



SOCIETY FOR AMERICAN ARCHAEOLOGY

June 29, 2011

The Honorable Daniel Akaka
Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Akaka:

Thank you for holding the hearing, "Finding Our Way Home: Achieving the Policy Goals of NAGPRA." Implementation of the Native American Graves Protection and Repatriation Act is a very important issue for the Society for American Archaeology (SAA), which represents some 6,800 members who work in a range of settings, from academia to tribal governments. As an active supporter of the idea, passage and implementation of NAGPRA, and as one of the key organizations involved in drafting the original regulations, the SAA welcomes the opportunity to provide testimony on recent developments in the legislation that affect our members. Since passage of NAGPRA, the SAA has seen a considerable expansion of institutional and tribal collaborations as a direct outcome. This collaborative work continues to be a growing strength in archaeological investigations in the United States. NAGPRA has encouraged active engagement among institutions, agencies, Native American tribes and Native Hawaiian organizations through consultation as outlined in the regulations. The regulations have led to the development of relationships of trust and mutual understanding of the law.

Our understanding of this hearing's purpose is that it will address issues that have emerged resulting from the recent Government Accountability Office reports on NAGPRA (GAO-10-768 July 28, 2010) and the Smithsonian Institution/NMAI (GAO-11-515 May 25, 2011), and implementation of the final regulations on the Disposition of Culturally Unidentifiable Native American Human Remains (43 CFR 10.11). The SAA respectfully submits the following points of concern on these issues. We also note that the Society has provided detailed responses to the DOI (letter dated June 29, 2011) in response to their request for comments on the overall NAGPRA process. We have attached a copy of that letter for your reference. In particular we note that in these new regulations there are no contingencies under which a museum could hold culturally unaffiliated human remains, an oversight which we believe is in neither the public interest nor the interest of all stakeholders concerned.

- 1) We would like to express concerns about DOI's response to federal, tribal, and public comments on the draft regulations of 43 CFR 10.11 that were submitted prior to the implementation of the final regulations in May 2010. While many comments were addressed in the published notice, very few appear to have had significant impact on the development of the regulations from their draft to final form. Additional written comments were solicited immediately prior to the implementation of the final regulations with assurances given by representatives of the National NAGPRA office that these comments would be used for future revisions and/or amendments to 43 FCR 10.11. Given the upcoming discretionary review of the full NAGPRA regulations, will

these additional written comments be revisited as well? This issue is critical one for the Society and its membership because many points of this section of the regulations remain unclear, inconsistent with the original NAGPRA regulations, and potentially harmful to the positive relationships that have developed among Indian tribes, Native Hawaiian organizations, museums, and Federal agencies over the past 20 years.

- 2) Funding in the form of NAGPRA grants has not increased in proportion with the increase in compliance and disposition activities required to implement 43 CFR 10 and particularly the new requirements of 43 CFR 10.11. Both tribes and institutions face an increased financial burden in conducting consultation, background study, and other associated activities. The GAO report supports our concern with funding shortfalls. For example, on page 28 of the GAO Report on NAGPRA, all Federal agencies identify lack of funding as the primary obstacle to compliance efforts. The U.S. Fish and Wildlife Service alone estimated that “it would cost \$35 million and take 28 years to properly review all of [their] collections for NAGPRA items.” Compliance requires qualified individuals, suitable facilities for maintaining inventoried human remains and cultural items, time to engage in thorough consultation efforts, and resources for the processes of repatriation and disposition. All of these activities require substantial funding. The Society recognizes the significance of the comments of Senator Murkowski during the hearing regarding best practices and agrees that there are ways that the overall process could be streamlined for museums as well as Federal agencies to facilitate compliance, but funding will still be necessary. NAGPRA grants are an important source for compliance efforts for tribes and museums, and the Society urges substantially increased funding for this vital program.
- 3) We are also strongly committed to the continuation of scientific investigations of archaeological objects and skeletal remains that help illuminate cultural affiliation, past lifeways, or other important topics. NAGPRA seeks to balance the rights of Native communities to reclaim remains of their ancestors with the public interest in preserving, documenting and understanding our shared past. But these interests often overlap, and the Society would like to draw the Senate's attention to the importance of preservation of evidence of the past by museums, and the value of scientific investigations--when agreeable to all stakeholders concerned--in helping understand the past and advance the interests of Native communities, scholarly communities, and the general public alike.
- 4) GAO review of NAGPRA also examined the National NAGPRA Review Committee. The report identified concerns about inappropriate actions of the National NAGPRA Program in the appointment process of Review Committee members. In addition, the report notes that past appointees were unaware of how the appointments were made subsequent to the submission of nominees (GAO-10-768 July 28, 2010, Page 48). The Society agrees with the GAO report findings that the actions of the National NAGPRA Program and the lack of transparency in the appointment process undermines the confidence of those who would use the Review Committee to facilitate dispute resolutions and for findings of fact. It is important that the appointments be made with the goal of providing a balanced panel of individuals representing all concerned parties. The Society would ask what measures will be taken in order to ensure a balanced process?
- 5) The Society would like to draw attention to two key issues of concern pertaining to the Review Committee's approach to the facilitation of disputes and findings of fact.

The fairness of the process. There is a wide perception that certain types of evidence and

those who present them are not given equal treatment or value by the Committee. Representatives from both institutions and tribes perceive imbalances in time and attention accorded each side in disputes.

The weight given to the findings and recommendations of the Review Committee.

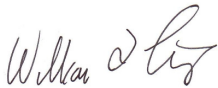
Misunderstandings and frustrations abound regarding how parties should interpret and act on the findings and recommendations of the Review Committee. The law is explicit that the committee's decisions do not carry the weight of legal decisions and are strictly recommendations. Increasingly, however, those approaching the Review Committee for findings and recommendations either misinterpret the weight of findings and recommendations as carrying the weight of legal decisions or, conversely, want the Committee to be empowered to make findings that have the weight of legal decisions.

Overall, there is a lack of clarity on how the deliberations of the Committee are undertaken, and how parties who seek the guidance of the committee should respond to the Committee's findings and recommendations. The SAA asks what can be done to make the process more transparent, in order to ensure that those requiring the use of the Committee as a neutral party in the facilitation of disputes and findings of fact can do so with the confidence that the process requires?

In closing, the SAA wishes to underscore the continued need for maintaining consistency of process and balance in consultative relationships that have emerged in the implementation of NAGPRA. The concerns expressed reflect issues that pose potential hardships to all parties under the process outlined by the recent changes to NAGPRA and challenges to the continued success of achieving the policy goals originally established.

Thank you very much for your time and consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "William F. Limp".

William F. Limp, Ph.D.
President