TESTIMONY BEFORE
THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS

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Good morning, Mr. Chairman and members of the Committee. Thank you for the opportunity to offer testimony at this oversight hearing on the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3001 *et. seq.* I am pleased to assist the Committee in examining the impact of *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004) upon NAGPRA and national efforts to implement that Act.

I am familiar with the issues in today's hearing based upon my work on repatriation issues as a Native American Rights Fund ("NARF") staff attorney since 1986. I participated in the Panel for a National Dialogue on Museum/Native American Relations (Dialogue Panel) referenced in Professor Bender's testimony. I worked with the Committee in 1989 and 1990 to develop the NAGPRA legislation on behalf of Native clients. Shortly after the passage of NAGPRA, I co-authored a law review article to memorialize the Act's legislative history.[1] I have participated in the implementation of NAGPRA over the years by representing Indian tribes in NAGPRA claims for the repatriation and reburial of Native American dead. I participated in the *Bonnichsen* case as counsel for *amici curiae* to protect the integrity of NAGPRA and ensure a proper interpretation of the Act. As a result of the foregoing work, I am aware of the impact of the Ninth Circuit's decision on NAGPRA.

Today, I represent the Working Group on Culturally Unidentified Human Remains ("Working Group"). The Working Group is composed of prominent Native American leaders

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

who are experienced in repatriation issues and concerned about the proper interpretation and implementation of the provisions of NAGPRA which pertain to the classification, treatment and disposition of unknown Native American dead (i.e., that category of human remains who are currently listed as not having any known descendants or cultural affiliation).[2] The sections of NAGPRA which pertain to unknown Native American dead are 25 U.S.C. §§3006(c)(5)-(6) and (g)(directing the NAGPRA Review Committee to compile an inventory of these dead in the possession of museums and federal agencies and make recommendations for specific actions for developing a process for their disposition, to be done in consultation with Indian tribes and Native Hawaiians), 3002 (a)(2)(C) (vesting ownership and control of such dead discovered on federal or tribal lands in the Tribe who aboriginally occupied the land where the remains were discovered.) The *Bonnichsen* decision would nullify these provisions and render them meaningless, since under its rationale those dead which by definition are not culturally affiliated with any current Indian tribe are not "Native American" for purposes of NAGPRA nor subject to any of its provisions.

My testimony addresses the impact of the *Bonnechin* decision on the (1) NAGPRA statute, (2) intent of Congress, and (3) national NAGRPA implementation efforts; and, finally, I will (4) recommend the need for legislation to correct the inappropriate restrictions which the *Bonnechin* decision improperly places upon NAGPRA's operation.

A. <u>*Bonnichsen* incorrectly narrowed the scope of NAGPRA.</u>

I agree with Professor Benders' legal analysis of *Bonnichsen* and it's impact upon the NAGPRA statute. I adopt his excellent analysis and recommendations and will not repeat them

[2] Working Group members include: Wallace Coffee, Chairman, Comanche Tribe; Mervin Wright, Jr., Pyramid Lake Paiute Tribe; Peter Jemison, Seneca Nation NAGPRA Representative; James Riding In, historian and repatriation consultant to the Pawnee Nation; Suzan Harjo, President, Morningstar Institute; Ho'oipokalaena 'auao Nakea Pa, Chairwoman, Native American Rights Fund; Kunani Nihipali, Hui Malama.

here. Let me add two points to further demonstrate that the Court's interpretation of NAGPRA is erroneous.

First, when considering the correctness of the decision, it is telling that no legislative history is cited to support the Ninth Circuit's restrictive interpretation of NAGPRA's definition of "Native American" in 25 U.S.C. §3001(9).[3] Indeed, *there is no legislative history* concerning that definition because it was not considered controversial. Everyone who worked on the bill, including myself, logically assumed that all pre-Columbian remains indigenous to the United States are "Native American" and would be covered by the Act regardless of their age or whether they can be culturally affiliated. That is why many provisions in the Act, listed above, *expressly pertain* to the classification, inventory and disposition of such remains. It is also telling that the Secretary of the Interior's regulations that implement NAGRPA interpret the scope of the Act in the same manner. *See,* 43 C.F.R. §10.2(d); *Bonnichsen,* 357 F.3d at 974-975.[4] Quite simply, at the time of the making of NAGPRA no one discussed or envisioned the threshold finding for "Native American" coverage espoused by the Ninth Circuit some 14 years later.

