

Mr. MINTHORN. I would concur that 8 years is enough time. There should not be any more extensions.

It is true the words that I have heard from my older ones. When traditions are followed, the right things will happen. These museums and universities and Federal agencies hold objects that are part of our traditions and our way of life.

Thank you.

Mr. GOUGH. Senator, I would just say that the materials that we have discussed here today on behalf of the estate were lost after the expiration of the first deadline—after that 5 year time period. What has happened in the last 3 or 4 years—how much else has been lost that we may never be able to retrieve — we cannot even give you an answer. We do not know how much more will be lost with further extensions. That is impossible to say.

Mr. STEVENS. On the technical parts of that, I agree. But I would like to emphasize the pain and suffering in the example I have given you that has directly affected my family regarding this. I think that the pain and suffering continues.

As I assert patience and understanding and assertiveness in this process, I think it has to be within reason. So I think that is more than enough time, if you consider that our ancestors continue to struggle while we do not finalize this process.

Senator INOUE. Gentlemen, once again, I thank all of you for your testimony. I give you my assurance, as a member of this committee, that your recommendations will be placed in the hands of the committee and we will fully consider every one of them.

Thank you very much.

Senator INOUE. Our final panel consists of the President of the Society for American Archaeology of Washington, DC, Professor Keith Kintigh; and the President and Chief Executive Office of Bishop Museum, Honolulu, on behalf of the American Association of Museums, Washington, DC, Donald Duckworth.

Professor Kintigh, welcome, sir.

STATEMENT OF KEITH KINTIGH, PRESIDENT, SOCIETY FOR AMERICAN ARCHAEOLOGY, WASHINGTON, DC

Mr. KINTIGH. Thank you very much.

Senator Inouye, the Society for American Archaeology thanks the committee for this opportunity to comment. SAA is the leading organization of professional archaeologists in the United States. In 1990, the SAA led the scientific community in working on NAGPRA and helped form a coalition of scientific organizations and Native American groups that strongly supported NAGPRA's enactment. We have always urged our members to work toward its effective implementation.

Joining us in this testimony is the American Association of Physical Anthropologists, the leading organization of physical anthropologists in this country, which also supported the passage of NAGPRA.

Senator 9 years ago I stood before this committee to present SAA's testimony on S. 1980, the bill that became NAGPRA. Looking back, I agree with you that the act is largely working, although problems remain. But I think the committee can be proud of what NAGPRA has accomplished. As you mentioned, hundreds of sum-

maries and inventories have been submitted to the tribes, repatriation occurs on a regular basis, and consultation has led to improved understandings among tribal people, museum personnel, and scientists.

However, in the interest of improving the implementation of NAGPRA, we introduce four issues.

First, coordination of the NAGPRA functions by the Departmental Consulting Archaeologist. The Secretary of the Interior delegates responsibility for NAGPRA coordination to the Departmental Consulting Archaeologist, or DCA, who manages the National Park Service's Archaeology and Ethnography Program. For the following reasons we believe that moving this administrative function to a different office would impede rather than enhance the implementation of NAGPRA:

Transfer of NAGPRA coordination functions would require a new, expensive, and redundant administrative unit.

No other administrative unit has the expertise necessary to coordinate NAGPRA. The Archaeology and Ethnography Program has coordinated NAGPRA for 9 years and only the DCA is in a position to articulate NAGPRA with other historic preservation law. And this is becoming increasingly important as the section 3 provisions of NAGPRA—those having to do with inadvertent discoveries and intentional excavations, mostly associated with development on Federal land—are becoming more and more a deep concern to Indian people, especially in the West.

The most serious complaints about NAGPRA coordination result from inadequate funding, as we have heard, not from administrative location. A move in itself will not solve the funding problem. There is just a lot of work that needs to be done.

Contrary to common belief, the Archaeology and Ethnography Program does not determine cultural affiliation. They do not do that even for National Park Service collections. Those determinations are made by the units that actually hold the collections.

I agree with Judge Hutt that allegations that the NAGPRA grant program is unfairly administered are just unfounded and the statistics, I believe, show that.

The NAGPRA review committee has not recommended movement of the NAGPRA functions but has worked with the National Park Service Archaeology and Ethnography Program.

