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RELIGIOUS FREEDOM ACT

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON AMERICAN INDIAN RELIGIOUS FREEDOM ACT OF 1978

JULY 14, 2004
WASHINGTON, DC

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RELIGIOUS FREEDOM ACT

WEDNESDAY, JULY 14, 2004

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m. in room 418, Russell Senate Building, Hon. Ben Nighthorse Campbell (chairman of the committee) presiding.

Present: Senators Campbell, Inouye, and Johnson.

STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

The CHAIRMAN. We will now turn to the oversight hearing of the American Indian Religious Freedom Act of 1978.

In 1978, Congress passed and President Carter signed into law the American Indian Religious Freedom Act, which provided that freedom of religion is an inherent fundamental right guaranteed to all Americans by the First Amendment to the U.S. Constitution, and that the religious practices of Native peoples are an integral part of their culture and form the basis of Native identity; that the lack of a clear, consistent Federal policy had often led to the abridgement of religious freedom for those traditional American Indians; and that some Federal laws designed for such worthwhile purposes as conservation and preservation of natural species were passed without consideration of their effects on Native religions, often denying American Indians access to sacred sites; and that Federal laws at times prohibited the use and possession of sacred objects necessary to the exercise of religious rites and ceremonies.

The AIRFA also called on the President to direct the various Federal departments, agencies and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with Native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rites and practice.

Aside from this directive, no legal mechanism was provided for enforcing the policy. In 1994, this act was amended to provide for traditional Indian religious use of the peyote sacrament. The amendment was prompted in part by the 1990 Supreme Court ruling that the First Amendment does not protect Indian practitioners who use peyote in religious ceremonies.

Attention was focused again on Indian religious freedom when in 1996 President Clinton issued Executive Order 13007, the Indian

Sacred Sites Order, which directed all executive branch agencies with statutory or administrative responsibility for the management of Federal lands, to the extent practicable permitted by the law and not clearly inconsistent with essential agency functions, first to accommodate access to and ceremonial use of Indian sacred sites on Federal lands and to avoid adversely affecting such sacred sites, and where appropriate guard their confidentiality.

There has been much litigation in the area of religious freedom and cultural practices since the late 1970's. We called today's hearing to receive testimony regarding the issue on how the 1978 Act has been implemented and whether there is a need for further congressional action.

With that, I would like to turn to my good friend and Vice Chairman Senator Inouye for any opening statement he might have.

Senator INOUYE. Mr. Chairman, I commend you for calling this session. I wish to associate myself with your remarks and I ask that my statement be made part of the record.

The CHAIRMAN. Your statement will be included in the record.

[Prepared Statement of Senator Inouye appears in appendix.]

The CHAIRMAN. Senator Johnson, did you have any opening statement on this issue?

Senator JOHNSON. No; I do not, only to commend you for holding the hearing on this critically important issue. I look forward to the testimony from a very distinguished panel.

The CHAIRMAN. Thank you.

We will start with the first panel. That will be Brian Pogue, director, BIA, Department of the Interior, Washington, DC; and Joel Holtrop, the deputy chief, USDA Forest Service, Department of Agriculture.

Gentlemen, your complete written testimony will be included in the record. If you would like to abbreviate, that will be fine. Why don't we go ahead with Mr. Pogue first. I call on you first. We will not flip a coin on this one.

STATEMENT OF BRIAN POGUE, DIRECTOR, BIA, DEPARTMENT OF THE INTERIOR

Mr. POGUE. Mr. Chairman and Mr. Vice Chairman, my name is Brian Pogue. I am the director of the BIA. I am pleased to be here today to the Department's statement on the 25th anniversary of the passage of the American Indian Religious Freedom Act.

In 1978, the American Indian Religious Freedom Act [AIRFA] was enacted and mandated that the Federal Government protect and preserve for the American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to the access of sites, the use and possession of sacred objects, and freedom to worship through ceremonies and traditional rites.

Under AIRFA, Federal agencies are required to, one, seek and consider the views of Indian leaders when a proposed land use might conflict with traditional Indian religious beliefs or practices and, two, avoid unnecessary interference whenever possible with Indian religious practices during project implementation.

In 1990, the Native American Graves Protection and Repatriation Act [NAGPRA] was enacted to make easier the efforts of the American Indians, Alaska Natives, and Native Hawaiian organizations to claim ownership of certain cultural items, including human remains, funerary objects, sacred objects, and objects of cultural patrimony in control of Federal agencies and museums that receive Federal funds. NAGPRA requires agencies and museums to disclose holdings of such human remains and objects, and to work with the appropriate Indian tribes, Alaska Native villages and corporations and Native Hawaiian organizations to repatriate such cultural items.

Recently, the Secretary of the Interior appointed three members to the Native American Graves Protection and Repatriation Act Review Committee. The committee consists of seven members who are charged with monitoring, reviewing and assisting in the implementation of NAGPRA.

Appointments to the committee are selected from nominations to the Secretary of the Interior by Indian tribes, Alaska Native villages, Native Hawaiian organizations and national museum and scientific organizations. Each appointee serves for a 4-year term. Executive Order 13007 on Indian sacred sites, issued in 1996, gives the Federal agencies guidance on dealing with sacred sites. The order directs Federal land management agencies, to the extent practicable, to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sacred sites.

The Executive order also requires Federal agencies to consult with tribes on a government-to-government basis whenever plans, activities, decisions, or proposed actions affect the integrity of or access to the sites.

There is a growing concern among the public that Native American burial grounds and other sacred places are being desecrated by human encroachment by urban sprawl. The BIA receives frequent requests for immediate intervention when individuals believe a burial mound is being bulldozed or a Native cemetery is being cleared for housing or other urban development. Whenever possible, we refer these requests to the appropriate agency.

The Administration and the Department continue to work with Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations to ensure access to and to protection of sacred sites and to comply with the law.

We support the American Indian Religious Freedom Act, which protects and preserves for the American Indian, Eskimo, Aleut, and Native Hawaiian the inherent right of freedom to believe, express and exercise their traditional religions, access to religious sites, and the use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.

This concludes my prepared statement. I would be pleased to answer any questions the committee may have.

[Prepared statement of Mr. Pogue appears in appendix.]

The CHAIRMAN. Okay. We will have a couple. Thank you.

Mr. Holtrop, why don't you go ahead and proceed?

STATEMENT OF JOEL HOLTROP, DEPUTY CHIEF, USDA FOREST SERVICE, DEPARTMENT OF AGRICULTURE

Mr. HOLTROP. Thank you Mr. Chairman, Mr. Vice Chairman and members of the committee. I am Joel Holtrop, deputy chief, State and Private Forestry, USDA Forest Service.

It is the responsibility of state and private forestry to provide technical and financial assistance to landowners and natural resource managers to help sustain the Nation's urban and rural forests and to protect communities and the environment from wild land fire. Among our important partners in this endeavor are tribal governments.

Thank you for this opportunity to provide the Department of Agriculture's views on the interpretation and implementation of the American Indian Religious Freedom Act of 1978 and followup laws in two main areas: Repatriation and protection of sacred places.

The Forest Services manages 192 million acres of public lands nationwide for multiple use, including timber production, recreation, grazing, habitat management, and water conservation. The Forest Service Heritage Program manages approximately 300,000 known heritage resources on National Forest system lands, a great many of them important to American Indians.

Under the direction of various statutes, executive orders and agency directives, the Forest Service consults with tribes regarding land and resource management policies, programs and actions that could affect resources important to the tribes, such as sacred sites. Executive Order 13007 requires Federal land management agencies to accommodate access to and use of Indian sacred sites, to avoid affecting the physical integrity of such sites, and to maintain the confidentiality of sacred sites locations.

Recently, the Forest Service chartered a task force on sacred sites to develop policy and guidelines to better protect the sacred sites that are entrusted to our care. The task force has been meeting with tribal governmental and spiritual leaders throughout Indian Country as part of this process.

Regarding repatriation, the Forest Service is implementing the Native American Graves Protection and Repatriation Act of 1990, which addresses the protection of Native American burial sites in the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony. The Forest Service is complying with the requirements to consult with Indian tribes prior to intentional excavations, and notification in the event of inadvertent discovery of human remains or cultural items. We also have a process for the repatriation of human remains and cultural items to the Indian tribe or lineal descendants to whom these remains or items belong.

Forest Service implementation and compliance with these statutes depends on maintaining effective consultation and collaboration with tribal governments. Recognizing that, the Forest Service has recently taken action on several fronts, all of which should improve the agency's collaborative relationships with tribes and reduce conflicts over a number of issues, including the protection of sacred sites.

For example, a forest service office of tribal relations was established to provide the infrastructure and support necessary to en-

sure high-quality interactions across programs with Indian tribes on a government-to-government basis. In March, the Forest Service issued new manual and handbook direction on tribal relations that provides clear guidance for agency-tribal relationships, spelling out specific obligations for Forest Service officials in providing guidelines for conducting government-to-government relations with tribes. And the agency has instituted core skills training pertaining to Forest Service policy with regard to tribal relations. The training incorporates the need to protect sacred sites and other culturally important areas.

The agency has identified certain recommendations that cannot be fully implemented without legislation to create new or clarify existing authorities. The legislative proposal which was included in the Administration's fiscal year 2005 budget would provide better access to National Forest system lands and resources for traditional and cultural purposes, express authority for reburials on National Forest system lands, and authority to maintain the confidentiality of reburial and other information. The legislative proposal is currently in clearance at the Department.

Mr. Chairman, the religious freedom of American Indians is and will continue to be an important factor in our management of the National Forest system lands and all Forest Service programs. The agency has made great strides to increase awareness of all Forest Service employees of the agency's responsibilities to Indian tribes. The Forest Service is eager to work with Indian tribal governments. Together, we can take appropriate actions to support the religious beliefs and practices of American Indians on National Forest system lands.

I would be pleased to answer questions that members of the committee may have.

[Prepared statement of Mr. Holtrop appears in appendix.]

The CHAIRMAN. Thank you, Mr. Holtrop. I am jotting a few things down here.

Let me ask Mr. Pogue first, the American Indian Religious Freedom Act was enacted in 1978, 26 years ago, but the Department of the Interior statement on it is somewhat sparse. Are there any positive examples of the Bureau's involvement with the Religious Freedom or the Native American Graves Protection and Repatriation Act issues that you care to share with the committee?

Mr. POGUE. Yes; in 2002, we did form an interagency committee that has been working on and with tribes. They have consulted with tribes three times during that period of time. We are in the process of looking at and developing the policy. The last meeting was held in June of last year and this group has been working on that development.

I have asked for some additional information on that. I have not received it yet, though.

The CHAIRMAN. Okay. When you get it, would you please forward it to the committee?

You said that was in 2002.

Mr. POGUE. The last meeting was in June of 2003.

The CHAIRMAN. Yes. It seems to me that was about the time the *Kennewick Man* case was decided, which leads me to ask you, who do you consult with? When you find remains that are so old, you

are not sure how to trace them. Tribes moved around from time to time by their own volition or by forced movement. How do you determine who you are supposed to consult with?

Mr. POGUE. Within our Trust Services Division, we have archaeologists. We rely on our archaeologists to provide that technical support in working with and identifying those agencies that we need to work with.

The CHAIRMAN. Okay. The archaeology program is administered by the Archaeology and Ethnography Program, according to my notes, of the National Park Service. Is that right?

Mr. POGUE. Yes; but we try and coordinate with them when we have questions.

The CHAIRMAN. You know, I do not want to say anything bad about them. Maybe they are doing a fine job, but I remember years ago when we were framing up the legislation for the National Museum of the American Indian, which Senator Inouye and I worked so hard on, one of the real glitches was from the archaeologists who absolutely did not want the section involved in that bill that would require the Smithsonian to start returning some of the remains.

So I might tell you that some tribes think that it is a conflict of interest having archaeologists make this determination or being in charge of it when their traditional goals were to keep those things forever and to keep studying them, rather than to give them back. Have you had any consultation or any feeling about that in talking to the archaeologists who are authorized to do this work?

Mr. POGUE. I do not. I can check.

The CHAIRMAN. I understand, and please correct me if I am wrong, that the BIA itself is one of the largest holders of unrepatriated indigenous remains and relics. Can you confirm whether that is true or not?

Mr. POGUE. I cannot.

The CHAIRMAN. I will tell you what. We will put it in writing, and if you could respond in writing, I am sure this committee would like to know, because we have been really instrumental in trying to get those remains returned by other agencies. I was rather surprised that in fact the Bureau was not one of the lead agencies who would have volunteered to do that.

Mr. Holtrop, looting of sacred sites has become a big problem. Executive Order 13007 directs Federal agencies to protect the confidentiality of sacred sites where appropriate, for obvious reasons. If the word got out, you are going to find looters sooner or later.

Let's say you do this, and you have some confidentiality discussions on a sacred site. If that has been compromised or leaked out, what do you do then?

Mr. HOLTROP. If the information that was considered confidential has been leaked out, what do we do at that point?

The CHAIRMAN. Yes; what is your plan B if that happens?

Mr. HOLTROP. Our plan B if that were to happen would probably include several steps that we would do. One of the first steps that we would need to take is to make sure that whatever steps we took were in consultation with the tribe or tribes that were most interested in and associated with that sacred site.

We would look at what are the mitigating actions that we would need to take at that time, and to try to limit whatever possible im-

pacts that it could have, all the way up to, leading to and in some cases closing recreational uses of areas and those types of things in order to continue to protect sacred sites, and there are examples of us having done so.

The CHAIRMAN. This is a little bit off the subject, but a few years ago there was a devastating fire in Mesa Verde. After the fire was contained, they found literally thousands of relics that they had not known existed when the brush was burned off. I assume that there are some places in the forest when you have forest fires, you have the same effect. Some things appear that you did not see before.

As you probably know, the Forest Service is using more and more Indian smokejumpers. I do not know how many total number, but they seem to have really found a niche. It is a very dangerous job and they like the work. It gives them an opportunity to show the traditional feeling of bravery in adverse conditions and I think they do a real super job. Has there been any dialog or negotiation, or any input on working with some of those smokejumpers who might have cultural knowledge about where they are jumping into to identify or spot or pass on information about things that appear?

Mr. HOLTROP. First of all, let me say as the deputy chief with responsibility for fire and aviation management in the Forest Service, we are proud to work with the Indian smokejumpers and many other Indian crews in our fire management responsibilities.

I think the question that you are asking causes me to wonder the same thing. I do not know for sure that we have examples of where we have done so, but it clearly has a great deal of wisdom associated with it. It is something that I will ask some questions about. If I find out that we have indeed done so, I will be more than happy to share that with you.

The CHAIRMAN. If you could, if you have not done so, I personally think that it would behoove the agency if it would utilize that knowledge that may be there and willing to help.

Mr. HOLTROP. Yes, sir. As you mentioned, we often do have situations in which, like you mentioned in the Mesa Verde fire, which I believe was called the "long fire" at the time, we have many instances in which previously unexposed heritage resources are discovered following the fires. One of the things that we are able to do with, one of our programs is called the Burned Area Emergency Rehab Program, is to utilize some emergency funds for the identification and protection of those sites immediately following a fire.

The CHAIRMAN. So if you find those after a fire, in the Forest Service you have somebody pick them up or identify them? What happens?

Mr. HOLTROP. It depends very much on the site and the object itself. If it is possible to be protected and there is any sense that there is an opportunity for it to be protected and undisturbed, that is the preferred approach.

The CHAIRMAN. Yes; good.

The Executive order on sacred sites was executed in 1996. The task force is just now being developed. It seems like a long time since 1996, if this is just being developed. Could you tell the committee what has been done to date, and particularly with its consultation with tribes in developing this task force for sites?

Mr. HOLTROP. Yes; I would be happy to. Yes, the Executive order was in 1996 and we have been doing work with tribes since the Executive order and before on consultation on sacred sites. I can provide some examples of that.

What we have been doing in the recent past couple of years is recognizing that there are some elevated efforts that we need to take as an agency to redeem our responsibility of working with tribes in a government-to-government relationship. I alluded to some of those actions that we are taking.

One of the things in that process of increasing our self-awareness and institutional awareness of the things that we need to do is we became more and more aware that there are several sacred sites issues around the country that we had been dealing with more on a one at a time, case-by-case basis, that we determined recently that we might be able to gain some benefit by looking at it in a more holistic manner. That is when we put the task force together.

The task force has been traveling around through Indian country. I know that it spent a long week in Alaska recently, for instance, visiting with tribal leaders. The reports that I am getting is that there is a great deal of appreciation for the consultation and the input that the task force has been able to get.

The CHAIRMAN. Okay. Do you have all the statutory authority you need to implement the actions of the task force, or do we need to do something from the standpoint of this committee?

Mr. HOLTROP. In the legislative proposal that I have mentioned that is still in clearance, there are some additional needs that we have identified, some of which deal with some additional perhaps statutory authorities to maintain confidentiality, either burial sites, traditional ecological knowledge that is shared by tribal members with our scientists, and some things like that.

When that legislation clears the executive branch, I would be more than happy to come up and talk with you and the committee in some detail about what the proposal is.

The CHAIRMAN. That will be fine. I appreciate that.

Senator Inouye.

Senator INOUYE. Thank you.

Mr. Pogue, you have testified that the Religious Freedom Act requires your agency to consult and discuss a matter if you feel that there is a conflict of interest involved in the use of the land by your agency. Who decides when there is a conflict? Let's put it another way. Tribe A goes to Interior and tells you that what you are doing with the land is in violation of religious freedom. At that moment, what is your position?

Mr. POGUE. I think I would need to find out a little bit more about what was going on with the use of the land and who was involved. I can give some examples that at one of our reservations we had proposed to construct a school. Every site that they chose turned out to have some artifacts. We actually went through five sites and have not found a site yet.

Once it is identified, we take a look at that site and make some determinations from there as to what the proper use should be or how we would use the land.

Senator INOUYE. And your belief is that you have been very cooperative with the Indian nations?

Mr. POGUE. Yes, sir.

Senator INOUYE. Why is it that the Indian nations are now trying to make certain that the law is implemented by bringing suit against the Interior Department? They seem to be unsatisfied, that they are not getting consultation.

Mr. POGUE. I do not know about that. I will have to find out and get back to you. I am not aware of this lawsuit.

Senator INOUYE. I would suggest that, Mr. Pogue, you remain here while the next panel testifies because I am certain some of the witnesses will bring up cases where they feel that they have not been consulted and they have been ignored.

Is it your view that no legislative remedy is required to ensure that agencies consistently accommodate the concerns of Indian nations? Or would you like to hear them out first?

Mr. POGUE. I would rather hear them out first.

Senator INOUYE. I would like to shift slightly. You have operation and maintenance responsibilities for 74 detention centers in Indian Country, of which 39 are owned by BIA. What sort of religious practices are permitted for inmates in these facilities? Do they have the full array?

Mr. POGUE. Senator, I do not know the answer to that question, but I can find out.

Senator INOUYE. We have received reports from Federal prisons that have suggested that recidivism rates of inmates are very profoundly reduced when they are encouraged to engage in religious and cultural practices. Do you encourage religious and cultural practices among inmates?

Mr. POGUE. I would, but I am not sure that that is what is happening right now. I need to check with my law enforcement folks and find out exactly what is happening in our detention centers.

Senator INOUYE. I can only suggest that in a few minutes the other panel will come up and I am certain they will have a few things to say about this.

If I may ask Mr. Holtrop, you have said that you have made attempts to identify all Indian artifacts or aboriginal sites in order to locate sacred sites. Because some of the tribes have been removed or have been forcibly transferred to some other place, does that make the task a little more difficult?

