

We understand, furthermore, that the National Park Service has not responded to claims for the objects held in their possession, made some time ago, by Hui Malama, the Department of Hawaiian Home Lands, and the Hawaii Island Burial Council.

In closing, we reiterate our commitment to fulfilling the spirit and intent of NAGPRA. We stand by our belief that the meaningful collaboration that Bishop Museum has enjoyed with Native Hawaiians as a result of NAGPRA has been most valuable and significant.

We support any effort made by this distinguished committee to ensure the NAGPRA program is administered with objectivity, cultural sensitivity, and in keeping with the spirit and intent of the act.

As is always the case, it is a pleasure and a privilege to appear before you. Thank you for this opportunity to testify.

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

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

Senator INOUE. May I now call on Professor Kintigh.

#### **STATEMENT OF KEITH KINTIGH, SOCIETY OF AMERICAN ARCHAEOLOGY, WASHINGTON, DC**

Mr. KINTIGH. Senator Inouye, the Society for American Archaeology thanks the committee for this opportunity to comment.

SAA is the Nation's leading organization of professional archaeologists. In 1990, SAA led the Coalition of Scientific Organizations that strongly supported NAGPRA's enactment. Joining SAA in this testimony is one of those organizations, the American Association of Physical Anthropologists, the Nation's leading organization of physical anthropologists.

Ten years ago I stood before this committee to present SAA's testimony on NAGPRA. Looking back, the committee should be proud of what has been accomplished. Repatriation is being accomplished routinely. Cooperation between tribal people and members of the scientific community has greatly expanded. Indeed, I'd like to provide the committee with copies of "Working Together," a book recently published by SAA that highlights exactly this cooperation.

I now turn to a brief discussion of several issues.

First, full compliance by some Federal agencies remains the largest stumbling block in implementing NAGPRA. Most conspicuous are failures to complete the inventories due 5 years ago. More pernicious problems lie in determinations of cultural affiliation made without reasonable efforts to compile and weigh the evidence.

While some agencies are moving too slowly, problems also arise when an agency moves hastily. For example, in its rush to repatriate the remains of Kennewick man, the court has found that the Corps of Engineers failed to satisfy the legal requirements, which included establishing cultural affiliation. The unfortunate consequence—the involvement of the courts and a lengthy lawsuit.

As you heard from Marty Sullivan, last November the Review Committee found that the assessments of cultural affiliation by Chaco Canyon National Historical Park were utterly inadequate. They recommended the park redo its inventory with appropriate consultation and attention to the evidence.

While the scientific community, nearly all of the affected tribes, and the Review Committee agreed on all the key points in this case, the NPS regional director saw fit to dismiss the Review Committee's recommendations.

Second, tribes have expressed dismay that repatriation is taking so long; however, lack of speedy reburial does not necessarily indicate that the process has gone awry. Universal reburial was never NAGPRA's goal. Indeed, tribes have only requested repatriation of a small fraction of the remains that have been culturally affiliated.

Lack of repatriation may represent a tribal decision to have museums maintain custody or may reflect tribal priorities and lack of funding. For tribes in the Southwest, for example, repatriation associated with ongoing excavations generally takes precedence over repatriation from existing collections, for understandable reasons.

The lack of necessary resources continues to delay the implementation of NAGPRA. Tribes need increased funding for NAGPRA grants. There is currently no Federal support for tribal implementation of repatriation associated with ongoing excavations, also covered by NAGPRA, and the NAGPRA office within NPS needs increased funding to accomplish its legal mandates.

Third, we discuss culturally-unidentifiable human remains. The committee should recognize that many human remains currently classified as culturally unidentifiable could be affiliated with additional consultation and research. In denying extensions to museums making good faith efforts last year, the Department of the Interior directed them to complete their inventories using available information, precluding adequate research or consultation.

