IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-35994
(District Court No. 96-1481JE (D. Or.))

ROBSON BONNICHSEN, ET AL.,
Plaintiffs-Appellees,
v.
UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants,
and
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
Defendants-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OPENING BRIEF FOR THE FEDERAL APPELLANTS

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ROBSON BONNICHSEN, C. LORING BRACE, GEORGE W. GILL, C. VANCE HAYNES, JR., RICHARD L. JANTZ, DOUGLAS W. OWSLEY, DENNIS J. STANFORD and D. GENTRY STEELE,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, FRANCIS P. McMANAMON, DAVID A. FASTABEND, EDWARD J. KERTIS, THOMAS E. WHITE, GALE A. NORTON, CRAIG MANSON, AND LIEUTENANT GENERAL ROBERT B. FLOWERS,
Defendants-Appellants,

and

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, NEZ PERCE TRIBE, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,
Defendants-Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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STATEMENT OF JURISDICTION

Plaintiffs invoked district court jurisdiction under 28 U.S.C. 1331, 1343(4), and 1361, 25 U.S.C. 3013, 16 U.S.C. 470 et seq., 16 U.S.C. 470aa et seq., 28 U.S.C. 2201 et seq., and the U.S. Constitution. Clerks's Record ("CR") 372 at 1 (amended complaint); Excerpts of Record ("ER") at 65. On August 30, 2002, the district court entered an order (CR 495; ER 124-167) and judgment (CR 496; ER 168-169) granting in part and denying in part plaintiffs' request for relief. The order and judgment decided all claims as to all parties and granted injunctive relief.

The United States and other federal defendants timely filed a notice of appeal on October 28, 2002. CR 545; ER 173-174. This Court's jurisdiction rests on 28 U.S.C. 1291.

STATEMENT OF THE ISSUES ON APPEAL

In 1996 skeletal remains estimated to be between 8,500 and 9,500 years old were discovered on federal property managed by the U.S. Army Corps of Engineers ("Corps"). After extensive study, the Department of the Interior ("Interior") determined that the remains, which came to be known as the "Kennewick Man," are "Native American" within the meaning of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. 3001-

3013, and that handling and disposition of the remains is therefore governed by the Act. In this suit brought by scientists who want to conduct studies on the Kennewick Man, the trial court held, inter alia, that the Kennewick Man is not "Native American" within the meaning of NAGPRA. The federal defendants seek appellate review on the following issues:

1. Whether the Secretary of the Interior's determination that the Kennewick Man is Native American within the meaning of NAGPRA is arbitrary, capricious, an abuse of discretion, or contrary to law; and

2. Whether the Magistrate Judge erroneously interpreted the term "Native American" for purposes of NAGPRA as requiring there to be a demonstrated cultural relationship between the remains and a presently existing American Indian tribe.

STATEMENT OF THE CASE

This case involves a dispute over control, custody, and the authority to decide the scope of scientific study by the plaintiffs of the Kennewick Man remains. Control and disposition of Native American remains found on federal land after 1990 are governed by NAGPRA, 25 U.S.C. 3001-3013, a statute that Congress charged the Secretary of the Interior ("Secretary") with administering. Pursuant to a memorandum of agreement with the Department of the Army and

based on extensive scientific study, the Secretary determined that the Kennewick Man is Native American within the meaning of NAGPRA and that a coalition of tribal claimants is entitled to custody of the remains under the Act.[1]/ Accordingly, the Corps denied a request by plaintiffs for access to the remains for the purpose of conducting tests which, for the most part, have already been conducted. In this action challenging these agency decisions, the Magistrate Judge held, inter alia, that Interior's conclusion that the Kennewick Man is Native American is based on an impermissible legal interpretation of NAGPRA.[2]/ In so holding, the Magistrate Judge declined to accord Interior's interpretation any deference and interpreted NAGPRA as governing only those remains for which a demonstrated cultural relationship to a presently existing American Indian tribe has been shown. Based on his own review of the scientific evidence, the Magistrate Judge then concluded that the evidence did not support finding the requisite relationship in this instance. For this and other reasons, the court set aside the agency decisions which were

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[1]/ The coalition of tribal claimants includes four federally-recognized Indian Tribes – the Confederated Tribes of the Colville Reservation, Confederated Tribes of the Umatilla Reservation, Confederated Tribes and Bands of the Yakama Indian Nation of the Yakama Reservation, and the Nez Perce Tribe of Idaho – and one non-federally recognized band, the Wanapum Band.

[2]/ The parties agreed that the Magistrate Judge's determinations would be final and not subject to review by the district court.

based on Interior's determination that NAGPRA applied. However, the court declined to remand the matter to the Corps to consider the plaintiffs' study request under the Archaeological Resources Protection Act, 16 U.S.C. 470aa et seq., rather than NAGPRA, which the court concluded was the appropriate governing statute given its conclusion that the remains are not "Native American." Instead, the court ordered that the plaintiffs be granted access to study the remains and retained jurisdiction to determine the study conditions.

A. Statutory and Regulatory Background. –

1. The Native American Graves Protection and Repatriation Act. – Enacted in 1990, NAGPRA's purpose "is to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands." H.R. Rep. No. 101-877, 101st Cong, 2d Sess. at 8 (1990). NAGPRA addresses the disposition and treatment of Native American remains and objects subject to the Act in two main contexts: (1) remains and objects found on federal or tribal land after 1990; and (2) remains and objects held or controlled by federal agencies or museums (including federally-funded state, local, and educational institutions). Id. at 9. See generally J. Trope and W. Echo-Hawk, *The Native American Graves Protection*

and Repatriation Act: Background and Legislative History, 24 Ariz. St. L. J. 35 (1992).

a. The meaning of "Native American" for purposes of NAGPRA. – The initial determination which triggers the applicability of NAGPRA to human remains found on federal land or remains in museum or federal agency collections is whether the remains are "Native American" within the meaning of the Act. For purposes of the Act, "'Native American' means of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. 3001(9).

Pursuant to 25 U.S.C. 3011, which directs the Secretary to promulgate regulations to carry out the Act, Interior issued final rules in 1995 governing the process "for determining the rights of lineal descendants, Indian tribes, and Native Hawaiian organizations to claim Native American human remains * * * with which they are affiliated." 43 C.F.R. 10.1(a). See generally 43 C.F.R. Part 10; 60 Fed. Reg. 62134 (Dec. 4, 1995). The regulations provide: "The term *Native American* means of, or relating to, a tribe, people, or culture indigenous to the United States, including Alaska and Hawaii." 43 C.F.R. 10.2(d). The regulations define *human remains* to mean "the physical remains of the body of a person of Native American ancestry." 43 C.F.R. 10.2(d)(1).

Interior has consistently interpreted the statute and regulations to mean that human remains and other cultural items are "Native American" if they "belong to a culture that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian tribes." DOI AR 10018; see also DOI AR 10012, 10842-45; ER 193, 188, 399-402.[3]/

b. Disposition and control of Native American human remains found on federal land. – Section 3 of NAGPRA, 25 U.S.C. 3002, governs the study, excavation, removal, and disposition of Native American human remains either inadvertently discovered on, or intentionally excavated from, federal or tribal lands after November 16, 1990.[4]/ If such remains are determined to be "Native

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[3]/ Interior's Administrative Record is cited as "DOI AR" followed by the page number. The Corps' Administrative Record is referenced as "COE AR" followed by the page number. Parallel citations to the Excerpts of Record are also provided.

[4]/ Section 3(d)(1) imposes notification and other requirements respecting remains and objects inadvertently discovered on federal land. Section 3(c) addresses the intentional excavation or removal of cultural items from federal lands for purposes of discovery, study, or removal. Regardless of whether intentionally excavated or inadvertently discovered, the ownership and disposition of items is determined by subsections (a) and (b).

American," disposition and control over the remains must be determined by a hierarchy set forth in subsections 3(a) and 3(b).

