Nos. 02-35994 & 02-35996 (Companion Appeals)
(Related case DC 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, et al.,
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-Appellants.

On Appeal from the United States District Court
for the District of Oregon
Honorable John Jelderks

APPELLANT TRIBES' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The District Court for the District of Oregon had jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and 25 U.S.C. § 3013. The Oregon District Court entered an Opinion and Order, and Judgment on August 30, 2002 ("Order"). Excerpts of Record ("ER") 141-215. Notices of appeal were timely filed by the four federally-recognized tribal claimants of the remains at issue in this case, and separately by the United States, on October 24, 2001 and October 28, 2002 respectively. ER 225-34.

ISSUES PRESENTED

The Oregon District Court vacated the final decision of the United States Department of the Interior ("DOI") finding that the remains of the Kennewick Man, or the "Ancient One" as he is known to the claimant tribes, were "Native American" and culturally affiliated with the claimant tribes pursuant to the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.,* and awarding the remains to the Confederated Tribes of the Colville Reservation, Nez Perce Tribe, Confederated Tribes of the Umatilla Indian Reservation, and Confederated Tribes and Bands of the Yakama Nation

(collectively "Joint Tribal Claimants"). The following issues are presented for appeal:

1. Whether the plaintiffs have standing to maintain this action;
2. Whether the district court erred as a matter of law in rejecting DOI's definition of "Native American" and in substituting its judgment for that of the expert agency charged with interpreting NAGPRA;
3. Whether the district court erred as a matter of law in rejecting DOI's finding of cultural affiliation with the claimant tribes and in substituting its judgment for that of the expert agency charged with interpreting NAGPRA;
4. Whether the district court erred as a matter of law by applying the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, and eviscerating NAGPRA's mandate to agencies to consult with tribes when making cultural affiliation determinations;
5. Whether the district court erred as a matter of law by foreclosing joint tribal claims for repatriation of remains under NAGPRA; and
6. Whether the district court erred as a matter of law by granting plaintiffs' study request instead of remanding this matter to the expert agency.

STATEMENT OF CASE AND PROCEEDINGS BELOW

NAGPRA was enacted in 1990 and applies to the remains of the Ancient One, found on the Columbia River shoreline in 1996. NAGPRA culminated a long effort by Congress to protect the interests of indigenous people in burials made before European-style cemeteries were established in this country. *See* Jack F. Troupe & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz.St.L.J. 35, 36 (1992). The appellant Tribes seek to enforce the remedial mandates of NAGPRA and uphold DOI's final agency action to secure the expeditious return of the remains without additional needless scientific study by any party.

This action was originally filed by the plaintiff academics in 1996 seeking a temporary restraining order against the United States Army Corps of Engineers ("Corps") which had issued a "Notice of Intent to Repatriate" human remains that were discovered on federal land near Kennewick, Washington, to the Joint Tribal Claimants, and the Wanapum Band (which is not federally-recognized). The restraining order sought to prevent repatriation and demanded a detailed scientific study of the remains. Rather than litigate, the Corps agreed to work with plaintiffs and provide them with sufficient notice of any final agency decision to seek relief from the Oregon District Court.

Subsequently, the Corps moved to dismiss the lawsuit on two separate occasions. First, the Corps moved to dismiss the action for failure to exhaust administrative remedies and to state a claim. This motion was granted in part, dismissing the plaintiffs' civil rights claims, but denied in part, finding that the plaintiffs' claims were legally sufficient and ripe for adjudication. *Bonnichsen v. United States*, 969 F. Supp. 614 (D. Or. 1997). After the ruling, the Corps withdrew its "Notice of Intent to Repatriate" and again moved to dismiss, arguing that the academics lacked standing to pursue the action, that the claims were not ripe because no final agency decision had been made, and that the claims were moot because the original "Notice of Intent to Repatriate" was no longer in effect. The district court rejected the Corps' arguments, vacated the Corps' earlier decision regarding the disposition of the remains, and directed the Corps to reopen the decision making process and address seventeen specific questions posed by the court. *Bonnichsen*, 969 F. Supp. 628, 651-54 (D. Or. 1997). The court also denied without prejudice the plaintiffs' motion to study the remains. *Id*. at 632.

Recognizing the need for expert agency review of the cultural evidence, the Corps officially transferred the task of determining the final disposition of the remains to DOI. On January 13, 2000, after reviewing the government studies and archaeological, linguistic, and other evidence of cultural affiliation, DOI

announced its determination that the remains are "Native American" as defined by NAGPRA. On January 25, 2000, the tribal claimants formally requested repatriation. ER 80-84 (DOI 4108-12). On September 21, 2000, DOI issued a final agency decision finding the remains to be culturally affiliated with the claimant tribes, awarding the final disposition of the remains to the claimant tribes, and rejecting plaintiffs' request to conduct additional studies of those remains. ER 3-9 (COE 23-29). Plaintiffs filed an amended complaint on January 2, 2001 seeking APA judicial review of DOI's final determination, and asserting statutory and constitutional violations.

Upon review of the administrative record and after oral argument, at which the claimant tribes participated as *amicus curiae*, the district court ruled for the plaintiffs and vacated the decision awarding the remains to the claimant tribes, enjoined the transfer of the remains to the claimant tribes, and rather than remanding to the agency, required that plaintiffs be allowed to study the remains upon the submission of a study plan. *See* Order at 69. Plaintiffs' other statutory requests for relief were dismissed with prejudice. ER 215 (Judgment at 2).

The Joint Tribal Claimants were granted intervention for purposes of appeal in this case on October 21, 2002. A timely appeal was filed by the Joint Tribal Claimants on October 24, 2002. The United States filed a companion appeal on

October 28, 2002. The Joint Tribal Claimants filed a motion seeking a stay of study pending appeal with the Oregon District Court which was denied on January 8, 2002. Subsequently, the Tribes sought a stay pending appeal with this Court which was granted on February 12, 2003.

STATEMENT OF FACTS

The Joint Tribal Claimants are four federally-recognized Indian tribes who share a statutory property interest in the ancient human remains known to the claimant tribes as the "Ancient One." The tribes are the express beneficiaries of the agency cultural affiliation determination vacated by the lower court. Each tribal claimant previously filed a claim for ownership of the remains, but decided to forego their individual claims and proceed under one formal joint claim to ensure the appropriate disposition of the ancient remains. ER 80-84 (DOI 4108-12).

The human remains were discovered at Columbia Park, a shallow water area along the Columbia River near Kennewick, Washington in July 1996. ER 1 (COE 1). This area is federal property under the management of the Corps and lies within the Confederated Tribes of the Umatilla Indian Reservation's ceded territory, as recognized by the United States in the treaty with the Confederated Tribes of the Umatilla Indian Reservation. ER 8 (COE 28 n.2). The area that now

encompasses Columbia Park was aboriginally used by all of the tribal claimants and has been determined to be an aboriginal joint use area. ER 19, 8 (COE 107, 28). Anthropological evidence, as well as oral histories, suggest that the claimant tribes and their predecessor groups have occupied the Columbia Plateau region for thousands of years. ER 7 (COE 27).

After being removed from the site, the bones were extensively studied, through both observation and destructive studies, and were revealed to be between 9200 and 9600 years old. ER 1, 26-29 (COE 1, 9308-11). Each of the Joint Tribal Claimants objected to these studies and demanded that the remains be returned to the tribes (i.e., "repatriated" under NAGPRA) for immediate reburial without additional testing. ER 74-77, 30-32 (DOI 1256-57 (Nez Perce), 1373 (Yakama), 1374 (Colville); COE 9316-18 (Umatilla)). Relying on the protective provisions of NAGPRA, the Corps took custody of the remains, but allowed additional government testing. ER 1, 3-15 (COE 1, 23-35). Based on the results of these additional studies, some of which were done in participation with plaintiffs, the Corps determined that the proper disposition of the remains rested with the claimant tribes. ER 3-9, 20-25 (COE 23-29, 5037-42). DOI affirmed the Corps' decision awarding the remains to the claimant tribes and issued a final

determination that the remains at issue are "Native American" and are culturally affiliated with the claimant tribes. ER 1, 3-15 (COE 1, 23-35).

The Joint Tribal Claimants are adversely affected by the disposition of this case below and the breadth of the district court's opinion, which emasculates the specific remedial purposes for which NAGPRA was passed by Congress.

STANDARDS OF REVIEW

The following standards of review are relevant to this Court's review of the issues presented on appeal.

A. Review of Lower Court

This Court reviews de novo a district court's application of the arbitrary and capricious standard of review to final agency action. *Tribal Village of Akutan v. Hodel*, 859 F.2d 651, 659 (9th Cir. 1988). The district court's interpretation of questions of law under NAGPRA are reviewed de novo. *Harper v. U.S. Seafoods*. 278 F.3d 971, 973 (9th Cir. 2002).

B. Review of Agency Action

Under 5 U.S.C. § 706(2), agency action shall withstand judicial review unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" *Id.* (internal citation omitted). This Court is "not to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park,*

Inc. v. Volpe, 401 U.S. 402, 416 (1971); *Morongo Band of Mission Indians v. Federal Aviation Admin.*, 161 F.3d 569, 573 (9th Cir. 1998).

