

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON THE NATIVE AMERICAN GRAVES
PROTECTION AND REPATRIATION ACT

July 28, 2005

WRITTEN TESTIMONY OF FRIENDS OF AMERICA'S PAST

INTRODUCTION

Thank you for the invitation to appear before this Committee and to provide both written and oral testimony on the amendment that has been proposed to Section 2(9) of the Native American Graves Protection and Repatriation Act ("NAGPRA").

We are attorneys in Portland, Oregon and are appearing here today on behalf of Friends of America's Past ("FAP") which is a nonprofit organization dedicated to promoting and advancing the rights of scientists, teachers, students and the public to learn about America's past. Mr. Schneider is a founder of FAP and a member of its Board of Directors. Since its creation in 1998, FAP has been a resource for teachers, students, government agencies, scientists, journalists and other parties seeking relevant information about NAGPRA and other federal and state laws, and due investigation of the past. FAP maintains an internet website (www.friendsofpast.org) that posts documents and other materials relating to NAGPRA and the Kennewick Man litigation.

Ms. Barran's practice includes complex litigation which involves the interpretation and application of federal and state laws and administrative regulations. Mr. Schneider advises scientists, government agencies, and other parties on the interpretation and application of federal

and state laws as they relate to archeological sites and objects. We were privileged to represent eight scholars in litigation that arose after the 9,000 year old Kennewick Man skeleton was discovered nine years ago. As you may be aware, that skeleton was seized by the U.S. Army Corps of Engineers for the purpose of giving it to a coalition of Amerindian groups that had no cognizable link to the remains. Earlier this month, after years of litigation, the plaintiffs-scientists finally began their studies of the skeleton. The immense media interest in their studies highlights the importance of these matters to the American people, and their strong interest in understanding how this land of ours was originally settled by people. See articles and editorials cited in Relevant Publications. But it is not just in this country that Kennewick Man captures such interest. The whole world is watching these developments with deep interest.

We are presenting this written testimony and appearing in person to express our opposition to the proposed amendment and to describe to you the sweeping and catastrophic changes this proposed legislation would have. We urge this Committee to support the rights of the American people to study, learn and understand the past. We are not alone in opposition to the proposed amendment. Many people from all walks of life, ethnic affiliations and geo-political backgrounds also oppose this attempt to expand the types of human remains and objects covered by NAGPRA. Attached are letters and statements from some of them. If the proposed amendment is accepted, NAGPRA will be expanded far beyond the boundaries of what is reasonable, and you will have removed from the national patrimony ancient cultures and heritages that should be a source of pride for all Americans. Such actions will impoverish future generations and seriously harm education in this country.

THE COMPROMISES WHICH LED TO THE ENACTMENT OF NAGPRA

NAGPRA was originally conceived and presented as legislation that sought to balance the interests of Amerindians, museums, scientists, archeologists (including amateur archaeologists) and the public. In its present form, the law requires a two step analysis. First, remains or objects are to be evaluated to determine whether they are “Native American” as defined in the statute. The law defines Native American as “of or relating to a tribe, people or culture that is indigenous to the United States.” It is that definition that the proposal would amend.

If human remains or cultural objects are determined to be Native American, the statute treats them very differently from other antiquities or archeological resources. For example, and this is by no means exhaustive, if remains are determined to be Native American, only a very small subset of people (i.e., Amerindians, Native Hawaiians and Alaska Natives) have a right to claim them or can have a voice in what happens to them. Once that occurs, the law also defines how the remains or objects are to be disposed. That disposition may be determined on the basis of lineal descent or cultural affiliation. In some cases, however, tribes may be allowed to claim remains or objects simply because they happened to be found on land that the tribe once occupied. Mechanisms also exist, and others are being discussed, for giving culturally unidentifiable remains to regional coalitions of tribes. All of that happens merely because something is classified as Native American.

NAPRA was never intended to cover all remains regardless of age. The focus of the hearings and debates in 1989 and 1990 make it clear that the concerns of Congress were to reunite

Amerindians and other modern Native Americans with the remains and cultural items of their family members, ancestors and other kin. See Ryan Seidemann letter. It was not the intent of Congress to allow tribes to claim things that have no verifiable connection to living Amerindians.

