TESTIMONY OF
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THE NAVAJO NATION

BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

The Navajo Nation is the largest Indian Tribe in the United States, having approximately 200,000 enrolled members. The Navajo Nation encompasses roughly 25,000 square miles in the States of Arizona, New Mexico, and Utah. The Navajo people have been the subject of study by anthropologists since the mid-19th century, certainly qualifying us as one of the most intensively studied peoples on earth. Thousands of archaeological projects have been conducted on Navajo Nation lands. As a result of this lengthy and intensive research interest, museum and archaeological collections of Navajo materials are very extensive.

The Navajo Nation Historic Preservation Department (HPD) serves as the Navajo Nation's point of contact on matters pertaining to the Native American Graves Protection and Repatriation Act (NAGPRA). More than 326 museums have contacted HPD and provided us with preliminary notices required under NAGPRA. For many museums, including the Smithsonian Institution, the Navajo collection is their largest holding.

For these reasons the Navajo Nation has a direct interest in the implementation and administration of the NAGRPA program. NAGPRA assigns lead responsibility for implementation to the Secretary of the Interior, who has delegated this responsibility to the National Park Service (NPS). The Navajo Nation is deeply troubled about the way in which NPS is implementing and administering the NAGPRA program.

## THE ORIGINS OF NAGPRA

NAGPRA was enacted in 1990 as the culmination of a decade of legislative activity that had been aimed at resolving the disposition of the skeletal remains of hundreds of thousands of Native Americans held in museum and federal agency archaeological collections. Native Americans had been trying for decades to obtain the return of those remains for proper and respectful disposition in accordance with tribal customs. To varying degrees, museums, archaeologists, and physical anthropologists had actively resisted those efforts. This resistance had been largely successful, even in some particularly egregious instances where the remains were of a known individual and the details of the grave robbing were notorious.

Native Americans asserted the basic human right to bury their dead and to the dead's right of repose, and by extension, the right to reburial of remains that (for whatever reason) had been disinterred. Archaeologists and physical anthropologists argued for retention of collections because they asserted that these materials were a potential source of scientific information. Museums contended that they owned the material in their collections, and they could not divest themselves of their property without violating the public trust (which, they claimed, provided the

legal basis for their existence as not-for-profit entities). Although public forums had been held to provide for discussion among the various parties, by and large they were all talking past one another.

Prior to the passage of NAGPRA, the Senate Indian Affairs Committee sponsored a "national dialogue" among representatives of the professional archaeological community, museums, and Native Americans. The result of that "dialogue" was a report that was essential to the drafting of NAGPRA?

In passing NAGPRA, Congress was fully aware of the competing claims on these human remains and the nature of the controversies among the various parties. The Senate Committee on Indian Affairs had considered and held numerous hearings on various bills relating to this matter throughout the 1980s. NAGPRA was crafted with full knowledge of the disagreements and with the benefit of the "national dialogue." The result was a carefully considered balancing of all of these competing claims and interests. It is certainly true that Native Americans viewed NAGPRA as a victory for their basic human rights. But NAGPRA was recognized in Indian country for the compromise that it was, and few Native Americans or Indian Tribes were completely happy with the compromises struck. From the start it was clear that the professional archaeological community was dissatisfied with the outcome. The archaeological community objected in part to the report of the national dialogue? The Society for American Archaeology gave NAGPRA only qualified support during its consideration by Congress.

## PROBLEMS AND ISSUES

APPEARANCE OF A CONFLICT OF INTEREST. From the time of the initial consideration of NAGPRA, the Navajo Nation has been concerned with the conflict of interest apparent in the assignment of principal responsibility for NAGPRA program development and oversight to the Secretary of the Interior. The apparent conflict arises because NPS is charged with providing guidance and oversight for NAGPRA implementation, yet at the same time NPS holds considerable collections of archaeological and ethnographic materials, some which are subject to repatriation under NAGPRA. This problem is exacerbated by the fact that day-to-day administration of the program within NPS has been assigned to the Departmental Consulting Archaeologist (DCA), in effect the chief archaeologist of NPS and the Secretary's principal advisor on archaeological matters. The Navajo Nation believes that NPS's NAGPRA program administration and oversight, no matter how evenhanded, will always be tainted by this apparent conflict of interest.

Although there may be ways to minimize this appearance of conflict, because many Interior agencies besides NPS hold archaeological collections that include human remains and items of cultural patrimony,3 delegation of NAGPRA program responsibility will be problematic as long as Congress chooses to assign principal responsibility for NAGPRA to the Interior Department.

RECENT IMPLEMENTATION PROBLEMS. Until recently, NPS generally seemed to approach NAGPRA matters fairly and openly. In the Navajo Nation's experience at least, this

statement remains true with respect to the Park units. Unfortunately, it is no longer true with respect to the central office.

