

SENATE COMMITTEE ON INDIAN AFFAIRS  
HEARING ON THE IMPLEMENTATION OF THE  
NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

BY

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Mr. Chairman and members of the committee, I am Sherry Hutt, a Superior Court judge from Arizona and a White Mountain Apache Tribal Appellate judge, although I am not here to represent tribal interests. I am also a trustee with the Heard Museum and a PhD candidate in Forestry, although I am not here to advocate for museums or for science. Rather, I will draw upon my experience of the last fifteen years in writing and teaching in the area of cultural property law in order to relate to you some perspectives on the implementation of the Native American Graves Protection and Repatriation Act. I am pleased to have been invited to give testimony on the law.

My comments will be divided into two areas. First, I will address NAGPRA and its contribution to the area of cultural property law, and then I will address some of the areas of concern which have arisen and which may yet arise, together with some suggestions for resolution of those issues.

First, this Committee must be commended for its past efforts in providing the citizens of this country with a law which promotes equality of property rights for Native Americans. Such rights were not generally recognized in our society or enforceable in court. This law does not create a special class of persons in Native Americans, but rather guarantees to native people the right to control the disposition of their dead and the burial items of those deceased ancestors, as well as to obtain improperly removed items of sacred property and cultural patrimony. The elegance of this law is that it does not give special rights to Native Americans, Native Hawaiians and Alaska Natives, and therefore does not violate the 14th Amendment. Instead NAGPRA requires that the equal protection of property rights otherwise established in this nation be afforded to Native Americans. This law has become one of the

most significant pieces of human rights legislation since the Bill of Rights.

NAGPRA is consistent with, and incorporates within, "otherwise applicable property law" (25 USC 3001 sec. 13). To further the understanding and application of the law we may draw upon the wealth of established property rights principles. The NAGPRA protected categories are consistent with those types of items for which analogous protection has been assumed for non-Native Americans as part of our common law of property.

The remains of the deceased and their burial items may not be owned or sold in this country and are subject to disposition according to the wishes of the relatives of the decedent. NAGPRA accords this same respect to the remains and burial items of Native Americans. No longer will the human remains and burial items of native people be assumed to be government property when they are located on government land or are in a repository which receives federal funds and which for the most part came into possession of the items after exhumation due to a permit for scientific study or infrastructure improvement activity.

Sacred items, needed for use by traditional religious leaders for traditional practices by present day adherents, and inalienable items of cultural patrimony all receive protection under NAGPRA comparable to the unquestioned protection given to similar items held by non-Native American groups. Sacred items stored in the cave of a medicine man are not free for the taking due to the failure to place them under lock and key any more than ceremonial items left in an unlocked church are available to anyone who may desire them. The cultural patrimony which defines a culture, such as the Wampum belts of the Onondaga Nation, are not available for sale any more than the Liberty Bell or Statue of Liberty would be considered marketable items.

When the law was first passed there was concern expressed that Native Americans would give an expansive definition to "sacred objects" and that all native ethnographic material would be removed from museums. In fact that has not occurred and the narrow definition of the law has become understood as the parameter for protection. A year ago veterans of World War II expressed horror over the treatment of pieces of the U.S.S. Arizona removed and discarded during the construction of the memorial in the Honolulu harbor. They were shocked over the treatment of "sacred" property. I mention this to show that native people are not alone in their concept of sacred as an attribute of special property. The concept of sacred is generally recognized by all people, but is afforded protection only in certain limited circumstances.

There is no provision in NAGPRA which would require the repatriation of a item for which the possessor holds lawful title. The law expressly avoids creating a "taking" of private property to effectuate a public purpose in violation of the Fifth Amendment. Sacred objects may be individually owned and be subject to alienation pursuant to the property laws of a tribe. Items which

are now considered to be cultural patrimony may not have been imbued with such distinction at the time they were separated from the group and are not subject to the requirements of NAGPRA. The law requires that federal agencies and those museums which receive federal funds look into their collections and question their lawful title to protected items. Property rights must be established as of the time the protected item was separated from the group. Assumptions of ownership are insufficient, therefore, the removal of items pursuant to an Antiquities Act or Archaeological Resources Act permit, which assumed government ownership and control, is insufficient to convey title. Lack of regard for Native American property rights may no longer be condoned.

