No. 02-35996
(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' REPLY BRIEF

Thomas P. Schlosser, WSBA #06276
Rob Roy Smith, OSB # 00393
Morisset, Schlosser, Jozwiak & McGaw
1115 Norton Building
801 Second Avenue
Seattle, Washington 98104-1509
Telephone: (206) 386-5200
Facsimile: (206) 386-7322
Attorneys for Defendant/Intervenor/Appellant Colville Confederated Tribes

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INTRODUCTION

Where the line between science and law blurs, courts must rely on fundamental maxims of administrative law to avoid forsaking reasoned agency decisionmaking for ad hoc scientific speculation. Fortunately, courts do not weigh science, but leave this confounding task to expert agencies.

Here, the United States Department of the Interior ("DOI") was charged with interpreting Congress' directives and applying the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et. seq.*, to very old remains. After considering reams of geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral traditional, historical, and other evidence, DOI relied on its technical and scientific expertise to correctly determine that the remains of the "Ancient One" are "Native American" and are culturally affiliated with the Appellants Joint Tribal Claimants. ER 1, 3-15.

Unfortunately, the Oregon District Court succumbed to the allure of subjective and unproven scientific speculation and threw itself headlong into a scientific quarrel by reweighing the evidence and rejecting DOI's scientific conclusions. The district court disregarded the textual basis for DOI's conclusions and ignored Congress' unmistakable intent – NAGPRA 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); *see United States v. Corrow*, 119 F.3d 796, 800 (10th Cir. 1997).

Appellees are now trying to accomplish through the courts what they failed to accomplish through Congress – the evisceration of NAGPRA's protections for human remains.[1] Appellees would have this Court believe that DOI misrepresented science and conspired with the Tribes to reach its cultural affiliation determination; however, the record refutes appellees' bare allegations. DOI's regulatory and interpretive rules regarding "Native American" and cultural affiliation determination are reasonable and are entitled to substantial judicial deference. This Court should vacate the erroneous decision of the district court and reinstate DOI's decision to return the remains to the Joint Tribal Claimants. Aside from being the most legally defensible outcome, granting the relief the Tribes request allows this Court to reign in judicial adventurism and facilitate the prompt and meaningful protection of "Native American" remains as Congress intended.

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[1] Congress twice rejected amendments to NAGPRA to allow the study appellees seek. *See* H.R. 2893, 105th Cong., 1st Sess. (1997) (introduced in response to this litigation); H.R. 2643, 106th Cong., 1st Sess. (1999) (same).

ARGUMENT

NAGPRA is remedial Indian human rights legislation.[2] Appellees can offer no persuasive evidence that DOI mistook Congress' intent. Fanciful claims of agency bias and conflicting scientific theories are insufficient. DOI's conclusions were directed by NAGPRA's text and sound science, and are entitled to deference.

I. APPELLEES LACK STANDING.

Appellees lack standing under both NAGPRA and the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*[3] Appellees are not within the zone of interests protected by NAGPRA and their claims are not redressable.[4] *See*

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[2] Appellees strain the bounds of logic to claim "it is arguable whether NAGPRA qualifies as Indian legislation." *Compare* Appellees' Br. at 30 *with Yankton Sioux Tribe v. United States Army Corps of Eng'rs*, 83 F. Supp.2d 1047, 1056 (D. S.D. 2000) (applying Indian canons of construction to NAGPRA). The cases cited by appellees fail to support the allegation that the Indian canons "play no role." *Government of Guam* dealt with Guam residents' attempt to use the Indian canon of construction; *MacEvoy* is not an Indian law case; and *Catawba Tribe* dealt with an unambiguous statute terminating the Tribe. Since ambiguities in NAGPRA exist, the Indian canons should be employed. Tribes' Br. at 9-10.

[3] Appellees' other claims for relief were dismissed by the district court. ER 215 (Judgment at 2). The Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. § 470aa *et seq.*, is of no consequence as this action was commenced and decided based on NAGPRA. The remains are in the custodial care of the United States pursuant to NAGPRA and all government study was performed pursuant to NAGPRA.

[4] Appellees' reliance on NEPA to support a weakened redressability standard is unavailing. Appellees' Br. at 21 (citing *Cantrell* and *Oregon Natural*

Allen v. Wright, 468 U.S. 750, 751 (1984); *Churchill County v. Babbitt*, 150 F.3d 1072, 1074-79 (9th Cir. 1998), *as amended* 158 F.3d 491 (9th Cir. 1998). The district court erred finding that the academics satisfied their standing burden. *Bonnichsen v. United States*, 969 F. Supp. 628, 632-38 (D. Or. 1997).

A. NAGPRA Does Not Authorize this Suit.

Appellees fail to offer any affidavits to support standing. Rather, they rely on strained legal arguments rejected by other federal courts. Appellees claim that NAGPRA § 3013 is a sufficiently broad grant of jurisdiction to encompass their challenge. Appellees' Br. at 20. However, appellees overreach. In a decision rendered after the district court erroneously found standing, the District of Columbia District Court found that NAGPRA § 3013 cannot "bestow standing on [ ] plaintiffs" who otherwise fail to meet the irreducible constitutional minimum of standing. *Idrogo v. United States Army*, 18 F.Supp.2d 25, 28 (D. D.C. 1998).

