

**The Native American Graves Protection and Repatriation
Act**

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United States Senate Committee on Indian Affairs
Oversight Hearing
July 25, 2000

I have been invited to address the Committee on current issues related to implementation of NAGPRA, and I appreciate the opportunity to share these comments with you. I will focus my comments on the disposition of "culturally unidentifiable" Native American human remains. As you know, the NAGPRA Review Committee has followed the statute's mandate by issuing a series of recommendations for the disposition of these remains, although none of these recommendations has yet resulted in a final set of rules. The most recent set of these recommendations was published in the Federal Register on June 8, 2000. This issue is also the subject of a National Park Service Grant issued to the Heard Museum in 1998 which sought to hold a three-day meeting (the "Tallbull Forum") involving a group of 30 participants, composed of representatives from the Native American, Museum, and Scientific communities. I would like to

tell you a bit about the history and current status of this grant, before addressing the broader substantive issues related to disposition of culturally unidentifiable remains.

Martin Sullivan was the Director of the Heard Museum in 1998, and he put together the grant proposal for the Tallbull Forum. Mr. Sullivan requested the assistance of the ASU Indian Legal Program in facilitating this meeting. We initially agreed to do so, but became concerned when we saw nature of the grant conditions and began to gain a broader appreciation of the concerns of many Native people over the process that was to be used in setting up the Forum. Ultimately, Mr. Sullivan decided not to proceed with the grant. When Mr. Sullivan left his position, the NPS approached the Indian Legal Program about assuming responsibility for the grant. We agreed to do so only if the grant was significantly restructured to accommodate the legitimate concerns of the Indian Nations. Our proposal was approved late this Spring, and we are now in the process of structuring a national dialogue on the issue of disposition of culturally unidentifiable Native American human remains. We believe that this dialogue is

necessary and important. We also believe, however, that the product of this dialogue must facilitate the broader goals of NAGPRA, which involve the federal government's trust responsibility to Native people and the interests of Native Nations as sovereign governments.

I. Culturally Unidentifiable Human Remains: What are the Issues at Stake?

NAGPRA is a statute which protects the cultural, political, and moral rights of Native people by recognizing their legal rights to ancestral human remains, funerary objects, sacred objects and objects of cultural patrimony. As a scholar of federal Indian law, I would like to discuss several aspects of the statute's implementation which bear on the rights of Native peoples.

First, I would like to highlight the importance of NAGPRA as one of the only statutes in the history of this country to issue enforceable protections for the cultural rights of Native people. NAGPRA is perceived by many commentators as "human rights legislation" which guarantees "equal rights" to Native people, for example by ensuring their rights to control the disposition of ancestral human remains and funerary objects. I do not

disagree with this assessment but would like to emphasize the importance of NAGPRA as a statute which explicitly makes reference to tribal cultural knowledge and the role of tribal law and custom in shaping the standards of "ownership" and "cultural affiliation." In that sense, NAGPRA embodies the federal government's trust responsibility to ensure Native peoples' cultural survival by protecting their unique cultures and ways of understanding themselves as the indigenous peoples of this land. In short, NAGPRA protects Native American peoples and their distinctive cultures, and the legal standards encompassed within the statute and its regulations must be responsive to these goals.

I am concerned about the tendency of certain groups in contemporary society to regard NAGPRA as a "compromise" piece of legislation which must serve the "collective interests" of Indian people, museums, and scientists. As a scholar of federal Indian law, I see NAGPRA as an exercise of Congress's plenary power undertaken in an effort to meet its unique trust responsibility to Native people. I commend Congress for its sensitivity to the interests of other Americans. This sensitivity is reflected, for example, in the

composition of the Review Committee, which acts as an Advisory body and assists in the implementation of the statute. However, I think it bears repeating that Congress's trust responsibility is to Native people, and the Committee's attention today should be on whether that duty is currently being met in the implementation of the statute.

