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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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
FOR THE DISTRICT OF OREGON

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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TABLE OF CONTENTS

PAGE

PAGE

TABLE OF AUTHORITIES

CASES:

PAGE

STATUTES, RULES & REGULATIONS:

PAGE

LEGISLATIVE HISTORIES:

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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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,
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REPLY BRIEF FOR THE FEDERAL APPELLANTS

A. Introduction. – In our opening brief, we demonstrated, employing a plain language analysis, that the Department of the Interior ("Interior) properly interprets the term "Native American" as used in the Native American Graves Protection and Repatriation Act ("NAGPRA") to include "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." ER 399. The lower court erred in concluding, based on de novo review, that a demonstrated cultural relationship between remains and present day American Indians is necessary for remains that predate European exploration to be considered "Native American" for purposes of NAGPRA. A relationship to presently existing tribes or Native Hawaiian organizations, through the establishment of cultural affiliation or one of the other statutory criteria, is required for the disposition or repatriation of Native American human remains to such groups, but that determination is made subsequent to, and separate from, the threshold criteria governing the Act's applicability, i.e., the definition of "Native American." Even if the statute is ambiguous as to whether a relationship between

remains that predate European exploration and a present day tribe is required, Interior's interpretation is permissible and should be accorded deference.

Before addressing answering briefs, it is important to clarify what is and is not at stake in light of the government's decision not to defend on appeal its earlier determination awarding the Kennewick Man remains to the tribal claimants, and consequent current position that these remains should be treated as Native American remains without a qualified claimant. Recognition that these are "Native American" remains, without a qualified claimant, does not mean that scientific study of ancient remains will be precluded. NAGPRA contains no provision expressly prohibiting study of culturally unidentified or unclaimed Native American remains. See SER 540; ER 403-404. Here, for example, Interior's determination that the remains are "Native American" was preceded by extensive study by qualified experts, including scholars and scientists from museums and universities. Detailed reports on all of these studies have been disseminated and are available at <**www.cr.nps.gov/aad/Kennewick**>. As we discuss below, the extent of additional study is an issue that would have to be addressed on remand.

This appeal is not intended to deny these, or any other scientists, an opportunity to study ancient remains generally or the Kennewick Man remains

specifically. Rather, the Magistrate Judge's decision is the first judicial interpretation of the meaning of "Native American" under NAGPRA and, in our view, the relationship requirement imposed by the lower court effects an erroneous and unworkable interpretation of the statute with implications that transcend this particular dispute. A broader definition of "Native American" than that spelled out by the Magistrate Judge is compelled by the statutory language and is necessary to ensure that the process set out in NAGPRA, which Congress formulated to balance the interests of science, museums, Native Americans, and the public, can effectively work.

Plaintiffs devote considerable effort to portraying the government agencies, or individual government employees, as inept or biased. However, ultimately none of their allegations has any bearing on the proper statutory interpretation of "Native American." This interpretation is the issue on appeal, not earlier actions by the agencies (particularly those actions that occurred before the district court remand).

B. Native American includes culturally unidentifiable and unclaimed human remains, not just remains for which a relationship to present day Indians can be established. – The Magistrate Judge conducted a de novo interpretation of the statute and concluded that "Native American" within the meaning of

NAGPRA "requires a cultural relationship between remains or other cultural items and a present-day tribe, people, or culture indigenous to the United States." ER 142 (emphasis added). The intended consequence of this present day relationship requirement is to exclude from the Act's coverage remains of, or relating to, indigenous tribes, peoples, or cultures for which a relationship to presently existing Indian tribes is unclear, cannot be proven, or that may have gone extinct. Interior's position on this precise issue has been clear and consistent: "There 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." ER 400 (emphasis in original).

We recognize that "if the 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, 535 U.S. 212, 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). The Supreme Court describes this initial inquiry as requiring the court to decide "whether the statute unambiguously forbids the Agency's interpretation." Id. This question is resolved using traditional rules of statutory interpretation – text, structure, purpose, and legislative history. Here, the

initial inquiry is whether the statute "unambiguously forbids" Interior's interpretation that the term "Native American" does not require proof of a relationship to presently existing tribes. As explained in our opening brief (at 28-41), it does not.

The crux of plaintiffs' argument (Br. 32-34) that it does is based on the use of the present tense in the statutory definition of "Native American" which they contend means, of or relating to, *presently existing* or *present day* indigenous cultures. Verb tense can be the touchstone for finding plain meaning, but it is not invariably so. See Costello v. INS, 376 U.S. 120, 125 (1964) ("the tense of the verb 'to be' is not considered alone dispositive"); Abercrombie v. Clarke, 920 F.2d 1351, 1357 (7th Cir. 1990) (use of present tense verbs does not clearly exclude penalties for past violations). This is a case where the verb tense does not supply clear meaning. "The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). In this context, the present tense is more versatile than plaintiffs would have it.