Section 3013 is not akin to the Endangered Species Act's sweeping citizen suit provision and does not independently accord standing here. *But, c.f. Bonnichsen*, 969 F.Supp. at 636-37. The narrow language of section 3013 merely acknowledges that "United States district courts shall have jurisdiction over any

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Desert Ass'n). The Joint Tribal Claimants incorporate their previous arguments against redressability by reference. Tribes' Br. at 17-18; *infra* Section VII.

action brought by any person alleging a violation of this chapter." 25 U.S.C. § 3013. This is more analogous to the restrictive formulations Congress has used in other statutes. *Bennett v. Spear* 520 U.S. 154, 165 (1997) (listing statutes with more limited provisions that do not expand the zone of interests) (citing 33 U.S.C. § 1365(g) ("[any citizen] having an interest which is or may be adversely affected"); 30 U.S.C. § 1270(a) (same); 15 U.S.C. § 797(b)(5) ("[a]ny person suffering legal wrong"); 7 U.S.C. § 2305(c) ("[a]ny person injured in his business or property")). NAGPRA § 3013 does not provide access to the courts for appellees' claims.

B. Appellees Are Not Within NAGPRA's Zone of Interests.

With the more limited zone of interests in play, appellees have not shown that they suffered a legal wrong under NAGPRA's ownership provisions. *Churchill County*, 150 F.3d at 1080-81. The Supreme Court has found "the breadth of the zone of interests varies according to the provisions of law at issue." *Bennett,* 520 U.S. at 163. "As 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*, 18 F.Supp.2d at 27. NAGPRA was "[e]nacted 'to protect . . . burial sites and the removal of human remains,'" not to authorize study of remains held in the

temporary custody of the United States for disposition to tribal claimants pursuant to NAGPRA's ownership provisions. *Id.* at 26. NAGPRA does not envision appellees' litigation and no other statute is before this Court.

II. THE DISTRICT COURT ERRED BY FAILING TO AFFORD *CHEVRON* DEFERENCE TO DOI'S DEFINITION OF "NATIVE AMERICAN."

DOI's two separate rules – one issued though formal notice and comment rulemaking and the other in response to the district court's direct query – regarding the definition of "Native American" are entitled to substantial judicial deference. DOI's rules are reasonable, consistent with NAGPRA's plain meaning and legislative history, and follow accepted canons of statutory construction. Rather than addressing the merits of the Tribes' arguments, appellees seek to mislead this Court by obscuring DOI's two separate formal and interpretative rules under the veil of a blurred informal action. Appellees' argument is specious and facially invalid.

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

DOI's regulatory rule was adopted pursuant to formal notice and comment rulemaking 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) (1995) (omitting

"that is"). The district court inexplicably added a requirement that a tribe be "presently existing." Order at 27. The court's reading runs into an immediate and insurmountable textual obstacle.

DOI is charged by Congress to "promulgate regulations to carry out" NAGPRA. 25 U.S.C. § 3011. The Secretary's judgment that a particular regulation fits within this statutory constraint must be given considerable weight. *United States v. O'Hagan*, 521 U. S. 642, 673 (1997). Deference is properly given to an agency's "construction of a statutory scheme it is entrusted to administer." *Chevron*, 467 U.S. at 844. The Supreme Court and this Court have affirmed *Chevron* deference for agency rules, such as the one here, promulgated through formal notice and comment rulemaking. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *Wilderness Society v. USFWS*, 316 F.3d 913, 921 (9th Cir. 2003).

DOI's regulatory definition of "Native American" comports with NAGPRA's purpose and language, and qualifies for *Chevron* deference.[5] Crafting

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[5] One of the appellees, Stephen Loring, agrees that "this definition of Native American [removing "that is"] is both reasonable and consistent with current practice in anthropology." Tribal Supplemental Excerpts of Record ("TSER") 374. Loring also concluded that both the "indigenous" definition and the conclusion that the remains are "Native American" and indigenous for the purposes of NAGPRA are reasonable. TSER 375.

NAGPRA's 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.[6] "Native American" is a term of art; had Congress intended some relationship with modern day tribes, Congress would have used the more limiting term "Indian tribe" or "American Indian," rather than the broader "Native American," as was done in other parts of the statute. *See, e.g.,* 25 U.S.C. § 3002(a); *compare id.*

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[6] Appellees' "tense" argument is unavailing and inconclusive. Appellees' Br. at 27-28. Unlike *Sutton* where an agency lacking authority to interpret the statute changed verb tense, DOI has been delegated the requisite authority and did not change verb tense. *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 479 (1999) (changing "substantially limits" in statute to "substantially limited"). The fallacy of appellees' logic is highlighted by a translation of Jean-Jacques Rousseau's *On the Social Contract*, in which the French "*L'homme est ne libre, et partout il est dans ler fers*" is translated as "Man is/ was born free, and everywhere he is in chains." *See* Rousseau, *On the Social Contract* at 46 (Judith R. Masters trans. (1978) (emphasis added). Although Rousseau used the same word (*est*), its meaning in context encompasses both the present and the past tense. Being born free is both a static event in time and is a status carried in perpetuity. DOI properly interpreted "is indigenous" the same as "*L'homme est ne libre.*" Individuals cannot lose the essence of being born free anymore than a people can lose their indigenousness.