An agency's interpretation of a statutory provision or regulation it is charged with administering is entitled to a high degree of deference. *Todd Shipyards Corp. v. Director, Office of Workers Compensation Programs*, 950 F.2d 607, 610 (9th Cir. 1991); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). "Deference requires affirmance of any interpretation within the range of reasonable meanings the words permit, comporting with the statute's clear purpose." *Alcaraz v. Block*, 746 F.2d 593, 606 (9th Cir. 1984). This Court will overturn an agency's decision only if the agency committed a "clear error of judgment." *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 666 (9th Cir. 1998).

C. Indian Canons of Construction

NAGPRA is remedial Indian legislation that is "not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights." Statement of Sen. Inouye, 136 Cong. Rec. S17,174- S17,175 (daily ed. Oct. 26, 1990). "Respect for Native human rights is the paramount principle that should govern resolution" of issues under NAGPRA. *United States v. Corrow*, 119 F.3d 796, 800 (10th Cir. 1997).

This Court has recognized that "the standard principles of statutory construction do not have their usual force in cases involving Indian law." *EEOC v. Karuk Tribe Housing Auth*., 260 F.3d 1071, 1082 (9th Cir. 2001) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Ambiguous provisions in both treaty and non-treaty matters should be "construed liberally" in favor of the Indians. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *see also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, (1980) (finding "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence"); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (finding court "must be guided by that eminently sound and vital canon, that statutes passed for the benefit of . . . tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians").

These canons of construction have been properly applied to NAGPRA. *Yankton Sioux Tribe v. United States Army Corps of Eng'rs*, 83 F. Supp.2d 1047, 1056 (D. S.D. 2000).

SUMMARY OF ARGUMENT

The following briefly summarizes the arguments in support of the six issues presented for review.

1. The plaintiffs lack constitutional and prudential standing to prosecute this action. The district court's decision granting standing under NAGPRA was erroneous. *See Bonnichsen*, 969 F.Supp. at 632-38. NAGPRA was enacted to protect against the very interests the academics purport to advance. Moreover, there are no provisions for scientific study of inadvertently discovered remains in NAGPRA, and as such, no means by which courts may redress plaintiffs' alleged harms. Accordingly, plaintiffs are not within the "zone of interests" protected by NAGPRA and their claimed harms cannot adequately be redressed.

2. The district court erred as a matter of law and substituted its judgment for that of the agency by rejecting DOI's regulation defining "Native American" and DOI's interpretative rule defining "indigenous."

DOI's definition of "Native American" in 43 C.F.R. § 10.2(d) specifically removed the words "that is" from the statutory definition. This definition is consistent with the purposes of NAGPRA and the intent of Congress. The rule was adopted by notice and comment rulemaking and is entitled to substantial judicial deference pursuant to the *Chevron* doctrine. DOI's interpretative rule defining the term "indigenous" is a reasonable interpretation by the agency charged with administering the statute that is also entitled to *Chevron*-style deference. The district court far exceeded the bounds of acceptable APA review by independently

defining these terms, interjecting its own hypotheses as to the populating of the Americas, and ignoring Congress' clear intentions in passing NAGPRA.

3. The district court erred as a matter of law and substituted its judgment for that of the agency by rejecting DOI's cultural affiliation determination for the remains.

NAGPRA's legislative history and DOI's regulations regarding cultural affiliation determinations require a "reasonably traced" relationship between tribal claimants and the remains based on "[g]eographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion." Congress rejected the need for "scientific certainty" and instead sought to "ensure that the claimant has a reasonable connection with" the remains. ER 40-41 (S. Rep. No. 101-473 at 8-9). The minimal showing required here is less rigorous than the "preponderance of the evidence" standard used in NAGPRA's other repatriation provisions.

The district court ignored the lenient evidentiary standard adopted by Congress and undertook an independent examination of the evidence to require proof of cultural affiliation with scientific certainty. The district court twisted NAGPRA, ignored canons of construction requiring NAGPRA to be interpreted broadly in favor of Indians, and exceeded the bounds of APA judicial review.

4. The district court erred as a matter of law by applying the APA's prohibition on ex parte communications to NAGPRA's requirement that agencies consult with Indian tribes who may be culturally affiliated with discovered remains.

The APA prohibition on ex parte communications is inapplicable; it applies only when an agency is required by statute to conduct an adjudication or an administrative hearing. NAGPRA's provisions on cultural affiliation contain no reference to "hearings" or "on the record." Rather, NAGPRA requires consultation with claimant tribes, reflects "the unique relationship between the Federal Government and Indian tribes . . . and should not be construed to establish a precedent with respect to any other individual, organization or foreign government." 25 U.S.C. § 3010.

5. The district court erred as a matter of law in denying the ability of the claimant tribes to file a joint ownership claim for the remains at issue.

Nothing in NAGPRA prohibits a joint claim from interrelated federally-recognized tribes. Congress specifically recognized that in instances where several tribes are making competing claims, agreements between tribes regarding the disposition of human remains or objects is a proper method of resolving the dispute and should be allowed. ER 41 (S. Rep. No. 101-473 at 9). NAGPRA's implementing regulations, adopted through formal rulemaking, also support the

"possibility of joint claims." Alternatively, repatriation was proper pursuant to NAGPRA's aboriginal land provision.

6. The district court erred as a matter of law and exceeded its authority by failing to remand the action to the expert agency for further interpretation consistent with the court's guidance.

This is a typical record review case devoid of the rare circumstances necessary to trigger substantive relief. Particularly here, where the district court rejected DOI's definition of NAGPRA's controlling term, "Native American," the appropriate remedy is a remand to the agency charged with interpreting the statute. The district court erred in circumventing remand. The appellees have no legal right to study these remains.

ARGUMENT

This appeal presents ordinary issues of judicial review of agency action. The Tribes face a public bias that more study is always a good thing. Here, however, Congress has drawn a line between the interests of academics and human rights, striking a balance in favor of protecting native remains. The district court erred by ignoring the fundamental principles of administrative law and succumbing to the allure of subjective and unproven scientific speculation.

I. PLAINTIFFS LACK STANDING TO SUE.

The plaintiffs lack standing to prosecute this action under both NAGPRA and the APA. It is a bedrock principle that "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies,'" requiring, at minimum, that plaintiffs establish standing to sue. *Allen v. Wright*, 468 U.S. 750, 752 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61 (1992). The district court erred as a matter of law finding that plaintiffs had satisfied their standing burden. *Bonnichsen*, 969 F.Supp. at 632-38. Standing is a question of law reviewed de novo that can be raised at any time. *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002).

The Supreme Court has held that a plaintiff satisfies the requirements of standing when bringing suit under the APA if that plaintiff meets judicially-created prudential limitations, including the requirement that the interest sought to be vindicated falls "within the zone of interests protected by the law invoked." *Allen*, 468 U.S. at 751; *Churchill County v. Babbitt*, 150 F.3d 1072, 1074-79 (9th Cir. 1998), *as amended* 158 F.3d 491 (9th Cir. 1998).

Plaintiffs have not suffered a legal wrong under the particular NAGPRA provision upon which they rely. *Churchill County*, 150 F.3d at 1080-81. In a decision directly on point issued after Judge Jelderks' standing ruling, the District Court for the District of Columbia found that "[a]s Congress has structured the

repatriation provisions of NAGPRA, only direct descendants of Native American remains and affiliated tribal organizations stand to be injured by violations of the Act." *Idrogo v. United States Army*, 18 F.Supp.2d 25, 27 (D. D.C. 1998).[1] In *Idrogo*, the court denied standing to a non-Indian individual plaintiff and organization because NAGPRA was "[e]nacted 'to protect . . . burial sites and the removal of human remains,'" thereby placing any lawsuit attempting to thwart repatriation to culturally affiliated tribes outside of NAGPRA's reach. *Id*. at 27-28. Here, plaintiffs' claims seeking to bar repatriation and conduct their own invasive studies are repugnant to NAGPRA and are so "inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400 (1987); *see also U.S. v. Mindel*, 80 F.3d 394, 397 (9th Cir. 1996). NAGPRA is remedial Indian human rights legislation, enacted to protect Native American burial sites and the removal of human remains. As such, Congress foreclosed these academics from asserting the right to challenge repatriations in order to conduct what amounts to peer review of previous government studies of the native remains; consequently, plaintiffs lack prudential standing.

[1] This is the only other case addressing standing under NAGPRA.

In addition to APA standing requirements, plaintiffs must meet Article III standing requirements. The "irreducible constitutional minimum" of standing contains three elements: (1) plaintiff must have suffered an "injury in fact;" (2) the injury must be "fairly traceable" to the challenged conduct; and (3) it must be likely, as opposed to merely speculative, that the injury will be "redressed" by a favorable decision. *Defenders of Wildlife*, 504 U.S. at 560-61. This Court need not reach the question of whether plaintiffs meet all the prerequisites for standing, because the absence of any one element, here redressability, requires dismissal. *See Snake River Farmers v. Department of Labor*, 9 F.3d 792, 795 (9th Cir. 1993).