Subsection (a) provides:

> The ownership or control of Native American cultural items[5/] which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)--
>
> (1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or
>
> (2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony--
>
> (A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
>
> (B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects[6/]; or
>
> (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe--

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5/ The term "cultural items" is defined to include "human remains." 25 U.S.C. 3001(3).

6/ The Act provides that human remains are considered culturally affiliated with a present day tribe if "there is a shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian and an identifiable earlier group." 25 U.S.C. 3001(2).

> (1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or
>
> (2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

25 U.S.C. 3002(a).

Native American remains not claimed under subsection (a), "shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 3006 of this title, Native American groups, representatives of museums and the scientific community." 25 U.S.C. 3002(b). This review committee consists of seven members, three of whom are appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders (with at least 2 of such persons being traditional Indian religious leaders); three of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and one appointed by the Secretary from a list of persons developed and consented to by the other members. 25 U.S.C. 3006(b).

In addition to consulting with the Secretary on the development of regulations to carry out the Act, this review committee has numerous other advisory responsibilities, including making recommendations related to the disposition of culturally unidentifiable remains or other objects subject to the Act that are in possession of museums or federal agencies. 25 U.S.C. 3006(c).[7]/ The NAGPRA review committee has provided recommendations to the Secretary concerning the disposition culturally unidentifiable Native American human remains under Section 7 in the possession or control of Federal agencies and museums prior to the enactment of NAGPRA. See 25 U.S.C. 3006(c); 65 Fed. Reg. 3642 (June 8, 2000). The review committee, however, has not yet made specific recommendations on Section 3(b) regulations concerning unclaimed human remains recovered from federal lands after 1990 although the

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[7]/ These responsibilities include monitoring the inventory and identification process which the Act requires museums and federal agencies to undertake, upon the request of any affected party, reviewing and making findings related to the identity or cultural affiliation of cultural items, facilitating the resolution of any disputes among Indian tribes and Federal agencies or museums relating to the return of cultural items, compiling an inventory of culturally unidentifiable human remains that are in the possession or control of Federal agencies or museums and recommending specific actions for developing a process for disposition of such remains, and consulting with Indian Tribes. 25 U.S.C. 3006(c).

circumstances surrounding Section 7's culturally unidentifiable human remains and Section 3's unclaimed human remains are similar.[8]/

2. The Archaeological Resources Protection Act. – The removal, handling, and custody of archaeological items found on federal land are governed by the Archaeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. 470aa et seq., which provides, inter alia, that "[n]o person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit * * *." 16 U.S.C. 470ee(a). Pursuant to 16 U.S.C. 470ii(a), uniform regulations implementing the Act have been promulgated by various agencies. See, e.g., 32 C.F.R. Part 229 (Department of

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[8]/ Even though final regulations for culturally unidentifiable Native American human remains have not been implemented, the review committee employs a process for Federal agencies and museums to repatriate culturally unidentifiable human remains in their possession. 43 C.F.R. 10.9(6). An agency or museum that possesses unidentifiable human remains may make a recommendation to the review committee concerning the disposition of those remains. The review committee considers the request and if it concurs, the agency publishes notice of the disposition in the Federal Register. Since 1995, the review committee has made final recommendations in 16 cases concerning culturally unidentifiable human remains. See, e.g., 66 Fed. Reg. 22,255 (May 3, 2001) (repatriation of culturally unidentifiable human remains in the possession of the University of North Dakota Hariman Research Center under the control of the Bureau of Reclamation); 66 Fed. Reg. 18,505 (April 9, 2001) (repatriation of culturally unidentifiable human remains in the possession of the Anthropology Museum, University of Colorado under the control of the Bureau of Reclamation).

Defense's codification of uniform rules). Under the uniform rules, the agency managing the land on which resources are found processes a permit application for excavation of archaeological resources. 32 C.F.R. 229.4, 229.5, 229.7, 229.8. The ARPA uniform regulations state that disposition of Native American human remains and cultural items as defined by NAGPRA are governed by NAGPRA and its implementing regulations. 32 C.F.R. 229.3(a)(6), 229.13(e).

Archaeological resources subject to ARPA, which are excavated or removed from public lands, remain the property of the United States. 32 C.F.R. 229.13 ARPA authorizes the Secretary of the Interior to promulgate regulations providing for exchange, where appropriate, between universities, museums, or other institutions, of archaeological resources removed from public lands and for the ultimate disposition of these resources. See 16 U.S.C. 470dd; 32 C.F.R. 229.13(c). Interior's regulations implementing this provision, which govern the use of archaeological resources after they have been removed or excavated from federal land, are set forth at 36 C.F.R. Part 79. The regulations generally provide that federally owned or administered resources should be made available for scientific, educational and religious uses subject to such terms and conditions as are necessary to protect and preserve the condition, research potential, religious or sacred importance, and uniqueness of the collection. 36 C.F.R. 79.10. The federal

agency having primary management authority over a collection makes the determination of whether and under what conditions an applicant will be granted permission to study the resource. 36 C.F.R. 79.10.[9]/

B. Factual background. – In July 1996, a spectator watching a boat race along the shoreline of the Columbia River discovered the skeletal remains of the Kennewick Man. Investigation at the instigation of the local coroner's office revealed that the remains were not of recent origin. After initial radiocarbon tests results received in August 1996 indicated that the human remains were approximately 9,000 years old, they were turned over to the Corps. COE AR1; DOI AR 2759-64; ER 178-183, 407. Since October 1998 the remains have been curated at the Burke Memorial Washington State Museum in Seattle, Washington. COE AR 1; ER 407.

In September 1996, the Corps published notices stating that it had determined that the remains were of Native American ancestry and that the Corps intended to repatriate the remains to a coalition of five Columbia Basin tribes and

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[9]/ 36 C.F.R. 79.10(5) provides:

> The Federal Agency Official shall not allow uses that would alter, damage or destroy an object in a collection unless the Federal Agency Official determines that such use is necessary for scientific studies or public interpretation, and the potential gain in scientific or interpretative information outweighs the potential loss of the object.

bands claiming the remains (see n.1 supra) if no additional claimants came forward. COE AR 1; ER 407. On October 16, 1996, the plaintiffs filed suit against the Corps alleging violations of NAGPRA and seeking injunctive and declaratory relief to prevent the repatriation to the tribal claimants and to prevent the federal defendants from "depriving plaintiffs from access" to the Kennewick Man. CR 1; ER 12. The plaintiffs are forensic scientists and anthropologists who wish to study and conduct invasive and non-invasive tests on the remains. CR 1, 372; ER 1, 65-67.

In an order dated February 19, 1997, the Magistrate Judge denied the federal defendants' motion to dismiss. Bonnichsen v. United States, 969 F. Supp. 614 (D. Or. 1997); CR 44; ER 14-27. In that order, the Magistrate Judge recognized that NAGPRA required an initial determination that the remains are Native American, stating: "A determination that the remains or cultural objects are Native American and are subject to NAGPRA is a prerequisite to any decision as to which tribes are entitled to custody of the remains." Id., 969 F. Supp. at 623; ER 23.

In March 1997, the Corps rescinded the notices of intent to repatriate. COE AR 2; ER 408. In an order and opinion dated June 27, 1997, the Magistrate Judge vacated the Corps' notice to the extent it had not already been withdrawn and remanded the matter to the Corps for further consideration. Bonnichsen v. United

States, 969 F. Supp. 628 (D. Or. 1997); CR 122; ER 35-62. The order also set out a series of questions that the court wanted answered on remand and ordered the Corps to respond to the plaintiffs' study request. 969 F. Supp. at 651-54; ER 58-62.

C. Agency action on remand. –

The Corps requested Interior's views on the court's questions relating to NAGPRA. In a December 23, 1997, letter the National Park Service, the agency within Interior responsible for implementing NAGPRA, answered the court's question "What is meant by the terms 'Native American' and 'indigenous' in the context of NAGPRA and the facts of this case?," as follows:

> We consider that the term "Native American" as used in NAGPRA applies to human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and, irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian tribes. Cultural affiliation or biological relationship, however, as discussed below, are relevant to disposition of Native American human remains and cultural items under NAGPRA.
>
> We base these views primarily on the statutory definition of the term "Native American, which is defined in 25 U.S.C. 3001(9), and in the NAGPRA implementing regulations at 43 CFR 10.2(d) as meaning "of, or relating to, a tribe, people, or culture that is indigenous to the United States, including Alaska and Hawaii."