Mr. HOLTROP. Yes; it does.

Senator INOUYE. Do you consult with those tribes that have been transferred out?

Mr. HOLTROP. When we are able to determine the cultural heritage of sites in areas, that is our intention to do so. I would not pretend to think that we have been successful in all cases, but it would be our intention.

Senator INOUYE. What is the nature of your consultation? I say this very seriously because in some agencies, consultation is after the fact.

Mr. HOLTROP. There may be instances in which it is after the fact in our agency as well, but again it is not our intention. The nature of our consultation depends a great deal on the nature of the issue or the situation in which we are consulting over. Many of the National Forest system lands have off-reservation treaty rights that tribes have off-reservation treaty rights on. Anytime

that we are going to carry out any type of a land management activity, whether it is the development of a recreation site, a timber sale, a mineral geology exploration, any of those things, the consultation occurs with the tribal entities beforehand.

In certain circumstances, when we are going into a situation in which we are expecting to find cultural remains, heritage sites, objects of significance to the American Indians, our intention is to consult before that happens. There are times in which we unexpectedly come across those types of objects, at which point we have policies that require us to consult immediately after that and determine together, in consultation, what is the right next course of action.

Senator INOUYE. You have spoken of your task force. When will the task force finish its business?

Mr. HOLTROP. We are working on trying to have a policy in place based on the work of the task force by October 2005. The task force is continuing to do some additional listening sessions in Indian country around different parts of the country. I believe that most of that work will likely conclude here in the next few months, and then they will go to work as to taking all of the information that they have learned and decide the recommendations that they should make, go through our processes, and get to the point where hopefully we have a new policy in place by October 2005.

Senator INOUYE. I assume that the report will be shared with this committee?

Mr. HOLTROP. That would be my assumption as well. I will make sure that that happens.

Senator INOUYE. What nature of expertise do you have on this task force?

Mr. HOLTROP. We have several of our tribal relations program leaders, the regional tribal relations program leaders from the regions around the country. We also have legal counsel on that. I do not have the entire makeup of the task force in my mind, but we also have some of the people who we will be needing to implement some of the policy recommendations, line officers, district rangers, forest supervisors and such. I cannot tell you from my memory right now for sure that they are on the task force, but I know as the task force was being put together that we have processes in place to make sure that we are consulting with them as we go through the process.

Senator INOUYE. Am I correct to assume that there are many Native Americans on your task force?

Mr. HOLTROP. Yes; you are correct in assuming that.

Senator INOUYE. I thank you, sir.

Mr. HOLTROP. From the Southwest, from the Middle Rocky Mountains and on the West Coast, a good geographic mix.

Senator INOUYE. Were they recommended by the Indian tribes, or were they selected by you?

Mr. HOLTROP. They were officially selected by the Forest Service, but again we had discussions with tribal entities as we went about making up the makeup of the task force. When there are over 500 tribal entities, I would again not pretend to tell you that we consulted with each one of them in our decisionmaking process. We

went to those that we recognized that had some of the greatest issues as we were working on putting the task force together.

Senator INOUYE. Thank you very much, Mr. Holtrop.

Mr. HOLTROP. You are welcome.

The CHAIRMAN. Thank you.

Let me ask one further question, because Senator Inouye has jogged my thinking about this. I understand how you formed the task force and who is on the task force to do the consultation. Who is on the other side? When you go out to do some consultation with the tribes, do you just go through the tribal councils? Do you let them pick whoever they want to be the ones you consult with? Or do you go directly to the spiritual leaders, who are rarely elected officials within a tribe? How do you do that?

Mr. HOLTROP. Are you asking about for the work of the task force on sacred sites that is going around Indian Country right now? They are consulting with both tribal leaders, as well as spiritual leaders.

The CHAIRMAN. I see. Okay, good. Thank you. I have no further questions, but there may be some written questions by other members of the committee who are not in attendance today.

Thank you for being here. I appreciate it.

We will now go to the second panel, which will be Suzan Shown Harjo, my friend and colleague, president of the Morning Star Institute of Washington, DC; Walter Echo-Hawk, Sr., the senior staff attorney for the Native American Rights Fund; Bernard Red Cherries, Jr., Northern Cheyenne Elk Society Headsman and Sundance Arrow Priest from Valley, Washington; and Paul Bender, professor of law, Arizona State University.

If you folks would all come and sit down, we will start in that order. As I said to the first panel, all your written testimony will be included, so if you would like to abbreviate that will be fine.

Walter, you look very dapper in that Western hat.

Mr. ECHO-HAWK. Thank you, Mr. Chairman. I thought you might like it. [Laughter.]

The CHAIRMAN. We will start with Ms. Harjo first. Suzan, nice to see you here.

You have been with this issue since day one, haven't you?

Ms. HARJO. Well, I have actually before day one.

The CHAIRMAN. You have lived with it.

Ms. HARJO. Since 1967.

The CHAIRMAN. Yes.

Ms. HARJO. Senator Inouye, of course, was one of the original sponsors of the American Indian Religious Freedom Act, and staff director and counsel, Patricia Zell has been on this issue as well from day one. Of course, you, Mr. Chairman and Paul Moorehead have been involved in much of the follow-on legislation, particularly the Repatriation Act.

STATEMENT OF SUZAN SHOWN HARJO, PRESIDENT, THE MORNING STAR INSTITUTE

Ms. HARJO. It has been 25 years that we have been waiting for a cause of action to protect sacred places; 26 years ago, the Forest Service was successful in lobbying Congress to strip the American Indian Religious Freedom Act of a cause of action and to make

statements on the House floor that would guarantee that there would be no such cause of action in this bill.

The Supreme Court, because of that action and that successful lobby effort by the Forest Service, basically said in 1988 that, not only did the Religious Freedom Act not offer a cause of action, but the freedom of religion clauses of the First Amendment did not offer any protection for us.

We have no way of getting into court on this matter. We have no way of staying in court to protect our sacred places. The Federal agencies know that. That is why they are pretty cavalier about ignoring what we have to say about access and protection of our sacred places on what they view as their land.

The authority for the Forest Service and other Federal agencies to allow us access to medicine places, for example, is in the fact that those lands are our lands. They were confiscated by the Federal Government. They were taken by these Federal agencies and I believe are held illegally. But even if you allow that they are taken and held under the color of law, it does not make it right, and we still have prior and paramount rights to those gathering areas.

There should be no question that Federal agencies can permit closure of certain areas for ceremonial purposes, permit taking of what was referred to in one testimony as "forest products." Those are our medicine plants. Those are our sacred objects. Those are our sacred items. Those things are guaranteed to us by the natural laws, by the original laws, by the laws that put us in these places.

We thought that the American Indian Religious Freedom Act provided some protection. It is so sad that, after 25 years, the Department of the Interior sends the BIA up and a witness that clearly knows nothing about the subject, to deflect attention from the Bureau of Land Management, which is desecrating and damaging and destroying site after site after site across the country, all without consultation. The committee has heard in three oversight hearings on sacred places that that is being done.

I think it is important to point out where the BLM is doing a good job and, as we pointed out in those hearings, that is at Kasha-Katuwe Tent Rocks National Monument. But aside from that, the BLM has done a terrible job and is doing a terrible job at Quechan Indian Pass and other places, and Medicine Lake, where they are destroying sacred places and have plans to destroy sacred places and have plans to permit others to destroy sacred places, all without consultation. It is either consultation after the fact or not at all. When there is consultation, it is often ignored.

We heard in those oversight hearings from Mr. Bettenberg from the Department of the Interior on behalf of the Administration, that the Administration wants a confidentiality provision in law to protect sacred places information. It is a good thing. We thought it was a good thing then. Now, today we hear from the Forest Service official that that is still a policy that is being tested, that is being discussed.

So we have gone backward, it seems, from an Administration position favoring a confidentiality provision 2 years ago and 1 year ago, to a position where the Forest Service is asking for that kind

of Administration position. We applauded that position in a previous hearing and I do not know what to do about it now.

You will hear later testimony about how happy we are with consultation from the National Park Service in the implementation of the Repatriation Act. Indian country is calling for the repatriation laws to be taken out of the stewardship, the administration, the implementation of the National Park Service. We have National Park Service and its nearly 100 percent archaeological officers—I think there is one exception to that—and no Native people in their NAGPRA office running repatriation issues, deciding these life and death and death and death and observance of death kinds of matters that are so important to us, and often deciding against us unless our interests coincide with the archaeologists.

They have severe conflicts of interest which they have not acknowledged. They have not dealt honestly. They have by administrative fiat taken sacred objects belonging to deceased Indians. They have tried through administrative fiat, through regulatory proposals, to classify our dead relatives as the property of these entities that hold them. This is shocking and stunning stuff and I do not think that Congress intended this, even people who were only vaguely interested in the subject never intended this kind of result.

We have had good relations with certain agencies, with the Department of Navy for example, on access to sacred places issues over 25 years. We have had very good relations in most of the Defense agencies. It is these squishy agencies that have a long history of suppressing Native people and being used by the other agencies as the entities that go out and pretend to be nice to the Indians, and then aid in our destruction. That is where we have the problem, especially within the Interior Department. And, with all due respect to the Forest Service witness, they already have authority to do everything they want except for the confidentiality requirement, but that they can also carryout under secretarial discretionary authority under the Freedom of Information Act, under scientific exemptions.

The requirement that is ongoing under the American Indian Religious Freedom Act is not for the Forest Service to consult with people who are on their payroll, whether they are Indian or not. The requirement is for them to consult with the traditional religious leaders. So I think we should just step back and read the actual Religious Freedom Act and take a look at what is being said all across Indian country about the problems over 25 years, particularly with the agencies that testified here today, and by that I include all of the Department of the Interior. At the moment, BIA is probably the least egregious agency, but that is a contest I think it would not want to enter.

Thank you.

[Prepared statement of Ms. Harjo appears in appendix.]

The CHAIRMAN. Thank you.

Walter, why don't you proceed, please?

STATEMENT OF WALTER R. ECHO-HAWK, SR., SENIOR STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND

Mr. ECHO-HAWK. Good morning, Mr. Chairman and Mr. Vice Chairman. It is with a great deal of pleasure that I come before

the committee today. I really do appreciate the opportunity to offer testimony on AIRFA implementation issues.

As this committee is well aware, during the course of the history of this Nation, prior to 1978 there was an absence of adequate legal protections to protect Native American worship. As a result, Native people suffered a long history of religious intolerance and religious discrimination through the machinery of government.

However, through the leadership of this very committee in 1978 American began to address that human rights problem. In the subsequent generation, 25 years, this committee has legislated follow-up legislation in that area to address the fundamental human rights needs of our Native people. I feel that for each member of this committee, this leaves a major legacy for each of you. It has certainly been my privilege to have participated in that. All of Indian country knows and appreciates the work and the strides made by this committee, not only in enacting legislation, but monitoring the implementation of that legislation.

Today, I wanted to talk about three subjects. The first concerns the NAGPRA legislation which was enacted 14 years ago. The NAGPRA legislation at the time that it was enacted was very lengthy, complicated legislation. A lot of people have worked to implement that legislation in the intervening 14 years. Today it is timely to tinker with the statute to improve it, and make sure we are back on the right path of the original intent of Congress and the original national dialog panel that worked on that legislation that Professor Bender is going to be testifying about, and to make sure that as we implement that legislation that it is done efficiently, without unnecessary delay, without unnecessary litigation and in accordance with the original intent of Congress and this very committee that advanced that measure to the floor.

There is a need to tinker with the statute in light of *Bonnichen* v. *United States* that Professor Bender is going to be talking about. This is the highly publicized *Kennewick Man* decision. That case, as I have indicated in my testimony, basically seized on two words, that is in the definition of "Native American," and rewrote the entire statute as very clearly pointed out in the legal analysis provided to the committee by Professor Bender. The court ruled that human remains that are indigenous to the United States are not Native American unless there is some threshold proof of some relationship to a presently existing tribe.

The court utilized those two words "that is" in that particular definition to strictly narrowly restrict the scope of the statute. There are many provisions that Professor Bender will go into that are now written out of the statute as a result of that interpretation.

Professor Bender has provided some very sound, simple potential amendments that would get us back on that track. It is very telling that the Ninth Circuit did not cite any legislative history to support its narrow construction of that statute. Indeed, there is no legislative history on the definition of "Native American" because to my knowledge everyone who worked on that legislation, it was a non-controversial term. Everyone logically assumed that any remains indigenous to the United States are Native American. There was no debate. There was no discussion. It was a logical assumption. So to then have the court take that construction is well out

of kilter. It not only renders many provisions superfluous as Professor Bender is going to talk about, but it creates two standards, one for Indian tribes in terms of their coverage where they have to meet this new standard of the court in the *Kennewick* case, and Native Hawaiians.

The Ninth Circuit said that Congress knew how to make remains indigenous to a geographic area by virtue of the language that it used in Native Hawaiians. So the court created two disparate standards of coverage. That that was clearly not intended by the committee when it advanced that measure.

Professor Bender's testimony discusses and provides a very sound legal analysis of that opinion on the implementation of NAGPRA. He makes some very sound, simple recommendations to fix it. I supplement his testimony by pointing out some dicta in the lower court decision which is a very lengthy opinion covering all aspects of the statute. This dicta of the District Court may create some confusion by agencies in implementing the statute, whether joint claims can be presented by multiple tribes, which was certainly what was being at the time in 1988, 1989, and 1990 when Congress was confronted with this legislation, and whether the statute itself should be subject to Indian canons of statutory construction.

Despite the fact that this bill originated in this committee, is codified in 25 U.S. Code and has a provision that says it was enacted pursuant to Congress' relationship with Native people and Native Hawaiians, the District Court at the hearing could not bring itself to think that this was really an Indian statute and therefore marginalized those important canons of statutory construction.

Even though the Ninth Circuit did not technically address that dicta, the committee may still want to take a look at it, because of the confusion that it could prompt and the unnecessary litigation that it could engender.

The second area that I wanted to cover is in the area of sacred sites. The protection of Native worship at holy places in the United States is perhaps the paramount political and legal challenge in the implementation of the American Indian Religious Freedom Act. I know that this committee has labored over the years to examine aspects of this problem. But the need for such legislation is crystal clear in the 15 years of the hearings of this committee. We are not going to get any smarter in terms of the factual need for that legislation.

Regardless of these difficulties, all world religions have their sacred places and it is the responsibility of each Nation to protect those sites. I personally have not been involved in that issue much lately, having been diverted into water law litigation, but in my quieter moments I have pondered this issue. My testimony presents the elements of a short cause of action statute and an equal protection rationale for that statute. Even though there are no legal protections for Native worship other than a patchwork of limited procedural protections that are unenforceable, Federal law does provide protection for religious property. But each of these Federal statutes exclude Native American religious places.

The RFRA legislation in 1993 provided a cause of action that could have been used to protect native worship at sacred places in

that cause of action, but the committee reports and the legislative history, the floor statements said that RFRA is not intended to cover the government's use of its own property. This would exclude protection of religious sites on Federal land. That double standard was continued in the Religious Land Use and Institutionalized Persons Act of 2000, which provides a cause of action, but you have to own the property. You have to have an easement or some kind of an ownership. So therefore it does not protect the dispossessed Native Americans who no longer own these sites.

This disparity raises an equal protection of the Federal laws problem. We need to have a short cause of action statute that accords equal protection of the existing Federal laws to protect Native American worship, to be inclusive of Native American religion. I suggest a cause of action statute very similar to the Federal undertaking cause of action in the Religious Land Use Statute that I mentioned and propose in my testimony.

It is good to have Federal Executive orders and Federal land use changes and some consultation, but at bottom what is needed is a cause of action statute to level the playing field.

My final area that I wanted to touch on in my testimony goes back to NAGPRA, I attached the National Congress of American Indian emergency resolution concerning NAGPRA. NCAI, as well as my client, who is a working group of very prominent Native Americans, that has been following the issue of the disposition of hundreds of thousands of culturally unidentifiable human remains under NAGPRA.

NAGPRA contemplated that despite its detailed procedures and the best efforts of all parties that there would remain unidentifiable human remains, unknown Native Americans. The reasons for that are many. But NAGPRA intended a disposition of those remains. Part of that dealt with the development of recommendations by the NAGPRA Review Committee, who is also under the statute supposed to develop an inventory of those remains, in consultation with native people and some regulations governing their disposition.

Deep concerns have emerged over that. It has been 14 years. The inventory has not been completed and no consultation, aside from some discussions at some of the Review Committee meetings, have taken place. Indeed, Indian country is not able to conduct informed consultation until we get that inventory so we know what the facts are. The history of the Park Service and particularly the conflict of interest concerns that we have, has convinced many in Indian country that we cannot expect an impartial disposition of those unknown Native Americans because of the conflict of interest that the agency has in upholding the archaeological resource protection statutes, which promote science as well as the very staff that are implementing this. The Park Service employees in the NAGPRA office are to a person members of the Society for American Archaeology, which is the very organization that on this particular issue differs with native people, and yet they are charged with implementing these regulations.

So there are conflict of interest concerns and we would hope that steps could be made to inquire and see if there is anything avail-

able that could move this NAGPRA implementation to a neutral agency. That is all we want, is a level playing field.

With that, I conclude my testimony. I was handed a two-page statement here by the Native American Church of Navajoland to request that their statement be put into the record.

The CHAIRMAN. We will include that in the record, too, if you will leave that with us.

[Prepared statement of Mr. Clark appears in appendix.]

Mr. ECHO-HAWK. Thank you, Mr. Chairman.

[Prepared statement of Mr. Echo-Hawk appears in appendix.]

The CHAIRMAN. Thank you for appearing here. I have not seen you for about 3 years. I did not realize you were off fighting the water wars.

Mr. ECHO-HAWK. That is right. When you have a water case, you just drop off the end of the earth indefinitely. [Laughter.]

The CHAIRMAN. But in the American West, it is becoming a very, very much more valuable resource and the conflicts with Indian tribes and State governments and everybody else is on the rise. So I commend you and wish you well in those battles.

Mr. ECHO-HAWK. Thank you.

The CHAIRMAN. Professor Bender, would you like to proceed? Your complete testimony will also be included in the record.

STATEMENT OF PAUL BENDER, PROFESSOR OF LAW, ARIZONA STATE UNIVERSITY COLLEGE OF LAW

Mr. BENDER. Thank you, Mr. Chairman and Senator Inouye.

My name is Paul Bender. I am professor of law at Arizona State University College of Law. The committee has invited me to testify about the implementation of NAGPRA. I have not been involved as much as the other witnesses on this panel with that subject.

I assume the reason the committee asked me to testify was that I was a facilitator of the national dialogue panel that Mr. Echo-Hawk just referred to, which was put together at the recommendation of this committee to try to reach a consensus between the Indian community and the museum community and archaeologists about repatriation issues. The panel did reach a consensus. I testified before the committee about that consensus in presenting the committee's report. NAGPRA and the committee's report are very similar in their content and the panel supported the enactment of NAGPRA.

The reason why I was glad to have this opportunity to testify now is because, as Mr. Echo-Hawk just mentioned, the Ninth Circuit a few months ago, in February, issued a decision about the meaning of NAGPRA which is not only seriously incorrect, but potentially destructive of the purposes of the statute. I wanted to bring that to your attention and suggest the possibility of some corrective legislation before that incorrect interpretation became too ingrained in the law.