One significant issue related to this, which already has been the topic of hearings before this Committee, is whether the statute's administration by the National Park Service is set up in a way that serves the federal government's trust responsibility to the tribes. Moreover, a significant concern has been raised over whether the intensive involvement of archaeologists within the National Park Service, at the highest administrative levels, has in fact skewed the implementation of the statute to the disadvantage of the tribes. This proved to be one of the fundamental problems with the Tallbull Forum, as it was initially structured. In the original grant proposal, the managers of the National Park Service's Archaeology and Ethnography Program retained authority to approve the final participant list and to prepare an agenda for the

meeting. This level of supervision and control by archaeologists seemed completely inconsistent with the nature of the NAGPRA process as one designed to serve the federal government's trust responsibility to Native people.

The second point that I would like to make is that implementation of NAGPRA must support the government-to-government relationship between the Indian Nations and the United States government. Indian tribes are not part of the multitude of "stakeholders" who assert an interest in such remains. They are separate governments who claim repatriation of their Ancestors as a political right, much as the United States seeks to repatriate its dead from war zones such as Vietnam. The physical custody of the remains may rest with federal museums and agencies. However, the political right of repatriation rests with the Indian people. Because of this, the NAGPRA implementation process must respond to the needs of Indian Nations for adequate consultation. Again, this was one of the main problems with the Tallbull Forum as it was initially structured. Many Indian nations did not believe that a select group of individual Indians (probably not more than 10, since the

grant specified a "balanced representation" from the tribal, museum and scientific communities) could fairly represent the interests of all of the sovereign Native Nations in this country. The Department of Justice is among the entities that has consistently held full consultations with the Indian nations on important policy matters. This model should be followed for NAGPRA implementation.

Finally, it is clear that the legal right to culturally unaffiliated Native American human remains must build from the Indian peoples' moral right to control those remains. Several categories of "culturally unaffiliated" remains trigger substantial moral issues which must become a factor in the dialogue. For example, a mere century ago, many Indian Nations were officially at war with the United States. The deceased Ancestors who are in the custody of the museums and agencies are in many cases the victims of that bitter war. They may be "culturally unidentifiable" because their removal from the battlefields to the museums was done without the appropriate care to preserve their actual identity. They may also be "culturally unaffiliated" because the remains belong to

a group that did not survive into the present. Some would argue that if a tribe was "exterminated," no contemporary group can claim the remains. However, on moral grounds, a contemporary Native group that survived this genocidal history and claims kinship with the other group may well have the right to step in and claim the remains. And what about the remains of very ancient Ancestors? These remains may be claimed by Native people based on a cultural or traditional understanding of kinship rather than some demonstrated "genetic" descendency. Moreover, Indian Nations may possess treaties with the United States government in which they were assured that their cession of land did not entail a cession of rights to care for their deceased Ancestors. Nothing in those treaties conditions this right on subsequent genetic testing to prove "cultural affiliation." Nor does NAGPRA have such a provision. Rather, the statute specifically allows "cultural affiliation" to be established based upon geographical, kinship, folkloric, oral tradition, historical, or other relevant information or expert opinion." And the canons of construction applicable to both treaties and federal statutes concerning Native people specifically provide

that ambiguities must be construed in favor of the Native people.¹

II. The Review Committee's Recommendations:

The Review Committee has issued draft recommendations on several occasions. The history of this process illustrates some of the tensions over the disposition of culturally unidentifiable human remains, and thus I will briefly summarize the history of these recommendations for you before addressing the current situation. In 1995, the Review Committee recognized a "principle in the act that assigns responsibility for what happens to human remains and associated funerary objects to lineal descendants and culturally affiliated tribes." Building on this principle, the Committee acknowledged that unaffiliated remains are "nonetheless Native American, and they should be treated according to the wishes of the Native American community." The Committee recommended that the ultimate decision about

¹ See Cohen's Handbook of Federal Indian Law 221 (1982 ed.). See also *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943) (treaties should be liberally construed in favor of the Indians and as the Indians would have understood them); *United States v. Winans*, 198 U.S. 371, 380 (1905) (treaties should be construed "as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection"); *Choate v. Trapp*, 224 U.S. 665 (1912) (applying rules of construction to Congress's presumed intent in enacting a statute affecting Indian rights).

disposition of such remains "should rest in the hands of Native Americans," although non-Natives could have input in the process. The Committee acknowledged that the scientific and other values asserted by various interest groups could not supersede the "spiritual and cultural concerns of Native American people" who had the closest general affiliation to the Native American remains. The 1995 draft recommendations suggested possible procedures for deciding the disposition of unidentified remains, which would permit tribes across the nation to establish "affinity" with the remains and make a request for repatriation.