While the Review Committee issued its recommendations regarding the disposition of culturally-unidentifiable human remains less than 2 months ago, a coalition of southeastern tribes has offered an alternative. They suggest empowering a consortium of tribes to determine disposition.

Because many culturally-unidentifiable remains have the potential to be affiliated, empowering tribal consortia to decide quickly on the disposition would bypass the rights of affiliated tribes. Furthermore, this approach fundamentally upsets the balance embodied in NAGPRA in which decisions are shared by representatives of the scientific, museum, and Native American communities.

Notably, the Review Committee's recommendations also include use of tribal consortia and regional consultation, but, consistent with NAGPRA, they include museums and agencies in consensus-based decision-making.

Fourth, scientific interests in human remains and cultural items derive from their ability to inform on our human heritage. The next fundamental step in the human genome project will be to chart variation within the human genome. Study of Native American human remains will be invaluable to this important medical research and to many other worthy efforts.

We do not suggest that scientific interests outweigh those of tribes; we simply point out that NAGPRA appropriately recognized the legitimacy of scientific interests, as well.

Finally, the recent reorganization of the NAGPRA function within the Department of the Interior has removed, in our minds, the appearance of a conflict of interest. Repatriation issues associated

with the parks, themselves, have been separated from those associated with the national implementation and the Review Committee.

At this point, I think we should all just work with Mr. Robbins and his staff toward the effective implementation of NAGPRA.

In conclusion, we offer three recommendations. First, we ask that Congress bring Federal agencies into full compliance with NAGPRA, attending particularly to the importance of tribal consultation and evidentially-based determinations of cultural affiliation.

Second, once the Department of the Interior responds to the Review Committee's recommendations regarding the disposition of culturally-unidentifiable human remains, this committee can better evaluate whether additional action is needed.

Third, we ask that Congress address the insufficient funding of tribal, museum, scientific, and agency repatriation programs.

The Society for American Archaeology and the American Association of Physical Anthropologists thank you for your consideration of our concerns.

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

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

Senator INOUE. Mr. West, the National Park Service, as you have heard from testimony, conducted DNA analysis on the Kennewick remains. It has been alleged by witnesses appearing before us this morning that the Park Service intends to increase the use of DNA analysis to determine cultural affiliation of human remains. My question is: what is the current standard of proof used to determine cultural affiliation of human remains under NAGPRA?

Mr. WEST. I guess I would like, first of all, to reiterate the position that the AAM presented last year during the April oversight hearings, and then that will lead directly to the question that you have asked, because I think it all fits together.

The position of the American Association of Museums is that DNA testing in this particular context is a very, very distant last resort, and the reason that it is such is the following—and I would offer three points in support of that particular position.

The first is that, notwithstanding the extensive discussion you've heard today about the fact that the NAGPRA legislation was a compromise between scientific interests, on the one hand, and the Native community's interests, on the other hand, the fact is that this compromise represented a paradigm shift along the line, and the legislation really is reflective of a much heightened consideration on the part of the Congress in support of Native cultural and human rights. I think that is the beginning point.

The second point is that, if you take that as the premise, DNA testing is abhorrent to many Native communities, and therefore I think that must be taken into consideration.

Third, I would also say that, in trying to define what we mean by cultural affiliation, as the NAGPRA legislation makes very clear, the evidentiary scope that we are supposed to try to research is extremely broad, and I think that it is very dangerous, given the spirit of the NAGPRA legislation, to focus on a particular piece of evidentiary finding which may be scientific in nature.

The fact is that Native people, themselves, as has been pointed out in abundance at these hearings, have many methods for trying to chart the affiliation between their communities and human remains that may be found in their aboriginal areas.

Senator INOUE. Then you disagree with the departmental consulting archaeologist? He has stated that this sets a new standard, a new precedent.

Mr. WEST. I would be very skeptical of that kind of position, given what I understand to be the Congressional intent that sits behind the NAGPRA legislation. It is a much more complicated matter than that simple statement.