Moreover, disposition of remains with tribes is not "automatic." *C.f.* Appellees' Br. at 28. Remains must be both "Native American" and culturally affiliated. Not all "Native American" remains will be culturally affiliated with Indian tribes. This is why Congress included the "unclaimed remains" provision, 25 U.S.C. § 3002(c). Nor does it follow that study is foreclosed. Returning remains to tribes merely means that tribal consent is required before any study can take place.

§ 3001(9) *with id.* § 3002(a)(1).

Appellees insist DOI's rule is "out of harmony" with NAGPRA. Appellees' Br. at 28 (citation omitted). However, it is the district court and appellees' interpretation that is out of harmony with Congress' selective textual approach. The district 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." ER 170 (Order at 30). This makes the pivotal "cultural affiliation" determinations required by the statute (25 U.S.C. § 3002(a)) superfluous.[7] The court's definition also fails to give independent effect to NAGPRA's provisions regarding unclaimed remains (25 U.S.C. § 3002(b)), culturally unidentifiable remains (25 U.S.C. § 3006(c)(5)), and illegal trafficking of "Native American" remains (NAGPRA § 4, *codified at* 18 U.S.C. 1170).

The "'cardinal principle of statutory construction' . . . [is that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *United States v. Menasche*, 348 U.S.

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[7] Appellees never explain what remains would be "Native American," but not culturally affiliated under the district court's definition, because, in fact, the district court collapsed the two definitions into one. Only the definition of cultural affiliation references "present day tribe." 25 U.S.C. § 3001(2).

528, 538 (1955) (internal citation omitted). The district court's "present day" relationship interpretation emasculates NAGPRA and should be vacated.

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

DOI's separate interpretation of "indigenous" qualifies as an interpretative rule drawn from NAGPRA's statutory language and legislative history, and is entitled to substantial deference. *See* 5 U.S.C. § 553(b)(B). The district court exceeded the bounds of judicial review and misapplied *Mead* to substitute its own definition of "indigenous."

As this Court has recognized,

> After *Mead*, we are certain of only two things about the continuum of deference owed to agency decisions: *Chevron* provides an example of when *Chevron* deference applies, and *Mead* provides an example of when it does not. *Id.* In those 'other, perhaps harder, cases' that do not clearly track either *Chevron* or *Mead*, we must 'make reasoned choices between the two examples, the way courts have always done.'

Wilderness Society, 316 F.3d at 921; *see also State of California Dep't of Social Services v. Thompson*, 321 F.3d 835, 848 (9th Cir. 2003). *Chevron* deference has properly been applied "to agency interpretative rules . . . indeed, the rule at issue in *Chevron* itself appears to have been interpretative." *Trans Union Corp. v. FTC*, 81 F.3d 228, 230 (D.C. Cir. 1996). *Chevron* deference should have been accorded

by the district court. [8]

Contrary to the appellees' assertion, "indigenous" is ambiguous as evidenced by the district court's command to DOI to define the term. *Bonnichsen*, 969 F.Supp. at 651. Second, DOI's definition is reasonable. Prior to NAGPRA, there was a history of congressional and judicial use of the word "indigenous" in reference to people present before European contact. Tribes' Br. at 37. It is permissible to conclude that Congress intended "indigenous" to mean any remains present "prior to the historically documented arrival of European explorers." *Id.* at 37-38; ER 79; Webster's Third New Int'l Dictionary 1151 (1993) (defining indigenous as "native: not introduced directly or indirectly according to historical record or scientific analysis . . . <Indians were the ~ inhabitants of America>"). DOI's interpretation affords objective and consistent significance to the meaning of the words Congress chose. Third, DOI's definition of "indigenous" was not an ad hoc decision of litigation counsel; rather, DOI issued the interpretation as

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[8] Even if this Court were to conclude that the interpretative rule was "beyond the *Chevron* pale," this Court should nevertheless respect the analysis. *Mead*, 533 U.S. at 234-35; *Pronsolino v. Nastri*, 291 F.3d 1123, 1135 (9th Cir. 2002) ("[i]n the end, though, it does not much matter in this case whether we review the EPA's position through the *Chevron* or *Skidmore/Mead* prism. Under both the more and less rigorous versions of the judicial review standard, the Agency's position is . . . more than sufficiently supported by the statutory materials").

directed by the court's June 1997 Order. ER 78.

These two rules flow from a natural and symmetrical reading of NAGPRA and fulfill Congress' mandate. The district court erred as a matter of law and substituted its judgment for DOI. Appellees provide no compelling reason for this Court not to accord substantial deference to both DOI's formal and interpretative rules.