Plaintiffs cannot establish a substantial likelihood that this Court can provide them access to study the remains.[2] An injury is redressable only if "the prospect of obtaining relief from the injury as a result of a favorable ruling is [not] too speculative." *Allen*, 468 U.S. at 753. Neither NAGPRA nor the APA provide the courts with the independent authority to grant substantive relief to study ancient native human remains. There are no provisions in NAGPRA allowing for study of discovered remains. *See* 25 U.S.C. § 3002. In addition, under the APA, a ruling

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[2] The district court erred by simply presuming redressability: "For purposes of determining whether plaintiffs have standing, I must assume that the court does have the capacity to grant the requested relief." *Bonnichsen*, 969 F.Supp. at 637 n.5.

favorable to the plaintiffs would result in a remand to the agency to correct any deficiency, not an award of substantive relief. Likewise, since the disposition of the remains in this case is governed by NAGPRA, the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. §§ 470aa *et seq*., is irrelevant and all of plaintiffs ARPA-based claims were properly dismissed with prejudice by the district court. ER 215 (Judgment at 2). As the plaintiffs did not seek a cross appeal, none of the ARPA claims are before this Court. Hence, it is purely speculative whether the plaintiffs will ever have access to the remains.

This Court cannot redress plaintiffs' alleged injury,[3] lacks subject matter jurisdiction, and must dismiss plaintiffs' claims for want of standing.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW AND SUBSTITUTED ITS JUDGMENT FOR THAT OF THE AGENCY BY FAILING TO AFFORD *CHEVRON* DEFERENCE TO DOI'S DEFINITION OF "NATIVE AMERICAN."

[3] NAGPRA § 3013 is of no moment as "Congress cannot augment the case-or-controversy requirement beyond what the Constitution permits." *Idrogo*, 18 F.Supp.2d at 28. In stark contrast to the lower court's finding, section 3013 is not akin to the Endangered Species Act's citizen suit provision and cannot be independently used to afford standing here. *See Bonnichsen*, 969 F.Supp. at 636-37.

NAGPRA requires a two-prong analysis before any remains discovered on federal land may be repatriated to claimant tribes. *See* 25 U.S.C. § 3002(a). First, the remains must be "Native American" within the meaning of the statute. Second, if the remains are "Native American," they must be reasonably established to be culturally affiliated with claimant tribes. If both prongs of the test are satisfied, the native remains are returned to culturally affiliated tribes for disposition.

Congress, in enacting NAGPRA, defined "Native American" as "of or relating to, a tribe, people or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). DOI, as the agency charged with administering NAGPRA, issued a regulatory and an interpretive rule to administer Congress' definition of "Native American."

The regulatory rule was adopted pursuant to formal notice and comment rule making defining "Native American" as "of or relating to a tribe, people or culture indigenous to the United States." 43 C.F.R. § 10.2(d). The regulation omitted the words "that is" from the statutory definition. The district court then inextricably added a requirement that a tribe be "presently existing." Order at 27.

The interpretative rule was issued by DOI in response to a question posed by the district court. Responding to the court's June 1997 inquiry, DOI issued an interpretation clarifying the term "indigenous" on December 23, 1997 to mean

"belong[ing] to a culture that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers." ER 2, 10 (COE 10, 30).

DOI's regulatory and interpretive rules are entitled to substantial judicial deference. Because DOI's rules were reasonable, consistent with NAGPRA's plain meaning and legislative history, and followed accepted canons of statutory construction, the lower court should have deferred to DOI's interpretations of "Native American" and not substituted its judgment for that of the expert agency.

A. DOI's Regulatory Definition of "Native American" Is Entitled to *Chevron* Deference.

DOI's definition of "Native American" in the implementing regulations is entitled to substantial judicial deference under the *Chevron* doctrine.

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1. The Chevron Doctrine Applies to DOI's Definition of "Native American."

Reviewing final agency determinations, "deference is given to an agency's interpretation of the statute that it administers." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Recently, the Supreme Court affirmed *Chevron* deference for agency rules, such as the one here,

promulgated through formal notice and comment rulemaking. *See United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001) (finding that the "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. . . . as by . . . notice-and-comment rulemaking").

DOI is charged by Congress to "promulgate regulations to carry out" NAGPRA. 25 U.S.C. § 3011. The definition of "Native American" was subject to numerous revisions and public comment, and intentionally omitted terms that suggested an indigenous tribe, people or culture must presently exist from the initial proposed rule through the regulations' final form. *Compare* 43 C.F.R. § 10.2(d) *with* 58 Fed. Reg. 31,123 (May 28, 1993). Since this regulation was adopted with the "force of law," the regulatory definition of "Native American" was entitled to substantial judicial deference below, and is entitled to such deference here.

2. DOI's Construction of NAGPRA Is Reasonable.

When determining the level of deference an agency regulation is entitled to, "the question for the court is whether the agency's answer is based on a

permissible construction of the statute." *Chevron*, 467 U.S. at 482. While judicial review must be "searching and careful" the ultimate standard of review is "narrow" as the "court is not empowered to substitute its own judgment for that of the agency." *Volpe*, 401 U.S. at 416; *Morongo Band of Mission Indians*, 161 F.3d at 573. "Deference requires affirmance of any interpretation within the range of reasonable meanings the words permit, comporting with the statute's clear purpose." *Alcaraz*, 746 F.2d at 606.

DOI's regulatory definition of "Native American" comports with NAGPRA's purpose and language, and qualifies for deference under the reasonableness standard. Crafting the NAGPRA regulations without a temporal limitation on indigenousness effectuates Congress' intent to ensure NAGPRA's applicability without threshold proof of a relationship between the ancient remains and present-day Indian tribes. A relationship must be separately proven under the cultural affiliation prong. Had Congress intended "Native American" remains to have some relationship with modern day tribes, Congress would have used the term "Indian tribe" or "American Indian," rather than "Native American," as was done in other parts of the statute. *See, e.g.* 25 U.S.C. § 3002(a). Congress' choice of "relating to" rather than "lineal descendants" also evinces a desire for the definition to have broader applicability. *Compare Id.* § 3001(9) *with Id*.

§ 3002(a)(1). Thus, "Native American" is plainly distinguished from present day groups. For the lower court to require a present-day relationship ignores both historical realities in the impact of white settlement and congressional intent, evidenced by Congress' rejection of restrictive definitions of "Native American."

Enacting NAGPRA, Congress explicitly rejected the restrictive definition of "Native American" used by the lower court and that had been contained in four preceding bills that would have narrowly defined "Native American" as including "American Indians . . . Native Alaskans, Native Hawaiians . . . and the decedents of such individuals."[4] Congress instead adopted a definition of "Native American" that references "indigenous tribes, peoples, or cultures." The definition in 25 U.S.C. § 3001(9) is more expansive, eliminating the term "Indian" as a modifier of "tribe" and eliminating proof of a present-day relationship.

Where the final version of a statute deletes language contained in an earlier draft, there is a presumption that the earlier draft was inconsistent with ultimate congressional intentions. *In re Town & Country Home Nursing Services, Inc.,* 963

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[4] H.R. 1381, 101st Cong. § 5 (1989) ("Native American Burial Site Preservation Act of 1989) ; H.R. 1646, 101st Cong. § 3(1) (1989) ("Native American Grave and Burial Protection Act") (defining "Native American" as a "member of an Indian tribe"); S. 1021, 101st Cong. § 3(1) (1989) "Native American Repatriation of Cultural Patrimony Act"); S. 1980, 101st Cong. § 3(1) (1989); H.R. 5237 § 2(11) (1990).

F.2d 1146, 1151 (9th Cir.1991). Congress' final definition of "Native American" is strong evidence that Congress intended NAGPRA to apply broadly to remains of all "indigenous tribes, peoples, or cultures," not merely the remains of "descendants" of "American Indians," "Native Alaskans," or "Native Hawaiians" - terms that denote present groups. Courts assume Congress is conscious of what it has done, especially when it chooses between two available terms that might be included in the provision in question. *American Petroleum Inst. v. E.P.A.,* 198 F.3d 275, 279 (D.C. Cir. 1999). Based on the language Congress chose, "Native American" remains do not have to be related to a modern day Indian tribe. Thus, DOI construed "Native American" in a permissible way, effectuating Congress' intent.

3. The District Court Erred by Failing to Defer to DOI's Definition.

Magistrate Jelderks exceeded the bounds of APA judicial review and erred as a matter of law by substituting his judgment for that of DOI by refusing to afford the level of deference required by law to the expert agency's regulatory definition of "Native American."

Both the court's order and oral argument transcripts evince the extent to which the court refused to follow DOI's permissible construction of NAGPRA. Essentially conducting a trial, rather than reviewing the record, a significant portion of the first day of oral argument was spent discussing the meaning of the word "is." On several occasions, the lower court opined that:

> If the statute said 'is or was indigenous to the United States,' it would be much easier for me to accept the Department's position on this, particularly if we are talking to groups of people or individuals disconnected with modern groups of people. How can I accept the DOI's definition without, in effect, inserting a couple more words in the statute?