DOI AR 10842; ER 400-401. The letter repeatedly underscores that:

> [t]here is nothing in the statute or its implementing regulations which states or implies that NAGPRA's applicability is limited to Native American human remains and cultural items which are directly related to present-day Indian tribes. However, the matter of a direct relationship with present-day Indian tribes is of concern with respect to disposition of Native American human remains and cultural items pursuant to NAGPRA.

DOI AR 10843-44; ER 400-401.

Interior's letter also explained that NAGPRA does not forbid scientific study of remains. DOI AR 10845-46; ER 402-403. However, the scope of permissible scientific study depends on the "particular circumstances of each situation." DOI AR 10846; ER 403. For example, "[i]n some cases, scientific study may be necessary in order to determine whether NAGPRA is applicable and, if so, to determine appropriate disposition under the statute." Id. If ownership and control of human remains is determined under NAGPRA to be with an individual or Indian tribe, the individual or tribe may study the remains or authorize others to study the remains. Id. If no qualified owner exists or can be identified, the disposition of the remains would be governed by regulations pursuant to Section 3(b). DOI AR 10847; ER 405.

On March 24, 1998, the Department of the Army and Interior entered into an Interagency Agreement pursuant to 25 U.S.C. 3002(d)(3), providing that

Interior would make the determinations on NAGPRA issues concerning the Kennewick Man, i.e., whether the remains were Native American and, if so, their appropriate disposition under the Act. DOI AR 10838-40; ER 395-397. In order to make the NAGPRA determinations, Interior gathered and considered an extensive array of information. DOI AR 10013; ER 188. Besides considering previously conducted scientific examinations, Interior undertook or sponsored many additional studies. DOI 1013-14, 10046-10048, 10050-10085; ER 188-189, 221-223, 225-260.[10]/ These included both non-invasive and invasive studies, such as the extraction of bone samples that were processed and analyzed by three laboratories (the Radiocarbon Laboratory of the University of California, Riverside; the National Science Foundation - Arizona AMS Facility of the University of Arizona; and Beta Analytic, Inc. of Miami, Florida) . DOI AR 10020; ER 195. Drilling and sampling of the bones for DNA tests was also conducted, but the DNA analysis was inconclusive. DOI AR 10514-10628.

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[10]/ A sizeable team of well-qualified scientists, which included numerous academics and other scientists outside of the federal government as well as individual plaintiffs in this case, was assembled to conduct a detailed non-destructive, physical examination of the remains, sedimentary analysis, and analysis of a lithic object lodged in the skeletal remains. See DOI AR 10659-10669; ER 282-292. Investigations of the discovery site were conducted. DOI AR 10661; ER 284. Interior also sponsored numerous studies on the issue of cultural affiliation. DOI AR 1-103-10106; ER 278-281.

Interior also considered information submitted by the tribal claimants and by the plaintiffs. DOI AR 10053; ER 227.

In a letter dated September 21, 2000, the Secretary made a final determination on the NAGPRA issues based on several attached reports and the underlying administrative record. The Secretary reaffirmed Interior's finding, released in January 2000, that the skeletal remains meet the definition of "Native American within the meaning of NAGPRA. DOI AR 10012; ER 187. The Secretary then focused on the second inquiry regarding disposition under NAGPRA Section 3, and determined that the evidence of cultural continuity linking the cultural group with the coalition of presently-existing Indian groups that claimed the remains "is sufficient to show by a preponderance of the evidence that the Kennewick remains are culturally affiliated with the present-day Indian tribe claimants." DOI AR 10016; ER 191.[11]/ The Secretary also determined that disposition to the claimant tribes was appropriate based on aboriginal occupation of the discovery site by the claimant Indian tribes. DOI AR 10016; ER 191. The disposition determination to the tribal claimants under NAGPRA meant that any

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[11]/ The Secretary noted that the four federally recognized tribes claiming the remains (listed in n.1 supra) had standing under NAGPRA but that the nonrecognized band did not. DOI AR 10017 n.1; ER 192.

further study of the actual remains could only be conducted with the tribal claimants' permission. DOI AR 10017; ER 192.

Accordingly, the Corps subsequently denied the plaintiffs' request to study. COE AR 1-7; ER 407-414.

D. The Magistrate Judge's decision. – The plaintiffs then amended their complaint (CR 372; ER 63-86) and moved to vacate the Secretary's and Corps' decisions (CR 416). On August 30, 2002, the Magistrate Judge issued an opinion and order ruling in the plaintiffs' favor. Bonnichsen v. United States, 217 F. Supp. 2d 1116 (D. Or. 2002); ER 124-167.

The Magistrate Judge rejected Interior's conclusions concerning NAGPRA. First, the Magistrate Judge rejected Interior's interpretation of "Native American" for purposes of NAGPRA, holding that "the term 'Native American' [under NAGPRA] requires, at a minimum a cultural relationship between remains or other cultural items and a present-day tribe, people, or culture indigenous to the United States." 217 F. Supp. 2d at 1138; ER 142. To reach this conclusion, the Magistrate reasoned that the "use of the words 'is' and 'relating' in the present tense [in the statutory definition of "Native American"] requires a relationship to a presently existing tribe, people, or culture." 217 F. Supp. 2d at 1136; ER 141. As further support for this interpretation, the Magistrate relied on the Act's definition

of "sacred objects" as meaning "'ceremonial objects which *are* needed by traditional Native American religious leaders for the practice of traditional Native American religions *by their present day adherents*,'" (217 F. Supp. 2d at 1136 (quoting 25 U.S.C. 3001(3)(C) with emphasis added)); ER 141), and on a dictionary defining "Native American" as synonymous with "American Indian" (217 F. Supp. 2d at 1136 n.35; ER 141 n.35). The Magistrate Judge stated that "[i]nterpreting the statute as requiring a 'present-day relationship' is consistent with the goals of NAGPRA." 217 F. Supp. 2d at 1136; ER 141. By contrast, the Magistrate Judge explained, Interior's interpretation would produce an absurd result that it would not presume Congress intended because it would mean that long-extinct peoples who differ genetically and culturally from surviving groups would be "placed totally off-limits to scientific study." 217 F. Supp. 2d at 1137; ER 141.

The Magistrate Judge recognized that Interior's determination that the Kennewick Man is Native American under NAGPRA would be erroneous only if the administrative record contained insufficient evidence to support a conclusion that the remains are related to a present-day tribe. The Magistrate Judge concluded based on his review of the administrative record that the scientific evidence would not support a finding of the requisite relationship to a presently

existing Indian tribe. 217 F. Supp. 2d at 1138. Accordingly, the court concluded that disposition and handling of the remains is not governed by NAGPRA and is instead governed by ARPA. 217 F. Supp. 2d at 1139, 1166-67; ER 143, 165-167.

Second, the Magistrate Judge held that even if Interior's Native American determination was correct, the award of custody to the tribal claimants must be set aside because the administrative record did not support the Secretary's cultural affiliation determination. 217 F. Supp. 2d at 1143-56; ER 146-158. The court also concluded that a "final judgment" by the Indian Claims Commission had not recognized the discovery site as aboriginal land and therefore the remains could not be awarded to the tribal claimants on that basis. 217 F. Supp. 2d at 1156-61; ER 158-162. The Magistrate also held that in this instance the Secretary improperly treated the coalition of tribes as a collective claimant, and instead should have separately analyzed the relationship of the particular tribal claimants to the remains. 217 F. Supp. 2d at 1139-42; ER 143-146.