THE DISCOVERY OF THE 9,200 YEAR OLD KENNEWICK MAN

The Committee's members may have some familiarity with the Kennewick Man skeleton because of its great significance in NAGPRA jurisprudence, and the great attention that the lawsuit has received in newspaper and other media reports here in the United States and internationally.

In 1996 two college students stumbled on a portion of a skeleton. After the bones and fragments were collected, it became apparent that Kennewick Man was a discovery of substantial importance. The skeleton does not look like present day Amerindians. It also does not look like any other existing human population. If you had to determine what group it does resemble most closely, you would look to Polynesians or the prehistoric ancestors of the Ainu of Japan. Even those resemblances, however, are faint. Kennewick Man's remains are 9,200 years old. Few human lineages last that long. Indeed most lineages do not succeed in reproducing themselves over a span of 500-1000 years. See Brace et. al. letter. Kennewick Man is separated from the modern world by almost 500 generations.

The skeleton presents other intriguing puzzles. There is a spear point imbedded in its hip. We do not know whether it got there by accident (a form of prehistoric "friendly fire") or by design.

That latter possibility—perhaps even likelihood—may mean that Kennewick Man was unrelated to the people who made the projectile point. Perhaps he strayed, intentionally or by mistake, into the territory of a competing group and paid a price for his transgression.

During the litigation over the skeleton, the Army Corps of Engineers buried the discovery site under tons of rubble. Now we will never know what might have been found in that same area. So we do not know and can never know what group Kennewick Man belonged to, or what that group called itself. We do not even know where Kennewick Man spent most of his lifetime. The location where the skeleton was found is not particularly distant from Canada. Kennewick Man could have taken a summer's stroll from British Columbia to Washington.

We know very little about people who lived 9,200 years ago in Kennewick Man's time. We can not identify how many different groups lived in a region, or their size. We know nothing about their political organization or their interactions, or their languages, religious beliefs or social customs. We do not know if Kennewick Man has any living descendants. If he does, they may not be Amerindians. They could as easily be Hispanics.

Many misinformed people have commented that if only the scientists had tried to talk the issues through with the government, it might not have been possible to avoid a lengthy and costly lawsuit over the skeleton's fate. We would like the Committee to understand that long before these scholars ever thought of initiating litigation, they contacted representatives of the Army Corps and asked for an opportunity to examine the skeleton before it was given to the tribes. These requests were rebuffed. The Corps took the position that the skeleton was Native American

solely because of its age, and because it was Native American the scientists had no right to study it. Representatives of two agencies ultimately became involved in the controversy, the Department of the Interior and the Army Corps. It would be a kindness to describe their conduct as “overzealous.” Eventually, a federal court would conclude that these agencies acted in bad faith. They very simply abused their authority under the law.

Skeletons from this country as complete and as old as (or older than) Kennewick Man are rare. You can count them on the fingers of one hand. Parts have been found of another dozen or so skeletons of this antiquity; in some cases, the parts are only a few fragments of the lower body. A few more have been in Canada and Mexico. The situation is only slightly better with respect to skeletons that are somewhat more recent in age (5000 to 9000 years old). Most of the skeletal remains of this age that have been found in the United States are incomplete. Less than one hundred of those that have been securely dated are complete (or nearly complete).

These ancient skeletal remains are irreplaceable. Archaeological sites and artifacts can tell us something about where ancient people lived, what they ate, what tools they made and the places they visited. But they cannot tell us who the people were who made the tools and used the sites. Only the remains of the people themselves can tell us who they were, where they may have come from, who they were related to and whether they have any living descendants. Without study of the remains themselves we will never be able to solve the great mystery of the peopling of the Americas. See George Gill and Richard Jantz letters. Through DNA analyses, even fragments can provide important information. To destroy ancient skeletons like Kennewick Man and others that may be found in the future is akin to burning a library. Once the knowledge contained in the

books (or in this case, the bones) has been destroyed, it will be lost forever and can never be replaced.

