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Student Note

THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION  
ACT AT THE MARGIN: DOES NAGPRA GOVERN THE DISPOSITION  
OF ANCIENT, CULTURALLY UNIDENTIFIABLE HUMAN REMAINS?

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*Table of Contents*

I. Introduction	228
II. Grave Protections at Common Law and Under State Statute	230
A. Grave Protections at Early American Common Law	230
B. Common Law Standing	232
C. Cemetery Protections at Common Law and Under State Statute	234
III. NAGPRA	237
A. Overview	237
B. Statutory Limitations on Repatriation	238
C. What is “Native American”? The Problem of Kennewick Man	240
D. What does it mean to be “Culturally Affiliated”? The Problem of Spirit Cave Man	243
IV. Draft Rule Disposing of Culturally Unidentifiable Human Remains	248
A. The Secretary's Authority to Regulate CUHR under NAGPRA	248
B. A Bureaucratic Threat to the NAGPRA Equilibrium	251
V. Summary & Conclusion	255

**\*228 I. Introduction**

*Our religion tells us so. Our oral history tells us so. All of those tell us that we were created here. We did not cross any land bridge like the scientists tell us. Our religion tells us we were created here. Period.*<sup>1</sup>

Such was the view expressed by one Umatilla Indian religious leader upon learning that the recently-unearthed “Kennewick Man” skeleton was nearly 10,000 years old. Kennewick Man's great age, to Mr. Minthorn's mind, merely confirmed what he already knew--the skeleton had to be that of a tribal ancestor because his people had *always* lived along the Columbia River near Kennewick, Washington, where the remains were found.<sup>2</sup> In view of similar certainty on the part of many tribes about their peoples' historic origins, many Native Americans contend that no worthwhile knowledge can be gleaned from studying ancient skeletons.<sup>3</sup> Moreover, the study of such skeletons violates the religious beliefs of many tribes which require that disinterred human remains be reburied immediately.<sup>4</sup>

**\*229** For scientists, however, Kennewick Man's extreme antiquity intimated an exciting and unprecedented glimpse into North America's prehistoric past.<sup>5</sup> In opposing the reburial of Kennewick Man, scientists emphasized the skull's cranial features, which are dissimilar to those of any known Native American population.<sup>6</sup> The scientists also maintain that Indian

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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tribes' declarations of relationship and continuity with remains become debatable and arguably unrealistic with remains, like Kennewick Man, which are thousands of years old. To assume that Kennewick Man is the direct ancestor of a tribe inhabiting the region today assumes no migration in or out of the area for more than nine thousand years.<sup>7</sup>

Thus, the debate over Kennewick Man reveals the basic disconnect between the beliefs and interests of Native American tribes and the scientific community. On one hand, scientific study of Kennewick Man is likely to yield information tending to undermine the Umatilla oral history while also violating the tribe's religious beliefs concerning appropriate treatment of the dead. Yet, respecting the tribe's oral histories and religious beliefs means countenancing the loss of incredibly valuable, if not entirely unique, archaeological data. This fundamental tension gives rise to difficult questions such as whose vision of "truth" and what quantum of "evidence" should guide the disposition of ancient human remains like those of Kennewick Man.

This Note considers Congress's reconciliation of these competing beliefs and interests under the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990.<sup>8</sup> In particular, it examines the ways in which a new regulation proposed by the Department of the Interior (DOI) threatens to knock off kilter the precarious balance struck by NAGPRA.<sup>9</sup> The statute's equilibrium is embodied in the central tenet of NAGPRA that human remains should be repatriated to Native American tribes that can demonstrate cultural affiliation with them.<sup>10</sup> The new DOI regulation, \*230 however, requires museums and agencies to cede control over even those remains that are culturally unidentifiable, a mandate that could sound the death knell for the study of all prehistoric North American human remains.<sup>11</sup>

The Note begins with an account of the inability of traditional common law and statutory grave protections to afford Native American burials equal protection. This account is followed by a discussion of NAGPRA as a response to these problems. The Note next analyzes major legal challenges to the disposition of human remains under NAGPRA to date, focusing in particular on the litigation over the Kennewick and Spirit Cave Men. Finally, the Note considers whether the Secretary of the Interior has authority to regulate culturally unidentifiable remains under NAGPRA and whether the proposed rule is consonant with the statute's spirit.

