TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

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Good Morning, Mr. Chairman and members of the Committee. I am Walter Echo-Hawk, a staff attorney for the Native American Rights Fund ("NARF"). Thank you for the invitation to offer testimony at this Oversight Hearing on the American Indian Religious Freedom Act of 1978 (43 U.S.C. 1996) ("AIRFA"). As we near the 25th Anniversary of the AIRFA, I commend the Committee for reviewing the manner in which the AIRFA and follow-up laws have been implemented in two main areas, repatriation and protection of sacred sites.

As the Committee is aware, in the absence of adequate enforceable legal protections, Native Americans suffered an unprecedented history of religious intolerance and discrimination in the United States, which has included an outright federal ban on practicing tribal religion. Fortunately, through the work of this Committee, America began to address and reverse that human rights problem with the passage of AIRFA in 1978. AIRFA is a landmark law that set federal policy to protect and preserve the endangered traditional religions of America's indigenous peoples. The congressional findings made in 1978 regarding the scope and nature of infringements upon indigenous religion, which are embodied in the "whereas clauses" of AIRFA and further documented in the Report to Congress mandated by section 2 of AIRFA, continue to provide a foundation for legislative policy to protect Native American religious liberty which has endured over the past generation. However, the social change set in motion by AIRFA

will not be complete until all attributes of religious infringement have been addressed and Native American religious liberty is fully protected under federal law.

Because protection of indigenous religious liberty is critical to the cultural survival of Indian tribes and Native American communities, NARF and its clients have been vitally concerned with AIRFA and its follow up legislation. Staff attorneys of the Native American Rights Fund, including myself, offered testimony in 1978 to support passage of AIRFA and, following its enactment, worked with traditional religious leaders to provide their input into the Report to Congress mandated by Section 2 of AIRFA and entitled *American Indian Religious Freedom Act Report, P.L. 95-341* (U.S. Dept. Interior 1979); and, in later years, my colleagues and I offered oversight testimony on AIRFA implementation issues. On behalf of NARF clients, I have worked with this Committee on the development and enactment of important follow-up laws, such as, the 1989 repatriation provisions of the National Museum of the American Indian Act (20 U.S.C. 80q *et seq.*), the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001 *et. seq.*) ("NAGPRA"), and the American Indian Religious Freedom Act Amendments of 1994 (43 U.S.C. 1996a). My work on the NAGPRA legislation included participation as a member of the Panel for a National Dialogue on Museum/Native American Relations ("Dialogue Panel") which is referred to in Professor Bender's testimony.

All of Indian Country knows and appreciates the central role of this Committee since 1978 in developing and enacting legislation to protect the religious liberty of Native Americans and in monitoring efforts to implement that body of federal Indian law. The 25th anniversary of AIRFA provides an opportunity to celebrate substantial progress in

effectuating the social change set in motion 25 years ago and an occasion to take steps to address current implementation problems of paramount concern to Native American religious practitioners in the areas of repatriation and the protection of sacred sites, which are the subjects of today's hearing. My testimony discusses three issues:

1. I agree with Professor Bender that *Bonnichen v. United States,* 357 F.3d 962 (9th Cir. 2004) creates serious and immediate problems in effectuating the intent of Congress which warrant the legislative attention of this Committee. His legal analysis explains how the court's erroneous interpretation of NAGPRA's definition of "Native American" defeats the intent of Congress. I offer supplementary testimony to identify additional NAGPRA implementation problems created by that case which can also be corrected by legislative action.
2. Today the major NAGPRA implementation issue concerns the compiling of an inventory by the NAGPRA Review Committee of "culturally unidentifiable human remains" and the development of adequate recommendations and regulations on a process for the disposition of hundreds of thousands of those remains, as required by 25 U.S.C. 3006(c)(5) and (g). To date, this has not been done and deep concerns about the process being followed by the National Park Service have emerged. The attached emergency resolution of the National Congress of American Indians expresses conflict-of-interest and other concerns about the National Park Service's role in developing those important regulations.
3. Since 1989, there remains a pressing need to create a federal cause of action that allows Native American religious practitioners to protect sacred sites and afford Native American with equal protection of existing federal laws which protect the free

exercise of religion. This need is well-documented in Committee hearings for the past 15 years. I discuss the elements for a cause of action approach and explain why it is necessary accord Native Americans with equal protection of the federal laws.

1. *Bonnichen* creates a need to amend NAGPRA to preserve the intent of Congress.