Senator INOUE. And it is your contention that a DNA analysis is to be used, if at all, under the most extreme situations?

Mr. WEST. That is correct, and then maybe even not there, given the objections that some Native communities have to this kind of defilement of human remains.

Senator INOUE. If the current standard of proof is changed to the new standard described by the departmental consulting archaeologist as a member of associations board will this have an effect on museums and their costs incurred to effectuate the law?

Mr. WEST. I think it would have a rather direct impact on the cost that would be incurred by museums, because, as you, yourself, have noted in the course of this morning's testimony, the cost of this particular kind of research is extremely great.

Senator INOUE. Do you believe that when we enacted this law there was any intent that DNA analysis would be employed at all?

Mr. WEST. I don't know that I can answer the question whether somebody had specifically in mind that DNA would be a part and parcel of the research. What I do know, from what I understand of the Congressional intentions behind the NAGPRA legislation, it was a piece of legislation that said to all parties involved, both museums and Native people, that, in trying to determine what constituted cultural affiliation, the evidentiary base should be extremely broad and should be done in close consultation, not just with scientists whose domain this had been previously, but with Native people, themselves, and to make sure that this legislation, in its processes, tapped the knowledge that Native people, themselves, have about the matter of cultural affiliation.

Senator INOUE. I'm not certain whether you can respond to this, but I noted that you were sitting here throughout the session. Is it your belief that these witnesses who have many complaints have grounds to do so?

Mr. WEST. If I were to venture a position based upon what I have heard this morning, I would have to say that there are matters well worth this committee's exploration in determining whether NAGPRA is actually on the ground, at least in respect to the work of certain Federal agencies, operating in the manner that it should be.

Senator INOUE. I thank you very much, Mr. West.

Dr. Duckworth, what is the present status of the remains in issue?

Mr. DUCKWORTH. The remains at issue are not really remains in this sense, Senator. Some year or so ago—this repatriation process

has been going on since 1994. Both human remains, EV, and unassociated burial objects, goods, were involved in this.

A little over 1 year ago, the four claimant groups at that time—Hui Malama, Office of Hawaiian Affairs, Department of Hawaiian Home Lands, and the Hawaii Island Burial Council—all agreed that the consultation process would be facilitated by the lending of the EV to Hui Malama and having the EV placed in a temporary location on the Big Island in the district that the burial caves occur in to facilitate what, as you know, is a very serious and demanding cultural and spiritual discussion that must take place.

That happened with no concerns whatsoever.

A similar request was made to Bishop Museum earlier this year by Hui Malama, assuring us that they had the concurrence—I should predicate this by saying discussion had been held again by the claimants concerning the associated burial goods, and discussions alluding to the fact that it would facilitate the overall consultation once again if those items were lent and treated as the EV had been 1 year earlier.

We were assured that all four claimants were in agreement and we lent the objects in question to Hui Malama.

Later, the Office of Hawaiian Affairs and others refuted that they had, admitting they had discussed the issue with Hui Malama but they had not come to an agreement, and thus the controversy ensued.

We have indicated that we wanted to work with the claimant groups, all four. My board passed a resolution asking the four claimants to comment on the materials. The materials are sequestered on the Big Island of Hawaii in the burial caves from which they were taken. That's well known to all four claimants. The four claimants have indicated to us that they would like to continue to have discussions concerning the material. Three of the four have commented they would like the material kept exactly where it is at the moment, while the new claimants that have come into the process—and there are six new claimants that have emerged as a result of these discussions and the controversies—they would like to continue the consultations with the ten now legally-recognized consultants or claimants before anything.

We have inspected the site. We are comfortable that the material is in an appropriate circumstance with security and the appropriate conditions.

I'm sorry to take so long. It was a little detailed.

Senator INOUE. Are you optimistic that this matter will be resolved?

