practice in Oregon (1980) and Washington (1984), and before federal courts in both states. I am admitted to the Ninth Circuit Court of Appeals.

I have practiced law, concentrating on labor and employment, since 1980 without interruption. I practiced full time when I attended the Oregon Executive MBA program from 1989 to 1991.

I have been an adjunct professor at Lewis and Clark, Northwestern School of Law, teaching employment discrimination law, during two separate terms. I have been an adjunct professor at Willamette University School of Law in 2001 and 2002, teaching labor law. I have participated as a panelist or presenter in many programs on practice related matters through the Oregon State Bar's CLE programs, Oregon Law Institute, and more than a dozen other sponsors. I am a contributor to Oregon State Bar and other publications. I am listed in Best Lawyers in America. My publications include:

"Public Policy Challenges to Labor Arbitration Awards: Still a Safe Harbor for Silly Fact Finding?" Willamette Law Review, Volume 38, Co-author (Spring 2002); "Managing Reentry: Returning to the Interrupted Practice," The Professional Lawyer (February, 1996); "Individual Rights in a Collective Bargaining Environment," LERC Monograph No. 12 (University of Oregon, 1993); "The Glass Ceiling: Do You Need to Worry? and Can You at Least Worry Constructively," Arbitration Quarterly of The Northwest, Vol. XIII (Spring, 1993); "Employees," The Oregon Health Law Manual, Co-author (Oregon State Bar Health Law Section, 1992, 1994); "Employment Related Torts," Oregon State Bar CLE Publications, Co-

author (1990, 1994); "Sexual Harassment in the Workplace: Eliminating the Offensive Working Environment," LERC Monograph No. 7 (University of Oregon, 1988).

On August 7, 2005 I will be inducted into the American College of Labor and Employment Attorneys.

Alan L. Schneider
Pertinent Biographical Information

I received a B.A. degree in 1965 from the University of San Francisco and a J.D. degree in 1968 from Stanford University. I have been a member of the Oregon State Bar since 1968 and have been continuously engaged in the practice of law since that date. I have been admitted to practice before the United States District Court for the District of Oregon, the Ninth Circuit Court of Appeals and the United States Supreme Court.

I have special expertise in matters relating to federal and other cultural resource laws. Pertinent federal laws include the Native American Graves Protection and Repatriation Act, 25 U.S.C. §3001 et. seq ("NAGPRA"), the Archaeological Resources Protection Act, 16 U.S.C. §470 et. seq ("ARPA"), and the National Historic Preservation Act, 16 U.S.C. §470 et. seq ("NHPA"). These federal statutes establish the basic structure or framework for the protection, use and disposition of archaeological sites and objects located on federal (and, in part, tribal) land. They regulate, among other things, the investigation of archaeological sites, curation of objects after excavation, study of federal collections, and claims for repatriation of human remains and objects qualifying as "cultural items". They are supplemented by a variety of other federal laws having more limited or specialized applications. Most states and many counties and cities also have laws that regulate activities affecting archaeological sites, and many also regulate the study and disposition of human remains and other objects found in archaeological contexts. Such federal, state and local laws are usually supplemented by regulations adopted by the administrative agencies that enforce them. The laws and regulations adopted by these different

jurisdictional levels of government often vary significantly in the types of activities they regulate, and in the restrictions and requirements they impose.

I developed and taught a class on NAGPRA for the U.S. Forest Service. The purpose of that class was to instruct Forest Service land managers, archaeologists and other decision makers on their obligations under NAGPRA and how they should deal with various situations that might arise under that statute. Class materials included a course handbook (103 pages) that I wrote entitled "NAGPRA and Federal Land Management". The course has been given for many of the Service's regions and has been attended by more than 300 persons. Attendees have included representatives from a number of tribal organizations and from federal agencies in addition to the Forest Service.

I have written many articles and papers on NAGPRA and other cultural law topics. Some of the publications that have printed these articles and papers include: Current Research in the Pleistocene (volumes 12 and 13); Topics in Cultural Resource Law (Society for American Archaeology 2000); Proceedings of the 58th Annual Biology Colloquium (Oregon State University 1999); The Mammoth Trumpet (Center for the Study of the First Americans); Legal Perspectives on Cultural Resources (Altamira Press 2004); New Perspectives on the First Americans (Center for the Study of the First Americans 2004); Anthropology Newsletter (American Anthropological Association); ACPAC Newsletter. I am also the author of "A Guide to Northwest Archaeological Laws" (Oregon Archaeological Society 1993) which summarizes the pertinent provision of federal, Idaho, Oregon and Washington laws regulating archaeological resources. I currently have in draft a paper co-authored with Dr. Robson Bonnichsen (now deceased) that discusses how law and public policy impact scientific study of the past. It is entitled "Where Are We Going? Public Policy and Science", and is scheduled to appear later this

year or next year in Paleoamerican Origins: Beyond Clovis (Center for the Study of the First Americans, in press).

I have advised government officials (municipal, state and federal), attorneys, scientists, Native Americans, landowners and other persons on questions relating to NAGPRA and other cultural resource laws. Some of the matters on which I have advised such persons include: ownership rights to ancient human skeletal remains; challenges to state and municipal restrictions on investigation of archaeological sites; standards for repatriation of sacred objects; rights of scientists to study objects held in federal collections. I have participated in public panel discussions of cultural law topics, and I have given speeches and talks on such topics at scientific conferences, meetings and archaeological societies, universities and other venues. I have attended meetings of the NAGPRA Review Committee, and have helped draft comments on proposed regulations under NAGPRA and the NHPA. A special adaptation of my NAGPRA training class was given for Southwest Pueblo tribal officials and members in Santa Fe, New Mexico in October 1999. I have served on the Board of Advisors of the Center for the Study of the First Americans, of which I was a Co-Chairperson for two years, and I was a member of the Training Committee of the Oregon Archaeological Society.

I have personally participated in a number of archaeological and paleontological excavation projects. I have conducted research to help develop methodologies for the recovery of hair and other small-scale organic materials from archaeological sediments. I have co-authored with Dr. Robson Bonnichsen several papers and articles on archaeological subjects. They include: "Breaking the Impasse on the Peopling of the Americas" (Ice Age Peoples of North America 1999); "The Case for a Pre-Clovis People" (American Archaeology; Winter 2001-02); "Roots" (the Sciences; May/June 1995); "Battle of the Bones" (The Sciences;

July/August 2000). I have attended many archaeological and other scientific conferences; observed the laboratory investigation of human skeletal remains and other materials; and inspected archaeological sites, research facilities, DNA laboratories and museum curation facilities.

For more than the past 10 years, I have closely monitored developments on the federal and state level relating to the repatriation of human skeletal remains and other objects. Among other things, I have reviewed available literature and documents concerning the following matters: the so-far unsuccessful efforts of the Fallon Paiute Tribe to obtain possession of the Spirit Cave Mummy (approximately 10,600 years old) that was found in 1940 on Bureau of Land Management property; repatriation programs undertaken by a number of states; efforts by the NAGPRA Review Committee to develop guidelines for the repatriation of culturally unaffiliated remains; disposition of the Buhl Woman skeletal remains (more than 10,000 years old) by Idaho state authorities. In addition, I have tried to stay informed about repatriation activities in other countries such as Australia, New Zealand and the United Kingdom.

June 17, 2005

Senator John McCain, Chairman
Senate Committee on Indian Affairs
United States Senate
86 Hart Office Building
Washington, DC 20510
FAX: (202) 224-5429
Re: Mc Cain Amendment to NAGPRA

This letter is to register our opposition to your proposal to amend Section 2(9) of the Native American Graves Protection and Repatriation Act (NAGPRA). As we understand it, the purpose of the amendment is to broaden the meaning of the term "Native American" so that NAGPRA will cover all prehistoric human remains and cultural items found in this country, regardless of their antiquity and even if they lack any verifiable connection to present-day Native Americans. We believe that there is no scientific justification for such a measure.

We are anthropologists who have spend our professional careers studying human physical and cultural evolution. Together, we have devoted more than 30 years apiece to research and teaching. We have written or co-authored more than 20 books and more than 600 articles and papers. We have studied remains, objects and sites in the United States and throughout the world.

Nowhere in the world can it be said with any degree of confidence that human skeletons of any significant antiquity are the direct and unmodified ancestors of the people living today in the localities where the skeletons happen to be found. This is not an unsupported opinion. Among other things, we have accumulated a database of craniofacial measurements taken on human skeletal material ranging in age from well over 9,000 years ago to modern times, and truly worldwide in scope. The measurements were made on collections housed in North and South America, China, Japan, Thailand, Indonesia, Australia, South Asia, Western Europe, Central Europe, the Mediterranean (both Northern and Southern edges), Israel, Egypt, and East Africa. This collection contains measurements made according to a standard protocol. For each of these regions we have sets of two dozen craniofacial measurements on representative samples of the individuals involved which we have used for statistical comparisons of the representative groups. It is the largest such database in the world

NAGPRA cannot be safely applied to skeletons that are thousands of years old. How such skeletons are related to modern Native Americans, if they are related at all, is difficult to determine. One example is the 9.000 year old skeleton known as Kennewick

Man. Although we have not been allowed to make our measurement set on the Kennewick individual, a visual appraisal of his craniofacial form causes us to doubt that he is ancestral to the people who are now claiming descent from him. The offhanded comment that "humans and animals change over time to adapt to their environment" has been made to account for the evident difference in appearance between the Kennewick individual and the Native American people living in that area at present. From an analysis of the material in our database, we can say that no human group anywhere else in the world over a 9,000-year time span has undergone a degree of *in situ* change comparable to the difference between Kennewick and the tribes that now claim him as ancestral.

From an assessment of the photographs of the Kennewick find, one of the undersigned (Brace) was the first scholar to suggest that the skeleton exhibits more morphological similarity to the prehistoric Jōmon of Japan, the ancestors of the Ainu, than he does toward those American Indians who are claiming him as an ancestor. The same suggestion occurred in assessing the form of some Kennewick contemporaries found at Lagoa Santa in east central Brazil just before the mid-point of the 19th century. Two years ago we were allowed access to the Lagoa Santa material, made our measurements, and have since done the kind of statistical analysis we would like to do on Kennewick Man. The results were unequivocal. Lagoa Santa indeed ties closely to Jōmon Japan. It is not unrealistic to suspect that the prehistoric inhabitants of the northeastern edge of East Asia contributed to one of the early waves of human entrants into the Western Hemisphere.

The chances are remote that individuals who lived in North America as long ago as Kennewick Man have any living descendants today. Most human lineages do not succeed in reproducing themselves over a span of even 500 or 1000 years, and even fewer survive after 9000 years. Because of the contingencies of human survival, modern humans are the descendants of a relatively small fraction of the people who lived in Kennewick Man's era. Human survival in prehistoric times was a problematic proposition. Even entire bands were at risk of sudden or gradual elimination due to competition from other groups, warfare, disease, droughts, famine and other circumstances. Furthermore, even if an ancient individual or his or her band does have modern living descendants, it cannot be assumed that they are living in the same area where the ancient person's skeleton is found. Hunter-gatherers of 9,000 years ago appear to have been highly mobile peoples, and over time their descendants could have ended up living many thousands of miles from where their ancestors lived and died. The historic and prehistoric record contains many examples of tribal migrations not related to European expansion that involved movements over considerable distances within only one or two generations. By comparison, more than 400 generations have passed since someone as old as Kennewick Man died.

The Lagoa Santa skeletons provide a good example of why it is fallacious to assume that the modern inhabitants of a region are necessarily the direct descendants of people who lived in the region thousands of years before. The native people of Tierra del Fuego are the modern population that ties closest to these ancient skeletons. Approximately 3500 miles separate their region from the Lagoa Santa area of Brazil. Whether any ancestral-descendant relationship exists between the two populations has yet to be determined.

Nowhere in the world is the lifeway of people more than 9,000 years ago the same as the lifeway of the people living there today. And nowhere in the world does the treatment of the dead today have any relationship to how people who lived there more than 9,000 years ago conceptualized the great mystery of mortality. To illustrate this point, let us use the people who have inhabited the British Isles. Some 9,000 years ago, the Celts did not yet exist, the Romans had not yet invaded Britannia, the Anglo-Saxons had not emigrated to England from Germany, and the Norman French had not yet crossed the Channel. We would be misguided to claim that an individual who lived there 9,000 years ago had the same views of an afterlife as the people now living in the United Kingdom. The New World is not different. We simply have less historic data, which is all the more reason we need scientific study of early remains and objects..

To treat the remains of people more than 9,000 years old according to the customs of the people living today in the discovery area ignores the huge cultural differences between then and now. The most honor we can give the remains of ancient prehistoric people is to find out who they were most closely related to and what their way of life actually was. The only way this can be done is to subject their tangible remains to scientific study and to investigate archaeologically sites containing information about their living practices. To bury such material in an unknown place at the behest of a group to whom they have no demonstrated biological or cultural connection is actually a form of cultural imperialism. Future generations will not thank us for allowing the destruction of key evidence for understanding America's past. We urge the Committee to take a more long-range view of the issues raised by the McCain Amendment. To erect hasty and ill-conceived barriers to scientific investigation of prehistory, as this bill would do, is not in the public interest.

Sincerely,

C. Loring Brace
Kent V. Flannery
Joyce Marcus
Henry T. Wright

C. Loring Brace, Ph.D.
Professor of Anthropology
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July 21, 2005

Senate Committee on Indian Affairs
United States Senate
836 Hart Building
Washington, DC 20510
FAX: (202)224-5429

Re: Proposed Amendment to NAGPRA

Dear Senator McCain:

The Colorado Archaeological Society (CAS) was founded in 1935 and currently is composed of eleven local Chapters across the State. Our membership of approximately 2000 is very broad-based in background, with people from all walks of life: student to retiree, blue and white collar workers, businessmen, professionals, educators and, to a lessor extent, professional archaeologists. We have published the highly respected quarterly scientific journal, *Southwestern Lore*, for seventy years and currently ninety educational institutions across the United States subscribe to it on an annual basis.

Through the proposal of legislation and lobbying, our organization was directly responsible for the creation of Colorado's Office of the State Archaeologist. We work closely with the Office of Archaeology and Historic Preservation and have two members representing our interests on the Board of Directors of the Colorado Historical Society. We are also represented on the Colorado Interagency Archaeological Education and Anti-Vandalism Task Force which is a group composed of representatives from all Federal, State and private sector agencies involved in archaeology and historic preservation. In October of 2005, CAS will, along with The Friends of the Dunes, the National Park Service, the US Forest Service and several other entities, co-sponsor a public research symposium commemorating the creation of the Great Sand Dunes National Park.

All members of CAS come together to share in a quest for knowledge about our history. For Federal income tax purposes, the declared nature of our business is the "conservation of archaeological resources, scientific research and historical activities". We believe that it is the "scientific research" that is key to unlocking the secrets of our past.

Our organization has a long term history of respect and support for Native Americans. CAS produced an exhibit entitled *awakening Stories of Ancient Bison Hunting* which is currently on display at the Southern Ute Cultural Center and Museum in Ignacio, Colorado. This exhibit is the result of a cooperative effort between CAS, Northern Cheyenne, Northern Arapahoe, and Oglala Lakota people to develop a picture of part of America's past from the results of an archaeological excavation carried out by Colorado State University.

CAS, as an organization, supports the Native American Graves Protection Act (NAGPRA) and agrees that the religious and spiritual beliefs of all Native Americans concerning the protection of the remains of their identifiable relatives should be honored. That said, we feel equally strongly that scientific inquiry and spiritual beliefs are complementary, not at odds with each other. In the distant past the heritage of all people merge. Understanding of the earliest peoples of this hemisphere, as well as the understanding of the human heritage of all other continents, belongs to all humans. Spiritual, cultural and scientific perspectives are all important to interpret and honor this heritage.

It is the unanimous opinion of the Board of Directors of the Colorado Archaeological Society that Section 108. DEFINITION OF NATIVE AMERICAN of S-536 Native American Omnibus Act of 2005 has the potential to do untenable damage to the the understanding of our past. While the current law is not perfect, the framers of NAGPRA found a way to protect the spiritual concerns of Native Americans while preserving the ability of the scientific community to continue with important research on our prehistory. *We would most strongly urge the Committee to withdraw its support for Section 108 of S-536 and any other similar proposal to amend NAGPRA by changing its definition of the term Native American.*

Respectfully,

Thomas R. Hoff, Past President
For the Board of Directors,
Colorado Archaeological Society

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Centennial, Colorado 80111
(303) 770-5205
tthoff@hotmail.com

Senator John McCain, Chairman
Senate Committee on Indian Affairs
United States Senate
836 Hart Office Building
Washington, DC 20510
FAX: (202) 224-5429

July 15, 2005

Re: Proposed Amendment to NAGPRA
(108 of S.536 of the Native American
Omnibus Act of 2005)

Dear Senator McCain:

Please share this letter and accompanying official Written Statement to the members of the Senate Committee on Indian Affairs.

The Ethnic Minority Council of America (EMCA) is opposed to the proposed amendment to the Native American Graves Protection and Repatriation Act **(NAGPRA)** that would add the words "or was" to the statute's definition of Native American. We believe that the amendment would be harmful to the best interests of the country generally, and more particularly to the rights of those individuals of American Indian descent who want to know more about their heritage.

1. WHO WE ARE

EMCA is an organization of more than 3000 families who are committed to promoting and protecting our varied ethnic heritages. We were founded in 1985. Many of our members are of American Indian descent and these members live both on US Indian reservations and independently outside reservations.

Our organization consists of a broad base of members who, politically, are Democrats, Republicans and Independents. We are located in every state and represent a wide variety of occupations (e.g. day laborers, housewives, lawyers, physicians) and social economic levels. We ascribe to varied religions including Native American, Christian, Jewish, Moslem, Hindu, Buddhist and agnostic faiths.

We are representative of modern ethnic America: an America that unites different people into one strong nation.

2. WE SUPPORT A BALANCED APPROACH TO THE PAST

The EMCA supports the preservation and study of ancient remains and artifacts because these items comprise part of the history of this country. We believe this history must be explored and recorded for posterity. The EMCA recommends the cultural, educational, medical and scientific exploration of ancient artifacts and remains as a way of helping future generations.

> We support repatriation of remains in cases where the direct next-of-kin are identified and wish reburial, cremation or other disposition. Repatriation in such situations should be allowed not only for the remains of American Indians, but should be granted in all situations regardless of the ethnic or religious affiliations of the people involved.

> We are concerned that the McCain Amendment, if it becomes law, will give unidentified remains to unrelated or very tangentially related people who are not direct relatives and will thus destroy an important part of our history.

> We are troubled that the McCain Amendment will permit repatriations of unidentified remains to individuals or groups who practice religious burial ceremonies that are foreign to, and likely repugnant to, the beliefs of the people being reburied.

> We support DNA, scientific identification and study techniques which may lead to the identification of the direct, next of kin of a deceased individual. These techniques will increase in accuracy and specificity over time.

> We support the careful, patient study and identification of remains; not the hurried burials that are professed by some political groups and that will only increase if this amendment is adopted.

> We believe that repatriation decisions should be based upon sound scientific and historic information, not religious beliefs that cannot be objectively verified. Government policy should not be used to promote religion, or to elevate one set of religious beliefs to a favored position above all other beliefs.

We support the holding, curation and study of all unidentified remains and cultural artifacts pending positive identification; especially in the case of individuals of possibly mixed heritage (e.g. White-Indian).

> We believe that preservation and study of ancient remains and artifacts will help to UNITE all citizens in a mutual exploration and celebration of our

diverse ethnic heritages. Too often, NAGPRA and its implementation have become the source of racial or ethnic divisions and political discord.

3. WE ARE DEEPLY CONCERNED WITH WHAT THE McCAIN AMENDMENT WOULD DO.

The McCain Amendment would open the door for giving away ancient remains and artifacts that have no known connection to modern Indian tribes. Examples of the types of ancient remains that would be affected by the amendment include Kennewick Man in Washington State and Spirit Cave Man in Nevada. Such remains should not be given away to tribal groups that may have no relationship to the remains and that are likely to practice religious burial services that are foreign to the person being reburied. Unrelated remains of this kind should be preserved and studied so that all of us, Indians and non-Indians alike, can learn more about the people who preceded us on this continent.

If the Committee on Indian Affairs wishes to do something productive with its time, it would be better advised to investigate the NAGPRA activities of the Department of the Interior and other federal agencies. Too often, these agencies make hurried, ill-conceived decisions that are not based upon sound evidence. Too often, they use NAGPRA as a pretext to block scientific study of ancient remains and artifacts. The Kennewick Man case is a good example of how NAGPRA can be misused. It seems to us that such over-applications of the law are motivated, in many cases, by a desire to mollify a few tribal activists who do not represent the true descendents of the remains and who are seeking to pursue their own political agenda. We do not believe that NAGPRA was intended to have such a one sided interpretation and agenda. The "any ol' Indian will do" attitude of some agencies is deplorable.

Agencies also refuse to use modern technology (e.g. DNA analysis) for identification of remains because of religious objections to scientific testing raised by a few fundamentalist believers who may not be representative of the wide range of religious beliefs within an Indian community. This is problematic because such tests are in standard use for existing populations (e.g. identifying Jane Does and other unidentified remains brought to a Coroner or Medical Examiner's office). Likewise, agencies often, unfairly favor Indian claimants at the expense of other races in cases where the remains are identified as mixed-race.

The Ethnic Minority Council of America respectfully recommends that the McCain Amendment be withdrawn and not included in the NAGPRA law. We request that the Committee on Indian Affairs conduct appropriate investigations to ensure that

federal agencies will act fairly and scientifically in their repatriation decisions. Please feel free to contact us if we can be of help.

Respectfully,

E. J. Neiburger-Director
Ethnic Minority Council of America, 1000 North Ave. Waukegan, IL 60085 847-244-0292 eneiburger@cs.com

July 25, 2005

Senator John McCain, Chairman
Senate Committee on Indian Affairs
United States Senate
836 Hart Office Building
Washington, DC 20510
FAX: (202) 224-5429

Dear Senator McCain:

I am writing to you regarding your proposed amendment to the Native American Graves Protection and Repatriation Act (NAGPRA). I am a member of the Department of Anthropology at the University of Wyoming, Laramie, Wyoming, and an active, practicing forensic scientist. Attached to this letter is a one page summary of my professional background and credentials. Further details will be provided upon request.

The amendment's proposed addition of only two small words (i.e., "or was") to NAGPRA's definition of the term Native American may seem like a minor change, but in practice it will have profound effects upon our future. If passed, it will directly and adversely affect such things as the quality of medical science and forensic science education in our country, and also our future capacity to solve important forensic cases such as homicides, missing persons cases and mass disasters (like the 9/11 Twin Towers and Pentagon terrorist attacks). Please let me explain.

First of all, I would like to begin by saying that I fully support the rights of Native Americans, or any other people, to claim the remains of deceased relatives for burial, or whatever other disposition they deem appropriate. Since 1990 NAGPRA has provided the long overdue opportunity for Native American peoples to have the same rights as anyone else with respect to the handling and disposition of their relatives' remains. As the only biological anthropologist at the University of Wyoming for a 30 year period (from 1971 until recent departmental expansion) I was, and still am, very involved with the implementation of this law. If properly implemented NAGPRA is a good law. However, not all claims made under NAGPRA are equally meritorious. One particularly troublesome area is remains that are so old they have no verifiable connection to any existing American Indian tribe or to present-day Native Americans as an aggregate population. One good example of such remains is the Kennewick Man skeleton. Such ancient remains should not be subject to disposition under NAGPRA. Instead they

should be properly curated and carefully maintained in a safe, appropriate facility. Doing so serves two very important purposes. First, the unidentified remains will be kept safe until those who have a true relationship can claim them, and secondly, in the interim they will provide an invaluable resource for both teaching and research.

In just the last few years the progress in DNA research has been so immense that we never would have believed it possible a decade or two in the past. Equally stunning advances have been made in other methods for investigating prehistory. Soon it may be possible to repatriate remains with much greater precision than is now the case. To try and speed the process now will only result in injustice to those persons who have the closest relationship to the remains in question but have no way at present to prove their connection.

Regarding my second point about the value of having extant skeletal remains available for teaching and research there are a number of factors that should be pointed out. First of all, students in certain medical sciences, forensic anthropology/skeletal biology and many areas of archaeology must have actual human remains available for study. Casts, plastic models and computer images are fine for introductory students, but for educating competent, advanced professionals in certain fields of science these substitutes are totally inadequate. Furthermore, study collections must contain a wide range of human skeletons representing both sexes, people of various major races/populations, all ages (developmental stages), and both normal and pathological skeletal conditions. No forensic anthropologist has ever been educated to an adequate level (eg. for board certification), and become fully capable of testifying in court on homicide cases, mass disaster cases, etc., without having been trained on excellent, well-maintained skeletal collections that possess great biological diversity within them.

Regarding research on human skeletons, skeletal collections are invaluable to our understanding of population change, disease, forensic body identification and many other things. In fact, skeletal collections are no less important to research than they are to the process of education. In my own laboratory, not a single day passes without the bones in our collection being put to quite important uses (eg. helping to teach, helping to solve crime cases, helping to develop new scientific methods).

The proposed current change in the NAGPRA law, if passed, would clearly accelerate the dismantling of existing important skeletal collections. One consequence would be the loss of ancient skeletal remains that are absolutely essential to understanding how this continent came to be inhabited by people. Without the ability to study the few truly old skeletons (i.e., those more than 8,000 years old) that are currently held in federal or museum collections, or that might be found in the future, the early prehistory of this continent can never be reconstructed. Only the remains themselves have the information needed to tell us who these ancient people were, where they might have come from, how they were related to one another, and whether they are related to any people living today.

NAGPRA should not be amended to allow tribal groups to claim individual skeletons to which they have weak or non-existent relationships and which might actually be more closely related to other people elsewhere in this country (or from other parts of the continent). Such would be the result of this amendment. I therefore urge that it not be approved by the Committee. Thank you for your attention to these considerations.

Sincerely,

George W. Gill, Ph.D., D.A.B.F.A.
Professor, Anthropology
Former Chairman, Physical Anthropology Section,
American Academy of Forensic Sciences

July 19, 2005

To the Honorable Senator McCain and the members of the Senate Committee on Indian Affairs, United States Senate

I am retired from a career in high technology, and I am personally familiar with the issues related to the proposed legislation offered by Senator McCain to amend NAGPRA's definition of Native American. I have a graduate degree in physical anthropology from the University of Tennessee, Knoxville. I was trained in human osteology and skeletal biology and participated in research in those areas. Since 1998, I have assisted the attorneys for the scientists in the Kennewick Man lawsuit. These are my personal views.

I strongly oppose the McCain Bill or any legislation that would expand NAGPRA's definition of Native American to include all people residing here before European contact. One cannot simply assume that a single unbroken line connects all the earliest people who have ever lived on this continent to modern American Indian tribes today.

Through careful scientific study we have come to understand much about human life on earth. Even so, a basic question about the prehistory of our continent awaits an answer. Who were the earliest people to come here and by what means did they arrive in the empty land of the Americas thousands of years ago? The ancestors to modern day American Indians came into the Americas from elsewhere. Who, if anyone, did they find when they arrived? We simply do not yet know.

It now appears that the Americas were a melting pot long before Europeans arrived. The assumption of a single migration by a small band of people over a Bering land bridge is inadequate to explain all the facts as we now know them. Tantalizing evidence of early

migrations along the Pacific coast suggests that a variety of unrelated peoples from the Pacific rim made contact over many millennia. Surprisingly, the oldest US archeological sites have been found in the south and east. Even older evidence of human habitation is found in South America. We rely on scientific techniques to piece together the facts of prehistory. Assumptions must be carefully reasoned, then verified.

The argument is often made that the study of unidentified and unaffiliated human remains is not important. Nothing could be further from the truth. Every bit of evidence adds to a factual, verifiable understanding of the complexities of prehistory.

Precious ancient remains have been lost on false assumptions and without establishing cultural links. The Buhl woman, who lived 10,800 years ago, was found in Idaho in 1989. Her remains were buried in 1991. Someone assumed that this one skeleton couldn't tell us much. The limited information gathered about her reveals that she bore no resemblance to modern American Indians. Ideas about her life, her culture, her beliefs and her population relationships were assumed and imposed, not established by factual inquiry.

Most of the known ancient remains from the Midwest are gone forever because of misapplications of NAGPRA, and there is now little hope of finding out if any common thread backwards or forwards connect these remains to the tribal cultures that we recognize today. Browns Valley, Pelican Rapids, Wet Gravel, Gilder Mound, Hour Glass Cave: these ancient remains and others in the West are named now for the places where they were discovered. Each was a single ancient skeleton. Each was given an identity that was assumed and imposed, not established. Not one of these ancient skeletons received protection from NAGPRA's requirement to establish a cultural link.

In Oregon, Prospect Man lived sometime before Mt. Mazama erupted nearly 7,000 years ago. Preliminary examination of his remains revealed a mixture of human traits.

Recommendations to establish a firm carbon date for when he lived were denied. This single skeleton could have provided important clues to help connect the early people with those who may have arrived later. The remains were buried in 1999.

The first court test of NAGPRA's definition of Native American came in the Kennewick Man lawsuit (Bonnichsen, et al.). Without bothering to check the evidence, the Army Corps of Engineers assumed that the tribal claim was legitimate. It turned out that no cognizable cultural link could be established.

During the appeal to the Ninth Circuit, a judge on the panel posed a question to the Department of Justice attorney: If the bones of the earliest humans on earth, a virtual Adam and Eve, were found on Federal land, would they be Native American under the defendants' interpretation of NAGPRA's definition? The response was yes. The court found that such an interpretation yielded an absurd result. Defending this interpretation cost the American taxpayers an estimated $6,000,000.

Some claim that the Ninth Circuit got it all wrong. I challenge every member of this committee to actually read the Ninth Circuit decision before accepting that position.

The government and the tribes sought to impose on Kennewick Man a history that does not exist. We do not know where he was born, how far he traveled in his lifetime, who his group was, what his beliefs were, who thrust the spear point into his hip, or how he died. We do not even know yet if he was accidentally or intentionally buried. But with scientific study, many of these questions can be addressed. Had the lawsuit not been brought in 1996, the 9,000 year-old Kennewick Man remains would have been buried with no study whatsoever.

With scientific study of individual skeletons, insights into the lives of newly discovered early individuals can be built on a foundation of fact, not simplistic assumptions that exclude a world of other equally plausible possibilities.

The history of the earliest peoples in this country still waits to be understood. These people deserve their histories to be told accurately and as completely as we can manage. A factual understanding of the past through scientific study is of interest not only to the citizens of the United States but also to people worldwide. All of the earliest people came from elsewhere, bringing their ingenuity to the Americas. Some left descendants, others may not have. Descendants from the earliest people could be anywhere. One cannot simply assume that a single unbroken line connects all the earliest people to modern tribes today.

Congress should not pass legislation that would restrict access to factual information or limit explanations of the past to a single view. NAGPRA's cultural affiliation requirement has offered no protection to culturally unaffiliated and unidentified ancient remains in the past. It is not clear what this legislation is actually intended to accomplish.

I urge you to withdraw the proposed McCain bill to define Native American as including all humans on this continent before European contact. This legislation is flawed by unfounded and narrow assumptions about the earliest people who inhabited the continent.

Respectfully submitted,

Cleone Hawkinson
8520 SW Cecilia Terrace
Portland, OR 97223

July 19, 2005

Senate Committee on Indian Affairs
United States Senate
836 Hart Office Building
Washington, DC 20510
FAX: (202) 224-5429

Re: McCain Amendment

Dear Committee Members:

I am writing to urge that Senator McCain's proposed amendment to the Native American Graves Protection and Repatriation Act (NAGPRA) not be approved by the Senate Committee on Indian Affairs. That amendment would change NAGPRA's definition of the term Native American by inserting the words "or was" after the word "is" in Section 2(9) of the statute.

I am a professor of anthropology at the University of Tennessee. I have 30 years experience studying the skeletal remains of both ancient and recent Americans, including Native Americans and those of European, African, or other origins. As a scientist interested in the history of American human populations, I am concerned about the profound negative consequences that the McCain Amendment would have on our ability to study the remains of early skeletons and to understand the history of human occupation of North America.

There are not more than about a dozen reasonably well preserved early skeletons (older than about 8000 years ago) or substantial parts of skeletons that are available for study in the United States. The proposed amendment, should it become law, would give

Native Americans control over these ancient remains, and any others that might be discovered in the future on federal land. If that were to occur, it can be anticipated that most, if not all, of them will be reburied and thereby lost to scientific investigation. The same would happen to dozens of other skeletal remains that date to 5000 years ago or more. Possible connections between these early remains and modern Native Americans are entirely speculative. Despite all of the advances that have been made in the last 80 years or so, our knowledge of the many different groups of people that lived in North America more than 2000 or 3000 years ago is still quite limited. We know something about the tools and other artifacts that they made, the animals and plants that they ate, and where they made some of their camps. However, we know very little about the people themselves.

Research on these early remains has demonstrated that they differ in significant ways from modern Native American tribes. There are two scenarios that might explain this apparent discontinuity between the ancient remains and modern people: (1) there is an ancestor-descendent relationship between the early people and recent ones, and the differences are due to in-situ change; (2) the early inhabitants of North America differ from modern Native Americans because they are unrelated, and the ancestors of Native Americans represent a later migration of people into the continent.

At present, there is insufficient evidence to reach any reliable conclusions about which one of these scenarios is correct. We will never be able to know what actually happened without continued study of existing skeletal remains and of those that might be

discovered in the future. Even those remains that have already been studied have not lost their importance as sources of potential information. The need to restudy them from time to time will continue to grow as scientific advances occur. For example, it is now possible to extract DNA from ancient remains, or to infer diet or place of origin from elemental isotopes. Such studies were impossible only a few decades ago. Future generations of scientists are certain to develop methods of analysis that we cannot even imagine and that are many times more powerful than anything that we can do today. If the McCain Amendment were to become law, it may never be possible to answer questions about who the earliest inhabitants of the continent were, where they came from, whether they had descendants, and how or whether they relate to modern Native Americans. If early inhabitants did in fact evolve into modern Native Americans, we will not be able to understand how or why that process occurred. If the ancestors of modern Native Americans replaced these early people, we will never understand the nature of the transition.

Our ability to understand human origins and dispersal is critically dependent on our ability to study remains. It is done routinely in most countries of the world. America is one of the last parts of the world to be inhabited by humans. Turning over to modern Indian tribes remains that are thousands of years old would, in effect, prevent the telling of this last chapter of the human story. There might be some conceivable justification for adopting such a policy if there were a demonstrable relationship between these ancient remains and modern Native Americans. Since such a relationship has yet to be established, and may never be, it would be premature and short-sighted to empty

museums and institution collections of these precious relics from the remote past.

I support NAGPRA as it now stands. I believe that on the whole it is good legislation that enables Native American tribes to claim remains identifiable as their ancestors. In fact on several occasions I have conducted analyses on skeletal remains that provided evidence connecting the remains to a specific tribe, hence facilitating their repatriation. However, the fact that NAGPRA has fair and appropriate applications in some situations does not mean that it should be applied to every skeleton that might be found on federal land. NAGPRA should be limited to what its title implies (i.e., those remains and objects that can fairly be said to be Native American). If the definition of Native American is modified as proposed in the McCain Amendment, the term Native American will essentially become a meaningless term.