Second, *Bonnechin* creates disparate statutory coverage between Native Hawaiian and Native American remains, which was not intended by Congress. While the Court imposed a threshold finding "that human remains bear a significant relationship to a *presently existing* tribe, people, or culture to be considered 'Native American,'" (357 F.3d at 975), it recognized that no

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[3] This section reads: "'Native American' means of, or relating to, a tribe, people, or culture that is indigenous to the United States."

[4] And, of course, that interpretation comports with the United States' position in the *Bonnichsen* case. Furthermore, the Secretary's interpretation of the NAGPRA's definition of "Native American" was correctly supported by the Society of American Anthropology (SAA). *See*, SAA *amicus curiae* brief submitted to the district court in *Bonnichsen*, pp. 4-9 (Attached hereto).

such requirement is made for "Native Hawaiian" coverage, because the Act defines "Native Hawaiians" with different language using geographic criteria. The Court stated:

> Our analysis is strengthened by contrasting the statutory definition of the adjective "Native American" to the statutory definition of the noun "Native Hawaiian." Under §3001(9), "'Native American' means of, or relating to, a tribe, people or culture that is indigenous *to the United States.*" (Emphasis added). Under §3001(10), "'Native Hawaiian' means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty *in the area that now constitutes the State of Hawaii.*" (Emphasis added).
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> The "United States" is a political entity that dates back to 1789. (citation omitted) This term supports that Congress's use of the present tense ("that is indigenous") referred to tribes, peoples and cultures that exit in modern times, not to those who may have existed thousands of years ago but who do not exist now. By contrast, when Congress chose to harken back to earlier times, it described a geographic location ("the area that now constitutes the State of Hawaii") rather than a political entity ("the United States").

357 F.3d at 976 (underline supplied). Congress did not intend disparate coverage for the two groups. There is no rational reason why Native Hawaiians have broader statutory coverage than Native Americans in the law, yet this troubling disparate treatment gave no pause to the Court.

B. Impact of *Bonnichsen* upon NAGPRA implementation efforts.

The Court's narrow and erroneous interpretation has adverse impacts in three major respects upon NAGRPA and its implementation.

First, the holding drastically limits the coverage of NAGPRA by excluding an entire category of more than 100,000 human remains who are indigenous to and discovered in the United States.[5] These unknown American Indian dead, who were inventoried under the provisions of NAGPRA, are not subject to the provisions of NAGPRA according to the

[5] As of June 30, 2005, the database (which is about 95% complete) compiled by the National Repatriation Office (U.S. Dept. Interior) currently lists more than 108,247 Native American dead as not having any identified descendents or known cultural affiliation based upon the NAGPRA inventories submitted by museums and federal agencies. My clients suspect that an inordinately high number of these remains were classified by museums and agencies as being unidentifiable given the inclination of the scientific community to rely upon inordinately high standards of certainty that is the norm in scientific research, rather than a simple preponderance of the available evidence which is the standard set forth in NAPGRA for making cultural affiliation determinations. As discussed

Bonnichsen holding. Yet, according to scientists, museums and tribal representatives the Working Group has talked with, the cultural affiliation of many of these unknown dead could likely be identified upon consultation between museums and Indian tribes. However, that opportunity may never arise if those dead are excluded from the consultation and other provisions of NAGPRA.

Without NAGPRA coverage, museums and agencies are free to make unilateral determinations affecting the classification, treatment and disposition of these dead without any consultation with Indian tribes. NAGPRA sought to remedy that precise human rights problem which too often arose in pre-NAGPRA days when scientists and museums ignored tribal inquiries and requests or, worse yet, barred tribal access to their records, such as that experienced in several NARF cases which I handled. *See, e.g.*, Robert M. Peregoy, "The Legal Basis, Legislative History, and Implementation of Nebraska's Landmark Reburial Legislation," 24 Az. L. Rev. 329 (1992) at 358-359, 374-377.