The case involved *Kennewick Man.* The result of the case, which is that *Kennewick Man* would not be repatriated, is not the principal cause of my concern. The principal cause of my concern is the route by which the Ninth Circuit reached that result. They reached their decision by holding that the Kennewick Man remains were not Native American remains covered by NAGPRA. They said

NAGPRA was entirely irrelevant to what should happen those remains. That was a startling holding for somebody like myself who was involved in the framing of NAGPRA. I think it would startle every member of our dialog panel. I think it would startle every member of the Senate committee that recommended that Congree enact NAGPRA.

The reason for this surprise is that NAGPRA was not solely concerned with repatriation issues. Those were very important, but I think equally important were its provisions regarding consultation with the Indian community, something that has been mentioned here this morning several times. Indeed the biggest problem that the dialog panel found with regard to relations between the Indian community and museums and archaeologists was the lack of consultation, the lack of participation, the lack of ability to participate of the Indian community—both the traditional community and tribal governments—in decisions about what should happen to remains, how remains should be treated and classified and what should happen to funerary objects and sacred objects.

Indians had been completely excluded from that process in a lot of instances. They had made requests for repatriation which were ignored. They had not been given information about what kinds of materials the Smithsonian had, about what kinds of materials were in the possession of universities and museums. It was extremely important to the dialog panel, and I think to the committee in recommending NAGPRA, that that situation be changed. NAGPRA therefore, contains many provisions that require consultation.

By excluding materials from NAGPRA unless there is a prior determination that the materials are related to a presently existing tribe, the Nith Circuit Court decision really ruins those consultation requirements. For example, museums were required bt NAGPRA to go through their holdings and make inventories of Native American materials. They were supposed to consult with Indians and tribes in doing that and in deciding how to classify those materials.

Under the Ninth Circuit's decision, however, a museum could say, well, there is no existing tribe that is related to these materials so they are not under NAGPRA, so we do not have to consult with any part of the Indian Community. The same thing would be true if, as with *Kennewick Man,* human remains are discovered on Federal lands. The discoverer could say, well, they look too old to be connected to a present-day tribe so we do not have to consult with any tribe or tribes.

With regard to unaffiliated remains, the Ninth Circuit decision reads them out of NAGPRA altogether, and yet NAGPRA clearly has provisions that are intended to deal with how unaffiliated remains should be treated. For example, if unaffiliated remains are found on tribal lands, under NAGPRA the tribe on whose lands they are found has repatriation rights. The Ninth Circuit decision changes that because it says that unaffiliated remains are not covered by NAGPRA, and therefore NAGPRA's repatriation right of the tribe on whose lands the remains are found is eliminated.

Even if remains are not found not on present tribal lands, but on aboriginal lands that have been adjudicated to be aboriginal lands of a tribe, the tribe has NAGPRA repatriation rights regard-

less of whether there is any cultural affiliation. NAGPRA is absolutely clear on that, yet under the Ninth Circuit decision NAGPRA does not apply if there is no preexisting finding of affiliation, so that the repatriation right is destroyed.

Then there is the culegory of unaffiliated remains that the panel was divided about. The legislation left to the review committee to provide rules about how those remains were to be treated. Those were remains that are in possession of museums and universities and also that are found after the enactment of NAGPRA. Under the Ninth Circuit decision, the review committee has nothing to do with regard to unaffiliated remains because unaffiliated remains are not covered by NAGPRA. That eliminates from the statute the really important provision which was going to let the Indian community, through its representation on that review committee, participate in decisions about what should be done with the unaffiliated materials.

So the decision is wrong as a matter of statutory construction because it ignores the fact that the statute contains provisions about what should be done with unaffiliated materials, and instead says all unaffiliated materials are not under NAGPRA at all, which makes nonsense of those provisions.

Even more important than as a matter of statutory construction, it frustrates what I consider in some ways the most central purpose of NAGPRA which was to get the Indian community involved, to give them a right to be involved in decisions about characterizing materials, about are they affiliated and if so with whom are they affiliated, and if they are not affiliated, what should be done with them.

The purpose of NAGPRA was to provide a right to that consultation, and by at the outset eliminating from the statute materials that the possessor believes are not affiliated with any current tribe just frustrates that entire consultation procedure. It is an interpretation of the statute which turns on the fact that they use the word "is," rather than "is or were" in a provision which as Walter has pointed out, nobody had any doubt that that provision referred to all indigenous materials, all materials by people who were indigenous to the United States before the European community came into the United States.

So *Kennewick Man* is clearly Native American within the meaning of NAGPRA. That, then, plugs in the NAGPRA consultation procedures and the NAGPRA procedures about what should be done with it. Under NAGPRA, you have to decide whether it was found on aboriginal lands; if so, the tribe whose lands have a right to it. If not, it is to go to the review committee to decide what to do with it. The Ninth Circuit decision is wrong in cutting out all of those provisions.

So I think in order to get NAGPRA back on track, to make sure that those consultation and participation rights are there, it is really important to clarify the language of that definitional provision to make clear that NAGPRA applies to all indigenous American materials, not only the narrow class of indigenous materials that relates to a present-day tribe.

If that is not done, my fear is that we will return to the situation where possessors of materials said to tribes, you do not have any

connection to these materials so we will not even talk to you. That was the thing that created the most antagonism between the Indian community and the museums.

Looking on the other side of that coin, that consultation, everything that I have heard about it, suggests that that consultation has been enormously fruitful. Archaeologists and museums have learned a tremendous amount through that consultation. So by excluding those materials from NAGPRA and excluding the consultation, the Ninth Circuit decision also I think strikes a blow at the advancement of science.

So I really urge the committee to consider the possibility of making a small change in this definitional provision to correct that error. I would be glad to work with the committee staff in doing that if they wanted me to.

Thank you very much.

[Prepared statement of Mr. Bender appears in appendix.]

The CHAIRMAN. Thank you.

We will now go to Mr. Red Cherries. I just got a note that I have to leave the room for a bit to be where they are short a member for a quorum for the Energy Committee, so I will have to leave. Senator Inouye will go on with the hearing.

I might tell you, Mr. Red Cherries, if you were not home on the Fourth of July in Lame Deer, you missed a very, very good function. Assistant Secretary Anderson came up for it and it was just a terrific homecoming.

Would you handle this, Senator Inouye, please?

Senator INOUYE. I would be pleased. Sure.

The CHAIRMAN. Thank you.

Senator INOUYE. Mr. Red Cherries.

STATEMENT OF BERNARD RED CHERRIES, JR., NORTHERN CHEYENNE ELK SOCIETY HEADSMAN AND SUNDANCE ARROW PRIEST

Mr. RED CHERRIES. I am glad and honored to be here to be able to address and direct our concerns from the traditional standpoint.

As you probably are aware, I am one of the chiefs of the Cheyenne Nation. I am also one of the Sundance leaders, which is a religion that was given to us by the Creator at the beginning of time.

Our religion has been with us since the beginning of time. As such, our religion is passed down from generation to generation in a very sacred manner. This religion is a renewal of our complete way of life from one year to another. This Sundance is now being held out of our traditional jurisdiction. Non-Natives have now adopted our religion. They have now taken it into U.S. Forest jurisdiction where we as traditional tribal leaders have no jurisdiction with the U.S. Forest Service.

When we go and attempt to consult with the U.S. Forest Service, we are told that they wish to not keep the constitutional right of religion from anybody. Joel Holtrop, he testified that the U.S. Forest Service very much would like to work with Indian tribes. When we as Indian tribes came together two years ago, we formed a coalition of Sundance leaders from various tribes across the country. The Sundance religion is exclusive of probably less than 10 tribes

on this entire continent, yet many tribes have adopted our way of worship.

We do not have a problem with people praying with us. What we do have a problem with is the leadership, the interpretation roles and the authoritative roles that those non-natives have assumed. It has impacted our traditional way of life. It has impacted the way our children view things.

We had asked Region XI Forestry Supervisor Gary Harris to a meeting of traditional leaders on June 19. Mr. Harris declined. He said that he was advised by his superiors in the U.S. Forest Service that he not attend our meeting. We had attempted to consult with Hoosier National Forest officials who have a permit process by which they allow non-natives to hold our sacred Sundance on their U.S. Forest grounds.

We have an issue with that in the traditional realm. We have unwritten laws. I as a traditional chief of my people make those decisions if a person is worthy enough. He brings his request to us and we decide. We have certain traditional laws that we need to meet traditional requirements before a person is allowed to proceed.

Yet these individuals have gone out of our jurisdiction and we are at a loss. We do not have jurisdiction. This law, the AIRFA law, we feel today is being used in conflict with the constitutional right to gather and worship. Today, we are in a struggle to try to protect and preserve our traditional ways of worship.

We have formed, like I said, a coalition of traditional leaders. Sometimes we are at odds with our own tribal governments because our governments are elected officials. We are hereditary leaders. I am a sixth generation direct descendant of Chief Little Wolf, who along with Dull Knife, led our people out of Indian Territory, Oklahoma, in 1878. I am a hereditary chief in the Elk Horn Scrapers Society of which my grandfather was at the time of his death.

These roles, these positions are passed on from generation to generation. I would urge and plead with this committee to please take into consideration the impacts that this is having on our children and what lies ahead. We are certainly not prepared for it in Indian Country, but yet we are continuing to try to bring this focus to the forefront of our legislators and leaders in Washington, DC.

Thank you for your time.

Senator INOUYE. Thank you very much, Mr. Red Cherries.

I am just looking at my clock. Unfortunately, this committee will have to vacate this room by noon because another committee will be coming in at that time.

I have a few questions to ask. But before I do, may I request that Ms. Harjo, Mr. Echo-Hawk and Professor Bender share with us your recommendations for legislative changes, because all of you testified that you had some recommendations to make. We have not had the opportunity to study them, but we would like to do that.

Mr. BENDER. There are some suggestions at the end of my written testimony. I think Walter and Suzan may have different ones.

Senator INOUYE. All right.

Ms. Harjo, you mentioned that the BIA has the largest collection of human remains. Is that correct or did I hear wrong?

Ms. HARJO. I do not know that that is the case.

Senator INOUYE. Or the earlier panel said that. I was under the impression that the Smithsonian had the largest.

Ms. HARJO. Smithsonian certainly has one of the largest collections. As I understand it, most of the agencies within the Department of the Interior are not in compliance with the repatriation laws. They have very large holdings. The Park Service, BIA and BLM have very large holdings of human remains and sacred objects and funerary objects and they are not in compliance, particularly the Park Service, with its own regulations.

Senator INOUYE. When I became one of the leaders of this committee, I am certain all of you are aware that I had very little knowledge or any knowledge of Indian affairs. When I was made aware that the Smithsonian had something like 14,000 Indian skulls and remains and that most of them were not identifiable because no one knew where they came from exactly, very enthusiastic soldiers that just dug them up and sent them over.

What do you recommend we do with the unidentifiable human remains? There are thousands lying in green boxes in the Smithsonian at this moment.

Ms. HARJO. In a meeting that was held at Arizona State University 2 years ago, conducted at the College of Law by Professor Rebecca Tsosie, the people who represented the large museums said that some 90 percent of all of the remains that they have categorized as unidentifiable can be identified if only the Park Service will let Indian country have that information. One of the main people who said this was from the Harvard Peabody Museum, who said that they were unable to make determinations as between tribes, say two tribes or three or five in a region.

But if the Indians had that information—if those people had that information, then people could determine by the year that these were taken, by the placement, by the information about them, which institution has them most of the people now categorized as "unidentifiable" would be identified.

All we have been trying to do in Indian country is get the Park Service to give us that information, to give that information to the tribes that are involved or just make it available generally. So far, they have not. Instead, they tried to categorize all of them as property belonging to the entities that declared them unidentifiable. But most of those, the overwhelming majority of the human remains now classified as unidentifiable can be identified by the statements and testimony of the entities themselves who are holding them.

Senator INOUYE. Even those held by the Smithsonian?

Ms. HARJO. Most of the ones held by the Smithsonian can be because most of them have letters attached to them saying where the Army officer was when he "waited until cover of darkness, until the grieving family left the grave" and then exhumed the body and decapitated the head and forwarded it. That kind of material is in the Anthropological Archives of the United States. So most of those remains can be identified.

For those that cannot, the people in the region step forward and try to reinter them, to try to put them to rest finally. That was the model that existed before passage of the Repatriation Act, these

coalitions of tribes coming together in those instances where not enough information existed for the people to be identified. Everyone would come forward and speak for the dead.

Senator INOUYE. Do you have any thoughts?

Mr. ECHO-HAWK. Yes; I do. Thank you, Mr. Chairman.

I think what Suzan was referring to there was that it is a difficult issue about these unknown native dead. That is why we have been wanting to get the Park Service to produce this inventory so that we can look at the facts, how many are they, where are they located, how were they obtained, so that Indian country can enter into informed consultation with the NAGPRA Review Committee to determine in perhaps a very particularized way what would be their appropriate disposition.

Now, some of these remains could be identified perhaps; others, we could assess the scientific value. I think for many of these remains because they are unknown have no scientific value. It might just be a bone fragment in a sack and you do not know where it came from or who it belongs to and have no earthly scientific value. So things of this nature could I think be sorted out through the regulations that would be called for under the NAGPRA Review Committee recommendations.

That is why we want to have a neutral agency be involved in those deliberations, so that we can not have a biased set of staff decisionmakers that are working solely for the archaeologists. I think we need to find a neutral forum within the executive branch to address this difficult problem in a very rational way.

That is my thought on it. The over-arching policy concern and my own personal thinking is that all of the statutes and the ordinances in the 50 States and the District of Columbia guarantee that every person is going to get a burial, whether you are a pauper and you cannot afford it; whether you are a stranger who may have died someplace. These statutes say society is going to bury you at some time, at some point. We think that those policies and sensibilities that safeguard the right of each and every one of us to be buried should be ultimately be applied to the unknown Native American dead. That is an over-arching policy in my mind.

Senator INOUYE. Some of you may recall that when we learned of the large collection of skulls and human remains by the Smithsonian, we proposed that an appropriate memorial be constructed in the middle of the Mall and place all these remains there, the ones we cannot identify. But as you may also recall, the opposition came from Indian Country. Instead, we built the museum.

Does your proposal, is it part of your recommendation, legislative change?

Mr. ECHO-HAWK. What I have recommended in my testimony with regard to the disposition of these unknown Native American dead is, first of all the NCAI resolution has registered deep concerns about the process that is currently being followed by the Park Service on this very difficult issue. On behalf of my client and my testimony at page 11, I urge that the committee attempt to determine when the inventory will be completed that is presently called for by the statute, of these unknown Native American dead, and made available to Indian country.

Second, that no recommendations or proposed regulations concerning their disposition be made by the Review Committee until it enters into some informed consultation with the tribes and gives them the information necessary to enter into a set of discussions about that.

Then finally, the third recommendation would be for the committee to investigate any steps that may be available, and I understand it is sensitive separation of powers, but whether there are any available steps to ensure that the implementation of this NAGPRA issue is moved to neutral agency within the executive branch. Because right now, there is just a loss of confidence due to conflict of interest on a very sensitive and a very important and a very complex issue, and we really do need a neutral forum there to focus on that complex set of issues.

Senator INOUYE. Do you have any suggestions as to what agency?

Mr. ECHO-HAWK. I was afraid you were going to ask that question. My thought was the United States military. The United States Army has a repatriation office where in fact their job is to go across the world and repatriate military men and bring them back home and work with the families to ensure their reburial. I had occasion in representing the Pawnee and the Arikara and Wichita Tribes to work with that office to repatriate some Pawnee scouts, U.S. military veterans that had been decapitated and wound up in the Smithsonian.

With the help of the committee, that particular unit got involved here in town in effectuating and helping us to actually carry out that repatriation. They did it in a very professional, very caring, very sensitive professional manner. These are professionals that do that every day. It seems to me that that is one office that really does that day in and day out for our military veterans. They have no vested interests at stake here, one way or the other. So the Defense Department might be a place to look at.

Senator INOUYE. I shall make an official inquiry and see where we go.

Professor Bender, I will be a devil's advocate. I do not know enough to discuss *Kennewick,* but I presume the remains are homo sapien.

Mr. BENDER. Yes.

Senator INOUYE. What would the law be if we found remains akin to, say, homo erectus?

Mr. BENDER. That is a very interesting question, which I do not think anybody had thought of at the time of NAGPRA. The statutory language is "Native American" means of or relating to a tribe, people or culture that is indigenous to the United States. That seems to suggest they are talking about homo sapiens. So without thinking about it very much, my initial reaction is NAGPRA probably does not apply to something that is pre our present species, and maybe something should be written into the statute about that, but there was no issue about that at the time that NAGPRA was drafted.

Senator INOUYE. Many years ago in preparing for these hearings, I read several articles about the human trek of men and women from Mongolia and others from the south, going across the 48 States.

Mr. BENDER. Across the land bridge.

Senator INOUYE. The articles suggested that they do not know where the Indians came from. What are your thoughts?

Mr. BENDER. It is interesting. I have just spent two weeks in Peru on an archaeological trip. I asked the archaeologist who was leading the trip more or less the same question, because I think the oldest human remains that have been found in North America are Kennewick Man, and they are about 8,000 or 9,000 years old. And yet, they believe that human beings inhabited the Pacific Coast to South America as long ago as 12,000 or 15,000 years ago.

I said, why do you insist on thinking that all those people came across the land bridge and down, rather than that they started there or that they came from someplace else? He had a detailed explanation which apparently the scientific community agrees with that the land bridge idea is really the only way to account for the civilizations that they found down along the west coast.

I do not understand that completely. It seems to me it is at least plausible that human beings arose in South America, as well as that human beings only arose in the Middle East. But archaeologists do not believe that. What I do not understand is, what is the explanation for not finding older remains in the northwest of the United States, because if those people passed down through there, you would think that older remains would have been found, and yet they have not been.

But the main issue for us today is that all of those remains of the people who lived here, wherever they came from, whether they came from Asia or whether they came from the east, as long as they are human beings, are Native American remains within the meaning of NAGPRA. It is really important to clarify that the statute applies to all of them so that the procedures that Walter was just referring to, the Review Committee can make decisions about what to do with the unidentifiable remains.

Under the Ninth Circuit's decision, that whole process does not apply and everything is left in limbo.

Senator INOUYE. I cannot speak for the committee, but I agree with you. If you were the Ninth Circuit, what would the disposition of the *Kennewick Man* be?

Mr. BENDER. I think that the issue in *Kennewick Man* would be first of all whether the land on which the remains were found was the aboriginal land of any of the tribes that requested repatriation under the provision of NAGPRA that talks about that. If that was the aboriginal land within the meaning of NAGPRA, then that tribe or tribes should have repatriation rights.

If not, then I think NAGPRA provides that it goes to the Review Committee to decide what to do with them. The Review Committee, I gather, has not made that decision yet. It is really important. That was the big unresolved question at the time of NAGPRA. It was supposed to be decided by a group of people that included traditional people and tribal governments and scientists.

My own view of what the right answer to that is, is that if you know the area the remains came from, and I think in almost all cases you know where they were found, then the right thing to do is to repatriate it to the tribe or tribes that have a relationship to that area. If you do not know where they were found, if they are

truly unidentifiable, then I think the Indian community should make a decision about what the right form of reburial is, whether it is here in Washington or somewhere else in the country.

I think that is a relatively small percentage of the remains. For almost all of them, I think we know where they were found. Then I think the spirit of NAGPRA is to let the tribe with association with that are, or the tribe or tribes. It is important not to think of this as one tribe against another tribe, because sometimes you do not know whether it is this tribe or that tribe, but you know it is one of two or three or four.