The Magistrate Judge recognized that ordinarily the judicial remedy when an administrative decision is set aside is to remand the matter to the agency for further proceedings. 217 F. Supp. 2d at 1164; ER 164-165. However, the court held that here it would not remand to the agencies for further consideration of the plaintiffs' study request in light of the decisions set out in its opinion because it

regarded the agencies as biased. The Magistrate Judge reserved for itself the role of adjudicating the plaintiffs' study request in light of its conclusion that NAGPRA did not apply. The Magistrate Judge concluded that in the absence of NAGPRA, ARPA would govern and further concluded that "but for Defendants' assumption that NAGPRA applies, Plaintiffs almost certainly would have been allowed access to study the remains." 217 F. Supp. 2d at 1166; ER 166.

The Magistrate Judge acknowledged that some, if not all, of the studies the plaintiffs intended to carry out had already been done as part of Interior's analysis. 217 F. Supp. 2d at 1167; ER 167. However, explaining that "further study may yield additional information and serve as a check on the validity of earlier results" (id.), the Magistrate Judge ordered that the plaintiffs be allowed to study the remains. The court required the plaintiffs to submit a proposed study protocol within 45 days of its order and allowed the federal defendants to respond to the submission within 45 days of receipt. Id.[12]/

Following entry of judgment, the tribal claimants were granted leave to intervene for purposes of taking an appeal. CR 541. Both the federal defendants

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[12]/ Prior to this Court's granting of a stay pending appeal, which put the plaintiffs' study request on hold, the plaintiffs had submitted a study request to the agencies and the agencies had responded.

and the tribal claimants filed notices of appeal.[13]/ On the tribal claimants' motion, this Court granted a stay of the judgment pending appeal. Accordingly, pending resolution of the appeals, the Kennewick Man will remain in the Corps' control and the plaintiffs' proposed study of the remains will not commence.

SUMMARY OF ARGUMENT

Interior properly interprets "Native American" for purposes of NAGPRA to include human remains of, or relating to, tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of whether some or all of these groups are or are not culturally related to present day Indian tribes. This interpretation conforms to the statutory language, structure, and purposes of the Act and therefore should be upheld because it accurately reflects congressional intent.

The Magistrate Judge's conclusion that "Native American" requires the existence of a demonstrated cultural relationship between remains and presently existing American Indian culture is untenable. No statutory language imposes this limiting criteria. Moreover, this interpretation cannot be squared with other

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[13]/ By order of this Court dated February 11, 2003, the two appeals are considered companion appeals.

provisions or the statutory structure. The interpretation effectively negates the provision addressing claims based on aboriginal land and implausibly collapses the cultural affiliation inquiry relevant to disposition of Native American remains into the threshold determination of the Act's applicability. Furthermore, the Magistrate Judge's interpretation ignores Section 3(b), the provision dictating the process for disposition and control of Native American remains for which there is no qualified claimant. The Magistrate Judge's interpretation of "Native American" is also at odds with congressional intent respecting the provisions of the Act addressing museum's responsibilities to inventory "Native American" remains and other cultural items, and the recognition that many prehistoric remains and cultural items in collections will not be culturally identifiable, yet are subject to the Act.

Finally, there is no merit to the Magistrate Judge's suggestion that Interior's interpretation produces an absurd result because it allows tribes with no relationship to remains to secure custody and prevent scientific study of such remains. Neither outcome results from the threshold determination that remains are "Native American."

Even if the statute is deemed ambiguous on the issue of whether there must be a demonstrated cultural relationship between the remains and presently existing

American Indian culture in order for remains to be considered "Native American," Interior's interpretation should be upheld. The Magistrate Judge erred by refusing to accord any deference to Interior's interpretation. Interior's interpretation is entitled to Chevron deference because it is the agency charged with administering the Act and its interpretation is reflected in a regulation promulgated after notice and comment rulemaking. Even if Chevron does not apply, Interior's interpretation is still entitled to deference. Regardless of the degree of deference accorded, Interior's interpretation should be upheld because it is more persuasive than the Magistrate Judge's.

Interior's conclusion that the Kennewick Man is Native American under its legal interpretation is not arbitrary and capricious. Interior reasonably concluded that the Kennewick Man was a native inhabiting the Columbia Plateau area long before recorded European exploration. Accordingly, this Court should vacate the lower court's remedy and remand to Interior to determine disposition of the Kennewick Man as unclaimed remains under NAGPRA.

ARGUMENT

INTERIOR PROPERLY DETERMINED THAT THE KENNEWICK MAN IS "NATIVE AMERICAN" UNDER NAGPRA

A. Standard of review. – This Court should review de novo the district court's determination that the Kennewick Man is not "Native American." This Court reviews de novo a district court's determination on an issue of statutory interpretation. NRDC v. Evans, 316 F.3d 904, 910 (9th Cir. 2003). Moreover, although the plaintiffs captioned their district court motion as a "Motion to Vacate Second Administrative Action," their motion effectively was one seeking summary judgment in an action seeking judicial review of agency action based on review of an administrative record. This Court reviews de novo a grant of summary judgment. Hall v. Norton, 266 F.3d 969, 975 (9th Cir. 2001).

"'De novo review of a district court judgment concerning the decision of an administrative agency means [this Court] view[s] the case from the same position as the district court.'" Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d 955, 959 (9th Cir. 2002) (quoting Sierra Club v. Babbitt, 65 F.3d 1502, 1507 (9th Cir. 1995)). Interior's determination on the NAGPRA issues is properly reviewed under the deferential standard governing judicial review of agency action set forth in the Administrative Procedure Act ("APA"). See Ninilchik

Traditional Council v. United States, 227 F.3d 1186, 1193-94 (9th Cir. 2000)(even where a statute contains a provision providing for district court jurisdiction, "a reviewing court must apply the deferential APA standard in the absence of a stated exception when reviewing federal agency decisions").

Under the APA, agency decisions must be upheld unless found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2). Under this standard, the reviewing court should not substitute its judgment for that of the agency's; rather, the reviewing court assesses "whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made." Pacific Coast Fed'n of Fishermen's Ass'ns v. National Marine Fisheries Service, 265 F.3d 1028, 1034 (9th Cir. 2001) (quotations omitted). Deference to Interior's determination that scientific evidence supports the conclusion that the Kennewick Man is "Native American" is especially appropriate because it implicates substantial agency expertise. See Ninilchik Traditional Council, 227 F.3d at 1194; United States v. Alpine Land and Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989) ("Deference to an agency's technical expertise and experience is particularly warranted with respect to questions involving ... scientific matters").

B. The Secretary's decision rests on a proper interpretation of the statute. – The familiar Chevron standard governs review of statutory interpretation issues. If a statute speaks clearly "'to the precise question at issue,'" the reviewing court "'must give effect to the unambiguously expressed intent of Congress.'" Barnhart v. Walton, 122 S. Ct. 1265, 1269 (2002), quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). "If, however, the statute 'is silent or ambiguous with respect to the specific issue,' [the court] must sustain the Agency's interpretation if it is 'based on a permissible construction' of the Act." Barnhart, 122 S. Ct. at 1269 (quoting Chevron, 467 U.S. at 843).

As we explain in this section, Interior's interpretation that NAGPRA applies to the remains of indigenous people inhabiting the United States prior to known European exploration, without requiring that the agency demonstrate a cultural relationship to a presently existing American Indian culture or tribe as a threshold matter, rather than in the context of considering a claim based on cultural affiliation, should be upheld under Chevron's first step. The Magistrate Judge erred in interpreting NAGPRA as applying only to those human remains for which there is shown to exist a cultural relationship between the deceased and a presently existing American Indian Tribe.