Bonnichen is a highly-publicized decision affecting NAGPRA implementation and the effectuation of Congress' intent which requires oversight legislative attention. In *Bonnichen*, the Ninth Circuit vacated the Secretary of the Interior's determination that a preponderance of the evidence supported a finding that the pre-Columbian remains of the so-called "Kennewich Man," which pre-date European arrival in North America and were discovered on federal land, are culturally affiliated with certain present-day Indian Tribes and must therefore be repatriated. To support its decision, the court held that the pre-Columbian remains discovered in the Columbia River gorge are not "Native American" within the meaning of NAGPRA and the statute does not apply to govern their disposition. The court reached this result by interpreting two words ("that is") in NAGPRA's definition of "Native American" (25 U.S.C. 3001(9)) to mean that pre-Columbian remains found in the United States are not subject to the provisions of NAGPRA unless there is "a finding that remains have a significant relationship to a presently existing 'tribe, people, or culture,' a relationship that goes beyond features common to all humanity." 357 F.3d at 974. Despite the Secretary's interpretation to the contrary in 43 C.R.F. 10.2(d), the court held that NAGPRA requires "that human remains bear a significant relationship to a *presently existing* tribe, people or culture to be considered Native American" and enunciated its own guidelines for meeting this statutory requirement which are vague and provide no guidance as to who carries the

burden of proof, how the determination is to be made and by whom, or whether and to what extent Native Americans will have input in that determination. Id. at 975-77; see also, 217 F.Supp.2d at 1138. Moreover, these requirements *apply only to American Indian tribes and not to "Native Hawaiians"* because, according to the court, NAGPRA defines "Native Hawaiians" with different language using geographic criteria. 357 F.3d at 976. Creation of troubling disparate statutory coverage for the two groups gave no pause the court nor cause it to question its analysis.

I am familiar with NAGPRA's provisions from working on the legislation and writing about its legislative history[1] and *Bonnichen* from *amicus* participation on behalf of the National Congress of American Indians, Morningstar Institute, and Association on Indian Affairs. In my opinion, Professor Bender provides the Committee with a correct legal analysis of the Ninth Circuit decision and its impact on NAGPRA implementation. His recommendations for legislative language to correct the court's erroneous interpretation of NAGPRA's definition of "Native American" are sound.

As explained by Professor Bender, the court impermissibly rewrote the statute based on it's interpretation of a two-word phrase in 25 U.S.C. 3001(9). The interpretation is erroneous for two reasons. First, the court's narrow construction violates canons of statutory construction for remedial human rights legislation and for federal Indian legislation that require courts to construe statutes broadly for the benefit of Indian tribes, to resolve ambiguity in favor of the Indians, and to achieve the remedial purposes of the legislation. Second, because the court's construction nullifies other provisions and creates internal inconsistencies within NAGPRA's statutory scheme, as explained by

[1] *See,* Echo-Hawk & Trope, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," 24 Az. S.L.J. (1992) at 35-77.

Professor Bender, it fails to give effect to the statute as a whole. When considering the correctness of the decision, it is telling that no legislative history was cited to support the court's narrow interpretation of section 3001(9). Indeed, *there is no supporting legislative history* because no discussion or debate over that definition took place in the legislative history. The "Native American" definition was non-controversial, because everyone who worked on the legislation, to my knowledge, logically assumed that all pre-Columbian remains indigenous to the United States are “Native American” for purposes of the statute. That logical assumption is shared by the Secretary of the Interior who is responsible for interpreting and implementing NAGPRA under 25 U.S.C. 3011 and borne out in the Secretary’s regulations interpreting this provision. 357 F.3d at 974-75. It is also telling that the decision creates disparate treatment for "Native American" and "Native Hawaiian" remains which was clearly *not* intended by this Committee when it advanced that measure to the floor of the Senate.

Bonnichen is an example of judicial law-making. Rather than simply deciding the case on the facts by determining whether or not Secretary Babbitt's detemination is supported by the evidence, the Ninth Circuit and the court below rewrote the statute with a broad sweep that was unnecessary to decide the case.

The lengthy decision in the court below (217 F.Supp.2d 1116) contains several holdings issued in *dicta* which call into serious question several important aspects of NAGPRA and may potentially create confusion among agencies charged with implementing the statute. While the Ninth Circuit did not technically address that *dicta*, the Committee may nonetheless consider it necessary to address those issues in the interest of avoiding confusion, expense, delay and litigation in implementing NAGPRA

and to preserve, clarify and effectuate the intent of Congress. Those issues are listed below.

1. Joint repatriation claims by tribal groups. The district court held in *dicta* that joint repatriation claims by multiple claimants are generally inappropriate and struck down the Secretary's determination that such claims were appropriate. 217 F. Supp.2d at 1142, n.43, 1142-43. This holding imposes limitations on NAGPRA which were unnecessary to decide the case. The court recognized but disregarded the fact that most NAGPRA claim dispositions published in the Federal Register "involve multiple claimants" and its dicta gratuitously calls the propriety of those dispositions into question. Id. 1142, n. 45.