So tribes have to be able to be given the chance to get together and decide collectively what to do. It seems to me that is the right thing to do.

Senator INOUYE. Is the Ninth Circuit decision under appeal?

Mr. BENDER. The *Kennewick* decision? There was a petition for rehearing to the Ninth Circuit which was denied. As far as I know, a cert petition has not been filed. I think the time for filing a cert petition is almost up. I am not in contact with the people litigating that case, but I do not believe that a cert petition has been filed.

Senator INOUYE. As of February 1987, 18,000-plus skulls and human remains of Native Americans are in green boxes in the Smithsonian. Of that number, I supposed slightly less than 1,000 have been repatriated. I agree with all of you. Something has to be done.

Mr. BENDER. It is just extraordinary that this much time has passed since NAGPRA and there still has not been repatriation of those remains.

Senator INOUYE. Mr. Red Cherries, let me assure you that this committee will do its utmost to see that human remains be accorded the full dignity and respect that they deserve. We commend you for maintaining your religion. It is very important.

Mr. RED CHERRIES. If I may, this religion forms the whole foundation of our entire existence. We cannot lose it. We have a prophecy in the Cheyenne Nation. We have lost the land. We have lost most of what we had. All we have is our religion and we are supposed to hang onto that. I aim to hang onto it.

Thank you.

Senator INOUYE. I thank all of you very much. I am sorry that we have to cut it at this point, but we will be sending, because I know that Chairman Campbell would want to, to submit to all of you written questions and we hope we can get your response. The record will be kept open for another month.

Thank you very much.

[Whereupon, at 12 noon, the committee was adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Mr. Chairman, I want to thank you for scheduling this hearing today.

Several years ago, we began a series of hearings on Native American sacred sites to explore how the various land managing agencies were addressing the responsibilities with which they are charged to protect and preserve sites that are sacred to the Native people of this land.

These issues are closely related to the protections that were first enacted into law in 1978 as the American Indian Religious Freedom Act.

Later, in 1990, the Congress enacted the Native American Graves Protection and Repatriation Act.

Together, these laws provide a framework for the repatriation of Native American human remains, funerary objects, and the protection of cultural artifacts and sacred places.

I think the question I would pose to each of the witnesses today is whether this framework of laws is sufficient, or whether we need to consider amendments to the American Indian Religious Freedom Act, for instance, to assure that Native people have a cause of action that they can bring when the spirit and intent of the law are not being honored.

I look forward, as you do Mr. Chairman, to hearing the testimony that will be presented by our witnesses today.

PREPARED STATEMENT OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY

The Society for American Archaeology appreciates this opportunity to submit testimony to the Senate Committee on Indian Affairs on the subject of implementation of the American Indian Religious Freedom Act of 1978 [AIRFA] and expresses its appreciation to the committee for holding this important hearing.

SAA is an international organization that, since its founding in 1934, has been dedicated to the research, interpretation, and protection of the archaeological heritage of the Americas. With more than 6,900 members, the Society represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 States as well as many other nations around the world.

Prior to the enactment of AIRFA, the constitutional right of Native Americans to exercise their freedom of religion was severely circumscribed. This injustice was part of a set of cultural policies pursued by the Federal Government and many state governments from the mid-19th Century through the first one-half of the 20th Century. The goal of these policies was to actively subjugate Native American cultures and ways of life. In addition to religious intolerance, these policies also included prohibitions on the use of Native languages, and forced "adoptions" of Native children

by non-Native families. Although these practices were halted, the damage done to Native cultures is still very evident.

The enactment of AIRFA was an important step taken by Congress to try to rectify the past injustice of government-sponsored religious discrimination. The act made it the official policy of the Federal Government to protect Native Americans' freedom of worship by allowing access to the sites and possession of the objects sacred to the various tribes and necessary for those tribes to carryout the expression of their religious beliefs.

Since the passage of AIRFA, there have been a number of additional efforts to address these historical inequities at the national level. Revision of the regulations implementing the Archaeological Resources Protection Act [ARPA] and adoption of sentencing guidelines for violations of the act have greatly strengthened penalties for those caught looting ancestral sites on public and tribal lands. The 1992 amendments to the National Historic Preservation Act [NHPA] greatly increased the ability of tribes to protect historic cultural and sacred sites on their own lands and to be consulted about agency decisionmaking affecting such sites on the public lands.

In 1990, President George H.W. Bush signed the Native American Graves Protection and Repatriation Act [NAGPRA], which among other provisions, mandates the repatriation to tribes of sacred objects and objects of cultural patrimony needed for traditional religious practices. In 1996, President Clinton signed Executive Order 13007, which required Federal agencies to take a more active role in the protection of Native American religious freedom by delineating a specific set of procedures that agencies mast take in order to ensure the physical integrity of Indian sacred sites, as well as Native Americans' access to such sites.

SAA actively participated in the development of the ARPA regulations and NHPA amendments as well as in the development and passage of NAGPRA, and we strongly support better and more proactive implementation of AIRFA and E013007.

PREPARED STATEMENT OF BRIAN POGUE, DIRECTOR, BIA, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the committee, my name is Brian Pogue and I am the director, of the Bureau of Indian Affairs [BIA]. I am pleased to be here today to provide the Administration's statement on the 25th anniversary of the passage of the American Indian Religious Freedom Act.

In 1978, the American Indian Religious Freedom Act, [AIRFA] was enacted and mandated that the Federal Government "protect and preserve for the American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and freedom to worship through ceremonials and traditional rites." Under AIRFA, Federal agencies are required to (1) seek and consider the views of Indian leaders when a proposed land use might conflict with traditional Indian religious beliefs or practices, and (2) avoid unnecessary interference, whenever possible, with Indian religious practices during project implementation.

In 1990, the Native American Graves Protection and Repatriation Act [NAGPRA] was enacted to make easier the efforts of American Indians, Alaska Natives, and Native Hawaiian organizations to claim ownership of certain cultural items including human remains, funerary objects, sacred objects, and objects of cultural patrimony in the possession or control of Federal agencies and museums that receive Federal funds. NAGPRA requires agencies and museums to disclose holdings of such human remains and objects and to work with appropriate Indian tribes, Alaska Native villages and corporations, and. Native Hawaiian organizations to repatriate such cultural items.

Recently, the Secretary of the Interior appointed three members to the Native Protection and Repatriation Review Committee. The committee consists of seven members who are charged with monitoring, reviewing, and assisting in the implementation of the NAGPRA. Appointments to the committee are selected from nominations to the Secretary of the Interior by Indian tribes, Alaska Native villages, Native Hawaiian organizations, and national museum and scientific organizations. Each appointee serves for a 4-year term.

Executive Order 13007, on Indian Sacred Sites, issued in 1996 gives Federal agencies guidance on dealing with sacred sites. The order directs Federal land management agencies, to the extent practicable, to accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and to avoid adversely affecting the physical integrity of such sacred sites. The order also requires Federal agencies to consult with tribes on a government-to-government basis whenever

plans, activities, decisions, or proposed actions affect the integrity of, or access to, the sites.

There is a growing concern among the public that Native American burial grounds and other sacred places are being desecrated by human encroachment or "urban sprawl." The BIA receives frequent requests for immediate intervention when individuals believe a burial mound is being bulldozed or a Native cemetery is being cleared for housing or other urban development. Whenever possible, we refer these requests to the appropriate agency.

The Administration and the Department continue to work with Indian tribes, Alaska Native villages and corporations, and Native Hawaiian organizations to ensure access to and protection of sacred sites and to comply with repatriation laws. We support the American Indian Religious Freedom Act, which protects and preserves for the American Indian, Eskimo, Aleut, and Native Hawaiian the inherent right of freedom to believe, express, and exercise their traditional religions, access their religious sites, use and possess sacred objects, and the freedom to worship through ceremonial and traditional rites.

This concludes my prepared statement. I would be pleased to answer any questions the Committee may have.

PREPARED STATEMENT OF JOEL HOLTROP, DEPUTY CHIEF STATE AND PRIVATE FORESTRY USDA FOREST SERVICE, DEPARTMENT OF AGRICULTURE

I am Joel Holtrop, Deputy Chief, State and Private Forestry [S&PF], USDA Forest Service. It is the responsibility of the S&PF to provide technical and financial assistance to landowners and natural resource managers to help sustain the Nation's urban and rural forests and to protect communities and the environment from wildland fire. Among our important partners in this endeavor are tribal governments. Recently, the Forest Service established an Office for Tribal Relations within S&PF that I will discuss later in my statement.

Thank you for this opportunity to provide the Department of Agriculture's views on the interpretation and implementation of the American Indian Religious Freedom Act of 1978 [AIRFA] and follow-up laws in two main areas: repatriation and protection of sacred places.

AIRFA declares that ". . . it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians including but not limited to access to sites, use and possession of sacred objects and the freedom to worship through ceremonial and traditional rites." The act explicitly recognizes the importance of traditional Indian religious practices and directs all Federal agencies to ensure that their policies will not abridge the free exercise of Indian religions.

The USDA Forest Service manages 192 million acres of public lands for multiple use nationwide, including lands in 44 States, Puerto Rico, and the Virgin Islands. The National Forest System [NFS] includes 155 National Forests, 20 National Grasslands, 20 National recreation areas, a National tall grass prairie, and 4 National monuments. The NFS is managed for multiple use, including timber production, recreation, wilderness, minerals, grazing, fish and wildlife habitat management, and soil and water conservation. The Forest Service Heritage program manages approximately 300,000 known heritage resources on NFS lands, a great many of them important to American Indians.

Because tribes are affected by NFS land and resource management policies, programs and actions, the Forest Service must consult with Tribes on a government-to-government basis under various statutes, Executive Orders, and agency directives.

Under the 1982 planning regulations, the Forest Service is required to coordinate regional and forest planning efforts with Indian tribes, to notify tribes whose lands or treaty rights are expected to be affected by the agency's activities, to review and consider the objectives of Indian tribes as expressed in their plans and policies, and where conflicts are identified, to consider alternatives so conflict may be resolved.

Beyond the planning requirements, other existing laws ensure that American Indians have an opportunity to participate in land management decisions. The Forest Service National Environmental Policy Act [NEPA] procedures require the Forest Service to determine the scope of issues to be addressed in an environmental analysis. Under the National Historic Preservation Act, the Forest Service is required to identify historic properties on NFS lands. The process of determining the effects of management on these sites provides for consultation of interested parties, including Indian tribes.

The Archaeological Resources Protection Act of 1979 prohibits the disturbance or destruction of archaeological resources, including Native American religious and cultural sites located on Federal lands except under a permit issued by the appropriate Federal land manager. The land manager must notify and consult with concerned Indian tribes regarding any permit that may harm an Indian religious artifact. As part of this program, the Forest Service attempts to identify all Indian tribes having aboriginal or historic ties to NFS lands and to determine the location and nature of the specific sites of religious or cultural importance for future reference for management decisions affecting the land.

Executive Order 13007 directs Federal land management agencies, to the extent permitted by law, and not clearly inconsistent with essential agency functions, to accommodate access to and use of Indian sacred sites, to avoid affecting the physical integrity of such sites wherever possible, and, where appropriate, to maintain the confidentiality of sacred sites. Federal agencies are required to establish a process for ensuring that reasonable notice is provided to affected tribes of proposed Federal actions or policies that may affect Indian sacred sites. Sacred sites are identified by tribes.

Recently, the Forest Service chartered a Task Force on Sacred Sites to develop policy and guidelines to specifically address EO 13007 and our other statutory and regulatory responsibilities to better protect the sacred sites that are entrusted to our care. The Task Force has been meeting with tribal governmental and spiritual leaders throughout Indian Country.

The Native American Graves Protection and Repatriation Act of 1990 [NAGPRA] addresses the protection of Native American burial sites and the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony. NAGPRA requires Federal land management agencies to consult with Indian tribes prior to intentional excavations and requires notification in the event of inadvertent discovery of human remains or cultural items. NAGPRA also sets forth a process for the repatriation of human remains and cultural items in the possession of Federal agencies and museums to the Indian tribe or lineal descendants to whom these remains or items belong.

Across all Federal land management agencies, NAGPRA compliance is very emotional, highly sensitive and a high priority for tribes. A related concern, but one not addressed in NAGPRA, involves reburial of human remains and cultural items on lands that Indian tribes used and occupied traditionally, which includes NFS lands. Reburials have been occurring on NFS lands in certain regions even though a consistent national policy did not exist until direction was provided in the Forest Service Manual in March 2004. For example, there have been formal regional FS policies in the southern and southwestern regions, developed in collaboration with tribes. In addition, providing confidentiality of information related to reburial sites has been a primary concern of Indian tribes regarding reburial.

In addition to cases of individual remains, the Forest Service and tribes are working together in situations involving complex cultural affinities to identify disposition preferences for large collections of artifacts and remains. These will involve reburial at locations other than archaeological sites and thus entail a higher level of environmental analysis and documentation, and concern over the confidentiality of that documentation.

Forest Service implementation and compliance with AIRFA and NAGPRA depends on maintaining effective consultation and collaboration with tribal governments. Several years ago, the Forest Service's National Leadership Team [NLT] concluded that the agency's working relationship with many tribal governments needed significant improvement. The leadership commissioned a National Tribal Relations Program Task Force [Task Force] to address recurring issues that affected our work with Indian tribes. The finding and recommendations of the Task Force were published as the *"Report of the National Tribal Relations Program Task Force: A Vision for the Future"*. The report provided recommendations to improve the consistency and effectiveness of program delivery and to institutionalize long-term collaborative relationships with tribal governments.

Based on the Task Force report, the Forest Service has taken action on several fronts, all of which should improve the agency's collaborative relationships with Tribes and reduce conflicts with Tribes over a number of issues, including the protection of sacred sites and reburial.

Office of Tribal Relations—The Forest Service established an Office of Tribal Relations to provide the infrastructure and support necessary to ensure high quality interactions across programs with Indian tribes on a government-to-government basis. The office will integrate tribal issues across Deputy Areas, advise the chief on tribal issues and concerns, and ensure that tribal government relations are a standard operating procedure for the agency.

Directives—In March, the Forest Service issued new manual and handbook direction on tribal relations that provides clear guidance for agency tribal relationships, spelling out specific obligations of Forest Service officials and providing guidelines for conducting government-to-government relations with tribes.

Training—The agency has instituted core skills training pertaining to Forest Service policy with regard to tribal relations. The training also incorporates the need to protect sacred sites and other culturally important areas. All agency line officers and staff who regularly interact with Tribes will be required to demonstrate a core competency in tribal relations. Supplemental and specialized training for agency positions that involve interactions with tribal governments will also be developed.

The agency has identified certain recommendations that cannot be fully implemented without legislation to create new or clarify existing authorities. The legislative proposal, which was included in the Administration's Fiscal Year 2005 Budget would provide:

- authority for the Forest Service to close specific areas of NFS lands to the general public for the shortest duration of time necessary to accommodate various tribal uses, including traditional tribal use.
- authority to provide forest products free of charge to Indian Tribes for traditional and cultural purposes.
- express authority for reburials on NFS land.
- authority to maintain the confidentiality of reburial and other information.

The legislative proposal is currently in clearance at the Department.

Mr. Chairman, the religious freedom of American Indians is, and will continue to be, an important factor in our management of the National Forest System. The agency has made great strides under the leadership of Chief Dale Bosworth to increase awareness of all FS employees of the agency's responsibilities to Indian tribes. The Forest Service is eager to work with Indian tribal governments. Together we can take appropriate actions to support the religious beliefs and practices of American Indians on NFS lands.

I would be pleased to answer questions that members of the committee may have.

TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

Paul Bender
Professor of Law, Arizona State University College of Law

July 14, 2004

I thank the Committee for this opportunity to testify about the implementation and interpretation of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 *et. seq*. I am especially pleased to have the chance to address the Committee at this time because of the recent decision of the United States Court of Appeals for the Ninth Circuit in *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004). That decision incorrectly limits the coverage of NAGPRA in a way that is inconsistent with Congress' statutory objectives. In order to preserve the NAGPRA that Congress intended to enact, the Committee may wish to consider a corrective legislation that would eliminate the inappropriate restrictions that the *Bonnichsen* decision improperly places on NAGPRA's operation.

I have not been involved in the implementation of NAGPRA, but I have a strong interest in the subject, having been the facilitator of the Panel for a National Dialogue on Museum/Native American Relations (Dialogue Panel), which reported its findings to the Senate Select Committee on Indian Affairs on February 28, 1990, several months prior to NAGPRA's enactment. The Dialogue Panel had been formed, with the encouragement of the Select Committee, in an attempt to arrive at agreement among traditional tribal leaders, tribal government representatives, anthropologists, and representatives of the American museum community regarding what federal

legislation might be needed to address the then highly-divisive issue of repatriation to tribes of human remains, funerary and sacred objects, and items of cultural patrimony that were in, or might subsequently come into, the possession of federal agencies or of American museums, universities, archaeologists or anthropologists. Tribes and tribal groups had made repeated requests for the repatriation of many such materials without success or, in some cases, without even receiving a response to their requests. They had often been refused access to materials and even refused information about what materials an agency or institution possessed. Indians had especially strong objections to the destructive analysis of ancestral human remains without the consent of - - or even consultation with - - tribal groups or governments. Resentment had built up in the American Indian community, which considered the disregard for Indian human remains and sacred objects to be a serious violation of Indian human rights. Anthropologists and museums, for their part, feared that mandatory repatriation might result in their loss of access to, or possession of, scientifically important materials. The Dialogue Panel was charged with trying to work through these differences. The Panel was comprised of four museum representatives, two anthropologists, two representatives of tribal governments, three representatives of American Indian organizations, and one traditional tribal leader.

Despite a history of acrimony over repatriation issues, the Panel achieved a remarkable degree of consensus. It unanimously "deplore[d]" the fact that "the human rights of Native American nations and people have been violated in the past through the collection, display and other use of human remains and cultural materials without Native American consent and in ways inconsistent with Native American traditions and religions." Those human-rights violations had

occurred "in the name of science, non-indigenous religion, economic development and entertainment, as well as in pursuance of commercial grave robbing." The Panel's central - - also unanimous - - recommendation was that, while the values of scientific research and public education are important considerations bearing upon repatriation issues, respect for the human rights of Native Americans "should be the paramount principle where claims [for repatriation] are made by Native American groups that have a cultural affiliation with remains and other materials." Three quarters of the Panel members believed that human rights should also be paramount in determining repatriation issues even when no present-day Native groups have cultural affiliation with materials. The two anthropologist members and the representative of the Smithsonian Institute (also an anthropologist) partially dissented from this recommendation, believing that, in some cases, "scientific and educational values may predominate where cultural affiliation with a present-day Native group does not exist." And, in what I characterized in testimony to the Senate Select Committee as the Panel's most important procedural recommendation, the Panel unanimously recommended that potentially interested Indian governments and tribal groups be informed of the existence of materials in the possession of institutions and federal agencies and that they be included, as well, in the decisions regarding the treatment and disposition of those materials, including decisions about what scientific examination, if any, should be performed on human remains. On behalf of the Panel, I stated in my testimony the Panel's strong belief that such a cooperative decisional process would "remove much of the resentment that has built up around these issues" and would also "lead to museums and science that are vastly more informed" than would be the case if tribes continued to be excluded from participation in decisions regarding the classification and treatment of sensitive cultural materials. Hearing Before the Select Committee on Indian Affairs,

U.S. Senate, 101st Cong., 2nd Sess., on S.1021 and S.1980 pp. 36-41, 108-113.