Finally, while Native American groups argue that their interests are not adequately considered, within the scientific community, there is a widespread belief that it is in fact scientific interests that are routinely ignored. But I think together we have to recognize that NAGPRA was a legislative compromise intended to balance legitimate traditional Native American concerns with the scientific community and the broader public interest in our shared American heritage. I think the Departmental of Consulting Archaeologist and his staff have consistently attempted to fairly maintain that balance.

The second issue is that of Federal agency compliance. SAA and AAPA join the review committee, tribes, and museums in expressing dismay about the lack of compliance by some Federal agencies. Most obvious is the failure of some agencies to complete inventories. Where they are made, however, agency determinations of

cultural affiliation are often made without adequate tribal consultation and also without adequate efforts to compile and adequately weigh scientific or traditional knowledge. We ask Congress to employ the means at its disposal to induce or compel agency compliance. While new appropriations are badly needed, punitive measures may also be required.

The third issue is extensions for museums to complete inventories. Interior is apparently planning to arbitrarily deny requests by six museums with very large collections that have asked for extensions to complete their inventories. Where museums have made good faith efforts to comply with the law, denial of extensions is contrary to the objectives of NAGPRA and I believe will place a heavier burden on the tribes to achieve the repatriation that would be just.

The fourth issue is the interpretation of cultural affiliation. Cultural affiliation is a cornerstone of NAGPRA because it provides legitimacy for most repatriation claims. A critical problem is the expansion, in practice, of the statutory definition of cultural affiliation beyond any legally defensible limits. While the law requires evidence demonstrating cultural affiliation, frequently little or no evidence is presented. Procedural shortcuts and distortions of the definitions have already led to problems such as that of the Kennewick Man and have the potential to lead to many more problems, disputes, and ultimately, lawsuits.

In conclusion, we offer five recommendations:

The overwhelming obstacle to the effective implementation of NAGPRA is the lack of funding for ongoing tribal programs, for museum programs which continue as well apart from the inventory process, and for agency repatriation programs. These are all ongoing funding problems that will remain into the foreseeable future.

The committee should discourage the transfer of NAGPRA coordination from the Archaeology and Ethnography Program and move to increase that program's funding.

The committee should forcefully work to bring Federal agencies into compliance with the law.

The committee should encourage the Department of the Interior to reconsider requests for inventory extensions based on a case-by-case evaluation of each museum's efforts to see if they have been in fact in good faith.

Finally, we ask the committee to strive to improve agency and museum adherence to the letter and the spirit of NAGPRA, particularly in making their determinations of cultural affiliation.

We thank you for your consideration and stand ready to work with your committee or other groups within Congress or Native American groups on any amendments that you feel may be required.

Thank you.

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

Senator INOUE. Thank you very much, professor.

Mr. Duckworth.

STATEMENT OF W. DONALD DUCKWORTH, PRESIDENT AND CEO, BISHOP MUSEUM, HONOLULU, ON BEHALF OF THE AMERICAN ASSOCIATION OF MUSEUMS, WASHINGTON, DC

Mr. DUCKWORTH. Vice Chairman Inouye, it is a pleasure to appear before you in any capacity. In this particular instance, I am honored to be here as President and CEO of Bishop Museum, as you well know, a Hawaii-based not for profit corporation, which includes the Bernice Pauahi Bishop Museum, which is Hawaii's State Museum of Natural and Cultural History. I am presenting testimony on behalf of that institution and on behalf of the American Association of Museums, for which I serve on the Board of Directors.

I have submitted my longer written testimony for the record.

The Bishop Museum is committed to repatriation, as it has been since 1990 when a representative of the institution, Dr. Elizabeth Tatar testified before this committee on behalf of Bishop Museum in favor of the passage of what we now know as the NAGPRA Act.

I would like to comment briefly on our experiences over the past 9 years as we have worked very hard to implement both the letter and the spirit of the law. I would also comment very briefly on the national situation for museums with respect to the law and the activities associated with it.

