

October 7, 2009
Testimony of Colin Kippen before the House Resources Committee
on the
Native American Graves Protection and Repatriation Act

Aloha Chairman Rahall and members of the House Resources Committee.

I am Colin Kippen and am testifying before the House Resources Committee as a private citizen.

I am a former member of the NAGPRA Review Committee, having recently completed a four year term on that Committee as its 7th member- - - having been nominated for appointment by the unanimous recommendation of the scientific, museum, and Native religious members of the Review Committee and appointed by the Secretary of the Interior. I am the first Native Hawaiian to ever have been appointed to serve on this Committee. I was honored to serve at the last meeting as the Chair of the Committee after being unanimously selected by the members then present before my term expired. I am presently employed as the Executive Director of the Native Hawaiian Education Council in Hawaii, am a lawyer, former prosecutor, former tribal judge, and former Senior Counsel to the Senate Committee on Indian Affairs. The testimony and reflections I offer the Committee are my own, and I have come here today from Hawaii on my own accord and at my own expense to help in the important work you do.

The Native American Graves Protection and Repatriation Act is a statute intended to remedy a history of the desecration, taking, theft, wrongful possession, and trafficking in the human remains and cultural items of Natives as defined in the statute. It constitutes human rights and Indian legislation that was long overdue when Congress passed it in 1990, and when the President signed it on November 16th of that year. The pain, trauma, and anguish caused to present-day Native people by the actions which this statute was created to address can never be forgotten. It is the polestar that guides the process by which we must navigate our way through this statute and by which we must give meaning to the words and phrases chosen by the Congress.

My comments today are focused on some of the institutional and systemic issues I have observed while on the Review Committee. My view is definitely affected by my status as the 7th member of the Committee appointed as the consensus member. It is also affected by the fact that I am Native Hawaiian and that I have worked and lived in both Indian and Native Hawaiian communities. It is my hope that I will be able to paint a clear picture of what I have seen and what we can improve upon so that this law will be better implemented.

Do Native people have the capacity and knowledge to effectively participate in the NAGPRA process?

NAGPRA is an incredibly complex and technical piece of legislation that is constructed around a simple human ideal--respecting the human rights of Native people to possess and care for the remains and cultural property of their ancestors. The NAGPRA process -- the laws, regulations, internal processes, and data systems--are full of minutiae and difficult to understand. After working with NAGPRA for years, I still struggle to find my way through the statute and regulations.

The NAGPRA process assumes Native people understand the law and regulations, know how to access, read, and search the on line NAGPRA data bases, know how to read and respond to the notices in the Federal register, know the consultation requirements and how to assure that proper consultation happens, and have the resources to travel around the country and call for the return of their ancestors or cultural items from museums and Federal agencies.

This is a false assumption, in part because the NAGPRA process we have created is antithetical and disrespectful to traditional native beliefs--and because we have not sufficiently given Natives access to the training and resources they need to effectively advocate for themselves, their ancestors, and their cultural items. We must invest heavily in training and building the capacity of Native people if we want to see the system work better. And, the training we provide must be in a cultural context they understand and delivered by trainers and teachers who are able to bridge the cultural divide between an extremely legalistic, hyper-technical, and foreign administrative process and their traditional cultures and beliefs.

I have seen time and again the trauma and pain displayed in the faces of those Native people who come forward to address the Review Committee about the return of their ancestors, and how the systems we have designed, the words we use, and the way we do things are hurtful to them. We can do a better job of reducing barriers to Native's participation in this process, in building bridges with them, and in translating and interpreting these rules so they are understood. We can do better, and we must.

What does success for NAGPRA look like, and why should we care?

A good deal of the work we did in the four years I was on the Review Committee had to do with resolving disputes and making factual determinations about culturally unidentified human remains or cultural items. The individual case material we were provided was voluminous, technical, and detailed. While this is important work, our focus on the details prevented us from seeing a bigger picture, so that we never got to the really important work of understanding how to assess our progress to date, how to build a metric to track our results, and how to create systems of measurement to increase the traction of this law.

Over 124,000 human remains and over 915,000 cultural items are now classified as culturally unidentified. They represent 721 museums and Federal agencies. Is this what

we would have predicted would have been our story of success 19 years after this law was passed?

NAGPRA was created to remedy the harm, degradation and disrespect to Native people as regards their human remains and cultural items and so we must ask Native people to tell us what their measure of success is under this law. We must ask them to help us create the metrics to track and measure our collective actions. We must ask them how these systems can be improved. And we must recast the Federal agency responsible for administering this Act to create systems, measures, and reports that are simple, clear, and understandable and that are tied to frequent and regular Congressional oversight. We must also engage other NAGPRA stakeholders in this metric setting process as well, so all are clear on what success under NAGPRA means. If what gets measured is what gets done, then we need to get busy creating the right measures to get us to our goal.