NAGPRA was enacted eight months after the Dialogue Panel's report. Its provisions accord closely with the Panel's recommendations. With regard to the Panel's recommendation that Indians be informed, consulted and included in decisional processes, NAGPRA requires federal agencies and all museums, universities and other institutions receiving federal financial assistance to compile inventories or summaries of all sensitive Native American materials in their possession - - human remains, funerary and sacred objects and objects of cultural patrimony. Tribal governments and traditional Indian religious leaders must be included in this inventory process, are entitled to access to the inventories and summaries after they are completed, and tribes must be notified of the presence of materials with which they have specific cultural affiliation. Repatriation to tribes that are culturally affiliated with materials is mandatory if sought by the affiliated tribe. As to materials not culturally affiliated with any present-day tribe, NAGPRA established a seven-member review committee - - with at least three Indian members - - that is charged with developing a process for disposition of these materials. Consultation with tribes is also required regarding all sensitive Native American materials newly excavated or discovered on federal or tribal lands. Mandatory repatriation rules apply to these materials. Criminal penalties are imposed for trafficking in material obtained in violation of NAGPRA and civil penalties are imposed on museums, universities and other institutions that do not comply with NAGPRA's requirements.

NAGPRA thus respects the human rights of American Indians by providing a comprehensive system for (1) involving American Indians in decisions about the characterization, treatment and

disposition of sensitive materials; (2) giving Indian tribes important repatriation rights with regard to materials to which they are affiliated; and (3) involving the Indian community in decisions about the policies that should apply to the treatment and disposition of unaffiliated materials. Unfortunately, the Ninth Circuit's decision in *Bonnichsen v. United States* seriously undermines the scope of Congress' broad remedial purpose. The decision construes the central provision of NAGPRA - - the provision defining the materials to which NAGPRA applies - - in a way that is not only plainly incorrect as a matter of statutory interpretation, but that frustrates NAGPRA's important human rights objective of including Indian governments and groups in decisions about whether materials are Indian-related and about the treatment and disposition of such materials.

The *Bonnichsen* case involved human remains discovered on federal lands near the shore of the Columbia River outside of Kennewick, in the state of Washington. The remains, sometimes referred to as Kennewick Man, are more than 8,000 years old. Four Indian tribes from the area in which Kennewick Man was found invoked NAGPRA, seeking control of the remains so that they could immediately be re-buried. NAGPRA provides for this transfer of control if the remains are either affiliated with a requesting tribe or found on a tribe's current reservation or aboriginal lands. 25 U.S.C. 3002 (a) (2). The four tribes' request was opposed by a group of scientists seeking to analyze the remains. After lengthy consideration of the issues, the Secretary of the Interior decided that NAGPRA required transfer of the remains to the tribes for re-burial. The scientists then brought suit in federal court to challenge the Secretary's decision. The Ninth Circuit panel ultimately reversed the Secretary, holding that NAGPRA did not require or even permit tribal control of Kennewick Man's remains.

The Ninth Circuit's decision was based on its startling holding, not that the remains of Kennewick Man did not meet NAGPRA's repatriation standards, but that NAGPRA *had nothing whatever to say* about the disposition to be made of Kennewick Man because his remains did not fall under NAGPRA at all. NAGPRA establishes procedures and rules regarding the treatment to be accorded to "Native American" remains, funerary and sacred objects and items of cultural patrimony. NAGPRA defines the term "Native American" for these purposes as "of, or relating to, a tribe, people, or culture that is indigenous to the United States." Most people, including the Secretary of the Interior, have read this coverage provision as including, not only materials relating to present-day Indian tribes, but also materials relating to indigenous people who inhabited the area that is now the United States before the arrival of European explorers and settlers. Under that understanding, very old remains like those of Kennewick Man are covered by NAGPRA because 8,000 year-old Kennewick Man was almost certainly indigenous to the area in which he was found - - i.e., he was not a tourist or explorer from a far-off place. In the Ninth Circuit's view, however, materials - - including remains - - are "Native American" for NAGPRA purposes - - and thus are covered by NAGPRA and subject to its rules and procedures - - only if they are shown to "bear a significant relationship to a *presently existing* tribe, people or culture." (emphasis added). It is not sufficient in the Ninth Circuit's view that the materials relate to indigenous inhabitants of the United States; they must relate to *current* indigenous inhabitants. The court found that no relationship of a present-day tribe to Kennewick Man had been established. As a consequence, NAGPRA's provisions were completely inapplicable to Kennewick Man and the plaintiffs were free to conduct scientific studies of the remains - - including cranial, dental and DNA studies, and "diet analysis" - - without any consultation with the tribes seeking reburial and without reference to any NAGPRA

procedures or standards.

In holding that a relationship to a present-day Indian tribe must be established before NAGPRA's procedures, rules and standards can be applied to any materials, the Ninth Circuit panel made a serious error of statutory construction. Proof of a relationship to a present-day Indian tribe is, it is true, often important *under* NAGPRA - - a tribe, for example, does not have a right to mandatory repatriation of remains or funerary objects held by a museum, university or federal agency unless it has a "cultural affiliation" with these remains or objects. NAGPRA, however, was clearly not intended by Congress to be wholly inapplicable unless a relationship of materials to a present day tribe is established. On the contrary, NAGPRA has important provisions that *expressly* apply to materials when those materials *cannot* be shown to be related to a present-day tribe. The Ninth Circuit panel's interpretation is flatly - - and dangerously - - inconsistent with these provisions.

The provision of NAGPRA involved in the Kennewick Man case is a good illustration of how, contrary to the Ninth Circuit's view, NAGPRA was intended by Congress to apply to indigenous materials even when no relationship with a present-day Indian tribe has been established. Section 2 of NAGPRA (25 U.S.C. 3002) governs the ownership of Native American cultural items that are excavated or discovered on federal or tribal lands. In the case of human remains and associated funerary objects, those materials are to go to any "lineal descendants" of the individual whose remains or associated objects are discovered or excavated, if such lineal descendants exist. If there are no lineal descendants, the materials are to go to the Indian tribe on whose land the materials were discovered or to the tribe that has the closest cultural affiliation with the materials.

The statute then provides (25 U.S.C. 3002 (a) (2) (C)) that, "*if the cultural affiliation of the objects cannot be reasonably ascertained*," the materials are to be under the control of the tribe that has been found to have aboriginally occupied the area where the objects were discovered. NAGPRA thus expressly and unquestionably establishes a statutory rule for the disposition of materials whose "cultural affiliation . . . cannot be reasonably ascertained." Yet the Ninth Circuit panel, by holding that NAGPRA applies to materials only if the materials have been shown to bear a relationship to a present-day tribe, would interpret NAGPRA as being wholly inapplicable to such materials. When a statute expressly establishes rules for the disposition of certain materials, it cannot be a correct interpretation of that statute to read it as being inapplicable to those materials.

NAGPRA's repatriation provisions also expressly deal with materials that cannot or have not been shown to have a relationship to a present-day tribe. Section 8 of NAGPRA (25 U.S.C. 3006 (c)) establishes a review committee and directs that committee to compile an inventory of "culturally unidentifiable human remains" that are in the possession of federal agencies, museums, universities, and other covered institutions. The Committee is to recommend "specific actions for developing a process for disposition of such [culturally unidentifiable] remains." If the Ninth Circuit's view that NAGPRA applies only to materials with an established "significant relationship" to a present-day tribe were correct, this provision would make absolutely no sense. NAGPRA certainly would not establish a committee to consider how to dispose of "culturally unidentifiable" remains, if NAGPRA does not apply to such remains.

The Ninth Circuit was thus plainly wrong to require a showing of a significant relationship

to a present-day Indian tribe before materials can be deemed covered by NAGPRA. NAGPRA applies to all indigenous American materials, whether or not a specific relationship to a present-day Indian tribe has been established. That does not mean that all American indigenous materials are subject to mandatory repatriation. They are not. All American indigenous materials are, however, subject to NAGPRA's important provisions requiring consultation with tribes and regarding the classification and treatment of indigenous materials and the inclusion of Indians in determining the procedures to be established under NAGPRA for disposition of unaffiliated materials.

I cannot emphasize too strongly the importance of applying NAGPRA to indigenous American materials regardless of whether they have been shown to be culturally affiliated with a present-day Indian tribe. That statutory coverage is extremely important in accomplishing NAGPRA's fundamental human-rights objectives. Remember that one of the serious abuses that led to the enactment of NAGPRA was the refusal of many agencies, institutions and scientists to give Indians information about materials in their possession, and their related refusal to permit Indians to participate in deciding whether materials in their possession were in fact Indian, whether they were affiliated with a present-day tribe, and how materials should be treated or disposed of depending upon the answers to those questions. Whether particular materials are Indian or related to a present-day tribe or tribes is a question upon which there is often no certainty. Opinions may differ widely, especially between scientists and tribes. Prior to NAGPRA, institutions and scientists frequently answered those questions for themselves, without informing tribes of the existence of indigenous materials, obtaining tribal input, or in any way consulting with Indians or tribes about the cultural affiliation of those materials. The decision about how to classify and treat the materials was thus

often made without any Indian participation.

A principal purpose of NAGPRA was to recognize the human right of American Indians to participate in these decisions, which have enormous cultural and religious importance to Indian people. NAGPRA accomplishes this purpose by requiring institutions and scientists to make information available to tribes about indigenous American materials in their possession and to consult with tribal governments and traditional leaders about how to classify and treat those materials. See 25 U.S.C. 3003, 3004. The consequence of interpreting NAGPRA's definition of "Native American" in the way that the Ninth Circuit panel does is that institutions and scientists would be free to make their own decision about whether such a relationship exists and, if they unilaterally decide - - without Indian input - - that no relationship exists, to ignore NAGPRA altogether - - to fail to inform tribes about materials and to fail to consult with them before making decisions about whether materials are Indian-related and decisions about how to treat materials in light of the evidence - - or lack of evidence - - of Indian affiliation. That is exactly the kind of exclusionary process that the Dialogue Panel unanimously deplored and that NAGPRA unquestionably sought to change. The term "Native American" in NAGPRA must be given a broad definition in order to insure that the information-sharing, consultation and participatory decision-making that NAGPRA requires take place as Congress intended.

Similar considerations apply to newly-discovered or newly-excavated material, as in the case of Kennewick Man. Here also NAGPRA requires consultation with tribes and tribal groups regarding the identity and possible Indian affiliation of all indigenous American materials found on

federal or tribal land. NAGPRA also requires the temporary cessation of construction and similar activity in order to protect discovered indigenous materials that may turn out to be Indian-related. See 25 U.S.C. 3002 (c) and (d). If the Ninth Circuit panel's interpretation of "Native American" were to prevail, however, the discoverer of pre-Columbian remains or other materials could make a unilateral decision that the materials have no "significant relationship" to a present-day tribe, fail to report the discovery, fail to permit tribal consultation or input, and even proceed to destroy the materials, even though an Indian tribe or tribes would have sought repatriation or preservation if they had been informed of the discovery. That is precisely what NAGPRA intended to prohibit.

The Ninth Circuit panel's narrow interpretation of "Native American" also has negative human-rights consequences for unaffiliated materials. Unaffiliated indigenous materials are not subject to mandatory repatriation under NAGPRA. NAGPRA, however, contains important provisions regarding the treatment of these materials. If they are excavated or discovered after NAGPRA's enactment, they are to be disposed of "in accordance with regulations promulgated by the Secretary [of the Interior] in consultation with the review committee established under Section 8 [of NAGPRA, 25 U.S.C. 3005], Native American groups, representatives of museums and the scientific community." 25 U.S.C. 3002 (b). Indians are thus plainly intended to participate in determining the treatment to be given to unaffiliated materials. The Ninth Circuit panel, however, has held that unaffiliated materials are not "Native American" materials at all for NAGPRA purposes. If so, NAGPRA's required Indian participation would not apply. The same would be true of culturally unidentifiable remains already in the possession of institutions or federal agencies. As noted above, NAGPRA establishes a review committee, with substantial Indian representation, to

recommend "specific actions for developing a process for disposition of such remains." By excluding these materials from NAGPRA, the Ninth Circuit panel would deny Indians the right to participate in the decision about how these unidentifiable materials are to be treated. NAGPRA clearly intended otherwise.*

There are several different kinds of corrective amendments that would reverse the Ninth Circuit's serious mistake. In reaching its decision, the Circuit panel principally relied on the fact that NAGPRA's definition of "Native American" employed the present tense in referring to materials relating to a "tribe, people or culture that *is* indigenous to the United States." The words "that is" could be removed from the definition or the words "or was" could be inserted after the words "that is," thus making it clear that relationship to a present-day tribe need not be established for indigenous American materials to be "Native American" for NAGPRA purposes. Alternatively, the more lengthy - - but substantively similar - - definition adopted by the Secretary of the Interior could be substituted for the present definition of "Native American." That definition would read:

> Native American means human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian

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* The Ninth Circuit decision is also inconsistent with NAGPRA provisions that (1) assign ownership of indigenous materials found on tribal land to the tribe on whose land they are found and (2) assign ownership to tribes recognized as aboriginally occupying the land on which materials are found. See 25 U.S.C. 3002 (2) (A) and (C) (1). Neither of these provisions requires a showing of any cultural affiliation. Congress intended in these provisions to recognize the responsibility that tribes ordinarily feel for remains found on land that they occupy. The Ninth Circuit panel would, in effect, remove these two provisions from the statute since, under the panel's interpretation, tribes could not obtain repatriation of materials found on their land without proving affiliation with those materials.

tribes.

A third approach would be to add, at the end of the present definition, a sentence reading: "A relationship to a present-day Indian tribe or group is not required to be established for indigenous materials to be Native American within the meaning of this Act."

There are, I am sure, many other possibilities. I would be glad to work with Committee staff in considering these and other proposals and in addressing other statutory amendments that are, or may become, necessary. It is extremely important that NAGPRA be able to continue to serve its vital human-rights objectives.

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David Clark, President
Herman B. Johnson, Vice President

Nathan Begay, Treasurer
Maggie B. James, Secretary

Statement of David Clark, President
Azee' Bee Nahagha of Dine Nation
Before the U.S. Senate Committee on Indian Affairs
Hearing on the American Indian Religious Freedom Act Amendments (Sacred Sites)
July 14, 2004

The Azee Bee Nahagha of Dine Nation (ABNDN), formerly the Native American Church of Navajoland, is a duly constituted organization representing the interests of the members of the ABNDN. We would like the members of the U.S. Senate Committee on Indian Affairs to know that the ABNDN highly supports the language change regarding the peyote regulations currently under administrative review by the U.S. Drug Enforcement Administration (DEA).

As you know, this year marks the 10th Anniversary of the passage of the American Indian Religious Freedom Act (AIRFA) Amendments of 1994, which provided for the use, possession, or transportation of peyote by federally recognized tribes for bona fide traditional ceremonial purposes in connection with the practice of a traditional Indian religion.

The ABNDN is very concerned about the recent court decision in The State of Utah v. Mooney and we encourage you to support the language change within DEA. We also encourage DEA to expeditiously amend its regulations to conform to the 1994 American Indian Religious Freedom Act (AIRFA) Amendments. ABNDN believes that the outcome of the court decision is in violation of the AIRFA Amendments and is a direct insult to American Indians nationwide that use peyote in a bona fide religious ceremony. We encourage Congress, DEA and the Texas Department of Public Safety to prevent non-Indians (i.e., James Mooney's Oklevueha Earthwalks Native American Church and the Peyote Way Church of God organization of Tucson) from abusing and using the peyote for other than what Congress intended when it passed the AIRFA amendments and for what DEA intended when it wrote the Controlled Substances Act exemption for federally recognized tribes.

Organizations such as the Oklevueha Earthwalks and the Peyote Way Church of God of Tucson consist of non-Indians who abuse the peyote. These organizations intentionally use our sacred and religious ways through exploitation and the charging of fees (sometimes high fees) for their own financial advantage. We consider their acts insults to our sacred ways of worship, which were passed down from our elders for generations. These organizations are depleting the peyote resources by marketing the peyote on the Internet and conducting themselves in a manner not intended for its use.

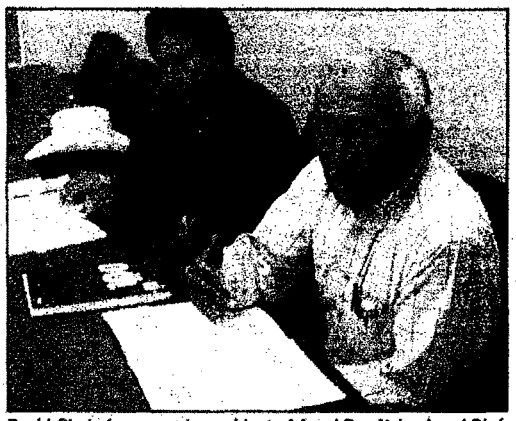
The ABNDN encourages the United States Congress, the U.S. Department of Justice, and the U.S. Drug Enforcement Administration, to expedite the DEA language reform to ensure the use of peyote in a bona fide religious ceremony by federally recognized tribes. The ABNDN also encourages Indian nations and Indian organizations, in a unified effort, to preserve and protect the use of peyote for future Indian generations.

As members of the ABNDN, we oppose the use of peyote (Azee') by non-Indians who openly abuse our religious ceremonies. Non-Indians do not know the origins of the stories, legends and mythology connected with the ceremonial use of peyote. They also do not know its sacred name, ceremonial practices, procedures and processes in conducting the ceremony to make it complete. Theses practices, procedures and processes are embedded in our culture and are a reflection and understanding of our ways of maintaining balance with nature. To condone the abuse of peyote by non-Indians would deprive our future Indian generations of the very sacred ways of our survival – our religion, language and culture.

Navajo peyote group works to remove negative drug label

By Marley Shebala
The Navajo Times

6-24-04



David Clark, foreground, president of Azee' Bee Nahagha of Diné Nation (formerly Native American Church), and Herman Johnson, vice president, will petition the Navajo Nation Council to remove peyote from the Navajo law which calls it a "controlled substance." (Times photo - Paul Natonabah)

WINDOW ROCK - Azee' Bee Nahagha of Diné Nation is building a case for the Navajo Nation Council to remove azee', or peyote, from Navajo law as a "controlled substance."

David Clark, the group's president, said on Monday that the first step is changing the name of the Native American Church of Navajoland to azee' bee nahagha, which means using peyote in a bona fide religious ceremony.

Clark said that the group over the years has been involved in federal court decisions to combat the "anti-peyote" faction.

He said the initial name, Native American Church, was adopted in 1918 in Oklahoma and was based on Christianity because the spiritual leaders at that time felt that it would level the religious playing field.

Clark said the U.S. Constitution guarantees freedom of religion but for Native Americans this freedom was not granted until 1978 when Congress approved the Indian Religious Freedom Act.

He said that was because when the Europeans arrived they believed that the Native Americans had no religion and way of life and called them pagans.

Clark said that's why the Europeans sent missionaries to Christianize the Natives.

But he said the Europeans also found good things among the Natives, such as their land, other natural resources and food.

They took all of that and now they want to take the peyote because they've decided that it's good, he said.

But Clark said the 1994 federal amendments to the Indian Religious Freedom Act prohibit white people from using peyote. "The white people feel left out and they are fighting the law," he said.

Clark said the 1994 amendments mandate the traditional ceremonial use of peyote by members of federally recognized tribes.

The law says nothing about church, he said.