THE CONSEQUENCES OF THE PROPOSED AMENDMENT

Some of the members of this Committee may be laboring under the misconception that the proposed amendment is merely a technical correction of the statute which will have few consequences in the treatment of ancient remains. Nothing could be further from the truth. Instead, it will make a sweeping change to NAGPRA, make it virtually impossible to learn more about the earliest inhabitants of this land, and will seriously prejudice this country in its efforts to maintain an educated public including in post-secondary education.

NAGPRA presently requires a small burden to be met before remains or cultural items are deemed to be Native American. As you will recall from the preceding discussion, categorizing remains or cultural items as “Native American” has significant consequences because they are then treated in an entirely separate way, i.e., placed off-limits to non-Indians and now subject to claims by tribes that may have no cultural affiliation or other connection to the remains or objects. In other words, once something is called Native American, there are severe and sometimes overwhelming impediments to learning anything more about them.

NAGPRA presently requires that something must be “of or related to a tribe, people, or culture that is indigenous to the United States” before it will be considered Native American and consequently subject to the statute. This requirement means there must be some reasonable proof of a connection to either a presently existing tribe or to living indigenous peoples or their

culture generally. You will note that the term “indigenous” is nowhere defined in the statute. The dictionary definition of the term and Congress’ use of the word “is” suggest that what it originally intended was that we look to see whether the tribe, people or culture were born or arose here and continue to this day.

You are now being asked to adopt an amendment that would change NAGPRA’s definition of Native American to make it applicable not only to people and things that are now indigenous to this country, but also to anything that was indigenous to the United States at any time in the past no matter how long ago. In other words, all prehistoric remains and cultural items found on federal land would be subject to the law. Even remains as old as Kennewick Man, or even older, would become Native American by definition. Scientists would have no right to study them, and they could be given to tribal claimants to whom they have no biological or cultural connection. This is no small change.

We presently know very little about the earliest inhabitants of this country. See Richard Jantz letter. But one thing we do know is that the processes that brought them or their ancestors to the New World, and what happened to them after they got here, is much more complicated than once believed. See D. Gentry Steele letter. It is entirely possible, if not probable, that some of these early colonizing groups eventually became extinct. See Brace et. al. letter. In addition, if an ancient group does have living descendants, those descendants may be residing today in Canada, Mexico, Central America or other parts of the world outside the United States.

If you pass the proposed amendment, you will forever block study of ancient people who have no relationship to living Amerindians. You will have done so by arbitrarily saying that they are Native American. We do not use the word “arbitrarily” to be disrespectful to the Committee. But it is arbitrary to assume that everyone whose skeleton is found in this country was an ancestor of modern Native Americans. See Brace et. al, Cleone Hawkinson and Ronald Mason letters.

This amendment will deprive all Americans of the opportunity to learn more about the early prehistory of this country. It will be bad for educators, students, Amerindians who want to learn more about their heritage, and everyone who values knowledge of the past. It will be particularly harmful to the education of forensic scientists and anthropologists in this country. See George Gill letter. Already many anthropology graduate students are choosing to conduct their original research outside the United States because NAGPRA even as presently written is impeding their studies. It affects their research not because of what the law actually says, but because overzealous agency and museum officials are overinterpreting the law. Very few graduate students possess the financial backing to engage in a nine year legal battle with the United States. If you pass this amendment, more and more physical anthropologists and forensic scientists will go elsewhere for their training. The scientists of the future will inevitably be taught by foreign schools, and foreign-trained scientists will become the faculty of the future.

THE PROPOSED AMENDMENT DOES NOT DESERVE

THE COMMITTEE’S APPROVAL

You will hear, if you have not heard already, many pleas and excuses for altering NAGPRA in the manner now being proposed.

We urge the Committee to look beyond the rhetoric, and to consider carefully what this amendment would do to the country's prehistoric heritage. No principled reason can be offered for giving to one segment of society control over ancient skeletal remains and objects to which they are unable to prove any close or unique connection.