ER 136 (Transcript at 77). Later, the court returned to the "that is" issue, confusing the regulatory definition of "Native American" with DOI's subsequent interpretative rule clarifying the meaning of "indigenous," and demonstrating a misunderstanding of how the regulation was adopted:

> [O]ne of the reasons we are spending this much time on it, I'm reluctant to give a judicial seal of a approval to what appears to me to be an expansive definition unless I'm satisfied, absolutely satisfied, one, that it is not inconsistent with the statute and, two, consistent with the intent of Congress, particularly since it was not enacted under the formal rulemaking process.

ER 137-38 (Transcript at 95-96). In fact, the regulation was adopted through formal notice and comment rulemaking. Final Rule, 60 Fed. Reg. 62,133 (Dec. 4, 1995). However, the most telling expression of the court substituting its judgment

for that of DOI came in this exchange between the court and Mr. Walter Eco-Hawk, counsel for the *amicus curiae* Native American Rights Fund:

> Court: Wouldn't this interpretation be equally or more consistent with the statute itself if it read: 'As defined in NAGPRA, 'Native American' refers to human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States at the time of the historically documented arrival of European explorers,' identifying a group of people [sic] Europeans came to the country, not attempting to swallow up ancient times from thousands of years ago, unless there was some tie-in with those people who lived here at the time the Europeans arrived and doing away with the dispute, because I think it would be generally conceded that those people who were here at the time of the documented arrival of European explorers are generally, if not always, considered to be 'related to tribes, peoples and cultures that exist at this time'?
> Mr. Echo-Hawk: Your Honor, that sounds like a legislative drafting session here.
> Court: It does.

ER 139 (Transcript at 102-03).

Judge Jelderks ignored the maxim of judicial review that a court "need not conclude that the agency's construction was the only one it could have adopted, or even the one the court would have reached." *Alcaraz*, 746 F.2d at 606 (quoting *Chevron*, 467 U.S. at 843 n.11). The lower court's conclusion that it is "reasonable to infer" from the use of the words "that is indigenous" that there must be "some relationship between remains . . . and an existing tribe" ignores NAGPRA's language and canons of statutory construction. ER 167 (Order at 27).

4. The District Court's Definition Renders NAGPRA Meaningless.

When interpreting a statute, courts look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain congressional intent. *See AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). The district court chose to focus only on one other NAGPRA provision regarding the definition of "sacred objects" to conclude that the word "is" overrides "indigenous" to require a present-day relationship. 25 U.S.C. § 3001(3)(C). This approach is unwarranted.

The court's definition of "Native American" renders a majority of NAGPRA surplusage by finding that "the term 'Native American' requires, at a minimum, a cultural relationship between the remains . . . and a present-day tribe." Order at 30. In particular, this makes the pivotal "cultural affiliation" determinations required by the statute (25 U.S.C. § 3002(a)) superfluous. In addition, the statute's provisions regarding unclaimed remains (25 U.S.C. § 3002(b)) and culturally unidentifiable remains (25 U.S.C. § 3006(c)(5)) would also be surplusage if remains had to have a cultural relationship to existing tribes to be "Native American."

DOI's regulations properly recognized that something "indigenous" cannot lose its indigenousness. Regardless of whether the agency or Congress used the term "is" or "was," "indigenous" refers to a past event which describes a current

condition. A tribe cannot be indigenous at some point, but then not be at others. While DOI's definition may not have been the one the lower court would have chosen, it was bound to defer to this reasonable interpretation. The court failed to do so, and this Court should find that the district court erred in not providing substantial judicial deference to DOI's regulatory definition of "Native American."

B. DOI's Interpretation of "Indigenous" Is Entitled to Deference.

Although discussed together by the district court, DOI's interpretation of the term "indigenous" was a separate agency interpretation from the 1995 regulatory definition of "Native American." DOI's interpretation of "indigenous" was issued in response to one of the seventeen specific questions posed by Judge Jelderks for the Corps to consider on remand – "What is meant by terms such as 'Native American' and 'indigenous' in the context of NAGPRA and the facts of this case." 969 F.Supp. at 651.

On December 23, 1997, DOI responded to this question, defining human remains to be "indigenous" 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.

ER 2, 10 (COE 10, 30). DOI's interpretation is an "interpretative rule" under the APA and is entitled to deference under the *Chevron* doctrine. The district court's misapplication of the United States Supreme Court's decision in *Mead* and failure to defer to the agency's interpretation was an error of law.

1. DOI's Interpretation of "Indigenous" Is An Interpretative Rule.

DOI's interpretation of "indigenous" qualifies as an interpretative rule that is exempt from notice and comment rulemaking under the APA. 5 U.S.C. § 553(b)(B). "Interpretative rules are those which merely clarify or explain existing laws or regulations." *Powederly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983); *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995) ("a prototypical example of an interpretive rule" applies existing law to a particular set of facts and is not inconsistent with any prior decisions of the agency).

DOI's interpretation of "indigenous" is drawn from the statutory language and legislative history of NAGPRA. The definition is interpretative because it does not create law, but rather "simply explain[s] something the statute already required" but did not adequately explain. *See Alcaraz*, 746 F.2d at 613. NAGPRA grants broad discretion to DOI, as the agency charged with administering NAGPRA, to provide meaning and clarity. *See Warder v. Shalala*, 149 F.3d 73, 80 (1st Cir. 1998) (holding an interpretation that "addresses an area of ambiguity" was

an interpretive rule, noting, "[t]hese definitions created the need for clarification – precisely the function of an interpretative rule."). Thus, DOI's statement is a prototypical example of an interpretative rule.

2. DOI's Interpretative Rule Is Entitled To Substantial Judicial Deference.

DOI's interpretation clarifying the term "indigenous" is entitled to judicial deference. Courts have appropriately given substantial deference to an agency's interpretation of the statute it administers, applying the *Chevron* deference principles to interpretative rules. *Trans Union Corp. v. FTC*, 81 F.3d 228, 230 (D.C. Cir. 1996) ("[W]e have extended *Chevron* deference to agency interpretative rules . . . indeed, the rule at issue in *Chevron* itself appears to have been interpretative."); *accord Elizabeth Blackwell Health Ctr. For Women v. Knoll*, 61 F.3d 170 (3rd Cir. 1995); *accord Garcia v. Secretary of Health & Human Servs*., 46 F.3d 552, 556 (6th Cir. 1995); *Christensen v. Harris County*, 529 U.S. 576, 589-91 (2000) (J. Scalia concurring) (*Chevron* deference applies where the agency is interpreting a statute to resolve ambiguity).

Alternatively, courts have given substantial deference to an agency's interpretation of a statute it administers after considering "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if

lacking the power to control." *See Louisiana-Pacific Corp. v. Block*, 694 F.2d 1205, 1212-13 (9th Cir. 1982) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) ("substantial deference should be given to the agency's interpretation" where factors met); *see also Mead*, 533 U.S. at 234-35 ("*Chevron* did nothing to eliminate *Skidmore*" deference and courts must leave "*Skidmore* intact and applicable where statutory circumstances" foreclose *Chevron*).

The lower court erred by failing to afford either deferential standard to this interpretation. The court provided two reasons why it refused to defer to DOI's interpretation of "indigenous": (1) because the definition "was first announced by the Secretary's counsel during the course of this litigation," and (2) because the United States Supreme Court in *Mead* found that interpretative rules such as this were not entitled to *Chevron*-style deference. Order at 26. The district court's reasons do not comport with the law.

First, the interpretation of the term "indigenous" was not an ad hoc decision of Justice Department attorneys made during the court proceeding. Rather, the administrative record shows that the interpretative rule was issued by DOI pursuant to the court's request in its June 1997 Order. ER 78 (DOI 2517).

Second, the lower court erred in applying the *Mead* decision to the facts of this case. In April 2002, this Court explained *Mead*'s narrow applicability only to

cases where Congress has foreclosed the agency from exercising its discretion in implementing a statute. *See Navajo Nation v. Dep't of Health and Human Sevcs*., 285 F.3d 864, 874 (9th Cir. 2002), *reh'g en banc granted,* 307 F.3d 977 (9th Cir. 2002) (upholding informal adjudication based on *Chevron* deference despite canons of construction requiring ambiguities to be resolved in favor of Indians). This Court explained that *Chevron* applies when (1) the agency is interpreting a statute it is expressly selected to administer and, (2) where there is ambiguity, the agency develops policy implementing Congress' intent while "staying within Congress' grant of authority." *Id*. at 872-74. When this occurs, an agency "has a far superior claim to deference" and is "entitled to far more leeway." *Id*. at 874. Thus, the interpretation was "one reasonable possibility" under the statute and is "entitled to deference under *Chevron*." *Id*. at 870.

Here, Congress provided a general outline in NAGPRA, delegating to DOI broad authority to fill in the details. *See* 25 U.S.C. § 3011(DOI is charged by Congress to "promulgate regulations to carry out" NAGPRA). DOI's interpretation of "indigenous" effectuates Congress' intent and is entitled to substantial deference. *Mead* precludes *Chevron* deference where Congress has removed all discretion from the agency. This distinction is telling and *Chevron* deference is warranted to DOI's interpretation of "indigenous."