Under NAGPRA, human remains are "Native American" if they are "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. 3001(9). Interior interprets this statutory definition to include all tribes, people, and cultures that were residents of the lands comprising the United States prior to historically documented European exploration of these lands. DOI AR 10842; ER 399. [14]/

Interior's interpretation comports with the plain meaning and common usage of the word "indigenous." In ordinary usage, "indigenous" refers to early inhabitants born in a region, as distinct from later European colonists or their descendants. For example, the Compact Edition of the Oxford English Dictionary (1971) defines "indigenous" as "born or produced naturally in a land or region; native or belonging naturally to (the soil, region etc.). Used primarily of aboriginal inhabitants or natural products." In turn, "aboriginal" is defined as "[a]n original inhabitant of any land, now usually as distinguished from subsequent European colonists." Id. See also Webster's Third New International Dictionary (Merriam-Webster, Inc. 1993) defining "indigenous" as "native" or

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[14]/ The Magistrate Judge mischaracterized Interior's interpretation as "automatically includ[ing] all remains predating 1492 that are found in the United States." 217 F. Supp. 2d at 1137; see also 217 F. Supp. 2d at 1135; ER 142, 140. See infra at 48-49.

"not introduced directly or indirectly according to historical record or scientific analysis into a particular land or region or environment from the outside." Furthermore, as explained below, the context and design of the statute as a whole confirms that Interior's interpretation is the one Congress intended.

As we explain in Section C below, even if the statute were deemed ambiguous and the Magistrate Judge's interpretation were a plausible reading of the ambiguity, the Magistrate Judge erred by refusing to accord Interior's interpretation any deference and concluding that Interior's is not a permissible interpretation. Regardless of the degree of deference applied, Interior's interpretation should be upheld because it is permissible and is the more persuasive interpretation.

1. The Magistrate Judge erred as a matter of law by requiring a demonstrated cultural relationship between the deceased and a presently-existing "American Indian tribe" in order for the human remains to be treated as "Native American" under the Act. – Neither the statutory definition of "Native American" nor any other statutory provision imposes, by its plain language, the relationship requirement imposed by the Magistrate Judge, which serves to exclude from the term "Native American" the remains of or relating to, an indigenous culture, tribe, or people that has become extinct or for which there is not a demonstrated cultural

relationship with a present day American Indian tribe or culture. The Magistrate essentially created a new legal standard governing NAGPRA's applicability, one that Congress did not envision.

a. Contrary to the Magistrate Judge's reasoning, the plain language of the statute does not impose this requirement. – The Magistrate Judge identified three linguistic bases for its interpretation: (1) on the use of the present tense words "is" and "relating" in the statutory definition of "Native American" (i.e., Native American means "of, or relating to, a tribe, people, or culture that is indigenous to the United States," 25 U.S.C. 3001(9)(emphasis added)); (2) the presence of words imposing a temporal limitation in the statutory definition of "sacred objects," 25 U.S.C. 3001(3)(C); and (3) a dictionary definition of "Native American" as synonymous with "American Indian." This plain language analysis does not withstand scrutiny.

The use of the word "is," rather than "was," in the Native American definition does not compel a requirement that there be a cultural relationship between presently-existing tribes and remains or objects subject to NAGPRA. See Costello v. INS, 376 U.S. 120, 125 (1964). In common parlance, the words "is" and "was" are appropriately used interchangeably when referring to tribes, peoples and cultures that existed in the past but are being spoken of in the present. For

example, one might say that the Ancient Pueblo (also known as Anasazi culture) "is indigenous" to the United States, even though Ancient Pueblo, or Anasazi, culture no longer exists. The more cumbersome "is or was" is not linguistically necessary to convey the meaning that the term "Native American" encompasses all tribes, peoples, and cultures that have existed within the territory of what is now the United States, whether or not those tribes, peoples, and cultures continue to exist today.

The Magistrate Judge regarded the inclusion of "present day" in the definition of "sacred objects" as supportive of its restrictive interpretation of "Native American." 217 F. Supp. 2d at 1136; ER 141. "Sacred objects" is defined as "ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." 25 U.S.C. 3001(3)(C). While that definition is instructive, the Magistrate Judge drew exactly the wrong inference. The use of "present day" in the definition of "sacred objects," as well as a similar limitation in the definition of "cultural affiliation," show that Congress was aware of, and knew how to clearly express, a temporal limitation when it intended that result. See 25 U.S.C. 3001(2) (defining cultural affiliation as meaning a relationship of shared group identity between a "present day Indian tribe or Native Hawaiian organization" and an

identifiable earlier group). "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Bates v. United States, 522 U.S. 23, 29-30 (1997)(quoting Russello v. United States, 464 U.S. 16, 23 (1983)(other internal quotation marks omitted)).

Indeed, the legislative history discloses that the definition of "sacred object" was controversial because the scientific community was concerned that it could be broadly construed to include any Native American object. Congress included the "present day" language for the purpose of limiting the objects to which the Act applied. See H. R. Rep. No. 101-877 at 14 ("the operative part of the definition [of sacred objects] is that there must be 'present day adherents'"); see also S. Rep. No. 101-473, 101st Cong., 2d Sess. (1990) at 7 (explaining that definition of "sacred objects" was controversial and that such objects must have "religious significance or function in the continued observance or renewal of [traditional religious ceremony or ritual]"). There is no discussion in the reports of any similar intention to limit the definition of "Native American."

Finally, the Magistrate Judge's reliance on a dictionary definition of "Native American" (defining it as "American Indian") was inappropriate because Congress

provided a statutory definition of "Native American" that does not limit its meaning to the current understanding of "American Indian" or even to tribes. Instead, the statutory definition more broadly defines the term by reference to indigenous peoples and cultures. [15]/

Congress's election of this broad definition is all the more significant because Congress rejected more limited definitions of "Native American." Between 1987 and the enactment of NAGPRA in 1990, Congress considered five bills dealing with the protection of Native American graves. Each of the rejected alternatives defined the term "Native American" through explicit reference to American Indians, Native Hawaiians, and Alaskan Natives. H.R. 1381, 101st Cong. (1st Sess.) §5 (1989) ("Native American Burial Site Preservation Act of 1989"); H.R. 1646, 101st Cong. (1st Sess.) (1) (1989) ("Native American Grave and Burial Protection Act"); S. 1021, 101st Cong. (1st Sess.) §3(1) (1989); S. 1980, 101st Cong. (1st Sess.) §2(1) (1989). However, in enacting NAGPRA (H.R. 5237), Congress rejected the reference to American Indians, Native Hawaiians, and Alaskan Natives in favor of the word "indigenous." "[W]here Congress

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[15]/ The Magistrate Judge's suggestion that Congress meant "Native American" to be synonymous with American Indian also cannot be reconciled with Congress's clear intent to include Native Hawaiians within the term "Native American" since Native Hawaiians are not generally referred to as American Indians.

includes limiting language in an early version of a bill and deletes that language before the enactment, it may be presumed that the limitation was not intended." Russello v. United States, 464 U.S. 16, 23 (1983); see also National Coalition for Students with Disabilities Education and Legal Defense Fund v. Allen, 152 F.3d 283, 290 (4th Cir. 1998) (when "'Congress employ[s] broad language' in drafting a statute, we 'are not free to disregard' it")(quoting United States v. Wildes, 120 F.3d 468, 470 (4th Cir. 1997)). The Magistrate Judge's interpretation effectively resurrects language that Congress rejected.

b. The Magistrate Judge's interpretation is at odds with the structure of NAGPRA Section 3. – Even if the words "is indigenous" by themselves are ambiguous, statutory words are not to be viewed in isolation, but in the context and design of the statute as a whole. See Deal v. United States, 508 U.S. 129, 132 (1993) ("[T]he meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used."); Crandon v. United States, 494 U.S. 152, 158 (1990) (Courts must interpret statutes in light of "the design of the statute as a whole and [of] its object and policy"). The structure and design of the statute eliminates any potential ambiguity with respect to the exact question at issue here– i.e., whether there must be a demonstrable relationship between the deceased and

presently existing American Indian tribes in order to be considered "Native American" under NAGPRA.

The Magistrate Judge's interpretation is untenable because it negates or renders superfluous other provisions of Section 3. See Hohn v. United States, 524 U.S. 236, 249 (1998)("We are reluctant to adopt a construction making another statutory provision superfluous"). Under the Magistrate Judge's definition, remains that are unrelated to a present day Indian tribe fall outside the ambit of NAGPRA. This result renders meaningless that part of subsection 3(a) that gives a tribe ownership of remains found on its aboriginal lands (as designated in a final judgment by the Indian Claims Commission) precisely in the situation in which a cultural affiliation determination cannot be made.