I am available to answer question from the Committee members and staff about the issues addressed in this letter, and can be reached at:

Telephone (865) 974-4408

E-mail: rjantz@utk.edu

Sincerely,

Richard L. Jantz, Ph.d.
University of Tennessee, Knoxville
Department of Anthropology
252 South Stadium Hall
Knoxville, TN 37996-0720

Brief Background of Richard L. Jantz, Ph.D.

My current position is that of Professor of Anthropology and Director of the Forensic Anthropology Center, The University of Tennessee, Knoxville. In those capacities I teach graduate and undergraduate courses in biological anthropology, direct the research of M.A. and Ph.D. students, conduct research, and administrate the Forensic Anthropology Center. I have been on the faculty of the University of Tennessee since 1971.

My research is concerned with history of human populations as inferred from their skeletal remains. Over the course of my career I have studied the remains of several thousand individuals of people from most regions of the world, ranging in time from 30,000 years ago to modern people. I have either established, or participated in the establishment of several skeletal data bases. These include (1) a data base of skeletal measurements of the populations of America containing information on some 2500 individuals, ranging in time from 10,000 years ago to the present; (2) a data base of modern American Blacks, Hispanics and Whites which is used to estimate sex, race and height of unknown skeletons that appear as forensic cases. I am co-author of a popular software package, FORDISC, now in its third edition. This software package is used by forensic anthropologists in America and the world to assist them in developing the biological profile of unknown skeletal remains. Over the course of my career, I have published over 200 articles and book chapters.

My membership in professional organization includes American Association of Physical Anthropology, Society for the Study of Human Biology and American Academy of

Forensic Sciences. I have served as Chair and Program Chair of the Physical Anthropology Section of the AAFS. I have served on the editorial boards of several scientific journals, and am currently on the editorial board of the Journal of Forensic Sciences.

July 20, 2005

Senator John McCain, Chairman
Senate Committee on Indian Affairs
United States Senate
836 Hart Office Building
Washington, DC 20510
FAX: (202) 224-5429

Re: Proposed NAGPRA Amendment

Dear Senator McCain:

We are concerned about the potential consequences of your proposed amendment to the Native American Graves Protection and Repatriation Act (NAGPRA). The amendment proposes to redefine the meaning of the term "Native American" by adding the words "or was" to Section 2(9) of the statute so that it would now include all prehistoric remains found in the United States, even those that have no cultural, linguistic, genetic or any other significant connection to modern American Indians. This change would overturn the decision of the federal district court in Bonnichsen v. United States of America that interpreted NAGPRA to mean that only those remains that can be shown to have a demonstrated connection to modern American Indians fall under the law, and that those remains of such antiquity that the demonstration of a connection is impossible do not. This decision was upheld by the Ninth Circuit Court of Appeals.

If NAGPRA is changed to redefine "Native American" as stipulated in your proposed Amendment, all human remains found on federal land regardless of their antiquity would become subject to the repatriation provisions and other restrictions of the statute. The effect would be to privatize our national, indeed the common human, patrimony represented by the Kennewick Man skeleton and other ancient remains that until now the government has traditionally protected. In this way Americans would be barred from learning more about our common heritage to the detriment of everyone concerned. Those who seek possession of ancient skeletal remains under NAGPRA often base their claims to a large extent on oral traditions. Such claims are wholly untenable because the historical validity of oral traditions become more problematic over time, fading to virtual unreliability for dates that are in excess of just a few hundred years.

ORAL HISTORY AND ORAL TRADITIONS

Oral history is knowledge from a person's direct experience. Such testimony is often collected and placed in the historical record. Care, however, must be taken when eliciting such testimony due to the fallibility of memory, selective recollection and other factors. Oral traditions, on the other hand, are memories of the memories of other people's narratives. In the process of oral transmission (passing down an account by word of mouth) changes inevitably take place revealing a dynamic much like that of rumor that folklorists, sociologists and psychologists have studied extensively. Indeed legend, passed down for at least one generation, has been characterized as "crystallized rumor." Even though oral traditions "crystallize" in the sense that a definable story is preserved in the process of oral transmission, the details of the story vary, sometimes greatly and sometimes in important ways to yield a number of different variations on a common theme. In fact such variation is a defining feature of folklore to which oral traditions belong.

THE PROCESS OF ORAL TRANSMISSION

The transfomative processes of oral transmission are: deletion of information, the telescoping of events, thus distorting chronology, the fusion of events and persons, the insertion of elements from other events or from other well known oral traditions, as well as the inclusion of what has been called neo-traditions, recently invented narratives with a contemporary purpose rather than the description of historical fact. David Henige, who has extensively studied the process of oral transmission and the usefulness of oral narratives as history, says that "the mental landscape is being repeatedly exposed to weathering" thus progressively diminishing orally transmitted narratives as sources of historical fact.

THE GENERA

The genera of oral tradition are the types of narrative which appear in a body of folklore. This type of variation also plays a part in the usefulness of an orally transmitted narrative in retrieving historical facts. Myths, for example, are the least factually reliable folk narratives. First, myths do not deal with the historical past, but rather with Creation or with a timeless realm of fabulous happenings, monsters, superhuman heroes and wondrous transformations. Myths address the unknowable, providing answers to metaphysical questions such as; where did we come from? How did things come into existence? Why are they the way they are? As well as questions of why the human condition is the way it is and why one way of life differs from another. Also, myth has a moral dimension, explaining things in moral rather than factual terms.

Mythic narrative also has a dream-like quality, taking reality apart and putting it back together according to its own logic, what anthropologist Claude Levi-Strauss has called "mythologic". Indeed myth and dream share several characteristic in this respect, leading some scholars to argue that myth and dream have the same psychological source; dreams are symbolic representations on the individual level while myth parallels them on the social level. Their significance, therefore, does not reside in historical fact but rather in the cultural and the psychological realm. The truths they reveal are thus psychological, not historical. Mythic narratives, therefore, should not be treated as historical narrative.

The historian, however, is on better ground with legends. Legends are narratives told about human beings who have lived in the historical past they are thought by narrators to be true. Historical fact is more likely to be captured in such narratives, especially when archeological and historical sources are available for verification, a subject that has been extensively studied by scholars.

Among the many examples that might be cited one is particularly illustrative of the process of narrative transformation. Robert Lowie studied the Plains Indians in the early twentieth century when traditional narratives were even more accessible than now. The introduction of the horse, whose provenience and date of introduction can be independently verified, was of major historical significance. Yet in the oral traditions of the Assiniboins of the Canadian plains the advent of the horse has been transformed into "a cosmogonic hero-myth".

Lowie also discovered the absence of any reference to the arrival of Lewis and Clark among the Lemi Shoshone notwithstanding its epochal consequences for the lives of those people. Instead, the origin of the White Man is found in myth: the children of Iron-Man as opposed to the Indians who are the children of Coyote (sometimes Wolf). Jan Vansina who has studied the oral traditions of Africa as possible sources of history, also discusses how the appearance of the White Man is treated in African oral traditions. The first explorer with whom the people had contact, he says, is not retained in folk memory. Instead it is the first White Man who happened to have made an impression on them; a merchant, for example, or a missionary or colonial administrator who came much later. Oral traditions are therefore highly suspect when trying to establish and date first contacts. Many post-contact traditions are also suspect. An example of the latter are the nineteenth

century Ponca reports of living hairy elephants and forty feet long monsters in Nebraska.

DISTORTION OF FACT AND INSERTION OF ELEMENTS IN ORAL TRADITIONS

Establishing chronology is also nearly impossible in oral traditions, and completely impossible in events that were supposed to have occurred thousands of years ago. One reason is the telescoping of events to create a longer or short time span in oral presentation. Other reasons are the erosion of factuality as time goes on, and the absorption of historical events into enduring, timeless mythic themes. The advent of the horse among the Assiniboins cited above is one of hundreds of examples. Also, when oral narratives tell of earthquakes, and other cosmic disturbances there is usually no way to correlate them with actual events revealed in the geological record.
Diffusion of elements from one area to another can be an important source of distortion. Patterns of diffusion of motifs (narrative elements) and folk themes have been carefully studied all over the world for well over a century, providing a wealth of data on how the process works. Unless one has access to verifiable information outside the folk tradition, the investigator is never sure which elements are local, and thus perhaps historically accurate, and which ones have been borrowed from distant places and other bodies of oral narrative.

Another source of confusion when searching for historical fact in oral narrative is what Levi-Strauss has described as "the astonishing similarity between myths collected in widely different regions" arising not from diffusion but from psychological parameters common to people everywhere and through time. Revitalization movements are also a source of distortion. The history of contact between native peoples and Europeans recurrently resulted in crisis for the native cultures. Very often a prophet arose with a new meaning system to explain the resulting trauma in mythic religious terms and to propose how the situation may be reversed. The Ghost Dance in America and the Cargo Cults of New Guinea are among the numerous examples of this process. Explanations that purport to be historical in nature, therefore, may actually be very recent components of a revitalization movement. Neo-traditions are also a source of distortion. A neo-tradition is an invented story designed to establish a connection between aspects of the past and the present to meet a group's changing needs and aspirations. Eric Hobsbaum and Terence Ranger edited an entire volume on this phenomenon. A case in point is the Lumbee of North Carolina in whom a tradition was

invented asserting that the Lumbee are the descendants of the offspring of Algonguin Indians and sixteenth English settlers from the lost Roanoke Colony. This narrative, although not true, seems so compelling that it has convinced others that the Lumbee's "self-identification was embedded in history".

The searcher for historical fact in oral traditions, therefore, must sift through possible diffusion, recurrent themes, the possibility of recent origin (revitalization movements and neo-traditions) as well as the various distorting factors inherent in the dynamics of oral transmission in order to find the kind of information applicable, for example, to establishing a connection that could support a claim to rightful possession of ancient remains. The further back in time one goes, the less historical fact one finds. For those reasons, oral traditions cannot be considered reliable evidence for establishing connections between modern claimants and human remains that are more than a few centuries old, let alone those as remote as Kennewick Man, Spirit Cave Man and numerous others.

Those who attempt to gain possession of such remains by using oral traditions as a basis for their claims are appealing to evidence that simply does not exist. There is no way at present to determine whether skeletons as old as Kennewick Man are related either culturally or biologically to modern American Indians. It is very possible that they are not because of the many contingencies that existed to human survival in the remote past. Such remains should not be made subject to NAGPRA. They should remain a part of the national patrimony so that we and future generations can learn the stories that are hidden in their bones. We urge you to withdraw your proposed amendment to NAGPRA's definition of Native American.

If requested, we would be happy to make ourselves available to the Committee members or staff to answer questions by telephone or e-mail concerning these matters. We can be contacted at the telephone numbers and e-mail addresses listed under our respective names on the attached page of biographical information.

Respectfully submitted,

Ronald J. Mason

Harry Glynn Custred Jr.

Biographical and Contact Information

Ronald Mason, Ph.D. is Emeritus Professor of Anthropology and Henry M. Wriston Professor of Social Science at Lawrence University, Appleton, Wisconsin. Before joining the faculty he worked as museum curator. He has also done archeological field work for the New Jersey State Museum, Temple University in Philadelphia, and the United States Park service in Pennsylvania. He is author of several books and numerous articles. Articles specifically concerned with relationships between archaeology and Native American oral traditions have been published in national and regional anthropological journals including American Antiquity, the Midwestern Journal of Archeology and the Wisconsin Archeologist. I can be contacted at telephone number (920) 832-6716 or by e-mail at Ronald.j.mason@lawrence.edu

Harry Glynn Custred, Jr. Ph.D., professor of anthropology at California State University East Bay (formerly Hayward). He has taught cultural anthropology, linguistics and folklore since 1971, author of several articles on the case of Kennewick Man and on rules of evidence involving language and oral traditions in relation to NAGPRA. I can be contacted at telephone number (925) 934-3969 or by e-mail at glynncustred@sbcglobal.net

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July 1, 2005

Mr. Alan Schneider, Esq.
1437 S.W. Columbia Street
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Dear Mr. Schneider:
It has recently come to my attention that the United States Congress is, once again, considering an amendment to the Native American Graves Protection and Repatriation Act (NAGPRA). In light of this proposed amendment, I would like to provide you with the following brief review of NAGPRA's history, including a discussion of materials that may have influenced the construction of that law. The results of my research indicate that NAGPRA, as it currently exists (and as interpreted by the courts in the Kennewick Man case), represents precisely what Congress originally intended for the law: To strike a delicate balance between human rights and scientific inquiry. The currently proposed amendment to NAGPRA is disturbing, as it would upset that balance and, as discussed more fully below, would have a chilling effect on the future of scientific study in the United States.

The proposed amendment to NAGPRA as set out in Section 108 of S.536 once again raises the question of the intent of Congress in the passage of the original NAGPRA bill, P.L. 101-601. Proponents of the proposed amendment have cited such sources as the *Report of the Panel for a National Dialogue on Museum/Native American Relations*[1] (hereafter the Heard Museum Report) as evidence to support their claims that the new amendment is needed in order to restore NAGPRA to the original intent of Congress for the functioning of that law. For this reason, a review of the Heard Museum Report is undertaken herein. It should be noted that the Heard Museum Report was only part of the materials considered by the 101st Congress when it passed NAGPRA. It does not constitute the totality of the material upon which that law was based. Indeed, the Heard Museum Report was only issued ten and a half months before the signing of NAGPRA by President George H.W. Bush.[2] In a debate that had occurred over a period of three

years (1987-1990) in Congress, a report issued just prior to the passage of NAGPRA can not be considered determinative in any attempt to reconstruct the original intent or history of that law.

If the Heard Museum Report was not the primary impetus for NAGPRA or even for the specific provisions sought to be altered by S.536, what then were the concerns of Congress when it enacted NAGPRA? Over the past several years, I have conducted a considerable amount of research into the history of NAGPRA. The results of that research, some of which accompany this letter in the form of a *West Virginia Law Review* article and a *Louisiana Law Review* article, demonstrate that Congress had three major areas of concern when it enacted NAGPRA: (1) the repatriation of the remains of recently deceased Native Americans, (2) reparations for the sometimes dubious collection practices of early anthropologists, and (3) the protection of the scientific study of ancient America.

The first two concerns intertwine and must, therefore, be discussed together. With respect to the latter of the two, the collection practices of early anthropologists, these activities in light of today's ethical and human rights standards were disturbing and regrettable. In the *Louisiana Law Review* article, I recently reviewed these practices in light of the repatriation debate of today.[3] These practices, occurring during the nineteenth and very early twentieth centuries, included the secreting away of the remains of recently deceased Alaska Natives for museum curation and the collection of Native American war dead from the battlefield for the purposes of scientific study. Few people today would seek to attempt to justify these collection practices as they relate to the recently deceased. However, as one advocate for indigenous groups in Australia has noted, "[t]imes change. Not only has archaeology become more professional, but...indigenous peoples now have much greater presence in archaeological research."[4] Indeed, archaeology has become more professional: Practices of the kind noted above have not been employed in the collection of human remains for nearly a century and the anthropologists of today are educated on the ethical and respectful treatment of *all* human remains. However, it was these antiquated practices of old that fanned the flames of controversy when Congress began to address the repatriation issue in the mid-1980s. This effort began in earnest in 1987 with the introduction of S.187 (100th Cong.), S.1722 (100th Cong.), and S.1723 (100th Cong.). In the debates that followed the introduction of these bills in 1987, all the way up to the passage of NAGPRA in 1990, the early, nolonger followed practices of 19th century anthropology and human remains research was made one of the primary focus of discussion in the presentations to Congress. A brief review of those debates, discussed more fully in the attached *West Virginia Law Review* article, is important here.

What is abundantly evident from the legislative history is that Congress was especially concerned with reparations for the wrongs committed against Native Americans since

A.D. 1492. Congress' principal focus was on remains of relatively recent age, such as those involved in United States Army acquisitions in the nineteenth century. Ancient remains were not a matter of concern. Members of the museum and anthropological community attempted to raise questions of ancient remains in their testimony before Congress, but these attempts were not addressed by the Congressional committees. Instead, the Committee members immediately reverted to questions of the whereabouts and disposition of recent remains. Indeed, at least one report issued by Congress subsequent to hearings on some of the pre-NAGPRA legislation stated that the law "provides a reasonable method and policy for the repatriation of Indian bones and funerary objects in the possession of the Smithsonian Institution. However, many human remains in the collection are of unknown origin and will, therefore, remain in the collection."[5]

The record from the Congressional hearings on pre-NAGPRA bills are replete with references to and concerns about remains that are 200 or less years old. Indeed, Senator Inouye went as far as stating that remains as old as 2,000 years were not the primary interest of the bill. Additionally, Senator Melcher, who was the author of the original Senate repatriation bill, stated that, "remains were also obtained by archaeologists. In general those are older remains, gathered for study to piece together the millennium of our unknown beginning. We do not intend in any way to interfere with this study and science in the bill."[6] This point cannot be stressed enough: Scientific study, especially of ancient human remains, when addressed in the congressional hearings, was intended to be expressly protected and preserved, *not* discouraged or banned.

Members of Congress made few other references to ancient items or the difficulty of demonstrating cultural affiliation to such remains. One reference of this kind was with respect to cultural materials and not human remains. Most of the comments addressing the application of this legislation to ancient remains were raised by the archaeological and museum communities. In testimony before the Senate Select Committee on Indian Affairs, representatives of the archaeological and museum communities raised issues of problems with the legislation's application to ancient remains. The Senators on the Committee ignored these issues. However, when Representative Charles Bennett directly addressed the issue of ancient remains in the House of Representatives hearings in 1990, he commented that "we should not overlook the fact that there are some of the deceased who don't have modern descendants, and their remains still should be kept with care."[7] This comment is incompatible with current claims that Congress deliberately intended the repatriation legislation to apply to ancient remains.

Overall, the issue of what is meant by NAGPRA's definition of the term "Native American", which is a matter of central importance to the currently proposed amendment, was not discussed in any depth by Congress. The clearest statements, to date, on this issue have come from the District Court and Ninth Circuit Court of Appeals decisions in the recent Kennewick Man case.[8] In those cases, the courts undertook an extensive

examination of the boundaries of the definition ultimately deciding that it required a showing of some cultural connection between ancient skeletal remains and modern Native Americans. This connection does not have to be to any specific tribe or group of tribes. Instead, it is sufficient if a reasonable connection to Native Americans generally or their culture can be demonstrated.[9] Based upon an examination of the legislative history, these judicial interpretations of the statute's words whereby NAGPRA does not affect such ancient and unaffiliated remains as the ones that were the subject of the Kennewick Man case, is clearly consistent with Congress' original intent for the law. Indeed, the cultural connection that the two court decisions require between modern and ancient groups in the Kennewick Man case is explicitly supported by the legislative history as discussed above. It is also supported by the Heard Museum Report.

In 1989, the Heard Museum in Arizona convened a panel of representatives from the Native American, anthropological, museum, and legal fields to address the issue of repatriation. The general findings of that panel do not substantially differ from the discussion of repatriation issues in NAGPRA's legislative history. The panel that authored the Heard Museum Report found, in pertinent part, that:

> 1. ...Resolution of the issue [of the disposition and treatment of Native American human remains] should be governed by respect for the human rights of Native peoples and for the values of scientific research and public education.
>
> 2. Respect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made by a Native American group that has a *cultural affiliation* with remains or other materials...[10][emphasis added]

Later in the report, in the section on human rights, the panel clarified their findings by stating that the Native American group making claims for remains *must* be culturally affiliated with those remains.[11] This cultural affiliation requirement was specifically intended by the panel to refer to *present-day* groups. This is evident from the fact that the next paragraph notes the panel's failure to reach a consensus on remains where no present-day Native American group is culturally affiliated.[12] The panel also notes the scientific importance of the study of human remains, *viz*: "[k]nowledge gained through studies of museum collections, including human remains, may benefit society generally and Native Americans particularly."[13]

What is the significance of the Heard Museum Report? The significance is twofold: (1) it is often cited as having had a substantial influence on the drafting of NAGPRA despite its appearance late in the NAGPRA debates, and (2) the panel members of the Heard Museum Report are clear in their distinction between the presence or absence of

presentday culturally affiliated groups and their respective ability to speak for human remains, the latter cannot be overlooked if this report did in fact influence the drafting of NAGPRA. If such an influence was present, considering the above discussed legislative history itself, there can be no doubt that Congress' original intent for NAGPRA was for it to function in a human rights capacity for present-day culturally affiliated tribes, while not interfering with the progress of science by returning ancient remains to unaffiliated groups.

The ramifications of the proposed changes to NAGPRA in Section 108 of S.536 would have substantial deleterious effects on the advancement of science in the United States that may not be fully appreciated by its supporters. This seemingly minor amendment to NAGPRA would have a chilling effect on the future of scientific studies into the peopling of the Americas and indeed to a complete understanding, on a global scale, of our shared human history.

Section 108 of S.536 proposes to add the words "or was" after the word "is" in Section 2(9) of NAGPRA. Additionally, Section 108 proposes to add the phrase "any geographic area that is now located within the boundaries of" after the words "indigenous to" in Section 2(9) of NAGPRA.

The significance of the latter portion of the amendment, the addition of "any geographic area that is now located within the boundaries of," needs to be fully explored in committee, as its meaning and usefulness is cryptic and of questionable relevance to the law as a whole. At the present time, I cannot discern what change to the scope or applicability of the law is intended to be made by this latter portion of the amendment. It appears to me to be merely superfluous.

As to the addition of "or was" to Section 2(9), it is necessary to understand what the word "is" in Section 2(9) means without the proposed addition. Section 2(9) of NAGPRA is the definition of "Native American." Under NAGPRA, the term Native American "means of, or relating to, a tribe, people, or culture that is indigenous to the United States." The importance of "is" in this definition was highlighted in the Kennewick Man case. It was upon the present tense of this definition (i.e., "is") that both the District Court and the Ninth Circuit decided that Kennewick Man must be related to a currently existing Native Americans before a valid NAGPRA claim can be made to the skeleton. Thus the significance of the word "is" is substantial: It ensures that human remains cannot be claimed under NAGPRA unless they are related to modern Native Americans. This limit is consistent with Congress's original intent for enacting the legislation, i.e., to protect the human rights of existing Native Americans through respect for the remains of their deceased relatives. The proposed addition of the words "or was" would expand NAGPRA far beyond its original human rights purposes and by so doing would interfere with the future of scientific study.[14] This eventuality was expressly avoided by the Congress that enacted NAGPRA.

The addition of these two words to NAGPRA would mean that all remains found on federal land, regardless of their lack of any cultural or biological affiliation to any modern Native American group, would be deemed to be Native American as long as they were "indigenous" to the United States. This proposed expansion of the definition could lead to absurd results. For example, if it were discovered that the initial inhabitants of the New World were Ainu peoples from Japan, the remains of these culturally and biologically distinct peoples would be considered Native American the same as the distinct and much different Indian peoples that later migrated to the New World. Thus, the proposal would subject the remains of non-Indians to repatriation claims by unaffiliated modern Native American groups. Another scenario that is an equally plausible side-effect of the proposed amendment could cause the remains of Scandinavian Norsemen, who were known to have settled for a time in southeastern Canada, to be considered Native American and subject to Native American reburial practices if their graves are found in the northeastern United States. Such scenarios would lead to obviously absurd results that are most certainly inconsistent with the original intent of Congress when it passed NAGPRA.

The creation of such a seemingly counterintuitive reality for repatriation claims under this new definition would not be rendered harmless because of the "cultural affiliation" requirements of the statute. Cultural affiliation is only one of the grounds for ownership claims under Section 3(a) of NAGPRA.

Section 3(a)(1) allows for claims by lineal descendants. The term "lineal descendant" is not defined in the statute, but the regulations adopted by the Department of the Interior make it clear that the term includes only actual, documentable descendants. This interpretation is consistent with Congress's intent to have NAGPRA allow for repatriation of close relatives' remains. The proposed amendment to NAGPRA would not affect this provision; nor was the provision affected by the court decisions in the Kennewick Man litigation. If someone can show that he or she is a direct lineal descendant of the person whose remains they are claiming, there would be no question that the remains are related to present-day Native Americans. Section 3(a)(2)(A), on the other hand, could be substantially affected by the proposed change. The change would allow items to be claimed regardless of their cultural or genetic affiliation, simply by virtue of their location on tribal lands. Section 3(a)(2)(B) of the statute would also be affected (albeit indirectly) by the proposed amendment. This section allows for claims based on cultural affiliation when items are found on federal (as opposed to tribal) lands. The proposed amendment would not expound the definition of "cultural affiliation". However, it would increase the number of remains that are subject to disposition as culturally unidentifiable remains because they are Native American. Under NAGPRA as currently drafted, such remains can be given to modern tribes or coalition of tribes with the consent of the Secretary of the Interior. In addition, the Secretary could adopt regulations permitting (or requiring) that all such remains be disposed of. Finally,

Section 3(a)(2)(C) kicks in if cultural affiliation cannot be determined and if a court has recognized the land on which the items were discovered as having been aboriginally occupied by a tribe. Here again, the expanded definition of "Native American" would allow for repatriation claims by nonculturally affiliated groups. In this case, the claiming tribe would only have to show that at time of European contact it once occupied the land where the remains were found.

What are the practical effects of these changes as a result of Section 108 of S.536? If Section 108 of S.583 passes, the well-accepted fundament of legislative interpretation that "courts do not assume that Congress intends to create odd or absurd results"[15] will be turned on its head. In future cases brought under NAGPRA, courts might have to consider that Congress intended for NAGPRA to allow modern groups to make claims to culturally and/or genetically unaffiliated items, which is indeed an "odd or absurd" result. Ultimately, the significance of the word "is" is that it maintains the delicate balance between Native American and scientific interests that Congress intended to preserve when it created NAGPRA. "Is" does this by ensuring that the human rights of modern Native Americans are protected by allowing them to make claims to items having some reasonable connection to Native Americans. "Is" also protects the scientific study of our shared history as Americans by allowing for research on ancient human skeletal remains that lack such a connection. The addition of the words "or was" to the definition of "Native American" would eviscerate this balance by thwarting Congress's intention to protect both human rights and science together in one law.

The proposed amendment to NAGPRA contained in Section 108 of S.536 is undoubtedly inconsistent with the purpose of NAGPRA as envisioned by its drafters. This reality is clearly supported by such statements from the legislative history as Senator Melcher's comment that, "[w]e do not intend in any way to interfere with…science in the bill."[16] As the above review demonstrates interference with science will be the inevitable result of the proposed amendment to NAGPRA. Rather than protecting the human rights of modern Native Americans, NAGPRA would be expanded to become an anti-science law should this amendment pass. The inappropriateness of this amendment is underscored by the Heard Museum Report: This report clearly advised that a balance between human rights and science should be reached by any law that is enacted dealing with Native American human remains. That is precisely what NAGPRA, as enacted, accomplished by allowing for repatriation of culturally affiliated remains while allowing for the study of ancient and unaffiliated remains.

The proposal amendment contained in Section 108 of S.536 would allow future claims for repatriation under NAGPRA to be made in the absence of any scientific support for a cultural link between remains and modern Native Americans. Such a scientifically unsupportable approach to the handling of remains that may be thousands of years old is unthinkable in our modern society. The proposed amendment to NAGPRA cannot be

reconciled with recent discoveries concerning human colonization of the Americas. Those discoveries leave little doubt that human expansion to and throughout the New World was a much more complex process than once thought. At present, we have only glimmerings of what that process (or processes) may have been. Our understanding of those ancient times can not be refined without continued scientific study of ancient human skeletal remains when they happen to be discovered. Congress needs to allow such work to continue by rejecting Section 108 of S.536 and maintaining the integrity of NAGPRA as its drafters intended in 1990: A delicate balance of human rights and scientific interests.

You have my permission to forward this letter to the Senate Committee on Indian Affairs, or any other members of Congress. As noted above, I have enclosed reprints of three of my articles on NAGPRA-related issues. These sources provide a comprehensive analysis of the NAGPRA debate on a national and international scope. As the sole author and holder of the copyrights on all of the enclosed sources, I hereby grant my permission to reprint the sources in any manner connected with the S.536 hearings.

With best regards, I remain,

Very truly yours,

Ryan M. Seidemann
Attorney at Law
Anthropologist
enclosures

Endnotes

1 Heard Museum, *Report of the Panel for a National Dialogue on Museum/Native American Relations*, Final Draft, 2/28/90 (1990).

2 Admittedly, the Heard Museum Panel convened in mid-1989, however, a draft of the report was not issued until February of 1990. *Id.*

3 Ryan M. Seidemann, *Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries*, 64 La. L. Rev. 545 (2004).

4 Russell Taylor, *Archaeology and Indigenous Australia*, Paper presented at the Fourth World Archaeological Congress, University of Cape Town, South Africa at 7 (1999).

5 House Report No. 101-340, part 1 at 16 (1989).

6 *National American Indian Museum Act (Part 2): Hearings on S.1722 and S.1723 before the Senate Committee on Indian Affairs and the Senate Committee on Rules and Administration* (100th Congress 1987) at 27.

7 *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 Before the House of Representatives Committee on Interior and Insular Affairs* (101st Congress 1990) at 130.

8 *See generally, Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002); *Bonnichsen v. United States*, 357 F.3d 962 (C.A.9 (Or.), 2004); *Bonnichsen v. United States*, 367 F.3d 864 (C.A.9 (Or.), 2004).

9 *Id.* at 1136.

10 Heard Museum, *Report of the Panel for a National Dialogue on Museum/Native American Relations*, Final Draft, 2/28/90 at 1 (1990).

11 *Id.* at 11.

12 *Id.*

13 *Id.* at 13.

14 I say that it is "another attempt" based on the presence of similar amendment attempts in the past, all of which have failed. These attempts are fully discussed in the attached *Mammoth Trumpet* article. Ryan M. Seidemann, *The Other Front of the War: Legislative Attempts to Alter NAGPRA*, 19 Mammoth Trumpet 1 (2004).

15 *Bonnichsen v. United States*, 217 F. Supp. 2d at 1136 (D. Or. 2002).

16 *National American Indian Museum Act (Part 2): Hearings on S.1722 and S.1723 before the Senate Committee on Indian Affairs and the Senate Committee on Rules and Administration* (100th Congress 1987) at 27.

Wednesday, July 20, 2005

Senator John McCain, Chairman
Senate Committee on Indian Affairs
United States Senate
836 Hart Office Building
Washington, D.C. 20510
FAX (202) 224-5429

Dear Senator McCain:

We are writing to you and members of the Committee on Indian Affairs to express our opposition to the proposed amendment to add the words "or was" to the definition of Native American in the Native American Graves Protection and Repatriation Act (NAGPRA). Our interest in this issue is based on more than 50 years of cumulative service as professors of anthropology, and more than 30 years devoted to research on the ancient prehistory of the New World.

To add these two words "or was" to NAGPRA's definition of Native Americans presumes that any and all prehistoric human remains recovered in North America, regardless of their antiquity, are direct ancestors of living Native Americans and therefore should be subject to repatriation under NAGPPRA rules. No provisions are proposed which would require scientific verification that newly discovered remains are representative of this lineage.

The presumption that all prehistoric biological and cultural remains represent evidence of Native American inhabitants appeared at one time to be compatible with the popular view that the first inhabitants to enter the New World arrived around 11000 to 12000 years ago from Northeast Asia by way of a presumably passable land bridge which connected Northeast Asia and North America at that time. Living Native American's strong biological similarities to Northeast Asians documents that they recently shared a common ancestor, and that their arrival in the New World was a recent event. Regarded as specialists in hunting mega fauna of the last Ice Age, the colonists, originating in Northeast Asia, were thought to have spread throughout the Americas in less than 1000 years. Adding the words "or was" to the NAGPRA definition of Native American would canonize this view, and would preclude the possibility of verifying the alternative view that Native Americans were not the only colonizers of the New World, nor the first colonizer.

Mounting evidence over a wide variety of research avenues has developed which challenges the traditional interpretation of North American early prehistory. Studies of ancient human remains, whose discoveries have been accidental and unanticipated, have documented their distinctiveness from living Native Americans and the Northeast Asian ancestors, and their closer similarities to peoples of central and southern Asia, and peoples of the south Pacific rim. Additionally, there has been a steady accumulation of evidence that the earliest peoples in the New World arrived earlier than previously believed, and that the peopling of the Americas involved different groups of peoples entering the New World at different times and by different pathways.

Since such evidence about the origins and history of the peoples who have populated the New World is recent, studies are still in the preliminary stages, and questions are arising at a faster rate than are answers. What is clear, however, is that there is substantial, verifiable evidence that the peopling of the New World was far more complex than previously thought. When we view the colonization of the Americas during historic times this complexity of process is readily apparent. Our heritage has been enriched as North America became the homeland for peoples from many regions of the world. We are coming to understand that human kind's settlement throughout other regions of the world has followed complex pathways, and it is becoming apparent that peopling of the New World during prehistoric times was also complex.

Amending NAGPRA to redefine the meaning of Native American to include all present and past indigenous peoples of North America is not consistent with known evidence and would preclude the possibility of establishing a true understanding of the peopling of the Americas. This amendment would deny the role that other peoples may have played in the colonization of the last continent to become home to humankind.

D. Gentry Steele, Ph.D.
Professor emeritus
Department of Anthropology
Texas A&M University

David L. Carlson, Ph.D. and Head
Department of Anthropology
Texas A&M University

July 14, 2005

Senate Committee on Indian Affairs
United States Senate
836 Hart Office Building
Washington, DC 20510
FAX: (202) 224-5429

Re: Proposed NAGPRA Amendment

Dear Committee Members:

I would like to express my dismay at Senator McCain's proposal to amend the definition of the term "Native American" as it is used in the Native American Graves Protection and Repatriation Act (NAGPRA).

If this proposed amendment is adopted by Congress, it will preclude archaeologists and other scientists from obtaining information that could be critical for understanding the people who lived in this country thousands of years ago. All of us, laypersons as well as scientists, will be the poorer for the resulting loss of knowledge about the country's heritage. One particularly disturbing aspect to Senator McCain's proposed legislation is that it will usher in, for the second time, a systematic attempt to annihilate Indian culture. As you undoubtedly know, in the 19th century, EuroAmericans forced Indians onto reservations, into boarding schools, or at the very least, into a society foreign to them. At the schools, non-Native attire and the speaking of non-Native language was often mandatory. The cultural ways of the American Indian population were to be dismissed and forgotten.

Thanks to the hard work of archaeologists and ethnographers, many customs and languages were recorded and preserved that otherwise might have been lost forever. The knowledge that they gathered has made it possible for many groups of Native People who had long since lost their cultural identity to reestablish their traditional beliefs and ways of living. The McCain bill would be a first step toward again ripping culture away from the Indians, but this time, it would be under the pretext of "repatriation". Call it what you will, the effect of the proposed amendment is the same: to obliterate knowledge of peoples and cultures that do not conform to how those in power wish to view the past. Only two words in the bill are at issue (i.e., "or was"), but those two words would reverse carefully researched court opinions that reaffirmed that NAGPRA should not be interpreted to prohibit scientific study of ancient skeletons and objects that predate existing tribes. By changing the law in this way, Congress would be saying the past does not matter and that it is acceptable to destroy knowledge. The proud heritage and deeds of the many people who preceded us would be forever eliminated from the record that we bequeath to future generations.

I hope that the Committee will take this letter to heart, even briefly, and will carefully consider the interests of all Americans. If you do, I am confident that you will not fail to recognize that the end result of this bill may be woefully negative, and may be something that future generations will come to regret very deeply.

I would be happy to respond by telephone or e-mail to any questions that the Committee might have concerning this matter. The necessary contact information is given below. Thank you so much for your time.