Even if *Mead* applies to the facts of this case, *Chevron* deference is warranted here. In *Mead*, the Supreme Court refused to apply *Chevron* deference to a tariff classification ruling letter based on the ruling in *Christensen v. Harris County*. *Mead*, 533 U.S. at 234 ("we hold nothing more than what we said last Term in response to the particular statutory circumstances in *Christensen*"). In *Christensen*, a sharply divided Court stated *Chevron* deference applicability as follows: "Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Christensen*, 529 U.S. at 587. Interpretative rules are absent from this list. The dissent clarifies this point, vehemently arguing that *Chevron* still applies to interpretative rules. *See Id.* at 589 (J. Scalia dissenting, joined by J. Stevens, Ginsburg and Breyer).

Mead also carves out an exception for interpretative rules, finding that "as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." *Mead*, 533 U.S. at 231 (emphasis added). Thus, the fact

that the interpretation of "indigenous" was "not a product of such formal process does not alone, therefore, bar the application of *Chevron*." *Id*.

As the record aptly demonstrates, DOI's interpretation of the term "indigenous" is reasonable in light of the plain meaning of the statute and NAGPRA's remedial purposes. Because of the difficult scientific questions and issues of first impression implicated by this case, DOI's interpretation deserves judicial deference.

3. The District Court Erred as a Matter of Law by Refusing to Defer to DOI's Interpretation of "Indigenous."

As was the case with the lower court's review of DOI's regulatory definition of "Native American," the district court erred as a matter of law by rejecting DOI's cogent interpretation of "indigenous" and exceeded its limited review by substituting its judgment for that of the agency.

The district court's views regarding the meaning of "indigenous" were apparent long before DOI exercised its congressionally granted authority to interpret the statute. In footnote 24 of his June 1997 remand order to the Corps, Judge Jelderks first presented his interpretation of "indigenous" as follows:

> [I]f we assume that Congress intended to use the ordinary meaning of the word, my dictionary defines 'indigenous' as 'occurring or living naturally in an area; not introduced; native.' It is not easy to apply the concept of 'indigenous' to remains as ancient as those at issue here, at least given the present state of knowledge regarding the origins of humanity in the

> Americas. . . . However, even assuming the ancestors of present day Native Americans have always been here, as the amici contend, that in itself does not preclude the possibility that non-Indians could also have been present in the Americas at some earlier date. For that reason, the age of the remains is not, by itself, conclusive proof that these remains are related to contemporary Native Americans. On the other hand, conventional scientific theory is that modern Native Americans are descended from immigrants who came to the Americas from other continents. If that is true, then were these original immigrants (who were born elsewhere) 'indigenous'? Were their children (born here of immigrant parents) 'indigenous'? The analysis is further complicated if there was more than one wave of ancient immigration to the Americas, or off-shoots from the primary group(s). If there were sub-populations whose members survived for a time in North America--perhaps hundreds or even thousands of years--but eventually became evolutionary 'dead ends,' i.e., all descendants of the group eventually died, leaving no one who today is directly descended from them, would a member of such an extinct sub- population be considered 'indigenous'? Would they be considered 'Native American'? It is essential to define what is meant by 'indigenous' and 'Native American' for purposes of NAGPRA.

969 F.Supp. at 651 n.24 (internal citations omitted). In addition to highlighting the court's willingness to enter the fray of scientific debate on the peopling of the Americas, this excerpt also demonstrates the fundamental reason for agency deference in cases like this, where statutory ambiguity, scientific uncertainty, and conflicting evidence is left for the expert agency, not the court, to address.

Throughout oral argument, the court consistently ignored DOI's scientific expertise to interject its own theories and definitions of "indigenous." The court's abuse of APA judicial review is most evident in its "Mt. Hood ice cave" hypothetical as follows:

> Maybe 'indigenous' is a word that sounds simple, isn't quite so simple. . . . How about if this afternoon in an ice cave on Mt. Hood a group of people, not just one person but a group of people, was found with evidence that they lived in the area several generations, got caught in an ice storm, frozen over, blond-haired, blue-eyed? Why wouldn't they fall within -- you suggest those would not be 'Native Americans.'

ER 133 (Transcript at 61-62); *see also* ER 134 (Transcript at 65-68). This type of extra-record conjecture is far outside of the scope of judicial review. It also demonstrates a fundamental misunderstanding of the statute, as NAGPRA applies "Native American" to remains, not to a group of people, i.e. "Native Americans." The same misguided speculative approach was taken by the court on the second day of oral argument, as demonstrated by the following:

> How about this theoretical concept of the Vikings, a period of time when maybe there was a group of people, what's now the Continental United States, that really have no real connection with modern-day Indian people? Why would Congress have wanted to lump those people -- well, one, why would Congress have wanted to lump those people in with American Indians, if they did? . . . . I have a very hard time reading that out of their definition.

ER 138-39 (Transcript at 99-100).

The court's rejection of DOI's interpretation also conflicts with previous legislative enactments. When Congress uses language with a settled meaning at common law, it "presumably knows and adopts the cluster of ideas that were attached to each borrowed word" as well as "the meaning its use will convey to the judicial mind unless otherwise instructed." *Beck v. Prupis*, 529 U.S. 494, 500

(2000) (citing *Morrissette v. United States*, 342 U.S. 246, 263 (1952)). Legislation enacted prior to NAGPRA made a distinction between "indigenous" people and the descendants of colonists who arrived in the United States after historically documented European arrival. Both the Native Hawaiian Health Care Act of 1988 and the Native Hawaiian Education Act of 1994 use the term "indigenous" to refer to people who lived in Hawai'i prior to first documented European contact in 1778. *See* 42 U.S.C. § 11701(1); 20 U.S.C. § 7902(2).

Congress' earlier legislation is taken as a guide to understanding Congress' intent in employing the word "indigenous" in NAGPRA. Prior to NAGPRA, there was a history of congressional and judicial use of the word "indigenous" in reference to people present before European contact. It is therefore reasonable for DOI to conclude that Congress intended "indigenous" to mean any remains present "prior to the historically documented arrival of European explorers." ER 79 (DOI 2518). The court simply failed to recognize this analysis, and instead mischaracterized the agency's interpretation in much the same way as counsel for the plaintiffs did by referring to DOI's interpretative rule by means of the date "1492," which is not found in the text of the interpretative rule.[5] *See* Order at 28-

[5] This mischaracterization leads the court to incorrectly apply the "absurd results" doctrine to reject the agency's interpretation based on the possibility that Indians were not the first inhabitants of North America. *See* Order at 28.

29. By mischaracterizing DOI's interpretative rule, the court ignored the fact that DOI's interpretation does not rely solely on age or calendar date. Remains predating European arrival that are not culturally affiliated with indigenous tribes would be "Native American" but would not be repatriated .[6] Quite simply, there is no "1492 Rule."

As such, both the regulatory definition of "Native American" and the interpretative rule clarifying the definition of "indigenous" were reasonable constructions of NAGPRA and are entitled to judicial deference. Judge Jelderks' narrow reading of the statute turns NAGPRA on its head, restriking the balance Congress placed in favor of returning remains to tribes, in favor of additional academic study. The district court erred by failing to accord deference and

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However, this rule of construction does not apply and operates quite differently than in the manner it was used below. The rule applies only in rare and exceptional cases, and requires, should a literal reading of a statutory term "compel an odd result," judicial review of a statute's legislative history to lend the term its proper scope. *Griffin v. Oceanic Contractors, Inc*., 458 U.S. 564 (1982); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989). This is not a rare case and the court never analyzed NAGPRA's legislative history, which would have revealed that NAGPRA is a first-of-a-kind statute "about human rights" designed to "protect Native American burial sites and the removal of human remains." *See* 136 Cong. Rec. S17174-75 (statement of Sen. Inouye); ER 61 (H.R. Rep. No. 101-877 at 8); ER 34 (S. Rep. No. 101-473 at 2).

[6] 25 U.S.C. § 3002(b) applies to such remains.

engaging in extra-record hypothesizing. This Court should reinstate DOI's interpretations.

III. THE DISTRICT COURT ERRED AS A MATTER OF LAW AND SUBSTITUTED ITS JUDGMENT FOR THAT OF THE AGENCY BY FAILING TO ACCORD SUBSTANTIAL JUDICIAL DEFERENCE TO DOI'S FINDING OF CULTURAL AFFILIATION.

NAGPRA defines cultural affiliation as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe ... and an identifiable earlier group." 25 U.S.C. § 3001(2); *accord* 43 C.F.R. §10.14(c). The types of evidence relied upon to establish cultural affiliation include "[g]eographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion." 43 C.F.R. §10.14(e). Applying this standard, and congressional expressions regarding the requisite evidentiary standard for cultural affiliation, the Secretary determinated that there was a "reasonable link between these remains and the present day Indian tribe claimants." ER 87 (DOI 10015).

DOI's factual finding is reasonable and permissible in light of NAGPRA and is entitled to substantial judicial deference. The district court erred in substituting its judgment for that of the expert agency by independently weighing the evidence and requiring a far more stringent standard of proof for cultural affiliation than was required by Congress.

A. DOI Properly Considered the Totality of the Circumstances and Evidence and Applied a More Stringent Evidentiary Standard than Congress Required in NAGPRA.