You may have been told that this extension of NAGPRA's reach is insignificant because human remains or cultural items could not be given to a tribe without proof of cultural affiliation. If you read the statute and check to see what is already happening, you will see that this claim is not true. The Secretary of the Interior has been given the authority to approve federal agency and museum dispositions of culturally unaffiliated remains. This authority has already been used to allow hundreds of unaffiliated remains to be transferred from public museums to tribal collections, and many of them were as much as 5,000 – 8,000 years old. See Cleone Hawkinson letter. Some were remains known to be European or African-American. Moreover, as previously noted, remains found on aboriginal lands can be turned over to tribes for disposition even when there is no demonstrable connection.

Adoption of this amendment will be seen as a green light by overzealous agency officials who have their own agendas. The Kennewick Man case illustrates how serious these threats can be. The Army Corps of Engineers had barely learned of the skeleton's age before they began telling the tribes that they would do whatever the tribes wanted with the remains. And they made clear to the scientists that they did not intend to let "a bunch of old bones" – as one Army Corps official put it - get between them and accomplishing other tasks they considered to be more

important. So Kennewick Man's remains became a political pawn. The situation will only get worse if this amendment is passed. Few scientists can overcome Agency barriers to study. Not only is the legal battle exhausting, it requires resources that most scientists lack and exposes them to possible retribution. Pressure may be brought on their institutions to force them to withdraw from the litigation, to cut back on their research funding or to punish them in other ways. Such incidents occurred in the Kennewick Man litigation.

You may also be told that NAGPRA is human rights legislation and this amendment will do nothing more than support those rights. The proposed amendment does exactly the opposite. It is not a human right to control the disposition of remains over which one has no connection. We ask that you consider the grave disrespect that you will do to ancient cultures if, by the stroke of your legislative pens, you make it possible to eliminate knowledge of their existence. To do so is a form of cultural genocide. See Alison Stenger letter. It imposes on ancient people the beliefs, name and culture of persons with whom they have nothing in common, and who may be descendants of ancient enemies – enemies who may have caused the other people to become extinct. Before you vote on this amendment to NAGPRA, we ask you to consider the consequences to the dead. Do they not have a right to have their stories told and preserved for future generations to learn from?

The amendment cannot be justified on the grounds that it is intended to promote respect for the dead. Not all people have or had the same culture or beliefs about human remains that some Amerindian tribes do. In fact, not all existing Amerindians share those beliefs. See letter of Ethnic Minority Council of America. Many believe that gathering and preserving information

about the dead—who they were, and what they did—is one of the highest forms of respect. Such belief systems are well-documented in many other parts of the world where information about early prehistoric peoples is better known than here. It is wrong to assume that the proposed amendment respects the wishes of these dead since we do not know what the wishes of those persons were. If you pass this amendment you will be subjecting ancient remains to the burial rituals and religious beliefs of people they never knew. Those beliefs and rituals may be very different from what they may have wanted.

Nor can you suggest that this is simply an extension of tribal sovereignty. Many of the remains in question will be those found outside of tribal reservations. Kennewick Man, for example, was found on land managed by the Army Corps of Engineers - federal land that is public land, not tribal land. Nor should tribal sovereignty be an issue here in any event. Kennewick Man has no cognizable link to any modern day tribe. None. The trust relationship that exists between the United States and recognized Native American tribes has no application to such ancient remains. They are not something unique to modern tribes, but are the cultural patrimony of everyone in this country. Present legislation already gives Amerindians the right to claim remains and cultural items that once belonged to them or their members.

Supporters of the proposed amendment may also claim that it does nothing more than restore NAGPRA to the form originally intended by the people who drafted the statute's text. If that was their original intent, they went to great efforts to keep it to themselves. Congress and the American public were not told in 1990 that NAGPRA would apply to nine or ten thousand year old remains that have no known connection to present-day Amerindians. Nor were they told that

the statute would be used to stop scientific study of remains and objects that predate now existing tribes by thousands of years. Such results were not suggested by the words of the statute, and no reference was made to these important issues in the House and Senate reports on NAGPRA. Even the title of the law, the Native American Graves Protection and Repatriation Act, suggests that its scope would be limited to things that are really Native American.

