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National Congress of American Indians
Testimony on the Implementation of the Native American Graves Protection
and Repatriation Act (NAGPRA)
before the Senate Committee on Indian Affairs
April 20, 1999**

I. Introduction

Good morning Chairman Campbell, Vice-Chairman Inouye and distinguished members of the Senate Committee on Indian Affairs. On behalf of the National Congress of American Indians (NCAI) and NCAI President W. Ron Allen, thank you for the opportunity to present testimony regarding the implementation of the Native American Graves Protection and Repatriation Act (NAGPRA).¹ My name is Ernie Stevens, Jr. and I am First Vice-President of NCAI and a member of the Oneida of Wisconsin Business Council. NCAI remains dedicated to advocating aggressively on behalf of the interests of our 250 member tribes on a myriad of issues including the protection and preservation of Native culture and tradition. We also remain dedicated to the exercise of tribal sovereignty and the continued viability of tribal governments.

In November 1990, NAGPRA was passed by Congress and signed into law by the President. NAGPRA is considered “remedial” legislation in that it provides a legal basis for the return of human remains, grave goods, and objects of cultural patrimony. Following NAGPRA’s enactment, Native Americans rejoiced at the prospect that their lost ancestors and sacred objects would be returned after decades of separation, and that their sacred burial sites would now receive some legal protection. As you know, Congress’ intent in enacting NAGPRA was to ensure that Native American human remains and sacred objects retained by the federal, state, and local governments, universities, and the museum community are returned to the appropriate tribes and/or descendants. The law also ensures that burial sites on tribal and federal lands are properly protected. However, unless those involved in the process maximize the law’s mandates and potentials, NAGPRA cannot continue to remedy the problems it was intended to address.

Indian people see the return of their ancestors and sacred objects as a return of their cultural and spiritual foundations, which is the very heart of Indian nations. In order to bring their people home to their rightful resting places, to protect those at rest, and to fulfill the mandates of NAGPRA, Native people have over the years begun to understand both the scope and limitations of the law, its process, and regulations. At the same time, they are also looking at their own community’s needs and goals and how to address their concerns through the NAGPRA Review Committee.

¹ Pub. L. 101 - 601

In 1996, NCAI established a Commission on Repatriation and Burial Sites Protection which meets during our Mid-Year and Annual sessions to address the variety of issues involved in repatriation and burial sites protection and preservation. The Commission was formed in 1996 to conduct investigations, hold hearings, issue reports, advocate appropriate legislation, articulate positions on repatriation and burial sites protection, and represent NCAI in appropriate forums, such as the NAGPRA Review Committee meetings. The NCAI Commission is comprised of nine members from throughout Indian Country. The formation of this national repatriation and burial sites protection coalition has helped tribes, through the sharing of common experiences, to work together on the sometimes difficult and complex decisions involved in the NAGPRA process. Over the next few months, the NCAI Commission, will be developing a survey which will help determine the existence and scope of tribal NAGPRA programs across Indian Country.

When discussing NAGPRA and its implementation, the original intent involved in the enactment of this legislation must always be kept mind. It was enacted to address and correct standards and behavior of the scientific community which were discriminatory, paternalistic, and a violation of human rights and property rights. It was drafted as a delicate compromise between the scientific community and Indian Country, with an understandable emphasis on the perspectives and needs of Native peoples. Overall, NAGPRA is human rights legislation signed into law in order to provide a legal avenue for tribes to right some of the wrongs committed against them in the past and the present.

II. Critical Issues in the Implementation of NAGPRA

Over the last nine years, many tribal leaders, their staff, elders, and religious leaders have worked to develop programs to deal with the many complex and difficult issues involved in the NAGPRA process. There are a variety of issues and concerns to tribal leaders and others in the implementation of NAGPRA which arise out of a multitude of different experiences and a broad spectrum of involvement with the law. Some tribes have a lot of experience and have established viable repatriation programs, while others may not have the resources to implement this important Act. There are many positive aspects to the law, as well as many shortcomings. For many of our member tribes the task has not only been to identify and address these shortcomings, but also to make the best of what the law already provides. The following are some of the critical issues and concerns raised by our member tribes with regard to the implementation of NAGPRA. Mr. Chairman, we appreciate your interest in and concern over this important process and we encourage the Committee to address the following concerns to ensure that tribes are able to fully implement the important provisions contained within NAGPRA.