Since the passage of NAGPRA in 1990, Bishop Museum has repatriated 4,252 Native Hawaiian human remains and funerary objects. This number, the result of NAGPRA-mandated inventories, is nearly double what we were able to estimate as our holdings when we testified in 1990, and they represent all the Native human remains and funerary objects that were retained in our collections by the museum. These inventories were carried out in consultation with Native Hawaiian organizations and verified by Native Hawaiian claimants as part of the repatriation process.

We are pleased to report that we have completed the repatriation under the law of all Native Hawaiian human remains and funerary objects.

In 1990, we estimated the cost of repatriation to be roughly \$388,000. The actual costs are expected to reach \$1 million, most of which have been for personnel costs, including consultation. About 64 percent of the cost has been provided from museum operating funds, the remainder from other various sources, contracts and otherwise.

Before and after the U.S. Navy contracted inventory—which was for a portion of our holdings which were not our property, but held for the U.S. Government, Department of Navy—the process for every inventory, including consultation and repatriation, has been carried out without incident and to the satisfaction of all involved. The number of consultations increased in time to include more members of Hawaiian organizations, elders, and families.

The relationship of the museum to these organizations did and has indeed improved as we had hoped it would at the outset. In some cases, claimants have grown to understand and appreciate the role of the museum as a caretaker and have indeed—after taking the materials repatriated—lent them back to the museum for safekeeping or in some instances withdrawn their initial claims.

The sense of responsibility for all Hawaiian collections items in the museum has clearly grown among these consultant groups.

In addition, as a result of the consultations, the museum has created a special secure area with restricted access that serves as both a storage and a ceremonial area for what Native Hawaiians consider sacred objects, including objects of cultural patrimony.

We would like to emphasize that consultations between Native Hawaiian organizations and the museum have brought about a deep sense of mutual respect, trust, and willingness to resolve issues related to the implementation of the Act, as well as issues that reach outside the jurisdiction of the Act. This relationship took a long time and lot of hard work on the part of all involved to establish and extend. It is very important that the agreements reached by Native peoples and museums be honored and supported in the spirit of the law and that the letter of the law be fulfilled with this spirit.

I would also like to briefly comment on implementation of NAGPRA from the national perspective in relation to museums.

The American Association of Museums represents a broad range of institutions with more than 16,000 members, of which about 11,000 are museum paid staff or volunteers and about 3,000 museums.

In 1994, the American Association of Museums did a survey of 500 of its member institutions, including all of its natural history museums and a selected sample of its art and history museums. Those respondents—a little more than 200—these alone had almost 3.5 million objects which fell under the jurisdiction of NAGPRA and the various NAGPRA categories.

In addition, in October 1990, at the time of passage of NAGPRA, the Congressional Budget Office had estimated NAGPRA implementation to cost museums roughly \$40 million and to tribes and Native organizations \$5 million to \$10 million over 5 years. It would appear now, based on our own experience as well as that of many other institutions—some of which have been alluded to here today—that these estimates are very low and additional resources should be appropriated in order to facilitate the ongoing endeavor.

While the situation with respect to repatriation differs very broadly across the museum community, the data we have indicates that the experience of the Bishop Museum, with many more repatriable items than it could initially estimate, with much higher costs to follow the procedures of NAGPRA than originally anticipated—and in our case most of which we have had to bear from our own limited resources—and with the importance and value of collaboration with Native Americans and Native Hawaiians is in important respects representative of the experience of museums nationally and across the country with the repatriation process.

Before closing, I would like to briefly comment on concerns raised about the appropriateness of continuing to administer the law at the Archaeology and Ethnography Program of the National Park Service.

I can speak only from the experience we have had with the National Park Service at the Bishop Museum and what I know of the experience of other museums in discussing it with colleagues at other institutions. That experience has been generally favorable.

Museums have a general sense that the National Park Service has striven to be evenhanded with all parties to the law. We have not always agreed, but we have felt in our dealings that every effort was being made on their part to provide support for and understanding of the extreme complexity of many of the issues with which we have had to deal.

Thus, if the committee were to consider moving the administration of the law, I am sure that we and other museums would want to be sure that such a step did not proceed without some reasonable assurance that there would be at least equal understanding in a new administrator of the complexities of the law and regulations and of the spirit of cooperation and balance of interests that surrounds the law and regulations.

I am indeed grateful, on behalf of my institution and on behalf of the American Association of Museums, to have this opportunity to appear before you today. I would be more than happy to respond to any questions you may have.