The holding relies upon the use of singular phrases in the Act. The court was not aware that Congress was confronted in 1989 and 1990 with prominent repatriation or reburial claims giving rise, in large measure, to the need for NAGPRA, and most were joint tribal claims. For examples, during that period I represented three Caddoan tribes -- the Pawnee, Arikara and Wichita -- in asserting joint claims against the Nebraska State Historical Society, the Salina Burial Pit near Salina, Kansas, and the Smithsonian Institution's Natural History Museum. These joint claims addressed Pawnee remains from the historic period and much older pre-Columbian remains ancestral to the Caddoan group of plains Indians consisting of the present-day Pawnee, Arikara and Wichita tribes. This Committee was aware that many, if not most, Indian tribes belong to larger culturally affiliated groups with common linguistic, religious and cultural traditions. The Committee was also aware that many such groups separated during their histories into regions, sometimes by migration and often by government relocation; and it is not

conceivable that the Committee would have enacted legislation such as NAGPRA that ignores those realities.

The Committee may wish to clarify any confusion created by the court's dicta. This can be done by inserting plural terms into the statute where appropriate and perhaps explicitly specifying that joint claims by multiple claimants are within the spirit and intent of NAGPRA. In that regard, consonant with the common practice in implementing NAGPRA, joint claims do not relieve the claimants of meeting all the requirements of the statute, including the burden to establish cultural affiliation, but evidence of joint claimants can be cumulative towards multiple tribes.

2. Consultation is a cornerstone of NAPGRA implementation. As the Committee knows, "consultation" is a cornerstone of federal Indian policy embedded in many statutes, executive orders and regulations as a tool for carrying out the government's trust obligations. As Professor Bender points out, consultation and information sharing was a key procedural recommendation of the Dialogue Panel and it has been incorporated into the spirit and provisions of NAGPRA and the Secretary's regulations for implementing this statute. *See, e.g.,* 25 U.S.C. 3003(b)(1)(A) and (2), 3004(b)(2), 3005 (a)(3) and (d), 3006(c)(6). Yet the district court strongly suggested that agency consultation efforts were "secret meetings" which contributed to "an appearance of bias" and relied upon agency consultation to support its holding, again in *dicta*, that the agencies did not act as fair and neutral decision makers. 217 F. Supp.2d at 1132-1134.

Least agencies and museums take that holding to heart and exclude Native American input from the repatriation process, which would bring the Nation back to pre-NAGPRA

times, the Committee should dispel any confusion that the consultation provisions of NAGPRA and the Secretary's regulations are central to the intent of Congress.

3. The need to clarify that Indian canons of statutory construction apply to NAGPRA. Despite the facts that NAGPRA originated with this Committee, is codified in Title 25 of the United States Code Annotated, and expressly states in 25 U.S.C. 3010 that NAGPRA reflects the unique relationship between Indian tribes and Native Hawaiian organizations, the court could not bring itself to believe that NAGPRA is an Indian statute for purposes of statutory construction. Those doubts were expressed by the Magistrate Judge during the hearing and marginalizes the role of those cannons when construing the statute in his opinion. 217 F. Supp.2d at 1139 n. 40

In addition, other aspects of the statute may need to be examined by the Committee in the wake of *Bonnichen* to safeguard against confusion in implementing NAGPRA and I am happy to work with Committee staff and the Tribes which were involved in that litigation to develop concrete legislative proposals.

2. Disposition of "culturally unidentifiable" human remains.

NAGPRA contemplates that despite its procedures, many Native American human remains and funerary objects may remain unidentified and unclaimed. The reasons for the existence of unknown Native American dead are various and may include: a lack of provenance documented by the original "collectors," loss of museum or agency records, theft, or the general turmoil and relocation of tribes in the history of the Nation. Yet NAGPRA contemplates a disposition of these dead. Section 3006(c) directs the Review Committee to compile an inventory of these dead in the possession or control of each Federal Agency and museum and directs it to make recommendations for specific actions

for developing a process for their disposition. Like all other Review Committee duties, this task must be done in consultation with Indian tribes and Native Hawaiian organizations with administrative and staff support provided by the Secretary currently performed by the National Park Service ("NPS"). 25 U.S.C. 3006(c)(6) and (g)

After 14 years, the Review Committee and its NPS staff have not completed the inventory. Nor has the Committee has not made its recommendations for specific actions for developing a process for disposition of them. Indeed, without having the inventory available, Indian tribes and Native Hawaiian groups are unable to enter into informed consultation with the Review Committee as required by Section 3006(c)(6).