Clark said recognition by Congress of using peyote in a traditional ceremony is how his group wants the Navajo government to view peyote.

The ABNDN appreciates Congress' recognition of the Native Americans as humans with a religion and way of life but Navajo sovereignty is really how peyote can and should be protected, he said.

Clark, Herman Johnson, ABNDN's vice president, and Irene Herder, an ABNDN staffer, showed a copy of the June 10 to 16 Tucson Weekly to the Navajo Times.

The cover story, "A Trip Down Peyote Way," showed Anglo people who were members of a southern Arizona church that was flouting federal law by offering peyote to all - for a price.

According to the story, the Peyote Way Church has a membership of mostly non-Indians who pay a $50 membership fee that can be renewed annually for $40.

The U.S. Drug Enforcement Agency has not shut down the church, which also grows peyote, because Arizona law allows citizens to use and possess peyote if it is connected to a bona fide religious practice.

Herder said it was upsetting to learn that these people were taking financial advantage of the work that Native people across the country and other organizations did concerning peyote.

Herder said the news of the passage of the Indian Religious Freedom Act and its amendments was a dream come true for her family and others who were jailed during the early years.

Clark said the history of peyote in this country before the Europeans arrived shows that peyote originated in the Southwest and was among the original Navajo ceremonies.

Clark said the officers are encouraging their members to attend the 38th annual ABNDN convention June 25 to 27 in Chinle so they can learn more about how to protect peyote so it doesn't get in the wrong hands.

TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

Walter Echo-Hawk
Staff Attorney, Native American Rights Fund

July 14, 2004

Good Morning, Mr. Chairman and members of the Committee. I am Walter Echo-Hawk, a staff attorney for the Native American Rights Fund ("NARF"). Thank you for the invitation to offer testimony at this Oversight Hearing on the American Indian Religious Freedom Act of 1978 (43 U.S.C. 1996) ("AIRFA"). As we near the 25th Anniversary of the AIRFA, I commend the Committee for reviewing the manner in which the AIRFA and follow-up laws have been implemented in two main areas, repatriation and protection of sacred sites.

As the Committee is aware, in the absence of adequate enforceable legal protections, Native Americans suffered an unprecedented history of religious intolerance and discrimination in the United States, which has included an outright federal ban on practicing tribal religion. Fortunately, through the work of this Committee, America began to address and reverse that human rights problem with the passage of AIRFA in 1978. AIRFA is a landmark law that set federal policy to protect and preserve the endangered traditional religions of America's indigenous peoples. The congressional findings made in 1978 regarding the scope and nature of infringements upon indigenous religion, which are embodied in the "whereas clauses" of AIRFA and further documented in the Report to Congress mandated by section 2 of AIRFA, continue to provide a foundation for legislative policy to protect Native American religious liberty which has endured over the past generation. However, the social change set in motion by AIRFA

will not be complete until all attributes of religious infringement have been addressed and Native American religious liberty is fully protected under federal law.

Because protection of indigenous religious liberty is critical to the cultural survival of Indian tribes and Native American communities, NARF and its clients have been vitally concerned with AIRFA and its follow up legislation. Staff attorneys of the Native American Rights Fund, including myself, offered testimony in 1978 to support passage of AIRFA and, following its enactment, worked with traditional religious leaders to provide their input into the Report to Congress mandated by Section 2 of AIRFA and entitled *American Indian Religious Freedom Act Report, P.L. 95-341* (U.S. Dept. Interior 1979); and, in later years, my colleagues and I offered oversight testimony on AIRFA implementation issues. On behalf of NARF clients, I have worked with this Committee on the development and enactment of important follow-up laws, such as, the 1989 repatriation provisions of the National Museum of the American Indian Act (20 U.S.C. 80q *et seq.*), the Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. 3001 *et. seq.*) ("NAGPRA"), and the American Indian Religious Freedom Act Amendments of 1994 (43 U.S.C. 1996a). My work on the NAGPRA legislation included participation as a member of the Panel for a National Dialogue on Museum/Native American Relations ("Dialogue Panel") which is referred to in Professor Bender's testimony.

All of Indian Country knows and appreciates the central role of this Committee since 1978 in developing and enacting legislation to protect the religious liberty of Native Americans and in monitoring efforts to implement that body of federal Indian law. The 25th anniversary of AIRFA provides an opportunity to celebrate substantial progress in

effectuating the social change set in motion 25 years ago and an occasion to take steps to address current implementation problems of paramount concern to Native American religious practitioners in the areas of repatriation and the protection of sacred sites, which are the subjects of today's hearing. My testimony discusses three issues:

1. I agree with Professor Bender that *Bonnichen v. United States,* 357 F.3d 962 (9th Cir. 2004) creates serious and immediate problems in effectuating the intent of Congress which warrant the legislative attention of this Committee. His legal analysis explains how the court's erroneous interpretation of NAGPRA's definition of "Native American" defeats the intent of Congress. I offer supplementary testimony to identify additional NAGPRA implementation problems created by that case which can also be corrected by legislative action.
2. Today the major NAGPRA implementation issue concerns the compiling of an inventory by the NAGPRA Review Committee of "culturally unidentifiable human remains" and the development of adequate recommendations and regulations on a process for the disposition of hundreds of thousands of those remains, as required by 25 U.S.C. 3006(c)(5) and (g). To date, this has not been done and deep concerns about the process being followed by the National Park Service have emerged. The attached emergency resolution of the National Congress of American Indians expresses conflict-of-interest and other concerns about the National Park Service's role in developing those important regulations.
3. Since 1989, there remains a pressing need to create a federal cause of action that allows Native American religious practitioners to protect sacred sites and afford Native American with equal protection of existing federal laws which protect the free

exercise of religion. This need is well-documented in Committee hearings for the past 15 years. I discuss the elements for a cause of action approach and explain why it is necessary accord Native Americans with equal protection of the federal laws.

1. *Bonnichen* creates a need to amend NAGPRA to preserve the intent of Congress.

Bonnichen is a highly-publicized decision affecting NAGPRA implementation and the effectuation of Congress' intent which requires oversight legislative attention. In *Bonnichen*, the Ninth Circuit vacated the Secretary of the Interior's determination that a preponderance of the evidence supported a finding that the pre-Columbian remains of the so-called "Kennewich Man," which pre-date European arrival in North America and were discovered on federal land, are culturally affiliated with certain present-day Indian Tribes and must therefore be repatriated. To support its decision, the court held that the pre-Columbian remains discovered in the Columbia River gorge are not "Native American" within the meaning of NAGPRA and the statute does not apply to govern their disposition. The court reached this result by interpreting two words ("that is") in NAGPRA's definition of "Native American" (25 U.S.C. 3001(9)) to mean that pre-Columbian remains found in the United States are not subject to the provisions of NAGPRA unless there is "a finding that remains have a significant relationship to a presently existing 'tribe, people, or culture,' a relationship that goes beyond features common to all humanity." 357 F.3d at 974. Despite the Secretary's interpretation to the contrary in 43 C.R.F. 10.2(d), the court held that NAGPRA requires "that human remains bear a significant relationship to a *presently existing* tribe, people or culture to be considered Native American" and enunciated its own guidelines for meeting this statutory requirement which are vague and provide no guidance as to who carries the

burden of proof, how the determination is to be made and by whom, or whether and to what extent Native Americans will have input in that determination. Id. at 975-77; see also, 217 F.Supp.2d at 1138. Moreover, these requirements *apply only to American Indian tribes and not to "Native Hawaiians"* because, according to the court, NAGPRA defines "Native Hawaiians" with different language using geographic criteria. 357 F.3d at 976. Creation of troubling disparate statutory coverage for the two groups gave no pause the court nor cause it to question its analysis.

I am familiar with NAGPRA's provisions from working on the legislation and writing about its legislative history[1] and *Bonnichen* from *amicus* participation on behalf of the National Congress of American Indians, Morningstar Institute, and Association on Indian Affairs. In my opinion, Professor Bender provides the Committee with a correct legal analysis of the Ninth Circuit decision and its impact on NAGPRA implementation. His recommendations for legislative language to correct the court's erroneous interpretation of NAGPRA's definition of "Native American" are sound.

As explained by Professor Bender, the court impermissibly rewrote the statute based on it's interpretation of a two-word phrase in 25 U.S.C. 3001(9). The interpretation is erroneous for two reasons. First, the court's narrow construction violates canons of statutory construction for remedial human rights legislation and for federal Indian legislation that require courts to construe statutes broadly for the benefit of Indian tribes, to resolve ambiguity in favor of the Indians, and to achieve the remedial purposes of the legislation. Second, because the court's construction nullifies other provisions and creates internal inconsistencies within NAGPRA's statutory scheme, as explained by

[1] *See,* Echo-Hawk & Trope, "The Native American Graves Protection and Repatriation Act: Background and Legislative History," 24 Az. S.L.J. (1992) at 35-77.

Professor Bender, it fails to give effect to the statute as a whole. When considering the correctness of the decision, it is telling that no legislative history was cited to support the court's narrow interpretation of section 3001(9). Indeed, *there is no supporting legislative history* because no discussion or debate over that definition took place in the legislative history. The "Native American" definition was non-controversial, because everyone who worked on the legislation, to my knowledge, logically assumed that all pre-Columbian remains indigenous to the United States are "Native American" for purposes of the statute. That logical assumption is shared by the Secretary of the Interior who is responsible for interpreting and implementing NAGPRA under 25 U.S.C. 3011 and borne out in the Secretary's regulations interpreting this provision. 357 F.3d at 974-75. It is also telling that the decision creates disparate treatment for "Native American" and "Native Hawaiian" remains which was clearly *not* intended by this Committee when it advanced that measure to the floor of the Senate.

Bonnichen is an example of judicial law-making. Rather than simply deciding the case on the facts by determining whether or not Secretary Babbitt's detemination is supported by the evidence, the Ninth Circuit and the court below rewrote the statute with a broad sweep that was unnecessary to decide the case.

The lengthy decision in the court below (217 F.Supp.2d 1116) contains several holdings issued in *dicta* which call into serious question several important aspects of NAGPRA and may potentially create confusion among agencies charged with implementing the statute. While the Ninth Circuit did not technically address that *dicta*, the Committee may nonetheless consider it necessary to address those issues in the interest of avoiding confusion, expense, delay and litigation in implementing NAGPRA

and to preserve, clarify and effectuate the intent of Congress. Those issues are listed below.

1. Joint repatriation claims by tribal groups. The district court held in *dicta* that joint repatriation claims by multiple claimants are generally inappropriate and struck down the Secretary's determination that such claims were appropriate. 217 F. Supp.2d at 1142, n.43, 1142-43. This holding imposes limitations on NAGPRA which were unnecessary to decide the case. The court recognized but disregarded the fact that most NAGPRA claim dispositions published in the Federal Register "involve multiple claimants" and its dicta gratuitously calls the propriety of those dispositions into question. Id. 1142, n. 45.

The holding relies upon the use of singular phrases in the Act. The court was not aware that Congress was confronted in 1989 and 1990 with prominent repatriation or reburial claims giving rise, in large measure, to the need for NAGPRA, and most were joint tribal claims. For examples, during that period I represented three Caddoan tribes -- the Pawnee, Arikara and Wichita -- in asserting joint claims against the Nebraska State Historical Society, the Salina Burial Pit near Salina, Kansas, and the Smithsonian Institution's Natural History Museum. These joint claims addressed Pawnee remains from the historic period and much older pre-Columbian remains ancestral to the Caddoan group of plains Indians consisting of the present-day Pawnee, Arikara and Wichita tribes. This Committee was aware that many, if not most, Indian tribes belong to larger culturally affiliated groups with common linguistic, religious and cultural traditions. The Committee was also aware that many such groups separated during their histories into regions, sometimes by migration and often by government relocation; and it is not

conceivable that the Committee would have enacted legislation such as NAGPRA that ignores those realities.

The Committee may wish to clarify any confusion created by the court's dicta. This can be done by inserting plural terms into the statute where appropriate and perhaps explicitly specifying that joint claims by multiple claimants are within the spirit and intent of NAGPRA. In that regard, consonant with the common practice in implementing NAGPRA, joint claims do not relieve the claimants of meeting all the requirements of the statute, including the burden to establish cultural affiliation, but evidence of joint claimants can be cumulative towards multiple tribes.

2. Consultation is a cornerstone of NAPGRA implementation. As the Committee knows, "consultation" is a cornerstone of federal Indian policy embedded in many statutes, executive orders and regulations as a tool for carrying out the government's trust obligations. As Professor Bender points out, consultation and information sharing was a key procedural recommendation of the Dialogue Panel and it has been incorporated into the spirit and provisions of NAGPRA and the Secretary's regulations for implementing this statute. *See, e.g.,* 25 U.S.C. 3003(b)(1)(A) and (2), 3004(b)(2), 3005 (a)(3) and (d), 3006(c)(6). Yet the district court strongly suggested that agency consultation efforts were "secret meetings" which contributed to "an appearance of bias" and relied upon agency consultation to support its holding, again in *dicta*, that the agencies did not act as fair and neutral decision makers. 217 F. Supp.2d at 1132-1134.

Least agencies and museums take that holding to heart and exclude Native American input from the repatriation process, which would bring the Nation back to pre-NAGPRA

times, the Committee should dispel any confusion that the consultation provisions of NAGPRA and the Secretary's regulations are central to the intent of Congress.

3. The need to clarify that Indian canons of statutory construction apply to NAGPRA. Despite the facts that NAGPRA originated with this Committee, is codified in Title 25 of the United States Code Annotated, and expressly states in 25 U.S.C. 3010 that NAGPRA reflects the unique relationship between Indian tribes and Native Hawaiian organizations, the court could not bring itself to believe that NAGPRA is an Indian statute for purposes of statutory construction. Those doubts were expressed by the Magistrate Judge during the hearing and marginalizes the role of those cannons when construing the statute in his opinion. 217 F. Supp.2d at 1139 n. 40

In addition, other aspects of the statute may need to be examined by the Committee in the wake of *Bonnichen* to safeguard against confusion in implementing NAGPRA and I am happy to work with Committee staff and the Tribes which were involved in that litigation to develop concrete legislative proposals.

2. Disposition of "culturally unidentifiable" human remains.

NAGPRA contemplates that despite its procedures, many Native American human remains and funerary objects may remain unidentified and unclaimed. The reasons for the existence of unknown Native American dead are various and may include: a lack of provenance documented by the original "collectors," loss of museum or agency records, theft, or the general turmoil and relocation of tribes in the history of the Nation. Yet NAGPRA contemplates a disposition of these dead. Section 3006(c) directs the Review Committee to compile an inventory of these dead in the possession or control of each Federal Agency and museum and directs it to make recommendations for specific actions

for developing a process for their disposition. Like all other Review Committee duties, this task must be done in consultation with Indian tribes and Native Hawaiian organizations with administrative and staff support provided by the Secretary currently performed by the National Park Service ("NPS"). 25 U.S.C. 3006(c)(6) and (g)

After 14 years, the Review Committee and its NPS staff have not completed the inventory. Nor has the Committee has not made its recommendations for specific actions for developing a process for disposition of them. Indeed, without having the inventory available, Indian tribes and Native Hawaiian groups are unable to enter into informed consultation with the Review Committee as required by Section 3006(c)(6).

NARF is legal counsel to the "Working Group for the Return of Culturally Unidentified Remains," which is chaired by Wallace Coffee, Chairman of the Comanche Nation and consists of prominent Native Americans concerned about the proper disposition of these unknown Native American dead and who have closely monitored the work of the Review Committee and NPS on this important issue.[2]

The Working Group is deeply concerned over the implementation of Section 3006(c)(5). In particular, it is concerned that the Review Committee will attempt to develop its recommendations or approve proposed NPS regulations governing the disposition of those dead without first entering into informed consultation with Indian tribes and Native Hawaiian groups. Various attempts to advance regulations adverse to Native interests were made over the past year or so, even though the NPS has not completed its inventory of those dead nor provided Indian country with that data which is

[2] Working Group members include the Chairwoman of the Native American Rights Fund Board of Directors, Ho'oipokalaena 'auao Nakea Pa; Suzan Harjo, President of the Morningstar Institute; Peter Jamison, NAGPRA Representative, Seneca Nation; Kunani Nihipali, Hui Malama; James Riding In,

necessary for informed Native American consultation. The Working Group is convinced that Section 3006(c)(5) cannot be implemented in an impartial fashion for the reasons set forth in the attached NCIA emergency resolution #MOH-04-002 (Resolution Urging the Immediate Separation of All NAGRPA Implementation Activities from the National Park Service) and especially the conflict-of-interest reasons discussed therein. On behalf of my client, I urge the Committee to determine when the inventory will be completed and made available to Indian country, ensure that no recommendations or proposed regulations concerning the disposition of unknown Native dead are made until after the inventory is made available and the Review Committee enters into informed consultation with Indian tribes and Native Hawaiian organizations, and, finally, to investigate steps which may be available to ensure that the implementation of NAGPRA is moved to a neutral agency with the Executive Branch.

3. **The need and rationale for a Sacred Sites cause of action statute.**

The longstanding need to enact legislation to protect Native American sacred sites continues to be the paramount political and legal challenge in implementing AIRFA policies. The absence of federal protection is the most glaring loophole in federal Indian law today. Despite these difficulties, all world religions have holy places and their preservation is the responsibility of each nation.

This need has been known since the1989 *Lyng* decision and repeatedly documented in numerous hearings. In the meantime, some irreplaceable sites have been destroyed causing immeasurable harm and remaining sites are jeopardized by the lack of protection. At the same time, federal statutes do protect religious property, such as

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Historian and repatriation consultant to the Pawnee Nation; and Mervin Wright, Pyramid Lake Paiute Tribe.

church buildings, but each of those statutes exclude protection for Native American holy places because they are natural landmarks which are not owned by dispossessed Native Americans. This double standard in federal law began with enactment of the Religious Freedom Restoration Act of 1993 ("RFRA"), which created a cause of action which could have been used by to protect Native American worship at sacred sites; however, Committee reports and floor statements in RFRA's legislative history indicate that this law is not intended to apply to the government's use of its own property which ensures that Native American holy places located on federal land are not protected by this statute. The double standard continues in the cause of action provided in the Religious Land Use and Institutionalized Persons Act of 2000, 16 U.S.C. 2000cc ("RLUIPA"), because this law protects the religious use of a church only if the claimant "has an ownership, leasehold, easement, servitude, or other property interest in the regulated land." 16 U.S.C. 2000cc5(5). For "second class" Native American holy places, existing federal law affords only an inadequate patchwork of unenforceable policies and limited procedural protections. This disparate legal treatment raises an equal protection of the law problem and a need to afford Native Americans with equal protection of federal law.

In light of the above concerns, I respectfully offer a concept for a proposal to amend AIRFA with a set of short provisions drafted to afford Native Americans with equal protection of existing federal laws that protect the free exercise of religion, such as RFRA and RLUIPA:

(1) clarify that 42 U.S.C. 2000bb1-4 of RFRA shall not be construed or applied to exclude free exercise claims involving Native American worship at sacred sites located on federal land;

(2) provide a one phrase amendment to 42 U.S.C. 2000cc-5(5) of RLUIPA to ensure that the interest of Native American religious practitioners in worshipping at traditional religious places located on federal land constitutes a sufficient "property interest" for purposes of that statute; and

(3) provide a substantive "federal undertaking" cause of action similar to RLUIPA that protects Native American worship at traditional Native American religious places.