Second, the decision nullifies or renders several important provisions of NAGPRA meaningless, causing internal inconsistencies within the statute. Those provisions are referenced below.

> 1. 25 U.S.C. §3005 (and related provisions) require the repatriation of any human remains where tribal claimants can prove their cultural affiliation with the remains by a preponderance of the evidence. Under *Bonnichsen*, to trigger the Act there must be a threshold "finding that remains have a significant relationship to a presently existing tribe, people, or culture" before remains can be considered "Native American" and subject to NAGPRA. 357 F.3d at 974. That showing of affiliation renders Section 3005 superfluous.
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> 2. 25 U.S.C. §3002(2)(C)(1)-(2) vests the ownership and control of human remains discovered on federal land whose cultural affiliation "cannot be reasonably ascertained" in the tribe who aboriginally occupied the land where the remains were discovered.

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elsewhere in my testimony, many of these dead can be culturally affiliated upon further consultation with Indian tribes.

These provisions are nullified if such remains are not covered by NAGPRA in the first instance, as held in *Bonnichsen.*

3. 25 U.S.C. §§3006(c)(5)-(6) and (g) direct the NAGPRA Review Committee to compile an inventory of unknown Indian dead in the possession of museums and federal agencies and make recommendations for specific actions for developing a process for their disposition, to be done in consultation with Indian tribes. These provisions are nullified if such remains are not "Native American" under the *Bonnichsen* rationale, since they would not be subject to NAGPRA.

In short, the Ninth Circuit abrogated statutory provisions that afford important rights to Native Americans. Abrogation of Indian rights is sadly familiar in the history of our Nation. But fortunately, it is within the power of this Committee to ensure that Native American human rights measures enacted by Congress are not abrogated by other branches of the federal government.

Third, Americans Indians will, once again, be excluded from participating in museum and agency deliberations and processes regarding the disposition and treatment of the dead Indians who are excluded from coverage. As explained by Professor Bender, that was one of the primary problems which the consultation provisions NAGPRA sought to remedy. Yet the decision serves to exclude Native Americans from participating in museum and agency processes regarding the disposition of more than 100,000 Native American dead who are indigenous to the United States. As such, *Bonnichsen* frustrates Congress' statutory objectives and is at odds with the Secretary of the Interior's regulations implementing the legislation.

C. Conclusions and recommendation for legislative action now.

I firmly believe that legislation is necessary to correct the Ninth Circuit's erroneous interpretation of NAGPRA's definition of "Native American" (25 U.S.C. §3001(9)) and effectuate the intent of Congress. Professor Bender's proposals for legislative language in that respect are sound. This does not mean that all ancient Native Americans remains that are

indigenous to the United States will automatically be repatriated, because claimants still must prove their cultural affiliation by a preponderance of the evidence in accordance with the procedures and standards set forth in the statute. Nor do I appear today with the intent to overturn the particular outcome in the *Bonnichsen* case (based upon the district court's finding that the claimants failed to prove their cultural affiliation to the so-called "Kennewick Man") but merely to advocate corrective legislation necessary to guide national NAGPRA implementation efforts along the path set by Congress in 1990.

The NAGPRA coverage problem created by the *Bonnichsen* decision is not new to the Committee. This is the second oversight hearing in which the problem has been brought to the Committee's attention, along with legislative recommendations. *See*, Oversight Hearing on the American Indian Religious Freedom Act (June 14, 2004) (witnesses were asked to provide testimony on how federal repatriation laws were being implemented and interpreted and to make recommendations for technical corrections and clarification). Two amendments were introduced in the past 9 months following the 2004 Hearing, but did not move very far.

At this time, I respectfully urge the Committee to continue its work on this important issue that affects the implementation of an important human rights law by developing and passing a short, narrowly tailored bill to amend NAGPRA's definition of "Native American." Such a bill could employ the simple language proposed by Professor Bender, similar to the two amendments introduced within the past 9 months. I offer my assistance in such an effort; and I respectfully submit that there is no need for any further delay.

Thank you for this opportunity to submit testimony. I am available to answer questions at this time.

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