Furthermore, the Magistrate Judge's interpretation improperly collapses the cultural affiliation inquiry that determines disposition into the initial determination of the Act's applicability. Sensing this particular problem, the Judge states: "NAGPRA recognizes two distinct kinds of relationships: The first is the general relationship to a present-day tribe, people, or culture that establishes that a person or item is 'Native American.' The second, more narrowly defined specific relationship establishes that a person or item defined as 'Native American' is also 'culturally affiliated' with a particular present-day tribe." 217 F. Supp. 2d at 1137-

38; ER 142. The Magistrate Judge further explains that the former "general" relationship may be satisfied "by showing a relationship to a present-day 'culture' that is indigenous to the United States. The culture that is indigenous to the 48 contiguous states is the American Indian culture, which was here long before the arrival of modern Europeans and continues today." 217 F. Supp. 2d at 1138; ER 142.

The Magistrate Judge's creation of the so-called "general" cultural relationship appears to rest on an assumption that there is a commonly-accepted generic "American Indian culture" that is distinct from a cultural relationship associated with a specific Indian tribe. However, the Magistrate Judge's assumption in this regard has no grounding in the statutory language or other indicia of congressional intent or legal precedent. Moreover, in concluding that the requisite "general" relationship was lacking here, the Magistrate Judge relied on its analysis of the cultural affiliation evidence – thus illustrating the overlap of analysis that its interpretation effectively requires. 217 F. Supp. 2d at 1138 n.39; ER 143.

The Magistrate's interpretation also cannot reasonably be reconciled with Section 3(b), which addresses disposition when a relationship with a presently existing tribe based on cultural affiliation or aboriginal land cannot be

determined.[16]/ Section 3(b) provides that in this situation, the remains or objects will be "disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 3006, Native American groups, representatives of museums and the scientific community." Although the Secretary has not yet promulgated those regulations, there is nothing in the Act itself which would require that custody or control of remains subject to Section 3(b) be awarded to an Indian tribe or that would preclude scientific study of such remains. The Magistrate overlooks Section 3(b), an omission which severely undercuts his suggestion that Interior's interpretation produces an absurd result not contemplated by Congress by allowing present-day tribes to take custody of remains of long-extinct peoples who may have differed genetically and culturally from the surviving American Indian tribes. 217 F. Supp. 2d at 1137; ER 141.

c. The Magistrate Judge's interpretation impacts other sections of NAGPRA, creating considerable tension with congressional intent respecting those sections. – The wrongheadedness of the Magistrate Judge's narrow

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[16]/ The Magistrate Judge's interpretation might not deprive Section 3(b) of all applicability, but it would limit the provision's applicability to only those rare situations in which no presently-existing tribe with a demonstrable relationship to remains or other cultural items wishes to claim them.

interpretation of "Native American" is even more manifest when one looks at other ramifications of this holding. NAGPRA's definition of "Native American" also applies to human remains and cultural objects in the control or possession of federal agencies and museums prior to the Act's enactment. 25 U.S.C. 3001(9); 25 U.S.C. 3002; 25 U.S.C. 3003-3007. Viewed in the context of these provisions, the error in the Magistrate Judge's interpretation becomes all the more apparent and far-reaching.

Under section 5 of NAGPRA, federal agencies and museums are required to produce inventories of Native American human remains and cultural items. 25 U.S.C. 3003 (a)-(b). If the museum or federal agency determines that they possess or control human remains that cannot be identified as affiliated with a particular Indian tribe, the museum or federal agency must provide Interior's Departmental Consulting Archaeologist a list of these culturally unidentifiable human remains. 43 C.F.R. 10.10 (g). The Departmental Consulting Archaeologist is required to submit the list of culturally unidentifiable Native American human remains to the NAGPRA Review Committee. Id. Section 8 of NAGPRA provides that the NAGPRA Review Committee is responsible for "compiling an inventory of culturally unidentifiable human remains that are in the possession or control of

each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains." 25 U.S.C. 3006(c)(5).

The Magistrate Judge's interpretation is in considerable tension with the NAGPRA provisions governing inventory and repatriation of remains or items in collections. See 25 U.S.C. 3003-3005. The reference to "culturally unidentifiable human remains" in museum collections indicates that Congress expected to include within the meaning of "Native American" remains where a cultural relationship with a presently existing American Indian Tribe is not demonstrable or apparent. See 25 U.S.C. 3006(c)(5).

For example, a requirement that a cultural relationship to a presently existing Indian Tribe be demonstrated before remains or other cultural items are considered "Native American" undermines Congress's intention that the inventory process not be unduly burdensome on museums. The Senate Report states:

> The Committee also recognizes that there are a significant number of Native American human remains, funerary objects and sacred objects for which the cultural affiliation may not be readily ascertainable. The Committee does not intend this Act to require museums or Federal agencies to conduct exhaustive studies and additional scientific research to conclusively determine the cultural affiliation of human remains or objects within their collections.

S. Rep. No. 101-473 at 12. See also 25 U.S.C. 3003(b)(1)(A), (C). If, as the Magistrate Judge held, the threshold determination that a cultural item is "Native

American" requires a determination whether there exists a cultural relationship between remains or other cultural items and a presently existing tribe, people, or culture, it would effectively impose on museums and federal agencies the investigative burden that Congress intended to avoid. By contrast, Interior's interpretation of "Native American," which does not include the criteria that there be a demonstrable cultural relationship to a presently existing tribe, imposes no comparable difficulties. Interior's interpretation is relatively easy to apply and is fully consistent with Congress's expectation that a cultural relationship to a presently existing tribe may not be readily ascertainable for many remains and other cultural items it intended to be subject to the Act.

Furthermore, a purpose of the inventories is to disclose to tribes and Native Hawaiian groups the content of collections so that tribes and Native Hawaiians may have information that may lead these groups to make repatriation claims to culturally unidentifiable remains or objects. See 25 U.S.C. 3004, 3005. A restrictive interpretation of "Native American" that excludes from the inventories remains or objects for which there is not a demonstrable relationship to a presently existing tribe undermines this fundamental purpose.

2. Interior's interpretation is consistent with Congress's intent and purpose in enacting NAGPRA and does not produce an absurd result. – With respect to the

general statutory purposes, there is no merit to the Magistrate Judge's suggestion that Interior's interpretation produces an absurd result, inconsistent with the purpose and policies behind NAGPRA's enactment. As explained above, the Magistrate Judge's analysis in this regard incorrectly assumed that a determination that the Kennewick Man is "Native American" results in a mandatory disposition to the claimant tribes and preclusion of any further scientific study. This is not the inevitable result of treating remains as "Native American." Congress delegated to the Secretary authority to decide the disposition of "Native American" remains for which sufficient evidence of a relationship to a presently existing tribe is lacking.

Congress enacted NAGPRA to protect Native American graves and to address the offense caused by the historical treatment of remains of indigenous people as scientific specimens or collectibles. Committee reports expressed agreement with the principle that human remains at all times be accorded dignity and respect.[17]/ The reports also indicate that Congress intended for NAGPRA to

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[17]/ S. Rep. No. 101-473, at 6 ("The Committee believes that human remains must at all times be treated with dignity and respect"); H. R. Rep. No. 877, 101st Cong., 1st Sess. (1989), at 10-11.

promote dialogue among Native American groups, museums, and scientists.[18]/ Congress was fully aware that some Native American human remains would not be culturally identifiable.[19]/ Accordingly, it is not insensible to attribute to Congress an intention to delegate to the Secretary under Section 3(b) the authority to decide after consultation with the review committee, representatives of museums and the scientific community and Native American groups the permissible study, handling, or disposition of remains of a pre-Colombian, indigenous person that has no conclusively demonstrated relationship with a presently existing Indian tribe.

