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Dear Mr. Schneider:
It has recently come to my attention that the United States Congress is, once again, considering an amendment to the Native American Graves Protection and Repatriation Act (NAGPRA). In light of this proposed amendment, I would like to provide you with the following brief review of NAGPRA's history, including a discussion of materials that may have influenced the construction of that law. The results of my research indicate that NAGPRA, as it currently exists (and as interpreted by the courts in the Kennewick Man case), represents precisely what Congress originally intended for the law: To strike a delicate balance between human rights and scientific inquiry. The currently proposed amendment to NAGPRA is disturbing, as it would upset that balance and, as discussed more fully below, would have a chilling effect on the future of scientific study in the United States.

The proposed amendment to NAGPRA as set out in Section 108 of S.536 once again raises the question of the intent of Congress in the passage of the original NAGPRA bill, P.L. 101-601. Proponents of the proposed amendment have cited such sources as the *Report of the Panel for a National Dialogue on Museum/Native American Relations*[1] (hereafter the Heard Museum Report) as evidence to support their claims that the new amendment is needed in order to restore NAGPRA to the original intent of Congress for the functioning of that law. For this reason, a review of the Heard Museum Report is undertaken herein. It should be noted that the Heard Museum Report was only part of the materials considered by the 101st Congress when it passed NAGPRA. It does not constitute the totality of the material upon which that law was based. Indeed, the Heard Museum Report was only issued ten and a half months before the signing of NAGPRA by President George H.W. Bush.[2] In a debate that had occurred over a period of three years (1987-1990) in Congress, a report issued just prior to the passage of NAGPRA can not be considered determinative in any attempt to reconstruct the original intent or history of that law.

If the Heard Museum Report was not the primary impetus for NAGPRA or even for the specific provisions sought to be altered by S.536, what then were the concerns of Congress when it enacted NAGPRA? Over the past several years, I have conducted a considerable amount of research into the history of NAGPRA. The results of that research, some of which accompany this letter in the form of a *West Virginia Law Review* article and a *Louisiana Law Review* article, demonstrate that Congress had three major areas of concern when it enacted NAGPRA: (1) the repatriation of the remains of recently deceased Native Americans, (2) reparations for the sometimes dubious collection practices of early anthropologists, and (3) the protection of the scientific study of ancient America.

The first two concerns intertwine and must, therefore, be discussed together. With respect to the latter of the two, the collection practices of early anthropologists, these activities in light of today's ethical and human rights standards were disturbing and regrettable. In the *Louisiana Law Review* article, I recently reviewed these practices in light of the repatriation debate of today.[3] These practices, occurring during the nineteenth and very early twentieth centuries, included the secreting away of the remains of recently deceased Alaska Natives for museum curation and the collection of Native American war dead from the battlefield for the purposes of scientific study. Few people today would seek to attempt to justify these collection practices as they relate to the recently deceased. However, as one advocate for indigenous groups in Australia has noted, "[t]imes change. Not only has archaeology become more professional, but…indigenous peoples now have much greater presence in archaeological research."[4] Indeed, archaeology has become more professional: Practices of the kind noted above have not been employed in the collection of human remains for nearly a century and the anthropologists of today are educated on the ethical and respectful treatment of *all* human remains. However, it was these antiquated practices of old that fanned the flames of controversy when Congress began to address the repatriation issue in the mid-1980s. This effort began in earnest in 1987 with the introduction of S.187 (100th Cong.), S.1722 (100th Cong.), and S.1723 (100th Cong.). In the debates that followed the introduction of these bills in 1987, all the way up to the passage of NAGPRA in 1990, the early, nolonger
followed practices of 19th century anthropology and human remains research was made one of the primary focus of discussion in the presentations to Congress. A brief review of those debates, discussed more fully in the attached *West Virginia Law Review* article, is important here.

What is abundantly evident from the legislative history is that Congress was especially concerned with reparations for the wrongs committed against Native Americans since A.D. 1492. Congress' principal focus was on remains of relatively recent age, such as those involved in United States Army acquisitions in the nineteenth century. Ancient remains were not a matter of concern. Members of the museum and anthropological community attempted to raise questions of ancient remains in their testimony before Congress, but these attempts were not addressed by the Congressional committees. Instead, the Committee members immediately reverted to questions of the whereabouts and disposition of recent remains. Indeed, at least one report issued by Congress subsequent to hearings on some of the pre-NAGPRA legislation stated that the law "provides a reasonable method and policy for the repatriation of Indian bones and funerary objects in the possession of the Smithsonian Institution. However, many human remains in the collection are of unknown origin and will, therefore, remain in the collection."[5]

The record from the Congressional hearings on pre-NAGPRA bills are replete with references to and concerns about remains that are 200 or less years old. Indeed, Senator Inouye went as far as stating that remains as old as 2,000 years were not the primary interest of the bill. Additionally, Senator Melcher, who was the author of the original Senate repatriation bill, stated that, "remains were also obtained by archaeologists. In general those are older remains, gathered for study to piece together the millennium of our unknown beginning. We do not intend in any way to interfere with this study and science in the bill."[6] This point cannot be stressed enough: Scientific study, especially of ancient human remains, when addressed in the congressional hearings, was intended to be expressly protected and preserved, *not* discouraged or banned.