Respectfully submitted,

Alison T. Stenger
4235 S.W. Westdale Dr.
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ASSOCIATION ON AMERICAN INDIAN AFFAIRS

FC

August 2, 2005

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Executive Director

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Hon. John McCain, Chairman
Committee on Indian Affairs
United States Senate
836 Hart Office Building
Washington, DC 20510

Re: Senate Committee on Indian Affairs
Oversight Hearing on the Native American Graves Protection and Repatriation Act (NAGPRA), July 28, 2005

Dear Senator McCain:

Please accept the following testimony in support of the proposed McCain amendments to NAGPRA for the above-captioned hearing record.

As you may know, the Association on American Indian Affairs (AAIA) is an 83 year old national non-profit organization with offices in South Dakota and Maryland. AAIA's policies are formulated by an all-Native American Board of Directors from tribes across the country. AAIA was an active participant in the negotiations which resulted in the enactment of the Native American Graves Protection and Repatriation Act (NAGPRA) and has continued to be actively involved in promoting the proper implementation of the Act, including assisting with specific repatriations of human remains and cultural items.

AAIA strongly supports the enactment of the McCain amendment to NAGPRA that would reverse the decision in *Bonnischen v. United States* insofar that it held that the term "Native American" applies only to remains and cultural items with a connection to a present day tribe. We agree with the witnesses who spoke on behalf of the legislation – Dr. Paul Bender, Walter Echo-Hawk and Professor Keith Kintigh – that the legislation would reinstate the original legislative intent of Congress and that the holding in *Bonnischen* creates serious obstacles to the full implementation of NAGPRA. We do not believe that we need to reiterate the points that they so capably made.

Instead, we are submitting this testimony in response to the surprising testimony of the Department of the Interior. As you know, the Department took a position in opposition to the proposed legislation. This was an about face for the Department -- a reversal that was little explained and cannot be justified.

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That this is the case can be seen by looking at the position of the Department of Interior in 2003, as expressed in its brief to the Ninth Circuit in *Bonnischen*. In that brief, the Department did not attempt to defend the findings (made by the previous Administration) that the remains in question were culturally affiliated with the claimant tribes. However, it vociferously defended the finding that the remains were "Native American" and that the term itself was meant to include all remains relating to tribal peoples living in the area encompassed by the United States prior to the arrival of European explorers. The Department cogently argued that the interpretation that would limit the definition to those remains that can be linked with present day tribes

> *cannot be squared with other provisions or the statutory structure. The interpretation effectively negates the provisions addressing claims based on aboriginal land and implausibly collapses the cultural affiliation inquiry relevant to disposition of Native American remains into the threshold determination of the Act's applicability. Furthermore, the Magistrate Judge's interpretation ignores Section 3(b), the provision dictating the process for disposition and control of Native American remains for which there is not a qualified claimant. The Magistrate Judge's interpretation of "Native American" is also at odds with congressional intent respecting the provisions of the Act addressing museum's responsibilities to inventory "Native American" remains and cultural items, and the recognition that many prehistoric remains and cultural items in collections will not be culturally identifiable, yet are subject to the Act.*

The Department of the Interior was absolutely correct in its analysis of the statute in 2003. Yet, almost inexplicably, it reversed its position in 2005. In so doing, it did not even pretend that its opposition to the bill was based upon an intent to maintain the status quo. When Deputy Assistant Secretary Hoffman, the Department's witness, was asked what the impact of the proposed amendment would be, he stated that if the McCain bill passed the Department of Interior would simply continue on as it has since 1993!

First and foremost, NAGPRA is human rights legislation. It was designed to address the flagrant violation of the "civil rights of America's first citizens." 136 Cong.Rec. S17174 (daily ed. Oct. 26, 1990) (statement of Senator Inouye). The record of the Committee hearings and floor debate on NAGPRA was replete with references to the fact that the goal of Congress was to rectify a centuries-old intrusion upon the human rights of Native peoples. See, e.g., Statement of Senator John McCain (The intent of Congress was to "establish a process that provides the dignity and respect that our Nation's first citizens deserve.") 136

Cong. Rec. S17173 (daily ed. Oct. 26, 1990). Much of the testimony before Congress emphasized that the need for the legislation arose from a sordid history of treating Native American human remains and cultural items merely as resources to be exploited. See, e.g., Senate Select Committee on Indian Affairs, Native American Grave and Burial Protection Act: Hearing on S. 1021 and S. 1980, 101st Cong., 2nd Sess., 1990, at 50-53, 74-79 (statements of Walter Echo-Hawk, Jerry Flute and Suzan Harjo).

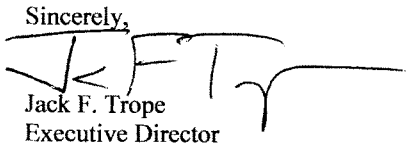
It is true that the bill as enacted reflected a compromise forged by representatives of the museum, scientific, and Indian communities. 136 Cong. Rec. S17173 (daily ed. Oct 26, 1990) (statement of Sen. McCain). Indeed, there are a number of provisions that addressed concerns of museums and scientists, such as provisions dealing with scientific study of cultural items, 25 U.S.C. 3005(b), the standard of repatriation applicable to unassociated funerary objects, sacred objects or objects of cultural patrimony, 25 U.S.C. 3005(c) and the definition of such terms as "sacred object", 25 U.S.C. 3001(3)(C). However, as Professor Kintigh testified (for the Society for American Archeology), it was understood by all involved that the Act would apply to all human remains and cultural items belonging to any of the peoples that resided in the area that is now the United States prior to the arrival of Europeans on this continent.

NAGPRA has led to increased cooperation between museums, scientists and Native peoples – to the mutual benefit of all. We simply cannot understand why the Department of the Interior has taken a position that could unravel the broad consensus in support of this human rights legislation – a position which has the potential to pit Native Americans against scientists once again and that will inevitably move many of the outstanding NAGPRA implementation issues from the Department of the Interior and the NAGPRA Review Committee (a committee of Indian people, scientists and museum representatives created by the statute) to the courts.

We urge the Committee pass this legislation, notwithstanding the position of the Interior Department. We also urge this Committee to ask the Secretary of the Interior to reconsider the Department's position. Only in this way can it be ensured that NAGPRA will be fully implemented as intended by Congress.

Thank you for considering these comments.

Sincerely,



Jack F. Trope
Executive Director

FC

BARRAN LIEBMAN LLP
ATTORNEYS

Paula A. Barran
(503) 276-2143
pbarran@barran.com

RECEIVED
AUG 16 2005

August 4, 2005

Cindy Darcy, Senior Policy Advisor
Senator Byron L. Dorgan, Vice Chairman
Committee on Indian Affairs
United States Senate
836 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Dorgan:

At the July 28, 2005 oversight hearing on the Native American Graves Protection and Repatriation Act you requested that we supplement the record with certain documentation, specifically relating to the expressed desire of a representative of the Department of the Interior to suppress a line of scientific inquiry. I am enclosing documentation with this letter pertinent to that issue and some of the other issues raised in my testimony before the Committee.

Attached hereto is a document which is Bates stamped DOI 06550 – 06551 and ER 115 – 116. The "DOI" numbers refer to the administrative record prepared and provided by the Department of the Interior and the "ER" numbers refer to the excerpt of record presented to the District of Oregon and the Ninth Circuit. This particular document is an electronic mail message from Francis P. McManamon who was at that time the Department Consulting Archeologist for the Department of the Interior, National Parks Service. He is referencing the possibility of using DNA analysis to dispel any argument that non-Indians may have occupied and substantially affected cultural developments in ancient America. You should be aware that at the time this document was prepared, Dr. McManamon was supposed to act in a neutral and unbiased manner when evaluating issues relating to the Kennewick Man skeleton.

I am also enclosing a document stamped 7905 and ER 42. This is an excerpt from the administrative record of the Army Corps of Engineers. It contains a statement from this Corps representative that "I told him [referencing Armand Minthorn from the Umatilla] we will do what the tribes decide to do with the remains, but that we would not involve ourselves in that decision. I assured him that we are working under the assumption the decision will be what the Umatilla have asked for."

Also attached is S-273 (ER 248). This document is from the Army Corps of Engineers and relates to the cover-up of the discovery site. This cover-up occurred during the Congressional Easter recess.

Finally, I am enclosing an excerpt from a transcript before the U.S. District Court for the District of Oregon from proceedings in open court on June 20, 2001. This excerpt is significant for two reasons. At page 347 of the transcript, an attorney representing the federal agencies from the Department of Justice states to the court that the plaintiffs' theories "are just another way to savage Indian heritage." The theories he references relate to the possibility that non-Indians were present on this continent. I would also suggest that you and the Committee consider the comments of the attorneys from the Justice Department on whether scientific study is permissible under NAGPRA. As you know, some of the witnesses before the Committee made a point of expressing the sentiment that proponents of scientific study should not have anything to worry about since the statute permits such study. In considering the validity of those representations, you will note at page 346 of this transcript that attorneys representing the United States told the court:

> "I think it is also clear that nowhere in NAGPRA is there a right to study under Section 3. The only limited provision for study under NAGPRA is Section 7, Museum Collection. It requires consultation with the tribes. It only applies to scientific studies already underway on the date of the enactment of NAGPRA and that it is shown to be a major public benefit to the United States. It does not allow the initiation of any new studies."

Thank you for the opportunity to appear before the Committee and to provide this supplemental information.

Very truly yours,

BARRAN LIEBMAN LLP

Paula A. Barran

PAB:tlt
Enclosures
cc: A. Schneider
00069462.DOC /

ER 115

Author: FP McManamon at NP-WASO-DCA
Date: 1/21/00 1:22 PM
Priority: Normal
TO: Anne_Shields@doi.gov (Anne Shields) at NP--INTERNET,
Carla_Mattix@ios.doi.gov at NP--INTERNET,
Dave_Watts@ios.doi.gov (Dave Watts) at NP--INTERNET,
John_Leshy@doi.gov (John Leshy) at NP--INTERNET
CC: FP McManamon, Jason Roberts, Veletta Canouts, Allison.Rumsey@usdoj.gov at NP--INTERNET,
Stephanie_Hanna@ios.doi.gov at NP--INTERNET
Subject: Notes on Presentation re: Kennewick and DNA

FYI--The following are my notes for the presentation I did this morning during our discussion of the Kennewick remains and DNA testing.

FPM

FPM NOTES-20 January 2000-Notes for discussion at DOI on 1/21/2000 concerning whether to conduct DNA tests of the Kennewick remains
Filename:\0001KennDNAdeterm

** Summary of DNA experts' report by Tuross and Kolman, main sections: (1) the likely extent of preservation of ancient mtDNA in this bone; (2) how knowing the mtDNA haplogroup of the Kennewick remains will help in determining "cultural affiliation", and (3) if mtDNA testing is conducted, how to avoid the dangers of contamination.

** (1) preservation of mtDNA in the Kennewick skeleton: sampled bones very low in carbon (est. 14.3% and 2.3% with "non-collagen amino acid composition" by UC-Riverside), yet metacarpal sampled and dated in 1996 est. as 68.8% amino acid carbon content of modern bone standard and collagen-like amino acid composition.
· Unlikely to get sufficient mtDNA from bones sampled for C14
· Might use remaining sample from metacarpal; however, provenance of this piece initially suspect
· Might sample remainder of skeleton using minute pieces to detect other bones with sufficient bone collagen and sample them for mtDNA; added benefit of this is that questions about variation in carbon between 1999 and 1996 samples would be resolved.

** (2) mtDNA and "American Indian", and specific tribal affiliation:
mtDNA description and analysis about 20 years old: worldwide, about
30 mtDNA haplogroups have been identified, many of these are geographically distinctive. E.g., haplotypes A, B, C, and D are found among American Indians and some Asians, not found among Europeans or Africans (see Table 2 from Tuross/Kolman report). mtDNA patterns are not yet detailed enough to distinguish among Indian tribes, however, as more info is accumulated, this might become possible. Note that Prof. Smith of UC-Davis believes he can show mtDNA pattern differentiating Navajo from Apache, but linking Navajo with Pueblo groups using mtDNA in Southwest.
· Ancient mtDNA analysis as "standard practice" within archeology: Among about 20 archeological investigations (within the last 10 years) in which human remains were included; about half included mtDNA description and analysis as part of investigation.
· In cases of ancient remains, this is even more frequently called for.
· In US there continues to be a belief that non-Indians occupied

DOI 06550

and substantially affected cultural developments in ancient America. Europeans, Africans, and Asians all have been suggested, and recently. An American Indian DNA haplogroup for K-man would help dispel this interpretation in this case
· Biological information is one of the several kinds of info that can be used in determining cultural affiliation under NAGPRA, mtDNA analysis is one kind of biological information.

(3) Possible contamination of the samples is warned against strongly by Tuross and Kolman; there is potential contamination that already has occurred. "Clean" labs needed, set up especially for ancient DNA. Handling at UC-Davis might have inadvertently introduced modern American Indian mtDNA. If we do this, need to include more than just UC-Davis. There might be enough remaining in samples handled by UC-Davis, but contamination issues then need to be resolved. Also, the issues of the metacarpal differences from remainder of the bone sampled also need to be addressed.

FPM recommends generally:
· Use scientific methods to try and resolve issues
· Why use DNA analysis to help in attempt to determine "cultural affiliation": (a) it is one kind of biological information that is supposed to be considered in making such determinations; (b) it is a technique increasing used in archeological, historical, and biological research; and, (c) it provides another means of disproving the "diffusionist" interpretations of ancient America (see examples of publications, including The Atlantic, which seem to be just below the surface in much of the public debate on this topic.

·· Wider perspective on recommendation:

· (a) sample skeleton extensively, but using very small amounts of material for collagen/carbon preservation and select additional new sample for DNA. This avoids problems with original samples-possible contamination; disparate amounts of carbon preservation; provenience questions; association with original collector.
(a.1.) alternative to selecting new sample would be to use sample from UC-Davis having UC-D run one portion and an independent lab run another portion. This doesn't avoid the potential criticisms of using the same sample for DNA, but does indicate DOI willingness to investigate biological aspects for cultural affiliation.

· (b) request additional time from court in order to complete DNA and to more fully consult with tribes about cultural affiliation reports. If successful this would give us time to work with tribes on cultural affiliation. If court believes gov't is moving in the direction the judge seems to be pointing, he might be willing to provide more time. Need DOJ agreement on this.

· (c) distribute draft cultural affiliation studies to tribes and arrange meetings with individual tribes to discuss substance of the information and interpretations.

· (d) also would provide DOI additional time to develop policy guidance on Sec. 3 of NAGPRA, especially treatment of "unclaimed".

· There is something for everyone in this approach--more time and room for manuver for DOI/DOJ/COE; direct/more detailed consultation on substance with tribes; judge sees gov't moving in his direction; Bonnichsen plaintiffs see additional scientific recording and analysis.

ER 42

Author: CENPW-DE-D at NPW
Date: 8/30/96 7:47 PM
Priority: Normal
Receipt Requested
TO: CENPW-DE
CC: John P Leier
CC: Linda R Kirts
CC: CENPW-EA
CC: Duane Dutch Meier
CC: Richard Carlton
CC: CENPW-OP-TN (Phil L Hixson)
CC: Maxine J Alley (Wayne H John)
CC: Mark C Charlton
Subject: Cultural Remains Update

---------- Message Contents ----------

Sir,
This is a chronological update since we last spoke, which was shortly after I talked to Cheryl Lohman and Adeline Ferdeen, Colville Tribes (as of 301930 Aug):

Sandy Simmons and Ray Tracy, from Planning met with Lee Hunt, Ice Harbor Natural Resource Chief, on site to discuss permitting requirements for the proposed burial and site protection. Sandy gave me these results:

[redacted]

Jeff Van Pelt, Umatilla called for a copy of the ARPA permit. I Faxed it to him.

I called Mr. Armand Minthorn, to give him an update. He seemed pleased with our efforts. I mentioned the Colville involvement and he confirmed that they want to do the exact opposite of what the Umatilla want to do. He is trying to reach them and hopes that they will defer to the Umatilla's wishes because of where they discovered the remains. I told him we will do what the tribes decide to do with the remains, but that we would not involve ourselves in that decision. I assured him that we are working under the assumption the decision will be what the Umatilla have asked for. I told him I would be at FT Lewis on Tuesday, but that you would be here.

Linda called me around 1650. This is when it got real interesting.

- She had contacted the Benton County Coroner, Floyd Johnson, to insure that he would cooperate with us. He told her that he and Jim Chatters, the archeologist, had arranged to transport the 1st set of remains to the Smithsonian for further testing on 8 Sep. He felt that state law gives him jurisdiction. Linda assured him that federal laws have precedence and disposition of the remains is our responsibility. She suggested that he speak with the county attorney and offered her services in working with the attorney.
- She managed to contact Andy Miller, the Benton County Attorney.

7905

Administrative Rc'd Exh 9

ER 248

Baker, James R NWW

From: Leier, John P NWW
Sent: Monday, January 29, 2001 11:18 AM
To: Baker, James R NWW
Subject: FW: Kennewick Site Protection Status -Reply

---Original Message---
From: Cannon, Dennis J NWW
Sent: Thursday, April 09, 1998 6:01 PM
To: Carter, Linda S NWW; Mettler, Lonnie E NWW; Christianson, Carl J NWW; Leier, John P NWW
Subject: FW: Kennewick Site Protection Status -Reply

Congratulations.....from the top!

Thanks,

Dennis

From: Mueller, Patrick J MAJ NWW
Sent: Thursday, April 09, 1998 8:00 AM
To: Charlton, Mark C NWW; Opbroek, David A NWW; Meier, Duane Dutch NWW; Kirts, Linda R NWW; Anderson, Jackie R NWW; Nutt, Lynda G NWW; Cannon, Dennis J NWW; John, Wayne H NWW; Bhamidipaty, Surya NWW
Subject: FW: Kennewick Site Protection Status -Reply

Note the comments back from LTG Ballard and COL Mogren. Good job by all involved.

From: Mogren, Eric T COL NWD
Sent: Thursday, April 09, 1998 7:37 AM
To: Curtis, Donald R LTC NWW; Mueller, Patrick J MAJ NWW
Subject: FW: Kennewick Site Protection Status -Reply

Don / Pat:

I forwarded Pat's update on the Kennewick site to the Chief yesterday. His response below; thought you'd be interested in his very positive comments about the District's efforts.

Great work on the part of the Walla Walla team.

COL Mogren

-----Original Message-----
From: Ballard, Joe N LTG HQ01
Sent: Wednesday, April 08, 1998 9:20 PM
To: Mogren, Eric T COL NWD
Cc: rlreklaw@worldnet.att.net; Allaman, Kristine L NWD02; Griffin, Robert H BG NWD; Johnston, Paul T NWD02; Meuleners, Michael S COL NWD02; Perry, Clare E NWD; Ransom, Rebecca B NWD; Turney, L Douglas NWD02; Bryson, Brian HQ01; Fuhrman, Russell HQ01
Subject: FW: Kennewick Site Protection Status -Reply

RICK,
THANKS FOR THE UPDATE. I REALLY APPRECIATE THE VERY QUICK RESPONSE ON THIS ACTION ONCE THE GO SIGNAL WAS GIVEN. DO BELIEVE THAT THE DIN WILL DIE OUT VERY QUICKLY. AM CONVINCED THIS WAS THE CORRECT THING TO DO.
>>> Mogren, Eric T COL 04/08/98 04:28pm >>>
Sir:
Update on progress of work at the Kennewick Man site, for your information, as of this afternoon (8 April):

Construction:
- The rockfill/topsoil mixture is all in place.

S-273

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 ROBSON BONNICHSEN,)
et al.,)
4)
)
5)
Plaintiffs,) CV-96-1481-JE
6)
vs.) June 20, 2001
7)
UNITED STATES OF AMERICA,) Portland, Oregon
8 et al.,)
)
9 Defendants.) **Volume 2**

10

11 TRANSCRIPT OF PROCEEDINGS

12 BEFORE THE HONORABLE JOHN JELDERKS

13 UNITED STATES DISTRICT COURT MAGISTRATE

14 APPEARANCES

15 **FOR THE PLAINTIFFS:** PAULA A. BARRAN
Barran Liebman, LLP
16 601 SW Second Avenue, Suite 2300
Portland, Oregon 97204
17
ALAN L. SCHNEIDER
18 Attorney at Law
1437 SW Columbia Street, Suite 200
19 Portland, Oregon 97201

20

21

22 **COURT REPORTER:** Dennis W. Apodaca, RPR
1000 S.W. Third Ave., Room 301
23 Portland, OR 97204
(503) 326-8182
24

25 Proceedings recorded stenographically,
computer-aided transcription.

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1 access these Native American human remains and conduct
2 whatever tests they deemed appropriate. There is no obvious
3 way to limit such a right, and to do so would appear to be
4 contrary to the Equal Protection Clause of the Constitution.
5 I think it is also clear that nowhere in NAGPRA is
6 there a right to study under Section 3. The only limited
7 provision for study under NAGPRA is Section 7, Museum
8 Collection. It requires consultation with the tribes. It
9 only applies to scientific studies already underway on the
10 date of the enactment of NAGPRA and that it is shown to be a
11 major public benefit to the United States. It does not
12 allow the initiation of any new studies.
13 Plaintiffs' claim seems to be that there may be
14 some break in the historic record between these tribes,
15 these claimant tribes, and the remains that were found at
16 the Kennewick site. Plaintiffs cannot accept what the
17 Indians know; that is, that their ancestors have always been
18 there.
19 In one of your examples, you hypothesized the
20 discovery of a body of a blue-eyed, blond-haired people
21 frozen in an ice cave. I realize you were just making a
22 point, but I think it points out the Eurocentric way we tend
23 to look at the history of the country.
24 We seem unwilling to believe that the Indians are
25 the descendents of the people who were always here and want

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1 to hypothesize that there may have been someone else here,
2 someone else who looks like us. Inadvertently or not,
3 plaintiffs' theories are just another way to savage Indian
4 heritage.
5 My point is that if Congress determined that the
6 oral tradition of Indian peoples would have as much weight,
7 and considering the prehistory of this country as other
8 types of evidence, such as the hypothetical evidence that
9 the plaintiffs advocate. All types of evidence were
10 considered by experts in the consideration of such evidence,
11 and the Secretary's determination was that there was more
12 evidence showing cultural continuity between the earlier
13 group represented by Kennewick Man and the claimant. The
14 Secretary determined that cultural affiliation had been
15 proved by a preponderance of the evidence.
16 I had wanted to show the maps earlier, but I would
17 like to point out that in enacting NAGPRA, Congress was
18 mindful of the importance of tribal sovereignty.
19 The United States acquired the lands where the
20 Kennewick remains were found by treaty in 1855. In so
21 doing, the United States recognized that these lands were
22 the lands of the Umatilla Tribe.
23 While the tribes do not have the same concept of
24 ownership that the Americans did, the United States
25 acknowledged that the tribes had rights in those lands.

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1 Nowhere in European history have I found a state can acquire
2 another state's human remains through treaty. I think
3 NAGPRA is mindful of that. I think Congress is mindful of
4 that.
5 I would like to conclude by saying what the
6 different parties here seek. Plaintiffs want to study these
7 remains because they are all scientists, are the only
8 scientists who can unearth the true significance. The
9 Society of American Archaeologists want to save museum
10 collections in general and this particular subset
11 specifically for the future.
12 The tribes want to have knowledge that the world
13 has changed and that all cultures have evolved. Ironically,
14 that's a hallmark of anthropology and that they properly
15 should have the control of the disposition of Native
16 American human remains.
17 The United States seeks to carry out the will of
18 Congress. Congress has recognized that the world has
19 changed and NAGPRA represents the Congressional decision, an
20 affirmative enactment onward, the ownership and control of
21 the disposition of Native American human remains should be
22 in the group which shares a connection, biological, cultural
23 or simply to the land itself with those remains.
24 The Secretary considered the proper factors under
25 NAGPRA to make that determination, and his decision is

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1 rationally based on the record that was before him.
2 That really wraps up my comments, Your Honor.
3 THE COURT: Mr. Cummings.
4 MR. CUMMINGS: Thank you, Your Honor. The tribe
5 in its initial brief that was filed in 1997 recognized that
6 certain determinations would need to be made under the
7 Native American Graves Protection Repatriation Act.
8 Interestingly, this Court recognized those same
9 questions are ones that the Agency should review, as it
10 finalized and made an administrative record and eventually
11 made a final determination in this case. That phase of this
12 case has come to a close. This Court is left, as we stated
13 in the opening, with simply the task of reviewing this
14 extensive and voluminous administrative record.
15 Yesterday, we took a look, using a magnifying
16 glass at words in the statute, talking about "is" or "was,"
17 talking about "indigenous," which we at least view as being
18 a status that can never be changed regardless of whether one
19 uses "is" or "was."
20 We took a careful, very searching look at those
21 words. Yet, yesterday, on four separate occasions
22 Ms. Barran spoke of substantial evidence; standard found
23 nowhere in administrative procedural law or nowhere in
24 NAGPRA.
25 Instead, we urge this Court to be very careful as

a944cfe0-6ba6-

TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

Paul Bender
Professor of Law, Arizona State University College of Law

July 28, 2005*

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,

* This Statement was submitted to the Committee on July 14, 2004, in connection with an oversight hearing on the American Indian Religious Freedom Act.

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 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 meant to establish 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 are first 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.

Other NAGPRA repatriation provisions also expressly deal with materials that cannot or have not been shown to have a relationship to a present-day tribe. For example, 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 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 first 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 a relationship with a presently existing tribe exists and, if they unilaterally decide, without Indian input, that no such relationship exists, to ignore NAGPRA altogether - - to fail to inform tribes about materials and to refuse to consult with them before making decisions about whether materials are Indian-related and 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

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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 with present-day tribes. 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.

> 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 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 all of its vital human-rights objectives.

A. VAN HORN DIAMOND
1523-F Halekula Way
Honolulu, Hawaii 96822
Telephone (808) 943-8675
28 July 2005

Senator John McCain, Chairperson and Members
Indian Affairs Committee
United States Senate
Washington, District of Columbia

Senator McCain, Honorable Chairperson
Senator Dorgan, Honorable Ranking Member
Senator Inouye, Honorable Hawaii Member and
Distinguished Members of the Indian Affairs Committee of the United States Senate:

Aloha Kakou (Greetings to each of you).

My name is A. Van Horn Piimauna Diamond. I testify today for my family, namely, the Van Horn Diamond Ohana. (The Hawaiian word "Ohana" means family). Moreover, we are a "Native Hawaiian Organization" pursuant to the applicable and appropriate NAGPRA provisions. We achieved this recognition with claimant status twice: (1) 1998 for approximately 1500 individual sets of ancestral remains --- repatriated in 1999. (2) 2000 for approximately 83 ancestral items(artifacts) --- repatriation not yet concluded. [This Diamond Family is presently seeking claimant status for 6 ancestral items in the custody of the Park Service, Kilauea Volcano National Park, Island of Hawaii.]

Please know. The knowledge and/or awareness regarding NAGPRA reflects this Diamond Family's hands-on participation in the processes and related activites of NAGPRA, e.g. application, recognition, cultural affiliation, claimant status, repatriation etc.

Thank you (Mahalo) in permitting this Diamond family to talk with you regarding NAGPRA and the Native Hawaiian, specifically, the need to provide the Native Hawaiian Family standing, preferably, separate from the NAGPRA definitions of "Lineal Descendent" and "Native Hawaiian Organization".

Presently, the record suggests few Hawaiian Families can satisfy the "lineal descendent" definition. This is because the Hawaiian Family connection to its ancestors is mainly through its oral traditions, geneology, history, and geographic presence within the Hawaiian archipelago. Further, Hawaiian Ancestors were secretly buried so to protect them from desecration --- so that subsequent generations were not necessarily apprised of their exact location and who, in particular, was buried. But, through the family history, its geneology, its oral traditions, and where family lands or settling occurred, the tie to the ancestors is maintained---through the generations. However, the NAGPRA "lineal descendent" definition does not respond to the Hawaiian way.

Yet, the care for, the custody of and the reverence to the ancestors, i.e. their remains and artifacts, is a prime responsibility of the Hawaiian Family. This responsibility is passed on to each succeeding generation --- until eternity ends!

In fact, this Hawaiian societal reality seems akin to the context and content of the Confederation of Coleville Tribes regarding their connection to the Kennewick Man and the 10,000 year old ancestor to the Fallon Paiute-Shoshone Tribe of Nevada. That is, the Hawaiian Family ways of connecting to/with its ancestors is the geneology, the history, the oral tradition, geographic presence. It was also the way, starting in Pre-Western contact, an individual from the island of Hawaii, for example, would be permitted to land and visit his kin on another island of the Hawaiian archipelago, such as Oahu. Lacking the proper information and protocols, landing on, say, Oahu, would be unwise. It could result in the visitor being slain for trespassing.

Before continuing, given this similarity as to approach for purposes of transcending the past with the present, and, after conversations with Native Hawaiian Organizations[including many Native Hawaiian Families], it is important here to note our support for Senate Bill 536, section 108 and its enactment . The respective Ways of the Native American, the Native Alaskan, the Native Hawaiian in connecting to ancestors and the past must have standing. Scientists do not and must not have singular license to pre-empt the indigenous peoples of these United States. Indeed, not all knowledge rests in the western methodologies and eschatalogies.

Next, the "Native Hawaiian Organization" definition is presently the only place where the Hawaiian Family achieves NAGPRA recognition along with state agencies (Office of Hawaiian Affairs, Hawaii State Department of Hawaiian Home Lands) and non-profit community-based Hawaiian organizations of all types.

This is because there was no Sovereign Hawaiian Government when NAGPRA was enacted. Until there is an Hawaiian Government, the "Native Hawaiian Organization" category will continue to be the catch-all definition for all Hawaiian organizations including the Hawaiian Family. But, if there is a shrinking of the "Native Hawaiian Organization," the Hawaiian Family could be excluded. If so, the entity with the prime responsibility for the care, custody and reverence of ancient Hawaiian remains and items would have no standing. It would then not qualify under "lineal descendent " and "native Hawaiian organization".

Accordingly, for the Native Hawaiian Family, with great respect and sincerity, we recommend the establishment of an additional definition for the Native Hawaiian Family. In fact, you may wish to consider using a definition from State of Hawaii law and the related administrative rules regarding the reburial of ancient Hawaiian remains, namely, "Cultural Descendent". It is contained in the documents provided with this testimony.

Most importantly, this proposed definition would continue only until a native Hawaiian government comes about. This is especially pivotal if the "Native Hawaiian Organization" definition were tweaked to eliminate entities such the Hawaiian Family.

Restated, we recommend a definition within which to place the Hawaiian Family --- separate from the current two definitions and categories. If not possible, it is imperative

to make sure the Hawaiian Family is not deleted from the coverage the "Native Hawaiian Organization" NAGPRA definition provides. Otherwise, the principal source and resource for the continued care, custody and revering of ancestral Hawaiian remains and artifacts, namely, the Hawaiian Family, will be prevented and unable to fulfill its responsibility in this regard. Again, all of this continues until there is a native Hawaiian government enabled, established and operative.

Lastly, please continue to insure that NAGPRA is responsive and responsible to the needs of the Native Hawaiian. Further, we are available to assist you in this matter – where we can.

Thank you for letting us talk with you.

Respectfully and Sincerely,

A Van Horn Piimauna Diamond
Principal Representative& Spokesperson
Van Horn Diamond Ohana (NAGPRA Native Hawaiian Organization)

DAUGHTERS AND SONS OF THE HAWAIIAN WARRIORS

(Mamakakaua)

Honolulu, Hawaii

March 14, 2005

N.A.G.P.R.A Review Committee Chairperson Rosita Worl,

Eighteen years ago, I attended a regular business meeting of the Daughters and Sons of The Hawaiian Warriors-MAMAKAKAUA where Edward Ayau was given permission to represent us as a Hawaiian Organization compliant with and answerable to N.A.G.P.R.A. law and Hawaiian tradition.

It is increasingly evident that our direct personal involvement is required.

Therefore Daughters and Sons of Hawaiian Warriors-MAMAKAKAUA withdraw support from Edward Ayau and Hui Malama. Consequently, we apply to be recognized as a Hawaiian Organization under N.A.G.P.R.A. regulations with rights and privileges of an authentic claimant.

Furthermore we see a great need for representation on this committee. We prefer one who knows the ways of our Royals and is qualified and approved by the four Royal Societies. We nominate and highly recommend Van Diamond for your approval.

Finally, we stand with Laakea Suganuma.

Thank you,

EiRayna Kaleipolihale Adams

EiRayna Kaleipolihale Adams
Kuhina Nui
Daughters and Sons of The Hawaiian Warriors-MAMAKAKAUA

"E ike i ka hoa kanaka, he mamalahoa ke kanawai"

DAUGHTERS AND SONS OF THE HAWAIIAN WARRIORS

(Mamakakaua)

Honolulu, Hawaii

September 17, 2004

Honorable Representative,

Daughters and Sons of The Hawaiian Warriors-MAMAKAKAUA, Hale O Na Alii O Hawaii, Ahahui Kaahumanu, and Royal Order Of Kamehameha (collectively known as The Royal Societies) have joined together to personally ask your support in passage of H.R.4282/S.344.

Mamakakaua's objectives are to unite the descendants of the ancient (Chiefly)Warriors of Hawai'i, to collect, preserve and perpetuate ancient traditions, to uphold the best customs and traditions of our people, and to unite for the common good in all public matters affecting our people. We are registered in the United States Library of Congress as a Hawaiian genealogical society.

As descendants of the first inhabitants, we have an unbroken lineage to past Warriors. Our traditional accounts were recorded by native historians such as S.M. Kamakau, honored member Mary Kawena Pukui, and others. Thus, the Nation of Hawaii is rooted and continues to live through those you see before you today.

Our Royal trusts continue to be openly challenged - jeopardizing our land tenure, special conditions of trusts and wills and in short, our birthright. This is increasing at an alarming rate. For example a mandatory lease to fee city council amendment directly affects the will of Queen Liliuokalani by reducing her land base and giving superior rights to lessee rather than owner. In addition, there is the continued eroding of the honorable Bernice Pauahi Bishop's will which manages and makes available education for Hawaiian children (The Kamehameha Schools). There are ongoing litigious entanglements regarding use of our lands by special interest groups. Too often, decisions are made regarding our trust lands without concern for the impact on Hawaiian beneficiaries.

To protect and secure the birthrights of the descendants of those who first arrived on these native shores, we ask you to join us in supporting passage of H.R.4282/S.344.

Sincerely, EiRayna Kaleipolihale Adams

EiRayna Kaleipolihale Adams
Kuhina Nui-Daughters and Sons of The Hawaiian Warriors-MAMAKAKAUA

Elsie Sarah Kawaonaheleopai'i Durante
Hope Kuhina Nui-Daughters and Sons of The Hawaiian Warriors-MAMAKAKAUA

Olive Kaulukane Souza
Aipuupuu-Daughters and Sons of The Hawaiian Warriors-MAMAKAKAUA

Yvonne Lefcourt
'Iamuku-Daughters and Sons of The Hawaiian Warriors-MAMAKAKAUA

"E ike i ka hoa kanaka, he mamalahoa ke kanawai"

'Ohana Keohokālole
P.O. Box 565
Kāne'ohe, Hawai'i 96744-0565
Ph: (808) 220-7873
E-mail: emalia@keohokalole.com

The Honorable John McCain
Chairperson
Senate Indian Affairs Committee
The Hart Building
Washington, D.C.