III. THE DISTRICT COURT ERRED BY FAILING TO ACCORD SUBSTANTIAL JUDICIAL DEFERENCE TO DOI'S CULTURAL AFFILIATION DETERMINATION.

DOI's cultural affiliation determination is an informal fact finding reviewed under the arbitrary and capricious standard. *Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1194 (9th Cir. 2000) (finding arbitrary and capricious standard appropriate for resolutions of factual disputes implicating substantial agency expertise).

A. Claimants Have A "Reasonable Connection" With The Remains.

Cultural affiliation ensures claimants have "a reasonable connection with the materials." ER 64 (H.R. Rep. No. 101-877 at 14) (emphasis added). Congress made it abundantly clear that "it may be extremely difficult, unfair, or even impossible in many instances for claimants to show absolute continuity from present day Indian tribes to older, prehistoric remains;" therefore, 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.* (emphasis added). Congress was reaching far and was doing so intentionally.

The lower court erred as matter of law and substituted its judgment for that of Congress and DOI. The court rewrote NAGPRA to impose a burden of proof more akin to scientific certainty. ER 178 (Order at 38). The court also supplanted DOI's decisionmaking by reweighing the underlying science de novo and drawing its own conclusions from the evidence. ER 190, 195 (Order at 50, 55). Despite appellees' contention, nothing in the statute or the regulations requires "direct evidence of biological continuity" to support cultural affiliation. Appelees' Br. at 10. In fact, DOI used a more rigid analysis than was required, but still was satisfied. A "preponderance of the evidence" is only required under sections 3002(a)(2)(C)(2) and 3005(a)(4) when DOI must decide between competing tribes with the "closest cultural affiliation." Here, there were no competing claims – only a single joint claim. Nonetheless, DOI applied the preponderance standard to this cultural affiliation, even though the Tribes' joint claim only requires reasonable proof of affiliation. Accordingly, DOI more than satisfied either

standard of proof. ER 88; 43 C.F.R. § 10.14(f).[9]

B. The District Court's and Appellees' Reading of NAGPRA Renders the Statute a Nullity.

The narrow interpretation of "group" adopted by the district court and advanced by appellees would turn the statute into a nullity for any remains older than a few hundred years. ER 179-84 (Order at 39-44). NAGPRA's breadth compels a different reading.

Congress specifically wanted NAGPRA to apply to "prehistoric remains." ER 64. NAGPRA's use of the term "group" was intentionally broad – no direct, unbroken evidentiary chain is required. *See* 25 U.S.C. § 3001(2). This is exactly why appellees' interpretation requiring the Ancient One's "group" to have "survived intact and unaltered over a span of 6500 years" is so unreasonable. Appellees' Br. at 38 n.19. To hold the Secretary to such an insurmountable evidentiary standard cannot be reconciled with NAGPRA's plain language and advances an interpretation that DOI could never successfully apply to prehistoric remains. Appellees' reading requires direct lineal descendancy for all cultural

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[9] Appellees' allegation that this argument was not raised by the Tribes below is false. Joint Tribal Amicus Mem. at 24-26, Docket No. 445 (June 4, 2001). Likewise, contrary to the assertions of the amicus SAA, the Tribes have never asserted that the preponderance standard "set too high a bar," but rather that the preponderance standard does not apply on the facts of this case.

affiliations. This reads out Congress' provision that ownership of remains be determined on a sliding scale of priority from "lineal descendants," to the tribe with the "closest cultural affiliation," or the tribe on whose aboriginal lands the remains were discovered. 25 U.S.C. § 3002(a)(1)-(2)(C). The latter governs even if no cultural affiliation can be proven.

The "shared group identity" language commingles several anthropological ideas and legal mandates, demanding that DOI's interpretation of "group" as a subset of "culture" be upheld as a reasonable interpretation of Congress' intent. TSER 276, 279. Dealing with prehistoric time periods, cultures, not groups, are the appropriate measure of relationship. The district court's rigid interpretation improperly narrows NAGPRA's scope and rewrites the statute in contravention of Congress' expansive construction.

C. DOI Considered All The Evidence.

The record supports DOI's cultural affiliation determination. A preponderance of the oral traditional, folklore, traditional history, and geographic evidence before the agency supported the determination.[10]

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[10] DOI determined that a preponderance of the evidence demonstrates the following: (a) the tribal claimants possessed similar traditional histories that related to the presence of their antecedents on the Columbia Plateau landscape; (b) oral tradition corresponded to known ancient geological events; and (c) there was no reference in oral tradition to migration. TSER 141-42, 156-61, 276, 286-90,

DOI's decision to rely on oral traditions as one aspect of this analysis was justified in fact and mandated by statute. NAGPRA and its regulations do not require DOI to base cultural affiliation on every piece of evidence. 25 U.S.C. § 3005(a) (listing types of evidence separated by "or"); 43 C.F.R. § 10.2(e) (same). Moreover, Congress and NAGPRA's regulations deem "oral traditional" evidence to be an essential component that must be considered when determining cultural affiliation. 25 U.S.C. §3005(a)(4); 43 C.F.R. §10.14(e). Anthropology recognizes oral history as an invaluable tool assisting in recreating the history of a people or region. TSER 315, 321-22, 347. Reliance on oral tradition is also sanctioned by