Mr. DUCKWORTH. I am confident, Senator, while it has not been an easy process—as you know, it has not been an easy process from the beginning. All of us involved, including Bishop Museum, have made many mistakes along the way. I can say without any hesitation from the museum's standpoint that the mistakes we've made have never been made with malice. They have been made solely in our efforts to deal with the implementation of the law and its spirit, and I'm confident that in this case, given the time and given a diminished media presence in large part stimulated by the factors that I indicated in my testimony, I'm confident that the claimants and the museum, working together, will reach a solution that will

be in everyone's best interest, as we have in all the previous repatriation processes that we have been engaged in.

Senator INOUE. I thank you very much.

Dr. Kintigh, you, too, have been sitting through the testimony. You have heard several witnesses speak of conflicts of interest. Do you believe that the departmental consulting archaeologist has been involved in any conflict of interest in issuing his directive on the disposition of some of these remains?

Mr. KINTIGH. As you know, the authority has now moved up a level from the departmental consulting archaeologist. That authority no longer rests with him.

It is my belief that the departmental consulting archaeologist not only tried but, largely succeeded in dealing effectively with the resources he had available. And, while I certainly can understand the argument that there was an appearance of a conflict of interest, I don't think that it was really there. I think that that appearance is partly because people see the National Park Service as a unitary body, when, in fact, as you know, it has many pieces. In fact, the individual parks, as Mr. Duckworth has referred to, and as Marty Sullivan and I talked about in the case of the Chaco-Hopi dispute, the individual parks have been responsible for their own inventories. I think they've completed them, often probably at odds with the advice of the NAGPRA office.

The parks have that responsibility the way Park Service authority is delegated, and so I think more problems than are really appropriate have been laid at the doorstep of the NAGPRA office. Thus I don't think there has been a conflict of interest, although I agree that there has been an appearance of one.

I think the decision by the Department to move that office attempted to deal with that.

Senator INOUE. Is there any conflict involved when the departmental consulting archaeologist provides a grant to your association?

Mr. KINTIGH. I'm sorry? When he does what?

Senator INOUE. When the Society of American Archaeologists received a grant from the consulting archaeologist who is a member of the Society's Board, was there a conflict of interest?

Mr. KINTIGH. In the giving a grant to the Society? I don't believe so. The departmental consulting archaeologist has many responsibilities, and, in fact, no longer has the NAGPRA one, but even apart from that he is responsible for implementing the national program for archaeology and ethnology, and furthering those goals.

One of the grants—in fact, a grant that we just finished expending the money on—was a grant to facilitate cooperation between Native Americans and archaeologists. And I just was at a meeting last Friday in which we had four Native people and three members of the Society of American Archaeology, and it was chaired by Professor Tsosie, to try to really see where we could come down, not in terms of NAGPRA, but in terms of just talking about how archaeology can be done better to serve the needs of Native people and to improve archaeology.

Senator INOUE. Do you concur with Mr. West's response to the question on the use of DNA analysis?

Mr. KINTIGH. I think I largely do. It seems to me that the involvement here of the courts has had a big impact on this. I think that, had the Corps of Engineers gone about this in the way that they should have—that is, going through the statutory requirements—we wouldn't end up where we are today.

I think that why we have this very extensive study and all the attention to this case is because it is a lawsuit. I think it is unfortunate that it came out that way, but I think that there are really two issues involved. There are a number of issues that the plaintiffs have raised—and the SAA is not a party to this lawsuit at all.

But the plaintiffs have raised two key issues. One is that Kennewick man is not Native American. Both the Department of the Interior and the Society for American Archaeology have asserted that, in fact, Kennewick man is Native American under the act. I firmly believe that's the case. I think that's what the law says and I think that's what the law intends.

However, the court seems to have taken seriously the argument of the plaintiffs that Kennewick man is not Native American, and, given that, it seems to me that the court might find the DNA evidence relevant to determinations both of Native Americaness and cultural affiliation.