Dear Senator McCain:

Our family, 'Ohana Keohokālole, is one of several families who has been recognized by appropriate agencies here in Hawai'i, as a family who has the ability and the necessary cultural expertise to re-inter ancestral remains when discovered as a result of excavation or development. We do this as our sacred duty out of love for our kūpuna (ancestors).

This letter is a letter of support for Mr. Van Horn Diamond, a direct descendant of chiefs, whose purpose for appearing before you is to present the aspect of 'OHANA – our word for family or kin group, as it relates to federal recognition to ancestral remains.

From ancient times in our culture, the responsibility of caring for ancestral remains always rested with family members. Before a chief died, he would call upon his confidante(s) – usually, a relative or relatives - and dictate the process for putting away his remains – it was a duty of both honor and obligation – this process helped to insure that the life force of that chief would continue through his descendants to this day.

Under current federal law, a Native Hawaiian Organization (NHO) is the dominant category for recognition whenever ancestral remains are discovered. We would ask that you consider the addition of another category separate from NHO and call it the 'OHANA category. This new category allows Native Hawaiians to assume their rightful position in the care of ancestral remains found on federal lands. The overall criteria for qualifying as an 'OHANA claimant would be how your family is serving other Native Hawaiians, how your family is contributing to the Native Hawaiian community and most important of all, what experience does your family have with burials of ancestral remains. All of these requirements make the 'OHANA claimant a

perfect fit for the care of KŪPUNA remains. Not all the NHOs named in the federal law meet these criteria now. Not only is the current federal statute missing the inclusion of family, but it is culturally bereft.

We ask that you allow Mr. Diamond to explain to you the importance of placing the family definition into the statutes as priority one, followed by NHOs.

Our family thanks you for allowing us to submit this letter of support.

Sincerely,

Emalia Keohokālole
for 'OHANA KEOHOKĀLOLE

TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

Walter R. Echo-Hawk
Staff Attorney, Native American Rights Fund

July 28, 2005

Good morning, Mr. Chairman and members of the Committee. Thank you for the opportunity to offer testimony at this oversight hearing on the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 *et. seq.* I am pleased to assist the Committee in examining the impact of *Bonnichsen v. United States,* 357 F.3d 962 (9th Cir. 2004) upon NAGPRA and national efforts to implement that Act.

I am familiar with the issues in today's hearing based upon my work on repatriation issues as a Native American Rights Fund ("NARF") staff attorney since 1986. I participated in the Panel for a National Dialogue on Museum/Native American Relations (Dialogue Panel) referenced in Professor Bender's testimony. I worked with the Committee in 1989 and 1990 to develop the NAGPRA legislation on behalf of Native clients. Shortly after the passage of NAGPRA, I co-authored a law review article to memorialize the Act's legislative history.[1] I have participated in the implementation of NAGPRA over the years by representing Indian tribes in NAGPRA claims for the repatriation and reburial of Native American dead. I participated in the *Bonnichsen* case as counsel for *amici curiae* to protect the integrity of NAGPRA and ensure a proper interpretation of the Act. As a result of the foregoing work, I am aware of the impact of the Ninth Circuit's decision on NAGPRA.

Today, I represent the Working Group on Culturally Unidentified Native American Human Remains ("Working Group"). The Working Group is composed of prominent Native

[1] *See, e.g.,* Echo-Hawk and Trope, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," 24 Az. S.L.J. 35 (1992).

American leaders who are experienced in repatriation issues and concerned about the proper interpretation and implementation of the provisions of NAGPRA which pertain to the classification, treatment and disposition of unknown Native American dead (i.e., that category of human remains who are currently listed as not having any known descendants or cultural affiliation).[2] The sections of NAGPRA which pertain to unknown Native American dead are 25 U.S.C. §§3006(c)(5)-(6) and (g)(directing the NAGPRA Review Committee to compile an inventory of these dead in the possession of museums and federal agencies and make recommendations for specific actions for developing a process for their disposition, to be done in consultation with Indian tribes and Native Hawaiians), 3002 (a)(2)(C) (vesting ownership and control of such dead discovered on federal or tribal lands in the Tribe who aboriginally occupied the land where the remains were discovered.) The *Bonnichsen* decision would nullify these provisions and render them meaningless, since under its rationale those dead which by definition are not culturally affiliated with any current Indian tribe are not "Native American" for purposes of NAGPRA nor subject to any of its provisions.

My testimony addresses the impact of the *Bonnechin* decision on the (1) NAGPRA statute, (2) intent of Congress, and (3) national NAGRPA implementation efforts; and, finally, I will (4) recommend the need for legislation to correct the inappropriate restrictions which the *Bonnechin* decision improperly places upon NAGPRA's operation.

A. *Bonnichsen* incorrectly narrowed the scope of NAGPRA.

I agree with Professor Benders' legal analysis of *Bonnichsen* and it's impact upon the NAGPRA statute. I adopt his excellent analysis and recommendations and will not repeat them

[2] Working Group members include: Wallace Coffee, Chairman, Comanche Tribe; Mervin Wright, Jr., Pyramid Lake Paiute Tribe; Peter Jemison, Seneca Nation NAGPRA Representative; James Riding In, historian and repatriation consultant to the Pawnee Nation; Suzan Harjo, President, Morningstar Institute; Ho'oipokalaena 'auao Nakea Pa, Chairwoman, Native American Rights Fund; Kunani Nihipali, Hui Malama.

here. Let me add two points to further demonstrate that the Court's interpretation of NAGPRA is erroneous.

First, when considering the correctness of the decision, it is telling that no legislative history is cited to support the Ninth Circuit's restrictive interpretation of NAGPRA's definition of "Native American" in 25 U.S.C. §3001(9).[3] Indeed, *there is no legislative history* concerning that definition because it was not considered controversial. Everyone who worked on the bill, including myself, logically assumed that all pre-Columbian remains indigenous to the United States are "Native American" and would be covered by the Act regardless of their age or whether they can be culturally affiliated. That is why many provisions in the Act, listed above, *expressly pertain* to the classification, inventory and disposition of such remains. It is also telling that the Secretary of the Interior's regulations that implement NAGRPA interpret the scope of the Act in the same manner. *See,* 43 C.F.R. §10.2(d); *Bonnichsen,* 357 F.3d at 974-975.[4] Quite simply, at the time of the making of NAGPRA no one discussed or envisioned the threshold finding for "Native American" coverage espoused by the Ninth Circuit some 14 years later.

Second, *Bonnechin* creates disparate statutory coverage between Native Hawaiian and Native American remains, which was not intended by Congress. While the Court imposed a threshold finding "that human remains bear a significant relationship to a *presently existing* tribe, people, or culture to be considered 'Native American,'" (357 F.3d at 975), it recognized that no

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[3] This section reads: "'Native American' means of, or relating to, a tribe, people, or culture that is indigenous to the United States."

[4] And, of course, that interpretation comports with the United States' position in the *Bonnichsen* case. Furthermore, the Secretary's interpretation of the NAGPRA's definition of "Native American" was correctly supported by the Society of American Anthropology (SAA). *See,* SAA *amicus curiae* brief submitted to the district court in *Bonnichsen*, pp. 4-9 (Attached hereto).

such requirement is made for "Native Hawaiian" coverage, because the Act defines "Native Hawaiians" with different language using geographic criteria. The Court stated:

> Our analysis is strengthened by contrasting the statutory definition of the adjective "Native American" to the statutory definition of the noun "Native Hawaiian." Under §3001(9), "'Native American' means of, or relating to, a tribe, people or culture that is indigenous *to the United States.*" (Emphasis added). Under §3001(10), "'Native Hawaiian' means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty *in the area that now constitutes the State of Hawaii.*" (Emphasis added).
>
> The "United States" is a political entity that dates back to 1789. (citation omitted) This term supports that Congress's use of the present tense ("that is indigenous") referred to tribes, peoples and cultures that exit in modern times, not to those who may have existed thousands of years ago but who do not exist now. By contrast, when Congress chose to harken back to earlier times, it described a geographic location ("the area that now constitutes the State of Hawaii") rather than a political entity ("the United States").

357 F.3d at 976 (underline supplied). Congress did not intend disparate coverage for the two groups. There is no rational reason why Native Hawaiians have broader statutory coverage than Native Americans in the law, yet this troubling disparate treatment gave no pause to the Court.

B. Impact of *Bonnichsen* upon NAGPRA implementation efforts.

The Court's narrow and erroneous interpretation has adverse impacts in three major respects upon NAGRPA and its implementation.

First, the holding drastically limits the coverage of NAGPRA by excluding an entire category of more than 100,000 human remains who are indigenous to and discovered in the United States.[5] These unknown American Indian dead, who were inventoried under the provisions of NAGPRA, are not subject to the provisions of NAGPRA according to the

[5] As of June 30, 2005, the database (which is about 95% complete) compiled by the National Repatriation Office (U.S. Dept. Interior) currently lists more than 108,247 Native American dead as not having any identified descendents or known cultural affiliation based upon the NAGPRA inventories submitted by museums and federal agencies. My clients suspect that an inordinately high number of these remains were classified by museums and agencies as being unidentifiable given the inclination of the scientific community to rely upon inordinately high standards of certainty that is the norm in scientific research, rather than a simple preponderance of the available evidence which is the standard set forth in NAPGRA for making cultural affiliation determinations. As discussed

Bonnichsen holding. Yet, according to scientists, museums and tribal representatives the Working Group has talked with, the cultural affiliation of many of these unknown dead could likely be identified upon consultation between museums and Indian tribes. However, that opportunity may never arise if those dead are excluded from the consultation and other provisions of NAGPRA.

Without NAGPRA coverage, museums and agencies are free to make unilateral determinations affecting the classification, treatment and disposition of these dead without any consultation with Indian tribes. NAGPRA sought to remedy that precise human rights problem which too often arose in pre-NAGPRA days when scientists and museums ignored tribal inquiries and requests or, worse yet, barred tribal access to their records, such as that experienced in several NARF cases which I handled. *See, e.g.*, Robert M. Peregoy, "The Legal Basis, Legislative History, and Implementation of Nebraska's Landmark Reburial Legislation," 24 Az. L. Rev. 329 (1992) at 358-359, 374-377.

Second, the decision nullifies or renders several important provisions of NAGPRA meaningless, causing internal inconsistencies within the statute. Those provisions are referenced below.

> 1. 25 U.S.C. §3005 (and related provisions) require the repatriation of any human remains where tribal claimants can prove their cultural affiliation with the remains by a preponderance of the evidence. Under *Bonnichsen*, to trigger the Act there must be a threshold "finding that remains have a significant relationship to a presently existing tribe, people, or culture" before remains can be considered "Native American" and subject to NAGPRA. 357 F.3d at 974. That showing of affiliation renders Section 3005 superfluous.
>
> 2. 25 U.S.C. §3002(2)(C)(1)-(2) vests the ownership and control of human remains discovered on federal land whose cultural affiliation "cannot be reasonably ascertained" in the tribe who aboriginally occupied the land where the remains were discovered.

---

elsewhere in my testimony, many of these dead can be culturally affiliated upon further consultation with Indian tribes.

> These provisions are nullified if such remains are not covered by NAGPRA in the first instance, as held in *Bonnichsen*.
>
> 3. 25 U.S.C. §§3006(c)(5)-(6) and (g) direct the NAGPRA Review Committee to compile an inventory of unknown Indian dead in the possession of museums and federal agencies and make recommendations for specific actions for developing a process for their disposition, to be done in consultation with Indian tribes. These provisions are nullified if such remains are not "Native American" under the *Bonnichsen* rationale, since they would not be subject to NAGPRA.

In short, the Ninth Circuit abrogated statutory provisions that afford important rights to Native Americans. Abrogation of Indian rights is sadly familiar in the history of our Nation. But fortunately, it is within the power of this Committee to ensure that Native American human rights measures enacted by Congress are not abrogated by other branches of the federal government.

Third, Americans Indians will, once again, be excluded from participating in museum and agency deliberations and processes regarding the disposition and treatment of the dead Indians who are excluded from coverage. As explained by Professor Bender, that was one of the primary problems which the consultation provisions NAGPRA sought to remedy. Yet the decision serves to exclude Native Americans from participating in museum and agency processes regarding the disposition of more than 100,000 Native American dead who are indigenous to the United States. As such, *Bonnichsen* frustrates Congress' statutory objectives and is at odds with the Secretary of the Interior's regulations implementing the legislation.

C. Conclusions and recommendation for legislative action now.

I firmly believe that legislation is necessary to correct the Ninth Circuit's erroneous interpretation of NAGPRA's definition of "Native American" (25 U.S.C. §3001(9)) and effectuate the intent of Congress. Professor Bender's proposals for legislative language in that respect are sound. This does not mean that all ancient Native Americans remains that are

indigenous to the United States will automatically be repatriated, because claimants still must prove their cultural affiliation by a preponderance of the evidence in accordance with the procedures and standards set forth in the statute. Nor do I appear today with the intent to overturn the particular outcome in the *Bonnichsen* case (based upon the district court's finding that the claimants failed to prove their cultural affiliation to the so-called "Kennewick Man") but merely to advocate corrective legislation necessary to guide national NAGPRA implementation efforts along the path set by Congress in 1990.

The NAGPRA coverage problem created by the *Bonnichsen* decision is not new to the Committee. This is the second oversight hearing in which the problem has been brought to the Committee's attention, along with legislative recommendations. *See,* Oversight Hearing on the American Indian Religious Freedom Act (June 14, 2004) (witnesses were asked to provide testimony on how federal repatriation laws were being implemented and interpreted and to make recommendations for technical corrections and clarification). Two amendments were introduced in the past 9 months following the 2004 Hearing, but did not move very far.

At this time, I respectfully urge the Committee to continue its work on this important issue that affects the implementation of an important human rights law by developing and passing a short, narrowly tailored bill to amend NAGPRA's definition of "Native American." Such a bill could employ the simple language proposed by Professor Bender, similar to the two amendments introduced within the past 9 months. I offer my assistance in such an effort; and I respectfully submit that there is no need for any further delay.

Thank you for this opportunity to submit testimony. I am available to answer questions at this time.

* * * * *

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

BONNICHSEN, et al.,	)	**CV 96-1481-JE**
	)	
Plaintiffs,	)	
	)	**MEMORANDUM OF LAW IN**
	)	**SUPPORT OF THE SOCIETY**
v.	)	**FOR AMERICAN**
	)	**ARCHAEOLOGY'S**
	)	***AMICUS CURIAE***
UNITED STATES, et al.,	)	**SUBMISSION**
	)	
Defendants.	)	
	)	

Amicus Curiae, the Society for American Archaeology (SAA), respectfully submits this Memorandum of Law and supporting Affidavit of Robert L. Kelly, President of the SAA, with associated exhibits.

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in the record with respect to the cultural affiliation of the Kennewick remains and a review of Secretary Babbitt's errors. For the convenience of the Court, included within the Review of Final Determination is a table (Table 1) that summarizes the evidence in the record pertaining to what is known about the "group" represented by the Kennewick human remains, the characteristics of the claimant groups circa 1805, the conclusions made by Secretary Babbitt, and the SAA's assessment of why the Secretary's conclusions are arbitrary and capricious.

II. THE DOI PROPERLY DETERMINED THAT THE KENNEWICK REMAINS ARE "NATIVE AMERICAN" UNDER NAGPRA

NAGPRA defines "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). In response to this Court's direction to the defendants to give further consideration to the meaning of "Native American" and the term "indigenous" as used in the statute, Bonnichsen v. United States, 969 F. Supp. 628 (D. Or. 1997), the DOI provided its views on these definitions in a December 23, 1997 letter, explaining:

> As defined in NAGPRA, "Native American" refers to 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.

DOI 2128. The Society for American Archaeology believes that this interpretation reasonably carries out Congress's intent, and, is consistent with the common-sense meaning of the terms "Native American" and "indigenous."

It is well established that when a federal agency's decision turns at least in part upon the construction of a statute or regulation, the court must consider whether the agency correctly interpreted and applied the relevant legal standards. When Congress has

unambiguously expressed its intent, that is controlling. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984). If the statute is silent or ambiguous concerning the issue in dispute, the court next inquires whether the agency is construing a statute that it administers or regulations that it has promulgated. Id. at 842-44. If the answer is yes, which it is with respect to the meaning of the term "Native American," the agency's construction will be upheld if it is based upon a "permissible construction of the statute" or regulation. Id.; Northwest Motorcycle Association v. United States Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994).

A. DOI's Interpretation is Consistent with the Plain Language of NAGPRA

NAGPRA's definition of "Native American" turns on the meaning of the word "indigenous." As neither the statute nor the regulations provide a definition of "indigenous" the Court should consider its plain meaning in the context of the statute. Volume 7 of the Oxford English Dictionary (2d ed. 1989) (hereinafter "OED") identifies two principal meanings for "indigenous":

> 1. Born or produced naturally in a land or region; native or belong naturally *to* (the soil, region, etc.). (Used primarily of aboriginal inhabitants or natural products.)
>
> and,
>
> 2. Of, pertaining to, or intended for the natives; 'native', vernacular.

The first meaning clearly links "indigenous" to "aboriginal inhabitants." The same dictionary gives the following meanings for "aboriginal" used as an adjective (Id. at Vol. 1):

> 1. First or earliest so far as history or science gives record; primitive; strictly native, indigenous. Used both of the races and natural features of various lands . . ..
>
> 2. *spec.* Dwelling in any country before the arrival of later (European) colonists . . ..
>
> 3. a. Of or pertaining to aborigines, to the earliest known inhabitants, or to native races.

Both meanings of "indigenous" also make use of the term "native." This word has many meanings, among which the most pertinent is the fourth (Id. at Vol. 10):

> 4. One of the original or usual inhabitants of a country as distinguished from strangers or foreigners; now *esp.* one belonging to a non-European race in a country in which Europeans hold political power.

These definitions show that "indigenous" commonly refers to the original or early inhabitants of a region, *particularly as distinct from later European colonists*. Consequently, DOI's interpretations of "Native American" and "indigenous," which turn in part on whether the remains or items in question are related to tribes, peoples or cultures that predated the historically documented arrival of European explorers, are consistent with the standard meanings of the terms.

The DOI's reliance on the concept of the Europeans' historical arrival in interpreting the definition of "Native American" is neither arbitrary nor unreasonable. The plaintiffs argue that the "defendants' choice of 1492 ignores the fact that there is no special significance to Columbus for these purposes." (Pls. Br., p. 6.)[2] However, for the purposes of NAGPRA, Christopher Columbus indeed has special significance, because it was his voyages into the Caribbean that initiated the period of sustained European exploration and colonization of the Americas. Regardless of whether Columbus himself set foot in the United States, his explorations provide a widely known and appropriate benchmark for the "historically documented arrival of European explorers" that quickly followed.

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[2] This characterization does not relate directly to the wording of DOI's interpretation as articulated in the Secretary's September 21, 2000 decision, but results from a clarification in which DOI stated that the phrase "historically documented arrival of European explorers" refers to Christopher Columbus. (Pls. Br., p. 2.)

The DOI's interpretation is further bolstered by the fact that, as a practical matter, remains and artifacts commonly understood not to be "Native American" will not be covered by the DOI's definition. The plaintiffs argue that the "1492 rule would indiscriminately and unreasonably sweep into NAGPRA's ambit remains and objects that have no logical relationship to the purposes of the statute" such as the Vikings and Japanese fishermen. (Pls. Br., p. 6.) In the ten years since NAGPRA became law, however, no such problem has arisen nor is any such problem likely to arise. Although the Vikings are known to have briefly colonized Newfoundland around AD 1000 (*outside* the United States and NAGPRA's jurisdictional reach), to date, no medieval Viking settlements have ever been persuasively documented in the United States. Nor is there any generally accepted evidence of Japanese fishermen in the United States in pre-Columbian times.

But even if the remains of pre-Columbian Vikings or Japanese fishermen were someday to be found in the United States, they would not present any undue problems under NAGPRA. Such visitors should not be considered "Native American" under DOI's interpretation if the word "indigenous" is understood, as it should be, to refer to a long-term, rather than temporary, presence. Moreover, the dictionary definition of "indigenous" quoted above includes the phrase "born … in a land or region." Thus, if the DOI were confronted with such an extraordinary case in the future, SAA believes DOI would be acting in accordance with NAGPRA if it determined that remains of African, Asian or European individuals that reflect temporary presence in the United States are not "Native American."

B. Alternative Readings of "Native American" or "indigenous" are Problematic

The DOI's interpretation of "Native American" is further bolstered by the fact that alternate readings of "Native American" or "indigenous" are problematic. Any reading of

"indigenous" that gives primacy to its connotations of "first or earliest," followed to an extreme, leads to a paradox, in that it would exclude later descendants, including present-day tribes. This was clearly not Congress's intent in enacting NAGPRA. Most scholars today believe that the initial, prehistoric peopling of North America was a long and complex process. Contemporary Native Americans are the descendants of people who arrived in many waves from multiple places of origin. Thus a definition of a "Native American" that would include only the "first or earliest" peoples to inhabit the United States would be inconsistent with the common understanding of "Native American."

Nor can "Native American" sensibly be interpreted, as plaintiffs do, to "require proof of a relationship to present day Native peoples." (Pls. Br., pp. 1-2.) Such an interpretation would be contrary to the plain language of the statute, which requires the remains or artifacts to have a relationship to "a tribe, people or culture indigenous to the United States," *not* a relationship to "present day Native peoples." 25 U.S.C. §3001(9). Moreover, it would be inconsistent with the common-sense understanding of the term "Native American" to exclude a particular group simply because it had not survived as a people to the present day. There are many historically documented and prehistorically known groups that would commonly be thought of as "Native American" but no longer have present-day descendants.

* * *

In sum, SAA believes that DOI's interpretation of "Native American," the so-called "1492 rule," is generally consistent with a standard English reading of the definition that appears in NAGPRA. The plaintiffs point out theoretical (and rather unlikely) scenarios under which the interpretation might yield results inconsistent with common sense, but as we suggest, these could be dealt with easily. Ultimately the question of whether the Kennewick remains are

Native American must be decided with reference to the definition that appears in NAGPRA itself. Given the Kennewick remains' pre-Columbian antiquity, the fact that they were found well within the boundaries of the United States, and the absence of any reason to believe that this man was either born outside these boundaries or not a permanent resident of the land within these boundaries, it is eminently reasonable to conclude that he was indigenous and therefore "Native American."

III. THE DOI'S DETERMINATION OF CULTURAL AFFILIATION WAS ARBITRARY AND CAPRICIOUS

Although SAA agrees that the Kennewick remains are Native American, SAA believes that the Secretary's decision on cultural affiliation is fundamentally flawed in its understanding of the term "cultural affiliation" and in its assessment of the evidence presented for cultural affiliation. This decision sets a precedent that, if it remains in effect, largely eliminates the compromise between the scientific and Native American interests that was embodied in NAGPRA.

A. The DOI's Decision with Respect to the Cultural Affiliation of the Kennewick Remains is Arbitrary and Capricious Because of Numerous Errors of Law

At each stage of its analysis, the DOI's determination of cultural affiliation is riddled with legal errors and fundamentally at odds with the statute. In Chevron, 467 U.S. at 842 (1984), the Supreme Court explained that when congressional intent is clear, the agency must "give effect to the unambiguously expressed intent of Congress." Id. at 843. Here, the DOI repeatedly disregarded the clear language of the statute in finding that the claimant tribes are affiliated with the Kennewick remains.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-35994
(District Court No. 96-1481JE (D. Or.))

ROBSON BONNICHSEN, ET AL.,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants,
and
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
Defendants-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OPENING BRIEF FOR THE FEDERAL APPELLANTS

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and the tribal claimants filed notices of appeal.[13]/ On the tribal claimants' motion, this Court granted a stay of the judgment pending appeal. Accordingly, pending resolution of the appeals, the Kennewick Man will remain in the Corps' control and the plaintiffs' proposed study of the remains will not commence.

SUMMARY OF ARGUMENT

Interior properly interprets "Native American" for purposes of NAGPRA to include human remains of, or 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 whether some or all of these groups are or are not culturally related to present day Indian tribes. This interpretation conforms to the statutory language, structure, and purposes of the Act and therefore should be upheld because it accurately reflects congressional intent.

The Magistrate Judge's conclusion that "Native American" requires the existence of a demonstrated cultural relationship between remains and presently existing American Indian culture is untenable. No statutory language imposes this limiting criteria. Moreover, this interpretation cannot be squared with other

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[13]/ By order of this Court dated February 11, 2003, the two appeals are considered companion appeals.

provisions or the statutory structure. The interpretation effectively negates the provision addressing claims based on aboriginal land and implausibly collapses the cultural affiliation inquiry relevant to disposition of Native American remains into the threshold determination of the Act's applicability. Furthermore, the Magistrate Judge's interpretation ignores Section 3(b), the provision dictating the process for disposition and control of Native American remains for which there is no qualified claimant. The Magistrate Judge's interpretation of "Native American" is also at odds with congressional intent respecting the provisions of the Act addressing museum's responsibilities to inventory "Native American" remains and other cultural items, and the recognition that many prehistoric remains and cultural items in collections will not be culturally identifiable, yet are subject to the Act.

Finally, there is no merit to the Magistrate Judge's suggestion that Interior's interpretation produces an absurd result because it allows tribes with no relationship to remains to secure custody and prevent scientific study of such remains. Neither outcome results from the threshold determination that remains are "Native American."

Even if the statute is deemed ambiguous on the issue of whether there must be a demonstrated cultural relationship between the remains and presently existing

American Indian culture in order for remains to be considered "Native American," Interior's interpretation should be upheld. The Magistrate Judge erred by refusing to accord any deference to Interior's interpretation. Interior's interpretation is entitled to Chevron deference because it is the agency charged with administering the Act and its interpretation is reflected in a regulation promulgated after notice and comment rulemaking. Even if Chevron does not apply, Interior's interpretation is still entitled to deference. Regardless of the degree of deference accorded, Interior's interpretation should be upheld because it is more persuasive than the Magistrate Judge's.

Interior's conclusion that the Kennewick Man is Native American under its legal interpretation is not arbitrary and capricious. Interior reasonably concluded that the Kennewick Man was a native inhabiting the Columbia Plateau area long before recorded European exploration. Accordingly, this Court should vacate the lower court's remedy and remand to Interior to determine disposition of the Kennewick Man as unclaimed remains under NAGPRA.

ARGUMENT

INTERIOR PROPERLY DETERMINED THAT THE KENNEWICK MAN IS "NATIVE AMERICAN" UNDER NAGPRA

A. Standard of review. – This Court should review de novo the district court's determination that the Kennewick Man is not "Native American." This Court reviews de novo a district court's determination on an issue of statutory interpretation. NRDC v. Evans, 316 F.3d 904, 910 (9th Cir. 2003). Moreover, although the plaintiffs captioned their district court motion as a "Motion to Vacate Second Administrative Action," their motion effectively was one seeking summary judgment in an action seeking judicial review of agency action based on review of an administrative record. This Court reviews de novo a grant of summary judgment. Hall v. Norton, 266 F.3d 969, 975 (9th Cir. 2001).

"'De novo review of a district court judgment concerning the decision of an administrative agency means [this Court] view[s] the case from the same position as the district court.'" Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 959 (9th Cir. 2002) (quoting Sierra Club v. Babbitt, 65 F.3d 1502, 1507 (9th Cir. 1995)). Interior's determination on the NAGPRA issues is properly reviewed under the deferential standard governing judicial review of agency action set forth in the Administrative Procedure Act ("APA"). See Ninilchik

Traditional Council v. United States, 227 F.3d 1186, 1193-94 (9th Cir. 2000)(even where a statute contains a provision providing for district court jurisdiction, "a reviewing court must apply the deferential APA standard in the absence of a stated exception when reviewing federal agency decisions").

Under the APA, agency decisions must be upheld unless found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2). Under this standard, the reviewing court should not substitute its judgment for that of the agency's; rather, the reviewing court assesses "whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made." Pacific Coast Fed'n of Fishermen's Ass'ns v. National Marine Fisheries Service, 265 F.3d 1028, 1034 (9th Cir. 2001) (quotations omitted). Deference to Interior's determination that scientific evidence supports the conclusion that the Kennewick Man is "Native American" is especially appropriate because it implicates substantial agency expertise. See Ninilchik Traditional Council, 227 F.3d at 1194; United States v. Alpine Land and Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989) ("Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving ... scientific matters").

B. The Secretary's decision rests on a proper interpretation of the statute. – The familiar Chevron standard governs review of statutory interpretation issues. If a statute speaks clearly "'to the precise question at issue,'" the reviewing court "'must give effect to the unambiguously expressed intent of Congress.'" Barnhart v. Walton, 122 S. Ct. 1265, 1269 (2002), quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). "If, however, the statute 'is silent or ambiguous with respect to the specific issue,' [the court] must sustain the Agency's interpretation if it is 'based on a permissible construction' of the Act." Barnhart, 122 S. Ct. at 1269 (quoting Chevron, 467 U.S. at 843).

As we explain in this section, Interior's interpretation that NAGPRA applies to the remains of indigenous people inhabiting the United States prior to known European exploration, without requiring that the agency demonstrate a cultural relationship to a presently existing American Indian culture or tribe as a threshold matter, rather than in the context of considering a claim based on cultural affiliation, should be upheld under Chevron's first step. The Magistrate Judge erred in interpreting NAGPRA as applying only to those human remains for which there is shown to exist a cultural relationship between the deceased and a presently existing American Indian Tribe.

Under NAGPRA, human remains are "Native American" if they are "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. 3001(9). Interior interprets this statutory definition to include all tribes, people, and cultures that were residents of the lands comprising the United States prior to historically documented European exploration of these lands. DOI AR 10842; ER 399. [14]/

Interior's interpretation comports with the plain meaning and common usage of the word "indigenous." In ordinary usage, "indigenous" refers to early inhabitants born in a region, as distinct from later European colonists or their descendants. For example, the Compact Edition of the Oxford English Dictionary (1971) defines "indigenous" as "born or produced naturally in a land or region; native or belonging naturally to (the soil, region etc.). Used primarily of aboriginal inhabitants or natural products." In turn, "aboriginal" is defined as "[a]n original inhabitant of any land, now usually as distinguished from subsequent European colonists." Id. See also Webster's Third New International Dictionary (Merriam-Webster, Inc. 1993) defining "indigenous" as "native" or

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[14]/ The Magistrate Judge mischaracterized Interior's interpretation as "automatically includ[ing] all remains predating 1492 that are found in the United States." 217 F. Supp. 2d at 1137; see also 217 F. Supp. 2d at 1135; ER 142, 140. See infra at 48-49.

"not introduced directly or indirectly according to historical record or scientific analysis into a particular land or region or environment from the outside." Furthermore, as explained below, the context and design of the statute as a whole confirms that Interior's interpretation is the one Congress intended.

As we explain in Section C below, even if the statute were deemed ambiguous and the Magistrate Judge's interpretation were a plausible reading of the ambiguity, the Magistrate Judge erred by refusing to accord Interior's interpretation any deference and concluding that Interior's is not a permissible interpretation. Regardless of the degree of deference applied, Interior's interpretation should be upheld because it is permissible and is the more persuasive interpretation.

1. The Magistrate Judge erred as a matter of law by requiring a demonstrated cultural relationship between the deceased and a presently-existing "American Indian tribe" in order for the human remains to be treated as "Native American" under the Act. – Neither the statutory definition of "Native American" nor any other statutory provision imposes, by its plain language, the relationship requirement imposed by the Magistrate Judge, which serves to exclude from the term "Native American" the remains of or relating to, an indigenous culture, tribe, or people that has become extinct or for which there is not a demonstrated cultural

relationship with a present day American Indian tribe or culture. The Magistrate essentially created a new legal standard governing NAGPRA's applicability, one that Congress did not envision.

a. Contrary to the Magistrate Judge's reasoning, the plain language of the statute does not impose this requirement. – The Magistrate Judge identified three linguistic bases for its interpretation: (1) on the use of the present tense words "is" and "relating" in the statutory definition of "Native American" (i.e., Native American means "of, or relating to, a tribe, people, or culture that is indigenous to the United States," 25 U.S.C. 3001(9)(emphasis added)); (2) the presence of words imposing a temporal limitation in the statutory definition of "sacred objects," 25 U.S.C. 3001(3)(C); and (3) a dictionary definition of "Native American" as synonymous with "American Indian." This plain language analysis does not withstand scrutiny.

The use of the word "is," rather than "was," in the Native American definition does not compel a requirement that there be a cultural relationship between presently-existing tribes and remains or objects subject to NAGPRA. See Costello v. INS, 376 U.S. 120, 125 (1964). In common parlance, the words "is" and "was" are appropriately used interchangeably when referring to tribes, peoples and cultures that existed in the past but are being spoken of in the present. For

example, one might say that the Ancient Pueblo (also known as Anasazi culture) "is indigenous" to the United States, even though Ancient Pueblo, or Anasazi, culture no longer exists. The more cumbersome "is or was" is not linguistically necessary to convey the meaning that the term "Native American" encompasses all tribes, peoples, and cultures that have existed within the territory of what is now the United States, whether or not those tribes, peoples, and cultures continue to exist today.

The Magistrate Judge regarded the inclusion of "present day" in the definition of "sacred objects" as supportive of its restrictive interpretation of "Native American." 217 F. Supp. 2d at 1136; ER 141. "Sacred objects" is defined as "ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." 25 U.S.C. 3001(3)(C). While that definition is instructive, the Magistrate Judge drew exactly the wrong inference. The use of "present day" in the definition of "sacred objects," as well as a similar limitation in the definition of "cultural affiliation," show that Congress was aware of, and knew how to clearly express, a temporal limitation when it intended that result. See 25 U.S.C. 3001(2) (defining cultural affiliation as meaning a relationship of shared group identity between a "present day Indian tribe or Native Hawaiian organization" and an

identifiable earlier group). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Bates v. United States, 522 U.S. 23, 29-30 (1997)(quoting Russello v. United States, 464 U.S. 16, 23 (1983)(other internal quotation marks omitted)).

Indeed, the legislative history discloses that the definition of "sacred object" was controversial because the scientific community was concerned that it could be broadly construed to include any Native American object. Congress included the "present day" language for the purpose of limiting the objects to which the Act applied. See H. R. Rep. No. 101-877 at 14 ("the operative part of the definition [of sacred objects] is that there must be 'present day adherents'"); see also S. Rep. No. 101-473, 101st Cong., 2d Sess. (1990) at 7 (explaining that definition of "sacred objects" was controversial and that such objects must have "religious significance or function in the continued observance or renewal of [traditional religious ceremony or ritual]"). There is no discussion in the reports of any similar intention to limit the definition of "Native American."