Thank you, and aloha.

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

Senator INOUE. I thank you very much, Dr. Duckworth.

If I may ask general questions for both of you, Is it necessary to define the word sacred so that it would be administratively and legally enforceable and understandable by most of us?

Mr. KINTIGH. Senator Inouye, my answer parallels yours, that it is an issue that in 1990 we dealt with. I know the tribal people working on the law dealt with it. It has been very difficult. I am certainly prepared to try—if that is felt to be needed—to work on that some more. As Dr. Worl indicated, she thought that exactly how you do that is not clear.

It certainly has led to problems. I more than agree that alternative world views need to be brought into account, that that is not meant to be a western sense of sacred, that that was not the intent of the law. I do not think it should be interpreted that way. I think the definition attempted to convey that. If that definition is not successfully conveying that, then maybe we do need to work on it.

Mr. DUCKWORTH. In essence, I concur. I think to the extent possible obviously the implementation of the law and the spirit of that implementation is facilitated by a clearer definition. However, the challenge of clarifying the definition so that it spreads over such an enormous array of cultures and circumstances is indeed a challenge.

Senator INOUE. As you know, we have had many instances where museums and archaeologists have disagreed with leaders in Indian country as to whether an item was sacred or was not sacred. This has been one of the major causes of contention between the two communities.

In bringing about a definition, how would you propose we do it? Do you have any ideas? Should we call upon Indian leaders to decide what sacred is? Or should we call upon you people? Or should you leave it up to us? [Laughter.]

Mr. KINTIGH. With all due respect, I probably would not leave it up to the Congress. I would suggest a joint effort to maintain that balance that is in NAGPRA. I would suggest a small group—as small a group as can reasonably represent the diversity—but a

group of people who can sit down and truly talk to one another and try to understand each other's position and come to some better achievement. That would be my best recommendation.

Senator INOUE. I would like to alert all of you that I believe that this is a good recommendation to bring about some definition of sacred. So I would suggest that the archaeologists start thinking, that about three or four of your eminent scientists and museum people do the same, and that Indian country get together and call upon your best minds because time is of the essence. We do not want to bring this about 10 years from now.

You have suggested that the National Park Service and the Archaeology and Ethnography Program is the proper place for the responsible administration of this program or the coordination of activities. On the other hand, testimony from Indian country shows otherwise.

That in and of itself would suggest to me that there must be some conflict. Do you believe that placing this in the hands of the ethnology and archaeology division of Interior or the National Park Service creates a conflict of interest or the appearances of a conflict of interest, Professor?

Mr. KINTIGH. No, sir; I do not. I think that some of the problems are from a lack of understanding about exactly what they do. I think there is a widespread sense that in fact the program is making determinations on cultural affiliation. In fact, as Judge Hutt pointed out, what they do is publish the notices. They are enjoined from even changing in any substantial way the content of those.

I think just as very often tribal cultural preservation programs deal simultaneously with other kinds of historic preservation laws that are affecting ancestral sites and so forth also deal with NAGPRA—that is also the office within the National Park Service that deals with the Archaeological Resources Protection Act, with the National Historic Preservation Act, and other preservation law. I think it makes an awful lot of sense and they have a lot of experience. I think they have been sensitive. Within the staff there are diverse personalities and people with diverse expertise and I think they have attempted to try to achieve a balance within the office of interest and to try as best they can—but probably as best as anyone could—to fairly put those together.

Mr. DUCKWORTH. As I indicated, Senator, from the museum's perspective—and we have not surveyed broadly on this question that has been fairly recently posed for us—I commented primarily from our experience at Bishop Museum. Even though one of the groups with whom we work very, very closely, Hui Malama I Na Kupuna o Hawai'i Nei, were mentioned as having put forth a resolution, our belief is that efforts have been made within the framework of the original law and its intent that the Park Service administered it to the best of their ability.

And while we have not agreed with all of the actions that have occurred and we certainly would like the processing of NAGPRA claims and the inventory and the publishing aspect, which is badly behind, caught up and facilitated more rapidly, that also takes money and staff. I think from our standpoint we view it as having the even-handedness that at least in our specific instance we have

seen over and over again. So it is perhaps premature to judge them ineffective.