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314-48, 350-51, 212-62, 268-75. Evidence "preponderates where it is more convincing to the trier [of fact] than the opposing evidence." McCormick, Evidence § 339 (4th ed. 1992). Other supporting evidence includes the following: (1) continuing exploitation of salmon and other fish species since 11,000 BP (TSER 155, 264, 296-97, 307-10); (2) continuing exploitation of camas bulbs, berries, and other plant species since 11,000 BP (TSER 263); (3) occupation of a central locality around which various groups or bands would move through the various seasons exploiting various subsistence resources (TSER 223, 239, 265-66, 281, 304-06); (4) progression in lithic technology from stemmed and shouldered lanceolate and notched projectile points (Period IB) to stemmed, corner, and side-notched projectile points (Period II) to smaller notched projectile points (Period III) (TSER 147-54, 266-67, 292-94, 301); (5) continuing evidence of trade and exchange since 11,000 BP (TSER 102-05, 317-19); (6) linguistic evidence that Penutian (the language family encompassing Sahaptian) originated in Southern Oregon, and no evidence that any other language has been spoken in the Plateau (TSER 349-50); and (7) none of the cultural discontinuities suggested by the evidence are inconsistent with a cultural group continually existing in the region, interacting with other groups migrating through the area and adapting to climate change. (TSER 277).

this Court. *See United States v. Washington*, 384 F. Supp. 312, 350 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975) (concluding the testimony of tribal members educated in tribal history and customs provides reasonable and credible factual data). Oral tradition cannot be callously dismissed as "myth." Oral tradition was a primary means of historical documentation for all cultures and was sufficiently credible to be included by Congress as a co-equal scientific discipline to determine cultural affiliation.

To the extent it was required, DOI considered appellees' submissions and cited their work in the scientific materials. *See, e.g.*, TSER 278, 283-84, 352-64, 366-72. DOI expressly acknowledged and considered conflicting evidence. *See, e.g.*, TSER 275, 278, 280-83, 285-86, 289, 291, 298-99, 300, 303, 309, 313. Arbitrary and capricious judicial review requires nothing more.

Appellees fail to show that DOI did not consider relevant, available, scientific data. DOI articulated a rational connection between the evidence and its conclusions.

D. DOI's Cultural Affiliation Determination Is Entitled to Deference.

DOI's cultural affiliation determination reasonably weighed the scientific evidence and, as such, judicial deference must be at its paramount.

"Deference to an agency's technical expertise and experience is particularly

warranted with respect to questions involving . . . scientific matters." *United States v. Alpine Land and Reservoir Co.*, 887 F.2d 207, 213 (9th Cir. 1989). A reviewing court may not "fly speck" an agency decision document and invalidate it on the basis of inconsequential, technical deficiencies. *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). "An 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. *Kandra v. United States*, 145 F.Supp.2d 1192, 1210 (D. Or. 2001) (citing *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1336-37 (9th Cir. 1992) (upholding an agency decision based on admittedly "weak evidence"). In fact, "an agency has wide latitude to determine" what evidence it should rely upon. *Id.* at 1208.

DOI's determinations "are supported by voluminous administrative records, rendering it unlikely that they have no rational basis." *Id.* Simply put, appellees "would have [this] court substitute [appellees'] analysis of the relevant science for that of the expert agencies. However, [this] court cannot force [the agency] to chose one alternative over another." *Id.* (*citing Southwest Center for Biological Diversity v. United States Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998)). If, after reviewing the record, courts are "convinced that [DOI's] discretion is truly informed, . . . we must defer to that discretion." *Friends of the*

Payette v. Horsehoe Bend Hydroelectric Co., 988 F.2d 989, 993 (9th Cir. 1993) (internal citation omitted).

The best appellees and their amici can do is demonstrate that they have a different view of the evidence and their own scientific theories about the subject matter. This is not enough. "[C]oncerns and criticism alone do not undermine the validity" of agency decision making. *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991). "The opposing views and supporting evidence of the parties demonstrate that [appellees] simply disagree with the scientific conclusions reached by [DOI]. The fact that such disagreement exists, however, does not render the [agency decisions] arbitrary and capricious." *Kandra*, 145 F.Supp.2d at 1210 (citing *Aluminum Co. v. Bonneville Power Admin.*, 175 F.3d 1156, 1162 (9th Cir. 1999), *cert. denied*, 528 U.S. 1138 (2000). This Court is not required to "resolve disagreements among various scientists as to methodology." *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985). Other scientists concur in DOI's conclusions and specifically reject appellees' theories. Jones & Stapp, *An Anthropological Perspective on Magistrate Jelderk's Kennewick Man Decision*, High Plains Applied Anthropologist, No. 1, Vol. 23 (Spring 2003) (concurring in DOI's science).

