

STATEMENT OF PAUL HOFFMAN, DEPUTY ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR, BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS CONCERNING THE OVERSIGHT OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT.

July 28, 2005

Mr. Chairman, thank you for the opportunity to appear before you today to discuss the Department of the Interior's views on the Native American Graves Protection and Repatriation Act (NAGPRA) specifically, the United States Court of Appeals for the Ninth Circuit decision in *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004) and the proposed amendment to the definition of "Native American" under the Act. The Department of the Interior does not support the proposed amendment.

BACKGROUND

NAGPRA was enacted on November 16, 1990 to address the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. In 1990 the Congressional Budget Office estimated that NAGPRA would apply to the remains of between 100,000 and 200,000 individuals in museum and Federal agency collections. In the last 15 years, museums and Federal agencies have announced their willingness to repatriate the remains of 31,093 individuals. Another 111,000 human remains were listed as "culturally unidentifiable."

NAGPRA assigned several implementation responsibilities to the Secretary of the Interior, including:

- Promulgating implementing regulations;
- Establishing and providing staff support to the Native American Graves Protection and Repatriation Review Committee;
- Making grants to assist museums, Indian tribes, and Native Hawaiian organizations in fulfilling their responsibilities under the Act;
- Extending inventory deadlines for museums that demonstrate a good faith effort;
- Publishing notices for museums and Federal agencies in the Federal Register;
- Assessing civil penalties on museums that fail to comply with provisions of the Act; and
- Responding to notices of inadvertent discoveries of Native American cultural items on Department of the Interior lands.

BONNICHSEN V. UNITED STATES

In 2004, the United States Court of Appeals for the Ninth Circuit rendered a decision in the case *Bonnichsen v. United States*. At issue was whether skeletal remains found on Federal land near Kennewick, Washington were “Native American” within the meaning of the NAGPRA. In accord with an interagency agreement with the U.S. Army Corps of Engineers, the Department of the Interior determined that the human remains met the definition of “Native American” because they predated the arrival of Europeans to the

United States. The District Court and Court of Appeals for the Ninth Circuit rejected this determination. The Court held that for remains to be deemed “Native American” there must be a general finding that the remains have a significant relationship to a presently existing tribe, people, or culture and that the relationship must go “beyond features common to all humanity.” The Court felt that the lack of some relationship to a tribe would render the definition meaningless because any remains found within the continental United States would be considered “Native American.” Or, as the Court stated, any contrary interpretation would mean that the finding of “any remains in the United States in and of itself would automatically render these remains ‘Native American’.” The Court stated that the congressional intent was “to give American Indians control over the remains of their genetic and cultural forbearers, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture.”

Following the Ninth Circuit ruling, Congress during the 108th Congress and again during this Congress proposed a change to the definition of “Native American” under NAGPRA. The proposed amendment would amend the definition of “Native American” by adding “or was” after “is.” The term “Native American” would mean of, or relating to, a tribe, people, or culture that is or was indigenous to any geographic area that is now located within the boundaries of the United States. With this amendment, for remains to be “Native American” there would still have to be a general finding that remains have a significant relationship to a tribe, people, or culture indigenous to the United States, whether the tribe, people, or indigenous culture presently exists; that is, there would not

need to be a general finding that the remains have a significant relationship to *a presently existing* tribe, people, or culture. Therefore, remains found within the United States that predate European settlement might be considered Native American as long as they have a significant relationship to a tribe, people or culture indigenous to the United States rather than being limited to those remains that have a significant relationship to a present day tribe, people, or culture.

As stated above, the Department of the Interior does not support the amendment to NAGPRA. The proposed change to the definition of “Native American” would broaden the scope of what remains would be covered under NAGPRA from the Court’s decision in *Bonnichsen* that the remains must have a significant relationship to a presently existing tribe, people, or culture in order to be considered “Native American”. As previously stated, in *Bonnichsen* the Ninth Circuit concluded that congressional intent was “to give American Indians control over the remains of their genetic and cultural forbearers, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture.” We believe that NAGPRA should protect the sensibilities of currently existing tribes, cultures, and people while balancing the need to learn about past cultures and customs. In the situation where remains are not significantly related to any existing tribe, people, or culture they should be available for appropriate scientific analysis. The proposed legislation would shift away from this balance.

Mr. Chairman, this concludes my prepared statement. I would be happy to answer any questions the committee might have.