Congress was undoubtedly painting with broad stokes when it enacted NAGPRA. The purpose of cultural affiliation is to ensure that claimants have "a reasonable connection with the materials." ER 64 (H.R. Rep. No. 101-877 at 14). Congress recognized that "it may be extremely difficult or even impossible" for "claimants to show absolute continuity from present day Indian tribes to older, prehistoric remains;" therefore, a finding of cultural affiliation "should be based upon an overall evaluation of the totality of the circumstances and evidence" and "should not be precluded solely because of some gaps in the record" *Id*.; ER 64 (H.R. Rep. No. 101-877 at 14).

Any plausible connection satisfies cultural affiliation. NAGPRA's plain language is devoid of a precise evidentiary standard for cultural affiliation under the facts of this case. Congress only required cultural affiliation be determined by a "preponderance of the evidence" where there are two or more competing claims, 25 U.S.C. § 3002(a)(2)(C)(2), or when tribes seek repatriation of an existing collection from a museum under 25 U.S.C. § 3005(a)(4). This was a pointed departure from earlier versions of NAGPRA which required proof by a "preponderance of the evidence" for <u>all</u> cultural affiliations. *See* S.1980, 101st

Cong. § 3 (1990). Where the final version of a statute deletes language contained in an earlier draft, there is a presumption that the earlier draft was inconsistent with ultimate congressional intentions. *In re Town & Country Home Nursing Services, Inc.,* 963 F.2d at 1151. By rejecting this standard in favor of a more lenient one, Congress explicitly struck a balance in favor of repatriation.[7] Reasonableness requires nothing close to scientific certainty. Congress could not have been more clear: claimants "do not have to establish 'cultural affiliation' with scientific certainty." ER 40 (S. Rep. No. 101-473 at 8).

DOI's regulations, promulgated through notice and comment rulemaking, used Congress' exact words, requiring cultural affiliation be "reasonably" traced "based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record." 43 C.F.R § 10.14(d).

Here, DOI applied a more rigid analysis than was required by NAGPRA's plain language. A "preponderance of the evidence" is only required for repatriations under sections 3002(a)(2)(C)(2) and 3005(a)(4). However, DOI

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[7] The rejection of scientific certainty is further highlighted by Congress' groundbreaking use of "folkloric, oral traditional . . . or other relevant information" to establish cultural affiliation. 25 U.S.C. § 3005(a)(4).

applied that standard to all cultural affiliations, even though the Tribes' joint claim only requires any reasonable proof of affiliation under the statute. *See* ER 88 (DOI 10016); 43 C.F.R. § 10.14(f). Using a higher standard of proof than NAGPRA required, DOI spent three years obtaining and reviewing evidence in accordance with NAGPRA, its regulations, and the lower court's June 1997 order directing DOI and the Corps to "gather additional evidence." *Bonnichsen*, 969 F. Supp. at 645. DOI conducted numerous studies, tests, and investigations, including: linguistic studies, biological studies, morphological studies, taphonomy/paleopathology studies, DNA studies, skeletal reconstructions, affiliation studies, and discovery site studies. Many of these studies and investigations were performed at the specific behest of the plaintiffs and over the objections of the claimant tribes. *See* ER 90, 16-18 (DOI 10052, COE 46-49).

DOI expressly considered all of the voluminous affiliation studies and technical reports with particular focus on "geographical, biological, archeological, anthropological, linguistic, and oral tradition." ER 90 (DOI 10052). DOI acknowledged and explained gaps that existed, finding that "none of the cultural discontinuities . . . are inconsistent with a cultural group continuously existing in the region," and determined that the record "is sufficient to show by a preponderance of the evidence that the Kennewick remains are culturally affiliated

with the present-day Indian tribe claimants." ER 88 (DOI 10016) (emphasis added). DOI's rigorous review exceeded what Congress required in NAGPRA. But even this did not satisfy the district court.

Cultural affiliation need not be proven by clear and convincing evidence. NAGPRA's standard asks whether, based on the whole record, cultural affiliation is reasonably established. This standard is more than satisfied here.

B. DOI's Cultural Affiliation Determination Is Entitled To Substantial Judicial Deference.

Where, as here, an expert agency fact-finding must weigh conflicting scientific evidence, judicial deference to agency decisions must be at its paramount.

This high deference is particularly warranted with respect to those actions whose "detail and technical nature" require an agency's unique experience and expertise with the statute. *See Elcon Enters. v. Washington Metro. Area Transit Auth.*, 977 F.2d 1472, 1478-79 (D.C. Cir. 1992); *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.").

"When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh*, 490 U.S. at 378. The fact that such "disagreement exists, however, does not render the [agency decisions] arbitrary and capricious." *Kandra v. United States*, 145 F.Supp.2d 1192, 1210 (D. Or. 2001) (citing *Aluminum Co. v. Bonneville Power Admin*., 175 F.3d 1156, 1162 (9th Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000) (agency decision was not arbitrary and capricious where differing scientific views were resolved through expert choices and further studies)). Moreover, "[a]n agency is not required to rely on evidence that is conclusive or certain; rather an agency must utilize the best evidence available" when making its determinations. *Id*. (citing *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336-37 (9th Cir. 1992) (upholding an agency decision based on admittedly "weak evidence")).

An agency's factual findings must be upheld if supported by substantial evidence in the record. *See Dickinson v. Zurko*, 527 U.S. 150, 152-61 (1999). This Court must affirm where there is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence. *See In re Exxon Valdez*, 270 F.3d

1215, 1237 (9th Cir. 2001). As such, DOI's cultural affiliation determination is entitled to substantial judicial deference.

C. The District Court Erred by Failing to Defer to DOI's Cultural Affiliation Determination and Requiring Scientific Certainty.

Although arguably all dicta,[8] the district court vacated the Secretary's finding of cultural affiliation between the remains and the claimant tribes because "it is impossible to say whether" cultural affiliation is established because the "remains are so old." Order at 38 (emphasis in original).

The exacting scientific connection required by the lower court to sustain a link between ancient remains and present day tribes would render NAGPRA a nullity, as no remains older than a few hundred years could ever be repatriated. As a practical matter, the necessary studies would be far too costly and offensive for tribes to bear. Moreover, legislative history demonstrates that Congress was aware of this difficulty, and therefore drafted NAGPRA to allow for repatriation of prehistoric remains with less than scientific certainty. ER 40 (S. Rep. No. 101-473 at 8). The lower court ignored Congress' directions and the requirement of

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[8] The court notes that after rejecting the Secretary's definition of "Native American" "[i]t is therefore arguably unnecessary to review the Secretary's related conclusion that the remains are culturally affiliated to a coalition of tribal claimants. I conclude that the review of the Secretary's cultural affiliation analysis is nevertheless appropriate . . . judicial economy favors creating a complete record for possible appellate review." Order at 32.

NAGPRA and its implementing regulations that the remains have a "reasonable" connection by with "claimants" based on the "totality of circumstances" in the record. *Id.* The lower court erred in substituting a strict standard of proof proposed, but rejected by Congress in NAGPRA. Indeed, the district court never once articulated the proper standard by which to judge the Secretary's determination.

While the lower court's review must be searching and careful, it must not substitute its judgment for that of the agency. *See Volpe*, 401 U.S. at 416. Here, the court's extra-record review is particularly troubling. During oral argument, the court went so far as to selectively change the facts to suit its hypotheses: "Let me give you have an example of what I am looking for in the oral tradition. Let's change the facts slightly. . . ." Transcript at 257. The court not only ignored the fact that Congress rejected the need for scientific certainty, but rebalanced the evidence in the record. The court rejected the Secretary's finding because "linguistics cannot tell us what language the Kennewick Man spoke, what group he was personally affiliated with, who else was in the region, or whether the Tribal Claimants are related to the Kennewick Man's group" and that the tribes' oral histories "do not help to establish how far into the 'prehistoric past' [ ] continuity

extends." Order at 50, 55. The court was seeking exactly what Congress did not require – scientific certainty.

Where Congress vests expert agencies with the authority to make scientific determinations, courts should not be in the business of weighing conflicting science. Such factual finding is committed to the sound discretion of agencies with the requisite expertise to weigh the evidence properly. The lower court misapplied NAGPRA's standard for cultural affiliation, ignored Congress' directive, and failed to apply traditional APA deference to agency fact-finding, raising the bar to prove cultural affiliation so high as to turn the statute into a nullity. Present-day tribes are not going to have identical cultural practices with, although they are still descended from, prehistoric peoples. Culture is not static, and tribes have adapted to climatic conditions, and have been forcibly changed, relocated, and reorganized by governmental policies. *See Washington v. Pacific Fishing Vessel Ass'n*, 443 U.S. 658, 664 (1979) (noting the government aggregated loose bands into designated tribes). These changes should not frustrate the intent of Congress or the reality that the Joint Tribal Claimants maintain a cultural affiliation with the remains.

D. DOI's Aboriginal Lands Analysis Properly Provided an Independent Basis to Return the Remains to the Tribal Claimants.

Even if this Court concludes the evidence does not reasonably support cultural affiliation, the proper disposition of the remains is still with the claimant tribes as per 25 U.S.C. § 3002(a)(2)(C). DOI properly determined that the aboriginal lands provision provides independent grounds for repatriation to the Joint Tribal Claimants. *See* ER 88 (DOI 10016).