Members of Congress made few other references to ancient items or the difficulty of

demonstrating cultural affiliation to such remains. One reference of this kind was with respect to cultural materials and not human remains. Most of the comments addressing the application of this legislation to ancient remains were raised by the archaeological and museum communities. In testimony before the Senate Select Committee on Indian Affairs, representatives of the archaeological and museum communities raised issues of problems with the legislation's application to ancient remains. The Senators on the Committee ignored these issues. However, when Representative Charles Bennett directly addressed the issue of ancient remains in the House of Representatives hearings in 1990, he commented that "we should not overlook the fact that there are some of the deceased who don't have modern descendants, and their remains still should be kept with care."[7] This comment is incompatible with current claims that Congress deliberately intended the repatriation legislation to apply to ancient remains.

Overall, the issue of what is meant by NAGPRA's definition of the term "Native American", which is a matter of central importance to the currently proposed amendment, was not discussed in any depth by Congress. The clearest statements, to date, on this issue have come from the District Court and Ninth Circuit Court of Appeals decisions in the recent Kennewick Man case.[8] In those cases, the courts undertook an extensive examination of the boundaries of the definition ultimately deciding that it required a showing of some cultural connection between ancient skeletal remains and modern Native Americans. This connection does not have to be to any specific tribe or group of tribes. Instead, it is sufficient if a reasonable connection to Native Americans generally or their culture can be demonstrated.[9] Based upon an examination of the legislative history, these judicial interpretations of the statute's words whereby NAGPRA does not affect such ancient and unaffiliated remains as the ones that were the subject of the Kennewick Man case, is clearly consistent with Congress' original intent for the law. Indeed, the cultural connection that the two court decisions require between modern and ancient groups in the Kennewick Man case is explicitly supported by the legislative history as discussed above. It is also supported by the Heard Museum Report.

In 1989, the Heard Museum in Arizona convened a panel of representatives from the Native American, anthropological, museum, and legal fields to address the issue of repatriation. The general findings of that panel do not substantially differ from the discussion of repatriation issues in NAGPRA's legislative history. The panel that authored the Heard Museum Report found, in pertinent part, that:

> 1. …Resolution of the issue [of the disposition and treatment of Native American human remains] should be governed by respect for the human rights of Native peoples and for the values of scientific research and public education.
>
> 2. Respect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made by a Native American group that has a *cultural affiliation* with remains or other materials…[10][emphasis added]

Later in the report, in the section on human rights, the panel clarified their findings by stating that the Native American group making claims for remains *must* be culturally affiliated with those remains.[11] This cultural affiliation requirement was specifically intended by the panel to refer to *present-day* groups. This is evident from the fact that the next paragraph notes the panel's failure to reach a consensus on remains where no present-day Native American group is culturally affiliated.[12] The panel also notes the scientific importance of the study of human remains, *viz*: "[k]nowledge gained through studies of museum collections, including human remains, may benefit society generally

and Native Americans particularly."[13]

What is the significance of the Heard Museum Report? The significance is twofold: (1) it is often cited as having had a substantial influence on the drafting of NAGPRA despite its appearance late in the NAGPRA debates, and (2) the panel members of the Heard Museum Report are clear in their distinction between the presence or absence of present day culturally affiliated groups and their respective ability to speak for human remains, the latter cannot be overlooked if this report did in fact influence the drafting of NAGPRA. If such an influence was present, considering the above discussed legislative history itself, there can be no doubt that Congress' original intent for NAGPRA was for it to function in a human rights capacity for present-day culturally affiliated tribes, while not interfering with the progress of science by returning ancient remains to unaffiliated groups.

The ramifications of the proposed changes to NAGPRA in Section 108 of S.536 would have substantial deleterious effects on the advancement of science in the United States that may not be fully appreciated by its supporters. This seemingly minor amendment to NAGPRA would have a chilling effect on the future of scientific studies into the peopling of the Americas and indeed to a complete understanding, on a global scale, of our shared human history.

Section 108 of S.536 proposes to add the words "or was" after the word "is" in Section 2(9) of NAGPRA. Additionally, Section 108 proposes to add the phrase "any geographic area that is now located within the boundaries of" after the words "indigenous to" in Section 2(9) of NAGPRA.