On the other hand, if an appropriate location that would void the sense of conflict of interest—surely in activities as complex as these, even the appearance of conflict needs to be of concern to facilitate the overall process—we would have no objection to that.

Senator INOUE. Do you believe that it was clear intention on the part of Congress when we enacted this legislation to cover not just museums, per se, but to cover any institution that receives Federal funds such as colleges and universities?

Mr. KINTIGH. Oh, yes, Senator. I think that is absolutely unequivocal. I do not think there is any question. My own institution has complied.

Senator INOUE. So it is not just for museums?

Mr. KINTIGH. Of course not.

Senator INOUE. However, we have one little problem here. We assess civil penalties for a non-compliant museum or college if they fail to make their inventory of human remains and consult with the appropriate tribes. But this does not extend to Federal agencies. Do you think it should be extended to Federal agencies?

Mr. KINTIGH. I do, sir. I think that Federal agency compliance has been identified across the board as a major problem. The National Park Service has no enforcement authority over Federal agencies, as you know. And to the extent that compliance is out of line, I am not an attorney and I do not know legally how the Congress can—I assume that the presumption was that the Federal agencies would at least obey the law. To the extent that that is not happening, I would like to see whatever means the Congress has to make that happen brought to bear in a fair way.

Mr. DUCKWORTH. If the intent, purpose, and concept of the law itself were noble, then I do not see how you could logically not extend the concept to those that hold by far, I suspect, the largest array of materials that come under the NAGPRA categories. I think it goes without saying that it should be extended to them.

Frankly, Senator, I have never quite understood why, for example, the Smithsonian was separated into separate legislation simply because it was the national museum as opposed to the others of us.

Senator INOUE. The provisions of NAGPRA would cover cultural items found or excavated from Federal or tribal lands. Do you think the coverage should be extended to State lands, county lands, and private lands?

Mr. KINTIGH. Yes, sir; I do. I think that one of the largest problems archaeology faces and a very serious concern that tribal people face is the looting of ancestral sites on private, State, or county land. Currently States have varying provisions protecting State land. In some cases, there are some—and in my own State—fairly weak provisions protecting Indian graves on private land. Those are really in general not very satisfactory. Most of the looting and destruction of these ancestral sites occurs in order to loot the graves. So if Federal protection were extended to private, State, and county lands it would have the effect of extending Federal protection, to a very large extent, over those sites in their entirety as the goal of the looters is by and large the graves.

So I think from the standpoint of preservation, it would be an enormous achievement if we could do that. We raised that question in 1990 and SAA advocated that with congressional staff. I think it was the political realities at that time that we all wanted the bill to pass and the staff felt—I think quite properly—that were that provision included it would not make it through. We have supported that consistently.

Mr. DUCKWORTH. I agree. I agree. I think now with our having essentially completed the repatriation of our materials I think the largest holder of human remains—at least in Oahu, if not the State of Hawaii—is the State Division of Historic Preservation, who have yet to file. I do not even know if they are required to file an inventory.

Senator INOUE. NAGPRA provides for a 5-year time period for the compilation of an inventory. We have provided an extension of 3 years to 58 museums, I believe.

Do you believe that 8 years is sufficient?

Mr. KINTIGH. I believe that in the case of 52 of those, it has been enough and those inventories have been completed. To my knowledge, there have only been six museums that have asked for extensions. As I understand it, most if not all of those are among the museums in the country that have the very largest collections and the very largest jobs to do in those inventories.

I have a personal familiarity with three of those museums and the programs they have undertaken. I also interact with tribal people that have worked with those museums on consultation and working toward repatriation. My sense is that if there has been a good faith effort—and from my knowledge in at least three of those cases—and I am simply not familiar with the others—there has been a good faith effort. Then I think extension should be provided as the law allows but does not require because I think that were that not to happen the museum will simply have to do the inventory in a much more speedy way. The law provides quite a bit of latitude in how much evidence is required, how much consultation is required. It is my experience that the more investigation and work the museum does, the more carefully it consults, the more materials it is able to repatriate.