Finally, the Magistrate Judge's reliance on a dictionary definition of "Native American" (defining it as "American Indian") was inappropriate because Congress

provided a statutory definition of "Native American" that does not limit its meaning to the current understanding of "American Indian" or even to tribes. Instead, the statutory definition more broadly defines the term by reference to indigenous peoples and cultures. [15]/

Congress's election of this broad definition is all the more significant because Congress rejected more limited definitions of "Native American." Between 1987 and the enactment of NAGPRA in 1990, Congress considered five bills dealing with the protection of Native American graves. Each of the rejected alternatives defined the term "Native American" through explicit reference to American Indians, Native Hawaiians, and Alaskan Natives. H.R. 1381, 101st Cong. (1st Sess.) §5 (1989) ("Native American Burial Site Preservation Act of 1989"); H.R. 1646, 101st Cong. (1st Sess.) (1) (1989) ("Native American Grave and Burial Protection Act"); S. 1021, 101st Cong. (1st Sess.) §3(1) (1989); S. 1980, 101st Cong. (1st Sess.) §2(1) (1989). However, in enacting NAGPRA (H.R. 5237), Congress rejected the reference to American Indians, Native Hawaiians, and Alaskan Natives in favor of the word "indigenous." "[W]here Congress

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[15]/ The Magistrate Judge's suggestion that Congress meant "Native American" to be synonymous with American Indian also cannot be reconciled with Congress's clear intent to include Native Hawaiians within the term "Native American" since Native Hawaiians are not generally referred to as American Indians.

includes limiting language in an early version of a bill and deletes that language before the enactment, it may be presumed that the limitation was not intended." Russello v. United States, 464 U.S. 16, 23 (1983); see also National Coalition for Students with Disabilities Education and Legal Defense Fund v. Allen, 152 F.3d 283, 290 (4th Cir. 1998) (when "'Congress employ[s] broad language' in drafting a statute, we 'are not free to disregard' it")(quoting United States v. Wildes, 120 F.3d 468, 470 (4th Cir. 1997)). The Magistrate Judge's interpretation effectively resurrects language that Congress rejected.

b. The Magistrate Judge's interpretation is at odds with the structure of NAGPRA Section 3. – Even if the words "is indigenous" by themselves are ambiguous, statutory words are not to be viewed in isolation, but in the context and design of the statute as a whole. See Deal v. United States, 508 U.S. 129, 132 (1993) ("[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."); Crandon v. United States, 494 U.S. 152, 158 (1990) (Courts must interpret statutes in light of "the design of the statute as a whole and [of] its object and policy"). The structure and design of the statute eliminates any potential ambiguity with respect to the exact question at issue here– i.e., whether there must be a demonstrable relationship between the deceased and

presently existing American Indian tribes in order to be considered "Native American" under NAGPRA.

The Magistrate Judge's interpretation is untenable because it negates or renders superfluous other provisions of Section 3. See Hohn v. United States, 524 U.S. 236, 249 (1998)("We are reluctant to adopt a construction making another statutory provision superfluous"). Under the Magistrate Judge's definition, remains that are unrelated to a present day Indian tribe fall outside the ambit of NAGPRA. This result renders meaningless that part of subsection 3(a) that gives a tribe ownership of remains found on its aboriginal lands (as designated in a final judgment by the Indian Claims Commission) precisely in the situation in which a cultural affiliation determination cannot be made.

Furthermore, the Magistrate Judge's interpretation improperly collapses the cultural affiliation inquiry that determines disposition into the initial determination of the Act's applicability. Sensing this particular problem, the Judge states: "NAGPRA recognizes two distinct kinds of relationships: The first is the general relationship to a present-day tribe, people, or culture that establishes that a person or item is 'Native American.' The second, more narrowly defined specific relationship establishes that a person or item defined as 'Native American' is also 'culturally affiliated' with a particular present-day tribe." 217 F. Supp. 2d at 1137-

38; ER 142. The Magistrate Judge further explains that the former "general" relationship may be satisfied "by showing a relationship to a present-day 'culture' that is indigenous to the United States. The culture that is indigenous to the 48 contiguous states is the American Indian culture, which was here long before the arrival of modern Europeans and continues today." 217 F. Supp. 2d at 1138; ER 142.

The Magistrate Judge's creation of the so-called "general" cultural relationship appears to rest on an assumption that there is a commonly-accepted generic "American Indian culture" that is distinct from a cultural relationship associated with a specific Indian tribe. However, the Magistrate Judge's assumption in this regard has no grounding in the statutory language or other indicia of congressional intent or legal precedent. Moreover, in concluding that the requisite "general" relationship was lacking here, the Magistrate Judge relied on its analysis of the cultural affiliation evidence – thus illustrating the overlap of analysis that its interpretation effectively requires. 217 F. Supp. 2d at 1138 n.39; ER 143.

The Magistrate's interpretation also cannot reasonably be reconciled with Section 3(b), which addresses disposition when a relationship with a presently existing tribe based on cultural affiliation or aboriginal land cannot be

determined.[16]/ Section 3(b) provides that in this situation, the remains or objects will be "disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 3006, Native American groups, representatives of museums and the scientific community." Although the Secretary has not yet promulgated those regulations, there is nothing in the Act itself which would require that custody or control of remains subject to Section 3(b) be awarded to an Indian tribe or that would preclude scientific study of such remains. The Magistrate overlooks Section 3(b), an omission which severely undercuts his suggestion that Interior's interpretation produces an absurd result not contemplated by Congress by allowing present-day tribes to take custody of remains of long-extinct peoples who may have differed genetically and culturally from the surviving American Indian tribes. 217 F. Supp. 2d at 1137; ER 141.

c. The Magistrate Judge's interpretation impacts other sections of NAGPRA, creating considerable tension with congressional intent respecting those sections. – The wrongheadedness of the Magistrate Judge's narrow

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[16]/ The Magistrate Judge's interpretation might not deprive Section 3(b) of all applicability, but it would limit the provision's applicability to only those rare situations in which no presently-existing tribe with a demonstrable relationship to remains or other cultural items wishes to claim them.

interpretation of "Native American" is even more manifest when one looks at other ramifications of this holding. NAGPRA's definition of "Native American" also applies to human remains and cultural objects in the control or possession of federal agencies and museums prior to the Act's enactment. 25 U.S.C. 3001(9); 25 U.S.C. 3002; 25 U.S.C. 3003-3007. Viewed in the context of these provisions, the error in the Magistrate Judge's interpretation becomes all the more apparent and far-reaching.

Under section 5 of NAGPRA, federal agencies and museums are required to produce inventories of Native American human remains and cultural items. 25 U.S.C. 3003 (a)-(b). If the museum or federal agency determines that they possess or control human remains that cannot be identified as affiliated with a particular Indian tribe, the museum or federal agency must provide Interior's Departmental Consulting Archaeologist a list of these culturally unidentifiable human remains. 43 C.F.R. 10.10 (g). The Departmental Consulting Archaeologist is required to submit the list of culturally unidentifiable Native American human remains to the NAGPRA Review Committee. Id. Section 8 of NAGPRA provides that the NAGPRA Review Committee is responsible for "compiling an inventory of culturally unidentifiable human remains that are in the possession or control of

each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains." 25 U.S.C. 3006(c)(5).

The Magistrate Judge's interpretation is in considerable tension with the NAGPRA provisions governing inventory and repatriation of remains or items in collections. See 25 U.S.C. 3003-3005. The reference to "culturally unidentifiable human remains" in museum collections indicates that Congress expected to include within the meaning of "Native American" remains where a cultural relationship with a presently existing American Indian Tribe is not demonstrable or apparent. See 25 U.S.C. 3006(c)(5).

For example, a requirement that a cultural relationship to a presently existing Indian Tribe be demonstrated before remains or other cultural items are considered "Native American" undermines Congress's intention that the inventory process not be unduly burdensome on museums. The Senate Report states:

> The Committee also recognizes that there are a significant number of Native American human remains, funerary objects and sacred objects for which the cultural affiliation may not be readily ascertainable. The Committee does not intend this Act to require museums or Federal agencies to conduct exhaustive studies and additional scientific research to conclusively determine the cultural affiliation of human remains or objects within their collections.

S. Rep. No. 101-473 at 12. See also 25 U.S.C. 3003(b)(1)(A), (C). If, as the Magistrate Judge held, the threshold determination that a cultural item is "Native

American" requires a determination whether there exists a cultural relationship between remains or other cultural items and a presently existing tribe, people, or culture, it would effectively impose on museums and federal agencies the investigative burden that Congress intended to avoid. By contrast, Interior's interpretation of "Native American," which does not include the criteria that there be a demonstrable cultural relationship to a presently existing tribe, imposes no comparable difficulties. Interior's interpretation is relatively easy to apply and is fully consistent with Congress's expectation that a cultural relationship to a presently existing tribe may not be readily ascertainable for many remains and other cultural items it intended to be subject to the Act.

Furthermore, a purpose of the inventories is to disclose to tribes and Native Hawaiian groups the content of collections so that tribes and Native Hawaiians may have information that may lead these groups to make repatriation claims to culturally unidentifiable remains or objects. See 25 U.S.C. 3004, 3005. A restrictive interpretation of "Native American" that excludes from the inventories remains or objects for which there is not a demonstrable relationship to a presently existing tribe undermines this fundamental purpose.

2. Interior's interpretation is consistent with Congress's intent and purpose in enacting NAGPRA and does not produce an absurd result. – With respect to the

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TESTIMONY OF DARRELL HILLAIRE, CHAIRMAN
LUMMI INDIAN NATION, STATE OF WASHINGTON
FOR THE OVERSIGHT HEARING RECORD- ON THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

Thursday, July 28, 2005
Submitted to
The Senate Committee on Indian Affairs

The Lummi Indian Nation is very concerned about the lack of legal protections needed to assure that (1) our ancestral remains are repatriated, and (2) that our Nation is always 'consulted' whenever and wherever the remains of our ancestors are discovered. The enactment of the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et.seq.*) was a first step in the right direction, to provide such an assurance to the Native American People and to re-establish their rights to have their ancestors remains repatriated for reburial. It was critical to the Native American communities and Nations that they secure a legitimate right to be at the tables that review and determine the cultural and ancestral affiliations of the remains discovered, dug up, removed, and stored in various governmental, public, and even private institutions. Consultation is critical in that the 'true experts' on Native American Culture are the Native peoples themselves. Desecration of their ancestors' remains and burial grounds, is an insult and pain the modern day descendants have to endure until repatriation and reburial restores the integrity of the original burials.

The impacts of the Bonnichsen v. United States, 357 F.3d 962 (9th Cir. 2004), decision shall be extremely detrimental to the interests of Native Americans if left unchecked by the Congress. The idea that Native Americans will not be consulted in the process of determining the status and disposition of the remains is very trying upon the Native Peoples and communities. We have a right, or had a right, to be consulted and at the review table. The Review Committee, as originally established, provided three seats for the Natives and four for the scientific community. Both sides, in the established

process, had input into the final decision making. Now, with the 9th Circuit Decision, the Native Americans are, once again, left involuntarily muted.

We recognize that the 'territory' of the modern day United States was not '*terra nullius*' at the time of the alleged discovery of unoccupied lands. Whether it is the Native Americans of the continental United States, or the Natives of Alaska and Hawaii, we all proudly proclaim that we are indigenous to our respective territories. We all know that Euro-American diseases killed off the majority of the Native populations before first official contact between them and the United States. We all had already experienced a devastating catastrophe. Much of the transgenerational knowledge was destroyed or eliminated during the times the plagues found virgin soil amongst the natives. Our communities were robbed by the deaths of leaders and elders, in addition to the tremendous impacts upon the young. We survived. We have continued to maintain our separate cultural identity as a community of people distinct from that of the general populace of the United States. We still identify with the aboriginal lands and the mass number of graves, burial grounds, and other sacred places and spaces found outside our modern day land holdings.

The Lummi Nation, in the Pacific Northwest, has been impacted by anthropological and archeological digs that have taken place at locations targeted for development- on private property, state property, and federal property. The inadvertent discovery of ancestral remains necessitates that our nation be contacted, if the remains are found in our aboriginal territory. The Tribes of Northwest Washington are in a slightly different position then some of the other tribal communities in that we had litigated the boundaries of our aboriginal territories, most recently, in the fishing rights cases of the 1970's. This was supplemental to the older Indian Claims Commissions findings. Regardless of the outcomes, the Lummi people believe that they were never given full recognition of their actual aboriginal boundaries. And, we claim the rights to all ancestral remains located inside those boundaries.

However, it is recognized and proclaimed in the federal district court decisions that the Lummi are composed of membership that derived from other tribal affiliations. We have significant membership of tribal Indians that are Samish, Dwamish, Jamestown S'Klallam, and Semiahmah. The Samiah and S'Klallam are both re-recognized federal

tribes and are dealing with their own repatriation issues. The *new* Dwamish is not a federally recognized tribe and is not supported by the Lummi Nation. The Samish, guided by a lawyer involved in indigenous questions, is presently in conflict with the Lummi Nation; in that the Samish are involved in authorizing the anthropological/archeological digs taking place upon burial grounds located within the historical, Lummi aboriginal territory. The Lummi have no conflicts with the Jamestown S'Klallam.

But, the story changes when we look to the question of repatriation activity in the aboriginal Semiahmah Territory. The recent discovery of ancestral remains in the northern part of the Lummi territory was a subject of dispute within the tribe and between tribal groups. This is because the aboriginal Semiahmah, at treaty time, had split up into two groups-one went to British Columbia and the other relocated on the Lummi Reservation. They relocated to the Lummi Reservation because their leadership was married into the Lummi leadership, binding the nations to peace relationships before the coming of the non-Indians. The modern day descendants of the Semiahmah, whether or not they were located in British Columbia or on the Lummi Reservation, absolutely opposed any digging up and removal of their ancestral remains.

What happened was another major desecration of the Ancient Semiahmoo Village burial grounds took place. This was the second time in recent history. The site was known to be a burial ground. The site was documented. The first major impact was in the late 1970's. The second act took place in the late 1990's. The first did not result in any lawsuits; the second became the subject of litigation in the federal district court. What was common to both impact dates was the fact that neither the local government nor their hired archeological experts believed that they had to 'consult' with the Lummi Nation before proceeding, or even after discovery of numerous ancient burials.

In the first instance, the Lummi Nation became involved when a local school child brought an ancient Indian skull into a classroom and proudly proclaimed it was a 'Lummi Skull.' Construction workers had continued to unearth remains under the watchful eyes of the local university archeological staff. The Lummi were never notified or consulted. The Lummi Nation negotiated with the University and repatriation of the remains took place. The Lummi documented this journey of repatriation in a video

production entitled, "A Final Resting Place". What was evident from the experience was the emotional, spiritual, and social turmoil the desecration had upon the tribal people and the tribal community. The Lummi People lived in fear that it could happen again.

The second desecration took place under the expert surveillance of a hired archeological firm from British Columbia, with offices in Colorado. A sewer plant was going to be constructed upon a known burial ground. '*Sewer Service*' type notice was given to Lummi by the firm. Consultation was not formally activated or initiated. The numerous ancestral remains that were dug up were quickly and secretly transported to the firm's Colorado office for study and storage. The Lummi Nation inadvertently learned of the activity and immediately filed legal actions against local government and the private firm. In addition, tons of burial ground material were transported and dumped upon private property as land fill, miles away from the ancient village site.

The sewer development project was partly funded by the Department of Agriculture. The result, of course, was federal involvement in the disposition of the legal questions associated with the denial of Lummi rights to be consulted. At first, the defendants tried to prove that the Semiahmoo Village was not associated or affiliated with the modern day Lummi Nation. This legal maneuver failed. Eventually, the Lummi prevailed on all the legal questions and challenges surfaced in the district court. After years of litigation, both the local government and private firm had to settle. The damages to the Nation, and the recovery of expenses and legal fees, amounted to millions of dollars. The Lummis that were recognized as lineal descendants of the ancient Semiahmah, and had direct family ties to the Semiahmoo Village Cemetery were class action litigants. The Lummi Nation leadership stepped forward and represented them well throughout the process.

The problem with the Semiahmoo Spit properties is that it is prime beachfront property that is under constant threats of development. Recently, the Lummi Nation was informally notified by an ex-employee of the City of Blaine (who was involved in the settlement action), and an ex-construction worker, that a lot of the land of the Semiahmoo Spit was removed under a contract issued by the local government, and hauled to private land fills, in order to make room for placing 'dreg fill from the harbor located inside the spit'. Again, there never was any official notice to the Lummi Nation, never was any

consultation, and the facts are just now being brought to the attention of the tribal government. If this is true, then the conflict is not over. In the mean while, small property owners are constantly seeking permits to disturb discovered burials for water lines, sewer lines, and swimming pools.

In the early 1980's, an ancestral cemetery located on one of the islands that was within the definite aboriginal territory of the Lummi Nation was being disturbed for development. It was private investment into condominium development that involved the Washington State governor's family. In the final resolution, as a result of negotiations, the lands were permanently set-aside into protected status. Thanks to U.S. Congressional Appropriations the Lummi Nation was able to purchase the property at a reduced rate and place it into non-profit protection; but the land was never placed into trust status by the Department of Interior.

Another impact example is that of the 'Pearl Little Estate'. She was a lineal descendant of the aboriginal Lummi People when they still occupied San Juan Island. Over the generations, her estate was inherited and sold. Located upon the private property is a known burial ground. Past owners refused to negotiate protection for the site. However, a recent purchaser has come forward and has offered to set the burial site aside and to clearly designate the boundaries. The problem is that there are numerous burials located on 'private property' without incentives for the owners to disclose discovery or to set-aside the land or transfer its ownership to the Lummi Nation for protection as a permanent, known burial ground. The issue of singular burials is one thing, but the conflict really surfaces when the land holds ancestral cemeteries.

The legal action associated with the Semiahmoo Burial Ground, addressed above, was successful due to aggressive legal action taken by the tribe. It was successful because the law firm hired had experience in the area of law being challenged. This action may not have prevailed had it gone up to the 9th Circuit Court of Appeals (in light of the *Bonnichsen* Decision). It was originally argued in the Federal District Court in Seattle. The NAGPRA does not provide the tribes with complete power over ancestral remains or the Repatriation process. But, at least, we do have or had the right to be consulted. We believe that the 9th Circuit Opinion endangers the nominal rights we have secured since

1990. We believe that Congressional action is necessary in order to clarify for the Courts the intent of Congress that 'Consultation' is as important as 'Repatriation'.

The Lummi Nation has reviewed the Oversight Hearing Testimony of Walter Echohawk, Staff Attorney for the Native American Rights Fund, and supports his position and recommendations. Also, we have reviewed the Oversight Hearing Testimony of Professor Bender, Arizona State University College of Law as well. We believe that the expertise and experience of both should be given great weight in the final deliberations of the Committee on the resolution of the problems generated by the *Bonnichsen* decision.

It is difficult for Native Americans to be told that we have no rights to repatriation of our ancestral remains or to even be consulted. There are hundreds of thousands of Native American remains that have not been repatriated. There are challenges that proclaim that the modern tribe cannot establish the necessary cultural affiliation to establish the right to demand repatriation. It is spiritually, emotionally, socially, legally, and politically tragic to rub into the faces of the Indian Nations, and Native Americans, that 'you cannot establish' the necessary historic and cultural affiliation. It is a way of telling the 'Victims' of the Native American Holocaust that they have no right to the bodies and remains of their ancestors because we were not suppose to exist by this day and age.

The tribal and cultural identities of the Native Americans have been under attack for centuries. We have been branded under all the derogatory classifications that could be imagined by the non-Indian society and religions. The whole collective initiative of American Society has been to 'Kill the Indian to Save the Man'. Our people have continued to suffer from Historical Traumatization. Every aspect of who we are, as a distinct race(s), and as tribal nations, has undergone constant challenge and attack. It is as if it is really believed that we have no human rights. Denying Native Americans either Consultation or Repatriation as a matter of right is dehumanizing. It is a process in which the 'victims are further victimized' in attempts to mute their outcry for justice. What is even more pathetic is that the 'scientific community' believes that the discovered remains are their private or institutional property and the Native Americans do not have a right to their 'discovery'.

It is interesting how 'terra nullius' was originally used to argue that the North, Middle, and South American Continents were unoccupied and the 'Discovery' entitled the first Christian Nation to make the discovery to all rights and claim to the land and natural resources, even though the three continents was occupied by thousands of aboriginal Indian Nations. Now, the American scientific community would like to have some type of 'terra nullius' domain where they can dig and unearth remains without external controls, or a duty to consult, since the 'tribal nations' cannot prove affiliation to ancestral remains discovered in their aboriginal territory. This is effectively what the *Bonnichsen* decision created… a terra nullius domain for scientists that can now claim a superior right to the Native remains…because there are 'no natives' with a right to speak out.

The Lummi Nation firmly believes that the Native Alaskan and Native Hawaiians have a right under NAGPRA as much as any Indian Nation located within the continental forty-eight states. It is a legal fiction to hold that there were no Alaskan Natives or Hawaiian Natives. They were discovered at the same time as their aboriginal lands were encountered. These were aboriginal lands owned by them. The Discovery Doctrine, as inherited by the 1787 United States, after the 1776 Revolution, was addressed in the Supreme Court Decision of M'Intosh. But, as promised in the Northwest Ordinance of 1787, Native title would be respected and the natives would be treated with honor and respect. They were not to be cheated out of their rights, lands, and resources. This applies to the Alaskan Natives as much as the Hawaiian Natives. Without conquest by war, the United States diplomatically negotiated securing titles from the Native Nations.

What we want to elaborate upon is that our 'ancestral remains' were never intended to become the private property of citizens, scientists, or public or governmental institutions. At the Point Elliot Treaty Negotiations of 1855, Chief Seattle spoke on behalf of the members tribes that formed that 'Dwamish, Suquamish Alliance' as follows:

> "*We will ponder your proposition, and when we have decided we will tell you. But should we accept it, I here and now make this first condition: that we will not be denied the privilege, without molestation, of visiting at will the graves of our*

ancestors and friends. Every part of this country is sacred to my people. Every hillside, every valley, every plain and grove has been hallowed by some fond memory or sad experience of my tribe. Even the rocks that seem to lie dumb as they swelter in the sun along the silent shore in solemn grandeur thrill with memories of past events connected with the fate of my people, and the very dust under your feet responds more lovingly to our footsteps than to yours, because it is the ashes of our ancestors, and our bare feet are conscious of the sympathetic touch, for the soil is rich with the life of our kindred."

As Senator Dorgan had acknowledged, even the treaties reserved the rights of the tribes to preserve and protect the burial grounds of their ancestors. Even if the treaty wording did not specifically address the issue, then it is recognized as 'reserved rights' of the tribes. The treaty was a grant of rights to the United States, and anything not given was reserved (Winans, 1905). In the case of the Point Elliot Treaty, at the negotiations, Chief Seattle made the specific point that we (as tribes) reserved the right to protect and visit our ancestors' graves. He declared that the visits should be 'without molestation'. We hold that for the scientific community to legally prevail under the fiction that the aboriginal Indian Nations do not have rights to the remains is a form of legal fiction that qualifies as 'molestation'.

Chief Seattle did not condition acceptance of the treaty with the idea that 'we will remove our ancestors from their graves' (and then have them repatriated). He conditioned the treaty relationship under the idea that their burial grounds were a permanent part of the environs that were aboriginal lands owned by the tribe(s). We, as Indian people, would go there (wherever the burial was located) to visit. We did not expect our ancestors to be dug up and handed over to us. To dig up our ancestors, with the intent to study them (as if they were animal remains) and then hand them over to us (in the repatriation process) without ever having consulted is dehumanizing.

During World War II, Hitler killed the Jews and burned or buried their bodies; over time the United States killed us and stored our bones in museums, universities, and private collections (next to other 'big game' trophies). The correlating scientific community sees the collections as private or public property. Of course this is not an

acceptable governmental practice today; but the scientific community would like it to be. Their victory in *Bonnichsen* wipes out our right to be consulted during what we consider an act of inhumanity practiced by one (dominant) society against another (smaller society). Even Stallin, Chairman Mao, and Sudam Hussein buried the bodies of those they massacred. The bodies of our massacred are still in museums and university collections because we cannot meet the criteria to prove cultural affiliation. Now, the destruction of our right to be consulted makes it ever more impossible to recover our ancestors' remains.

We, the Lummi Nation, pray that Congress shall reverse the Bonnichsen Decision. We have an inherent right to the remains of our ancestors. To many that have recently moved into our 'aboriginal territories' it seems that the graves reach back into ancient history. Many do but some are recent in the memory of our people, and the definition of recent incorporates the last two hundred years. Let me give an example of two oral histories found within Pacific Northwest Native American communities (from the Spokane Reservation and the Lummi Reservation). Both stories come from Native American elders that are War Veterans. The Spokane Indian Veteran served in World War II, the Korean War, and Vietnam. He was raised by his grandparents, since his parents died when he was a little boy. His grandfather lived to be 114 years and his grandmother to 109 years old. At the age of ten he was brought to get advice from two elderly sisters that were in the village. The oldest sister was 140 and the younger was 138 years old. This dated his advice back to the years 1798 and 1800. The Lummi Indian Veterans served in Korea. He was witness to and listened to the advice of an elder relative that came down from British Columbia, in 1932, to give advice to tribal members on the traditional society. That elder was born in 1799. Both men testify to advice deriving from a time period that pre-dates the treaty negotiations of 1855. In light of this testimony, it may be easier to understand that the Indian People have not forgotten their dead, even if their births are separated by two hundred years minimum.

Our songs, dances, ceremonials, and sacred philosophy (or cosmology) are transferred from one generation to the next. We have a sacred contract with our ancestors. We have not forgotten them. The knowledge they have pasted down to each generation is transferred to the next with no or very little change. For example, even the new Peyote

Church that has been spreading across the North American Continent amongst the Indian Nations has been radiocarbon dated to a minimal of 10,000 years old. To the Native Americans this is still a new Native religion. Our traditional cultures are guided by the teachings of our ancestors. We have a spiritual duty to protect their burial sites that is supreme to any man-made law that has evolved since the formation of the United States and individual states, and definitely before the concept of private property was ever attached to the lands located within our aboriginal territories.

We thank the Senate Committee on Indian Affairs for holding this Oversight Hearing on the clarification of the definitions in the Native American Graves Protection and Repatriation Act.

Hy'shqe.

ORPHANS OF MOTHER EARTH- PACIFIC NORTHWEST TRADITIONAL INDIANS BATTLE TO EXIST

By Jewell P.W. James

@ February 19,1991
@ July 2005

***Introductory Note**: While this chapter deals with some of the historical and current concerns of Coast Salish traditionalistic thought on changes in relationship with the environment that is being superimposed upon Indian Society, ultimately the question is 'How can we bridge the two worlds- the Indian and dominant non-Indian- such that the values?' of the former can be considered and incorporated by the latter into natural resource harvest management regimes and development plans? The writer is encouraged by the work of Dr. Gregory Cajete on Native Science and believes that he has initiated a line of interpretation of native paradigms that can translate into non-Native management regimes. However, it remains to be seen as to whether Academia will accommodate these lines of teaching, and whether government natural resource management agencies will accommodate traditional native values and concerns into the management planning process. In addition, it will be up to modern tribal governments to work with their traditional communities to develop the draft proposals on native management recommendations that can be submitted and subjected to the review process. Of course, their recommendations will impact modern economic values and considerations and will therefore be subjected to hard review & criticism. However, failure of the tribes to react and offensively seek to secure protections of sacred sites and places will have devastating, long-term impacts upon their tribal communities. So the stakes are high but the investment is worth it.*

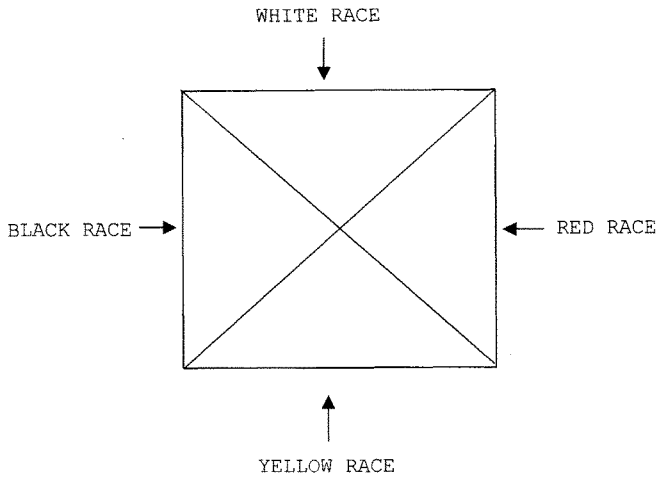
When we begin to study the history of religion and its tremendous impact upon society, we begin to understand that it is a 'human institution' that is utilized to bring the masses together into one common system of comprehending the reality of the world around them. Human beings are a part of the surrounding environment. How they understand the environment influences their relationship with it over multiple generations. Especially over the past two thousand years, wars of extermination have been waged in the 'Name of God.' The aggressors see 'themself' as the defender of 'their right to force their God upon the non-believers.' Xenophobic

classifications of the culturo-religious others' helps nullify any beliefs or feelings that perhaps they (the aggressor) could be wrong. Societies tend to form cultural collective orientations that overly generalize their perceptions of others, to the extent that it is easier to accord them basic human rights. People, in societies, tend to specialize in being a part of those they live with. They are experts in what they know and choose to accept (as individuals & in collectives) and often choose not to study the culturo-religious others in dept or detail. Most often they see the differences more then they ever seen or comprehend the commonalities. Process wise, they first see your race, then your gender, then your age class, and after that began to pigeon hole you into finer categories of which 'religion' is a major factor differentiating your group.

A people's understanding of the religious and spiritual tends to help form and mold their concepts of the sacred. The complexity and beautify of the complex world around us moves us, as human beings, toward believing that someone or something build and created all that we see and experience. All people were tribal at one time and lived with the earth. At one time they were connected with their immediate environment. Their songs, dances, ceremonials, and systems used to transfer sacred knowledge to subsequent generations became the foundations for their cosmic awareness. These aspects of human thought process help develop the respective society's sacred philosophy over the long-term. Translated into the written word it becomes the foundation for their religion experience in that it, now, manifests the written word of 'God.' But, before that these experiences and sacred concepts of awareness molded the 'spiritual umbilical cord that tied the human being to the earth.' The evolution, as many writers will tell, of the recent 'Father/Son God Religions' has done much to disconnect us from our 'Mother Earth Spirituality.' Eventually, ethnocentrically, we began to see the 'others' as being 'blind' to what we know is the 'whole truth.' We come to understand that 'God' gave 'our race' dominion over the whole earth, superior to all others.

This view of having an absolute understanding of the 'truth' from the view of the four different races that compose the human family can be depicted as shown in the simple diagram provide below. Imagine that you are looking down upon the top of a pyramid, and you can see all four sides equally. We have placed one of each of the four races (White, Black, Yellow, Red) on their side of the pyramid. We are reaching toward showing how societies develop a concept of the religious/sacred based on the relevance of their position or view.

In this view (depicted below) of the world the individual (as society) sees the 'Pyramid' only from the ground and only from the central spot (as the majority) of their side. They cannot see the other three sides of the 'culturo-religious pyramid.' However, they absolutely believe in what they see and experience as the real perception and understanding of 'god.' Thus, the four races of the world, at one time, evolved their understanding of the sacred from their part of the earth and from their view and understanding. Above we can see down upon the 'culturo-religious pyramid' and see that all four races of humanity (White, Black, Yellow, and Red) have a real view of 'their' limited world. Because of where they stand they see (believe) the whole pyramid to be all white, all black, all yellow, or all red. Each believes they see the whole reality of the pyramid. Collectively, maybe, they ultimately believe in the same concepts of god and the sacred, if they could only get past the culturo-racist biases superimposed upon them by the social collective they are a member within. Each believes themselves to be right. Each believe they must defend any attacks upon their perceived and understood reality of 'god' and the 'sacred.' From this view of real wars were justified.



With the Age of Discovery, as so much corresponded with the Age of Enlightenment' and the 'Reformation,' large populations were disconnected from their evolutionary roots. They brought their belief systems with them, much in the form of religion. While they encountered other people and races with different religious persuasions or doctrines or philosophies, they did not bend with flexibility and understanding; instead they became xenophobic, self-righteous, ethnocentric, anthroprocentric, and religio-centric. They did not and would not accept the spiritual views of the encountered people. The encountered people were considered less than human or unenlightened with a soul and cover possibly be converted before they are executive for being infidels. It was the conquer's god that had to be accepted or no god could defend you (the native) from the impending & justified massacre.

Native American Indians, as aboriginal people, have experienced this polarization of religious belief. It is not uncommon. It is a pressure experienced by all indigenous people that have been conquered or colonialized by foreigners. Our histories are mutually full of the stories of the 'first missionary' that came amongst us, to convert us, to save us, to prevent our children from going to 'hell.' Hereunder, we shall begin to deal with the Native American experience as so much pertains to the Lummi Indian People as members of the Coast Salish Nations of the Pacific Northwest part of the United States.

It is not simple to explain the difficulties faced by Pacific Northwest Indians, when it concerns their traditional, ceremonial practices and concepts of the sacred. However, what is true is that there has been a lot of damage caused by the contacts between Native society and the non-Indian Euro-American societies. Preceding actual contact, of course, was the devastating affects of European diseases that spread from village to village, all across the continent, from the east to the western shores (Atlantic to the Pacific Ocean). The diseases were carried from one tribal group to another, as natives fled from village to village trying to escape the death that came to the people. This, in turn, spread the diseases more rapidly. Whole strands of knowledge were taken out of the traditional communities by the frequency of death- that struck the elders quickly. Whole villages were vacated as the people fled from this invisible killer of women, children, elders, and warriors. Life in the Pacific N.W. was already changing before the first physical contacts were made between the races.

Many modern writers claim that there were very few Indians in North America, or the Americas at contact. It is a form of denial of the devastating impact of disease and contact between the races. Chief Seattle said, "*There was a time when our people covered the whole land, as the waves of a wind-ruffled sea cover its shell-paved floor. But that time has long since passed away with the greatness of tribes now almost forgotten.*"

Erdrich, in Where I Ought to Be: A Writer's Sense of Place (N.Y. Times Book Rev., July 28, 1985, at 1, 23) stated it as follows: "*Many Native American cultures were annihilated more*

thoroughly than even a nuclear disaster might destroy ours, and others live on with the fallout of that destruction, effects as persistent as radiation- poverty, fetal alcohol syndrome, chronic despair. Through diseases such as measles and small pox, and through a systematic policy of extermination, the population of Native America shrank from an estimated 15 million in the mid-15th century to just over 200,000 by 1910. That is proportionately as if the population of the United States were to decrease from its present level to the population of Cleveland. Entire pre-Columbian cities were wiped out, whole linguistic and ethnic groups decimated. Since these Old World diseases penetrated to the very heart of the continent even faster than the earliest foreign observers, the full magnificence and variety of Native American cultures were never chronicled, perceived, or known by Europeans."

Then the explorers came, some sailing around the southern tip of South America and coming up the western shoreline, into what became named the Straits of Juan de Fuca. Some came by land- the English and French crossed the Canadian portion of the continent, to the Frazer River Valley, and then south into present day Washington. The Spaniards came up the coast from Mexico. The Russians were coming down the northwestern coast. In the beginning, the explorers were looking for the 'Northwest Passage' but eventually most began to follow the enriching fur trade. The Americans came by sail and later along the route that became known as the Lewis and Clark Trail (or the Oregon Trail). The explorers were mapping the maritime (shoreline) geography. Others were mapping the routes over the mountain ranges that separated the coast from the eastern portion of the continent. But, more importantly, all were laying the claims to the territory, as the first Christians to represent a sovereign that could own the territory under the international Doctrine of Discovery.

Lewis and Clark, in the expedition (1803-06) across the continent, on behalf of President Jefferson, ended their journey amongst the Chinook Indians on the Coast of Oregon, at the northwest side of the mouth of the Columbia River. The Chinooks were prominent traders amongst the coastal and inland tribes. Although nearly powerless today, and battling to be recognized by the federal government, the word Chinook had a

derivative value in the idea of trade. Thus, Chinook Jargon was developed in two dialects - in land version and coastal version. This was the language of the commerce between the tribes and the foreigners.