Considering the complex scientific and technical issues involved in determining cultural affiliation, the district court erred in failing to defer to DOI. Appellees admit that "the District Court interpreted [shared group identity] as requiring consideration of a number of factors." Appelees' Br. at 41 n.21. This is exactly the independent interpretation of a term left ambiguous by the statute that is for the agency to define and not the courts. "Courts are properly reluctant to look into complex, fact bound, discretionary determinations of an agency's decisionmaking process." *Gete v. INS*, 121 F.3d 1285, 1292 (9th Cir. 1997). The district court's erred in vacating the cultural affiliation determination.

IV. DOI'S ABORIGINAL LANDS DETERMINATION IS REASONABLE.

DOI properly determined that the aboriginal lands provision provides independent grounds for cultural affiliation with the tribal claimants. ER 88; *Confederated Tribes of the Umatilla Indian Reservation v. United States*, 14 Ind. Cl. Comm. 14, 168-171 (1964) (finding joint use of area by tribal claimants and predecessor groups). NAGPRA's legislative history supports DOI's interpretation to review the entirety of the Indian Claims Commission's ("ICC") findings. Congress wanted demonstrable evidence of which tribes are "recognized as aboriginally occupying the area." 25 U.S.C. § 3002(a)(2)(C)(1); ER 65. Sensibly read, "recognized" encompasses the whole of the Commission's decision.

Contrary to appellees' claims, the aboriginal lands issue was properly before the Secretary. Appellees' Br. at 50. NAGPRA's aboriginal lands provision is mandatory for cultural affiliations whenever ownership under section 3002 cannot be determined by lineal descendants. 25 U.S.C. § 3002(2)(C). In addition, Congress' use of the term "final judgment" is ambiguous and subject to interpretation. As this Court's jurisprudence indicates, determining what is a "final judgment" is hardly a simple task, made more complex here by the special status of the ICC tribunals. *C.f.* Appellees' Br. at 50 (asserting "[t]here is nothing confusing about this term"). Particularly in reference to ICC final judgments, DOI's interpretation is permissive and gives effect to Congress' intent. Congress would not have made reference to a body of law if it was to be futile. However, arbitrarily limiting section 3002(2)(C) to the "final judgment" document would render this provision meaningless. ICC "final judgments" do not describe a tribe's recognized aboriginal land occupancy; they only decide monetary awards. *See, e.g., Umatilla*, 16 Ind. Cl. Comm. 484, 513-a (TSER 100). Rather, the extent of aboriginal territory was determined in the Commission's findings of fact and is independently significant regardless of the final award. *Id.* at 484-88 (leaving findings of fact undisturbed); *Umatilla*, 14 Ind. Cl. Comm. 14, 14-171 (findings of fact).

DOI properly concluded that if the ICC "findings of fact and opinions entered prior to the compromise settlement clearly identified an area as being the joint or exclusive aboriginal territory of a tribe, this evidence is sufficient to establish aboriginal territory for purposes of § 3002(a)(2)(C)(1)."[11] TSER 1. No other interpretation preserves section 3002(a)(2)(C). Limiting cultural affiliations to ICC "final judgments" is absurd. The district court erred in overturning DOI's affiliation decision based on aboriginal occupancy.

V. THE DISTRICT COURT ERRED IN FINDING THAT THE SECRETARY'S CONSULTATION WITH THE CLAIMANT TRIBES WAS IMPROPER.

The district court erred as a matter of law in finding that the Secretary's cultural affiliation determination was an "adjudication" and that communications between DOI and the claimant tribes created an unfair proceeding. ER 162-63 (Order at 22-23). The record does not support appellees' incendiary allegations of "bias."

A. Cultural Affiliation is Not An Adjudication.

The APA prohibition on ex parte communications is inapplicable because NAGPRA does not require a formal administrative hearing to determine cultural

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[11] Appellees' lack standing to object to use of the Umatilla Tribe's settlement. Appellees' Br. at 51. Only the United States and the Tribe may so object, and have not done so here.

affiliation. 5 U.S.C. §§ 554(a), 557(d)(1). Even though the magic words "on the record" are not required, resolution of this issue turns on the substantive nature of the hearing Congress intended to provide. *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1540 (9th Cir. 1993) (citing *Marathon Oil v. EPA*, 564 F.2d 1253, 1261 (9th Cir. 1977).

Neither NAGPRA nor its legislative history contain any indication of congressional intent requiring cultural affiliation determinations be anything more than an informal fact finding. The APA contains no procedures applicable to informal decisionmaking. *See* 5 U.S.C. § 555(b). Accordingly, DOI had discretion to fashion its own informal process. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523-25 (1978). The district court committed clear error by applying the rigors of APA § 554 and twisting required consultation into "ex parte" contacts.

B. NAGPRA Provides For Consultation With Claimant Tribes.

NAGPRA requires consultation with Indian tribes. 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." 25 U.S.C. § 3010. Congress required the Secretary to obtain "oral traditional" evidence from tribal claimants

and "share what information it 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(a)(4), (d). The consultation requirement is buttressed by DOI's trust obligation requiring government-to-government consultation when decisions of the federal government impact tribes. *See, e.g., United States v. Navajo Nation*, No. 01-1375 (U.S. Mar. 4, 2003) (reaffirming trust relationship and finding proscription against ex parte contacts inapplicable); Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments" § 3(a) (Nov. 6, 2000).