## *II. Grave Protections at Common Law and Under State Statute*

### *A. Grave Protections at Early American Common Law*

When the American common law was developing during the 18th and 19th centuries, "courts and legislatures had little opportunity to consider issues involving the disposition of prehistoric aboriginal remains and grave goods."<sup>12</sup> Interestingly, this was due in part to a belief prevalent among professionals at the time that Native Americans had only recently arrived in the Americas and were too nomadic and simple to have built the continent's many burial, effigy, and temple mounds.<sup>13</sup> While such beliefs were convenient for politicians seeking to justify the confiscation of Indian lands, they also "delayed the adoption in the United States of European technical \*231 innovations," i.e., excavation, for archaeological "sites with significant 'time depth.'"<sup>14</sup>

Thus, while significant looting of Native American graves occurred in the 19th century, these activities were generally undertaken pursuant to deplorable Government policies and did not involve archaeological effort.<sup>15</sup> Not surprisingly, such policies went unchallenged in court by Native Americans.<sup>16</sup> After all, "[e]arly American courts, like politicians and archaeologists of the time, were likely to be racially biased and Indians had little reason to have confidence in them."<sup>17</sup> As a result of these convening factors, the courts and lawmakers were not allowed the benefit of considering practical issues related to appropriate disposition of prehistoric aboriginal remains and grave goods or regarding the property rights of Indians to these

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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items. Thus, when issues later surfaced in the courts, the judicial system was forced to apply an established body of statutes and common law to situations that law had not previously considered and with which it was ill suited to deal.<sup>18</sup>

In England, dead bodies were traditionally buried in churchyards for protection.<sup>19</sup> The church parson alone had standing to seek “a remedy against disturbers of the dead” and had to do so in English ecclesiastical court because the common law did not recognize the relatives of a deceased as having property rights in the corpse.<sup>20</sup> In the United States, churchyard burials were not as prevalent as in England, and ecclesiastical courts were unknown.<sup>21</sup> While early American common law similarly recognized no “ownership” rights in corpses, the remedy of the parson in England was \*232 quickly replaced by a “quasi-property property” right giving the deceased's next of kin legal standing to possess the body for the purpose of burial and to sue in tort for desecration of the deceased's grave.<sup>22</sup> Statutes criminalizing the desecration of formally dedicated burials and cemeteries were also enacted in many jurisdictions.<sup>23</sup>

### *B. Common Law Standing.*

Judicial and legislative measures, however, were inadequate to furnish Native American graves the same protection afforded other burials. For instance, extension of the quasi property right which developed under the American common law, even in the most liberal jurisdictions, was limited to friends or relatives of the deceased.<sup>24</sup> Thus, the common law failed to account for the fact that Native American mortuary practices rarely, if ever, involved marking the deceased's grave with his identity, or that many tribes were forced to relocate far from their traditional burial grounds.<sup>25</sup> As a result, “[i]t is often difficult for living Indians to prove direct familial descent from prehistoric aboriginal remains sufficient to constitute the standing required to maintain an action at law to protect the remains.”<sup>26</sup>

Some commentators thought that the Louisiana case of *Charrier v. Bell*<sup>27</sup> signaled a new era of relaxed standing requirements for Native \*233 Americans.<sup>28</sup> There, an “amateur archaeologist” sought declaratory judgment that he was the lawful owner of a collection of funerary objects that he removed without permission from more than one hundred and fifty Indian graves located on private property.<sup>29</sup> The Court ultimately awarded the funerary collection to the local Indian tribe, but by that time the State had purchased the property from its owners and subordinated its own claim to the collection to that of the tribe.<sup>30</sup> Thus, although certain language in *Charrier* appeared to broaden the legal concept of standing to accommodate Native American tribal descendants,<sup>31</sup> it is far from certain that the tribe would have prevailed if the State had not disclaimed its interest as landowner in the grave goods.<sup>32</sup>

A more recent Tennessee case evidences persisting judicial reticence to confer legal standing upon Native Americans seeking to protect unmarked Native American graves on the basis of shared ethnicity with the deceased.<sup>33</sup> In *Medicine Bird*, the State brought a proceeding to discontinue the use of some property as a Native American burial ground in order to widen a highway intersection near Nashville.<sup>34</sup> Fifteen Native Americans sought to intervene under a statute requiring that all “interested persons” be given notice of an action to close a burial ground.<sup>35</sup>

\*234 The appellate Court overturned the trial court's conclusion that the Indians were interested persons, noting that “[t]he provisions for notice in the statutory procedures for closing a burial ground reflect the common law.”<sup>36</sup> At common law, only “family members of deceased persons were entitled to notice of proceedings to terminate the use of” property as a burial

ground.<sup>37</sup> Finding that the Native American intervenors did not even attempt “to prove that they [were] related by blood to any of the persons buried in [the] graves,” the Court denied them standing to intervene as interested persons.<sup>38</sup>

### *C. Cemetery Protections at Common Law and Under State Statute.*

Like legal standing on the basis of shared ethnicity, common law cemetery protections also proved to be ineffective tools for Native Americans seeking to curtail the disturbance of Indian graves. In *Wana the Bear v. Community Construction, Inc.*,<sup>39</sup> for example, California's Miwok tribe sought to enjoin the construction of a housing development which, at the time of suit, had resulted in “the disinterring of over 200 [Native American] human beings.”<sup>40</sup> The issue before the Court was whether the burial ground, known to have been used by the tribe before they were driven from the area by 1870, had “achieved a protectable status as a ‘public cemetery’ under [an] 1872 cemetery law by virtue of its prior status as a ‘graveyard.’”<sup>41</sup>