The significance of the latter portion of the amendment, the addition of "any geographic area that is now located within the boundaries of," needs to be fully explored in committee, as its meaning and usefulness is cryptic and of questionable relevance to the law as a whole. At the present time, I cannot discern what change to the scope or applicability of the law is intended to be made by this latter portion of the amendment. It appears to me to be merely superfluous.

As to the addition of "or was" to Section 2(9), it is necessary to understand what the word "is" in Section 2(9) means without the proposed addition. Section 2(9) of NAGPRA is the definition of "Native American." Under NAGPRA, the term Native American "means of, or relating to, a tribe, people, or culture that is indigenous to the United States." The importance of "is" in this definition was highlighted in the Kennewick Man case. It was upon the present tense of this definition (i.e., "is") that both the District Court and the Ninth Circuit decided that Kennewick Man must be related to a currently existing Native Americans before a valid NAGPRA claim can be made to the skeleton. Thus the significance of the word "is" is substantial: It ensures that human remains cannot be claimed under NAGPRA unless they are related to modern Native Americans. This limit is consistent with Congress's original intent for enacting the legislation, i.e., to protect the human rights of existing Native Americans through respect for the remains of their deceased relatives. The proposed addition of the words "or was" would expand NAGPRA far beyond its original human rights purposes and by so doing would interfere with the future of scientific study.[14] This eventuality was expressly avoided by the Congress that enacted NAGPRA.

The addition of these two words to NAGPRA would mean that all remains found on federal land, regardless of their lack of any cultural or biological affiliation to any modern Native American group, would be deemed to be Native American as long as they were "indigenous" to the United States. This proposed expansion of the definition could

lead to absurd results. For example, if it were discovered that the initial inhabitants of the New World were Ainu peoples from Japan, the remains of these culturally and biologically distinct peoples would be considered Native American the same as the distinct and much different Indian peoples that later migrated to the New World. Thus, the proposal would subject the remains of non-Indians to repatriation claims by unaffiliated modern Native American groups. Another scenario that is an equally plausible side-effect of the proposed amendment could cause the remains of Scandinavian Norsemen, who were known to have settled for a time in southeastern Canada, to be considered Native American and subject to Native American reburial practices if their graves are found in the northeastern United States. Such scenarios would lead to obviously absurd results that are most certainly inconsistent with the original intent of Congress when it passed NAGPRA.

The creation of such a seemingly counterintuitive reality for repatriation claims under this new definition would not be rendered harmless because of the "cultural affiliation" requirements of the statute. Cultural affiliation is only one of the grounds for ownership claims under Section 3(a) of NAGPRA.

Section 3(a)(1) allows for claims by lineal descendants. The term "lineal descendant" is not defined in the statute, but the regulations adopted by the Department of the Interior make it clear that the term includes only actual, documentable descendants. This interpretation is consistent with Congress's intent to have NAGPRA allow for repatriation of close relatives' remains. The proposed amendment to NAGPRA would not affect this provision; nor was the provision affected by the court decisions in the Kennewick Man litigation. If someone can show that he or she is a direct lineal descendant of the person whose remains they are claiming, there would be no question that the remains are related to present-day Native Americans. Section 3(a)(2)(A), on the other hand, could be substantially affected by the proposed change. The change would allow items to be claimed regardless of their cultural or genetic affiliation, simply by virtue of their location on tribal lands. Section 3(a)(2)(B) of the statute would also be affected (albeit indirectly) by the proposed amendment. This section allows for claims based on cultural affiliation when items are found on federal (as opposed to tribal) lands. The proposed amendment would not expound the definition of "cultural affiliation". However, it would increase the number of remains that are subject to disposition as culturally unidentifiable remains because they are Native American. Under NAGPRA as currently drafted, such remains can be given to modern tribes or coalition of tribes with the consent of the Secretary of the Interior. In addition, the Secretary could adopt regulations permitting (or requiring) that all such remains be disposed of. Finally,

Section 3(a)(2)(C) kicks in if cultural affiliation cannot be determined and if a court has recognized the land on which the items were discovered as having been aboriginally occupied by a tribe. Here again, the expanded definition of "Native American" would allow for repatriation claims by nonculturally affiliated groups. In this case, the claiming tribe would only have to show that at time of European contact it once occupied the land where the remains were found.

What are the practical effects of these changes as a result of Section 108 of S.536? If Section 108 of S.583 passes, the well-accepted fundament of legislative interpretation that "courts do not assume that Congress intends to create odd or absurd results"[15] will be turned on its head. In future cases brought under NAGPRA, courts might have to consider that Congress intended for NAGPRA to allow modern groups to make claims to culturally and/or genetically unaffiliated items, which is indeed an "odd or absurd" result. Ultimately, the significance of the word "is" is that it maintains the delicate balance between Native American and scientific interests that Congress intended to preserve

when it created NAGPRA. "Is" does this by ensuring that the human rights of modern Native Americans are protected by allowing them to make claims to items having some reasonable connection to Native Americans. "Is" also protects the scientific study of our shared history as Americans by allowing for research on ancient human skeletal remains that lack such a connection. The addition of the words "or was" to the definition of "Native American" would eviscerate this balance by thwarting Congress's intention to protect both human rights and science together in one law.