For example, several years ago Pueblo religious leaders identified a number of items in the collection of a particular National Park that were needed for the practice of traditional religion. The Park agreed to repatriate the items, but the repatriation was halted when the DCA refused to sign the Notice of Repatriation. Only after the issue was brought to the NAGPRA Review Committee's attention were the Notice published and the items repatriated.

This example illustrates both the disparity between the attitudes of the parks and those of the central administration as well as use of the notification process by the NPS administration to attempt to halt repatriation.

ADMINISTRATIVE DELAYS. As of April 20, 1999, when the Senate Committee on Indian Affairs held an oversight hearing on NAGPRA implementation, there was a twoyear backlog in publishing Notices, the final step before an agency or museum can return items of cultural patrimony to an Indian tribe claiming them. This backlog remains undiminished.

A Notice is prepared by an agency or museum only after it has reached agreement with an Indian tribe that particular materials in its possession are items of cultural patrimony or human remains, and that the tribe making the claim has a "repatriation right" to them under NAGPRA. Reaching this point is often an arduous and harrowing experience for both the tribe and the agency/museum. Certainly, it almost always takes far too long.

The Notice represents the culmination of this process. It is outrageous that the NPS adds a two-year delay to this process because they cannot or will not expedite the publication of these Notices in the Federal Register. Publication of the Notice is not required by NAGPRA, it is imposed by NPS's regulations. This backlog reflects the refusal to allocate the resources necessary to accomplish the task.

In another example, a museum agreed to repatriate items stripped from bodies after the massacre at Wounded Knee, but again the Notice went unsigned until the review committee become involved. Both this and the example provided earlier illustrate the fact that NPS is using its own requirement for publication of Notices as a way to review the content and completeness of the Notice as well as the substance of the decision being made by a museum/agency. It is apparent that, if the NPS disagrees with the decision, the Notice is not signed.

Since 1990 when NAGPRA was enacted, Notices have been published that involve about 18,900 human remains? The best available estimates are that museums and federal agencies hold the remains of approximately 200,000 Native Americans.5 In the decade since NAGPRA was enacted, less than 10 percent of all human remains in museum/agency collections have been have been repatriated. At this pace, repatriation of current museum/agency holdings of Native American human remains will not completed for at least another 100 years. Furthermore, the Navajo Nation believes that, absent dramatic changes in policy and program implementation, it will take far more than a mere century to complete the process of repatriating existing collections.

The remains identified for repatriation so far are most likely the ones involving the least controversy--the ones for which there is little or no reasonable question about cultural affiliation. Where questions arise about affiliation, the process will certainly take even longer.

Recently, NPS has hired contractors to supplement the tiny staff assigned to NAGPRA matters. But it is unclear what degree of administrative or technical NAGPRA expertise the contractors actually possess. It is also unclear whether NPS will provide the leadership necessary to improve this situation or even that the contractors will be left alone to do what needs to be done. In short, NPS has not been effective at reducing the backlog in the past 15 months. The Navajo Nation believes that this reflects a policy decision to slow repatriation rather than being the result of meager resources or inept administration.

ANTI-REPATRIATION BIAS IN PROGRAM ADMINISTRATION.

Until quite recently, the DCA was the NPS staff leader on NAGPRA matters. The DCA is highly respected in and intimately involved with the professional archaeological community. The most vocal members of the professional archaeological community have taken an increasingly antirepatriation stance. The most visible members of this group, are of course, the plaintiffs in the so-called Kennewick Man case. While some archaeologists assert that these people do not represent the profession as a whole, the professional community has done little or nothing to repudiate their actions or claims.

In 1988, the DCA said "I continue to feel, as I've already stated a couple of times, that what we need is a situation by situation analysis concerning burial and reburial and I think it is a mistake in the long run for this society, including Native Americans, to reinter all human remains from archaeological sites .... 6 More recently, the DCA informed Justice Department attorneys that NAGPRA is not an "Indian" law; that is, it is not for the benefit of Native Americans. The DCA asserted a variation of this at a recent training for U.S. Department of Justice staff when he pointed out the need to "balance" the public interest in materials covered by NAGPRA with the interests of Native Americans. As stated above, Congress struck that balance in enacting NAGPRA. Nothing in NAGPRA suggests that a further balancing is required or that NPS is authorized to engage in such a balancing of interests in developing, implementing, and administering NAGPRA policy and guidance (and procedures? regulations?). NAGPRA envisions no such balancing of interests. The only issue is whether or not a tribe making a claim has a legitimate one under the criteria established by NAGPRA. Once cultural affiliation is determined, control of the remains passes to the tribe, and Congress declared this to be the proper outcome of balancing the various interests in Native American human remains.