The 1996 Draft Recommendations responded to the commentary on the earlier set of recommendations. The Committee concluded that clarifying the meaning of statutory terms such as "shared group identity" could facilitate the disposition of many sets of remains currently classified as "culturally unidentifiable." The Committee explored the idea of regional or cultural associations based on "shared group identity," and also probed ways to work with non-Federally recognized tribes who could establish cultural affiliation to human remains. The 1996 recommendations are responsive to the

principles established in the 1995 recommendations, but attempt to analyze the statute's requirements in light of the tribes' needs. The important feature about both sets of recommendations, however, is that the Review Committee appeared to generate a presumption that Native people should have the paramount right to decide disposition of Native American human remains, regardless of formalistic determinations of "cultural affiliation." This assertion clearly responded to the cultural, political, and moral rights of Native peoples within the broader framework of federal-tribal relations.

In 1998, the Review Committee generated yet another set of draft recommendations. This set of recommendations suggested four "principles" which should serve as the foundation for any set of regulations, which asserted that the disposition of culturally unidentifiable human remains should be (1) respectful; (2) equitable; (3) doable; (4) enforceable. The Committee ultimately recommended two models for disposition of such remains. The first model suggested disposition according to "joint recommendations" by institutions, federal agencies and the "appropriate claimants." The second was a "regional consultation"

model, which would guide disposition according to solutions proposed by the respective federal agencies, institutions and Indian tribes within particular regions.

Finally, in June of 1999, the Review Committee generated its latest set of recommendations. This set of recommendations suggests three "guidelines" for disposition of culturally unidentifiable remains: first, respect for all such remains; second, flexibility in fashioning the appropriate solutions based on particular circumstances (e.g. where the remains are uncovered on tribal or aboriginal land of a tribe, or where the contemporary group is identifiable but not recognized), and third, the ability of the review committee to generate other criteria in a given case.

The Committee expanded on its earlier proposed models for disposition based on (1) joint recommendations of particular federal agencies, museums and claimants in a given case, and (2) joint recommendations emerging from regional consultations with federal agencies, museums and Native groups. These recommendations have assisted us in thinking about the best structure for a National dialogue on these issues.

We are hopeful that the dialogue will probe some of the more controversial issues before regulations are enacted to implement the Review Committee's recommendations. The Committee's recommendations offer general guidance on these important issues. However, the regulations will turn this general guidance into binding rules that will govern the Indian nations in their dealings with agencies and museums. Because of this, adequate tribal input is vital before the regulations are enacted.

III. Structuring the National Dialogue:

Our restructured grant proposal first identified the need for a concise written summary of the law and proceedings governing disposition of culturally unidentifiable Native American human remains, which would identify the salient issues, legal and policy framework, and points of agreement and disagreement among the interested communities. This document would then be used to facilitate a discussion among the communities. Thus, our grant proposal has two main components. The first goal is to prepare a comprehensive legal and policy study of the issues, legal framework, and proceedings thus far on the issue of disposition of "culturally unidentifiable" Native

American human remains. This study, which is currently being prepared by participants in the Indian Legal Program, includes a legal review and assessment of the various recommendations of the Review Committee, and discusses the models of resolution that have been proposed by the Review Committee, including relevant case studies that have already been concluded.

The second goal is to facilitate a forum or forums which will accomplish the following goals: (1) allow Indian Nations to discuss the substance of the Report as it implicates tribal sovereignty and the government-to-government relationship with the United States; (2) support efforts to engage the museum and scientific communities in a dialogue about the Report; and (3) facilitate an integrated dialogue among the tribal, museum and scientific communities that might lead to a set of written regulations to guide the disposition process. We envisioned that the first part of the process would be completely open and inclusive, while the final part of this process would involve a smaller working group that might make policy recommendations based on the wider input solicited during the first phase of the project.