A. Tribal Programs

One of the most important and central issues of concern to tribes is having the resources to develop their own program or system that would assist them in the implementation of NAGPRA and help them meet their individual cultural and historic preservation goals. For those tribes

which have the resources, their programs have incorporated the following components, which generally allow them the ability to:

- (A) provide an authoritative source of tribal law and customs;
- (B) provide the expertise needed to analyze information such as summaries and inventories; in many cases, the information provided is often very vague;
- (C) facilitate involvement by traditional religious leaders and other cultural authorities;
- (D) hold consultations with governmental agencies, museums, and universities;
- (E) conduct independent investigations;
- (F) fully assert their claims to certain remains and objects;
- (G) determine proper treatment of repatriated items;
- (H) resolve intra-tribal disputes; and
- (I) preserve and protect those remains and items still at rest.

Overall, tribal programs have been instrumental in helping tribes meet these objectives, which in turn, has helped them comply with NAGPRA. By facilitating and ensuring tribal compliance, those in the government, in museums, and in universities will also be held more accountable. The resources and expertise are available, but tribes must have access to those resources to meet the ultimate goals of NAGPRA.

B. Funding and Resources

Since the passage of NAGPRA, activities under the law have intensified in a number of areas, including the completion of summaries and inventories of remains and objects, as well as a variety of successful repatriations. However, while the process is moving forward, many tribes are still finding themselves with very little resources and limited staff available to complete the work necessary to properly fulfill the mandates of the law. Meanwhile, government agencies, museums, and universities, in many cases, have the available resources and staff available to implement the laws requirements.

Under Section 10 of NAGPRA, the Secretary of the Interior is authorized to provide grant funds to Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations to assist them in the repatriation of human remains and cultural items. Museums are also eligible to receive grants under this section. Most funded proposals emphasize collaboration: tribes working with tribes; tribes working with museums; and museums working with other museums. The funds

are usually divided equally between tribes and museums, but have proven to be inadequate. Despite a continual tribal request since FY1994 for NAGPRA related grants of \$10 million², to date, the Administration has requested and Congress has appropriated only a fraction of that amount - \$2.4 million annually. This funding level is far below the projected amount necessary to successfully comply with the provisions of the Act and well below the \$10 million level. Mr. Chairman, the protection and return of our ancestors and their sacred objects is of vital concern to our member tribes. In order to be equal partners in the NAGPRA process, tribal governments must be provided with sufficient funding, a request which we recently conveyed to this Committee during its hearing on the President's FY2000 budget request.

C. NAGPRA and the National Park Service

Another issue of vital concern to our member tribes is the status and viability of the NAGPRA Program within the National Park Service under the Department of Interior. Over the years our member tribes have expressed a number of concerns regarding this program and its overall role in the implementation of the law. Many feel that keeping the NAGPRA Program within the National Park Service unbalances the delicate compromise originally struck during the drafting of NAGPRA; thereby, subjecting tribes to undue pressure in the name of science, based on the needs of the museums, the agencies, and the states. Furthermore, to place this program under the authority of the Departmental Consulting Archaeologist is clearly erroneous due to obvious potential for conflict of interest. This position requires the oversight of a federal statute, NAGPRA, that mediates museum and archaeological interests with the interests of American Indians, Alaska Natives, and Native Hawaiians.

The NAGPRA Program plays a critical role in providing much of the funding and technical assistance necessary for tribal governments to carry out the mandates of NAGPRA and its administrative regulations. NCAI believes that the original intent and focus of the law requires that the NAGPRA Program be raised to a level and a location within the Department of Interior which will provide the least amount of bias, and accordingly it staffed with qualified individuals attuned to the objectives and goals of this very important human rights legislation. This includes staff who understand the perspectives of all the parties involved and who have a clear understanding of all applicable cultural and historic preservation laws, such as the Archeological Resources Protection Act, the National Historic Preservation Act, and others.

The United States must consider the government-to-government relationship and the trust responsibility to Indian tribes and their members concerning the return of goods and remains. This responsibility carries with it the highest of fiduciary standards guiding the conduct of federal agencies in its treatment of tribes in the area of repatriation. Mr. Chairman, the proper placement of the NAGPRA program within the Department of Interior is a very important decision. One which requires the consideration of variety of issues and perspectives involved in the

² NCAI and the Museum community have continuously pointed out this need when providing testimony to the Senate Committee on Indian Affairs and both the House and Senate Interior Appropriations Subcommittee.

implementation of the Act. Therefore, pursuant to the attached NCAI Resolution # MRB-98-102, we ask that the Senate Committee on Indian Affairs examine the issue of conflict of interest and consider the views and concerns expressed above by our member tribes.