To summarize the law, it may be said that NAGPRA is wholly consistent with American ideas of property rights. In its present form the law is internally consistent and unambiguous in its adherence to prevailing concepts of property law. Quite simply, the law provides a process by which federal agencies and museums which receive federal funds can go about the task of righting past wrongs in a consistent manner. The Congress has rectified past injustice and in so doing has saved agencies and museums considerable effort and expense in devising a management plan which is fair and efficient.

It is my belief that many of the areas of conflict which have been referred to your attention are either the product of a lack understanding or experience with the law, or may be resolved by administrative action in the implementation of the act. There are just a few areas where amendment may refine rather than unbalance that which is an artful compromise.

Previously, amendments to Section 3. Ownership, were proposed, which, if passed, would have disrupted the perfect harmony of NAGPRA with property law. Section 7. Repatriation and Section 3. Ownership each speak to different circumstances and are not interdependent components of the law. Section 7. deals with protected items in the possession of federal agencies and museums which receive federal funds and which have been long separated from the land. A stay of repatriation for items in collections may be obtained in order to complete scientific study of major benefit to the United States. There is no such provision in Section 3. for good reason. Section 3. applies to new discoveries where the disposition of the items is to be determined in the first instance. Ownership in the federal landowner is not presumed. Instead, acquisition is deferred until a determination is made as to ownership rights. If NAGPRA applies then possession goes to the culturally affiliated tribe having standing to receive the human remains and cultural items. If the government were to retain protected items for scientific study, it would be exercising dominion and control. The government would be asserting a property right hostile to the proper owner. The practical effect of such an amendment would be to eviscerate any curative effect of NAGPRA and Section 3. would become mired in ambiguity.

Recently, complex and protracted litigation erupted after the discovery of ancient human remains on federal land. Scientists contend that they are entitled to study the remains prior to agency compliance with NAGPRA. There are several simple responses to the issues raised in the lawsuits. First, there is no right of a private individual to take control of government property for study. Second, only descendants, or those designated as culturally affiliated under the due process provisions NAGPRA, have standing to claim the remains. The federal agency did have the ability to take whatever action it deemed appropriate initially, but upon determining that the remains were those of a Native American further action would be dependent upon receipt of permission from the individual or tribe with the authority to give approval. The issue raised by NAGPRA is not one of Indians versus science. Rather the issue is one of property rights. Permission pursue scientific research must come from the party with the right to grant it.

There are also agencies and institutions which claim that NAGPRA places burdensome responsibilities on them for compliance. This issue should not concern this committee. Congress has authorized grants to assist in NAGPRA compliance, federal agencies and museums have now had almost nine years to bring their collections into compliance, and the federal curation regulations require a standard of professionalism in collections, which, if adhered to, would facilitate the due process requirements of NAGPRA.

It is now time for Congress to consider funding the position of a prosecutor to evaluate and pursue sanctions for violations of the act under the civil penalties provision (25 USC 3007). One method of funding would be an amendment to the law which would allow the Secretary of Interior to retain the proceeds from an action to assist in funding the administration of NAGPRA compliance.

Another area of potential dispute concerns the determination of cultural affiliation. This concern arises from two areas; the method of determination of cultural affiliation and the level of proof necessary to make the determination. In neither case is amendment to the law warranted. Again, amendment may lead to imbalance in the law and to future controversy. The determination of cultural affiliation is a fact intensive process which is best served by a law which is flexible. NAGPRA provides that evidence to support cultural affiliation for repatriation may be scientific, ethnographic, oral history, or other means. The initial determination is made based on any competent evidence. There is no quantitative threshold in the law, therefore the standard would be within the bounds of reasonable discretion. The decision must not be arbitrary or capricious or emanate from an abuse of discretion. This is the standard which applies generally to the deference given to the decisions of agency officials. The level of proof necessary to resolve a claim in the face of a dispute is a

preponderance of evidence. This is the level of proof which applies in courts of law in most civil proceedings. There is no requirement that proof be grounded in scientific study and be established to a "scientific certainty." Such an exacting level of proof is not required by NAGPRA and does not exist in law or science, except as to those concepts so devoid of question that they have become laws of science.

