

TESTIMONY OF TEX G. HALL, CHAIRMAN
THREE AFFILIATED TRIBES
The Mandan, Hidatsa, and Arikara Nations
of the Fort Berthold Reservation
AND
CHAIRMAN, ABERDEEN AREA TRIBAL CHAIRMEN'S ASSOCIATION

SUBMITTED TO THE SENATE COMMITTEE ON INDIAN AFFAIRS
AT THE OVERSIGHT HEARING ON THE NATIONAL IMPLEMENTATION OF THE
NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

APRIL 20, 1999

Senator Campbell, Senator Inouye and members of the Committee, my name is Tex G. Hall. I am Chairman of the Mandan, Hidatsa and Arikara Nation. We are known as the Three Affiliated Tribes, from Ft. Berthold Reservation in north central North Dakota. Today, I present testimony on behalf of my people and also on behalf of 16 other tribes from the Aberdeen Area - almost 200,000 individuals. I speak on their behalf as Chairman of the Aberdeen Area Tribal Chairmans Association. I want to express my concerns regarding the implementation of the Native American Graves Protection and Repatriation Act commonly referred to as NAGPRA,.

Our North Dakota tribes, the Standing Rock Sioux, the Spirit Lake Sioux, the Turtle Mountain Band of

Chippewa and our people, the Three Affiliated Tribes, have been active in the issues of reburial and repatriation since 1985. We repatriated and reburied more than 2,000 of our ancestors in 1989, then joined a national intertribal coalition to work for the passage of NAGPRA. We have since reburied more than 3,000 additional ancestors, as well as their personal burial property. We fought hard to get this law, and we have worked hard to locate our relatives and bring them home. We did this because our elders told us to; they said our spiritual beliefs tell us our ancestors suffer every day they languish in the scientific repositories of this country. We did it because we *never* forget our dead, we love them, we respect them, and because we believe they, too, should enjoy the self-evident, human right to rest in peace.

Senators, we did not work so hard for the passage of this law so that it would protect the interests and desires of the science and museum industries. Everybody knows this law was passed so our ancestors and our sacred things could come home to us. Everybody knows it was passed at our insistence, and that the museum and science industries opposed it with all of their might and resources. It has always been our understanding that it would protect the rights of the deceased and their descendants.

Yet, since 1990, our tribes have observed the steady erosion of protections to tribes granted by the law, and watched as federal, state and academic personnel circumvented the law to satisfy their personal, vested interests in our ancestors' remains. We monitored the promulgation of regulatory language to implement the Act and watched as the regulatory process was used to substantially alter federal Indian policy. We brought these grievances to the attention of this Committee at the last Oversight Hearing on NAGPRA held on December 6, 1995, but received no assistance with the issues we raised. We have also closely monitored the activities of the NAGPRA Review Committee, spending thousands of precious dollars to send our representatives to meetings where our questions were not answered, our concerns ignored, minimized or manipulated, and where we watched as federal agencies, museums and universities were granted one extension after another with regard to NAGPRA deadlines. Members of the Review Committee were, at the same time, inventing repatriation requirements for tribes, such as requiring the Minnesota tribes to obtain written permission from a long list of tribes before they could repatriate remains. This is documented in the minutes of the January 1998 Review Committee meeting. The Minnesota request, which had the full support of the state, was delayed for almost a year while repeated attempts were made to fulfill this extra-legal demand.

Our Nations are also extremely concerned about a document generated by the NAGPRA Review Committee at their Oregon meeting held in June of 1998, where four distinct categories of unaffiliated Native remains were "created" without precedent in the Act. We have severe problems with these categories, as they are designed to be the foundation upon which science will base its claims to carry out extra-legal studies of our ancestors' remains. Two of the categories discuss "archeological populations," and whether or not they are extinct or have living descendants. Members of the Committee, this term "archeological populations" is completely foreign to our peoples, and comes from a world view and philosophy which has nothing to do with the way we define or see ourselves. *These categories have been created to do nothing more than separate tribes from our claims that all so-called "unaffiliated" Native remains taken from our collective aboriginal homelands are our ancestors. We do not want people who are new to our homelands using their own definitions of us or our histories to separate us from our right to rebury our dead.*

Our only "success" story where the NAGPRA Review Committee is concerned was the Federal Register publication of their recommendation for the disposition of tribally unaffiliated remains, where decisions for repatriation and reburial would be left in the hands of intertribal, regional coalitions whose joint claims would be based upon our collective aboriginal homelands. Provided for in the law, joint intertribal claims EMPOWER tribes, and we have done a half-dozen successful joint reburials to prove it, so we worked hard to prevail upon the Review Committee to make this recommendation to Secretary Babbitt, and felt, finally, a sense of hope and fair play when it was published for public comment. But we were told in January of 1998 by National Park Service staff that the recommendation was "dead in the water" because Secretary Babbitt wanted the Review Committee to *broker a compromise* between tribes and the science industry with regard to the final disposition of our ancestors.