An 1854 California statute “made punishable the mutilation of any public grave yard,” which it defined as any place “[w]here the bodies of six or more persons are buried.”<sup>42</sup> The 1854 law was superseded in 1872 by a \*235 statute providing that a “public cemetery” could be established only through official dedication or proscription use.<sup>43</sup> Conceding that the burial ground did not qualify as a protected cemetery under the dedication or proscription provisions, the *Wana* plaintiff nevertheless contended that the 1872 statutes applied to burials created prior to 1873 “by virtue of its derivation from the 1854 cemetery law.”<sup>44</sup> The 1872 act, however, expressly provided that “[n]o part of [it was] to be retroactive unless expressly so declared.”<sup>45</sup> Because the Miwoks no longer made interments in the burial ground when the new statute took effect, the Court ruled that “the burial ground was not made a cemetery by operation of the” 1872 law.<sup>46</sup>

The 1872 statute's lack of retroactivity, as well as the failure of cemetery statutes to protect Native American burials generally, can be explained by several factors. First, there is a legal presumption that “[i]n any clash between the interests of the dead ... and the interests of the living, presently extant persons prevail.”<sup>47</sup> This common law principle undergirds statutes like that in *Medicine Bird*, which authorize the closure of burial grounds pursuant to the state's exercise of eminent domain.<sup>48</sup>

A second factor is that cemetery laws appear to have been aimed, at least in part, at promoting public health and safety by ensuring the interment of the recently-deceased. This explains why statutes regulating the establishment of cemeteries and the burial of the dead are often codified in public health and safety codes, like the one at issue in *Wana the Bear*.<sup>49</sup> In the case of largely-decomposed human remains decades or centuries old (let alone millennia), however, public health and safety are simply not implicated.

\*236 These factors surely informed the Ohio Supreme Court's decision in *Carter v. City of Zanesville*,<sup>50</sup> a relevant case not directly involving Native Americans graves.<sup>51</sup> There, the trustees of a public cemetery relocated the remains of the plaintiff's mother from the grave in which she had been buried for forty years.<sup>52</sup> The plaintiff sought damages under a statute creating a cause of action for the relatives of a deceased person against anyone who takes “unlawful possession of the body.”<sup>53</sup> Yet, the Court ruled that the statutory terms “bodies” and “corpses” did not include “the remains of persons long buried and decomposed.”<sup>54</sup> Thus, *Carter* stands for the Anglo-centric proposition that as dead bodies decompose, they become less entitled to “that secure repose which natural affection and a decent respect for the remains of a human being demand.”<sup>55</sup>

In view of these cases, it is clear that the common law simply cannot furnish unmarked Indian graves a level of protection that comports with modern sensibilities. Because contemporary Native Americans can rarely prove specific blood relationships

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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to Indians buried in unmarked graves, they will normally lack the legal standing required to assert quasi property rights in the remains that would give them control over their disposition.<sup>56</sup> This problem, highlighted in cases like *Medicine Bird* and *Charrier*, is exacerbated by the fact that so many tribes have been forcibly relocated over the years.<sup>57</sup> Decisions like *Wana the Bear* evidence similar inefficacy on the part of common law cemetery protections to afford Indian burial grounds the same solicitude enjoyed by white graveyards.<sup>58</sup> Lastly, cases like *Carter* and *Glass* suggest that common law protections of bodies may not attach at all in the case of remains that are largely decomposed, as will usually be the case in older Indian graves.<sup>59</sup>

### \*237 III. NAGPRA

#### A. Overview

In response to these common law shortcomings, states began adopting laws in the 1980's "prohibit[ing] intentional grave disturbance, provid[ing] guidelines to protect unmarked graves, and mandat[ing] disposition of human remains from the graves in a way that guarantees reburial after a period of study."<sup>60</sup> At least five states passed legislation specifically requiring that Native American human remains found on state lands or in the possession of state agencies or museums be repatriated to appropriate tribes for reburial.<sup>61</sup>

NAGPRA, enacted in 1990, comprises the Government's solution to these problems. Lauded as "human rights legislation," NAGPRA was "designed to address the flagrant violation of the 'civil rights of America's first citizens'" in three primary ways.<sup>62</sup> The statute first establishes guidelines for disposing of the massive quantity of Native American human remains held by the Government at the time of the statute's enactment.<sup>63</sup> Hence, NAGPRA directs federal agencies and museums receiving federal funds to inventory their collections of Native American human remains and cultural objects.<sup>64</sup> The inventories must be made available to all federally-recognized tribes, who may request the repatriation of enumerated items.<sup>65</sup>