The present tense of the verb "to be" links the nouns "tribes, peoples, and cultures" to the adjective "indigenous." Grammatically, and in ordinary usage, it is entirely proper to say that a Babylonian artifact, such as those found in Iraq,

"relates to" a culture "that is" indigenous to Iraq even though there is no presently existing Babylonian culture.[1] Clearly, while many indigenous cultures are no longer extant, their indigenous character does not cease and therefore this characteristic of the culture is appropriately described in the present tense. [2]

Plaintiffs suggest (Br. 32) that it is no answer to say that in ordinary usage the verb tenses for the word "to be" in this context are used interchangeably. To the contrary, Congress is presumed to use words consistent with their ordinary usage. Norman J. Singer, 2A Sutherland Statutory Construction §45.13 at 78 (5th ed. 1992) ("[L]egislators can be presumed to rely on conventional language usage"); U.S. v. Middleton, 231 F.3d 1207, 1210 (9th Cir. 2000); cf. McGrary Const. Co. v. Director, Office of Workers Compensation Programs, 181 F.3d 1008, 1015 (9th Cir. 1999) (rejecting Director's interpretation because it

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[1] A representative for the Society for American Archaeology ("SAA"), the leading professional organization of archaeologists, stated at oral argument that when archaeologists write about the past it is "not uncommon for people to use the present tense when referring to past cultures." CR 466 at 213.

[2] In the trial court, the SAA filed a brief as amicus supporting Interior's interpretation of "Native American" and disagreeing with a reading of "Native American" that requires proof of a relationship to present day Native peoples. See also Interior Administrative Record ("DOI AR") 491 at 05058 (paper presented by President of the SAA stating: " "[I]t is the SAA's position that under NAGPRA, First Americans [Paleo-Indians] are Native Americans, regardless of how many migrations there were, where they came from, when they came, or whether some groups died out").

"conflict[s] with the way we ordinarily use words, so it is unlikely to be how Congress used them"). Use of the present tense in the definition of "Native American" does not, as plaintiffs contend, evidence a clear and unambiguous intent to narrowly limit the scope of NAGPRA to those remains or other objects for which a demonstrated relationship to present day Indians can be shown.

Plaintiffs argue (Br. 49) that the inclusion of "present day" in the definitions of "cultural affiliation" and "sacred objects," 25 U.S.C. 3001 (2), 3001(3)(C), evidences Congress' intent for the Act to apply only to those remains or other cultural items that can be tied to the present. To the contrary, the "present day" language in those definitions illustrates how easily Congress could have accomplished what plaintiffs would like the Act to mean by simply inserting those words into the definition of Native American – i.e., by writing "Native American means of, or relating to, a *present day* tribe, people, or culture that is indigenous to the United States." But it did not do that.

More importantly, the "present day" language in the definition of "cultural affiliation" and "sacred objects" only indicates that Congress intended to limit the right to repatriation of cultural items under Section 7 or to disposition under Section 3(a) to presently existing individuals, tribes, or Native Hawaiian organizations with some relationship to the remains or which are needed for

religious purposes by present day adherents.[3/] However, there is no good reason for assuming that Congress wanted to duplicate this limitation in the threshold definition of "Native American" and every reason to conclude it did not.

The threshold definition of "Native American" determines what remains or other cultural items are subject to the Act's process. The process required by NAGPRA and its implementing regulations includes, for example: (1) notification requirements applicable to new discoveries, 25 U.S.C. 3002(d); (2) consultation with claimants, 43 C.F.R. 10.4(d)(iv), 10.5; (3) promulgation of regulations in consultation with the Review Committee, members of the scientific and museum communities and Native American organizations on disposition of unclaimed cultural items, 25 U.S.C. 3002(b); (4) compilation of inventories of human remains and associated funerary objects in federal agency control or museum collections, 25 U.S.C. 3003; (5) compilation of summaries for other cultural objects in such collections, and access to information about such objects, 25 U.S.C. 3004; (6) numerous functions of the Review Committee, which include the monitoring of the inventory and identification processes under 25 U.S.C. 3003 and 3004 to ensure fair, objective consideration and assessment of all available

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[3/] As explained in our opening brief, the legislative history demonstrates that the phrase "present day adherents" in the definition "sacred objects" was added to restrict the scope of objects subject to the Act.

relevant information and evidence and, upon the request of any affected party, the making of recommendations or findings related to the identity or cultural affiliation of cultural items.