The Trading Posts of British Columbia, in the Fraser Valley and on Vancover's Island, became centers for the Indians of Puget Sound to bring their trade goods and make exchanges. The fur trade was the big reason for the trade centers. On this side of the mountain range, the language used by the Indians and traders was commonly called Coastal Chinook Jargon. It was composed of words that came from the Spanish, French, English, Russian, and Indian languages (of which several tribal languages and different dialects were borrowed from). The jargon was limited to about three hundred words. The exchanges and conversations between the races were conducted by the use of this jargon. Not very many Indians or non-Indians could use the jargon, and were forced to rely upon the few that did speak it. Later on, this jargon would be used as the foundation for the negotiation of several treaties between the United States and the Coastal Salish Indian tribes.

All to often, the missionary priests came into the new Indian territories, to save the souls of the heathens and convert them to Christianity. This was believed to have a civilizing effect upon the tribes and their people. So, we witness the explorers followed by the traders and supported by the priests. Eventually, the traders set up their own posts and forts. These became places for others to settle. Before to long a settlement was established inside Indian Country. Over time more and more settlers would reach the fort and stay. The longer they stayed the more they would begin to expand their

settlement away from the fort and claim open lands (usually Indian village sites) for homesteads and farming.

If we jump a little forward in time, then for the Lummi Indians, the Catholic Priests were the first to come into their traditional homelands and began Christianize and civilize the

heathens (the Lummis), before settlers began to arrive. The Lummi Catholic Church (St. Joachim's) is located on a treaty established reservation and is one of the oldest churches in the territory. Originally it was located at the Lummi Fish Point Village located at the southwestern mouth of the Nooksack River. But the land of the village was included as part of the treaty land assignment secured to Tsee-wana-muck otherwise known as Jim Eldridge (referenced as the Julius Charles property today). During the floods of the mid-1890's, it was decided the government and church buildings should be moved from the river flood plain. It was at this time the government found it was in a state of trespass upon a treaty assignment. So, the church was moved to land owned by Chief Henry Kwina (an early convert to Catholicism), and the government school building was located on land owned by Chief August Martin.

Going back to our point of departure, contact with white (foreign) societies would institute rapid change in technology of the tribes- per the introduction of metal and other trade goods. However, the tribes continued to prosper on the harvest of their traditional foods and maintained their interdependence on the rich natural environment. Their traditional culture was based on an indigenous cosmology that incorporated respect for the natural balance of relationships. Song, dance, ceremony, and sacred knowledge was a part of the tribal collective knowledge system that assured no one person over-harvested or took to much from nature.

But, this relationship with nature was contrary to Christian doctrines that advocated dominance over nature- that man was to inherit dominion over all things. Indian beliefs systems were considered heathenistic, athenistic, agnostic, and if not the work of the devil then at least the beliefs of the uninstructed savage. Thus, missionary zeal was to overcome this state of affairs- to force or voluntarily secure the conversion of the savage tribal member. This was believed a necessity that dates back to the debates that transpired right after Columbus

discovered the Western Hemisphere. The conversion system was well entrenched by the time the Euro-Americans began to arrive in the Pacific Northwest. Forced conversion to the Christian dogmas were central to Indian/Non-Indian relationships for the prior three hundred years (1492-1792).

Chief Seattle was only about seven years old when Captain Vancover sailed into the Straits of Juan De Fuca (1792). He and his uncle were one of the first to make contact with the non-Indians. He was enthralled by this first impression. However, as he came to know the white man and to understand his religion, he had this to say at the treaty negotiations: *"Your God seems to be partial. He came to the white man. We never saw him. We never even heard His voice. He gave the white man laws but He had no word for His red children whose teeming millions filled this vast continent as the stars fill the firmament. No, we are two distinct races and must ever remain so. There is little in common between us. The ashes of our ancestors are sacred and their final resting place is hallowed ground while you wonder away from the tombs of your fathers seemingly without regret. Your religion was written on tables of stone by the iron finger of an angry God, lest you might forget it. The red-man could never remember it nor comprehend it. Our religion is the traditions of our ancestors, the dreams of our old men, given them by the great Spirit, and the visions of our sachems, and is written in the hearts of our people."*

Over time with post-contact shock, colonial and then federal and state policies of non-Indian governments, and their churches, would force drastic and rapid changes in the Pacific Northwest Natives' concepts and understandings of the spiritual, the ceremonial, and the sacred. Each generation of tribal Indians have confronted complex and vicious social, political, legal, theological, and economical cycles of oppression that seemed to always eventually set target on destroying the last fragments of Native spiritual beliefs and practices. If there really was a social shock caused by the contact and interaction between the two races, then it was a shock created by the forced changes that transpired in tribal

societies- especially in the concepts of the sacred and the value, rules, and taboos that governed over tribal peoples' relationships with the real world around them.

Try to understand the following parabolization. In the 1950's, a young Indian boy, living on the Lummi Indian Reservation woke up from a seemingly recurring dream. In it:

> *"He was running. Something fearfully bad was after him. It always approached from the same direction. He fled through the parched, yellowing, knee high grasses of the open field in a southerly direction, stopped and turned around. It nearly caught him; but, then, a rainbow descended to the base of his feet, arching down from the north. He ran up the multi-colored arch, feeling more and more safe as he reached the peak. He reached the top of the arch, and then slid down to the other end- going from a south to a northern direction. He landed in another field, warm golden grasses blowing in the wind. The field had only one thing in its center- an old, old cedar stump. He ran to it and climbed to the top. As he stood there, he could see the top and the old tree rings, it was once a huge old tree. The center was hallow and dark. He climbed in and sat down, knees up, arms wrapped around his legs, in a fetal position. He was safe once again. It could not reach him. The top of the trunk closed. His heart began to pound louder and louder, until it seemed his ears would burst. The tree began to grow around him, pushing him upward and out. The tree forced him out and through the top, which was now covered by a cross-hatched screen. As he was forced through, he felt multiple, excruciating pains as his body was shredded, and he screamed out. His heart beat louder than any drum, he painfully screamed into existence."(#1)*

There was a time that this dream would have had great significance and traditional elders would have been able to help the youth understand the importance of this dream

manifestation. The process of life, death, and rebirth are spiritual aspects of many tribal societies worldwide. The Judeo-Christian belief that "Jesus died on the cross and had risen three days later" (#2) is no different. And, Eastern culture is full of gods and heros that fulfill the same mysteries that had befallen the life and times of Jesus. To the annoyance of the organized Christian and Catholic Churches, history is full of these models and examples. Most people do not know that modern history has, at least, seventeen father/son god religions that share the same story as Jesus and has many of the same teachings. In comparing the religions, you must take notice of the common themes and teachings incorporated throughout all seventeen of them.

However, from 1492 to 2003, the two worlds- that of the indigenous peoples of the Western Hemisphere and the Old World would continue to collide. The new religions that came to the Americas would nurture policies affecting the Native Indians (Indios) that were compatible to the interests of enriching Kings, Queens, and a newly developing merchant class, as well as enriching the Holy Catholic Church. Not only were the Native Indian people destined to be constantly considered non-Christian, and therefore unacceptable to Christian society, but the colonialization process would encourage their enslavement and the eventual extermination of many tribes. When extermination failed then the final solution was to relocate the remaining Indian peoples onto isolated reservations of land (1832-1887).

We need to begin earlier to more fully understand the evolving relationship between the Nation and the Indian tribes. One man came to the Americas with Christopher Columbus. He was encouraged by his father to go to the new world as early as 1502. He witnessed, as a young man, the atrocities committed against the natives by the conquistadors and colonialists that relocated to the New World. He would become the first-born-again Christian convert (1507) in the Western Hemisphere. He found a deep respect for the natives and would spend the next several decades in their defense. His name was Bartholomew de Las Casas (1474-1566)(#3).

In 1550, King Charles V of Spain would summon him to debate Juan de Sepulveda (1490-1573)- who had never laid eyes on the Indian people nor traveled to the New World. The former argued the Indians deserved to be Christianized by kindness and good deeds (#4). The latter considered them to be heathens, not the children of Adam and Eve, and only worthy of the Sword. Sepulveda sought to defend the rights of the Conquistadors to enslave the Natives and take all their property and possessions for themselves- as the spoils of Christian war against the infidels. Sepulveda relied upon the teachings of Aristotle and modified the lessons of the bible to meet his needs. It has been said that neither man won the debates; although Bartholomew de La Casas had read his 800 page testimonial to the Council of 14. During his life-time he would continue to seek the protection of the Native Indians and to demand a recognition of an "Apologia" on their behalf. (#5) We ask, Why would the Church fail to come to the defense of the Indians (Indios)?

Well, Martin Luther posted his 95 Theses on the Church doors at Wittenburg and gave birth to Lutheranism (Protestant Reformation) and caused a large exodus of souls from the orthodox church- his movement and that of Calvin (Father of Calvinism) had began to empty the Catholic Church's Bank of Souls. It was the responsibility of the church to continue to find new recruits to fill this bank account with their souls. The New World promised not only an enrichment of the Church treasuries- through new found gold, silver, and lands- but, the Bank of Souls could be replenished if the new found peoples were declared the Children of Adam & Eve and could be convinced or forced to convert to Christianity (#6), at least before they were executed.

The Bible talks about Judas Iscariot selling the body and beliefs of Christ for 30 coins (#7). The Church would receive more then thirty coins in this exchange. Old Scripture testified that you go as far east as you can and you will come to the Garden of Eden (#8). Eventually, east meets west (#9). The discovery of the new people led the Church to predict a

land bridge connecting the Old World to the New World (about 1504); after all, Church doctrine preached that all people were the Children of Adam and Eve so there had to be a connection, it was logical at the time. The discovery of the new world would expedite the corruption of this doctrine. The Church, and colonial populations, would give birth to "racism" and the acts against the Native Indians would be justified- for no one had proof that they were connected to the others. Europe, Africa, and Asia were all connected and it was conceivable that all their children could come from the same first parents, biblically (#10). After 1492, the Church would cooperate with the Sovereign Kings and Queens and claim different portions of the New World- the royal family received new territory and the church received new souls. This guaranteed a fair share of the bountiful riches to the Church- since the discovery of gold, silver, precious stones would be divided between king, church, and conquering discoverer.

As time passed, the North American Colonies gave birth to the United States (#11). The Churches would continue to maneuver into the good graces of politicians, assuring their access to the Indians' souls.

From 1792 to the 1870's, the Church would move in to the newly discovered and yet-to-be-explored Pacific Northwest. Converting Indian people and saving their souls was still the manifest goal- save and Christianize the heathens. The new, fledgling United States would aggressively pursue control and negotiate the withdrawal of Great Britain (#12), Spain (#13), and Russia (#14) from the Pacific Northwest. These withdrawal treaties would substantiate U.S. claims to this region for future American trade and settlement (#15). In conformity to constitutional powers vested in the President and the U.S. Senate (#16), and in accordance to the Northwest Ordinance of 1787 (#18), and as agreed in commitments for the withdrawal of other foreign sovereignties, treaties were negotiated with the Pacific N.W. Indian tribes. The treaties would open large territories of ceded lands for new settlement. The United States promised to buy the land for their people from the

Indians. The Indian treaties would eventually be interpreted by the U.S. Supreme Court to be a diplomatic situation where the tribes gave to the United States certain rights & territory and reserved those powers, lands, natural resources, and rights not specifically given (#19).

Yes, there are parts of the treaties that are not written but still the Indians have their rights. These rights are reserved rights and this is as important to the Indians as the reserved rights of the citizens (United States and the individual states) hold in relation to their delegation of powers under the respective popular sovereignty constitutions. Our rights to believe in our own religious way and to practice this spiritual freedom was not surrendered. At the treaty negotiations, Chief Seattle continued: *"We will ponder your proposition, and when we have decided we will tell you. But should we accept it, I here and now make this first condition: that we will not be denied the privilege, without molestation, of visiting at will the graves of our ancestors and friends. Every part of this country is sacred to my people. Every hill-side, every valley, every plain and grove has been hallowed by some fond memory or sad experience of my tribe. Even the rocks that seem to lie dumb as they swelter in the sun along the silent shore in solemn grandeur thrill with memories of past events connected with the fate of my people, and the very dust under your feet responds more lovingly to our footsteps than to yours, because it is the ashes of our ancestors, and our bare feet are conscious of the sympathetic touch, for the soil is rich with the life of our kindred."*

The neither the boiler-plate treaty of the Omahas, or the concluded Stevens or Palmer treaties, included any articles that guaranteed religious or spiritual freedom to the Coastal Indians, although it was demanded. Stevens promised to address it and assure it was included but subsequently died at the Battle of Gettysburg. But, still, it remains an inherent and reserved right that was obviously implied and noted in the acceptance speech of Chief Seattle. This right was never surrendered via treaty.

The establishment of government-to-government relationships with the Indian tribes with the United States, was constitutionally provided for. Article I, Section 2, Clause 3 of the U.S. Constitution kept the tribal Indians from becoming citizens by the words "excluding Indians not taxed" (#20). This relationship of separateness would be reiterated during the debates that created the Fourteen Amendment, during the 39th and 40th U.S. Congresses, after the Civil War. It was clear, individual tribal Indians were citizens of their tribes and not the United States or the individual states. Governmental relationships with the Indian tribes would be covered by the treaty-making powers of the Presidency and the Senate (#21). Commercial relationships would be executed by the President as the enforcer of the laws enacted by the U.S. Congress, under the delegated authority of the Indian Commerce Clause (#22). Problems and legal challenges associated with the treaties or Indian commerce or trespass into Indian Country would be submitted to the federal judiciary (#23)- which would use and develop canons of construction of treaties, constitutions, and written documents to interpret the governmental relationship with the Indian Nations (#24) and the duty to keep the non-Indians outside of Indian Country unless permitted by federal license.

We may wonder who negotiated these treaties and under whose authority were they authorized. Based on constitutional powers the congress directed negotiation of the treaties, the President complied, and the Senate ratified the same. However, there were many treaties in which the United States took the benefits secured by the treaties but never ratified the treaties- to the disadvantage of the involved tribes (See: Unratified Treaties, Prucha (1994) - American Indian Treaties, p.517). The President did not directly negotiate each treaty, he was represented in the process by appointed plenipotentiates or treaty commissioners. In the 1850's, Joel Palmer and Isaac Stevens (#25) would be appointed as the Indian Agents and Territorial Governors for Oregon and Washington Territories, respectively. These two men would each receive a copy of the Treaty with the Omahas, from Commissioner of Indian Affairs George Manypenny (#26). This model would be used to negotiate sixteen treaties in the Pacific Northwest, covering the

territory of four future states in eighteen months. For the Lummi Tribe, the Treaty of Duwamish, Suquamish, Etc., negotiated at Point Elliot in Washington Territory, would be crucial (#27). It was at this time that the famous speech of Chief Seattle would be made, and has ever since been quoted world-wide.

Prior to the N.W. treaty negotiations, in 1848, the handling of Indian Affairs was transferred from the Department of War to the Department of Interior (#28). The War Department could not be trusted with the estates and interests of the Indians. It was believed federal employees, as civil servants, could be held more accountable. However, these employees would turn out to become just as corrupt as any strong-arm political boss of the day (1848-1870). The government was undergoing constant criticism by Church leadership and concerned well-meaning settlers and friends of the Indians over mismanagement of Indian affairs. Public outcry was demanding congressional investigations.

President U.S. Grant was convinced the Churches could do better, so Indian Affairs was transferred to the Churches (1872)- which in turn divided Indian Country amongst themselves in accordance to which denomination was predominantly on the various reservations. The Lummi Reservation would formally become Catholic territory under this arrangement (#29). The powers of the Judeo-Christian Churches would reach a peak in the drafting and implementation of Department of Interior Circular #1665- the Indian Religious Crimes Code (#30). Any Indian that was caught or suspected of practicing Native traditional ceremony and spirituality was guilty of practicing non-Christian activity. Sacred Indian ceremonial regalia was being confiscated nationwide. What was not burned as heathen idols was sent off to government collections, museums, or keep by private citizens. The accused faced an automatic imprisonment of thirty days for each accusation, as was mandated by the circular. The Lummi, like Indian communities

nationwide, would be forced to conduct traditional beliefs and ceremonials in secret or face imprisonment. The converted Christian Indians were encouraged to levy charges against the non-converted. Indian communities were being divided, many traditional tribal Indians began to fear the converted Indians.

As the prosecution of Indians under the Religious Crimes Code began to spread and increase in frequency, it could no longer be kept secret and a public outcry began. How is it Indians were not protected by the First Amendment guarantee of Religious Freedom (Bill of Rights of U.S. Constitution)? A movement was initiated to secure protection of the Indian people. A Californian, feminist named Ida May Adams would convince the Indian Welfare League, the National Association to Help the Indian, and the Defense Association of Northern California to come to the defense of Native Peoples. Thereafter, because of the political pressure, the 1924 Indian Citizenship Act was passed, irrespective of the constitutional provisions forbidding the citizenship of tribal Indians.

Indians were to receive protection under the First Amendment. Circular #1665 was dead, or so it seemed (#31). Fifty-four years later, in 1978, the U.S. Congress would order the Presidency, as Chief Executive, to report on the conditions of federal protection of Native American Religion. The American Indian (Eskimo, Aleut, and Native Hawaiian) Religious Freedom Act (commonly called AIRFA by American Indians) was passed that year (#32). All federal departments and agencies would report that there was little or no protection or consideration given to Native American religious practices or beliefs. Congress received the report. During this era, no President would dare issue an Executive Order directing the government departments and agencies to adhere to the Act or to protect Native American Religion (Spirituality). The lobbying power behind the economics that fed off the environment and natural resources had and continued to control politics and politicians.

Protection of Native American spirituality was viewed as contrary to the maximum exploitation of natural resources. Industrialists and multi-national corporations knew this all too well and logically it was to their disadvantage to allow an act like AIRFA to gain any real support in the U.S. Congress or with the Chief Executive.

What did this mean to the Lummi People? In 1979, after the passage of AIRFA, the U.S. Fish & Wildlife, U.S. Marshals, Bureau of Indian Affairs, Federal Bureau of Investigation, Washington State Patrol, County Sheriffs, and others would raid the Lummi Indian Reservation. It was alleged that Indians on the reservation had eagle feathers in their possession. These were poor Indians that had no other place to live nor ever wanted to leave the reservation. These were elders that had grandchildren living with them. These elders and little children would be dragged out of their beds at four in the morning, after the non-Indian agents crawled through windows and kicked in doors, unannounced. Naked, standing in the corners, with guns pointed at them, little Indian children cried for their parents and grandparents- who was also not allowed to dress themselves. The children could only witness those they loved and were protected by being handcuffed. The agents had thrown clothes from drawers, upset furniture, and poured sugar and flour bins on the floor in search of the allegedly illegal feathers. Later, the "captives" would be marched to vehicles and charged with suspected possession of Eagle Feathers. They would all be transported to the local, white town, marched down the street and then placed into the paddy wagon. Local whites and the media got to bear witness to the white agents successful capture of the Indians. Sacred Indian regalia, handed down from several generations, some before the advent of the White man, would be plucked of their eagle feathers- evidence against Native American spiritual practices and ceremonials under new excuses- protection of the eagles. During the time of this planned raid upon Indian communities, the U.S. Fish and Wildlife Service would issue hundreds of permits to in-land, non-Indian farmers, giving

permission for them to kill eagles that might raid their sheep farms. As the eagles carcasses rotten on the grounds of sheep farms, the Indians were raided, tried, and convicted for violation of the Endangered Species Act and the Bald Eagle Protection Act (#33).

In another instance, after the passage of AIRFA, the Lummi Traditionalists would, once again, become targets of the non-Indian enforcement agencies. The Lummi Seyowyn Raid would take place in the early 1980's. Lummi Traditionalist would be imprisoned for practicing non-Christian activities. Once again, leaders in the spiritual (Seyowyn) societies would become targets. Plea bargains would be made and agreements struck. The full force of federal conviction was waged against the young traditional leaders- who feared for their freedom and their families at home. The young leaders would agree to testify against the older leaders. In exchange, they would have the charges dropped against them, by the U.S. Prosecutors, as payment for testifying against their own elder leaders. The choices- prison while their families and children go hungry, or freedom and the ability to provide subsistence for their loved ones. The Defense Attorney would strike a deal- two of his clients would testify against the other two clients if the first two could go free. The court would find the two remaining defendants guilty and impose prison. Once again, Indians would go to jail for practicing non-Christian ceremonials (#34). This defense attorney violated the rights of two of his clients for the benefit of the younger two, and was never challenged or disbarred.

In this case, the prosecution would claim that the initiation rites may have involved some pain or discomfort to the Initiate. This was considered unacceptable and the Court would not allow it. It was being treated as an assault and jurisdiction was claimed under the Major Crimes Act. Ethnocentrically, the Court refused to understand the significance of the Native rites and initiation rituals to the traditional Indian community and their importance in healing. The Seyowyn members were to be prosecuted for performing ancient ceremonials- that have a common history amongst tribal

societies worldwide, predating the control of the institutionalized Christian churches. The Lummi society practiced a form of "ritual cannibalism" as a process of experiencing the magic of life-death-rebirth process. It was ritual, re-enactment of the dualistic aspects of life & death, it was make-believe for setting the psychological stage for initiation, no less important than eating the Body of Christ as the sacrament every Sunday. Accordingly, Sjoo and Mor, in discussing mankind's efforts to maintain a ritualistic relationship with the sacred Mother Earth, stated it comparatively:

> *"Ritual cannibalism doubtless began with shared eating of a totem animal- a taking in of the animal's life force by the group; to participate in its death, in its lifeblood, is to partake of its eternal rebirth in the Mother. Where it occurred in the world, ritual cannibalism- like hunting- was predominantly or exclusively a male activity. We can see it in early man's desire not to separate himself, and to reestablish magic bonds with the Mother, after the spilling of her blood. This sacred cannibalism is still practiced, symbolically, in the Christian communion." (#35)*

The Court, like the general public itself, finds it difficult to draw comparisons to the ritualistic, symbolic cannibalism of the "communion" of eating the blood (wine) and body (bread) of Christ and the Native American rituals. Both are intended to bring the initiate into closer communion with the spirit. Both are intended to create a belief in the recruit that they are now members of the society itself. This membership gives them rights to learn and experience the sacred in accordance to the teachings of the society and its leadership. Only recently has church leadership, and society in general, began to understand that Native reverence and respect for creation has scientific validity when viewed holistically.

However, the distinction was not important to the court. The distinction important to the court is one (Christianity) is central and incorporated and the other is not (Native societies). Native spiritual practices are more dependent upon the gifts of creation in their ceremonials.

In 1987, John Magnuson, a Lutheran campus pastor at the University of Washington would write about a Declaration of Churches, what some called "An Apology", in his "Affirming Native Spirituality: A call to Justice." As follows:

> *"On Saturday morning, the 21st of November, on the corner of Spring and First Streets in downtown Seattle, a sealed envelope, containing what may prove to be a critically historical document, was formally delivered by a delegation of ten bishops and denominational leaders to an American Indian: Jewell Praying Wolf James, Lummi (though, following native custom, he deferred to an elder member of his tribe to accept the document). Dated Thanksgiving Day 1987, and unheralded by the usual fanfare of ecclesiastical and political pomp, the document carries a declaration of confession and corporate commitment to the protection and enhancement of Native traditional religions. This presentation occurred after years of what for the church has been, at best, benign neglect and, at worst, a reflection of a thinly veiled racism infecting the North American psyche. Formally addressed to 26 federally recognized tribes in the States of Washington and Alaska, the paper was released that afternoon to 1,800 parishes in the Pacific Northwest and requested to be read during Thanksgiving Day services by the leaders of participating Churches."*

The Catholic Church, which was represented in this public sentiment and statement, has taken an additional step to recognize that the Vatican has been witness to the institutionalization of racism against colored peoples, including the American Indian. In February, 1989, the Vatican issued Communique #56 citing the evolution of "racism" over

the past five hundred years, since the discovery of the Western Hemisphere (#36). This is recognized in the continental U.S.A. in the Catholic Churches in some of the recent (late 1980's) Papal Decrees. It is important for the Lummi to find such organized, institutional statements of the non-Indian religions being circulated amongst their non-Indian congregations. Hopefully such calls for change and reconciliation will lead to a greater understanding and acceptance of Native American spiritual practices, ceremonials, traditions, and values amongst the general public. It is even more important for this view to be expressed by the constituents to their congressional membership, for instituting changes in laws more protective of Native American Spirituality and Traditional Cultures.

For the Lummi, this was an issue that should have been addressed when Charles the V of Spain could hear the request of Bartholomew de La Casas, when he spoke before the Council of 14. This is a stance the churches could have formulated well before the discovery and exploration of the Pacific N.W. in 1792. The Lummis brought the recent Apology to the Aboriginals of Canada, the Aboriginals of Australia, into the Maya LaConde Rainforests of Mexico, and up the Amazon River of Brazil (read by a Lummi to the Chiefs of 32 separate villages, meeting in an inter-tribal council). In 1988/89, the Lummi moved the Affiliated Tribes of N.W. Indians, the Alliance of American Indian Leaders, and the National Congress of American Indians to call for a national declaration of churches, and pressed for one to be released by the International Coordinating Committee of Churches on Religion and the Earth- as part of their statement for the 1992 United Nations Conference (Earth Summit) in Brazil.

In the interest of expanding the movement, the 38th Successor to the position of Bartholomew de La Casas had been contacted and asked to herald the call for the "Apologia". He, in turn, raised it in a meeting called by the Vatican in Mexico (#37). This proposed action was determined by the Lummi as essential; if the traditional Indians can ever expect to find religious freedom in modern day America. What happens to the Natives of the United States is a model to how foreign

countries treat their indigenous peoples, as well as how the churches interact with them in their Native territories. We must remember Christianity and Catholicism are international movements that are coordinated internationally by their central institutions.

In the late 1970's and into the early 1980's, the Lummi Tribe would lead a campaign to secure protection of the ancient cedar forests. The State of Washington and the U.S. Forest Service, still to this day, continue to advocate ancient forest clear-cutting. The maximization of profits to the timber industry and private citizens is still disguised as sound forestry management. Leading educational institutions still teach ways to justify clear-cutting. The last frontier in the Pacific Northwest was and is the remaining, untouched ancient cedar forests- which already has been 90%-plus clear-cut to date. Rather then developing sustainable forestry practices that would leave some of the ancient forests for future generations, the ancient cedars had been declared valueless. The U.S. Forest Service, and Washington's DNR had build and paved, at government expense, roads right up to the ancient trees and let private industry buy them for about $5 per log. The trees were cut down and directly trucked to the harbors of Puget Sound and shipped raw to foreign ports. Japan was a noted purchaser and was sinking the ancient trees under water for preservation and future use. In the early 1980's, the Lummi's had to organize intertribal activity to initiate a campaign to protect the ancient forests. The Lummi traditionalists and ceremonialist continue to practice Native religion/spirituality in the alleged "wilderness." To the Lummis, and other Coast Salish Indians, the wilderness is their spiritual sanctuary, a haven for healing.

A study on tribal cultural practices and values in and for the ancient forests had been authored and completed by fourteen tribes, in 1978-79. The U.S. Forest Service has continued to ignore the evidence presented, in confidence, by the Coast Salish Traditional Societies. The Forest Service has never been ordered to protect or even give real consideration and value to Native American religious freedom and spiritual practices under either AIRFA or the First Amendment. The

recommendations of the tribes had continued to directly conflict with the "management practices of the U.S. Forest Service." More important to the U.S. Forest Service, a court case developed in Northern California. The Northern California Indian people sued, in "G.O. Road" (#38), to have their religious practices and ceremonials protected under AIRFA and the First Amendment. The Court was to determine whether or not the construction of a forest road in an area of tribal spiritual significance would impact the Yurok, Karok, and Talowa Tribes.

In the territory of the Lummi, the Mt. Baker-Snoqualmie Office of the U.S. Forest Service feared the case might be won by the Indians at the Supreme Court level. So it worked, at the insistence of the Lummi, to include in its forest management plan an unprecedented "Objective #10"- which would give consideration to Native cultural use of the forests. In 1988, the Supreme Court released their opinion of "G.O. Road." The Court decided that AIRFA was not only bad federal law but was not even good federal policy and not worth the paper it was written on. The First Amendment protections for Native Americans was struck down. Indian religious freedom was a legal fiction and still viewed and disdained as being non-Christian. The Court could have avoided making this unnecessary, negative decision- *The impacts of building the proposed road could have been negated by allowing a logging company to come into the forest from the east end of the valley rather than the western route*. Normally, the Court would have avoided the decision and required the federal officials to take the alternative route to avoid unnecessary damages to any of the parties- but it chose to make a point about AIRFA. After all, once again, the Court could reinforce the opinion that non-Indian economic interests far outweigh the religious interests of the Native Americans. The Court continued to close the doors of justice to the Indian traditionalists and ceremonialists, nationwide.

In 1990, the U.S. Supreme Court issued a second legal blow to Native American Religious Freedom in the "Peyote" case of Oregon v. Smith. The Court struck down constitutional protection for the Native American Church to use their

sacrament (the non-addictive peyote) in their ceremonies. This Native ceremonial is known to be over ten thousand years old, based on radiocarbon tests of preserved regalia. You would think that this, in itself, would seem to strike a blow to all the Non-Indian, Judeo-Christian churches that use the addictive wines in their ceremonies or the Catholics dependency upon the ritual of the sacrament. However, once again, the First Amendment protections and guarantees offered by the passage of the 1924 Indian Citizenship Act was struck down, as was the 1978 AIRFA. The judicial door closed completely, leaving Indian people with only with a socio-political route for securing justice.

The U.S. Supreme Court continues to interpret the laws as if Manifest Destiny still ruled the day, guided by the repudiated federal policy of termination of Indian tribalism. And, the U.S. Government still fails to be administered by a Chief Executive willing to issue an executive order directing the federal departments and agencies to adhere to AIRFA of 1978. From 1990 to mide-1990's, the national, regional, and local tribal organizations worked diligently to secure support for the enactment of amendments to the AIRFA of 1978, in attempt to undue the damages being caused by the Supreme Court's decisions. National Indian leaders, such as the late Ruben Snake (past President of the National Tribal Chairmen's Association, the National Congress of American Indians, and the National Native American Church), formed the American Indian Religious Freedom Coalition. It began to aggressively campaign to secure amendments that would reverse the Supreme Court opinions. In the end, the American Indians secured amendments that would restore Eagle Feathers to the Indians, restore rights to rituals by Indian prisoners, rights to use the Peyote as a sacrament of the NAC, and rights to have their ancestors bones (bodies and spirits) repatriated to their communities and relatives for reburial and ceremonial cleansing. However, the Indians did not secure protection of off-reservation sacred lands or repatriation of sacred objects (although Congressman Rahall had introduced a Native American Sacred Lands bill it had not moved in the 108th Congress).

The U.S. Forest Service continues to ignore the recommendations from the Lummi Indian people on how to develop sound forest management principles that would protect Native spiritual practices, traditions, ceremonials, and provide access to sacred sites, cultural use sites, questing sites, bathing sites, etc., in the forests. The sacred plants and minerals needed for ceremonial objects and artifacts are located in the forests that have become the private property of the federal and state governments. The cedar trees for totems, masks, rattles, and ritualistic necessities are out of the reach of the Indians- who must compete with local, white cedar shake cutters for the surplus blow down old growth trees. Basket weavers cannot access bark for their craft, nor can the mask makers secure it for their ceremonial needs. Sacred sites for questing, bathing, and meditation are destroyed by clear-cutting, frequent access for non-Native tourists and wilderness buffs, and pollution by hikers and campers leaving their trash and garbage behind. The bathing sites are nearly all destroyed when the forest is stripped away. The same holds true for the salmon spawning beds, and the quantity & quality of the water in the streams has been destroyed by silt and logging debris. The forest plans are not incorporating the concerns of the Indian tribes. At the end of 2003, the tribes and the forest service were still trying to structure government-to-government consultation to institute some of the protections needed by Indian Country per the National Forestry Management Practices.

The Lummis, in the late 1980's, recognized that the ancient forests are disappearing in this generation's life-span. Thus, they realized that action was needed if there was ever going to be any ancient old growth outside of the National Forest. They organized and began to stop the harvest of a privately owned ancient forest known as Arlecko Creek. They had to wage a national campaign against Mutual of New York to stop the harvests. MONY refused to listen or even consider the tribal concerns. The tribe refused to give in. With protests and a lot of publicity, a stand off resulted in MONY selling the forest back to Crown Pacific Corporation. Crown agreed to sell the target forest sector to the Lummi

Nation for nine million dollars- well below the appraised value of up to fourteen million dollars. At this time, most of the target acreage has been secured, and a few hundred acres of old growth was set-aside as a result of the final million-dollar purchase payment that completed the transaction. As Crown Pacific was going bankrupt, the Lummis raced to raise the funds needed to prevent these trees from going on the public auction block. This campaign was a success story. Meanwhile, the Lummis dream of purchasing other privately owned forest sectors for preservation for all future generations and as experimental forests for development of more sound forest practices. While holding these dreams, the Lummi leadership continue to try and improve the impoverished conditions of their tribal community and membership.

What we have ignored up to this point are the impacts of federal and church policy upon the Indian communities, of which the Lummi is just one out of five hundred. Nationwide, the Indian tribes were constantly pressured and convinced to cede large tracks of land over to the U.S.- for it's citizens to settle upon. These treaties of peace and friendship were made with grandiose promises from the United States. For the Lummi this relationship was established in 1855. The Lummi ceded the majority of it aboriginal territory to the United States, believing the 'Great White Father' would keep his treaty-committed word. And, in 1972 the U.S. would offer to pay to the Lummi an unconscionable amount of $54,000 for the Pacific Northwest corner of Washington State, which included the largest remaining stands of Old Growth Cedar Forests and several hundred maritime islands in the Puget Sound network. In addition, the waters were full of the abundant and commercially valuable salmon populations. This offer was one hundred and seventeen years too late. When the Lummi rejected the offer the federal government sent in the Bureau of Indian Affairs (BIA) to force acceptance upon the tribal community. When the BIA failed to force the Lummis to accept the payment, the U.S. government placed the offer in the U.S. Treasury until such time the Lummi Indians become "reasonable" (#40). The Lummi Nation rejects this offer each year with each newly elected group of leadership. This money has been rising slowly in value due to the low federal interest rates; but, still, it

will never be acceptable to the Lummi People. As far as the Lummi are concerned, federal officials and politicians stole the land in the name of the Nation. But, this is a standard story nationwide.

Scattered throughout the islands and the mainland mountains are located the sacred sites and places that the Lummi People still utilize. They are dependent upon these sites. Their belief system does not comprehend or accept the modern fact that such sites can readily be destroyed for a few dollars gain under the banner of 'private property.' To them the sites are still reserved and are to be preserved in perpetuity. They feel victimized as they witness the lands that they never sold being destroyed and the sacred sites, including their ancestral cemeteries, being desecrated. As Chief Seattle stated at the treaty negotiations: *"Our dead never forget the beautiful world that gave them being. They still love its winding rivers, its great mountains and its sequestered vales, and they ever yearn in tenderest affection over the lonely-heart living, and often return to visit and comfort them."* There are probably one thousand 'modern day Lummis' that are Dwamish and directly affiliated with Chief Seattle's bloodline. His concern is there concern. Their beliefs about that dead and their connection to the earth is the same and capable to that of the Lummi proper.