1. Deadlines and Extensions

Under NAGPRA, the deadline for completion of inventories of human remains and associated funerary objects in museum and federal agency collections was November 16, 1995. Although agencies and museums were to have completed their inventories by this date, Section 5(c) of the law authorizes the Secretary of Interior to extend the inventory time requirements for museums that have made good faith efforts to complete their inventories by the statutory deadline. In 1996, 58 extensions were granted by the Secretary to various museums, institutions, and agencies to complete their inventories. Subsequently, six institutions have again applied for extensions beyond the one granted to them in 1996, causing further delays in the overall process. The continued granting of extensions raises concerns by our member tribes, leaving them wondering if the Park Service, who is in charge of providing the recommendations for extensions, are as serious as they should be about enforcement of the law. A total of 109 Notices of Intent to Repatriate have appeared in the *Federal Register*, representing 15,262 individual remains, 39,935 unassociated funerary objects, 780 sacred objects, and 479 objects of cultural patrimony (281 have been designated both sacred objects and objects of cultural patrimony). The Department of Interior has estimated that approximately 200,000 individual remains require repatriation under NAGPRA.³

2. The Final Rule

On December 4, 1995 final regulations implementing the statute were published in the *Federal Register*. On January 3, 1996 those regulations went into effect. The rule established procedures for protecting and determining the disposition of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony that are intentionally excavated or inadvertently discovered on federal or tribal lands. It also establishes procedures for conducting summaries and inventories and repatriating human remains, funerary objects, sacred objects, and objects of cultural patrimony in museum or federal agency collections. The final rule was drafted by the Departmental Consulting Archeologist for the Secretary of the Interior, in consultation with the NAGPRA Review Committee, as directed by Section 8(c) (7) of the Act. However, a number of tribes have expressed concern over the drafting of these regulations, including the consultation process, and the fact that it was overseen by the Departmental Consulting Archeologist instead of a more neutral authority.

D. Other Implementation Issues of Concern to Tribes

As tribes continue to become familiar with NAGPRA, it has become clear to them, implementation of the Act has not provided those protections which the law intended. Listed below are some of the concerns expressed by NCAI's member tribes:

³ This excludes those remains in possession of the Smithsonian Institution.

1. Repatriation

(A) the NAGPRA Review Committee's upcoming recommendation on the disposition of culturally unidentifiable human remains and funerary objects⁴;

(B) the lack of binding legal obligations for the Smithsonian Institution to summarize, inventory or return sacred objects and objects of cultural patrimony. Although the Smithsonian has adopted an internal policy regarding these objects, some have expressed concern that without that legal obligation tribes are left with no real assurances;

(C) if a tribe cannot or does not choose to immediately repatriate remains or objects held by an agency, museum, or university, that tribe *may* enter into an agreement on the "handling" of such items; however, the agency, museum, or university is not *required* to enter into such agreements;

(D) while NAGPRA completely prohibits all trafficking in Native American human remains and does prohibit the trafficking in funerary objects, sacred objects, and objects of cultural patrimony, the prohibition of the objects only applies to wrongful acquisitions after the date that NAGPRA was enacted, leaving auction houses, and others who have acquire these items before this date, open for the sale of our cultural heritage ; and,

(E) in determining cultural affiliation for the implementation of NAGPRA, the law expressly calls for the use of a variety of sources of evidence, including tribal history, knowledge, and tradition⁵; however, in many cases, archeologists have exclusively been making these determinations.

2. Burial Protection

(A) there are a number of "reactive" provisions within NAGPRA regarding burial

⁴ The issue of unaffiliated is also a topic which still remains outstanding within the regulations and is now before the NAGPRA Review Committee. NCAI supports the position that in many cases the issue can be resolved through tribal "consortiums". It has been shown that tribes in most cases do not compete over remains, but rather they work to find solutions based on consensus. The Review Committee is expected to support this position.