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[18]/ See, e.g., H. R. Rep. No. 101-877, at 16 ("There is general disagreement on the proper disposition of such [culturally] unidentifiable remains. The Committee looks forward to the Review Committees [sic] recommendations in this area.")

[19]/ See, e.g., Protection of Native American Graves and Repatriation of Human Remains and Sacred Objects: Hearing on H.R. 1381, 1646, and 5237 Before the Comm. On Interior and Insular Affairs, 101st Cong. 130 (1990)(statement of Rep. Charles Bennett)("we should not overlook the fact that there are some of the deceased who don't have modern descendants, and their remains should be kept with care and dignity..."); See H. Rep. No. 877, at 1 (1990) (describing purpose); see also, e.g., id., at 13 (noting testimony of Indians at congressional hearings that "the spirits of their ancestors would not rest until they are returned to their homeland"); id., at 10-11 (agreeing with the findings and recommendations of the Panel for a National Dialogue on Museum/Native American Relations, which concluded that respect for Native human rights is the paramount principle); id. at 11 (explaining that the Panel was split on what to do about human remains which are not culturally identifiable and that the Panel report strongly supported dialogue between museums and Indian tribes); 136 Cong. Rec. S17174 (Oct. 26, 1990) (statement of Sen. Inouye).

Under the Magistrate Judge's interpretation, human remains of indigenous peoples would be treated as archaeological resources no different than ordinary human cultural objects. This result is at odds with the policies and concerns that animated congressional enactment of NAGPRA.[20]/

In sum, Interior's interpretation of "Native American" should be sustained because the statutory language, structure, scheme, and purpose of the statute all support the conclusion that its interpretation conforms to congressional intent. The Magistrate Judge's interpretation, on the other hand, does not.

C. Even if the Act is ambiguous on the question of whether a relationship to a presently existing American Indian tribe is required for remains to be considered "Native American," Interior's interpretation is entitled to deference and should be upheld. – Even if congressional intent is regarded as ambiguous, the Secretary's reasonable interpretation should be upheld. See supra at 27-28. In

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[20]/ The Magistrate Judge's interpretation produces other anomalies. NAGPRA vests ownership of human remains and other items from Native American graves recovered from federal lands after November 16, 1990, primarily in "the lineal descendants of the Native American," 25 U.S.C. 3002(a)(1), if any can be identified, and only secondarily in a tribe that establishes a sufficient relationship to those items. Presumably, Congress would have intended NAGPRA to apply to situations in which the human remains were relatively recent (e.g., from the early 20th century) and where lineal descendants of the deceased could be identified, even if neither the deceased's own tribe nor any culturally related tribe continues to exist. Cf. Yankton Sioux Tribe v. United States Army Corps of Engineers, 83 F. Supp. 2d 1047, 1056 (D. S. D. 2000) (rejecting suggestion that the Act applies only to prehistoric human remains).

order to uphold the agency construction of an ambiguous statute, the reviewing court need not conclude that the agency construction was the only one it permissibly could have adopted, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. Ninilchik Traditional Council, 227 F.3d at 1193. The Magistrate Judge erred by refusing to accord Interior's interpretation any deference and by substituting its own preferred interpretation for the permissible interpretation by the agency charged with implementing the statute.

The Magistrate Judge held that the Secretary's interpretation is not entitled to Chevron deference because it had not been enacted by any formal process, such as by notice and comment rulemaking or formal adjudication. 217 F. Supp. 2d at 1135; ER 140. To the contrary, the statute expressly charges Interior with implementing the statute and Interior's interpretation of "Native American" is reflected in regulations that were adopted through notice and comment rulemaking. Even assuming that the use of the present tense verb in the statutory definition of "Native American" creates an ambiguity, Interior's regulation defining "Native American" resolves it. Interior's regulatory definition of "Native American" (43 C.F.R. 10.2(d)), deletes the words "that is," defining Native American as follows: "The term *Native American* means of, or relating to, a tribe,

people, or culture indigenous to the United States, including Alaska and Hawaii." 43 C.F.R. 10.2(d). Interior's regulatory definition, which was developed through Notice and Comment rulemaking pursuant to an express delegation of authority to promulgate regulations implementing the Act, 25 U.S.C. 3011, is entitled to Chevron deference.

The Supreme Court in United States v. Mead, 533 U.S. 218, 226-27 (2001) reaffirmed that deference is owed an agency's interpretation of ambiguous statutory terms in circumstances, like those here, where agency rules are adopted pursuant to notice and comment rulemaking and specific statutory authority to promulgate rules having the force of law. Furthermore, the Supreme Court has stated that an agency's interpretation of its own regulations is "controlling unless '"plainly erroneous or inconsistent with the regulation."'" Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)) (in turn, quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)). Similarly, this Court "give[s] great deference" to the interpretation of a regulation by the agency that created it. Lara v. Secretary of Interior, 820 F.2d 1535, 1538 (9th Cir. 1987)(citing Jewett v. Commissioner, 455 U.S. 305, 318 (1982) (Commissioner's interpretation of his own regulation is entitled to great respect)); see also Norfolk Energy, Inc. v. Hodel, 898 F.2d 1435,

1439, 1441-1442 (9th Cir. 1990) (agency's interpretation of its regulations is controlling if not plainly erroneous or inconsistent with the regulations); Ka Makani 'O Kohala Ohana Inc. v. Water Supply, 295 F.3d at 959 (same). Accordingly, if NAGPRA is deemed ambiguous on the precise issue presented here, this Court should defer to Interior's permissible interpretation of the statutory and regulatory definitions of "Native American."

For any agency statutory interpretation to which Chevron deference does not apply, Interior would still be entitled to deference under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Mead, 533 U.S. at 227-28, 234-35; see also Wilderness Society v. U.S. Fish and Wildlife Service, 316 F.3d 913, 922 (9th Cir. 2003). Under Skidmore deference, agency interpretations are "'entitled to respect' . . . to the extent that those interpretations have the 'power to persuade.'" Skidmore, 323 U.S. at 140; see also Mead, 533 U.S. at 235. The degree of deference in a particular case will "vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." Mead, 533 U.S. 228, 234-35 (footnotes omitted) (citing Skidmore, 323 U.S. at 139-40). Agency interpretations which are articulated in guidance letters, during informal adjudications, or more fully explained in the context of litigation are not

automatically disqualified from any deference. See id.; Auer v. Robbins, 519 U.S. 452, 462 (1997).

Thus, even if Interior's interpretation does not qualify for the heightened deference afforded under Chevron, it is surely "'entitled to respect'" and to some degree of deference. Christensen v. Harris County, 529 U.S. 576, 587 (2000) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). Deference to Interior's interpretation is particularly warranted given the express delegation of authority to Interior to administer and issue regulations implementing the Act and the specialized experience of Interior and the Departmental Consulting Archaeologist in implementing NAGPRA and other cultural resource laws, such as ARPA, and Native American matters generally. See Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1416 n.15 (D. Haw. 1995) (interpretation by National Park Service, the agency charged with implementation of NAGPRA, entitled to deference).

The Magistrate Judge indicated that no deference should be accorded the agency interpretation because the agency has not consistently adhered to its current interpretation. That is not the case. The Magistrate Judge's perception of inconsistency may stem from an apparent misunderstanding that Interior defines "Native American" solely by the age of the remains (i.e., as pre-Colombian). To

the contrary, Interior's interpretation has consistently been that "Native American" "encompass[es] all tribes, people, and cultures that were residents of the lands comprising the United States prior to historically documented European exploration of these lands." DOI AR 10842 (emphasis added); ER 399. Thus, age alone is not the only criteria under Interior's interpretation. In any event, the Magistrate Judge identifies no instance in which Interior has applied the statutory and regulatory interpretation differently.[21]/

Ultimately, however, this Court need not decide the issue of how much deference is owed Interior's interpretation. Regardless of the degree of deference accorded Interior's interpretation, for reasons explained above, Interior's interpretation is both a permissible and the more persuasive reading of the statute.