Second, NAGPRA provides for the disposition of Native American human remains that might be found on federal and tribal lands subsequent to its enactment--an important provision in view of the Government's vast landholdings in the arid American west where well-preserved human remains and objects are especially likely to be recovered.<sup>66</sup> This section \*238 provides that tribes shall retain "ownership or control" of such Native American human remains and cultural objects.<sup>67</sup> NAGPRA's third provision, with which this Note is least concerned, criminalizes trafficking in Native American human remains or cultural objects without a valid right of possession to them.<sup>68</sup>

#### B. Statutory Limitations on Repatriation.

Although it grants broad remedial rights to Native Americans, NAGPRA also "reflect[s] a compromise forged by representatives of the museum, scientific and Indian communities. NAGPRA was designed to create a process that would reflect both the needs of museums as repositories of the nation's cultural heritage and the rights of Indian people."<sup>69</sup> To that end, NAGPRA imposes some important limitations on tribes' abilities to demand repatriation. First, human remains or cultural objects must be "Native American" within NAGPRA's meaning in order to be subject to the provisions of the Act.<sup>70</sup> Second, the statute requires tribes claiming human remains or objects to establish cultural affiliation by a preponderance of the evidence with the items to be repatriated.<sup>71</sup>

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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A third restriction allows museums to decline to repatriate *cultural objects* to which they can show a “right of possession.”<sup>72</sup> This provision reflected the drafters' concern that requiring museums to repatriate objects in which they have a legitimate property interest would work an unconstitutional taking.<sup>73</sup> The statute, however, contains no similar provision authorizing museums to retain *human remains* where a right of possession can be shown. Perhaps NAGPRA's drafters simply assumed \*239 that because the quasi-property right to possess human remains at common law was limited to the next of kin for the narrow purpose of reburial, museums could not acquire a constitutionally-cognizable property interest in them.<sup>74</sup>

This theory, though, is unsatisfactory because NAGPRA expressly defines a right of possession to Native American human remains and therefore seems to anticipate that non-Native Americans may acquire such a right, presumably for purposes other than reburial.<sup>75</sup> Thus, although NAGPRA illegalizes trafficking in Native American human remains without a right of possession, the statute appears to allow the alienation of such remains for profit if one can show such a right.<sup>76</sup> “Such discretion sounds much like the attributes of a property interest, the deprivation of which would give rise to at least a due process claim, if not a takings claim.”<sup>77</sup> Moreover, cases like *Carter* and *Glass* suggest that decomposed “skeletons and body parts do not fall under the common law doctrine foreclosing property rights in a dead body.”<sup>78</sup>

To date, no museum has mounted a challenge to a request for the repatriation of human remains on the ground that it has a right of possession to, or ownership interest in, such remains. Indeed, it would be a rare museum that obtained Native American human remains in compliance with section 3001(13), which requires “full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe.”<sup>79</sup> What is more, it would be unwise for a museum to assert such an argument, at least in the case of a very old skeleton. In addition to having to prove knowledge and consent, a museum claiming a right of possession may also have to demonstrate the remains' cultural affiliation \*240 with the tribe that purportedly gave the right of possession. In the case of ancient skeletons, it is easier, and often far more plausible, to rely on NAGPRA's first two limitations by asserting that the remains are not culturally-affiliated with the claimant tribe, or that the remains are not Native American at all. The scope of these limits on repatriation has been tested in the federal courts in recent years, and the focus of this Note now shifts to that litigation.

### C. What is “Native American”? The Problem of Kennewick Man.

In the landmark *Bonnichsen v. United States*<sup>80</sup> decision, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's ruling that NAGPRA does not govern the disposition of the nearly ten-thousand year old Kennewick Man.<sup>81</sup> Kennewick Man's remains, the most complete skeleton of such antiquity ever found in the United States, were discovered on federal land under the control of the Army Corps of Engineers (Corps) in 1996.<sup>82</sup> Dr. Douglas Owsley, the head of the Physical Anthropology Department at the Smithsonian Institution and a plaintiff in the case, “made arrangements ... to bring this important find to [Washington, D.C.] for further study.”<sup>83</sup> Tribal claimants, including the Umatilla, intervened and demanded “that the remains be turned over to them for immediate \*241 reburial.”<sup>84</sup> Citing NAGPRA, the Corps sided with the Indians, though the district court later vacated that decision.<sup>85</sup>

Soon thereafter, the Secretary of the Interior assumed responsibility for determining whether the remains were “Native American” and therefore whether their disposition would be governed by NAGPRA: “Relying solely on the age of the remains and the fact that the remains were found within the United States, ... the Secretary pronounced Kennewick Man's remains ‘Native American’ within NAGPRA's meaning.”<sup>86</sup> The Secretary also found that Kennewick Man was “culturally affiliated with present-day Indian tribes” and so awarded possession to the tribal claimants.<sup>87</sup> The scientist-plaintiffs filed an amended

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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complaint and again the district court held in their favor, ruling that the evidence did not support the Secretary's decision and that NAGPRA did not apply.<sup>88</sup>