This has not happened to date for a number of reasons. The Review Committee is ill equipped to do this work given existing demands on their limited committee time and their expertise as subject matter experts rather than people experienced in creating and managing institutional change in a decentralized NAGPRA process potentially touching all museums, all Federal agencies, and all Native people. The Congress is a busy policy body that operates on a political triage system without a metric to gauge the success of this program on an ongoing and routine basis. The National NAGPRA program is consumed with implementing the present system which has evolved over time- -and lacks the resources, authority, or clear policy focus to make the changes suggested.

I have hope though, that we can make the changes needed. I ask this Committee to send a clear message to the Administration that you expect a metric be created and used in a way that directly aligns with the reasons for which NAGPRA was created and which includes the views of the Native people for whom this statute was created. I also ask that this information immediately be collected and digested, so that improvements to the program may be made. I finally ask that this metric be used by the Congress to gauge how we are doing and whether or not we are getting closer to meeting the intent of this Act.

Does the Review Committee have the authority to accomplish its policy and fact finding responsibilities?

The NAGPRA Review committee was created to accomplish a number of functions that run the gamut from case-specific factual determinations to policy evaluations to consulting with the Secretary to create administrative regulations. The NAGPRA staff set the agenda and determine what issues will receive priority and occupy the Review Committee's attention. It has been my experience that the NAGPRA Staff has the ability to heed or ignore the actions of the Review Committee at its discretion, without clear *a priori* guidance being provided to the Review Committee as to the limits and scope of the Review Committee's discretion.

This is a waste of effort and is an example of the Committee having responsibilities without the authority to carry them out. An example is recommendations made by the

Review Committee on January 8, 2008 with respect to 43 CFR 10.11 Disposition of Culturally Unidentified Human Remains and Associated Funerary Objects. A year and nine months later, the Review Committee is in the dark as to whether their unanimous recommendations will be acted upon.

Members of the Review Committee have also requested information from NPS NAGPRA about issues that arise in the normal course of business without any clear guidance as to whether these requests for information will be honored. Almost two years ago I requested information about NPS National NAGPRA Program's plan to 'withdraw' numerous notices of inventory completion that had been submitted for publication in the Federal Register by museums and Federal agencies but had been languishing unpublished in the NPS NAGPRA office for over a decade. If the national NAGPRA policy is to foster notice and awareness amongst Native people by publishing the notices received by the NPS NAGPRA program from museums and Federal agencies, then how is that purpose served by giving these museums and agencies the ability to now rescind these notices after all these years?

While the information requested would have helped me to better discharge my Review Committee duties of 'monitoring the inventory and identification process under sections 5 and 6 of this Act', I am resigned to the fact that I will never know the details of NPS NAGPRA's decision. Had I been able to review and evaluate the information requested, I believe our Review Committee would have been able to discuss the matter and render a policy recommendation that could have clarified the administrative process as well as reassuring the public about the fidelity of NPS NAGPRA's compliance with both the letter and the spirit of NAGPRA.

Recommendations.

The thrust of my comments have been directed at creating a set of systemic changes which I believe would help us to move this program forward in a tangible and measurable way. I recommend as follows:

Training and Capacity Building.

- Assess the barriers to Native participation in NAGPRA, report upon it, and formulate a plan to address it.
- Increase the capacity of Natives to participate in NAGPRA by immediately increasing comprehensive NAGPRA training and increased funding opportunities.
- Assure that all training provided is delivered in a culturally appropriate manner by trainers with a proven track record of being able to effectively teach in various Native communities.
- Assess and evaluate the effectiveness of the training provided, report these results, and use them to reassess and redesign training and funding opportunities delivered.
- Create a similar process to address similar issues for museums and Federal agencies and repeat the above process for them as well.

- Schedule routine and frequent Congressional oversight hearings on this issue with the expectation that a set of clear metrics and data collected within those metrics will be presented by NPS National NAGPRA to the Congress. Use this metric to measure agency performance.
- Fund these improvements.

Defining What Success Means Under NAGPRA.

- Engage Natives in defining a clear and understandable metric of what success looks like under NAGPRA. Engage other stakeholders in the process, too.
- Create a system of indicators and measures aligned with the purposes of NAGPRA to be used by NPS National NAGPRA.
- Use these indicators (and the data collected thereunder) to define existing barriers to success, to measure agency performance, to capture best practices, and to make improvements in program administration.
- Schedule routine and frequent Congressional oversight hearings on this issue with the expectation that a set of clear metrics and data collected within those metrics will be presented by NPS National NAGPRA to the Congress. Use this metric to measure agency performance.
- Fund these improvements.

Assess the role of the Review Committee in accomplishing the effective implementation of NAGPRA.

- Clarify Review Committee authority vis-a-vis NPS National NAGPRA to receive data and have their recommendations implemented by NPS National NAGPRA.
- Assess the Review Committee's ability to discharge each of its responsibilities under NAGPRA in terms of the Review Committee's access to clear and understandable information, its Committee expertise in addressing each of those items, and the resources (time, information, and funding) able to be brought to bear for each of these items.
- Define metrics to measure and track Review Committee performance in accomplishing its goals and objectives.
- Fund these improvements.