I think it will be less informative on cultural affiliation. I by no means think that this suggests that DNA analysis will become a routine part of cultural affiliation studies.

Senator INOUE. Do you believe that this now establishes a new standard of proof?

Mr. KINTIGH. No; and I have a hard time believing that the departmental consulting archaeologist, if he said that, intended that—that he intended that this meant that DNA studies would now be the standard by which cultural affiliation was judged.

You can ask him, but I don't think that was the case. I don't think that ought to be the case and I don't think it will become the case.

Senator INOUE. So you still believe that the standard of proof as set forth in the law is the preponderance of evidence?

Mr. KINTIGH. Absolutely, including consideration of all the evidence.

Senator INOUE. And am I correct in assuming that from your testimony you believe the departmental consulting archaeologist has done a credible job?

Mr. KINTIGH. I think he has done a credible job with the resources that have been available to him. I think a lot of the problems with Federal agencies and lack of compliance by other Federal agencies and, indeed, compliance by units within the Park Service which are not under his control at all, have ended up being set at his doorstep, and they are things over which he really did not have control.

Senator INOUE. Do you believe from the testimony that the committee has received that there is some justification for GAO to look into this?

Mr. KINTIGH. This hearing was the first I had heard of any allegations of financial mismanagement, which I take to be the major impetus behind that argument. I'm not aware of any evidence that there has been financial mismanagement. I think there has been

a strain on resources. No one doubts that. But, based on the evidence of which I am aware, I don't see any cause for that. No.

Senator INOUE. I thank you very much, sir.

Mr. KINTIGH. Thank you.

Senator INOUE. And I thank the panel very much.

And now, for our final witness, may I call upon the Associate Director of the Cultural Resource Stewardship and Partnerships, National Park Service, Katherine Stevenson.

**STATEMENT OF KATHERINE H. STEVENSON, ASSOCIATE DIRECTOR, CULTURAL RESOURCE STEWARDSHIP AND PARTNERSHIPS, NATIONAL PARK SERVICE, DEPARTMENT OF THE INTERIOR, WASHINGTON, DC, ACCOMPANIED BY FRANK McMANAMON, DEPARTMENTAL CONSULTING ARCHAEOLOGIST**

Ms. STEVENSON. Mr. Chairman, thank you for the opportunity to appear before you to discuss the National Park Service/Department of Interior views on the administration of the Native American Graves Protection and Repatriation Act enacted in November 1990.

I'd like to summarize my testimony and then answer any questions you may have.

I have organized my comments to parallel the act itself. I will highlight the actions of the National Park Service, as well as the work of Federal agencies, museums, and tribes.

First, as regards the regulations, in 1995 the National Park Service published regulations covering many important activities. These regulations were developed in close consultation with the Review Committee and with substantial public comment.

At that time, it was determined that some areas were most sensitive, and that we wanted to have additional consultation and more progress so that we could proceed on those at a later date.

Four sections are presently in preparation: Civil penalties, which was published for effect and has final regulations yet to come, and proposed regulations are in preparation; culturally-identifiable human remains; future applicability; and disposition of unclaimed cultural items.

As relates to the inventory, as you know, each Federal agency and each museum with Native American human remains and associated funerary objects had 5 years to develop their inventory. We have received 736 of these inventories, have gotten back to 213 institutions about the completeness of their inventories, and have published 355 notices of completion. That leaves a backlog of about 250 inventories.

Let me give you some perspective on those inventories.

There are about 150 linear feet of files, which is about 10 big filing cabinets of four drawers each. This is not a small matter in to which to look.

The summaries—each Federal agency and each museum, for unassociated funerary objects and sacred objects, have not less than 3 years to send their summaries. There have been 1,042 institutions that have sent those, and I might mention, for both the inventory and for the summaries, the National Park Service has completed its inventories and its summaries, with one exception—a park which has agreed with one of the potentially claimant tribes