

## Briefing Paper: Native American Omnibus Technical Corrections Act of 2007 (S. 2087)

### NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT AMENDMENT

Senator Byron Dorgan introduced S. 2087 (a technical amendments bill), co-sponsored by Senator McCain, in September. It was marked-up by the Senate Indian Affairs Committee in September. S. 2087 contains the NAGPRA technical amendment needed to fix problems in implementing NAGPRA created by *Bonnichsen v. United States*, 357 F.3<sup>rd</sup> 962 (9<sup>th</sup> Cir. 2004).

**Background of the Problem:** In 1990, NAGPRA was passed to restore indigenous peoples' human right to protect the graves and remains of their ancestors. In 1996, a lawsuit challenged the coverage of the Act. The case attacked the Corps of Engineers' decision to repatriate a 9000 year old skeleton to a tribal coalition. *Bonnichsen* and accompanying controversy created many problems throughout the country in implementing NAGPRA. The case turned on the statute's definition of "Native American." The court held that proof of a significant relationship between the remains and an existing tribe is required before NAGPRA applies to the remains. This narrow interpretation of NAGPRA's coverage (1) is contrary to the intent of Congress which intended the Act to apply to all indigenous remains found in the U.S.; (2) creates a loop-hole allowing museums and agencies to unilaterally, and without consultation, determine remains not to be Native American and therefore avoid the NAGPRA process; and (3) it renders several provisions of the Act, which address remains whose cultural identification cannot be ascertained, a complete nullity. As a result, over 120,000 Native American human remains found in the U.S. may not be covered by NAGPRA. This is all contrary to the interpretation of the Act by the USDOJ in the *Bonnichsen* case and the DOI in implementing NAGPRA since 1990.

**Legislative Background of S. 2087:** Two Senate hearings were held on this problem. In 2004, Senator Campbell introduced S. 2843 to amend the definition of "Native American" by adding the words "or was" to the definition. The bill did not pass for unrelated reasons. In 2005, Senator McCain introduced S. 536 containing a similar amendment. In 2007, Sen. Dorgan introduced S. 2087 adopting Sen. McCain's language so the definition would read:

"Native American" means of, or relating to, a tribe, people, or culture that is **or was** indigenous to **any geographic area that is now located within the boundaries of** the United States.

This amendment eliminates *Bonnichsen's* restrictive reading of NAGPRA's coverage, but does not effect the "cultural affiliation" repatriation standard. Thus, coverage does not mean any remains will be repatriated unless a claimant meets the standard; nor will the "Kennewick Man" be repatriated under the amendment. This language was supported in 2005 by the mainstream scientific community represented by the Society of American Archeology (SAA) as merely effectuating the original intent of the Act.

**Tribal Support for S. 2087:** Affiliated Tribes of Northwest Indians (ATNI) Res. # 05-60 supports the NAGPRA Amendment. ATNI members: 54 tribal governments in Washington, Idaho, Oregon, Montana, Nevada, Northern California, and Alaska. National Congress of American Indians (NCAI) Res. #TUL-05-029 supports the amendment language. NCAI members: 250 Indian tribes.