The DCA's apparent role in NAGPRA program development and administration has recently been reduced. Lead responsibility has been assigned to the Assistant Associate Director for Stewardship and Partnerships (AAD). We have three concerns with this delegation. First, the term "Stewardship" is normally used to refer to the management of "resources"---our ancestors are not resources. In addition all to often in our experience, "Partnerships" with federal agencies mean the federal agency talks to the tribe, and then the "partners" do whatever the federal agency thinks should be done. Finally, the AAD openly admits to having no expertise in NAGPRA

matters. Given the AAD's lack of expertise, is seems inevitable that DCA (whose office adjoins the AAD's) will continue to play a principal role in the NAGPRA program. This "redelegation" must be regarded as little more than cosmetic.

DE FACTO POLICY SETTING. NPS is developing NAGPRA policies and standards in an ad hoc fashion, without any input from Native Americans. The context for this is the so-called Kennewick Man case. Although the Navajo Nation has no direct interest in the Kennewick case, the Navajo Nation is gravely concerned about the way in which NPS appears to be allowing this case to shape national policy. The evolving ad hoc standards advance the anti-repatriation cause at the expense of Native Americans and our ancestors.- Since assuming responsibility from the Corps of Engineers for resolving the case, NPShas led a massive research effort. It is difficult to imagine the plaintiffs conductingstudies any more extensive, detailed or destructive than those being conducted by theGovernment, which are ostensibly justified by the need to identify cultural affiliation.

Recently, this research has turned to DNA testing, which is being conducted despite the fact that the Interior Department's experts recommended against DNA testing because in their judgment the probability that the remains contain DNA is extremely small,z Furthermore, while DNA, if present, might provide some interesting information on biological relationships--perhaps even on lineal descent--it is completely useless for determining cultural affiliation.

Nevertheless, the DCA asserts that the research project being carried out on the Kennewick remains represents the standard that should be met any time there is a dispute.8 This is disturbing for a number of reasons. First, these research-friendly precedents and standards are being set in the absence of any consultation with Native Americans in general or the tribes claiming cultural affiliation with the Kennewick remains in particular. It bears repeating that the DNA testing is being carried out even though the Government's experts view it as fruitless. If present, DNA testing might reveal some interesting information about what groups the Kennewick remains are related to genetically. But cultural affiliation is social or cultural matter, which is virtually independent of biology, genetic data, even if recoverable, can not answer what is, after all, a social and cultural question. As far as we can tell, DNA tests are being run solely for the sake establishing the precedent for doing DNA testing whenever archaeologists create a dispute over repatriation. Second, that this research, much of it destructive, is being conducted at all at this juncture can only be justified by the assumption that other sources of information, such as tribal traditions, will not provide a sufficient basis for making a determination of affiliation. Proceeding with this research based on such an assumption shows NPS's pro-archaeology bias. Ethnohistorical information or tribal traditions are being discounted a priori as a reliable means of determining affiliation since the "scientific" studies were planned and are being conducted prior to any analysis of the traditional evidence presented by the tribes. The research will be complete and the precedent, however ad hoc and haphazard, will be set long before NPS even proposes a decision on the matter of cultural affiliation.

Furthermore, it appears that the Corps of Engineers' original decision that the Kennewick find was from Umatilla lands was correct.

Although the original decision by the Indian Land Claims Commission excluded the land from which the Kennewick skeleton came from those lands for which the Umatilla would be compensated, the Umatilla appealed that original decision. On appeal, a settlement was reached which vacated the original decision, but never specified what lands were covered by the settlement. The lands from which the Kennewick remains were recovered fall within the boundaries of the Umatilla Reservation as originally designated. Thus, it appears likely that the Umatilla have a valid claim to the remains because they were found on Umatilla tribal lands. Absent another tribe making a claim and showing that those remains are more closely culturally affiliated to them than to the Umatilla, the remains should be repatriated to the Umatilla. In addition, in the absence of another tribe making a claim, the question of cultural affiliation does not arise. None of the tests completed, underway, or planned is necessary to resolve affiliation unless NPS intends its research to demonstrate that notwithstanding the clear language of NAGPRA, cultural affiliation must demonstrated to the satisfaction of the NPS. All of the information on the land claim case is a matter of public record. It is inconceivable that NPS and the Justice Department have prepared so poorly that they are unaware of these facts.

NAGPRA does address controversies over cultural affiliation. Nothing in the Act, however, suggests that archaeologists have a right to question issues of affiliation. These are questions the Act reserves to the Indian Tribes and the museums with which- they are dealing. Disputes may arise under the terms of NAGPRA, but only if more thanone tribe makes a claim for the same human remains or items of cultural patrimony or ifthe museum determines that a tribe's claim is not substantiated.