The budget of the grant may not support the inclusive tribal consultations that we have proposed. However, I think that this is a vital part of the process for the following reasons. First, NAGPRA is a statute that is intended to serve the pluralistic values of Native peoples within the American federal system. Cultural knowledge is vital to the definition of categories of remains and objects that merit protection. The only way to elicit this knowledge is through dialogue with the various Indian Nations, including their religious leaders and elders. Secondly, the regional consultation model proposed by the Review Committee's latest recommendations intersects closely with contemporary tribal efforts to establish regional intertribal coalitions. Of course, the relevant regions have yet to be established. The Review Committee's model depends upon an initial effort by the Indian tribes and Native Hawaiian organizations which will define the relevant regions within which such solutions could be generated. Once defined, the appropriate federal agencies, museums and Native groups will consult together and develop a framework and schedule to develop and implement the most appropriate model for their

region.

Many Indian Nations across the country are exploring the idea of regional intertribal coalitions which will take an active role in repatriation issues. This is an important effort and is related to the Review Committee's regional model, but it clearly involves sovereignty considerations. Can a regional intertribal coalition act on behalf of sovereign tribal governments? The input of the Indian Nations as governments is vital at the outset of this process. In fact, the very form of the ultimate "agreement" between "the tribes" and the "museums or agencies" has considerable implications for the sovereign status of Indian Nations within the consultation process. Finally, Indian Nations must be able to respond to the wider implications of the regional consultation model, given the legal and moral framework for Indian rights in this country. Will the process be based on the government-to-government relationship that frames Native rights in this country, or will it be a negotiated, ad hoc process among equally situated "stakeholders"? The disposition of "culturally unidentifiable remains" may seem amenable to an ad hoc, case by case process involving equal input from all

interested "stakeholders." However, from a tribal sovereignty standpoint, the legal process which guides implementation of a statute that serves the federal government's trust responsibility MUST protect the unique interests of the tribes as governments in protecting their rights to land, natural and cultural resources.

The implementation of NAGPRA implicates many fundamental interests of the tribal communities related to both political and cultural autonomy. An "ad hoc" process involving all "stakeholders" would hardly be protective of tribal interests in protecting their lands and natural resources. Nor can such a process adequately protect tribal interests in caring for their Ancestors, who, after all, are part of this land. In fact, although tribal cultural views are varied and distinctive, Native people share a common view of themselves as peoples related through time and tradition to the lands that nurtured them.

In conclusion, I would ask the Committee to insist that the implementation of NAGPRA serve the federal government's trust responsibility to protect Native cultures and their legal rights. We cannot address

NAGPRA in isolation. This statute is part of the pervasive set of federal laws that governs the relationship between Native peoples and the United States government. The rights of Native peoples are "sui generis" and the relationship between the federal government and the indigenous peoples of this land implicates both cultural and political rights. It is the Committee's charge to ensure that the implementation of NAGPRA is consistent with the broader relationship between the federal and tribal governments.

Similarly, we cannot take one issue within NAGPRA, in this case, that of "culturally unidentifiable" remains, and generate a "solution" through some administrative rule-making process that enforces a "compromise" between Native groups and other Americans. That is not how the federal government serves its trust responsibility to Native people, and I do not think that the Congress which enacted NAGPRA would have intended such a result. Rather, we must identify the important interests and rights at stake, and generate solutions that are responsive to Native peoples' legal rights, and to their interests in protecting and preserving their cultural resources. The input of other interested

groups is a necessary and important part of this process, as it is in the variety of other situations, such as environmental regulatory jurisdiction or gaming rights, which implicate the interests of both Native and non-Native people. I am not suggesting that museums and scientists do not have legitimate interests in knowing about the past. However, those interests are not coextensive with Native peoples' cultural, political and moral rights.

The implementation of NAGPRA must first serve Native rights, and then accommodate other interests that are consistent with those rights. It is my hope that the national dialogue on culturally unidentifiable Native American human remains will clarify the intricate balance of concerns that underlies the controversy over this issue. That controversy is vividly represented by the series of recommendations that has emerged from the NAGPRA Review Committee over the past five years, which vacillates between recognition for tribal rights and an effort to meet the broader interests of all stakeholders. It is also my hope that the National Dialogue will support a set of final recommendations on the consultation process and the framework for

adjudicating particular cases that is consistent with the ideals necessary to achieve justice for Native people in this Country. Thank you for inviting me to share these thoughts with you. I appreciate the Committee's time and attention to these important issues.