The purpose for these and other procedures is to ensure that Indian tribes and Native Hawaiian organizations have access to sufficient information to assess whether a legitimate repatriation or disposition claim can be made and to ensure appropriate and fair consideration of such claims. The legislative history explains that Indian tribes' efforts to seek repatriation of remains often had been stymied by museums' refusal to provide information about their collections, a problem which the procedures required by the Act are designed to rectify. E.g., S. Rep. No. 101-473, 101st Cong., 2d Sess. (1990), at 3-4. The Act also is intended to facilitate a dialogue between Native American groups and museums or scientists respecting the interests of each group. Id. at 6. A narrow definition of "Native American," such as that advocated by plaintiffs, undermines these purposes by limiting the circumstances in which the NAGPRA procedures would have to be invoked.

Furthermore, Congress recognized that there would be many remains and objects covered by the Act for which a relationship to a presently existing tribe could not be proven and included provisions to address this situation. E.g., 25 U.S.C. 3002(a)(2)(C)(1), 3002(b), 3005(a)(5), 3006(c)(6). Congress did not

resolve exactly how culturally unidentifiable remains or remains without a qualified claimant should be treated. Instead, for new discoveries it delegated that responsibility to the Secretary of the Interior by directing her to promulgate regulations governing the disposition of unclaimed remains after consultation with the Review Committee, representatives of museums and the scientific community, and Native American groups. 25 U.S.C. 3002(b). For culturally unidentifiable remains in federal agency or museum collections, it tasked the Review Committee with making recommendations for developing a process for disposition of such remains. 25 U.S.C. 3006(c).[4] In this light, it is implausible that Congress intended to obliquely exclude altogether from the Act, remains that cannot be

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[4] The House and Senate Reports explain that a report issued by the Panel of National Dialogue on Museum-Native American Relations was influential in shaping the legislation. The House Report states that "[t]he Panel was split on what to do about human remains which are not culturally identifiable. Some maintained that a system should be developed for repatriation while others believed that the scientific and educational needs should predominate." H.R. Rep. No. 101-877, 101st Cong., 2d Sess. (1990), at 11. Congress too was unable to resolve this debate: "There is general disagreement on the proper disposition of such unidentifiable remains. * * * The Committee looks forward to the Review Committees [sic] recommendations in this area." Id. at 16. On June 8, 2000, the recommendations of the Review Committee concerning a process to address culturally unidentifiable remains in the control of federal agencies or museums were published in the Federal Register, but those recommendations have not yet been implemented. 65 Fed. Reg. 36462.

shown related to present day Indians by using the present tense in the "Native American" definition.

As discussed in our opening brief, the importation of a relationship test between remains and present day tribes into the definition of "Native American" renders superfluous the cultural affiliation determination and imposes a complexity on the museum inventory process not intended by Congress. Plaintiffs dismiss these problems by pointing out (Br. 53) that the Magistrate Judge differentiated between the general cultural relationship requirement it imposed and the cultural affiliation standard. Repetition that there is a difference between the cultural relationship necessary to qualify as Native American and the cultural relationship required to support a disposition award is simply not convincing in establishing any real difference particularly since the Act says nothing about a "general" relationship and none of the proponents of this distinction have provided further articulation of the differentiating criteria. See also n.10 infra.

Furthermore, this distinction necessarily assumes the existence of a commonly accepted, generic, modern-day single American Indian culture. There is no evidence that Congress was aware of, or had in mind, such a concept. If anything, the legislative history suggests the opposite understanding. See S. Rep. No. 101-473 at 6 (the Committee recognizes "there are over 200 tribes and 200

Alaskan Native villages and Native Hawaiian communities, each with distinct cultures and traditional and religious practices that are unique to each community"). The assumption that there is a generic Indian culture to which all currently existing indigenous peoples are related is unsupported by citation to any legislative history, legal precedent, expert opinion, or evidence of scientific consensus defining such a generic culture.[5/] The lack of any discernable criteria for determining a general cultural relationship or for determining the difference between this so-called general relationship and cultural affiliation means that the standard advocated by plaintiffs and adopted by the Magistrate Judge injects considerable ambiguity into the definition of "Native American."