In NAGPRA's aboriginal lands provision, Congress used ambiguous terms, providing for repatriation if remains are found on land that is "recognized by a final judgment of the Indian Claims Commission . . . as the aboriginal land of some Indian tribe" that was "aboriginally occupying the area." 25 U.S.C. § 3002(a)(2)(C)(1). As this Court is aware, "final judgments" of the Indian Claims Commission solely determined the amount of monetary compensation due. *See* 25 U.S.C. §§ 70-70v (now omitted). The extent of aboriginal title was determined in the Commission's findings of fact and opinions by reviewing evidence of long-term exclusive use, not merely aboriginal occupancy. *See* F. Cohen, *Handbook of Federal Indian Law* 492 (1982 ed.). Because of NAGPRA's ambiguity, DOI properly interpreted this provision by means of statutory canons of construction and NAGPRA's remedial purposes to embrace lands that were subject to a final judgment of the Commission, not just the text of the Commission's final judgment.

Congress was seeking an independent recognition that the lands in question

were aboriginal use areas of claimant tribes. NAGPRA's legislative history supports this broad interpretation, as Congress merely wanted demonstrable evidence of which tribes are "recognized by the Indian Claims Commission as having aboriginally occupied the area." ER 65 (H.R. Rep. No. 101-877 at 17). The term "recognized" encompasses the whole of the Commission's decision. In other words, NAGPRA's aboriginal lands provision applies to remains "discovered on aboriginal land that has been the subject of a final judicial determination" by the Commission, not just lands described by metes and bounds in the final judgment. *See* Troupe & Echo-Hawk, 24 Ariz.St.L.J. at 71. To read the statute narrowly, as the lower court did, placing unnecessary and illogical emphasis on the term "judgment," eviscerates Congress' intent and leads to the absurd result that an area determined by the Commission to be an aboriginal joint occupancy area of the claimant tribes does not provide the evidence necessary to support repatriation under 25 U.S.C. § 3002(a)(2)(C). *See* 14 Ind. Cl. Comm. 14, 102-03, 121 (finding "substantial evidence" that numerous tribes, including the claimants, used the area in question "in common" for hunting, fishing, and gathering). Recognized aboriginal occupancy provides independent grounds for repatriation, and the court erred as a matter of law in overturning DOI's repatriation decision based on aboriginal occupancy. *See* Order at 64.

The district court's failure to afford deference and refusal to look to the legislative history of NAGPRA are arbitrary and capricious and provide grounds for this Court to vacate the decision of the district court and reinstate DOI's cultural affiliation determination.

IV. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE SECRETARY'S CONSULTATION WITH THE CLAIMANT TRIBES WAS IMPROPER UNDER THE APA.

The communications between the United States and the claimant tribes were not ex parte contacts because the APA's prohibition is inapplicable. The district court erred in finding that the Secretary's cultural affiliation determination was an "adjudication" and that communications between DOI and the claimant tribes created an unfair and biased proceeding. *See* Order at 22-23.

A. The APA's Prohibition on Ex Parte Contacts Does Not Apply to Cultural Affiliation Determinations Under NAGPRA.

The APA prohibition on ex parte communications does not apply. The APA prohibits ex parte communications only when an agency is required by statute to conduct a formal adjudication or an administrative hearing. 5 U.S.C. §§ 554(a), 557(d)(1); *see U.S. v. Navajo Nation*, No. 01-1375, slip op. at 5, 22 (U.S. Mar. 4, 2003) (finding regulatory proscription against ex parte contacts inapplicable because the implementing regulation's administrative process was largely unconstrained by formal requirements). Cultural affiliation determinations are not

governed by either APA section. NAGPRA contains no reference to "hearings" or "on the record," the latter of which is the language that typically triggers an adjudication. *See Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1540 (9th Cir. 1993) (holding that the APA's prohibition on ex parte communication attaches only when the statute requires an adjudication, determined on the record, after the opportunity for a hearing).

In the absence of language in NAGPRA requiring a hearing on the record for the cultural affiliation determination, the agency's cultural affiliation determination amounts to nothing more than an informal fact-finding. Had Congress wanted the prohibitions of the APA to apply in NAGPRA, Congress would have said so. Legislative silence means what it says.

Congress required consultation with Indian tribes in NAGPRA. NAGPRA "reflects the unique relationship between the Federal Government and Indian tribes . . . and should not be construed to establish a precedent with respect to any other individual, organization or foreign government."[9] 25 U.S.C. § 3010. As a result of this unique relationship, "[a]ny Federal agency . . . shall share what information it

[9] "Congress viewed NAGPRA as a part of its trust responsibility to Indian tribes and people . . . The trust doctrine has given rise to the principle that enactments dealing with Indian affairs are to be liberally construed for the benefit of Indian people and tribes--a canon of construction similar to that applicable to remedial civil rights legislation." Trope & Echo-Hawk, 24 ARIZ. ST. L.J. at 60.

does possess regarding the object in question with the known descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section." *Id*. § 3005(d). In addition, the Secretary is required to use "oral traditional" evidence acquired through consultation with tribes to establish cultural affiliation. *Id*. § 3005(a)(4). NAGPRA's legislative history also makes the case for communications between DOI and tribes requiring that "repatriation . . . shall be accomplished in consultation with the Indian tribe . . . that made the request." ER 44 (S. Rep. No. 101-473 at 12); *see also* 43 C.F.R. § 10.5. Under accepted canons of statutory construction, by requiring the agency implementing NAGPRA to consult with claimant tribes, the ex parte contact prohibition of the APA is expressly excluded. *See Echazabal v. Chevron USA, Inc*., 213 F.3d 1098, 1102 (9th Cir. 2000) (citing the *expressio unius est exclusio alterius* canon).

B. The District Court's Bare Allegations of Collusion Are Unsupported in the Record.

The Supreme Court has held an agency has discretion to fashion its own informal decision-making process as long as that process is fair. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523-25 (1978) (reviewing courts may not impose additional procedures on agencies if the agencies have chosen not to grant them); *Navajo Nation*, slip op. at 22. Here, there is no basis for the court to insist that an adjudication was required or should have been conducted. Thus,

for the type of informal administrative process conducted here, the communications between the Joint Tribal Claimants and DOI were not prohibited.

To prevail on an agency bias claim, the plaintiffs were required to demonstrate below that there was an "unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims." *Klamath Water Users Ass'n v. Oregon*, 44 F.3d 758, 772 (9th Cir. 1994) (internal citations omitted). It is not enough to show that the agency has taken positions adverse to plaintiffs' claims. *Id.* However, the evidence before the lower court amounted to nothing more. The administrative record demonstrates that the United States took positions adverse to the Tribes and engaged in numerous tests, studies, and actions over the vehement objections of the claimant tribes. In fact, DOI performed fourteen of the seventeen tests recommended by the plaintiffs and advised the academics of what evidence was to be considered, the nature of the determination, and when the final decision would be issued. ER 16-18 (COE 64-66).

The district court ignored these facts and instead asserted, without supporting evidence, that the Secretary's cultural affiliation determination was marred by ex parte communications. Order at 23. For there to be improper contacts there must be an adjudication. However, the court never made such a finding, stating instead that, "I need not determine precisely what procedures were

required." *Id*. at 22. Regardless, the court referred to the cultural affiliation determination as an "adjudication" and must have assumed as much to consider the communications ex parte contacts. *Id*. at 22-23. Based solely on this flawed assumption and a proclaimed "familiarity with the record," the court concluded that there were "secret[]" communications between the claimant tribes and DOI that violated the APA. *Id.* This finding is unsupported by the record and has no basis in law or fact. Moreover, the court's approach may have a chilling effect on future cultural affiliation determinations under NAGPRA, turning informal agency fact findings into adversarial hearings between scientists and claimant tribes. Congress could not have intended such a result. For the foregoing reasons, the lower court's finding must be vacated.

V. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY FORECLOSING JOINT TRIBAL CLAIMS TO REMAINS UNDER NAGPRA.

The Joint Tribal Claimants' claim for repatriation is proper in both law and fact. The district court's decision to bar joint claims is based on an unduly restrictive reading of NAGPRA, ignores reasonable agency interpretation, and forecloses the remedial purposes for which NAGPRA was passed by Congress.

A. Congress Anticipated and Acknowledged Joint Tribal Claims to Remains.

Federally-recognized Indian tribes filing a joint claim for repatriation is proper under NAGPRA. Nothing in the plain language of NAGPRA addresses or prohibits joint claims from interrelated tribes. Where there is ambiguity, it is proper to defer to DOI's interpretation allowing joint claims and use Indian canons of construction which support the use of joint claims for repatriation. It is fundamental that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). NAGPRA expresses no preclusion of joint claims. As a result, this Court should not hold otherwise.

Congress never intended NAGPRA to prohibit Indian tribes from unifying as a coalition to file a joint claim for the disposition of human remains and objects. On the contrary, Congress recognized that there may be instances where "several Indian tribes may have a claim to human remains." ER 41 (S. Rep. No. 101-473 at 9). Congress also acknowledged the possibility of affiliation with multiple tribes by supporting the ability of tribes to enter into "agreements" as to the disposition of remains. *Id.* at 9-10. Section 3002(a)(2)(B) also speaks of an Indian tribe with the "closest cultural affiliation," which suggests a congressional recognition that more than one tribe may be culturally affiliated with remains. The claimant tribes

chose to avoid conflict and avoid wasting judicial resources by uniting under a single claim for repatriation.