On appeal, the Ninth Circuit set out that the first step in determining whether NAGPRA governs the disposition of human remains is to ascertain whether they are "Native American."<sup>89</sup> NAGPRA defines "Native American" as "of, or relating to, a tribe, people or culture that is indigenous to the United States."<sup>90</sup> The Court found the words "that is" to be of paramount importance because they unambiguously require "that human remains bear some relationship to a *presently existing* tribe people, or culture to be considered Native American."<sup>91</sup> Furthermore, the Court held that the primary purpose of NAGPRA, to "spar[e] [modern Native Americans] the indignity and resentment that would be aroused by the despoiling of their ancestors' graves," is simply not served by requiring the repatriation "of human remains that bear no relationship to them."<sup>92</sup>

The Court thus rejected the Secretary's regulation implementing section 3001(9)'s definition of "Native American," which omitted the \*242 talismanic statutory words "that is."<sup>93</sup> The Court held that the regulation subverted Congress's unambiguous requirement that remains bear some significant relationship to an existing tribe and so was not entitled to *Chevron* deference.<sup>94</sup>

The Court concluded that the Secretary's construction of NAGPRA, under which any remains that predate European settlers are deemed to be Native American, "has no principle of limitation beyond geography ... [and] does not appear ... to be what Congress had in mind."<sup>95</sup>

Lastly, the Court determined that the Secretary's decision was arbitrary and capricious because the administrative record contained no evidence "that Kennewick Man's remains are connected by some special or significant genetic or cultural relationship" to an existing tribe.<sup>96</sup> With respect to a possible genetic relationship, the Court noted that the "features of Kennewick Man most closely resemble those of Polynesians and southern Asians" and "differ significantly from those of any modern Indian group."<sup>97</sup> It further held that the only evidence of a cultural relationship came from oral histories.<sup>98</sup> The Court ruled that the 9,000 year gap between the time of the Kennewick Man and the present was simply too great to be bridged by oral traditions alone.<sup>99</sup>

In 1998, the Army Corps used helicopters to bury the location of Kennewick Man's discovery under two million pounds of rubble, \*243 "effectively end [ing] efforts to determine whether there [were] other artifacts present at the site which might shed light on the relationship between the remains and contemporary Indians."<sup>100</sup> The district court became convinced that the Corps' underlying goal had been to prevent future investigation by burying the site and not, as it purported, to preserve archaeological integrity or to combat erosion.<sup>101</sup> It further rebuked the Corps' one-sided policy of consulting with the tribes while keeping the scientist-plaintiffs in the dark until after the final decision to bury the site had been made.<sup>102</sup> The Corps' decision to bury the site also came in the face of a bill which had passed both houses of Congress and that would have prohibited such action without the approval of the court.<sup>103</sup>

It is paradoxical that in its fervor to foreclose study of the site, the Corps demolished a potential source of evidence that could have proved that Kennewick Man was Native American. The Corps' actions belie its gross overestimation of the willingness of the courts to look past the clear limits which NAGPRA imposes upon Native Americans groups' power to demand repatriation. Instead, the opinions of the district court and the Ninth Circuit struck a blow in affirmation of the vitality of those limits and, in so doing, appeared to effectuate Congress's actual intent in enacting NAGPRA-- repatriating to presently-extant tribes the remains of their ancestors.

*D. What does it mean to be “Culturally Affiliated”? The Problem of Spirit Cave Man*

The requirement that a tribe establish cultural affiliation with human remains in order to obtain their repatriation was explored by the district court in *Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management*,<sup>104</sup> litigation over the remains of the Spirit Cave \*244 Man.<sup>105</sup> The Spirit Cave Man's partially-mummified remains had been held by the Nevada State Museum since the time of their discovery in 1940.<sup>106</sup> The remains were long believed to be less than 2,000 years old, though the Museum radiocarbon dated Spirit Cave Man after NAGPRA's enactment “[a]s part of the inventory and identification process required” pursuant to section 3003.<sup>107</sup> The analysis showed that “the initial estimate for the age of the bones ... was significantly flawed. The remains were, in fact, nearly 10,000 years old and, accordingly, a significant scientific find.”<sup>108</sup>

Spirit Cave Man was discovered on the aboriginal lands of the tribal plaintiffs, though the defendant Bureau of Land Management (BLM) has controlled the land since before the “time of [the remains'] discovery ... [up] until the present day.”<sup>109</sup> In 1996, the Museum determined that the Spirit Cave Man was culturally-unaffiliated and “the BLM authorized further study of the remains.”<sup>110</sup> The BLM authorized such study despite the facts that it had not made a final determination as to the Spirit Cave Man's culturally-affiliated status and that the tribe had not had an opportunity to respond to the Museum's determination.<sup>111</sup> In 1999, the Tribe was finally able to submit scientific evidence to the BLM, and, in 2000, the agency issued its final decision that the remains were culturally unaffiliated.<sup>112</sup> The Tribe then turned to the NAGPRA Review Committee \*245 and requested it “consider the matter and make findings concerning the affiliation of the remains and their potential repatriation to the tribe.”<sup>113</sup>