Even less persuasive is plaintiffs' contention (Br. 49-51) that the statutory definition of "Native Hawaiian," 25 U.S.C. 3001(10), supports its position. The only purpose for providing a definition of "Native Hawaiian," is to identify what constitutes a "Native Hawaiian organization," 25 U.S.C. 3001(11), under the Act. The term "Native Hawaiian" alone is never used outside this definition; only the

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[5/] Compare SER 620 (article by anthropologists suggesting it begs the question to say remains do not look like a modern Indian because "What *is* a 'modern Indian?' Do we really have a scientific, biological definition on which there is expert consensus? Do we not regard modern American Indian populations to be both culturally and morphologically diverse, both *between* and *within* tribal affiliations?")(emphasis in original).

term "Native Hawaiian organization" appears in the remainder of the Act. With the exception of lineal descendants, it is present day groups – Indian tribes and "Native Hawaiian organizations" – that can be proper claimants under the Act and, as we have explained, present day relationship is relevant to establishing a legitimate repatriation or disposition claim. Moreover, the specificity in the "Native Hawaiian" definition reflects the unique legal genesis and status applicable to that indigenous group; Native Hawaiian groups are not federally recognized Indian tribes and Native Hawaiians do not receive services based on Indian status. Cf. 25 U.S.C. 3001(7); see generally Rice v. Cayetano, 528 U.S. 495, 518 (2000); Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213 (D. Haw. 2002), appeal pending, 9th Cir. No. 02-1739. Thus, the definition of "Native Hawaiian" sheds little light on whether Congress intended "Native American" to have a present day relationship component.

The language, context, structure, and purpose of the statute indicates that the threshold for the Act's applicability was intended to be broad to ensure adherence to the Act's procedures for subsequently determining whether there is a sufficient relationship to a presently existing tribe to support repatriation or an ownership claim under Sections 7 or 3. Relying on the plain language of the statute, remains of indigenous peoples are Native American irrespective of a

relationship to present day American Indians. At a minimum, however, the problems we have identified with interpreting the statute to impose a present day relationship requirement on the threshold "Native American" determination illustrates ambiguity on this question. Interior's interpretation should be upheld because it is a permissible interpretation and is entitled to deference.

C. Assuming the statute is ambiguous, Interior's interpretation is entitled to deference. – There is a continuum of deference that may be accorded an agency's interpretation. At the highest end, "[a]n agency's statutory interpretation is entitled to Chevron deference if 'Congress delegated authority to the agency generally to make rules carrying the force of law, and ... the agency interpretation was promulgated in the exercise of that authority.'" Pronsolino v. Nastri, 291 F.3d 1123, 1131 (9th Cir. 2002) (quoting United States v. Mead, 533 U.S. 218, 226-27 (2001), cert. denied, __ S. Ct. __, 2003 WL 396184 (2003)). The Supreme Court in Mead clarified that agency interpretations, such as those set forth in guidance or opinion letters, that do not qualify for Chevron deference may nonetheless merit Skidmore deference in which the reviewing court defers to the agency's position according to its persuasiveness. Pronsolino, 291 F.3d at 1131 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)). Plaintiffs' position that Interior's interpretation is entitled to no deference whatsoever is in error.

1. Interior's interpretation is entitled to Chevron deference because it is reflected in formally-adopted regulations. – Although plaintiffs contend (Br. 27-28) that Interior has no delegated authority to alter or expound on the statutory definition by regulation and thus is not entitled to Chevron deference, this contention is nothing more than a recasting of the plain language argument.[9] Of course, if the plain meaning of the statute makes clear that Congress intended to restrict the term "Native American" to presently existing tribes, peoples or cultures, Interior could not alter such a requirement by regulation. But, as we have shown, no such clear intent can be discerned.

The mere existence of a statutory definition does not mean that Congress has necessarily spoken in a manner eliminating all ambiguity as to the meaning of that term or that an agency cannot promulgate a regulation defining the term in a different manner. E.g., Citizens Coal Council v. Norton, 330 F.3d 478 (D.C. Cir. 2003). Moreover, Mead does not hold, as plaintiffs suggest, that Chevron deference "is reserved for agency actions which are the result of 'express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.'"

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[9] Interior's regulation provides: "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).

Br. 27 (quoting Mead, 533 U.S. at 229). Mead actually states that an express congressional authorization to engage in rulemaking is "a very good indicator of delegation meriting Chevron treatment." Id. Moreover, Mead reaffirms that the delegation of authority warranting Chevron treatment may be implicit. Mead, 533 U.S. at 229. See Wilderness Society v. U.S. Fish and Wildlife Service, 316 F.3d 913, 922 (9th Cir. 2003) (according Chevron deference based on general authorization to manage refuge).