Unlike the consultation provided for tribal claimants, NAGPRA does not provide for public input or information sharing with academics during the informal decisionmaking process.[12] Appellees attempt to use due process to support their alleged entitlement to certain administrative procedures is without merit. Appellees' Br. at 61 (citing *Goldberg v. Kelly*). Appellees presuppose they have a property right in these remains; however, this is patently false. No court

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[12] Appellees attempt to discredit the Tribes by making an issue of the reversal of *Echazabal v. Chevron USA, Inc.*, 213 F.3d 1098, 1102 (9th Cir. 2000) which the Tribes cite for the *expressio unius est exclusio alterius* canon. Appellees' Br. at 62. However, reversal is irrelevant, as the canon remains viable. *United States v. Vonn*, 535 U.S. 55, 61 (2002) (applying canon that "expressing one item of [an] associated group or series excludes another left unmentioned").

has recognized a "right" to study human remains. The Supreme Court has stated: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In *Association of Orange County Deputy Sheriffs v. Gates*, 716 F.2d 733, 734 (1983), *cert. denied*, 466 U.S. 937 (9th Cir. 1984), this Court elaborated on *Roth* by noting that "[a] reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms." Appellees have no legitimate government guaranteed entitlement to study.

NAGPRA was not enacted for the benefit of scientific inquiry. Quite the opposite, NAGPRA supports the right of tribes to regain ownership of remains and the right to foreclose scientific study. Appellees were not entitled to any specific administrative procedures.

C. DOI's Process Was Fair.

Appellees' claims of preferential treatment and bias must fail. Appellees' Br. at 53-55. Their bare allegations of collusion result from exaggerations of the record. For instance, appellees cite a Corps email stating that they will "do what the tribes decide to do with the remains." *Id.* at 53 (citing SER 298). However, in

context, this statement is reasonable. Referencing an early dispute between two tribal claimants regarding the ultimate disposition of the remains, this excerpt merely states that the Corps will not interfere with intertribal relations. The rest of the sentence, which appellees omit, clarifies the Corps' limited role: "[the Corps] would not involve ourselves in that decision." SER 298.

Other citations do not support appellees' claims. Some allegedly damning statements were not made by agency decisionmakers, but rather Department of Justice attorneys zealously advocating on behalf of their client. Appellees' Br. at 54 (citing SER 290-95). The record also refutes appellees' claims of agency "coaching" as DOI was simply following NAGPRA's mandate to obtain "additional oral traditions." SER 854 (DOI 8705). That the agency "altered" expert reports is also of no moment as draft expert reports may always be amended, clarified, or updated at the client's behest. Appellees' Br. at 67 (including citation to SER 700 which merely shows grammatical edits). Finally, the fact that drafts of the cultural affiliation report, dated less than a year before the final report was issued, draw the same conclusions as the final report does not mean DOI "had preconceived conclusions" about cultural affiliation. *Id.* at 59 (citing SER 642, 647). Consistency does not equate to bias.

An agency bias claim cannot rest on few citations taken out of context from a 22,000 page administrative record. This is especially true since other parts of the record belie appellees' claims. The Tribes frequently objected to the United States' actions. *See, e.g.,* SER 707-11; TSER 48, 143-46. Over these objections, the United States conducted fourteen of the seventeen tests requested by appellees. ER 16-18. Moreover, it is simply not true that "[appellees] did not participate in the agencies' investigations." Appellees' Br. at 11. In fact, appellees had greater access to the remains than the Tribes. Appellee Owsley inventoried and examined the remains. TSER 2-47, 92-99. Appellees were given numerous opportunities to suggest who should perform the studies and what studies should take place. TSER 125-27, 132-38, 162-210. One appellee was invited to be a member of the study team. TSER 131. Appellees' comments on draft analyses were sought and received. TSER 109, 111-23. Appellees were invited to and submitted information regarding cultural affiliation. TSER 106-08, 128-30, 139-40, 211. This significant information sharing far exceeds what was required and seriously discredits the appellees' fanciful bias claims. *See, e.g.,* TSER 49-62, 76, 80-89, 90-91, 110, 124.

Appellees were provided meaningful participation; they merely disagree with the agency's conclusions.

VI. THE DISTRICT COURT ERRED BY FORECLOSING JOINT TRIBAL CLAIMS TO REMAINS.

Nothing in NAGPRA addresses or precludes joint claims. Based on Congress' intent and historical circumstances, DOI's allowance of joint claims is permissible;[13] the district court committed clear error in foreclosing joint claims.