In addition, the mid-1980s to the present has born witness to the Cobell case legally challenging the mismanagement of Individual Indian Money Accounts by federal guardian, and has kept the conflict before the federal court. These funds are generated by the BIA control over Indian lands and resources and the revenues derived from the commercial value of these lands. The Indians, under the General Allotment Laws (1887, as amended 1910), are considered too incompetent or non-competent to manage their own estates. So the BIA has been charged with this duty. The tribes believe one point four billion dollars has disappeared from the accounts. In 1988, the Assistant Secretary of the Interior (Ross Swimmer) tried to convince a House Committee that the BIA only lost four hundred million. Failure of the BIA to solve the problem resulted in Cobell suing the United States in a class action. The Lummi now

witness the United States taking BIA Funds, committed to the tribes by contract for essential services to the Indian communities, to finance reorganization of the BIA to resolve the trust fund mismanagement problem, while the case is pending and as a result of the orders of the court. Once again, Indians lose out on entitlements and services because of fraud and corruption in the management of Indian Affairs. While this crisis in BIA management is transpiring, tribes are attempting to organize to defend their membership's rights to spiritual freedom. Congressional focus is upon Cobell settlement and 'Trust Reform.' Thus, the sacred lands bill does not move, and amendments to the Native American Graves Protection and Repatriation Act are slowly moving through the committees.

In prior generations, the church and government had constantly attempted to force the Lummis (and all Indians across the continent) to give up their language, culture, and traditions. Also, generations of the tribal children were forced into Indian boarding schools- to be taught Christian prayers, the Pledge of Allegiance, and how to be "civilized like the whites," each day marching in governmentally issued uniforms, and learning the basic lessons. Through this process, the Indian extended-family institution would be broken due to the youth having been successfully separated from the non-conforming, traditional, tribal elder generations. Later, during the termination of tribes era, certain states (including Washington) would be given jurisdiction to force Indian children into local public schools (#41). . . which would then teach them that Indians were a conquered race, that Indians were evil, and worshiped pagan gods and totem poles, that Indians were lazy and untrustworthy, and that Indians attacked innocent women and children and that was why the U.S. Cavalry had to exterminate them or place them upon reservations. The whole system became a dehumanizing machine.

Once the Indians were located onto the reservations, many states, including Washington, would pass laws forbidding Indians from hunting, fishing, and gathering in their usual and accustomed grounds and stations, as secured by treaty with

the United States (#42). During this time, the United States turned and refused to honor any treaty protection commitments secured in any of the Pacific N.W. treaties. State oppression of Indian rights and the destruction of the treaty rights would continue for nearly 9 decades (1889 to 1974). With no food, or means to support their families, after the Great Depression, and during the Termination era, whole Indian families would be relocated to American cities hundreds of miles away from the reservation. . . under more federal (BIA) governmental promises of jobs, education or training. A few of the Lummi families would tough it out and remain on the reservation- some continuing to practice their cultural, traditional, spiritual beliefs, others turning to the Christian Churches.

During this time, the U.S. Government believed by passage of House Joint Resolution #108 (the Termination Policy signed by the President) that Indian tribalism would die once and for all (#43). We wonder why does Indian tribalism, and its deep traditioal cultural values for all of the natural world, continue to pose a threat to the "colonialization of America." We recognize, in Indian Country, that much of the Native spiritual beliefs and practices directly conflict with exploitation activities of private industry, the state, and federal government. This paradox is well stated by Sjoo & Mor as follows:

> *"To break up the ancient maternal groupings, and the sacred life-patterns they followed, for the purpose of robbing the Native Peoples of their land, stealing the earth's raw resources, and exploiting human labor- the colonial armies sent the missionaries in to introduce the abstract and alien concepts of "father-right" and a Father God who was the enemy of the Great Mother. Christian missionaries preaching of the heavenly Father and his son, and Moslems carrying the message of Allah and his prophet Muhammad, performed the same colonizing functions: They found the Mother's people, who were alive and well within the holistic now, and they denounced these people's ways and redefined them as backward children of a distant, aloof,*

paternalistic power. All exploitation follows, quite easily and self-righteously, from such a redefinition. Colonialist powers really convince themselves that they are doing their victims a favor, lifting them up from Mother Earth- through whips, degradations, imprisonment, hunger, and slaughter- so they can glimpse through tears a far-off shining palace, the abode of the heavenly Father (i.e., the exploiting home country). Imperialist colonialism always sees itself, officially, as an instrument of spiritual enlightenment. What this means in practice is that the Mother- the people's blood-identity - is denounced, in the name of some superior Father God who always happens to live somewhere else." (#44)

We in the Indian communities, and most "Americans", are slow to realize the long-term impacts upon our societies by the colonialization experience. In silence, our people suffered and continue to suffer the worst socio-economic conditions that could possibly impact any given racial group in America today. However, with the survival of traditional cultural values and tribalism awaits the conditions for revival of the tribal collective and sense of pride in community & nation. The Lummi reflect this awakening, the opportunity to reverse the externally imposed "cultural regression." In the 1960's and 70's two main types of activities would lead to the regrowth of the Lummi Tribe. The War on Poverty Programs and the great civil rights movement would result in some attention being given to the condition of the Indian on the reservations. Federal programs available to "other minorities" had to be provided to the Indians, irrespective of the termination policy. The era witnessed the development of the Indian Self-determination and Education policies (#45). Secondly, the Indian tribes in the Pacific N.W. were finally getting the federal government to go to court over the treaty obligations to protect native fishing rights. The Indian people could come home. They could support their families by fishing once again, as their forefathers and ancestors had for untold millenniums before them. The Lummi Reservation population would grow from 250 during the pre-termination era to 4500 by 2003. The Indian Fishing Rights

Cases had gone to the Supreme Court several times this past century. Each time the Supreme Court had confirmed its decision. Non-Indian fishermen and their politicians continued to be outraged that they had to share fish with Indians. The Indians, on the other hand, were outraged that half of their treaty-reserved fishing resources were given to the non-Indian citizens, after they took nearly one hundred percent for over a century of treaty violations.

The State resisted, decade after decade, giving recognition to Native rights, until the federal courts ordered federally enforceable compliance. The tribes, however, were angered. During the times they were forced out of the industry, most of the salmon runs and streams (and spawning beds) had been destroyed. Some salmon runs had been nearly fished into extinction. Some rivers, streams, and watershed basins had been destroyed for other industries (#46)- hydroelectric, mining, timber, agricultural operations, etc.

Under Phase II of the U.S. v. Washington Case the tribes could sue to have the last vestiges of the salmon habitats and natural environment protected. This meant that non-fishing industries and all governments and their political subdivisions could be liable for damages and obliged to institute sound natural resource management regimes, concurrently. This was unheard of and appeared to be too expensive for the non-Indian governments to implement. Private Industry was annoyed and hired experts to analyze how to get around the Indians rights, either administratively, politically, or legally.

Indian traditional communities, however, saw this in a different light. It meant the natural environment, as so much is interrelated to the health of the salmon runs, and water quality and quantity, might be protected from non-Indian activity. This was compatible to their traditional spiritual values. They knew, the Court in Phase I said that "*fish were as important to the Indians as the air they breathed*"; while

the Court in Phase II held, "*to dip their (Indians) nets into the water and come up empty (of salmon) was no right at all, and there is an implied right of environmental protection*" (#47).

According to Native traditional, cultural belief the health of the salmon runs depended upon the treatment of the salmon and its environment by humankind. The health of the salmon was and continues to be tied to the health of the rivers. The health of the rivers continues to be tied to the health of the ancient forests. The health of the spotted owls, and other endangered plants and animals, are tied to the health of the ancient forests- we witness floral and faunal species that are a litmus test to the health of the forests and its related biodiversity. And, the preservation of ancient, Native traditional spiritual beliefs, practices, and ceremonials has been tied to the type of justice found within the surrounding, dominant (colonial) society. Most non-Indians wonder how the Indian environmental legacy could continue to exist after the centuries and recent decades of attempts to terminate tribalism and cultures. Many N.W. Indian people find much teaching still in the Indian Stories of "Salmon Woman" (#48) and "Bear and the Steelhead (#49)" and the "Eyes of the Changer (#50)" and understand how they speak to Native reverence for all of the Great Spirit's creations. These stories are simply samples of the mythology that stores the lessons of Native cosmology passed down from generation to generation by the elders.

The surviving vestiges of the Indian family, extended family, and sense of community has continued to preserve the cultural underpinnings of such teachings. Traditional peoples understand that they, as children of the Great Spirit, have a sacred compact to respect and honor creation around them. These were some of the first treaties our people entered into. This world is on loan to us. We do not own it or any of the children of creation. We are only one of many children of the Great Spirit. To have "teachings" in the traditional tribal community, means you are really somebody, you are lifted up above those caught in the materialistic, and blinded life.

Cultural teachings opens your physical and spiritual eyes to the reality of the world and how it relates back as a part of one whole entity.

For example, when the traditionalists gather food from the ancient forests or materials for sacred regalia they do not go there to "kill something." In fact, the plants, animals, minerals, and elements (all understood as offering their existence up so that our's may continue or be made easier) are there for their use if and only if they maintain ceremonial respect for the spirituality of the other children of creation. The tribal people must perform prayer ceremonies in order to receive or earn the spiritual gift of the plants, animals, minerals, and elements- who are viewed as beings that sacrificed and continue to sacrifice themselves for the health and balance of the human person or collective group. It is this believe that not only leads the people to the plant, animal, mineral or elemental- but, it is the spiritual balance they find within themselves and with the "offerings" of spiritual creation.

An example of this believe is as follows- a highly respected Lummi Elder passed away and the funeral feast was to be set with venison and other "game." A young hunter, who deeply admired and respected the elder went to the mountains. Just as he got there an "Elk" walked out and nothing the youth did that would normally scare the animal away did so. The youth believed absolutely that he and the Elk both understood all the reasons why. The Elk had volunteered itself for the feast, it's spiritually would feed the living and the dead.

The same feelings, beliefs, and faith is placed into the selection of bathing sites, and storage sites. Acceptance of the floral, faunal, mineral, elemental beings' sacrifices to humankind (tribal natives) is conducted with ceremonial reverence, guided by mind, body, and spirit that has prepared for the harvest or the benefit. The preparation for and actual harvest of these older beings are guided by the teachings of tribal society- rules of conduct are applied with certain taboos not to be violated. Traditionalists are not to be abusive of their right to harvest or to take from nature. They

are not to be selfish or greedy in the amount they take and are required to share with those that are less fortunate (such as elders that can no longer harvest their own). This is reinforced and handed down from one generation to the other by means of culture, tradition, and ceremony.

In choice of bathing sites, for the traditionalists, new or old, the site must be pure, above the destructive forces of humankind- as in the case of clear-cut activity. During the winter, when the snows cover the mountains, it is then that natives meet the elemental aspects of creation. The cold and clean waters, having washed over Mother Earth and becoming charged with negative ions, help the initiate find the spiritual connectedness and cleanness they are questing for. The accompaniment of the bathing with prayer brings the initiate into ceremonial balance. The initiates sacrifice their own comfort by abstinence through "fasting" first, then cleaning the mind of impure thoughts, finding forgiveness of those they transgressed against, assuring the proper teachings are available for the prayers; then the choice of site for spiritual bathing is sought, all resting on the sacred waters of the earth cleansing the initiate for bringing them one step closer toward spiritual enlightenment.

Today, scientists have found that trees have their own song that can only be heard at levels that are normally five times above the average hearing levels of humans. The trees vibrate with sounds of the earth that moves, each species singing a different song, and the sick singing a song different from its own specie- calling the bugs and birds to it, speeding up it decay and downfall. And, other scientists have found that water responds to the emotions of the person handling the water- forming different crystal patterns in association to the emotions projected into it. Traditionalists have always believed that with the right amount of sacrifice, meditation, fasting, and body cleansing, coupled with sacred knowledge, and conducting oneself in a manner that reflects reverence for creation, that then you could hear the songs in the forest. And, still today, tribal ceremonialists and spiritual practices hold the use of water in ceremony to be a

sacred link between the sky, earth, creation, the spirit, and our humanness. The Lummi hold this same believe as they practice cleansing ceremonies at sacred sites found in the mountain ice waters during winter.

All preparation and belief collapses when the environment has been disturbed or destroyed by human activity. Only in the ancient forests are undisturbed sites still available. However, how could this Native spiritual sensitivity be incorporated into the technological, scientific aspects of modern-day co-management of the natural resources- between the U.S. Forestry management of the Mt. Baker/Snoqualmie National Forests and the local Indian tribes. Maybe, under the constant pressures, the non-Indian natural resource management agencies would have to develop integrated management plans that consider the accumulative impacts of mankind's treatment of the environment. In much the same light Native folklore, legend, and myth may be used to attempt to teach cultural belief systems to non-Indian managers, in conjunction with very limited discussions on the appropriateness and value of traditional ceremonies, songs, and sacred knowledge.

What does this mean to the modern day Lummi? It means that along with the traditionalists and ceremonialists will be the modern day cultural practitioners in tribal government. These are the Indian technicians and bio-scientists investigating the true health of the watersheds, basins, and forests. Their areas of study would be areas that have already been impacted in comparison to un-impacted areas; primarily the old growth forests. The constant search for more information and the understanding and analysis of the history of the regions growth will create opportunities to form alliances- to accomplish the same goals and objectives. Through this process would be woven the teachings that humankind must learn to understand the relationships of all things as an integrated whole; previously only understood or respected by Native traditionalists.

We have noted that the U.S. Forest Services is presently working toward developing a cooperative agreement with the Coast Salish Nations on access to the natural resources and

environments of the National Forests. These negotiations would be including the treaty secured rights that are delineated - fishing, hunting, and gathering. The words "fishing" and "hunting" have been the subject of much federal litigation. Due to the legal challenges the process of mediation has been applied. Still open to debate, of course, is the definition of "gathering." Does this incorporate just roots & berries and medicinal plants, or is it the natural resources used to construct ceremonial regalia, or build tribal long houses? Does it include the reserved right to collect our spiritual balance, to bath in pure waters, to meditate in pure environments? Doe it include the right to store sacred regalia in accordance to traditional laws and practices. These issues need definition but not at the point of destroying the confidentiality of Native spiritual practices and knowledge. This same process is pending as pertains to the Coast Salish and the forest regions under the control of the Washington Department of Natural Resources. The same debates will take place. In both instances, the parties are at the opposite end of the tables and need to find a meeting ground in between.

This will not be an easy task. The colonial process has superimposed foreign cultural values, religions, social organization, legal institutions, and exploitative natural resource harvest regimes upon the Native society, as much as it has upon its own modern citizens. Native Americans fight to retain their own traditional cultural values and spirituality, and maintain their enculturated respect for the natural world- all in the face of great odds and competition. However, the deeper traditional cultural values have continued to be a source of motivation for traditional leadership's negotiations with non-Indian governments, at least in the Pacific Northwest.

Based on their goal to influence natural resource management, the Lummi have submitted cultural recommendations to the U.S. Forest Service, the Washington DNR, the Federal Energy Regulatory Commission, the Washington Dept. of Fisheries, and other non-Indian governmental agencies mandated to be concerned with different aspects of management of the ancient forests, natural resources, wildlife, and river

systems. The cultural management considerations identified as important for the traditional tribal communities were: purity, privacy, isolation, integrity, and continuity. If the forest were managed with these values in mind then the traditionalists would be satisfied that the cultural value of the forest would be more intact. The traditionalists could look forward to entering the forest for its value for cleansing, questing, or storage of sacred regalia, especially if they were assured they would not be disturbed or molested by outsiders.

Such uses are impossible in clear-cuts and streams destroyed by flood-water caused by man-made conditions. In addition, the tribal fisheries staff would judge a site for its water quality and quantify, and conditions of the spawning habitat for natural, wild stocks of salmon. These types of concerns and activities are compatible to traditionalist's cultural values. In an interview of the late Lummi Traditionalist Cha-das-ska-dum, we talked about the suggestion of keeping Indian regalia stored on-reservation only. We learned that the gear of a traditionalist is sacred, it is connected to their spirituality and cannot be stored in areas that have been disturbed (made impure) by humankind, the area must be left in the comprehensive form the spirit created it (pure). Storage sites in the ancient forests still have all the required values. At one time the ancient forests came down to every shoreline and to find a more local place for storage was not a problem, especially in light of the knowledge that our people would never purposely disturb such sites. Even then, though, the storage of regalia was a sacred endeavor strictly guided by ceremonial requirement and safe areas located deep in the ancient forest was sought out, so as to not even allow inadvertent disturbance. Today the forests are being clear-cut up to the mountaintops. The little bit of the ancient forest remaining is precious to the traditionalists. This is one reason why the traditionalists and Lummi tribal staff sought the inclusion of an Objective #10 (cultural values) in the Mt. Baker-Snoqualmie Forest Planning process, which was included but not implemented by the end of the late 1980's.

However, the state and federal departments, agencies, public education institutions, private citizens and industry are slow to awake to the Indian's cry for protection of Mother Earth and Father Sky. The Great Chief Seattle, as has been quoted earlier, has been considered prophetic of the non-Indian destruction of the beautiful Pacific Northwest, and their constant attempts to drive the natives into extinction. In part of his speech he said:

> "The sable braves and fond mothers, and glad-hearted maidens, and the little children who lived and rejoiced here, and whose very names are now forgotten, still love these solitudes, and their deep fastnesses at eventide grow shadowy with the presence of dusky spirits. And when the last red man shall have perished from the earth and his memory among white man shall become a myth, these shores shall swarm with the invisible dead of my tribe and when your children's children think themselves alone in the field, the store, the shop, upon the highway or in the silence of the woods, they will not be alone. In all the earth there is no place dedicated to solitude. At night, when the streets of your cities and villages shall be silent, and you think them deserted, they will throng with the returning hosts that once filled and still love this beautiful land. The white man will never be alone. Let him be just and deal kindly with my people for the dead are not altogether powerless."

This reminds the writer of the passing of his teenage son. A very close friend of his deceased son dreamt that, "*(he) came to her and was dressed in traditional and sacred dancing regalia that she knew was sacred. He talked and assured her that all was well, put the gear on and left, letting her know he will watch-over her. He danced his way to the otherside.*" She awoke, and cried. She never ever see this type of gear or dance due to being raised in an enculturated family that has been alienated from their tribal traditions. After the passing of a couple years, she related the dream sequence and content

to his father (the writer). He assured her that although she never knew it, his late son was entitled to dance that specific type of gear due to family ancestral inheritance, and had he gone into the traditional society he would have joined other young men that share in that specific type of ceremonial observance. And, that she can rest assured that we do understand and believe that our dead never leave us alone. She began her healing journey. The confirmation of the knowledge tied to his right to dance the mask relayed to her via dream would be called 'Synchronicity' by the famed Psychologist Carl Jung (See: Shamanism and The Psychology of C.G. Jung, by R.E. Ryan, 2002). These types of young men and women that are chosen to exercise these 'rites' are highly dependent upon access to the sacred sites of the forests and streams in the mountains. Without this access, to sites and forest materials, it becomes nearly impossible to practice the traditions associated with ritualistic healing of self and the tribal/intertribal community.

As an example of on-going Indian and non-Indian negotiations, in 1990/91, the State of Washington, the timber industry, environmental/wilderness groups, local governments, and Indian tribes met in attempt to development a "Sustainable Forestry" agreement which would protect everyone's interests and the natural environment. Throughout this process, the tribes with traditional communities argued for stopping clear-cutting and the addition of protective language for Native cultural use. In the end, the negotiations resulted in a system that would sustain the economics of the timber industry but lend no protection to Native cultural concerns. During the negotiations, it was evident to the timber industry that a "Sustainable Forestry Act of 1991" might pass the Washington State legislature, with support of its Governor. The legislative initiative died out, with the Lummi in specific opposition to the proposed language. The Lummi testimony recommended the State of Washington change its motto from the "Evergreen State to the Clear-cut State," because of the high harvest rate within the ancient forests.

Throughout this process, over months of dedicated negotiations by all parties, the timber industry was panicking over the U.S. Forest Service and state agencies being forced to protect ancient forests under requirements for Endangered Species (e.g., Spotted Owl) management. These ESA factors could cut back potential harvests significantly. In addition, proposed federal or state law considered placing limitations on the export of raw timber to foreign lands, forcing more domestic economic gain by requiring further processing before export. So, from Northern California (in the "G.O. Road" case area) through Oregon and Washington, a race to clear-cut before the limitations became reality was on. As a result, timber yards held extremely large stockpiles of raw timber; while the federal and state governments looked away, not even sure of the real inventory or health of the ancient forests today. And, as mentioned above, the Coast Salish continued to seek to secure agreements with the U.S. Forest Services and Washington DNR to give due consideration to the natives reserved spiritual rights and traditional cultural necessities.

We started with the young Indian boy finding himself caught up in an apparent nightmare, back during the termination era of the 1950's. That young boy is now an adult Indian activist seeking to protect the ancient cedar forests from being clear cut by someone or something that he considers vested with evil intentions. In the nightmare the young boy finds short-lived comfort and immediate death in an old cedar stump. To him, the cry of the ancient cedar forests, as it was dying, was heard. He was taught and shown his life-time quest. To the Judeo-Christian societies, and modern day America, this would still only be a nightmare of a foolish boy. But, for him, his battle continues. He has watched traditionalists dodge logging trucks in the Ancient Forests, as they journey trying to find social, physical, psychological, environmental, and spiritual balance & harmony, as an intense life-quest to communicate with the Great Spirit.

For the Native Indian the conflict over their "religious freedom" is made more complex because in their belief system

their whole world is an interconnected spiritual existence, from which all things are related. For them, spirituality cannot be separated from the living; in fact, balanced simple living is its most fundamental necessity for following the Red Path. "Religion" is an institution that has evolved to keep the non-Indian from directly communicating with the spirit, communion with the institution has become the central and indispensable theme. The Indian belief does not afford one the luxury of separating life from the spirit; however, the assimilation and enculturation processes of the colonialized Americas are slowly and continuously eroding this nexus and separating the Indian from the earth; it's faunal, it's floral, it's elemental, it's mineral, and the unity of being.

A couple frequently asked questions arise, "What do the Indians do in the wilderness?" Then, "Where, specifically, do they practice these things?" In the late 1970's, fourteen Indian tribes had to address these questions. But, in the historical experience such answers have always been used to persecute the Indians and not protect them. So, understandably most traditionalists and ceremonialists were hesitant to place any trust in the value of confidentiality within the bureaucracies seeking this information. Such information was and remains private knowledge, often life-threatening in importance to the natives. To disclose it is to open their hearts and spirituality to attack. In the current attempts to secure the introduction and enactment of the 2003 Sacred Lands bill passed by this Congress, Indian Country must struggle with fear of their sacred knowledge being critical to the congressional hearing and administrative processes and yet not wanting to disclosure sacred knowledge to non-Indians. If the bill is enacted with confidentiality protections then there might be more comfort. The next fear is having to geo-plot and map sacred sites knowing that there are persons or corporations that would willfully access the sites and destroy them in attempt to remove the site's known cultural values as a prohibiting factor on development or general public use (and its resulting contamination).

The Pacific Northwest Native communities are opening themselves more with each passing year, in a desperate attempt to save the ancient forests. They still recognize that the receivers of the information have been enculturated to not understand or to be insensitive to the value of tribal collective knowledge and its importance to the Indian Communities and tribal people. It is this type of reasoning that comes to mind when the tribal leaders review the proposed "Sacred Lands Protection Act" pending before the current U.S. Congress. The tribes need guarantees that their disclosures will be protected and that practicing traditionalists demand it. The information is not to be readily accessible to those that want to become "writers about Indians" or to try and find clues to plants that can be used in medical research and patented for private profit. Thus, the proposed bill has a clause that provides assurances of confidentiality, and that the public disclosure laws will not, theoretically, apply to the information submitted in hearings before the various federal administrations and agencies.

We, then, must turn the question back. Can you, and yours, ever understand the views of the Native world. For example, in a story called the "Eyes of the Changer" the heart of Indian understanding is being addressed in story form, as pertains to our relationship with creation. This story, as one facet of insight, should be understood for all of its meaning before even a glimpse of Native spiritual ceremonials could be comprehended. The importance of our ceremonials must be comprehended before spiritual enlightenment can evolve into understanding.

In accordance to this myth, at one time all things were older spiritual children of the Great Spirit. But, the Changer or Transformer was asked to have each of the older children of creation to change into a final form that would be helpful to the new children (humankind). As each Older Brother or Older Sister of Creation changed to their final form, they entered into a sacred compact with the Great Spirit to give gifts and benefits to the weak, helpless younger children (human beings) of the Creator.

The life-quest is to understand how it all connects. Such understanding is central to the individual's new beginning, new birth into a whole spiritual reality. Until the readers opens themselves to this conceptualization then a telling of what it is the natives do, or are after, or where they go in the "wilderness" will not be appreciated, understood, or have any benefit for them.

Native Americans are denied spiritual freedom in America today. There still exists extensive prejudicial gaps between the Red Race and the others, a gap whose walls are reinforced with separate cultural and spiritual realities. While the natural world dies around us, we wait for the non-Indian to become a dreamer of paradise. Native American spiritual beliefs and practices are a reflection of sacred compacts that the tribal collective has entered into with nature. We are taught, through song, dance, ceremony, sacred knowledge, and protocols governing our relationships with each other and all things, a subtle cosmological understanding of our place in creation. We were not given the right to destroy and dominant the creations of the Great Spirit. The Christian God says that man has dominion over creation. This has been interpreted to make creation an object that can be used to its ultimate destruction or extinction. There is no sacred compact between Judeo-Christians and the Garden of Eden. It appears true that the Children of Adam & Eve were expelled from paradise and this resulted in making creation a living hell that does not need protection from mankind's destructive potentials. There, then, is a definite transcultural dilemma for Native Americans that have been constantly exposed to the Christian value system and religious doctrines & dogma- which is right the Indians belief system or the non-Indians.

In this light, we come to understand why it is so easy for the non-Indian to pollute the air, water, and land, and kill off whole species of faunal & floral. For example, industries add toxins to the atmosphere so severe that people die of cancer. Timber corporations clear-cut whole forests for access to single specie of tree- to the destruction of the whole bio-diversity indigenous to it, and irrespective of the flooding

cause downstream due to rapid water run-off. All the while U.S. multi-national corporations guide themselves based on economic standards held so high that it impoverishes whole third world nations of sustainable forests. All this is done in the view that God gave dominion over the peoples and resources of the natural world to the Christians. And, then, we become insulted as an American Christian Nation when people of a foreign country consider us heathens, infidels, atheists, agnostics or other popular terms that separate us from them - the true people of God. Indigenous People live in a world were there is no One God. As Native Americans, we are told that we are not All Children of God unless it is their god that we are subservient too.

We have differences between the Native Americans and the citizens & governments of the United States. As a Christian Nation the belief that is perpetuated is that after death the body decomposes and in the end the soul will ascend to heaven if the person lived life in accordance to Christian beliefs. In this light then, the non-Indian simply is free to walk away from their ancestors' graves and carry forward no further obligation. This is not so in the Indian world. The body and spirit remain connected to this world. The separation between life and death is a thin veil. Communication back and forth across this veil does happen. There are continuing obligations and duties associated with this belief system. We, as the living, have an obligation to the deceased- to assure their final resting-place is not disturbed.

As bears repeating, Chief Seattle said, "*Your dead cease to love you and the homes of their nativity as soon as they pass the portals of the tomb. They wonder far off beyond the stars, are soon forgotten, and never return. Our dead never forget the beautiful world that gave them being. They sill love its winding rivers, it great mountains and its sequestered vales, and they ever yearn in tenderest affection over the lonely hearted living and often return to visit and comfort them.*"

The Lummi Indians have been constantly working to protect known and unknown ancestral burial sites. All to often, the sites and ancestral cemeteries are disturbed or destroyed for the sake of non-Indian personal or corporate enrichment or the needed improvements of local governments and associations. The Lummis, like tribes nationwide, have many ancestral cemeteries located within their off-reservation aboriginal territory. No tribe has ever given up control or ownership of the duty & responsibility to protect their ancestors' graves. There are no treaties that exist that allow for this transference. In fact, as in the case of Chief Seattle, in his world famous speech, the Indians were concerned about their ancestors' remains. These remains connected the people, the land, and the spirit as one and the same. We hold the land to be sacred because it does hold the remains of our ancestors.

The off-reservation Indian cemeteries and gravesites are subjected to non-Indian jurisdiction. They make choices and notify the tribes, if at all, after the impact to the graves or cemetery has been discovered (usually by uninvolved, concerned citizens that inadvertently witnessed the activity). Because of the common occurrence of grave disturbance, Indian tribes nationwide seek protection of their ancestors' graves. The Native American Indian Graves Protection and Repatriation Act has resulted in Indian remains being returned to tribes for reburial. These remains have been in governmental, college, or even private collections. However, not enough has been done to provide tribes the right to protect the graves & ancestral cemeteries before the disturbance happens. The developers, usually supported by county and state officials, believe they had violated no laws or permits. They do not believe they did anything wrong, to them it was just an old Indian grave.

In the case of the Semiahmah Ancient Cemetery the Lummi are the modern day heirs of the Semiahmoo People. We are one and the same as a people and tribe. North of the established treaty reservation are historical village sites. The location

of our ancestors'graves are known and documented with local and state government entities. And, still, once again, masse destruction of the ancestors' graves (cemetery) happened. The costs to recover the ancestors' remains and reestablish some of the integrity of the cemetery was projected at nine million dollars. The Lummis sued all parties involved. At the time of settlement, the Lummi Nation had invested over two million dollars in recovery work- with a outstanding need for several hundred thousand dollars to cover immediate work pending the federal litigation on damage awards owed to the tribe.

The millions of dollars in damages could have been avoided if the company doing the excavation abided by the state and federal laws. But, the tribe and the corporate entities responsible ended up in federal district court. The tribe prevailed legally. It won the legal arguments of the case early, so the on-going legal maneuvers were about the award of damages. The corporation's insurance company went bankrupt due to the claims raised from the 911 Attack on the Twin Towers. So, it is anticipated that the corporation (Canadian owned, with US affiliates) responsible would try to avoid damage rulings by filing bankruptcy status. Up until the settlement was completed, the Lummi Nation was only about 25% done in the recovery work.

What is sad is that this same destruction took place in the same area twenty-five years ago. We did not sue for damages that time. Perhaps this is why the local governments and corporation decided to circumvent the law- there usually were no legal or financial repercussions, and at the most they believed it would be as misdemeanor. The Lummis recovered the remains from the local college and reburied the ancestors on the reservation, in the current tribal cemetery. During these years, there had been several instances in which individual ancestor graves were disturbed or destroyed and the tribe had to initiate recovery work, guided by lawyers ready to go to court if needed. The tribe has had to develop a tribal cultural protection department, and maintain access to several

lawyers just to try to stop the destruction of these known or discovered sites. All this investment could go to help children and elders in need, but instead we had to pay working staff to monitor non-Indian activity off-reservation.

A couple decades ago, the Governor's family had made an investment in some undeveloped island property (inside the aboriginal territory of the Lummis). The site was a known cemetery or burial site for Lummi ancestors. The Lummis ended up battling a major corporation, the Governor's family, and anti-Indians in the local island community. In the end, the Lummis had to buy the ancient cemetery site for a couple million dollars and place it into protected status as a non-profit (since the US Department of Interior would not take it into trust). This settlement happened because of U.S. Congressional support.

The Lummis recognize that there must be a federal solution to the nightmare of problems generated by the multitude of graves and cemetery disturbances caused by improvements authorized by local non-Indian governments. The Native American Indian Graves Protection and Repatriation Act must be amended to make local government more responsive and accountable to tribal governmental concerns about such sacred sites. The problem is that the local & state governments will argue that the US has jurisdiction only over lands and marine areas reserved to the federal government and not transferred to the states at statehood.

However, for the Lummis, we believe that the treaty is still Supreme law of the land under the Constitution and the federal government & state governments owe allegiance to the Constitution. The treaties were means for the tribes to give lands and resources to the United States, and anything not given was reserved to the tribes. We did not give our ancestors remains to the non-Indians. These remains and sites are indirectly reserved under the treaty commitments- as reserved rights secondly recognized as inherent rights. The federal law should recognize this truth and hold the states obligated to enact local laws that extend this protection.

State governments should be required to enter government-to-government dialogue with tribes and come up with mutually acceptable compacts for the preservation of ancient Indian graves and cemeteries. State laws should be enacted or amended to reflect the concerns of the impacted tribes. State agencies should be held accountable for decisions and plans that run counter to these compacts and implementation laws.

The Lummi Nation is concerned about the enactment of the Native American Sacred Lands Act (2005). This legislation is critical to Indian Country. As the tribes, nationwide, are confronted with development in the surrounding communities, they are witnessing the destruction of sacred lands that causes very significant damage to the sites and land. The damage results in significant impact to the extent that the access to the site has become meaningless. We are working, as an Indian Nation, to form alliances nationwide to secure enactment of this bill. We will continue to work with tribes at the local, regional, and national levels to assure that a bill originates from both houses of Congress to give Indian People legal rights to sue for protection of known or undisclosed sacred lands and sites.

The American Indian Religious Freedom Act was enacted in 1978. The rights under it were only valuable as foundation for federal policy statements. The Supreme Court destroyed AIRFA as a national law. The Congress, in the 1990s, began to re-institute legal protection of the rights of Native Americans to practice their own religions or forms of spiritual ceremonials and practices. However, the laws are being enacted piecemeal. The new piece is the Sacred Lands Bill. After that there will be concerns about securing state enactments that would be in compliance with or similar to the national law. In this case, the tribes of California are leading the national example and working to secure state sacred lands law that shall address the concerns of the tribes.

Indian Country shall not be exterminated. We shall not be terminated. We shall not be completely Christianized. We shall not surrender our right to speak our Native languages. We shall not surrender our spiritual compacts with creation. We shall not give up on our understanding of the sacred and our concepts of the cosmological. We have a right to live. We have a right to exist. We have a right to determine our own destinies and self-govern over our lands, peoples, and future.

We have a right to demand that the United States honor their commitments to Indian Country. We demand they live up to their own Constitution- since it is partially based on the sacred visions of the Iroquois Confederacy. We have a right to speak out against injustices. We have a right to the remains of our ancestors. We have a right to not be oppressed and dominated over. We have a right to believe in God in a way that is comprehensible to our ancestors and ourselves, and valuable to future generations.

In the 150 years since the Coast Salish Tribes negotiated treaties with your people, our world has died around us. . . the planet is nearly unfit for all life forms. Can we afford to negotiate any longer? How long do we have to stand alone? We apologize to the Great Spirit for what your people have done to the Garden! But, first, We apologize for passively letting it happen! While you have waged a war of conquest against the natural world around us, we have remained on the reservations- hoping to survive the aftermath of what you call civilization.

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STATEMENT OF PAUL HOFFMAN, DEPUTY ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR, BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS CONCERNING THE OVERSIGHT OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT.

July 28, 2005

Mr. Chairman, thank you for the opportunity to appear before you today to discuss the Department of the Interior's views on the Native American Graves Protection and Repatriation Act (NAGPRA) specifically, the United States Court of Appeals for the Ninth Circuit decision in Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004) and the proposed amendment to the definition of "Native American" under the Act. The Department of the Interior does not support the proposed amendment.