Here, NAGPRA grants the Secretary both express authorization to engage in rulemaking and implicit authority as the administering agency to address ambiguity in the statute. The express authorization of rulemaking authority in 25 U.S.C. 3003(b) and 3011, coupled with numerous other provisions charging the Secretary with authority to administer the Act,[7] warrant the conclusion that Congress expected the agency to speak with the force of law when it promulgated the regulation defining "Native American" and "Native American remains." See Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 740-41 (1996) ("We accord deference because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity

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[7] See, e.g., 25 U.S.C. 3002(d)(3); 25 U.S.C. 3006(a), 3006(b), 3006(f), 3006(c)(7), 3006(g), 3007(a), 3007(c).

would be resolved, first and foremost by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

Plaintiffs suggest (Br. 31, 35) that Interior cannot rely on the regulation to support deference to its interpretation because there is no evidence in the preamble to the regulations that the omission of the words "that is" involved a conscious choice. However, the reason for the omission is self-evident: the agency did not, and does not, regard the words "that is" in the statute as imposing a substantive requirement or limiting condition. It is well-settled that a reviewing court must give "controlling weight" to an agency's interpretation of its own regulation, "unless [the interpretation] is plainly erroneous or inconsistent with the regulations." Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945). See also Auer v. Robbins, 519 U.S. 452, 461 (1997). Interior interprets the regulation defining "Native American" to include "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 whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian tribes." ER 399. There is no basis for assuming that the regulation means

anything other than what Interior says it means. Cf. Pronsolino, 291 F.3d at 1132-33 (relying on directives issued after promulgation of regulations in question to reveal the agency's understanding of the regulations).

2. Interior's interpretation is entitled to Skidmore deference. – At the very least, Interior's interpretation, including that set forth in the 1997 opinion letter, is owed Skidmore deference. Plaintiffs' position that even this lesser degree of deference should be denied is meritless. They contend (Br. 42-43) that no deference should be accorded to the 1997 letter because it was not the result of a formal notice and comment process. But that is true in virtually every instance in which Skidmore deference comes into play.

Opinion letters are exactly the sort of instruments and guidance that have been explicitly recognized as warranting Skidmore deference. E.g., Community Hosp. of Monterey Peninsula v. Thompson, 323 F.3d 782, 791 (9th Cir. 2003). In any event, "'[a]n agency's interpretation may merit some deference whatever its form.'" Wilderness Society, 316 F.3d at 922 (quoting Mead, 533 U.S. at 235).

Certainly the 1997 letter does not carry the force of law, but the analysis warrants respect because of its persuasiveness, because it exhibits thorough consideration of various issues, because its reasoning is not unsound, and because it represents the views of the officials within Interior with the foremost expertise

and delegated authority for carrying out the Secretary's legal responsibilities under NAGPRA (i.e., the Solicitor of the Department of the Interior and the Departmental Consulting Archeologist). Not only is Interior the administering agency for NAGPRA, it has expertise generally in the areas of both Native American issues and archeological resources.

The agency's position does not, as plaintiffs suggest (Br. 43-44), fall within the category of interpretations advanced for the first time in a litigation brief. The Supreme Court has stated that deference may be denied "'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.'" Smiley, 517 U.S. at 741 (citation omitted); see also Wilderness Society, 316 F.3d at 921. As we have shown, Interior's position is firmly supported by its regulations. Furthermore, Interior provided the 1997 opinion letter in its role as the agency administering the statute. When the letter was written, Interior was not a party to this litigation as a defendant, nor had the agency yet entered into the agreement with the Corps to make the particular

determinations in this case.[8] Accordingly, Interior's position is entitled to deference.

D. Interior's position here is consistent with the 1997 opinion letter and that taken in the lower court. – Plaintiffs contend (Br. 36) that the position taken in the appellate brief is inconsistent with that part of the 1997 opinion letter explaining that it is "implausible" to consider that Congress intended the word "indigenous" to exclude tribes, peoples, or cultures that descended from immigrants who came