So if museums are speeded up, and they will have no real alternative—and I think they will be able to do it in a much more rapid way within legal bounds—I think the effect will be that we end up with a much larger proportion of remains in the culturally unidentified category. When remains are placed in that category, then the museum's job—at least in the first instance—is done and then the burden is placed on the tribes to essentially challenge that determination and to bring forth their own evidence.

Where museums have ongoing consultation with tribes to try to work toward figuring out appropriate repatriation, it seems to me the denial of extensions is completely counterproductive to the goals of both the tribes and the museums in doing what the law intends.

Senator INOUE. What is your reaction to testimony that suggests that some of this delay is deliberate?

Mr. KINTIGH. In some cases, it may be. I was at the NAGPRA review committee meeting in Santa Fe in December. In one in-

stance, the Park Service said that they certainly did not have much evidence that one of these museums had been doing very much. They did not know for sure that that was the case, but that was the indications they had at the moment. If that is indeed the case, I am fully in favor of not giving an extension and I think the civil penalties should come into play.

I think that in some cases there may be deliberate attempts—I have no reason to believe that there are deliberate attempts. There may simply be people saying, We do not have the money and we are just not going to do it. I think that is contrary to the law and they should be brought into compliance.

However, I think that many Indian people—for very understandable reasons—are frustrated by the time this has taken. I can understand why people might think that a delay is a consequence of stonewalling when in fact it is a consequence of people trying to do just the opposite, a very deliberate job that takes a lot of time and effort.

Senator INOUE. Mr. Duckworth, do you believe 8 years is enough?

Mr. DUCKWORTH. Understanding from our experience how complex some of these issues are—and our situation is admittedly much simpler than those faced by other institutions who serve many, many different groups, tribes, cultural entities, and what have you within their collections—I think it is risky to be arbitrary about drawing a line. I would emphasize the number of institutions that have met the deadlines and have done so oft times under very, very difficult circumstances.

But I think at the heart of the question, Senator, is where good faith efforts are not demonstrable, I certainly agree that they should be held to the letter of the law and whatever civil penalties are provided for and appropriate. As I said, however, with good faith demonstrable, for some institutions—because of the complexity I have alluded to, the size of the collections which have been alluded to, and the costs which are involved that without support from other sources fall on the hard-pressed operating budgets of the institutions—and contrary to popular belief, most of us do not have monies in excess of our needs and most of our people do not have undelegated time for their activities. So these new responsibilities oft times have proved very burdensome and have diverted institutions from their normal service to their communities and their other responsibilities.

I would be reluctant to say that 8 years is enough for everyone, but I would certainly be quick to say that 8 years is enough for those who have made less than good faith efforts to comply.

Senator INOUE. Both of you have mentioned two words that have caused lawyers and Members of Congress a lot of heartburn—good faith. [Laughter.]

At the present time, for example, this committee is struggling with the determination of good faith as it applies to the Indian gaming laws. What is good faith? The States say that they have exercised good faith and the Indians say that they have not done that.

Do you have any other suggestions other than good faith? [Laughter.]

Mr. KINTIGH. If I might elaborate on the good faith, I would encourage Interior to consult with some of the tribes that are working with those very museums and see if they feel that there has been good faith. I think in many cases you would find that the tribes—and some of those museums have had to consult with more than 100 tribes—that you find the tribes would say that there has been good faith. So even from a tribal judgment of those specifically involved—certainly not in all cases, and not in every instance—but I think you might find that from a tribal perspective you would get good faith.

I think at this point it is appropriate for whatever good faith is for there to be a fairly high standard for that—a higher standard than 3 years ago.

Mr. DUCKWORTH. Almost anything that poses an imponderable for lawyers are well beyond museum directors' ability to cope with.

Senator INOUE. Lawyers make good money on that. [Laughter.]

I wish to thank all of you and all the witnesses. This has been a very good hearing. My only regret is that my fellow committee members are not here. But I hope you will understand that we have a few other problems lurking around the halls, such as Kosovo and the budget and things like that.

The record will be kept open for the next 3 weeks. Your full prepared statements will be made a part of the record. If you have any addenda you would like to provide us or other testimony, please feel free to do so.

With that, the hearing is adjourned.

[Whereupon, at 12:10 p.m., the committee was adjourned, to reconvene at the call of the Chair.]