NAGPRA had established the Review Committee to “monitor and review the implementation of the inventory and identification process and repatriation activities required” by the Act.<sup>114</sup> The composition of the Committee was intended to reflect the compromise between the interests of the Native American and scientific and museum communities.<sup>115</sup> Its responsibilities include “facilitating the resolution of any disputes among Indian tribes ... and Federal agencies or museums relating to” repatriation.<sup>116</sup> Although the Committee's findings are not binding, they are admissible evidence in court.<sup>117</sup> On the basis of evidence submitted by the tribe, the Committee determined that “the Spirit Cave Man remains were in fact culturally affiliated with the Tribe and that the remains should be repatriated to the Tribe.”<sup>118</sup>

The BLM, however, took the position that the Review Committee was only an advisory board, and declined to formally address, or reconsider its position in light of, the Committee's findings.<sup>119</sup> The tribe sued the BLM, alleging that the agency's determination of non-affiliation was both procedurally and substantively deficient.<sup>120</sup> Before addressing these allegations, the Court dismissed an argument raised by an *amicus* brief contending that “remains as old as Spirit Cave Man's are not likely to be classified as ‘Native American’” under the Ninth Circuit's *Bonnichsen* decision.<sup>121</sup> The Court ruled that “[b]oth the Tribe and BLM have stated \*246 that the remains are Native American” and that an *amicus* brief cannot interject issues into a case which have not been presented by the parties.<sup>122</sup> The BLM's failure to argue that the remains were not Native American under *Bonnichsen* was inexplicable in view of the physical similarities between the Spirit Cave Man and the Kennewick Man and the total lack of physical similarity between the remains and the modern claimants.<sup>123</sup>

Addressing the adequacy of the BLM's procedure in making its determination, the Court held that the agency properly consulted with the tribe and that NAGPRA does not require it to consider and respond to the Review Committee's findings.<sup>124</sup> Yet, this fact did not preclude the Court from finding that the failure to consider the Committee's findings rendered the agency's decision arbitrary and capricious.<sup>125</sup> The Court noted that under the statutory framework of NAGPRA, tribes must be provided the

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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opportunity to present evidence to demonstrate cultural affiliation.<sup>126</sup> Thus, even though the BLM had already determined that the Spirit Cave Man was culturally unaffiliated, it was under a duty to later reassess its decision in light of any new evidence the tribe could proffer, including the Committee's findings.

The Court concluded that while the tribe's evidence appeared to have been “reviewed to some extent, there is no overarching determination by BLM which explains the reasons for its actions and determinations.”<sup>127</sup> Finding that the BLM's determination of non-affiliation between the remains of the Spirit Cave Man and the plaintiff tribe was arbitrary and capricious, the Court directed the agency to “compare its findings with the [Tribe's new] evidence and explain why its determination is, or is not, still \*247 the most correct finding available.”<sup>128</sup> The Court emphasized that its decision “does not determine that BLM's initial determination of nonaffiliation is wrong and should not be read to mandate a finding of affiliation by BLM.”<sup>129</sup>

NAGPRA defines cultural affiliation as meaning “that there is 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.”<sup>130</sup> As the Ninth Circuit observed in *Bonnichsen*:

[Establishing that remains are Native American] requires only a general finding that remains have a significant relationship to a presently existing ‘tribe, people or culture,’ a relationship that goes beyond features common to all humanity. [But establishing cultural affiliation] requires a more specific finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe.<sup>131</sup>

Thus, establishing that remains are Native American or culturally affiliated are similar inquiries insofar as both require proof of a significant relationship between the remains and a presently-extant Native American group. As a result, a tribe vying to prove cultural affiliation with remains as ancient as those of the Spirit Cave Man is likely to encounter many of the same difficulties that the tribes and agencies in *Bonnichsen* faced in trying to prove that Kennewick Man was Native American. For example, the utter lack of physical similarity between the remains and modern tribe members which plagued the respondents in *Bonnichsen* also likely presents a stumbling block for the claimant tribes in the Spirit Cave Man litigation.<sup>132</sup>

Moreover, where there is no physiological continuity between ancient remains like the Kennewick and Spirit Cave men and modern Native American claimants, the tremendous antiquity of the remains makes it unlikely that there will be additional physical evidence that would militate in favor of a finding of cultural affiliation. In *Bonnichsen*, evidence of the claimant tribes' oral traditions and of their aboriginal occupation of the area in which Kennewick Man was found was held to be insufficient to prove \*248 that the remains were Native American.<sup>133</sup> Such evidence should similarly be inadequate to establish cultural affiliation in the case of the Spirit Cave Man. Because Spirit Cave Man's remains would almost certainly fail to qualify as Native American under the Ninth Circuit's analysis in *Bonnichsen*, a finding that such remains were culturally affiliated with a Native American tribe would defy reason.