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[8] Plaintiffs assert (Br. 44) that the 1997 letter set forth "new ideas." However, in draft recommendations regarding the disposition of culturally unidentified human remains issued by the Review Committee in 1995, the Committee explained that "unidentifiable human remains" under NAGPRA includes a "very large number" of "ancient remains" from time periods before European exploration for which it is not possible to trace ancestry to any known contemporary tribe or group. See **http://www.cast.uark.edu/other/nps/nagpra/DOCS/rcrec001.html.** Furthermore, in other instances ancient human remains have been treated as "Native American" notwithstanding contentions that some do not show a physical affinity to present day American Indians. E.g., Spirit Cave Mummy (determined by the Bureau of Land Management to be Native American pursuant to NAGPRA but culturally unidentifiable for purposes of repatriation) (DOI AR 831 at 08745, 08751, 08753-54, 8323 at 08863, 08867, and 95 at 0713, 0717; SER 620); Sauk or Brown's Valley Man and Pelican Rapids Woman ("Archaic Tradition" human remains determined by the State of Minnesota to be Native American pursuant to NAGPRA, culturally unidentifiable, but repatriated to seventeen Minnesota Indian tribes under state law following a recommendation from the Review Committee) (64 Fed. Reg. 4321, 43418-19 (August 9, 1999); DOI AR 565 at 05534, 05535, 05540); Buhl woman (10,575-year-old, Paleo-Indian remains that Shoshone-Bannock tribes claimed and which were reburied pursuant to state law) (DOI AR 245 at 03190, 03191-92).

to the Americas from other continents because "there are differences of opinion as to the origins of at least some present-day Indian tribes with respect to whether or not they are descended from peoples who immigrated to the lands now comprising the United States" and because it is historically documented that Native Hawaiians did migrate. ER 399-400. The letter explained that if indigenous were construed to exclude descendants of immigrant peoples, it would frustrate the purposes of NAGPRA with respect to Native Hawaiians and perhaps with respect to some or all Indian tribes. ER 400.

Plaintiffs claim (Br. 36) that the government now argues in favor of this "implausible" view by contending that "indigenous" excludes those peoples, tribes, or cultures who are descended from peoples who migrated to the United States. That is not accurate. Our view is that in ordinary usage "indigenous" refers to early inhabitants of, or natives of a region, as distinct from later European colonists or their descendants. U.S. Br. 29. That is consistent with the 1997 opinion letter's position that indigenous should not be interpreted to exclude descendants of peoples, tribes, or cultures that may have migrated to the United States in prehistoric times, or, as in the case of Hawaii, in historic times, prior to European exploration. Our position here, as it was in the lower court, is that the

1997 letter accurately reflects Interior's interpretation and that is the interpretation we defend here.

Our opening brief stated (at 49) that age is not the only criteria considered because, as the 1997 letter said, "Native American" encompass[es] all tribes, people, and cultures that were resident of the lands comprising the United States prior to historically documented European exploration of these lands." Plaintiffs argue that this departs from a position taken in the trial court that "pre-Colombian" age alone is determinative of Native American status.

However, even assuming that Interior's interpretation admits of no exception to a rule that human remains predating European explorers are "Native American," plaintiffs have not demonstrated why that is an impermissible interpretation of the statute. The crux of the issue is whether the remains must be shown to be related to any modern tribe, people, or culture. Interior's position that such a relationship is not required has been consistent and clear. Even if it mattered, our argument that Interior considered evidence in addition to age alone in making the Native American determination and that other evidence is consistent

with the conclusion that Kennewick Man is indigenous, does not mark a departure from Interior's position on the merits in the trial court. [9/]

E. Interior's determination that Kennewick Man is Native American is not arbitrary or capricious. – Plaintiffs contend (Br. 54) that the evidence discussed in the opening brief at 49-52 illustrating the reasonableness of the Native American

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[9/] Plaintiffs are mistaken in their portrayal of trial counsels' arguments. The government's merits brief stated, for example, that remains of Europeans that predate 1492 are not "Native American" because European culture is not indigenous to the United States. SER 1740. At oral argument on the merits, government counsel stated that age is the primary indicator, that there is a presumption that remains which pre-date European exploration are Native American, and that in the absence of evidence that a person or group was simply passing through, that they did not live within these borders, or that they had not utilized resources in the area, age would be determinative. SER 1831-1832. The discussion necessarily implied the corollary that the presumption could be rebutted by definitive evidence that the remains did not relate to an indigenous culture. Counsel also pointed out that in this case there was evidence (i.e., a marine diet) consistent with finding the Kennewick Man to be indigenous. SER 1831. The government's brief pointed out factors other than radiocarbon dating (e.g., the lithic point) which are consistent with that assumption. SER 1738-1740.