Members of the Committee, the law does not speak of another compromise to be made on the part of tribes where our tribally unidentifiable ancestors are concerned. Indeed, we are compelled to say again to you that the law was *not passed* to protect the interests of science, it was passed to protect our peoples. But another compromise was almost obtained from tribes *without their even knowing it* with a \$48,000 grant from the Department of Interior, and an exclusive, invitation-only forum was planned, to be comprised of science and museum industry members and a handful of Native individuals. The plan was to hold a dialogue between 25 to 30 people, (half of whom would have no desire to protect tribal interests), come up with a compromise on behalf of over 500 sovereign nations, 95% of whom would be excluded from attending the forum, and forward it to the Review Committee for rubber-stamping before presentation to Secretary Babbit. *We spoke out against this forum because we viewed it as a manipulative tool to give a voice to the science and museum industries in an issue where they should have none, and the fate of our ancestors would be determined by those who only seek to mistreat, disrespect and exploit our dead. Moreover, any more compromises on the part of tribes would complete the gutting of the law of its protections to tribes, most notably by allowing the Department of Interior to utterly ignore its trust responsibility to Indigenous Nations, who should be the only ones to decide what happens to our own ancestors.* We understand that the organizer of the forum, Martin Sullivan of the Heard Museum, has now withdrawn from the project, but is attempting to get others to accept the grant and move forward with it. *We do not want anyone but our own Nations deciding the fate of our ancestors.* We have already made too many compromises; we do not wish to make anymore. It's someone else's turn to compromise.

Senator Campbell, members of the Committee, I wish I could say that is the extent of the problems we have experienced in trying to get this law to work for us. But it is only the tip of the iceberg. Please listen closely to the following statements, and see if you think the law is being followed.

The Great Plains Region of the Bureau of Reclamation signed a Memorandum of Understanding with the Smithsonian Institution to transfer our ancestors' remains and personal burial property to the ownership of the Smithsonian. NAGPRA is very clear in stating that all federal agencies must repatriate Native remains excavated from lands they manage or which are funded with federal dollars. It does not say it's okay to give them to the Smithsonian, nor does the law make any exceptions to this requirement. This was done post-NAGPRA, and it was done without our knowledge or permission. We were not consulted, and therefore had no opportunity to protect our interests or those of our relatives. The Smithsonian Institution has no repatriation deadline, nor do they have to meet restrictions on scientific studies, destructive or not. When we reacted to this shocking news, Terry Zontec and Myra Geisen of the BOR told us they didn't see why we were getting so upset at them, because the National Park Service and the U. S. Army Corps of Engineers had done the same thing. These ancestors' graves were all robbed during the Missouri River Basin Survey, an enormous archeological project paid for by federal dollars, carried out on federal lands, and which was conducted as a precursor to flooding us out of our homelands. When asked for copies of the legal contracts NPS signed with the Smithsonian to give away our deceased relatives, Frank McManamon of the NPS denied any knowledge of them. Michael Trimble of the U.S. Army Corps of Engineers, although he said he would not be surprised if such an agreement existed between his agency and the Smithsonian, failed to respond to our tribal request to investigate the matter and to forward any related documents. Please investigate this shocking footnote to the loss of our beloved bottomlands, and ensure that all federal agencies fulfill their responsibilities.

We ask this of you because when we inquired about filing a NAGPRA grievance on this matter, we were told by the NPS that it didn't matter WHO inventoried the remains, just so that they were inventoried. This is the regulatory authority for the Act making statements like this, Senator Inouye, and we need your assistance and intervention.

We also have documents which show that, rather than follow state law and rebury a 4,000 year-old body which washed out of a creek on state lands in Nebraska, the remains were shipped to Douglas Owsley of the Smithsonian on the pretense that he would establish tribal affiliation of the remains for the State. Not only did Owsley predictably fail to do so, but in a letter reporting this speculative "finding," he added a request that the remains be transferred to the Smithsonian for accession into its collections, and included

a form for this purpose. This was done post-NAGPRA, without the knowledge of affected tribes, and *the Nebraska Indian Affairs Commission was told that the remains were reburied!* We have not been able to ascertain where the remains are, if they were inventoried pursuant to state and federal law, nor if they were added to the Smithsonian's collections. You may recall that Mr. Owsley is one of the plaintiffs in the lawsuit brought to prevent the repatriation of Kennewick Man to a coalition of Washington tribes. You may not know, however, that Mr. Owsley purchased the airplane ticket of Jamie Chatters, the anthropologist who first examined Kennewick Man and a fellow plaintiff, so that Chatters could deliver Kennewick Man to the Smithsonian. The U.S. Army Corps stopped Mr. Chatters at the airport and prevented him from leaving the state with the remains. When attorneys for the tribal claimants in the case contacted the Smithsonian to complain about Owsley's actions in the case, they were told that nothing could be done because (a) Owsley was acting on his own personal time and money and (b) he is such a renowned scientist that they pretty much leave him to his own devices. A quick review of the documents we have provided in this case, however, show that Owsley used his position at the Smithsonian to obtain those remains. It's no longer personal, Members of the Committee, and our Nations do not believe that an individual's professional reputation should be used as a personal exemption to obeying the law.