The NAGPRA process now requires that the federal agency official or museum director make a determination of cultural affiliation for each of the human remains and associated burial items in the collection and record their decision on the inventory. There is no requirement that the decision be subject to prior approval or editorial review by some government official or other body. The NAGPRA administrator charged with the publication of inventories does not possess editorial discretion. That the law did not provide such a bottleneck was not a mere oversight. The NAGPRA administrator may provide guidance for compliance and has in practice included disclaimers on questionable notices where compliance with due process under the law was in doubt, but not where sufficiency of evidence was questioned. Cultural affiliation may be shown by any competent evidence and the law does not set preferences for types of evidence, nor does it set quantitative levels of proof.

Another area of concern related to the determination of cultural affiliation is rooted in an administrative problem, which may be best resolved by administrative action. At present the same office within the Department of Interior which is charged with the responsibility for Park Service compliance with NAGPRA has been assigned the responsibility for the administration of NAGPRA, including staff support to the Review Committee. This dual function is fraught with looming issues of conflict of interest, due to the fault of no one person, but rather due to the irreconcilable differences of interests to be represented. For example, a park may look to the Departmental Consulting Archaeologist (DCA), for assistance in making a determination of cultural affiliation, as well as in other areas of NAGPRA compliance or curation. The DCA is also charged with the administration of NAGPRA, including NAGPRA compliance and the staff support to the Review Committee which will hear any disputes between tribes and federal agencies, such as the National Park Service. This conflict of interest may only be resolved by placing NAGPRA compliance, including NAGPRA grants administration and staff support to the Review Committee, in an area of the Department of Interior which is not also in a position to advocate for tribes or the interests of science. The Secretary has several available options, which may receive support from this committee, but which do not require Congressional action. The DCA may then retain responsibility for NPS compliance and any special duties, such as the current memorandum of agreement between NPS and the Department of Defense, in which the DCA is assisting the Corps of

Engineers address NAGPRA issues.

This suggestion is not intended as an attack upon the DCA, whose position exists to further science. The office of Archaeology and Ethnography and the DCA performs many important functions, not the least of which is the mission to educate which has resulted in an exemplary partnership with the Justice Department. Together they train lawyers in the civil and criminal aspects of cultural property law so that they may defend our cultural heritage and prosecute those who violate protection laws such as the criminal provisions of NAGPRA.

Of all of the suggested amendments to NAGPRA which you may consider there are just a few which could enhance the law without disrupting the current balance. One possible action would be to amend the law to allow lands ceded via ratified treaties to be considered as a tribe's aboriginal territory along with those lands identified by decisions of the United States Court of Claims or the Indian Claims Commission (25 USC 3002 (a)(2)(c)), when determining priority of claims under Section 3. Also, some questions have developed in the application of the criminal law, 18 USC 1170 (b), concerning the definition of "obtained." Trafficking in protected items obtained in violation of the act is a criminal offense. One may obtain items from government or Indian land without permission, or they may obtain items by converting them or withholding them from the repatriation process. Since in the second instance the item may have been initially obtained without criminal activity, it may add clarity to the law to state "obtained or retained" in violation of the act. This omission is not fatal to the success of the law, but may forestall possible challenges.

Finally, the existence of conflicts arising from the NAGPRA process is not a cause for concern. Conflicts will inevitably arise, but the law has a built-in process for dispute resolution, which relies on the collective wisdom of a respected and capable group, the Review Committee. This dispute resolution coalition has the flexibility to fashion creative solutions to the most complex problems, in a manner not possible in the courts. Over time NAGPRA, with the guidance of the Review Committee, will develop its own culture of adherence. Remember, NAGPRA changed the rules after 84 years of doing business without consideration of Native American cultural property rights and will it take more than 10 years for equal protection of the law to become part of the fabric of our culture.