Plaintiffs also rely on (Br. 38-41) government counsel's remarks at a September 14, 1999, hearing on plaintiffs' motion for an immediate response to their study request. While government counsel stated in answer to a hypothetical posed by the court, that under Interior's interpretation, 12,000-year old European remains found in the United States would be Native American (SER 1613), the Magistrate Judge acknowledged that the government later retreated somewhat from that position. ER 142 n.36. Plaintiffs also rely on government counsels' failure to disagree expressly with the Magistrate Judge's remarks at that procedural hearing and at a scheduling hearing (October 24, 2002, status conference (CR 307)). However, such omission is hardly affirmative agreement.

determination in this case, is merely post hoc rationalization because the Secretary relied solely on age and did not consider the information discussed in the brief consistent with finding that the Kennewick Man resided in the area in which he was found. However, the Secretary's 21, 2000, determination stated: "The Native American determination was based upon information supplied by the radiocarbon analysis of bone samples and previously conducted scientific examinations." ER 187. The letter explained that the Native American determination had been made earlier, referencing a January 2000 memorandum. The January 2000 memorandum in turn stated that in determining that the remains should be considered "Native American," radiocarbon dating was given significant weight, but further stated that the determination also is "supported by other analyses and information regarding the skeletal remains themselves, sedimentary analysis, lithic analysis, an earlier radiocarbon date on a bone recovered with the other remains, and geomorphologic analysis (summarized in McManamon 1999)." ER 194. Thus, the 1999 McManamon report is properly viewed as articulating the bases on which Interior's Native American determination was made. The information discussed in our opening brief (at 50-52) comes from the 1999 McManamon report (ER 282-383).

Plaintiffs suggest (Br. 58-61) that the decision is unsupported because Interior refused to consider contrary evidence, in particular evidence that suggests the remains differ from modern American Indians. In view of the agency's position that a relationship to modern American Indians is not required for the Native American determination, there was no need to consider these issues in the context of the Native American determination.[10/] Rather, this information was considered in the context of the cultural affiliation analysis.

Plaintiffs also suggest (Br. 14-17, 43, 57-58, 60-62) that the process was defective because the plaintiffs themselves were not allowed to contribute to the discussion on Native American status and because the Secretary did not fully evaluate all of the contrary evidence.[11/] However, from the commencement of the

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[10/] Quoting from the preamble to Interior's 1995 regulations implementing NAGPRA, plaintiffs assert (Br. 60) that the government "knew from the start that it would be virtually impossible to show that the Kennewick Man is related to any modern day tribe, people, or culture." The preamble passage on which plaintiffs rely referred to ownership claims by lineal descendants, indicating that it is highly unlikely that lineal descendants could trace descent directly and without interruption for a period longer than 1,000 years. 60 Fed. Reg. 62135-03. Plaintiffs' suggestion that proof of uninterrupted lineal descent is a requisite criteria for "Native American" status illustrates that their demand for such rigorous proof for the threshold "Native American" determination would effectively collapse the threshold and disposition criteria.

[11/] Plaintiffs also suggest that Interior improperly consulted with the tribal claimants (Br. 14-17) and remark (Br. 11, 63) that federal defendants did not appeal the Magistrate Judge's comments that the process appeared unfair (ER

process to the final determination, plaintiffs expressed their views on and submitted evidence relating to the Kennewick remains to Interior and the Corps, which included recommendations on the physical tests they considered necessary and the applicability of NAGPRA. Plaintiffs' comments on Interior's initial draft study approach were solicited (DOI AR 205 at 02940, 242 at 3175), and plaintiffs submitted comments. DOI AR 247 at 03205-03217, 240 at 03161, 252 at 3250. The plaintiffs also submitted numerous affidavits to the Court and Interior (made part of the administrative record) that detailed their perspective and rationale for the types and manner of testing they believed should be conducted on the remains. DOI AR 78 at 015029, 80 at 01544, 81 at 01551, 82 at 01558, 83 at 01565; 360 at 04257, 361 at 04262, 362 at 04268, 372 at 04399, 838 at 08880. Interior adopted many of the plaintiffs' recommendations when it conducted studies of the remains. DOI AR 838 at 08880, 08884-08926 (comparison of studies performed by Interior with those recommended by plaintiffs).

Plaintiff Owsley, working with the Corps' curation team, inventoried and examined the remains. ER 286, 296. The government requested that plaintiff

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139). However, the Magistrate Judge declined to decide whether the perceived unfairness would be reason to set aside the decision (ER 139) and therefore there was no holding to appeal. Furthermore, as we explained in our opening brief (at 54 n.23), NAGPRA and its implementing regulations required consultation with tribal claimants.