⁵ Section 7(a)(4) of NAGPRA states:

"Where cultural affiliation of Native American human remains and funerary objects has not been established....such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon **geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.**"

protection⁶. However, there is a real need to develop broader language, as well as some pro-active strategies for burial protection enforcement, such as the following:

- (1) the establishment of a burial site designation program or database for all lands: tribal, federal, state and local, with the consideration of secrecy, privacy and preservation always in mind;
- (2) the establishment of a national program, working in conjunction with the tribes, to monitor possible violations; and,
- (3) stronger enforcement by the Departments of Interior and Justice. This requires the investigation, prosecution, and imposition of penalties, for violators of the law, including federal agencies and the states.⁷

3. Smithsonian Institution

While the Smithsonian Institution was not included under the provisions of NAGPRA, the Museum Act of 1989⁸ requires the Smithsonian, in consultation with Indian tribes and traditional Indian religious leaders, to inventory human remains and funerary objects in its possession or control for return to Native peoples. As this Committee continues its oversight of the implementation of NAGPRA, NCAI also encourages the Committee to examine the implementation of this law as well.

III. NAGPRA, Kennewick and Sound Science

Lastly, NCAI would like to take this opportunity to point out the high profile publicity given to the controversy over human remains discovered near Kennewick, Washington which has made it

⁶ 25 U.S.C. 3002(c) (2)

⁷ Since state governments receive federal funds they are required to comply with NAGPRA. There are a number of states currently in violation of the law, including Missouri, Maryland, Tennessee, and Virginia. Missouri is currently in violation over the construction of a highway which receives funds from the Federal Highway Administration. The State of Maryland has yet to contact those federal and state recognized tribes which could claim the remains and items in possession of the Maryland Historic Trust. In July of 1998, the Eastern Band of Cherokee contacted the State of Tennessee, a state which they have been trying to work with for a number of years, in order to address a burial site issue. They received no response for three months, and once they did receive a response, the state said that they would examine the issue. They have received no further response to date. The State of Tennessee also repatriated remains and objects to non-federally or state recognized groups. Virginia has also recently repatriated remains to a non-recognized group with no lineal descendants.

⁸ P.L. 101 - 185

very difficult to discuss the issues involved in the treatment of human remains. It is unfortunate that some scholars have chosen to introduce the concept of race, which is disavowed by the American Anthropological Association (AAA), as a factor in reviewing NAGPRA and making recommendations to amend this Act. The “Kennewick” case has shown that there are scholars from throughout the country that do not agree on what factors to use in reviewing this case. However, even if they do finally come to some agreement, Native Americans also have certain knowledge and traditions in a number of areas which must also be considered. Apparently, there is no “burden of proof” that scholars must meet before their scientific theories threaten a law which was carefully considered and based upon a broad range of knowledge, while Native Americans are restricted in their claims.

In the “Kennewick” case, there are scholars who have laid claim to primacy in the use of these remains in defiance of established knowledge by using outmoded theories. However, the AAA has clearly stated that race cannot be determined scientifically. By not requiring some standard to be met by any scholar or scientist making a claim to use human remains, the effects will be devastating for both Native Americans and the scientific community. Currently, Native Americans are restricted in their claims by a number of provisions within the law, including aboriginal occupancy. Scientists must also be restrained so that all competing interest will be served, particularly since NAGPRA was passed in 1990 to prevent the discriminatory and high-handed tactics which scholars and scientists had historically shown towards Native Americans. To now accept such principles would be a dreadful step backwards.

Remains that are found to be nine thousand years old in North America, such as the “Kennewick” case, should logically be determined as Native American based on the preponderance of evidence now available, including current history (both Indian and non-Indian), anthropology, and science. NCAI supports the Army Corps of Engineers’ original decision to repatriate those remains under NAGPRA, although flawed administratively, as a proper decision, supported by such accepted knowledge and standards.

IV. Conclusion

Mr. Chairman, in order to properly and faithfully carry out NAGPRA’s congressional intent and to facilitate its process, the concerns of tribes must be equally weighed and at times given even greater weight. Furthermore, the United States must adhere to its trust responsibility to tribal governments and Indian people to protect and preserve Native culture and tradition. NCAI commends this Committee for providing the opportunity for tribes to convey their concerns, suggestions, and recommendations regarding this important legislation aimed at protecting the traditions of native peoples. As tribes continue to implement this Act, new obstacles and opportunities will be encountered and embraced. Through further discussion, adequate funding and refinement of NAGPRA, proper compliance and enforcement of this Act can be ensured.

Mr. Chairman, this concludes my statement. Thank you for allowing me to present for the record the National Congress of American Indians’ comments regarding the implementation of the

Native American Graves Protection and Repatriation Act. I will be happy to answer any questions which you may have at this time.

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