There are other instances where Mr. Owsley attempted to obtain ancestral remains taken from lands within the state of North Dakota, for which we are also prepared to provide documentation. We also have written documentation where Mr. Owsley asked a museum curator at the University of Nebraska-Lincoln to look the other way while he examined remains taken from Bureau of Reclamation lands but which were off-limits to everyone but Reclamation personnel. We fear for our ancestors, Members of the Committee, because nearly every institution where we have completed NAGPRA consultations, we are told that Douglas Owsley of the Smithsonian Institution has been there first. He has made a specialty of studying our Northern Plains tribes, and we are afraid to find out how many more of our relatives have been spirited away from the NAGPRA process. We want you to investigate all allegations of Owsley's attempts to fulfill his own agenda in complete defiance of NAGPRA.

Also, Senators, we wish to tell you of a situation at the University of Nebraska-Lincoln, where Professor Karl Rhinehard conducted post-NAGPRA, destructive, invasive scientific study of Ponca, Pawnee, Arikara and Wichita ancestors. He extracted DNA from the remains of our relatives, and he did this in violation of the law and without our knowledge or permission. We know he did this because he published his speculative findings in a professional paper in one instance, *In the Wake of Contact: Biological Responses to Contact*, and openly defied the Ponca tribe's position of no scientific study of their remains in another. Incredibly, Rhinehard also lied to promote his illegal, immoral and unethical research agenda to obtain a federal grant by stating that he actually had the Ponca's *permission* to conduct this type of study on their relatives! You may have read media reports of this professor's exploits, where he put a little Native baby's skull on his hand, and made it "talk" and say inane things to make his students laugh. He also had sole access to a lab where the remains of an Omaha ancestor were found in a drawer with Taco Bell wrappers and other trash, and he is suspected of removing soft tissue remains from an official NAGPRA inventory and from the boxes themselves, before the rest of the remains were turned over to the Poncas for reburial. The Poncas were led to believe they had received all the remains of their relatives. A coalition of fifteen Great Plains tribes seeks a federal investigation into these allegations, since a state investigation (conducted by colleagues of Rhinehard's who hired him to do forensic murder studies) failed to result in charges against him. Moreover, instead of sanctioning Rhinehard for his actions, UNL gave him tenure. We are compelled to wonder if acts of this nature are occurring elsewhere, given the pervasiveness of the regrettable attitudes of the science and museum industries we are forced to work with. We fear there are many more tragic stories like this one that just have not come to light yet. The University of Nebraska at Lincoln, however, is a site where a series of acts of professional misconduct, immoral and unethical research and criminal behavior have been carried out without sanctions being brought by any institution or agency. We want you to assist us in opening a federal inquiry into the matter, since no one has acted on our request.

Members of the Committee, we also wish to inform you of a situation where a sitting member of the NAGPRA Review Committee attempted to extort ancient Native DNA from the Whitefish River First

Nations Band Reserve in Ontario, Canada. After telling the Whitefish River people that his institution, the University of Michigan, did not have to return ancestral remains stolen from an ancient island burial site in their aboriginal homelands, Professor John O'Shea informed Whitefish River they could not repatriate them because (a) they were not related to the remains despite the fact that they came from a burial site used by the band for many centuries and (b) the U of MI was not required, under NAGPRA, to repatriate them to a tribe outside the United States.

But then O'Shea had an idea, and he made them an offer: give me your written permission to extract DNA from these ancient remains and you can have them back, even though we said you're not related to them, and even though the law prevents us from repatriating to you. The Band members actually went home, took a vote on the issue, and the people's answer was a resounding "NO!" O'Shea's reply is in the documentation accompanying this testimony, which essentially expressed his disappointment that the Band could not be more cooperative, since it forced him to (1) keep their ancestors' remains, (2) lift the moratorium on study of the remains he had instituted, and (3) closed the door on any further communications with his university regarding their ancestors' remains.