You may also be told that the bill will not significantly affect scientific research. That too is untrue. Many overzealous federal agencies and museums take the position that NAGPRA prohibits study of skeletal remains and cultural items for research purposes, even in cases where they cannot be culturally affiliated to a specific tribe. That was the position taken by the agencies and government attorneys in the Kennewick Man case, and was one of the reasons why scientists had to resort to an expensive and time consuming lawsuit to gain access to study this important new discovery. Passage of this bill will inevitably generate more controversies of this kind, and it will encourage even more extreme interpretations of NAGPRA. One example is the argument that all information relating to remains and objects covered by NAGPRA belongs exclusively to potentially interested tribal groups and can only be released with their consent. Such claims were made in the Kennewick Man case.

Many critically important skeletons will be forever lost if this bill becomes law. Examples, include: Spirit Cave Man, a nearly complete 9,400 year old skeleton from Nevada; the partial skeletal remains of Arlington Woman, more than 11,000 years old; several crania from the Midwest thought to be at least 8,000 years old. Dozens of other remains in federal, state, and

museum collections that are more than 5,000 years old would also be lost. Like Kennewick Man, their connection (if any) to modern American Indians cannot be determined.

THE PROPOSED AMENDMENT IS DETRIMENTAL TO
EDUCATION IN THIS COUNTRY

This amendment will affect countless scholars in their capacities as teachers. Without access to ancient remains and cultural items, teachers cannot teach their students what may have happened in this country before written history. Not so very long ago the Supreme Court reminded all of us that education is one of the “transcendent imperatives of the First Amendment” and that we should be on guard against even well-intentioned measures that operate to suppress individual thought, expression and creative inquiry.

The Kennewick Man litigation and the examples it gives of overzealous government agencies should serve as a warning of how easily NAGPRA, even in its present form, can be misapplied. From the beginning, the agencies promised the claiming tribes that they would get the “right answer” so they could put a stop to any scientific study of the skeleton. They expressed their desire to suppress certain theories about how the Americas were settled. In other words, two federal government agencies decided that their views and the views of the claiming tribes were so important that they had a right to suppress free thought by other Americans. For the same reason, the Army Corps destroyed the skeleton’s discovery site and whatever information it contains even though both the Senate and the House had passed legislation to prohibit any tampering with the site. We would hope that these kinds of warnings would be staggering to you. This country has always held itself out as the one place in the world where totalitarian thought control does not happen. The proposed amendment is the ultimate form of thought control. It would make paramount one view of the past, and would prevent scholars from obtaining information that might support other, more accurate interpretations of prehistory.

You have the power to write words that affect how we and future generations will perceive the world. Please do not steal the past. It belongs to the scholars of today and the scholars of tomorrow, and to all people everywhere.

We urge your careful consideration of this amendment. We ask you to reject it.

Respectfully submitted,

Paula A. Barran
Barran Liebman LLP
601 SW Second, Suite 2300
Portland, Oregon 97204
Tel: 503-228-05500
Fax: 503-274-1212
pbarran@barran.com

Alan L. Schneider
1437 SW Columbia, Suite 200
Portland, Oregon 97201
Tel: 503-274-8444
Fax: 503-274-8445
alslawoffices@uswest.net

on behalf of Friends of America's Past

List of Attachments
Testimony of Friends of America's Past

- A. Biographical Data
 - 1. Barran, Paula, Summary of Biographic Information
 - 2. Schneider, Alan, Summary of Biographic Information
- B. Opposition Letters
 - 1. Brace et al., letter dated June 17, 2005 to Senator John McCain
 - 2. Colorado Archaeological Society, letter dated July 21, 2005 to the Senate Committee on Indian Affairs
 - 3. Ethnic Minority Council of America, letter dated July 15, 2005 to Senator John McCain
 - 4. Gill, letter dated July 15, 2005 to Senator John McCain
 - 5. Jantz, letter dated July 19, 2005, to Senate Committee on Indian Affairs
 - 6. Hawkinson, letter dated July 19, 2005 to Senator John McCain and Senate Committee on Indian Affairs
 - 7. Mason (and Custred), letter dated July 20, 2005 to Senator John McCain
 - 8. Seidemann, letter dated July 1, 2005 to Alan Schneider
 - 9. Steele (and Carlson) letter dated July 20, 2005 to Senator John McCain
 - 10. Stenger, letter dated July 14, 2005 to Senate Committee on Indian Affairs