NARF is legal counsel to the "Working Group for the Return of Culturally Unidentified Remains," which is chaired by Wallace Coffee, Chairman of the Comanche Nation and consists of prominent Native Americans concerned about the proper disposition of these unknown Native American dead and who have closely monitored the work of the Review Committee and NPS on this important issue.[2]

The Working Group is deeply concerned over the implementation of Section 3006(c)(5). In particular, it is concerned that the Review Committee will attempt to develop its recommendations or approve proposed NPS regulations governing the disposition of those dead without first entering into informed consultation with Indian tribes and Native Hawaiian groups. Various attempts to advance regulations adverse to Native interests were made over the past year or so, even though the NPS has not completed its inventory of those dead nor provided Indian country with that data which is

[2] Working Group members include the Chairwoman of the Native American Rights Fund Board of Directors, Ho'oipokalaena 'auao Nakea Pa; Suzan Harjo, President of the Morningstar Institute; Peter Jamison, NAGPRA Representative, Seneca Nation; Kunani Nihipali, Hui Malama; James Riding In,

necessary for informed Native American consultation. The Working Group is convinced that Section 3006(c)(5) cannot be implemented in an impartial fashion for the reasons set forth in the attached NCIA emergency resolution #MOH-04-002 (Resolution Urging the Immediate Separation of All NAGRPA Implementation Activities from the National Park Service) and especially the conflict-of-interest reasons discussed therein. On behalf of my client, I urge the Committee to determine when the inventory will be completed and made available to Indian country, ensure that no recommendations or proposed regulations concerning the disposition of unknown Native dead are made until after the inventory is made available and the Review Committee enters into informed consultation with Indian tribes and Native Hawaiian organizations, and, finally, to investigate steps which may be available to ensure that the implementation of NAGPRA is moved to a neutral agency with the Executive Branch.

3. <u>The need and rationale for a Sacred Sites cause of action statute.</u>

The longstanding need to enact legislation to protect Native American sacred sites continues to be the paramount political and legal challenge in implementing AIRFA policies. The absence of federal protection is the most glaring loophole in federal Indian law today. Despite these difficulties, all world religions have holy places and their preservation is the responsibility of each nation.

This need has been known since the1989 *Lyng* decision and repeatedly documented in numerous hearings. In the meantime, some irreplaceable sites have been destroyed causing immeasurable harm and remaining sites are jeopardized by the lack of protection. At the same time, federal statutes do protect religious property, such as

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Historian and repatriation consultant to the Pawnee Nation; and Mervin Wright, Pyramid Lake Paiute Tribe.

church buildings, but each of those statutes exclude protection for Native American holy places because they are natural landmarks which are not owned by dispossessed Native Americans. This double standard in federal law began with enactment of the Religious Freedom Restoration Act of 1993 ("RFRA"), which created a cause of action which could have been used by to protect Native American worship at sacred sites; however, Committee reports and floor statements in RFRA's legislative history indicate that this law is not intended to apply to the government's use of its own property which ensures that Native American holy places located on federal land are not protected by this statute. The double standard continues in the cause of action provided in the Religious Land Use and Institutionalized Persons Act of 2000, 16 U.S.C. 2000cc ("RLUIPA"), because this law protects the religious use of a church only if the claimant "has an ownership, leasehold, easement, servitude, or other property interest in the regulated land." 16 U.S.C. 2000cc5(5). For "second class" Native American holy places, existing federal law affords only an inadequate patchwork of unenforceable policies and limited procedural protections. This disparate legal treatment raises an equal protection of the law problem and a need to afford Native Americans with equal protection of federal law.

In light of the above concerns, I respectfully offer a concept for a proposal to amend AIRFA with a set of short provisions drafted to afford Native Americans with equal protection of existing federal laws that protect the free exercise of religion, such as RFRA and RLUIPA:

(1) clarify that 42 U.S.C. 2000bb1-4 of RFRA shall not be construed or applied to exclude free exercise claims involving Native American worship at sacred sites located on federal land;

(2) provide a one phrase amendment to 42 U.S.C. 2000cc-5(5) of RLUIPA to ensure that the interest of Native American religious practitioners in worshipping at traditional religious places located on federal land constitutes a sufficient "property interest" for purposes of that statute; and

(3) provide a substantive "federal undertaking" cause of action similar to RLUIPA that protects Native American worship at traditional Native American religious places.

Such amendments, together with appropriate federal Indian law definitions commonly used by the Committee in other legislation such as AIRFA and NAGPRA, may avoid undue government entanglement issues that are potentially involved in more lengthy and complex proposals to protect sacred sites through extensive federal land management procedures and consultation protocols.[3] While such approaches may well be possible and desirable, if not preferred, the basic goal of the above approach is simply to ensure that existing federal law is inclusive of important indigenous religious practices and does not favor one set of religions over indigenous religions as required by Establishment Clause principles. I would be glad to work with Committee staff in considering the above and other proposals to address the above concerns. It is extremely important that this loophole in federal Indian law be remedied as soon as possible to afford Native Americans with equal protection of federal law.

[3] Land management changes are laudable and may voluntarily by agreed to by federal land managers and Indian tribes after Congress "levels the playing field" by providing an effective cause of action statute.