BACKGROUND

NAGPRA was enacted on November 16, 1990 to address the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. In 1990 the Congressional Budget Office estimated that NAGPRA would apply to the remains of between 100,000 and 200,000 individuals in museum and Federal agency collections. In the last 15 years, museums and Federal agencies have announced their willingness to repatriate the remains of 31,093 individuals. Another 111,000 human remains were listed as "culturally unidentifiable."

NAGPRA assigned several implementation responsibilities to the Secretary of the Interior, including:

- Promulgating implementing regulations;
- Establishing and providing staff support to the Native American Graves Protection and Repatriation Review Committee;
- Making grants to assist museums, Indian tribes, and Native Hawaiian organizations in fulfilling their responsibilities under the Act;
- Extending inventory deadlines for museums that demonstrate a good faith effort;
- Publishing notices for museums and Federal agencies in the Federal Register;
- Assessing civil penalties on museums that fail to comply with provisions of the Act; and
- Responding to notices of inadvertent discoveries of Native American cultural items on Department of the Interior lands.

BONNICHSEN V. UNITED STATES

In 2004, the United States Court of Appeals for the Ninth Circuit rendered a decision in the case Bonnichsen v. United States. At issue was whether skeletal remains found on Federal land near Kennewick, Washington were "Native American" within the meaning of the NAGPRA. In accord with an interagency agreement with the U.S. Army Corps of Engineers, the Department of the Interior determined that the human remains met the definition of "Native American" because they predated the arrival of Europeans to the

United States. The District Court and Court of Appeals for the Ninth Circuit rejected this determination. The Court held that for remains to be deemed "Native American" there must be a general finding that the remains have a significant relationship to a presently existing tribe, people, or culture and that the relationship must go "beyond features common to all humanity." The Court felt that the lack of some relationship to a tribe would render the definition meaningless because any remains found within the continental United States would be considered "Native American." Or, as the Court stated, any contrary interpretation would mean that the finding of "any remains in the United States in and of itself would automatically render these remains 'Native American'." The Court stated that the congressional intent was "to give American Indians control over the remains of their genetic and cultural forbearers, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture."

Following the Ninth Circuit ruling, Congress during the 108th Congress and again during this Congress proposed a change to the definition of "Native American" under NAGPRA. The proposed amendment would amend the definition of "Native American" by adding "or was" after "is." The term "Native American" would mean 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. With this amendment, for remains to be "Native American" there would still have to be a general finding that remains have a significant relationship to a tribe, people, or culture indigenous to the United States, whether the tribe, people, or indigenous culture presently exists; that is, there would not

need to be a general finding that the remains have a significant relationship to ***a presently existing*** tribe, people, or culture. Therefore, remains found within the United States that predate European settlement might be considered Native American as long as they have a significant relationship to a tribe, people or culture indigenous to the United States rather than being limited to those remains that have a significant relationship to a present day tribe, people, or culture.

As stated above, the Department of the Interior does not support the amendment to NAGPRA. The proposed change to the definition of "Native American" would broaden the scope of what remains would be covered under NAGPRA from the Court's decision in *Bonnichsen* that the remains must have a significant relationship to a presently existing tribe, people, or culture in order to be considered "Native American". As previously stated, in Bonnichsen the Ninth Circuit concluded that congressional intent was "to give American Indians control over the remains of their genetic and cultural forbearers, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture." We believe that NAGPRA should protect the sensibilities of currently existing tribes, cultures, and people while balancing the need to learn about past cultures and customs. In the situation where remains are not significantly related to any existing tribe, people, or culture they should be available for appropriate scientific analysis. The proposed legislation would shift away from this balance.

Mr. Chairman, this concludes my prepared statement. I would be happy to answer any questions the committee might have.

SENATE COMMITTEE ON INDIAN AFFAIRS
Oversight Hearing on the Native American Graves Protection and Repatriation Act
Thursday July 28, 2005, 9:30a.m., 485 Russell Senate Bldg.

Statement of the Society for American Archaeology
Presented by
Keith W. Kintigh

Mr. Chairman, the Society for American Archaeology (SAA) thanks the Committee for this opportunity to comment on the proposed amendment to the Native American Graves Protection and Repatriation Act that would modify the definition of "Native American." With more than 6800 members, SAA is the leading organization of professional archaeologists in the United States. Starting in 1989, SAA led the scientific community in working with congressional staff on the language of the Native American Graves Protection and Repatriation Act (NAGPRA). We provided testimony at Senate and House Committee hearings and helped form a coalition of scientific organizations and Native American groups that strongly supported NAGPRA's enactment. Since that time, we have closely monitored its implementation and have consistently provided comment to the Department of the Interior, to the NAGPRA Review Committee, and to this Committee. We urge our members always to work toward the effective and timely implementation of the Act.

Fifteen years ago, I appeared before this committee to present SAA's testimony on S.1980, the bill that became NAGPRA. I think the Committee should be proud of what NAGPRA has accomplished. While we more often hear about the difficult and confrontational cases, repatriations of human remains and other cultural items from both museum collections and new excavations occur routinely. Most of these repatriations result from mutual agreements between tribes and museums and Federal agencies. Consultations mandated by NAGPRA have led to the development of improved understandings between tribal people, museum personnel, and scientists, and many cooperative ventures not required under the law have been successfully pursued.

As an amendment to NAGPRA is contemplated, it is important to remember that the law was explicitly recognized to be a compromise among Native Americans, museums, and scientists. Senator McCain's remarks on the day of Senate passage of NAGPRA make this clear:

> The passage of this legislation marks the end of a long process for many Indian tribes and museums. The subject of repatriation is charged with high emotions in both the Native American community and the museum community. I believe this bill represents a true compromise.... In the end, each party had to give a little in order to strike a true balance and to resolve these very difficult and emotional issues. (Congressional Record, Oct 26, 1990, p. S17173)

SAA agrees that the law strikes an appropriate balance between the public interest in the advancement of science and the concerns of Native Americans. We also believe it is absolutely essential that this balance of interests be maintained.

In its "Policy on the Treatment of Human Remains" (originally adopted in 1984) SAA explicitly recognizes the legitimacy of both traditional and scientific interests in human remains and cultural items. Mortuary evidence obtained by study of human remains and funerary objects provides unique information about demography, diet, disease, and relationships among human groups. Funerary objects respectfully displayed in museums (including tribal museums and the National Museum of the American Indian) often provide the most dramatic and informative evidence of the high artistic achievements of past cultures that have long been appreciated by museum visitors. As we saw with the opening of the National Museum of the American Indian and the recent "Hero, Hawk, and Open Hand" exhibition at the Art Institute of Chicago and the St. Louis Museum of Art, this public includes many Native Americans.

SAA understands that, through NAGPRA, Congress intended to enable repatriation of human remains and other cultural items to contemporary Indian tribes and Native Hawaiian organizations that have a reasonably close relationship to the remains or objects, and that in most cases "cultural affiliation" would be the guiding principle defining that relationship. We believe that any amendment should uphold this principle,

which serves as the keystone for NAGPRA's balance of interests among the Native American, museum, and scientific communities and the publics they serve.

The Proposed Amendment

The proposed amendment to NAGPRA (now embedded in Section 108 of S.536) would modify NAGPRA's definition of "Native American" in response to the court rulings in the Kennewick case (Bonnichsen v. United States). The 9th Circuit Court held that "the statute unambiguously requires that human remains bear some relationship to a *presently existing* tribe, people, or culture to be considered 'Native American'" (Opinion, February 4, 2004, p. 1596).

In an *amicus* filing with the district court in this case, SAA argued that the interpretation of "Native American" used by the Department of the Interior — the so-called 1492 rule — reasonably carried out Congress's intent:

> As defined in NAGPRA, "Native American" refers to human remains and cultural items relating to tribes, peoples, or cultures that resided in 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 the 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.

SAA further argued (and continues to maintain) that requiring demonstration of a relationship to present-day Native peoples in order to categorize remains or items as Native American is contrary to the plain language of the statue, is inconsistent with a common-sense understanding of the term, and would lead to the absurd result of excluding from the law historically documented Indian tribes that have no present-day descendants.

However, in that same filing, SAA argued that Kennewick man should *not* be repatriated to the claimant tribes because this individual did not meet the statutory standard of cultural affiliation. On this point, Judge Jelderks agreed, stating in his Opinion and Order (August 30, 2002, p. 57):

> The Secretary's decision does not meet this standard [cultural affiliation]. The present record does not provide a sufficient basis from which the Secretary could identify the "earlier group," or show that the Kennewick Man was likely part of that group, and establish by a preponderance of the evidence a relationship of shared group identity between the present-day Tribal Claimants and that earlier group. The Secretary has not articulated an adequate rationale for such conclusions. Consequently, even if the Secretary's conclusion that the remains are "Native American" had been correct, the decision to award these remains to the Tribal Claimants could not stand.

The proposed amendment would have the effect of reversing the court's decision on the definition of "Native American," thereby restoring the *status quo ante*. It would not, however, affect the court's findings on the matter of cultural affiliation. The intended effect of the amendment is to make NAGPRA's language consistent with what Congress, SAA, and — to our knowledge — all other involved parties understood "Native American" to mean back in 1990.

Analysis of the Consequences of the Amendment

The Chairman's characterization of the S.536 as a "technical" amendment (*Congressional Record*, March 7, 2005, p. S2148) implies that it was not intended to dramatically alter the implementation of the Act as it is now interpreted. Statements from the committee staff have confirmed that the intended consequences of the proposed amendment are minor. Indeed, the following analysis indicates that the predictable effects of the amendment would be minor.

For NAGPRA to apply to remains or objects, *in all cases*, those remains or objects must satisfy the definition of "Native American." That is, however, only the first step in the repatriation process. In most cases, repatriation will be mandated under NAGPRA only if there is also a finding of cultural affiliation with

a present-day Indian tribe or Native Hawaiian organization (the exceptions are discussed below). In NAGPRA:

> A "cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group. (Section 2(2))

Human remains or objects that are culturally affiliated comprise only a subset of the remains or objects that would meet the definition of "Native American," under either the Kennewick courts' interpretation or the proposed amendment. Because "cultural affiliation" is the more restrictive standard, *to the extent that repatriation is contingent on a showing of cultural affiliation*, the proposed definitional change should have absolutely no effect on the remains and objects that could be repatriated.

Thus, to see the logical effects of this amendment, we need to look to the circumstances within NAGPRA in which repatriation can occur *in the absence of a finding of cultural affiliation.*

- First, throughout the Act, a finding of cultural affiliation is not required where repatriation of human remains and associated funerary objects is to a lineal descendant. We take this to be unproblematic. *Any* return of human remains or associated funerary objects to lineal descendants is a reasonable disposition.
- Second, in Section 3(a)(2)(A), a finding of cultural affiliation is not required for human remains or other cultural items found on Indian land since November 16, 1990. A claim made by the Indian tribe on whose land the remains or objects were discovered has priority over that of a culturally affiliated tribe. Even if the remains or objects were not subject to NAGPRA (i.e., if the definition were not changed), the tribe would likely still have control over the remains or objects under other laws, so this exception is again unproblematic.
- Third, in Section 3(a)(2)(C), a finding of cultural affiliation is not required for remains or other cultural items that lack cultural affiliation but that were discovered since November 16, 1990 "on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe." If there is no claim with a higher priority, the tribe aboriginally occupying the land (or a more closely related tribe) can claim such remains or items. Here the proposed amendment would extend the possibility of repatriation to those human remains or objects that are found on legally recognized aboriginal lands and that would not meet the judicial interpretation of "Native American" but would satisfy the definition as amended, i.e. remains that would be Native American under the amendment but for which no relationship to a present-day tribe people or culture can be shown. As NAGPRA's language was being negotiated in 1990, SAA argued that these remains and items should be required to meet the standard of cultural affiliation in order for repatriation to be mandated. However, SAA accepted the language that appears in the statute as a part of a compromise on the language of the Act and we are prepared to stand by that compromise. Thus, we do not object to the amendment on these grounds.

Summary

Consistent with SAA's long-standing position on the meaning of "Native American," SAA supports the proposed amendment. Our analysis of its predictable effects suggests that the amendment would serve to maintain NAGPRA's balance of interests, in combination with responsible and balanced regulations that are consistent with the letter and the spirit of the law.

SAA is grateful for this opportunity to provide the Committee with our perspective. We also greatly appreciate the careful and balanced approach that the committee is taking toward NAGPRA.

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
Oversight Hearing on the Native American Graves Protection and Repatriation Act
Thursday, July 28, 2005, 9:30a.m., 485 Russell Senate Bldg.

Statement of the American Association of Physical Anthropologists

Presented by

Patricia M. Lambert

The American Association of Physical Anthropologists (AAPA) is the largest professional scientific organization devoted to the study of physical anthropology in the United States. We were part of the coalition of Native American and scientific groups that worked for the passage of the Native American Graves Protection and Repatriation Act (NAGPRA). The AAPA continues to support NAGPRA's key goal of ensuring that culturally affiliated, federally recognized tribes are allowed to make decisions regarding the disposition of their ancestral remains.

During the NAGPRA negotiations, it was our understanding that the term "Native American" encompassed both modern and ancient indigenous groups, including the many earlier archaeologically documented cultures that have disappeared and thus are not culturally affiliated with any modern, federally recognized tribe.

The Ninth Circuit court's ruling makes it clear that the current NAGPRA definition of "Native American" does not reflect this common sense understanding of the term. We consequently do not object to the insertion of "or was" into the current definition to clarify its meaning.

However, we do have a concern about the timing of the proposed amendment. It is impossible to judge effects of the proposed change in the absence of regulations regarding the disposition of "culturally unidentifiable human remains." It is our understanding that these regulations will soon be published in draft form. As we will explain, this apparently minor change in the definition of Native American could have profound legal ramifications at odds with the intent of NAGPRA depending on how these regulations are worded.

NAGPRA has been a success because of the careful way it was crafted to balance the disparate interests many different groups of Americans have in archaeological remains. NAGPRA's specific instructions regarding the composition of the Review Committee makes this balance of interests clear. The key to the compromise that allowed so many different groups to support NAGPRA's passage resides in the concept of "cultural affiliation." NAGPRA provides culturally affiliated tribes with the right to reclaim the remains of their ancestors where lineal descent or a relationship of shared group identity can be clearly established based on the preponderance of a broad range of different types of evidence provided by members of both the Native American and scientific communities. However, when a reasonably close relationship between human remains and a modern federally recognized tribe can not be established,

NAGPRA permits human remains to be retained for scientific study. In this way, NAGPRA balances the undisputed right close relatives have to decide the disposition of ancestral remains against the rich array of historical insights that can be derived through scientific study for all Americans.

The troubling aspect of the Kennewick case is not the fact that the Secretary of the Interior considered the Kennewick remains to be those of a Native American. Instead, it derives from the Secretary's lack of adherence to the statutory definition of cultural affiliation—"a relationship of shared group identity which can be reasonably traced between a present day Indian tribe...and an identifiable earlier group," and an apparent lack of appreciation for the delicately balanced compromise that is at the heart of NAGPRA.

Such attempts by the DOI to extend the concept of cultural affiliation to encompass very ancient remains with no demonstrable relationship to any modern tribe make us extremely apprehensive about the way the amendment you are currently considering will interact with pending draft regulations dealing with "culturally unidentifiable human remains." This is because the proposed amendment will bring very ancient human remains such as those of Kennewick man under the purview of NAGPRA by defining them as Native American.

NAGPRA neither instructs nor provides authority for mandatory mass repatriations of culturally unidentifiable human remains to culturally unaffiliated groups. However, it seems likely based on the position the DOI took in the Kennewick case that the proposed regulations will attempt to do just that. Culturally unidentifiable remains, by definition, are those of people who do not have a relationship of shared group identity with a modern tribe. Modern tribes, therefore, do not have the authority under NAGPRA to make decisions about the disposition of such collections.

Given these concerns, we hope that you will consider delaying passage of the proposed amendment until regulations dealing with culturally unidentifiable human remains are promulgated. We look forward to your assistance in making sure that any regulations dealing with such collections balance the absence of a relationship of shared group identity against the value these remains have as sources of information about our collective past. Culturally unidentifiable remains have enormous scientific value because the information they yield has broad implications for both historical and applied research in the social and natural sciences, medicine, and forensic work. That is, these remains have value for learning about life in distant times, as well as importance for significant present-day medical and forensic concerns. In many cases, these are remains of people who have many living descendants that may not be tribal members or even identify themselves as Native Americans. In other cases, culturally unidentifiable remains may be those of people from groups with no identifiable modern counterparts, very distantly related at best to any modern people.

In summary, the American Association of Physical Anthropologists supports the spirit of the proposed amendment and withholds its full support only because the legal ramifications of this change in the statute cannot be fully assessed in the absence of regulations dealing with the disposition of culturally unidentifiable human remains.

Testimony of Armand Minthorn, Member of the Board of Trustees, Confederated Tribes of the Umatilla Indian Reservation

before

THE SENATE COMMITTEE ON INDIAN AFFAIRS

Oversight Hearing on the Native American Graves Protection and Repatriation Act.

Thursday, July 28, 2005, 9:30 a.m.
485 Russell Senate Office Building

Good morning, Mr. Chairman, and members of the Committee. I am Armand Minthorn, member of the Board of Trustees and Chair of the Cultural Resources Committee of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR). Today I would like to address the proposed amendments to the Native American Graves Protection and Repatriation Act (NAGPRA), currently in Section 108 of S. 536, the Native American Omnibus Act of 2005. The CTUIR supports the proposed amendment which would insert the words "or was" into the definition of "Native American" in NAGPRA so that all tribal ancestors are protected under the law, not merely those determined by agencies, museums and scientists to be related to existing tribes.

The CTUIR, the Confederated Tribes of the Colville Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Nez Perce Tribe and the Wanapum Band were and are involved in the litigation that made this amendment necessary, *Bonnichsen v. United States*. Over the last 9 years we have participated in the painful battle to return these ancestral remains to the ground. While we had prevailed in the administrative hearing, we lost in the district court and court of appeals to what can be best described as a technicality. The district court and appellate court both found that the Ancient One as we know him, and Kennewick Man as the press portray him, was not Native American by reading into the law a requirement that there be proof of a relationship to an existing tribe prior to NAGPRA applying to the remains. This reading of NAGPRA creates a loop-hole that eclipses the law and must be corrected.

The ruling was wrong for many reasons, most significantly because it creates a back-door to NAGPRA whereby agencies, museums and scientists can exempt themselves from the law. The decision in the Ancient One litigation added a requirement that remains must now be determined to be related to an existing tribe prior to the applicability of NAGPRA. This takes the decision-making regarding the status of remains out of tribal and public view. Under NAGPRA, remains that are not identified as culturally affiliated under Section 7 or not claimed under Section 3, are included in separate inventories which can be subject to consultation with tribes to resolve the affiliation of those remains. Under the courts reading, museums or agencies could unilaterally determine remains not to be Native American and neither the tribe nor the public would ever have an opportunity to review that decision or even know that decision was made.

Another problem created by the requirement that ancestral remains have a relationship to an existing tribe prior to them being determined "Native American" under the law regards the criminal provisions of NAGPRA, 18 USC § 1170, which prohibit the sale of Native American remains and "cultural items". By requiring the establishment of a relationship prior to the law being applicable, pot-hunters are free to exploit older burials to which cultural affiliation is more difficult to establish. If a scientist cannot look at a skeleton and determine whether it's related to an existing tribe, then how exactly is a prosecutor to prove that a pot-hunter had the required knowledge that the remains he was selling were Native American. Other provisions of the law are rendered void or meaningless under this additional relationship test. For example, the added requirement of a cultural relationship to an existing tribe for NAGPRA to apply renders the cultural affiliation process at least redundant and likely superfluous. Further, the standard developed by the court approaches a requirement for scientific certainty prior to repatriation, a standard Congress rejected.

We, as tribes, find ourselves in the unenviable position of having our ancestral remains scattered across the academic battlefield of who the first Americans were. In archaeology, unlike mathematics or physics, anyone with a loud voice and a website can profess a new theory which the press devours and disseminates. This puts us in the position of having to disprove theories, including the impossible task of proving or disproving a negative. NAGPRA was intended to provide the tribes a voice in the treatment of their ancestors while the *Bonnichsen* litigation served to take that voice away.

I think it important to note that the Society for American Archaeology (SAA) did not oppose the text of the amendment last session. To quote from their position, "SAA is not opposed to the substance of this proposed amendment, which affirms the Society's position that the definition of 'Native American' was intended to include tribes, peoples, and cultures that were once indigenous to the United States as well as those presently recognized as indigenous, but we are strongly opposed to the process through which this amendment is being put forward." Since this amendment has been publicly available for at least 10 months, I feel it is safe to assume that those who want input on it have had an opportunity to develop their positions and present them to congress up to and including today. This amendment is not retroactive, it is forward looking to make sure other tribes are not cut out of the process like we are because of this litigation.

To summarize, I feel that this language is a reasonable fix that returns to NAGPRA the original intent behind the legislation. It would restore meaning to the cultural affiliation process by not subsuming it into the cultural relationship, Native American threshold determination and closes an enormous loop-hole in the law. This amendment renews the presumption that pre-historic and ancient remains are most likely Native American without altering the requirement of a demonstration of cultural affiliation prior to repatriation. Tribal rights to their ancestral remains must be the presumption, not the afterthought as preexisted NAGPRA. The congressional intent behind NAGPRA was to end the centuries old practice of discriminatory treatment of Native American ancestors over non-native burials. Congress should not retreat from the position that tribes have the ability to control the treatment of their ancestors, because the compromise of any fundamental human right on the basis of race diminishes us all.

As one final post script, I find it deeply disturbing to discover that the Department of the Interior has decided to pay the attorneys fees awarded in the *Bonnichsen* litigation out of the NAGPRA grants for tribes and museums. Adding final insult to injury, to take the money away from tribes and museums who implement NAGPRA to pay the attorneys fees to those who sought to and succeeded in eviscerating the law is beyond the pale. Tribes and museums need those grants to pursue repatriations of ancestors long-denied their rightful home in the earth. These funds must be restored or a great injustice will have been done to tribal ancestors. Again.

The Confederated Tribes of the Colville Reservation

Statement of the Honorable Harvey Moses, Jr., Chairman Confederated Tribes of the Colville Reservation

Oversight Hearing on the Native American Graves Protection and Repatriation Act

Senate Committee on Indian Affairs

July 28, 2005

Good morning, Mr. Chairman, Mr. Vice-Chairman and distinguished members of the Committee. My name is Harvey Moses, Jr., and I am the Chairman of the Colville Business Council, the governing body of the Confederated Tribes of the Colville Reservation ("Colville Tribe" or "Tribe"). We are pleased to provide our views on the Native American Graves Protection and Repatriation Act ("NAGPRA"), specifically the legislative proposals introduced in this Congress and in the 108th Congress to amend the definition of "Native American" in NAGPRA.

The Colville Reservation is located in north central Washington State, and is comprised of over 1.4 million acres of trust and allotted lands. The Confederated Tribes of the Colville Reservation, as the name states, is a confederation of 12 tribes and bands that historically resided all across eastern and central Washington and northern Oregon. These tribes or bands include the Wenatchee, Nespelem, Moses-Columbia, Methow, Colville, Okanogan, Palus, San Poil, Entiat, Chelan, Nez Perce and Lakes.

The Colville Tribe's Interest in NAGPRA and the "Ancient One"

The Colville Tribe has a strong interest in NAGPRA. The Colville Tribe was one of the Indian tribes involved in the *Bonnichsen v. United States* litigation, also known as the "Ancient One" or "Kennewick Man" case. As the Committee is aware, the Ninth Circuit Court of Appeals' decision in that case held that the Ancient One's remains were not entitled to NAGPRA's protections. This conclusion hinged on the Court's interpretation of the definition of "Native American" in Section 2(9) of NAGPRA.

The area where the Ancient One's remains were found was used by several different Indian tribes. These tribes include the Palus, Nez Perce, and Columbia tribes, all of which are part of the Confederated Tribes of the Colville Reservation. Although these and other tribes used the area, the Palus have – among the constituent tribes of the Colville Tribe – the strongest cultural affiliation with the Ancient One. Palus traditional territory extends from Moscow,

Idaho, in the east, north to Rock Lake, Washington, south to the headwaters of the Tucannon River and west to the Kennewick area. The U.S. government recognized the occupancy of the Palus people by issuing allotments and homesteads to Palus Tribal members near the location where the Ancient One's remains were discovered. A 10,000 year-old archaeological record, together with Tribal oral history that describes geological events that occurred prior to the Ancient One's birth, further demonstrates the Palus' connection to the Ancient One.

This connection is why the Colville Tribe has a strong sense of relationship and responsibility toward the Ancient One. He is our ancestor. One of the traditional values of the people of the Colville Tribe is respect for life and the cycle of life. One aspect of this cycle is returning to the earth after death and remaining there undisturbed and at peace. Extracting the bones of our ancestors and transferring them to a museum for display and study is against these values.

Although the Colville Tribe and the other Indian tribes involved in the *Bonnichsen* case expended (and continue to expend) substantial resources in the litigation and felt a great loss in the Ninth Circuit's decision, the Colville Tribe is hopeful that the Committee will continue to support a forward-looking legislative clarification to NAGPRA to ensure that the events giving rise to the dispute are not repeated.

The Colville Tribe Supports Amending the Definition of "Native American" in NAGPRA

The Colville Tribe wholeheartedly supports recent legislative proposals such as Section 108 of the Native American Omnibus Act of 2005 (S. 536) and Section 14 of the Native American Technical Corrections Act of 2004 (S. 2843) in the 108th Congress that would amend the definition of "Native American" under NAGPRA. Under current law, Section 2(9) of NAPGRA defines "Native American" as "of, or relating to, a tribe, people, or culture *that is* indigenous to the United States." (emphasis added). The language in the most recent legislative proposal, S. 536, would simply clarify that "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." (emphasis added).

In addition to ensuring that legal disputes such as those giving rise to the *Bonnichsen* litigation are not repeated, these legislative proposals acknowledge our unique status in American society as tribes and American Indians and our common human right to protect and preserve the integrity and honor of our ancestors. It provides a common-sense approach to applying the statute and matches the intent of NAGPRA.

We wish to note that these legislative proposals do not close the door to archaeology. Only tribes, peoples, or cultures that were born and lived in the territory that is now the United States would be "Native American." Other sections of NAGPRA would still require that Indian tribes have a special relationship to the cultural items before the items can be repatriated. Besides the initial determination that a particular cultural item is "Native American," NAGPRA

imposes the additional requirement that an Indian tribe demonstrate "cultural affiliation" between the item and the modern-day tribe. As we have seen in court decisions, proving that something is "Native American" is difficult. Demonstrating "cultural affiliation" is more difficult still. Both thresholds must be proven. These prerequisites to repatriation – already included in NAGPRA – provide adequate protection to archaeologists and ensure that they will not be foreclosed from their studies.

The Colville Tribe Supports Culturally Appropriate Archeology

The Colville Tribe supports culturally appropriate archaeological work. We maintain a large and active archaeological program. The Colville Tribe's History/Archaeology Program has sixteen full-time employees, including seven with a master's or doctorate degree in anthropology or archaeology. In addition, the Tribe's History/Archaeology Program employs more than a dozen seasonal employees who conduct archaeological and historical research and scientific excavations. The program has a federally approved repository for the curation of archaeological collections and is staffed by a repatriation specialist, who is a tribal descendant with a master's degree in museum studies. The Program Manager is also a tribal member and has been designated as a Tribal Historic Preservation Officer under an agreement with the National Park Service. In that capacity, our Program Manager assumes responsibility for historic preservation activities on the Colville Reservation under the National Historic Preservation Act.

The Tribe's History/Archaeology Program complements and enhances our cultural practices. There will always be those that feel that archaeology or science is somehow superior or more legitimate than the ancient cultural knowledge of Native Americans. However, we believe that our cultural information is necessary to a full and rich understanding of the world and that neither is superior nor inferior to other belief systems. We believe we strike an appropriate balance between our cultural interests and archaeological interests.

Conclusion

The Colville Tribe supports the Committee's efforts to clarify NAGPRA to ensure that cultural items that are Native American will be duly recognized as "Native American" under the statute. Thank you for the opportunity to present the Colville Tribe's views to the Committee. We would be happy to assist the Committee in any way that we can as the Committee continues to consider these and other NAGPRA issues.

Accepted for Publication. American Journal of Public Health. November 2005.
Release approved by Publisher and Editor July 28, 2005

Letter to the Editor,
American Journal of Public Health

The article by Sekiguchi et al.[1] has provoked controversy around the acceptability of Dental Health Aide Therapists (DHATs) who are trained to provide diagnostic and dental treatment services in Alaskan Tribal health programs.

To deal with extensive unmet dental needs, DHATs have been trained under a Federal program to deliver year-round care in their remote villages under the general supervision of a dentist, where it is difficult to recruit dentists.[2] However, Sekiguchi et al disagree with this initiative stating that dentists are the only personnel qualified to provide these services and that DHATs cannot be effective substitutes. They provide no evidence for their opinion.

In contrast, Nash has proposed that use of DHATs is an acceptable and valid means to address current unmet treatment needs, especially among young children, and not just in Alaskan villages.[3, 4] Double-blind studies comparing Canadian dental therapists with federal dentists, demonstrated equivalent quality of dental restorations. Currently, there are some 42 countries with some variant of a dental therapist including New Zealand, Australia, China (Hong Kong), Singapore, Thailand, Malaysia, Great Britain, and Canada.[2]

There has been a lack of dentists willing to work in these communities for years. Most dentists prefer to work in more economically viable communities. One of the constructive responses by the American Dental Association has been to ask Congress fund a loan forgiveness program for dentists willing to work in the Indian Health Service where there are positions currently vacant.[5]

The Alaska Board of Dental Examiners has informed the State Attorney General that in the Board's opinion, currently trained DHATs are practicing dentistry illegally. However, the Board has no jurisdiction because the therapists are working in tribal programs outside the purview of state law.[6] Ultimately, the tribes will decide which way to go.[7]

The leadership of the Oral Health Section of the American Public Health Association believes that the rural Alaska Natives will be best served by the DHATs and endorses the program as a practical and innovative response to address the extensive oral health needs of these communities.

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Signed by:
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Licking County
Archaeology & Landmarks
Society
210 Granville Street, Newark, Ohio 43055

June 9, 2005

The Honorable John McCain, chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 40510

Dear Senator McCain,

The Licking County Archaeology and Landmarks Society (LCALS) is a non-profit organization of professional and avocational archaeologists, academics, and citizens interested in the prehistoric and historic heritage of central Ohio. We write to express our concern over recently proposed legislation that threatens the ability of scientists to study the earliest peoples of America. This proposed legislation will change the definition of "Native American" in the Native American Graves Protection and Repatriation Act (NAGPRA) by adding two seemingly innocuous words. It proposes changing the definition from "... of or relating to, a tribe, people, or culture that is indigenous to the United States" to "of or relating to, a tribe, people, or culture that is ***or was*** indigenous to the United States" (emphasis added). The new bill, still not assigned a number, originated as a part of S. 536, but due to the understandable controversy over this section, it was pulled from S. 536 and put into its own bill. A hearing has been scheduled for this bill, but it is not open to the public and the process is being conducted with undue haste.

Senator Ben Nighthorse Campbell introduced the original bill in order to "make technical corrections" to NAGPRA, but the change, though seemingly small, is not merely technical. It will radically change the way ancient human remains, such as Kennewick Man, are handled by federal agencies and institutions that receive federal funding. The decision of Magistrate Judge Jelderks in the Kennewick Man case, which was unanimously affirmed by the 9th Circuit Court of Appeals, declared that Kennewick Man was so ancient that, for all practical purposes, he could not have a demonstrable relationship with any particular modern Native American tribe. Therefore, he was not "Native American" under the narrow, legal terms of NAGPRA. The intent of NAGPRA was to address the human rights concerns of modern Native Americans and to allow the repatriation of human remains when those remains had a specific and demonstrable affiliation to a modern American Indian person or tribe. If no such relationship could be demonstrated, then the disposition of those remains could not be regarded as a human rights issue for any particular modern American Indian tribe or person. This, of course, need not mean that Kennewick Man is not a "Native American" in some general anthropological sense, or that he is not an ancestor of modern Native Americans. His

great antiquity, however, establishes that he is either related to all living Native Americans or he is related to none. This is why it is appropriate to use a legal definition of "Native American" that excludes such ancient remains from a process that could lead to the repatriation of such remains to a particular modern tribe, effectively negating the equally legitimate claims any other tribe might make. Indeed, the Kennewick Man litigation was instituted when a government agency (the Army Corps of Engineers) decided to give this 9,000-year-old human skeleton to a coalition of Native American tribes (including one tribe that was not even a federally recognized tribe). Having lost this case based on the restriction of NAGPRA's definition of "Native American" to tribes that are (present tense) indigenous to the United States, some now seek to close what they perceive as a "loophole" so that *all* human remains found in the United States, regardless of their antiquity or importance to a scientific understanding of the American past, can be subject to NAGPRA and potential repatriation. As an editorial in the *Rocky Mountain News* for October 13th, 2004 concluded: "Society has a legitimate interest in furthering scientific research on the prehistory of America, and such research harms no one now alive or alive within living memory. [Senator] Campbell's attempt to revise current law is a misguided attack on such research, and it should be defeated." We agree. And if such a radical change in the law is to be contemplated, we believe it should be subject to more thoughtful deliberation and discussion than the Senate Committee on Indian Affairs currently has planned for it.

At the very least, we request that this statement be included in the record of testimony related to this proposed legislation. And we respectfully ask that you notify us as to whether it has been so included.

Sincerely,

Wm S Dancey

William S. Dancey, Ph. D.
Director, Licking County Archaeology and Landmarks Society

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July 1, 2005

Senator John McCain
Chairman
Senate Committee on Indian Affairs
U.S. Senate
836 Hart Office Building
Washington, DC 20510
FAX 202 224-5429

Dear Chairman McCain:

I write regarding section 108 of S. 536, the Native American Omnibus Act of 2005. Please include this letter of opposition as part of the permanent record for the upcoming hearings on this bill.

As a professor and research scientist at the University of California, I have deep familiarity with human skeletal remains in a global sense, and, in particular, with issues involving Native American skeletal remains. The passage of NAGPRA legislation was a dramatic legislative step that made it possible for Native Americans to repatriate affiliated skeletal and cultural remains with which they were affiliated.

This legislation has had profound effects in science, education, and cultural relationships among the people of this country. These results were made possible by a careful balance. The stealthily proposed amendment to NAGPRA (the "or was" clause) has been aimed to interrupt that balance, and the result will not be in the interest of the nation.

The proposed change in wording would have a negative impact on science relating to skeletal remains in this country and beyond. It will destabilize the productive NAGPRA compliance atmosphere that has taken decades to build. It will negatively impact ongoing studies of skeletal remains in this country. These studies range from understanding debilitating diseases such as Lyme and osteoarthritis to research into human occupation of this hemisphere. It was never the intent of the

drafters of NAGPRA to terminate such studies, to encourage controversy, or to deny the general public the ability to understand the prehistory of humankind.

NAGPRA legislation was designed to let living Native Americans to repatriate their relatives. Its goals have been largely accomplished, with the benefit of many new understandings among scientists, Native Americans, and the general public.

I urge you and your colleagues to resist what is an obvious political attempt to rewrite well-crafted legislation that has been rigorously tested in practice and has already served this country well since it was drafted and passed.

Thank you and your colleagues for your time and for your consideration of my concerns.

Yours sincerely,

Tim D. White
Professor and Member
U.S. National Academy of Sciences

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