Studies of the unique physical features of the Kennewick and Spirit Cave Men indicate that they may have been members of populations that later became extinct in North America.<sup>134</sup> Because such remains are unlikely to qualify as Native American or to be found to be culturally affiliated with a Native American tribe, they appear to fall outside NAGPRA's regulatory ambit. Yet, the proposed rule mentioned at the beginning of this Note endeavors to expand the DOI's authority under NAGPRA so as to include the power to regulate culturally unidentifiable human remains (CUHR) like the Kennewick and Spirit Cave Men. In so doing, the rule eviscerates NAGPRA of the limitations it imposes on tribes' ability to demand repatriation. It thereby erects a *de facto* bar to the future study of CUHR by offering up all such remains to tribes for reburial. Thus, the highly controversial draft rule presents important questions concerning the scope of the Secretary's authority, if any, to regulate CUHR under NAGPRA.

#### *IV. Draft Rule Disposing of Culturally Unidentifiable Human Remains*

##### *A. The Secretary's Authority to Regulate CUHR under NAGPRA.*

“When NAGPRA was under consideration, it was clear to Congress that culturally unidentifiable remains represented a particularly difficult problem. Not only was there a lack of agreement among tribes, museums and the scientific community, there was no agreement among Native \*249 American groups on how this issue should be resolved.”<sup>135</sup> It was Congress's hope that the experience gained by tribes, museums and agencies through the process of repatriating culturally identifiable remains would lead to a resolution for disposing of CUHR that would be agreeable to all sides.<sup>136</sup> For this reason, CUHR are mentioned but once in NAGPRA.<sup>137</sup>

Congress there directs the Committee to “compil[e] an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and [to recommend] specific actions for developing a process for disposition of such remains.”<sup>138</sup> This provision has been the source of much confusion because it does not specify just who is responsible for “developing a process for disposition of” CUHR--the Secretary of the Interior or Congress.<sup>139</sup> Moreover, if the Secretary is given authority to regulate CUHR, does such power extend to all CUHR or just that CUHR that can be shown to be Native American? The Review Committee, the DOI, and the scientific community have all advanced different interpretations of the Secretary's rulemaking power under NAGPRA.

In 2000, the Committee published recommendations urging the Secretary to draft a rule that would require disposition of Native American CUHR pursuant to agreements to be reached between tribes, museums and agencies at regional consultations.<sup>140</sup> The rule actually proposed by DOI on October 16, 2007, however, purports to regulate *all* CUHR regardless of whether the remains are identifiable as Native American.<sup>141</sup> Scientific organizations, for their part, maintain that NAGPRA confers no power upon \*250 the Secretary to regulate *any* CUHR, period.<sup>142</sup> The scientists' position is supported by the fact that neither section 3006(c)(5), nor any other provision in NAGPRA, expressly authorizes the Secretary to make rules for the disposition of CUHR.<sup>143</sup>

Some commentators cite section 3002(b) in asserting that, at a minimum, DOI has authority to regulate CUHR that can be identified as Native American.<sup>144</sup> Nevertheless, extrapolation of a broad grant of authority to the Secretary to regulate all Native American CUHR is unwarranted. Section 3002(a) establishes a process for disposing of Native American cultural items that are found on federal land after NAGPRA's enactment.<sup>145</sup> Concededly, CUHR that can be identified as Native American appear to fall within NAGPRA's definition of “Native American cultural items.”<sup>146</sup>

It must be kept in mind, however, that section 3002(b) applies only to items found on federal or tribal land and which go unclaimed under section 3002(a).<sup>147</sup> Section 3005, which governs Native American cultural items held by museums and agencies, contains no analogous provision empowering the Secretary to regulate the disposition of such items. Congress's decision not to empower the Secretary to promulgate rules for disposing of Native American cultural items held by museums and agencies \*251 evidences legislative intent that such institutions should keep their collections where no cultural affiliation is established. Moreover, the unique grant of regulatory power to the Secretary under section 3002 can be explained by the necessity of developing a scheme for the curation and disposition of unclaimed Native American items found after the enactment of NAGPRA.

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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In short, there is no basis for inferring that section 3002 was meant to confer upon the Secretary a general power to regulate CUHR, Native American or otherwise. At most, that section simply authorizes the Secretary to promulgate rules for the disposition of Native American CUHR found on federal land after the enactment of **NAGPRA**.