D. Interior reasonably concluded that Kennewick Man is Native American. Interior's determination that the evidence supports finding the Kennewick Man to be a "Native American" as it interprets that term is not arbitrary or capricious. No

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[21]/ The supposed inconsistency in position was based only on supposedly inconsistent responses by government counsel when answering hypothetical questions posed during hearings in this case. Counsels' off-the-cuff answers to rather improbable hypotheticals hardly qualifies as a change in official agency position and, in any event, are not reasonably read in context as marking a departure from Interior's consistent interpretation. See ER 31-34; 104-123. Most significantly, the Magistrate Judge identified no instance in which Interior has actually applied the term "Native American" in a manner inconsistent with that taken here.

one can seriously dispute that the Kennewick Man lived long before known European exploration or colonization of the United States. Moreover, Interior relied on multiple scientific studies including skeletal and sedimentary analyses, lithic analysis of the stone artifact lodged in the hip, radiocarbon dates and geomorphologic analyses to determine that the remains related to a pre-European culture that resided in the United States. DOI AR at 10019. This scientific evidence demonstrates that the Kennewick Man most likely resided in the Columbia Plateau region of the United States and was not merely a traveler passing through. Indeed, there is no clear evidence to support a contrary conclusion.

The skeletal evidence indicates that the Kennewick Man died between 45 and 50 years of age, was approximately 5'9" tall, well-muscled and overall in excellent physical shape. DOI AR at 10677; ER 300. Additionally, he suffered several minor injuries (two broken right ribs and a fracture of the right humerus), all of which healed well and caused him no disability. DOI AR at 10690; ER 313. He was, however, severely injured as a teenager when a stone point was embedded in his pelvis, which most likely required others to care for him for a time. Despite this serious injury, he fully recovered without suffering a bone infection or other

malady even though the stone point remained lodged in his hip until his death some 30 to 35 years later. DOI AR at 10690-91; ER 313-314.

The examination of the skeletal remains also indicated that the Kennewick Man was most likely intentionally buried, rather than left to decompose or be scavenged on the surface. DOI AR 10691; ER314. The completeness of the remains, lack of carnivore damage or evidence of rodent gnawing all indicate an intentional burial rather than accidental death and exposure. Id.

The Carbon-14 (C-14) examination dated the Kennewick Man remains to approximately 8500 to 9500 years ago. DOI AR at 10020; ER 195. The radiocarbon analysis also revealed an untypical amount of Carbon-13 (C-13) in the samples, which scientists interpreted as indicating that the Kennewick Man subsisted largely on a marine diet of anadromous fish. DOI AR at 10034; ER 209. These results are consistent with the lifestyle of a resident living near the Columbia River and eating primarily salmon.

The scientific investigation and examination of the point embedded in Kennewick man's pelvis concluded that this artifact resembled a form of Cascade Point commonly used approximately 7,000 years ago throughout the Pacific Northwest and the Columbia Plateau region. Cascade points are often associated with deposits of volcanic ash which facilitates placing the point in a temporal

context. DOI AR at 10811; ER 392. The sedimentary analysis strongly suggests that the Kennewick Man remains were buried below the Mazama volcanic ash layer, which dates to approximately 6,700 years ago. DOI AR at 10741, 10756-57; ER 364, 379-380.

In sum, the administrative record adequately supports a determination that the Kennewick Man was likely part of a group that resided in the Columbia Plateau region 8500 to 9500 years ago, subsisted on fish from the Columbia River and used a tool technology found in that area. Accordingly, the Secretary's determination that the remains of the Kennewick Man are Native American within the meaning of NAGPRA is reasonable.

E. The district court's order should be vacated and the matter remanded to the agencies for further proceedings. – The federal defendants do not appeal from that part of the Magistrate Judge's order setting aside the Secretary's determination that the tribal claimants should be awarded custody of the Kennewick Man under Section 3(a). Assuming this Court reverses the lower court's holding on the "Native American" issue and upholds the Secretary's decision that Kennewick Man is "Native American," this Court should require that the matter be remanded to the agencies for further proceedings. In the absence of a qualified claimant under Section 3(a), Section 3(b) governs disposition and the

permissibility of future study of the Kennewick Man.[22]/ In Section 3(b), Congress dictated that the Secretary decide the disposition of unclaimed remains, in consultation with the review committee, Native American groups, and representatives of museums and the scientific community. It would be contrary to congressional intent for a reviewing court to usurp this process. While Section 3(b) regulations have not yet been promulgated, the Review Committee has been working on recommendations concerning cultural unaffiliated remains and objects. See supra at 9-11.

In sum, the Magistrate Judge's remedial order granting the plaintiffs' request to conduct studies on the Kennewick Man on conditions determined by the court should be vacated because it rests on an erroneous interpretation of

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[22]/ The Magistrate Judge suggests, without deciding, that under NAGPRA Section 3(c), ARPA would govern the plaintiffs' study request even if the remains were properly determined to be "Native American" for purposes of NAGPRA, but cultural affiliation could not be established. 217 F. Supp. 2d at 1165 n.71; ER 165. That is not correct. NAGPRA Section 3(c), 25 U.S.C. 3002(c), provides that "intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items" is permitted only if excavated or removed pursuant to an ARPA permit and if "the ownership and right of control of the disposition "shall be as provided in subsections (a) and (b)." Thus ARPA does not govern final disposition and control once the remains have been excavated and removed. Furthermore, while the Kennewick Man was excavated and removed from the discovery site pursuant to an ARPA permit, the limited purpose of that permit (excavation and removal) has been completed and the permit is expired. Moreover, the permittee is not a party to this suit.

NAGPRA and conclusion that NAGPRA does not apply.[23]/ The matter should be remanded to Interior to determine control over, and disposition of, the Kennewick Man as unclaimed Native American remains. [24]/

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[23]/ The Magistrate Judge concluded that ARPA would apply to the study request in the absence of NAGPRA. ARPA explicitly provides that the relevant Federal Agency Official is to decide whether, and on what terms, a permit is to issue. See 16 U.S.C. 470cc(b); see supra at 8-9. More generally, the question of whether a permit should issue under a statute that the agency had no occasion to consider prior to the court's decision on NAGPRA, properly rests, in the first instance, with the executive, not the judiciary. The Magistrate Judge recognized as much. See 217 F. Supp. 2d at 1164 ("The court is well aware that, in actions involving judicial review of an agency's final administrative decision, the ordinary remedy when a decision is set aside is remand to the agency for further proceedings."). The Magistrate Judge nonetheless refused to remand to the Corps to process the plaintiffs' request under ARPA on the ground that the agencies had not treated the plaintiffs fairly by, for example, improperly consulting with the tribal claimants before arriving at a decision. 217 F. Supp. 2d at 1132-34, 1164-65; ER 138-139, 164-165. However, NAGPRA regulations required consultation with the tribal claimants, 43 C.F.R. 10.5, and this was an informal agency action, not a formal adjudication. There is no prohibition in that setting on ex parte contacts. See United States v. Navajo Nation, 2003 WL 71660, at *15-16 (March 4, 2003). While we disagree with the Magistrate Judge's assessment that the agencies were biased or that procedures were inappropriate and with the court's remedial disposition, the court's remedy is moot if the remains are properly recognized as "Native American" under NAGPRA.

[24]/ Even though the Section 3(b) regulations have not yet been promulgated, it is neither appropriate nor warranted for the Magistrate Judge to decide in the first instance whether plaintiffs may conduct studies on unclaimed Native American remains and, if so, the scope of permissible study. There are no exigent circumstances that would warrant departure from this remedy. For the most part, the studies the plaintiffs intended to carry out were already done as part of Interior's analysis. See DOI AR 10046-10048 (comparison between studies initiated by Interior and those requested and recommended by plaintiffs); 217 F. Supp. 2d at 1167; ER 167. The Kennewick Man is appropriately curated at the Burke Museum.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the matter remanded to the agencies for further proceedings.

Respectfully submitted,

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