Selected Publications
Testimony of Friends of America's Past

Magazine and Newspaper Articles

Please refer to the publisher's website or other authorized sources for text of these articles.

1. ABC News.com, February 2, 2000
2. American Archaeology, Summer 2005, Fall 2004, Summer 2004
3. Archaeology, November/December 2002
4. Arizona Daily Star, July 10, 2001
5. Associated Press, June 28, 2005, April 7, 2005, February 16, 2005, September 30, 2004, August 18, 2004
6. Barnes Review, September/October 2001
7. BBC News (UK Edition), July 21, 2004
8. Billings Gazette, April 19, 2001
9. Bulletin (Australia), October 17, 2000
10. Bulletin (Bend, Oregon), April 8, 2005
11. Chicago Tribune, June 28, 2005
12. Christian Science Monitor, June 21, 2001
13. CNN.com/Law Center, August 31, 2002
14. Columbian, July 13, 2001, July 9, 2001
15. Contra Costa Times, July 22, 2005
16. Corvallis Gazette Times (Corvallis, Oregon), August 10, 2001
17. Denver Post, October 1, 2002
18. Discover, June 2004
19. Economist, July 16, 2005

20. Fox News.com, July 8, 2000
21. Hartford Courant, April 27, 2003
22. Houston Chronicle, June 11, 2003
23. Independent News (UK), December 3, 2002
24. Independent Online (Missoula Independent), March 22, 2001
25. Los Angeles Times, October 1, 2000
26. Mammoth Trumpet, March 2003, December 2002
27. National Geographic, December 2000
28. National Review Online, April 14, 2005
29. Nature, July 7, 2005, April 14, 2005
30. Newsweek, July 20, 2005
31. New York Times, July 19, 2005, July 19, 2004, February 5, 2004
32. Oregonian, July 11, 2005, July 6, 2005, June 22, 2005, April 10, 2005, September 10, 2003
33. Press-Enterprise, September 26, 2000
34. Register Guard (Eugene, Oregon), October 25, 2002, August 31, 2002
35. Science, June 24, 2005, October 8, 2004, July 30, 2004, February 13, 2004
36. Scientific American, September 2000
37. Seattle Post-Intelligencer, July 11, 2005, July 6, 2005
38. Seattle Times, July 11, 2005, July 6, 2005
39. Spring Hill Review, October 2001
40. Tri-City Herald, July 15, 2005, July 11, 2005, June 20, 2005, October 1, 2004
41. Tucson Citizen, August 11, 2001

42. USA Today, June 30, 2005, April 20, 2004, October 1, 2002
43. Washington Post, September 17, 2004
44. Washington Post Online, May 30, 2001
45. Weekly Reader (Senior Edition), October 25, 2002

Editorials

Please refer to the publisher's website or other authorized sources for text of these editorials.

1. Arizona Republic, October 15, 2004
2. Cape Cod Times, August 25, 2004
3. Dallas News (Texas), August 22, 2002
4. Democrat-Herald (Albany, Oregon), July 18, 2004, October 4, 2001
5. Denver Post (Colorado), October 2, 2002
6. Denver Rocky Mt. News (Colorado), October 13, 2004, September 27, 2000
7. National Post Online, October 28, 2000
8. National Review Online, April 14, 2005
9. Otago Daily News (New Zealand), February 19, 2004
10. Seattle Times (Washington), April 4, 2005, July 22, 2004, July 21, 2004, September 5, 2002
11. Tri-City Herald (Washington), July 20, 2005, September 4, 2002
12. Washington Times, April 27, 2001