Haynes be a part of the expert research team, but he declined. DOI AR 328 at 04177. Haynes recommended Dr. Huckleberry, whom Interior ultimately chose. DOI AR 325 at 04170. Interior also selected Dr. Powell, another expert recommended by the plaintiffs, to be a member of the Phase I investigation team (i.e., for the Native American determination) and one who provided a report on the osteological characteristics of the remains. DOI AR 297 at 03606, 84 at 01571, 7328 at 04177, 58 at 08492; ER 296. Plaintiffs submitted an affidavit stressing the importance of additional radiocarbon dating and recommended that Dr. Taylor and Dr. Stafford perform the tests. DOI AR 408 at 04621; DOI AR 380 at 04499. Interior selected both of these scientists to perform the radiocarbon tests (although after the remains had been delivered to Dr. Stafford, he subsequently declined to conduct the testing). ER 291; DOI AR 395 at 04554; DOI AR 432 at 04731; DOI AR 433 at 04735.[12/]

[12/] The plaintiffs' views on DNA testing were also solicited and many of their suggestions adopted. E.g., DOI AR 597 at 06700, 606 at 06819, 666 at 07831, 676 at 07914, 677 at 07915, 679 at 0720, 684 at 07929, 688, at 08073, 689 at 08075, 722 at 08304, 723 at 8316, 724 at 08324, 724 at 08324-43, 738 at 08400-05; 739 at 08406-10, 745 at 08424-29, 747 at 08431-39, 748 at 47, 749 at 08448-55, 750 at 08456-71, 752 at 08472-74. The government also submitted Dr. McManamon's Scope of Work for the cultural affiliation evaluation to the plaintiffs and the Court and accepted plaintiffs' comments on it. CR 241; DOI AR 544, 546, 559, 566. In response, plaintiffs submitted affidavits from experts concerning the cultural affiliation of the remains (DOI AR 843 at 08972), as well as nine articles authored by themselves. DOI AR 95 at 01713, 138 at 02155, 141

Plaintiffs took advantage of the ample opportunity afforded to submit any evidence they thought relevant to the NAGPRA determinations.[13/] The documentation in the administrative record belies plaintiffs' claims that their views and contrary evidence were not solicited or considered by Interior.

F. The remedy must be vacated because it is based on legal error. – Although a district court's remedy is reviewed under an abuse of discretion standard, a "district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 405 (1990). Accord Levi Strauss & Co. v. Shilon, 121 F.3d 1309, 1313 (9th Cir. 1997). The Magistrate Judge's remedy of ordering that the scientists be granted access to study the remains is based on its legal conclusion that the remains are not "Native American" within the meaning of NAGPRA. If this Court concludes that the Magistrate Judge erred in its interpretation of "Native

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at 02235, 152 at 02607, 306 at 03854, 311 at 03892; 312 at 03908, 554 at 05310, 555 at 05318, 707 at 08205-09.

[13/] DOI AR 136 at 02138–41, 137 at 02142-54, 138 at 02155-72, 139 at 02173-02219, 140 at 02220-33, 141 at 02234-57, 181 at 02773-75, 182 at 02789, 183 at 02776-88, 184 at 02790-99, 185 at 02800-01, 186 at 02802-21, 204 at 02938-39.

American" under NAGPRA, the remedy based on that ruling must be vacated and the matter reconsidered in light of the correct legal standard.[14/]

In responding to the tribal claimants' appeal, plaintiffs recognize this consequence by arguing that if this Court concludes that the skeleton is Native American under NAGPRA, it would be necessary to remand to the district court to consider whether plaintiffs may study it. Br. in 02-35996 at 69. The Magistrate Judge declined to address plaintiffs' claim of a First Amendment right to hands-on study of the remains. ER 162. The Magistrate Judge also expressly declined to decide whether plaintiffs would have a right to study if the remains were properly determined to be "Native American" for purposes of NAGPRA, but cultural affiliation could not be established. ER 165. To the extent these issues are treated as purely legal questions within the scope of plaintiffs' claims below, it would be within this Court's discretion to ask the lower court to address them on remand with due consideration given to NAGPRA Section 3(b), which provides: "Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations promulgated by the Secretary

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[14/] We assume plaintiffs agree (Br. 10 (stating Magistrate Judge did not retain jurisdiction to determine what studies would be done)), that the court's order does not displace the government agency's authority to impose appropriate terms and conditions for study of federally-owned resources.

in consultation with the review committee established under section 3006 of this title, Native American groups, representative of museums and the scientific community."

However, if study of remains determined to be Native American, but without a qualified claimant, under NAGPRA is a discretionary agency decision, the case should be remanded to the appropriate agency. In any event, the agencies must retain authority, as they have even under the Magistrate Judge's order (see n.14 supra), to impose appropriate terms and conditions of study.

CONCLUSION

For the foregoing reasons and reasons stated in the opening brief, the judgment of the district court should be reversed and the matter remanded.

Respectfully submitted,

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