A controversy clearly exists over Kennewick. But it is not a NAGPRA controversy. Two issues have been raised, one procedural and one Constitutional. The procedural issue is legitimate: the Corps of Engineers followed no identifiable process to reach its decision to repatriate the remains. This procedural fault must be remedied, but the remedy NPS is pursuing is out of proportion to the effort actually necessary to correct the error. On the other hand, the Constitutional claim appears without merit. There is no obvious answer to the question of why the Government has not addressed the procedural questions in as rapid and straightforward a fashion as possible, opting instead for the most elaborate set of tests purportedly to determine cultural affiliation when the record reveals no evidence that determining cultural affiliation was ever question to anyone other than plaintiffs. Likewise, why the Government has not responded to and sought dismissal of the Constitutional claim is, at best, obscure.

## CONCLUSIONS

NPS's administration of the NAGPRA program has been seriously flawed. It has taken as an operational premise the false assumption that NAGPRA decisions must be made in a fashion that balances the interests of all parties who purport to have an interest in Native American human remains. This premise is utterly false: Congress itself has already balanced the interests, and Congress did not direct the Secretary of the Interior to engage in a further balancing of the human rights of Native Americans against the research "rights" of archaeologists and physical anthropologists. This is precisely the sort of balancing that archaeologists, and particularly the Society for American Archaeology and its officers, have argued for in every instance? It is also

the approach recommended by the DCA prior to the passage of the Act. This approach was considered by Congress but was not adopted. Yet the NPS has clearly sought to inject this "balancing of interests" in spite of the determination of Congress.

NPS has also injected itself into the decision making process that Congress has clearly reserved for the tribes, museums, and federal agencies holding collections that include Native American human remains and/or items of cultural patrimony. It has done so by creating via regulations a burdensome reporting requirement as a prerequisite to publication of a Notice of Intent to Repatriate, and then by choosing not to sign Notices when it does not agree with the decisions that were reached. This is a particularly egregious violation of the intent of Congress, which clearly contemplated that these decisions would, as far as possible, be made directly by the tribe(s) making claims and the organization holding items subject to repatriation under NAGPRA.

NPS has taken advantage of the controversy surrounding the Kennewick remains to further advance its pro-archaeologist agenda. NPS has pursued a course of action that requires a very high level of scientific study. Since the remains were found within the original boundaries of the Umatilla Reservation, they came from tribal lands and there is in fact no real question about cultural affiliation to be resolved. Setting a precedent that "raises the bar" so as to make repatriation more difficult and result in lengthy delays is clearly the real reason behind the current NPS approach to the Kennewick situation.

The studies undertaken thus far will undoubtedly cost well over $1 million. If this really is the research standard required to resolve a dispute, as the DCA asserts, repatriation will come to a halt. Many, perhaps most, museums could barely afford to complete the required NAGPRA inventories. We know of no museum or federal agency that has the resources to engage in a level comparable to the Kennewick studies even once, let alone dozens or perhaps hundreds of times.

RECOMMENDATIONS

In order to begin to correct the problems identified here, the Navajo Nation believes that the following steps should be taken.

1. The backlog in Notices of Intent to Repatriate needs to be eliminated. With recent budget increases, NPS no longer has the excuse of not having the resources to do the job. Now the question becomes whether or not Interior can limit itself to reviewing the completeness of the proposed Notices and leave the substantive decision making to the Tribes and the museums/agencies.

2. Congress should act to ensure that the NAGPPA Program is transferred from NPS by deleting NAGPPA funds from NPS and assigning them to the Secretary's office or to the office of the Assistant Secretary for Policy, Management, and Budget, a neutral branch of the Department of the Interior that manages neither land nor collections. Although NPS was put on notice over a year ago about problems in NAGPRA implementation, including the apparent conflict of interest, to date no meaningful steps have been taken to resolve any of these problems. The Navajo Nation believes that neither NPS nor the Department of the Interior will take any action to correct the

problems identified here. Congressional action is required if these problems are to be resolved.

3. The Committee should call for a Government Accounting Office study of the Kennewick case, both to examine the expenditure of public funds and to review the way in which NPS has fulfilled its responsibilities under NAGPRA in this instance. The research project being undertaken with respect to the Kennewick man is extremely intensive and extensive. The costs of these studies, which the DCA regards as precedent setting, should be closely examined by Congress.

The Kennewick man case is perhaps the best known case involving NAGPRA issues, even though NAGPRA issues have yet to be joined. NPS's activities appear to be problematic and inconsistent with the letter and spirit of NAGPRA. Yet NPS claims to be setting standards with its handling of the matter. The Navajo Nation believes that NPS's handling of the substantive issues also needs to be thoroughly investigated by GAO.