NAGPRA's implementing regulations follow congressional intent and support the filing of joint claims, stating, "[a]nother commentator recommended changing all references to Indian tribe in this section to 'Indian tribe or tribes' to reflect the fact that Indian tribes may bring joint claims for certain items. The drafters consider the current language to support the possibility of joint claims." 60 Fed. Reg. at 62,155 (Final Rule). Joint claims are also a commonly accepted practice, as "49% of the Federal agencies' affiliation determinations were multiple cultural affiliate cases, while museums determined that 41% of their affiliation cases were of this type." Jason Roberts, *Native American Graves Protection and Repatriation Act Census: Examining the Status and Trends of Culturally Affiliating Native American Human Remains and Associated Funerary Objects Between 1990 and 1999*, TOPICS IN CULTURAL RESOURCE LAW 79, 84-85 (2000).

Moreover, as a practical matter, the histories of the Joint Tribal Claimants support a joint claim under the facts of this case. All of the claimant tribes are from the Columbia and Snake Rivers, have overlapping aboriginal territories, are largely interrelated, and historically shared many common cultural characteristics. In particular, "the norms of intergroup relations and the relevant ceremonies, ritual

beliefs, and values form part of an intergroup culture" among the aboriginal Plateau groups. ER 85 (DOI 7512). It was also not uncommon for these groups to intermarry and form trading partnerships. *Id*. The United States, not the tribes, divided these groups into separate regional tribal entities. As such, DOI properly accepts joint tribal claims as a method of disposition.

B. The District Court Ignored Congress' Intent.

The district court's rejection of joint claims in the face of Congress' intent and DOI's regulations overlooks NAGPRA's broad remedial purposes. Where, as here, there is no intertribal dispute, cultural affiliation under section 3002 need only be established with reasonable certainty. Nothing in NAGPRA suggests that the evidence cannot point to a reasonable connection between the remains and more than one tribe.

Under the test the district court substitutes, repatriation to joint claimants would only be acceptable where "[a] tribe may have been forcibly separated by the United States government, with its members sent to different reservations. In such circumstances, the intent of Congress would not be served by denying repatriation to either tribe, or by forcing tribes to compete with each other." Order at 36 n.45. This restrictive test for joint claims is counter intuitive, as is vividly demonstrated by the example of the "Trail of Tears," described as follows:

> The liquidation of Indian reservations in the Old Northwest was largely accomplished between 1829 and 1843. Mixed bands of Shawnee, Delaware, Wyandot, and others were persuaded to accept new reservations west of Missouri. Their numbers were drastically reduced by disease on the journey. Theft by federal officials of what was due to the Indians, and funeral rites for those who died en route, exhausted their resources long before this 'trail of tears,' . . . came to an end.

U. S. v. State of Mich., 471 F.Supp. 192, 208 (W.D. Mich. 1979). Under the court's standard, if whole tribes were being forcibly relocated, and not just divided, no remains from the "Trail of Tears" could be repatriated. Such a broad preclusion of claims is inconsistent with the human rights objectives of NAGPRA. Arbitrarily limiting joint claims to so few tribes and such limited circumstances defeats NAGPRA's broad remedial purposes.

Joint claims were anticipated by Congress and acknowledged by DOI. Narrowly construing NAGPRA to prohibit joint claims ignores the statute's purpose and legislative history, and common sense where remains are found in a joint aboriginal use area of multiple tribes. Neither justice nor judicial economy are served by denying the ability of historically linked tribes to make joint claims for cultural affiliation purposes. As such, the district court's ruling must be vacated.

VI. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY FAILING TO REMAND THE AGENCY'S DECISION TO DOI FOR FURTHER CONSIDERATION IN LIGHT OF THE COURT'S OPINION.

Should this Court find that the district court did not err in vacating DOI's definition of "Native American" and the Secretary's finding of cultural affiliation, this Court should set aside the substantive relief awarded by the district court as excessive and in violation of the APA.

The district court erred as a matter of law in issuing the relief it granted. Particularly here, where the court rejected DOI's interpretation of NAGPRA's controlling term, "Native American," the appropriate remedy is a remand to the agency. The Supreme Court has held that "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power and Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). It is especially critical that the expert agency charged by NAGPRA with the responsibility to interpret the statute do so – rather than a court – because the agency's statutory interpretation must guide the resolution of all future claims under the statute.

While Judge Jelderks recognized this standard, he concluded that this case presented one of those rare circumstances, stating that:

> This is not the usual case. . . . I have already remanded this action once . . . . Defendants' conduct since that initial remand (including burial of the site where the remains were recovered), provides no basis for concluding that, if this action were remanded yet again, Plaintiffs' request to study would be evaluated in a fair and appropriate manner.

Order at 69. As a result, the court ordered substantive relief, granting plaintiffs access to study the remains. The district court cited three cases for the proposition that a remand is not the appropriate remedy here. *See id*. (citing *Guerrero v. Stone*, 970 F.2d 626, 636 (9th Cir. 1992); *Alvarado Community Hospital v. Shalala*, 155 F.3d 1115, 1125 (9th Cir. 1998); *Green v. Babbitt*, 943 F.Supp. 1278, 1288 (W.D. Wash. 1996)). However, all three of these cases present facts of unreasonably delayed agency action that are distinguishable from the instant matter.

This Court in *Guerrero* dealt with the correction of an enlistee's military records – a unique situation where courts play a special role – finding that: "Ordinarily, we will not substitute our judgment for that of an agency, but in an appropriate case, we may order the substantive relief sought, even if doing so supplants the decision of the agency." 970 F.2d at 636 (internal citations omitted). All of the cases cited in support of this proposition deal with correction of military records. Moreover, *Guerrero* involved "the extraordinary history of official vacillation by the Army covering a period of 50 years," which this Court went on to describe as "a case of official policy at war with itself, one in which Guerrero has been caught in the cross-fire for more than four decades," rife with a "dismal history of administrative pendulation" and "decision-making completely devoid of permanence and consistency." *Id.* at 628, 635.

Similar unusual circumstances are not presented by the instant matter. Courts do not have a heightened role to play in the typical record review case. In addition, DOI has consistently determined that the remains are "Native American" and culturally affiliated with the claimant tribes. Moreover, this case has not been proceeding for five decades.

Alvarado Community Hospital dealt with an agency decision regarding Medicare reimbursements for hospitals, where the central issue was the propriety of the agency's reliance on data from a prior fiscal year rather than the projected fiscal year. This Court directed the Secretary to act rather than issue a remand because "the reimbursements arose over thirteen years ago" and the proper data could now be used to determine the precise thresholds, making further investigation and explanation on remand unnecessary. 155 F.3d at 1125.

The facts presented by the instant matter are in no way analogous. The time period is significantly shorter here. In addition, the district court was not faced with a situation where, considering the court's ruling, the agency could not benefit from further investigation and explanation of its findings.

Finally, *Greene v. Babbitt* dealt with the Secretary of Interior's decision granting federal recognition to the Samish Tribe but rejecting certain proposed findings of fact made by an Administrative Law Judge. The district court found

that remand was inappropriate because "[t]he proceedings before the Bureau of Indian Affairs have been marred by both lengthy delays and a pattern of serious procedural due process violations. The decision to recognize the Samish took over twenty-five years, and the Department has twice disregarded the procedures mandated by the APA, the Constitution, and this Court." 943 F.Supp. at 1288. Again, like the cases distinguished above, the instant matter presents none of the lengthy delays, administrative vacillation, or systematic unlawful action that are necessary to create unconscionable conduct presenting the "rare circumstances" to skip a remand to the agency.

Vacating the agency's definition of "Native American" and specific findings and procedures with regards to cultural affiliation determinations will have a ripple effect on other NAGPRA repatriations across the country. The lower court's obvious frustration with the Corps and DOI does not warrant circumventing remand and allowing plaintiffs to perform redundant studies.

Courts cannot, and should not, grant a remedy without a right. Here, the plaintiffs have no right to study the remains and the lower court lacked jurisdiction to award such relief. The APA cannot be used to grant a remedy that a party would not otherwise be entitled to under NAGPRA. As this case is governed by NAGPRA, and plaintiffs' ARPA claims were dismissed, the district court lacked

jurisdiction to order the remains to be turned over to the appellees for destructive testing. Thus, should this Court affirm the decision below, this Court should set aside the award of substantive relief and order a remand to DOI.

CONCLUSION

This appeal is not the last act of a morality play between religion and science. The district court fundamentally erred by ignoring the law in favor of scientific speculation. However, the law is the appropriate standard here. This is simply a record review case, requiring this Court to apply clear, proven legal standards of agency review to DOI's decisions. For the foregoing reasons, the Joint Tribal Claimants respectfully request this Court find in their favor and vacate the decision of the district court in its entirety.

RESPECTFULLY SUBMITTED this 13th day of March, 2003.

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