Such amendments, together with appropriate federal Indian law definitions commonly used by the Committee in other legislation such as AIRFA and NAGPRA, may avoid undue government entanglement issues that are potentially involved in more lengthy and complex proposals to protect sacred sites through extensive federal land management procedures and consultation protocols.[3] While such approaches may well be possible and desirable, if not preferred, the basic goal of the above approach is simply to ensure that existing federal law is inclusive of important indigenous religious practices and does not favor one set of religions over indigenous religions as required by Establishment Clause principles. I would be glad to work with Committee staff in considering the above and other proposals to address the above concerns. It is extremely important that this loophole in federal Indian law be remedied as soon as possible to afford Native Americans with equal protection of federal law.

[3] Land management changes are laudable and may voluntarily by agreed to by federal land managers and Indian tribes after Congress "levels the playing field" by providing an effective cause of action statute.

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The National Congress of American Indians
Resolution #MOH-04002

TITLE: Resolution Urging the Immediate Separation of All NAGPRA Implementation Activities from the National Park Service

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the NCAI has a long history of supporting repatriation of Native American human remains and funerary objects; and

WHEREAS the Native American Graves Protection and Repatriation Act hereinafter, "NAGPRA", is a federal statute that specifically authorizes Indian tribes and Native Hawaiian organizations to exercise certain vital legal rights, such as, consultation and repatriation of cultural items specified in the statute, and to repatriate human remains, funerary objects, sacred objects, and objects of cultural patrimony from federal agencies and federally-funded institutions in the United States; and

WHEREAS, the National Park Service has been delegated authority to implement certain provisions of NAGPRA by the Secretary of the Interior, including providing staff support to the Native American Graves Protection and Repatriation Review Committee, promulgation of regulations, awarding of grants, and investigation of civil penalties; and

WHEREAS, the National Park Service is also required to comply with provisions of NAGPRA, because the agencies within the NPS have protected cultural items in their possession and have the duty and responsibility to consult on and repatriate human remains, funerary objects, sacred objects, and objects of cultural patrimony upon the request of culturally affiliated Indian tribes and Native Hawaiian organizations; and

WHEREAS, there is a growing concern that the National Park Service is hampered in the proper enforcement of NAGPRA because of the conflicts of interest that arise out of its compliance responsibilities which are in conflict with its enforcement duties as NAGPRA's goal of repatriating ancestral remains to Indian, Native Hawaiian and Alaskan communities conflicts with the National Park Service's mandate to promote archeological research and stewardship of cultural resources. There is substantial evidence of serious conflicts of interest that include:

- The National Park Service has obstructed the administration of grants awarded to Indian tribes and Native Hawaiian organizations, and has diverted grant and repatriation support funds for its own administrative purposes; while affirmatively contributing funds to the Society for American Archeology and to its own staff for purposes of planning policies that support archeological interest in Native American and Native Hawaiian remains; and

- The National Park Service has never assessed a single civil penalty against any of the museums that are known to have failed to comply with NAGPRA, and is itself out of compliance with NAGPRA; and

- The composition of NPS staff of the NAGPRA office is suspect because it removed the only Native staff person and all remaining staff are non-Native archeologists, the majority of which are members of the Society of American Archeology, the very organization which promotes interests adverse to Native America interests on the very issues pertaining to NAGPRA implementation; and

- The National Park Service has cancelled scheduled meetings of the Review Committee for over a year and there is no date set for their next meeting; and

- The National Park Service has failed to appoint Review Committee members within the statutory time allowed of 90 days from the date of the vacancy; and

- In Hawai'i, the National Park Service actively counseled a museum and a federal agency in ways to avoid repatriation of human remains, funerary objects, and objects of cultural patrimony to Native Hawaiian organizations which tainted the statutory implementation process and resulted in a loss of trust of Native Hawaiians and Native Americans, the class for whose interests NAGPRA was enacted in the first instance; and

- The National Park Service is preparing an interpretation of the recent 9th circuit opinion in the case of Bonnichsen v. U. S. in which the 9th Circuit held that an ancient set of Native American human remains found on federal land and claimed by five culturally affiliated tribes were not Native American within the meaning of NAGPRA. To the extent that National Park Service's policy is premised on such an interpretation it will violate Congress's intent to affirm the fundamental human right of native peoples to claim their ancestors no matter how ancient; and

- The National Park Service is preparing to promulgate regulations regarding the disposition of over 100,000 Native American ancestors listed as "culturally unidentifiable" or "unclaimed"; and

• The National Park Service has failed to provide Indian Country and Native Hawaiians with necessary information for informed consultation, and delayed informed consultation, concerning appropriate regulations for the disposition of more than 100,000 human remains classified as so-called "culturally unidentifiable" by federal agencies and museums as required under the provisions of NAGPRA; and

• The National Park Service most recent set of draft regulations would have made so called "culturally unidentified" human remains the property of the repositories where they are held, while at the same time withholding the data that Indian tribes and Native Hawaiian organizations need in order to claim and identify them and to consult with the National Park Service and NAGPRA Review Committee concerning such regulations on an informed basis; and

• The National Park Service continues to obstruct repatriation of Native American ancestors by failing to publish the backlog of hundreds of Federal Register notices; and

WHEREAS the National Park Service through administrative policies, has endorsed the scientific studies performed on our ancestors and has given science a place of higher authority, which is not in accordance with the true intent of the law and not in the best interests of the ancestral rights of our people and seriously erodes the "CULTURAL SOVEREIGNTY" of Indian Nations.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby strongly urge the immediate separation of all NAGPRA implementation activities from the National Park Service to a neutral agency within the Department of Interior, or to another federal department altogether, such as the Assistant Secretary for Policy, Management and Budget, in order to better provide equity and fairness to the NAGPRA implementation process; and

BE IT FURTHER RESOLVED, that Congress order an investigation, audit, and report of the implementation of NAGPRA that will include an inquiry into all the problems alluded to, and where an appropriate and permanent home for the NAGPRA program would be; and

BE IT FURTHER RESOLVED, that the NCAI strongly urges Congress to provide a technical amendment to NAGPRA clarifying that the definition of "Native American" includes all cultural items that are related to a group indigenous to the United States regardless of whether there is also a present-day Indian tribe or Native Hawaiian organization; and

BE IT FURTHER RESOLVED, that this resolution will be provided to the White House, Secretary of Interior, Director, National Park Service, Indian tribes and Native Hawaiian organizations, and members of Congress, for support and to urge the Secretary of Interior to act in accordance with this resolution; and

BE IT FURTHER RESOLVED, that in the interim transition period, the White House and Members of Congress force the National Park Service to provide all information to and consult with Indian tribes and Native Hawaiian organizations regarding all unclaimed cultural items and all human remains currently inventoried as "culturally unidentifiable," and to cease all attempts to promulgate regulations or implement policies on these subjects until and unless such information has been made available and informed consultation has taken place, and investigation has been carried out; and

BE IT FINALLYRESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted at the 2004 Mid-Year Session of the National Congress of American Indians, held at the Mohegan Sun Hotel and Casino, Uncasville, CT on June 23, 2004 with a quorum present.

_____
President

ATTEST:

_____
Recording Secretary

Adopted by the General Assembly during the 2004 Mid-Year Session of the National Congress of American Indians, held at the Mohegan Sun Hotel and Casino, in Uncasville, CT on June 23, 2004.

STATEMENT OF SUZAN SHOWN HARJO, PRESIDENT, THE MORNING STAR INSTITUTE, FOR THE OVERSIGHT HEARING ON THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT, BEFORE THE COMMITTEE ON INDIAN AFFAIRS, UNITED STATES SENATE, WASHINGTON, D.C., JULY 14, 2004

Mr. Chairman, Mr. Vice Chairman and Members of the Committee on Indian Affairs, I thank you for calling this oversight hearing on the American Indian Religious Freedom Act of 1978, P.L. 95-341.

The Act states: "...henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

A quarter century later, many of our sacred places are as endangered as they have ever been; many of our sacred objects remain out of our reach and control; and our freedom to worship in our traditional ways is impeded by federal and federally-permitted actions.

Policy to Preserve and Protect Native American Religious Freedom

The American Indian Religious Freedom Act turned 25 on August 11, 2003. Two months later, Arizona State University's College of Law held a gathering of Native American people who worked to achieve the Act's passage and to further its policy promise. Our reflections on the past quarter-century and our calls for future action, including much of this testimony, are contained in the journal, *Wicazo Sa Review.*

Today, there is every reason to both celebrate the American Indian Religious Freedom Act and to complete its unfinished agenda. In AIRFA, Congress and the President stated plainly that the policy of the United States is to preserve and protect Native American traditional practices and religious freedom. This was necessary in 1978 because Native Peoples were still suffering the ill-effects of sorry policies of the past intended to ban traditional religions, to neutralize or eliminate traditional religious leaders and to force traditional religious practitioners to convert to Christianity, to take up English and to give up their way of life.

Even though the federal Civilization Regulations that first criminalized traditional religious expressions in the 1880s were withdrawn in the mid-1930s, laws and practices impeding Native Americans' free exercise of traditional religions persisted. Native sacred objects continued to be confiscated and graves looted. Those stolen in earlier times filled federal, state and private collections, as well as museums and educational institutions in Europe. Native sacred places continued to be desecrated and damaged. Those annexed during the formal "Civilization" period remained in non-Native governmental and private hands, and Native people risked stiff fines and imprisonment for fulfilling religious mandates at those sites.

Native traditional people organized a national coalition in 1967 to gain protections for sacred places and ceremonies, to recover Native human remains and sacred objects and to promote respect for Native people and rights in general society. As the coalition achieved returns of important sacred places and legal protections for the use of feathers and other sacred objects, it sought broad policy to remove the federal barriers standing in the way of Native American traditional religious expression. When AIRFA was signed into law, it was greeted with relief, elation and hope by traditional American Indian, Alaska Native and Native Hawaiian people. After generations of traditional Native religions being driven underground or to extinction, and traditional practitioners being stigmatized as outlaws, AIRFA was lauded as a needed and welcome policy.

Policy to Consult with Native Traditional Religious Leaders

In sharp contrast to the religious suppression policies, AIRFA established the policy of federal agencies consulting with Native traditional religious leaders on proposed actions regarding Native traditional religious matters. This is an ongoing policy and the context for similar consultative requirements in subsequent federal laws and regulations.

Over the past 25 years, many lawyers, both for and against Native traditional interests, have ignored this consultative policy requirement of AIRFA. Governmental agents often overlook it, inadvertently or deliberately, when taking or approving actions affecting traditional religions. Some consult only with tribal governmental leaders or employees, to the exclusion of traditional religious leaders. Some even conduct sham consultations by making a record without seriously considering the information or conclusions of the traditional experts who are being consulted. This occurs most egregiously at present with respect to those developmental decisions that would damage or destroy sacred places. Sadly, some tribal governmental agents engage in these practices, too, and many Gucci-gulch lobbyists and federal staffers in Washington, D.C. keep a watchful eye on laws and regulations that would interfere with development plans at sacred places.

Part of the continuing religious freedom agenda is to assure that agents at all governmental levels comply with the consultative policy requirement under AIRFA. It is essential that governmental agents implement the Executive Orders on Indian Sacred Sites (1996) and on Consultation and Coordination with Indian Tribal Governments (1998), as well as other federal mandates, with the understanding that consultation with traditional religious leaders, not solely with the secular leadership, is a required part of tribal consultation when dealing with those Native Peoples with living traditional religions. For those Indian nations that are theocracies, it makes sense for their traditional governments to have sole standing. For the other 99 percent that are not theocracies, it is nonsensical to recognize the secular entities and not recognize the traditional religious entities and practitioners.

AIRFA's One-Year Review and Report to Congress

AIRFA required the President to direct federal "departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders in order to determine appropriate changes necessary to protect and preserve Native American religious cultural rights and practices."

AIRFA also required the President to "report back to the Congress the results of his evaluation, including any changes which were made in administrative policies and procedures, and any recommendations he may have for legislative action." Over 50 federal agencies participated in the one-year consultation and review process, and the President's report was delivered to Congress in August of 1979.

During the review period, numerous federal agents objected to Native American Church peyote ceremonies being characterized in the President's report as a traditional religion, arguing that the use of peyote by American Indians was a relatively new phenomenon and did not constitute a religion. The counter-argument prevailed -- that its practitioners believed they were practicing a religion and one their ancestors had practiced so for a century and more -- and ceremonial use of peyote was included as a traditional Native religion. Later litigation over peyote use by one Indian and one non-Indian resulted in a 1989 Supreme Court decision that weakened religious freedom law nationwide and left Native American Church members clinging to an Indian exemption to a regulation prohibiting the use of peyote. At the urging of the Justice Department, Congress amended AIRFA in 1993 to codify the drug regulation and provide for peyote use by Indian members of the Native American Church.

As part of the initial review, Indian inmates were afforded greater access to traditional religious counseling, sweat lodge ceremonies and use of feathers and other sacred objects, but religious liberty for Native people in prisons has not yet been achieved. During the review year and the following one, federal agencies entered into agreements with Native Peoples to provide access to certain sacred places and objects, and to return or jointly manage others. In negotiating these agreements, the agencies accommodated Native traditional religious interests, even in those cases involving national security interests at military facilities.

In some cases, the process began during the review period, but did not conclude until years or decades afterward. One example of this is Kaho'olawe, a former Naval bombing range in Hawaii, where Native Hawaiian people were willing to risk injury and death from unexploded ordinances in order to conduct traditional ceremonies. In mid-1979, the Secretary of the Navy made the Naval stations aware of the requirements of the religious freedom law and pledged to "cooperate with Native traditional religious leaders in an ongoing effort to ensure the free exercise of religious rights while at the same time ensuring the safety of all personnel and the completion of its military mission." A subsequent law set up the Kaho'olawe Island Reserve Commission and required the Navy to conduct a munitions cleanup. Kaho'olawe is now safe and, in 2003, was formally transferred to Hawaii.

Protection of Native American Sacred Places

Over the quarter-century life of AIRFA, numerous traditional and customary areas have been returned or protected through co-management agreements. Most of these sacred places are naturally-formed churches -- lands and waters where people go to pray for the good day, the precious earth, the blessing waters, the sweet air and peaceful life for all living beings the world over. While some are being protected, others have been damaged or destroyed, and far too many are under attack today.

Each White House and Congress over the past 30 years has acted to secure vulnerable sacred places, from the return of Taos Blue Lake in the early 1970s to additional protections for Zuni Heaven today. It is equally true that each Congress and administration has opposed lawsuits and a statutory cause of action to protect and defend Native sacred places. Ten years after the passage of AIRFA, the Supreme Court held that neither the Indian religious freedom law nor the First Amendment protected a Native sacred place in California against a Forest Service logging road, and invited Congress to enact a protective cause of action. That was 16 years ago and Congress still has not enacted a cause of action that

allows us to defend our sacred places through legal processes available to all other people in the United States who want to protect their places of worship.

Indian traditional and tribal leaders tried from 1989 to 1995 to get a legislative cause of action, but Interior politicos, Justice lawyers and White House pollsters opposed it. Native leaders then negotiated a substantive agreement on sacred lands, which was changed unilaterally within the administration to a weak restatement of the AIRFA policy. For all its faults, however, the 1996 Executive Order on Indian Sacred Sites did remind federal agencies of their continuing obligations to protect sacred places and did result in some sites being returned and otherwise protected.

The high court's 1988 ruling started a development rush that has increased in intensity over the past 16 years, and federal, state and private developers are ignoring or flaunting laws that could and should be used to protect sacred places. Today, over 50 sacred places are being threatened by development, pollution, poisons, recreation, looting and vandalism.

At the end of 2002, traditional and tribal leaders, practitioners and advocates who are among the most knowledgeable on these issues developed clear, concise lists of essential elements and objectionable elements for public policy on Native sacred places. Topping the list of objectionable elements is any law that tries to define or limit the sacred. The topmost essential element is a cause of action to defend sacred places in court and to serve as incentive for serious negotiations for the return, co-management or protected status of sacred places. Also a high priority is policy respecting traditional religious tenets and tribal law prohibiting disclosure of confidential and private information about the sacred.

Following those guidelines for essential and objectionable elements would not only keep faith with the people who reached consensus on these matters, but would honor the many people who sacrificed to save sacred places and the legions who were murdered and confined for trying to pray at sacred places.

In 2002 and 2003, this Committee held a series of oversight hearings on Native American Sacred Places. Witnesses from throughout Native America testified about the threats to sacred places and the need for legislation to protect them. After the most recent hearing in that series, on June 18, 2003, the Chairman asked The Morning Star Institute three follow-up questions about a cause of action to protect Native American sacred places. For the Committee's convenience, those questions and our responses are included here:

1. Q: *Your testimony is very straightforward in that, more than any other element, it urges that Federal legislation be crafted to include a cause of action to assist in the protection of Sacred Places. In the absence of such a provision, please describe the history of efforts to work collaboratively with agencies, states, and local communities to protect Sacred Places.*

In the first years after the American Indian Religious Freedom Act of 1978 was approved, there were successful negotiations with federal agencies for land returns, for access and use agreements and for other administrative protections of Native American sacred places.

For example, in 1979, the Secretary of the Interior saved a 120-acre parcel of Bear Butte land in South Dakota from development by purchasing it from a private owner (who gave the Cheyennes the right of first refusal), taking it into trust and conveying it to the Cheyenne & Arapaho Tribes of Oklahoma for all those Indian nations who use Bear Butte for traditional cultural purposes. Between 1978 and 1980, Native Americans achieved numerous access and use agreements regarding sacred places on federal lands. Some of these involved difficult national security and safety issues, most notably Coso Hot Springs in California and Kaho'olawe in Hawaii, both in Navy firing, testing and munitions storage areas.

During the remainder of the 1980s, there was little administrative activity to protect Native American sacred places. In 1989, the Supreme Court ruled in a case that pitted a Forest Service logging road against a Native American sacred place in California that AIRFA did not provide a cause of action to protect Indian sacred sites, citing a 1978 House floor statement by AIRFA sponsor Rep. Morris K. Udall that it had "no teeth." That statement had been forced by Rep. Thomas S. Foley on behalf of the Forest Service as a condition of House passage precisely so that Native Americans would not be able to sustain litigation in defense of sacred places.

In the years since the Supreme Court's decision, most Native American efforts to achieve protections for sacred places have not been successful because the federal agencies know that Congress has not backed up the policy promise of AIRFA and that the agencies cannot be taken to court under that law for failing to protect sacred places.

This was only reinforced by the 1995 Executive Order on Indian Sacred Sites, which did not provide a cause of action and even undercut AIRFA by excluding the traditional religious leaders of federally-recognized tribes and by excluding non-federally-recognized tribes and Native Hawaiians altogether. The federal agencies then knew that the President had not put any teeth into the AIRFA policy and, in fact, had further defanged it.

With rare exceptions, successive administrations since the 1980s have been increasingly uncooperative in administrative efforts to protect Native American sacred places. Today, we see dozens of known sacred places that are facing damage and destruction, mostly from the federal government itself. Until Congress amends AIRFA to create a cause of action to protect sacred places, the policy promise of the United States to preserve and protect Native American religious freedom will remain unfulfilled.

2. Q: *With regard to the issue of Sacred Places and confidentiality, if a discrete area cannot or will not be identified, what methodologies can the Federal government employ that will provide the kind of Sacred Place protection that you desire without rendering large swaths of acreage unusable in terms of other activities such as recreation and the various extractive industries?*

The federal government has vast territory to use for its own purposes and to dedicate for recreation and commercial development. Native American sacred places involve only a miniscule portion of that territory.