The proposed amendment to NAGPRA contained in Section 108 of S.536 is undoubtedly inconsistent with the purpose of NAGPRA as envisioned by its drafters. This reality is clearly supported by such statements from the legislative history as Senator Melcher's comment that, "[w]e do not intend in any way to interfere with…science in the bill."[16] As the above review demonstrates interference with science will be the inevitable result of the proposed amendment to NAGPRA. Rather than protecting the human rights of modern Native Americans, NAGPRA would be expanded to become an anti-science law should this amendment pass. The inappropriateness of this amendment is underscored by the Heard Museum Report: This report clearly advised that a balance between human rights and science should be reached by any law that is enacted dealing with Native American human remains. That is precisely what NAGPRA, as enacted, accomplished by allowing for repatriation of culturally affiliated remains while allowing for the study of ancient and unaffiliated remains.

The proposal amendment contained in Section 108 of S.536 would allow future claims for repatriation under NAGPRA to be made in the absence of any scientific support for a cultural link between remains and modern Native Americans. Such a scientifically unsupportable approach to the handling of remains that may be thousands of years old is unthinkable in our modern society. The proposed amendment to NAGPRA cannot bereconciled with recent discoveries concerning human colonization of the Americas. Those discoveries leave little doubt that human expansion to and throughout the New World was a much more complex process than once thought. At present, we have only glimmerings of what that process (or processes) may have been. Our understanding of those ancient times can not be refined without continued scientific study of ancient human skeletal remains when they happen to be discovered. Congress needs to allow such work to continue by rejecting Section 108 of S.536 and maintaining the integrity of NAGPRA as its drafters intended in 1990: A delicate balance of human rights and scientific interests.

You have my permission to forward this letter to the Senate Committee on Indian Affairs, or any other members of Congress. As noted above, I have enclosed reprints of three of my articles on NAGPRA-related issues. These sources provide a comprehensive analysis of the NAGPRA debate on a national and international scope. As the sole author and holder of the copyrights on all of the enclosed sources, I hereby grant my permission to reprint the sources in any manner connected with the S.536 hearings.

With best regards, I remain,

Very truly yours,

Ryan M. Seidemann
Attorney at Law

Endnotes

[1] Heard Museum, *Report of the Panel for a National Dialogue on Museum/Native American Relations*, Final Draft, 2/28/90 (1990).

[2] Admittedly, the Heard Museum Panel convened in mid-1989, however, a draft of the report was not issued until February of 1990. *Id*.

[3] Ryan M. Seidemann, *Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries*, 64 La. L. Rev. 545 (2004).

[4] Russell Taylor, *Archaeology and Indigenous Australia*, Paper presented at the Fourth World Archaeological Congress, University of Cape Town, South Africa at 7 (1999).

[5] House Report No. 101-340, part 1 at 16 (1989).

[6] *National American Indian Museum Act (Part 2): Hearings on S.1722 and S.1723 before the Senate Committee on Indian Affairs and the Senate Committee on Rules and Administration* (100th Congress 1987) at 27.

[7] *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 Before the House of Representatives Committee on Interior and Insular Affairs* (101st Congress 1990) at 130.

[8] *See generally*, *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002); *Bonnichsen v. United States*, 357 F.3d 962 (C.A.9 (Or.), 2004); *Bonnichsen v. United States*, 367 F.3d 864 (C.A.9 (Or.), 2004).

[9] *Id*. at 1136.

[10] Heard Museum, *Report of the Panel for a National Dialogue on Museum/Native American Relations*, Final Draft, 2/28/90 at 1 (1990).

[11] *Id*. at 11.

[12] *Id*.

[13] *Id*. at 13.

[14] I say that it is "another attempt" based on the presence of similar amendment attempts in the past, all of which have failed. These attempts are fully discussed in the attached *Mammoth Trumpet* article. Ryan M.

Seidemann, *The Other Front of the War: Legislative Attempts to Alter NAGPRA*, 19 Mammoth Trumpet 1
(2004).

[15] *Bonnichsen v. United States*, 217 F. Supp. 2d at 1136 (D. Or. 2002).

[16] *National American Indian Museum Act (Part 2): Hearings on S.1722 and S.1723 before the Senate
Committee on Indian Affairs and the Senate Committee on Rules and Administration* (100th Congress 1987)
at 27.