Members of the Committee, our Nations wish to stand in support of the Whitefish River First Nation Band of Ojibwe, and we ask that you do so also. We have included for your review excerpts from the Master's Thesis of Thomas Biron, published by the University of Michigan in 1998, which documents the history of this shocking situation. We feel this case very clearly demonstrates the distressing lengths to which Dr. O'Shea is willing to go to serve his own scientific interests. We also attach for your review correspondence from Dr. O'Shea to the University of Nebraska-Lincoln, in which he makes known his feelings regarding the University's moratorium on study of Native remains, which were perceived as threats by that University. Our Nations feel extremely uncomfortable in having to entrust this individual to make any kind of recommendation regarding a fair and ethical disposition of our ancestors' remains and burial property, and therefore call for his immediate removal from the NAGPRA Review Committee.

Finally, Members of the Committee, we wish to address the subject matter of the resolution passed by the Native Hawaiian group known as Hui Malama I Na Kupuna O Hawaii Nei. This resolution cites many problem areas in the fair implementation of the Act due to an inherent conflict of interest present because the regulatory authority of the Act, Frank McManamon, Departmental Consulting Archeologist of the National Park Service, is an archeologist whose agency must comply with the Act's requirements. Of the many problems and frustrations we could share about working with McManamon, the one we want to draw to your attention is the testimony he gave to Congress in June of 1998 during a hearing regarding the Hastings Bill. This bill, as you know, was introduced to amend the Act to specifically allow for scientific study of our dead, among other things. McManamon testified that the amendment was not necessary, since the Act already allows for study of our ancestors who have been placed in the category of tribally unaffiliated. Not only is this untrue, but there is nothing in the Act to provide for this or any other type of study.

Members of the Committee, our Nations regard this statement as nothing more than McManamon assigning himself powers and authorities he does not have, such as the power to reinterpret language in the Act. NAGPRA specifically states the following, *"The term 'documentation' means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects."*

McManamon was actually heard to say, at the January 1998 meeting of the Review Committee, that the above statutory language came about to protect museums from being forced to carry out studies on our ancestors that they didn't want to do. We were shocked to hear this because our tribes fought very hard to

get that precise language in the law to protect our interests, not those of the museums. Our Nations view McManamon's reinterpretation of the law as a blatant move to make available for destructive, invasive studies our ancestors' remains who have had the misfortune to find themselves placed in the "unaffiliated" category, not to mention the four "subdivisions" referenced in the Review Committee's document entitled "Draft Principles of Agreement." We fear, and rightly so, that he has been working all along to gain for his colleagues unhindered access to Native skeletal remains, bone collagen, DNA and other data that is not provided for in the Act. A consideration of the billions of dollars to be made from the patenting and marketing of Native DNA and DNA by-products fills us with fear, for we see what we are up against in trying to protect our ancestors' ancient remains. If this type of destructive study were to be allowed without our knowledge or permission on Native remains we can legally make joint intertribal claims to, Members of the Committee, why did we bother passing a law to protect the interests of tribes, who are opposed to any type of scientific study of their ancestors? When the regulatory authority for the law can make broad and sweeping changes just by saying, "This is true because I said so," our Nations believe we have a very serious problem. We are relying on you to see that all trust responsibilities pursuant to NAGPRA are fulfilled.

Senator Campbell, members of the Committee, we close our testimony by stating that, in the nearly fifteen years our Northern Plains tribes have been active on this issue, we have never asked for anything unreasonable. We do not now ask for anything that is not accorded any other citizen of this country: the right to rest in peace, our Nations' right to protect our deceased relatives, and the right to grant or deny our consent to the gathering and collection of Native DNA, skeletal samples and other methods of scientific research and inquiry which are currently carried out without our knowledge or consent. To carry out any form of research on any person in this room would require your signature or that of your next of kin. No such permission has been granted by our Nations, yet we and our ancestors continue to suffer from the total lack of respect, dignity and ethics consistently shown us by those who seek to exploit us. No Native Nation, moreover, has ever ceded by treaty or any other instrument the contents of our ancestors' burials, and there is nothing in any law which allows federal employees to transfer ownership in fee title of human remains.

We therefore ask for a federal inquiry into the activities of the NAGPRA Review Committee, particularly where treatment and disposition of our so-called "unaffiliated" ancestors' remains are concerned. We ask for a federal investigation into the activities of the Nebraska State Historical Society, the Douglas County Sheriff's Office of that state, the University of Nebraska-Lincoln and Professor Rhinehard, Douglas Owsley of the Smithsonian Institution and the Bureau of Reclamation, the National Park Service and the Corps of Engineers. Put simply, we ask you to make the law work the way Congress intended: to protect the rights and interests of our Native Nations and our ancestors, and not those of the industries that have caused us so many tears and heartbreak. We stand ready to provide you with information, documentation and any other assistance you may need to get to the truth of the horrific stories we have shared, and we thank the entire Committee for the opportunity to send a good voice to you today.