For the most part, the sacred places were put in the public domain because they were sacred, at a time when the policy of the United States was to ban Indian traditional religions, to confiscate sacred objects and to keep Indians from going to traditional and customary places of worship. As a result of that policy, most of the traditional Indian religions are extinct now and more sacred places have been destroyed than preserved. Under current United States policy to preserve and protect traditional religious sites, the remaining Native sacred places should be returned to or jointly managed by Native Americans or otherwise protected against damage.

The federal government already isolates areas for Christian religious purposes solely, by disallowing any recreation or development on or near churches on federal lands. The Christian religious leaders and practitioners do not have to detail their ceremonies or open them to the public; do not have to allow recreators to climb up the walls of their churches or developers to mine inside them; and do not have to disclose any private or confidential religious information in order to gain protections for religious use of their sacred places.

The administration, in the hearing of June 18, agreed to new law for federal agencies to protect Native American confidential religious information. The AIRFA should be amended for this purpose.

Pending congressional action, there are myriad ways that the agencies can protect Native American confidential religious information. They can use their scientific exemptions under FOIA to protect this information from disclosure. They can use their own administrative rules, procedures and processes to protect this information. For example, the Federal Energy Regulatory Commission has protected religious information from public disclosure by holding all materials under seal in perpetuity.

For another example, in mapping the California Desert Plan in the 1970s, the Bureau of Land Management worked with Indian traditional religious leaders and practitioners to isolate areas of sensitivity. Within these ink-blotted areas of sensitivity w ere sacred p laces. By using this method, the B LM could plan ar ound these areas and c ould u se the remainder of its vast territory for other purposes. At the same time, Native Americans did not reveal exact locations of sacred places or violate other religious tenets regarding confidentiality and non-disclosure.

The problem with leaving this matter to the discretion of federal agencies is that private religious information is at the mercy of the agency personnel who happen to be involved, and this shifts over time. When they want to cooperate, they can find all sorts of policies and authorities for doing so. When they do not want to cooperate, they can find any number of excuses for that.

3. Q: *There is often disagreement between and within tribes regarding which tribe has rights to certain sacred places, and what ceremonies can be performed there. Certainly, the Federal government is not in a position to be the arbiter of such disagreements. Can you provide the Committee with some ideas on workable solutions to who will determine who can exercise rights to sacred places under any legislation Congress may adopt?*

In order to avoid intruding into private religious matters and i n o rder to avo id E stablishment Clause entanglement problems, Congress should not try to resolve inter or intra tribal religious disputes.

Congress did create a dispute resolution mechanism in the Native American Graves Protection and Repatriation Act. Under the NAGPRA mechanism, if Native parties have competing claims over human remains, sacred objects or cultural patrimony, the museum or repository that has possession of the claimed objects or remains keeps them until the Native parties arrive at a solution. This puts the onus on the Native parties and provides a strong incentive for them to resolve their conflict, instead of having outsiders decide.

The experience under the NAGPRA mechanism may have proven so burdensome or unworkable for Native Americans that other types of mechanisms should be considered, but it is one that can be examined against a backdrop of more than a dozen years of experience.

This concern about in-fighting should not be used to deter or delay legislation. I do not know of a single instance where traditional religious leaders or practitioners have been at an impasse with each other over the protection or recovery of a sacred place. Each Native traditional religion has its own dispute resolution mechanism for dealing with internal and external conflicts.

For example, traditional religious practitioners of some 30 Native nations use Bear Butte for religious purposes and have managed to do so peacefully for millennia. There is no history of Indian versus Indian conflict at Bear Butte, even though two or more Indian nations have been at war or in conflict otherwise. It has long been understood that weapons and harsh words are to be left on the ground before entering the sanctuary of that holy mountain. On the other hand, there is a history of 150 years of conflict between Indians and non-Indians who have tried to damage Bear Butte, which with the Committee is familiar.

Disputes have arisen between traditional religious practitioners and the secular tribal governments when tribal leaders have wanted to develop sacred places for non-religious purposes. Only a very few tribes today are theocracies, and they would not act against their own religious interest. Tribal governments for the other 99 percent are secular entities. Any new law should make clear that tribal governments, like any other government, should not be allowed to damage or destroy Native American sacred places.

There are simple ways to avoid these conflicts in sacred places legislation.

First, the legislation must make clear that those with standing are: 1) the Native American tribal citizens who practice the traditional religions that hold the places to be sacred and 2) the Native nations, clans, societies, towns, kivas or moieties when they are acting on behalf of their traditional religious practitioners.

Second, the legislation must include conditions on the use of a sacred place that is to be returned, co-managed or otherwise protected, to assure that the area will be used solely for traditional and customary purposes and will not be used for recreational or resource development or commercial purposes.

Return of Native American Human Remains and Cultural Patrimony

AIRFA laid the groundwork for federal museums returning Native human remains and sacred objects, and led to the repatriation laws in 1989 and 1990.

The first major gains in the national Native repatriation movement were made during the six months following AIRFA's enactment. The heads of the military museums decided in 1979 that it was in keeping with the new law to return requested Native human remains, sacred objects and cultural patrimony in their collections. Scientists from the Smithsonian Institution disagreed with that decision and attempted to change it. Failing that, they claimed that the Smithsonian was a private, educational entity, rather than a federal agency with a duty to comply with AIRFA. That notion was overruled by the White House and the Office of Management and Budget, and the Smithsonian became one of the 50-plus federal agencies reviewing policies under AIRFA.

After the AIRFA review, however, Smithsonian scientists resisted returning any Native human remains or cultural property. Bowing to national Native and congressional pressure in the mid-1980s, new institutional leadership directed an inventory of Native human remains in their collections. The accounting – 18,500 Native human remains, together with 4,500 Indian skulls from the U.S. Army Surgeon General's "Indian Crania Study" in the late-1880s -- stunned people in Indian country and in general society. Native people and members of Congress began developing repatriation law in earnest. At the same time, Native Americans were preparing dozens of lawsuits to recover Native human remains, funerary objects and cultural property.

In order to slow down the process and gain political leverage, the repositories with large collections of Native human remains and cultural patrimony lobbied Congress for another study, the National Dialogue on Museum/Native American Relations (1988-1990). After two meetings, Native people quietly postponed their participation in the Dialogue -- in order to achieve the historic repatriation agreement with the Smithsonian -- and returned to the study once the repatriation agreement had been enacted at the end of 1989 as a provision of the National Museum of the American Indian Act. The Smithsonian leadership had opted to go forward with plans to acquire the new museum and to avoid litigation by settling on a repatriation process. Scientists who were opposed to repatriation redoubled their efforts to stop further repatriation law.

The Dialogue Report was presented to the Senate in January 1990. It reflected the repatriation law that applied to the Smithsonian and recommended new law extending that agreement to all federal and federally-assisted collections. Some of the scientists who participated in the Dialogue were so incensed by the Dialogue Report's use of the term "human remains" for what they called "our resources" that they disassociated themselves by name in a footnote from the use of the term. Their objection was that "human remains" implied that international standards of human rights and burial rights applied to dead Native Americans and their relatives. These scientists did not believe that these rights attached to "specimens," "bones" and "grave goods."

The Native American Graves Protection and Repatriation Act of 1990 became law eleven months after the 1989 repatriation provision was enacted. As with the 1989 law, Congress enacted NAGPRA as human and civil rights policy for Native Americans, and as pre-settlement of myriad lawsuits Native Peoples were on the verge of filing. Congress chose to establish a Native American policy and processes for the return of Native human remains, funerary items, sacred objects and cultural patrimony, rather than to leave it to the courts to decide repatriation policy on a piecemeal basis.

Certain scientists who opposed national repatriation policy have worked to frustrate the repatriation processes and delay repatriations until they can conduct further studies on human remains in their collections. Many are trying to hide the identity of human remains which are the subjects of their studies and to classify them as unidentifiable, in order to avoid repatriating them. Some federal scientists are abetting this effort by attempting to create new regulations to make the unidentified Native human remains the property of the repositories where they now reside.

Others have turned their attention to dismantling repatriation law through the courts. One group has pursued litigation, pitting what they see as a scientific right to conduct destructive studies of the Ancient One, popularly known as Kennewick Man, against the federal government and several related Indian tribes, who want to rebury him. Since the 2003 AIRFA gathering at ASU, the Ninth Circuit Court of Appeals has upheld a district judge's ruling that the scientists can go forward with studies, meaning that they can carve up, drill holes in and scrape away at the Ancient One.

The February 2004 decision upholds wrong-headed notions that the Ancient One is not Native American within the meaning of NAGPRA and does not have to be repatriated, that NAGPRA is not Native American policy, that a Native American coalition cannot jointly claim him and that federal-tribal consultation constitutes ex parte communication that somehow violates the scientists' due process. The tribal coalition is seeking a rehearing.

The main policy achievement of the repatriation laws is the recognition that Native Americans are human beings and no longer archeological resources. Ironically, the Ninth Circuit ruling denies the humanity of the Ancient One, holding that archeological resources law applies, that he is an archeological resource and that archeologists can have at him. Unless the courts reverse these rulings, this aspect of NAGPRA will become part of AIRFA's unfinished agenda and Congress will have to revisit and clarify repatriation law.

Conclusion

While much progress has been made under AIRFA and its follow-on legislation, there is much to do in order to fulfill AIRFA's promise to preserve and protect Native American religious freedom. AIRFA provided a policy context and incremental process for subsequent action. This has worked well in those areas where Congress has taken specific action – with respect to ceremonial use of peyote, for example. It has not worked well in those areas where Congress has not acted. The failure of Congress and five administrations to create a cause of action for sacred places protection is the most glaring item on AIRFA's unfinished agenda.

The overarching work that needs to be done under AIRFA is to educate Americans who teach and shape public opinion to learn and tell the truth about the history of suppression of Native American religions and religious freedom rights. Judges, policymakers and those who implement and enforce laws need to be educated about the onslaught of weaponry and laws that denied the religions and the very humanity of Native Peoples, and how that onslaught has diminished, but not ended. Only when they understand what brought us to this juncture will they appreciate that, because the federal government has used its vast power to do ill, it is necessary for it to take remedial actions in the direction of justice.

That is a fitting way to recognize AIRFA's anniversary and an honorable way to begin its next 25 years.

SOURCE: Dakota-Lakota-Nakota Human Rights Advocacy Coalition

The Cheyenne Declaration regarding the Protection of Sacred Ceremonies

May 6, 2003

The Cheyenne Declaration regarding the Protection of Sacred Ceremonies:

The Cheyenne Nation will seek support of the Plains Sundance Nations for the following Declaration on May 10, 2003 at Bear Butte, South Dakota. This Declaration was authored by the Cheyenne Nation through its Elk Society's Headsman, Bernard Red Cherries, Jr.

UNIFIED DECLARATION REQUESTING CEREMONIAL AND CULTURAL INTEGRITIES PROTECTION AND REQUEST CHANGES TO THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT, RELEVANT FOR THE PROTECTION OF OUR CEREMONIAL SUNDANCE, SWEAT-LODGE AND SACRED HEALING CEREMONIALS.

October 9, 2002

PRESIDENT GEORGE W. BUSH - UNITED STATES OF AMERICA VICE-PRESIDENT RICHARD CHENEY - UNITED STATES OF AMERICA DISTINGUISHED MEMBERS OF SENATE AND

CONGRESS

COMMITTEE ON INDIAN AFFAIRS-UNITED STATES OF AMERICA: WE hereby state and declare that we were given the Sacred Sundance as a way of offering and sacrifice by the Creator through his Prophets and spirits, and that the Sacred Sundance Ceremony is exclusive of the Plains tribes of which we descend. Our aforementioned Tribes practice and maintain the Sacred Sundance, sweat lodge and continue to heal our people in our ceremonial traditional Native healing ways. And that we reserve the right to protect, and ensure its preservation of these very sacred ceremonials for our People and our future generations. These aforementioned ceremonials are exclusive of our native peoples in our inherent right to offer sacrifice and worship not always understood by society at large. We the aforementioned Nations have come together in an unprecedented unified effort to seek remedy to protect and to preserve for our future generations our sacred Sundance, sweat lodge, and related Native American Indian healing ceremonials. We move and state that the following be considered:

1. THAT RELEVANT CHANGES BE MADE IN THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT.

We understand that this law was created for the purpose of ensuring the reservation of our Ceremonial and Cultural integrities of our most sacred ceremonial prayer ways. These ways have been left for us as a way of life and prayer expression by our Grandfathers, since time immemorial. We were born into this way of life and ceremonial prayer way and do not practice any other Nations ways of prayer or expression, choosing to respect their ways that was left for them by their Grandfathers, be it Christian, Muslim, Hinduism, etc.,..

2. WE UNDERSTAND THE IMPORTANCE OF OUR INHERANT RIGHT TO WORSHIP AS OUR GRANDFATHERS BEFORE US IN THE WAYS OF THIER GRANDFATHERS AND TO KEEP THESE WAYS SACRED AS IT WAS IN THE TIME OF OUR GRANDFATHERS, FOR OUR GRANDCHILDREN AND FUTURE GENERATIONS:

As the UNITED STATES GOVERNMENT has recognized this ever important factor in the Creation of the American Indian Religious Freedom Act in its induction into our system of laws, that was provided for the benefit of our people, Native Americans. This law however has been, we feel, manipulated and protected non-natives and those who have no Traditional or biological connection to the peoples it was intended to benefit, NATIVE AMERICANS.

These very people are the very ones who continue to sell and profit from our

Sacred Ceremonials and ways of life, and do not represent us but for their own motives and interests. We the undersigned Traditional, Validated, Legitimate Spiritual Leadership of our respective Tribes do come together in unison to request for these relevant changes after consulting with each other and respecting each others customs, and more importantly understanding together the abuses, and exploitation of our most Sacred Ceremonials, and its already devastating impacts on our Native American Peoples.

And requesting this help as it was this UNITED STATES OF AMERICA through their Representatives in SENATE and CONGRESS assembled, that under sec.2. of the American Indian Religious Freedom act states, THE PRESIDENT SHALL DIRECT THE VARIOUS FEDERAL DEPARTMENTS, AGENCIES, AND OTHER INSTRUMENTALITIES RESPONSIBLE FOR ADMINISTERING RELEVANT LAWS TO EVALUATE THEIR POLICIES AND PROCEDURES IN CONSULTATION WITH NATIVE AMERICAN RELIGIOUS LEADERS IN ORDER TO DETERMINE APPROPRIATE CHANGES NECESSARY TO PROTECT AND PRESERVE NATIVE AMERICAN RELIGIOUS CULTURAL RIGHTS AND PRACTICES.

We as Traditional Spiritual Leaders and Keepers of our Traditional and Ceremonial ways of life humbly come before you now in a unified Tribal effort. We feel that because of the blatant abuse of our Sacred prayer ways by those who do not know better, nor are neither Ceremonially qualified to give guidance continue to bring harm physically, spiritually and emotionally to those who innocently seek their guidance for spiritual enlightenment, sometimes resulting in grave danger or even death, as was the case in a "Solstice sweat lodge ritual", which is not of our culture, but imitated as such.

This supposed "Native ceremony" neither was under the guidance of a Traditionally recognized spiritual leader or "Medicineman". And as a result two (2) people of non-native descent died in El Dorado County, California., as was reported in the Sacramento Bee Journal, dated June 22nd, 2002. The following unfortunate incident is a direct result of what happens because of the illusion of seeking "Native American ceremonial experiences" without the proper guidance of QUALIFIED Spiritual Leaders, and combination of Laws protecting the innocent, and the Intended protectee, The Native Americans and their cultural & ceremonial integrities. We hope that these unfortunate incidents can altogether be avoided with the proper relevant changes to the American Indian Religious Freedom Act, making it impossible for those non-natives to lead these sacred ceremonials, taking into account the element of our "Native language" which is our key component in summoning the Powers and Sacred Elements in prayer and song and which is exclusive of the Native Americans in our Inherent right to

worship in the ways of our Grandfathers and theirs before them.

Each Tribe has their own Traditional laws that govern their ways of life and ceremonials, each provides for the traditional laws relevant for our protection and safety and guidance. These laws cannot exist and do the most benefit for the preservation of our sacred ways and for the protection of those non-natives who seek native traditional spirituality without the coordination of the UNITED STATES SENATE AND CONGRESS, through their representatives. All across this land and overseas as well, our Native Traditional ceremonials are being exploited in a fad like fashion, without regard to the impact it's effects will have on our Children and future generations, already we hold on desperately to what we have left, we are the Leadership entrusted by our customary traditional laws to uphold and to preserve our most Sacred Ways. We also feel that because of the blatant abuses and exploitations of our most Sacred Ceremonials, that this Earth and its inhabitants are out of balance and would rather resist this endeavor than to favor a stand on preserving our most Sacred Ways. We also at this time humbly and respectfully request of our white brothers and sisters to cease leadership, authoritarian and interpretive roles in our traditional ceremonies.

We request this as we need to restore balance and harmony to our traditional ceremonies and spiritual ways of life.

Moreover this document does not address the participation of non-natives in these ceremonies as actual participants, this is at the discretion of each tribe who have in place already existing traditional laws that address this issue. Each tribe since time immemorial have customary laws that address concerns relevant to this protection endeavor, and respects these traditional laws of each Nation as it pertains to their tribal customs. Our foremost concern is for the leadership and interpretations of our Sacred ceremonials and to maintain and stabilize our ceremonial and cultural integrities of the aforementioned spiritual ways.

We also have made it very clear that this is not a document of hatred or dissention of which its contents efforts have been mistakenly identified, but a very simple plea for the preservation of our most Sacred Ceremonial integrities, which are priceless and irreplaceable. We also understand that some Tribes make concessions allowing for the participation of other Tribes and non natives into their sacred ceremonials, however keeping for their own the cultural and ceremonial integrities, preserved in song and language.

We have also identified and all agreed that our key component in communicating with the Creator, Earth, Sacred beings, Stars, Moons, Seasons, Animals, Sacred Grandfathers and Grandmothers is our Native Language and songs which are priceless and irreplaceable and cannot be

duplicated or fully rationalized by non natives. We believe that the guidance and interpretations of our Sacred Ceremonials belongs to the Traditional Leadership, made possible because of their Spiritual and physical participation in their Tribes Sacred Ceremonials earning this right and having been customarily taught the contents of these aforementioned Ceremonials, thus making it possible to offer the Sacred Ceremonials at the customary required and much needed times.

We come to you seeking remedy and consultation as it is this UNITED STATES OF AMERICA IN SENATE AND CONGRESS ASSEMBLED that guaranteed the protection through it's creation of the AMERICAN INDIAN RELIGIOUS FREEDOM ACT.

"WE THE FOLLOWING NATIONS HAVING MET IN TRADITIONAL COUNCIL UNANIMOUSLY CONCUR THAT THE EXISTANCE OF OUR PEOPLE AND SACRED WAYS DEPENDS ON THE DEPTH OF OUR AWARENESS ABOUT THE EXPLOITATION OF OUR CULTURE. OUR CONCERN FOR THE FUTURE GENERATIONS AND OUR SUPPORT FOR ONE ANOTHER CAN BE BENIFICIAL TO ALL OUR PEOPLES BY HOW WELL WE SUPPORT ONE OTHER" WE CONCUR ON THIS ENDEAVER TO PROTECT AND PRESERVE OUR CEREMONIAL AND CULTURAL INTEGRETIES AND THE WAYS OF OUR GRANDFATHERS FOR OUR GRANDCHILDREN AND FUTURE GENERATIONS.