The district court's narrow reading of "Indian tribe" is inconsistent with Congress' intent and statutory construction. *C.f.* Appellees' Br. at 32. First, Congress recognized there may be instances where "several Indian tribes may have a claim to human remains" and provided for tribes to enter into "agreements" as to the disposition of remains. ER 41 (S. Rep. No. 101-473 at 9-10). Second, Congress used the phrases "closest cultural affiliation" and "different tribe" which, under any interpretation besides the appellees' tortured reading, supports the conclusion that more than one tribe may claim remains. 25 U.S.C. §§ 3002(a)(2)(B), (C)(2). Third, 1 U.S.C. § 1 provides that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise - words importing the singular include and apply to several persons, parties, or things." The district court's broad preclusion of joint claims is repugnant to NAGPRA's broad remedial human rights objectives. The district court arbitrarily limited

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[13] Appellees' amicus SAA agrees that "joint affiliations may be valid." SAA Br. at 18.

claims to those of a single tribe under limited circumstances, encouraging multiple litigation and tribal in-fighting, thereby defeating a primary innovation of NAGPRA. ER 176 (Order at 36 n.45) (restrictive test).

VII. THE DISTRICT COURT ERRED BY CIRCUMVENTING REMAND AND ORDERING STUDY OF THE REMAINS.

The district court committed a clear error of law by ordering study. The APA does not provide discretion for a reviewing court to order substantive relief that lies outside the bounds of the controlling statute. *See* 5 U.S.C. §§ 706; 702(2). The Supreme Court has held that

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation. The reviewing court is not generally empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.

Florida Power and Light Co. v. Lorion, 470 U.S. 729, 744 (1985). None of the rare circumstances are present and the authority relied upon by the district court was thoroughly distinguished in earlier briefing. Tribes' Br. at 60-63 (distinguishing cases because "none of the lengthy delays, administrative vacillation, or systematic unlawful action" necessary to skip remand exist here). The mere fact of appellees' advancing age is not grounds to eviscerate a statute

and evade normal judicial review. The only relief appropriate based on the district court's erroneous findings was a remand to DOI.

Appellees have no legal right to study these remains.[14] NAGPRA differs significantly from the Antiquities Act of 1906, 16 U.S.C. § 431 *et seq.*, the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, and ARPA. Notably, NAGPRA does not vest ownership of the remains in the federal government and there is no study reservation for inadvertently discovered remains.[15] NAGPRA was enacted after these statutes and is specifically tailored to control the disposition of "Native American" remains. This Court has recognized that "in the case of an irreconcilable inconsistency between [statutes] the later and more specific statute usually controls the earlier and more general one." *Hellon & Assocs., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992) (internal citations omitted). NAGPRA occupies the field of law regarding "Native

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[14] Amicus Pacific Legal Foundation's First Amendment arguments are barred. The district court declined to decide this issue and it has not been preserved by cross appeal. ER 205 (Order at 65).

[15] Contrary to amicus Texas Historical Commission, all study is not foreclosed by NAGPRA. *Na Iwi O Na Kapunau O Makapu v. Dalton*, 895 F.Supp. 1397, 1417 (D. Haw. 1995) (permitting limited study to determine cultural affiliation).

American" remains. To the extent NAGPRA's prohibition of study conflicts with ARPA, a previously enacted general statute, NAGPRA must control.

Appellees' study request circumvents NAGPRA and forces this Court to recognize broad public access to ancient native remains for unlimited study. Such access would turn NAGPRA on its head. ER 34. Congress specifically sought to end the practice of unfettered testing and study of "Native American" remains.

CONCLUSION

NAGPRA does not signal the death knell of scientific advancement. Rather, Congress enacted this long-overdue remedial human rights legislation to protect against unconsented scientific exploitation of Indian remains. Appellees, their amici, and the district court simply disagree with Congress' decision to afford such broad protection to Indian tribes with respect to native remains. That the appellees' analyses may differ from DOI does not make their analyses of greater scientific correctness, and it certainly does not lead to the conclusion that DOI acted in an arbitrary and capricious manner.

For the foregoing reasons, the Joint Tribal Claimants respectfully request this Court find in their favor, vacate the decision of the district court in its entirety, and reinstate DOI's determinations, or at minimum, vacate the district court's order of study and remand to the agency for further investigation.

RESPECTFULLY SUBMITTED this 30th day of June, 2003.

Thomas Schlosser, WSBA #6276
(206) 386-5200
Attorney for the Confederated Tribes
of the Colville Reservation

Rob Roy Smith, OSB #00393
(206) 386-5200
Attorney for the Confederated Tribes
of the Colville Reservation

Naomi Stacy by RS per oral.
Naomi Stacy, WSBA #29434
(541) 278-5274
Attorney for the Confederated Tribes
of the Umatilla Indian Reservation

David J. Cummings by RS per oral.
David J. Cummings, OSB #92269
(208) 843-7355
Attorney for Nez Perce Tribe

Thomas Zeilman by RS per oral.
Thomas Zeilman, WSBA #28740
(509) 865-5121
Attorney for Yakama Nation

Tim Weaver by RS per auth.
Tim Weaver, WSBA #3364
(509) 575-1500
Attorney for Yakama Nation

Melissa Campobasso by RS per auth.
Melissa Campobasso, WSBA #30602
(208) 818-0952
Attorney for the Confederated Tribes
of the Colville Reservation

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