*B. A Bureaucratic Threat to the **NAGPRA** Equilibrium.*

Specifically, the Secretary's rule provides that, for each CUHR in its possession, a museum or agency must consult all Indian tribes having a "cultural relationship" to the region in which the remains were found.<sup>148</sup> Where remains' origins are unknown, a museum or agency must consult all tribes having a "cultural relationship to the region in which the museum or Federal agency repository is located."<sup>149</sup> Unless a museum or agency can prove a "right of possession" to the CUHR as defined in **NAGPRA**, the remains must be surrendered to the most appropriate Indian tribe according to the hierarchy of claimants established by the rule.<sup>150</sup> In the event that no tribe claims CUHR, a museum or agency may obtain the Secretary's permission to transfer the remains to a non-federally recognized tribe or reinter them "according to State or other law."<sup>151</sup>

Assuming *arguendo* that the Secretary does have authority to promulgate this rule, opponents charge that it is irreconcilably at odds with \*252 the basic framework established by **NAGPRA**.<sup>152</sup> By effectively requiring the surrender of all CUHR for reburial, the proposed rule disregards "the legitimate public interest in the educational, historical and scientific information" that the study of such remains may yield.<sup>153</sup> It thereby "destroy[s the] careful balancing of divergent interests that has been the key to **NAGPRA's** success."<sup>154</sup> There are two features of the rule that give it the practical effect of exposing all CUHR to reburial. First, it applies to all CUHR rather than merely to remains that can be identified as Native American; and second, it allows museums and agencies to retain CUHR only where they can prove a "right of possession" that is impossible to acquire.<sup>155</sup> The regulation is also fundamentally inconsistent with **NAGPRA's** basic scheme insofar as it requires remains to be ceded to tribes solely on the basis of a sort of "geographic affiliation."<sup>156</sup>

The most striking feature of the proposed regulation may be what it does *not* say--throughout its text, the rule consistently omits of the qualifier "Native American" from the phrase "culturally unidentifiable human remains."<sup>157</sup> Despite the fact that many provisions in **NAGPRA** make clear that the statute applies only to Native American human remains, the rule defines "culturally unidentifiable" as "refer[ring] to human remains and associated funerary objects in museum or Federal agency collections for which no lineal descendant or culturally affiliated Indian tribe ... has been identified."<sup>158</sup> As the Ohio Archaeological Council observed in comments to DOI, "[t]he rule does not specify that the human remains also must meet \*253 the legal definition of Native American to be considered culturally unidentifiable."<sup>159</sup>

In construing **NAGPRA** as a grant of authority to regulate the disposition of CUHR without regard to whether the remains are Native American, the Secretary runs a flagrant end-around the Ninth Circuit's decision in *Bonnichsen*.<sup>160</sup> *Bonnichsen* stands for the very proposition that "[t]he exhumation, study, and display of ancient human remains that are unrelated to modern American Indians was not a target of Congress's aim, nor was it precluded by **NAGPRA**."<sup>161</sup> Under *Bonnichsen*, inquiry is made into the culturally affiliated or unaffiliated status of remains only *after* they have been determined to be Native American.<sup>162</sup> The draft rule thus rewrites **NAGPRA** by disposing of the Native American requirement and, in the process, exposes all CUHR to tribal requests for repatriation. The regulation's departure from **NAGPRA's** mandate has led critics to condemn the rule as an unprincipled "effort to force a transfer of all [CUHR] out of institutional curation."<sup>163</sup>

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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Such cynicism is substantiated by the illusory nature of the provision purporting to allow museums and agencies to keep CUHR to which they can show a right of possession.<sup>164</sup> As explained above in Section III(b), proving a right of possession to human remains under **NAGPRA** entails showing that the remains were acquired with “the full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe.”<sup>165</sup> The Secretary's regulation is thus illogical--if remains were acquired with the knowledge and consent of the deceased's next of kin or of a culturally affiliated tribe, then the cultural \*254 affiliation of the remains would be known and they would never have been classified as CUHR.<sup>166</sup>

Lastly, the rule is antithetical to **NAGPRA's** basic scheme insofar as it allows a Native American tribe's geographic affiliation with a region to serve as a proxy for cultural affiliation with the remains.<sup>167</sup> The express purpose of Congress in requiring tribes to demonstrate cultural affiliation with remains in order to obtain repatriation was “to ensure that the claimant has a reasonable connection with the materials.”<sup>168</sup> Clearly, evidence as to the aboriginal occupation of the land on which remains were discovered is a relevant factor in determining their cultural affiliation.<sup>169</sup> But, as both **NAGPRA's** drafters and the Court in *Bonnichsen* recognized, “geographic proximity is not tantamount to cultural or biological affiliation.”<sup>170</sup> Moreover, the geographic location of an institution may “have absolutely nothing to do with cultural affiliation of the remains [it] curate[s].”<sup>171</sup> Thus, the provision allowing tribes to claim CUHR of unknown origins solely on the ground that they inhabit the same geographic region in which the curating institution is located is particularly absurd.

For myriad reasons, it is apparent that the Secretary's proposed regulation flouts the limits which **NAGPRA** imposed on repatriation. At the same time, the regulation does nothing to further **NAGPRA's** bedrock principle that Native American cultural items should be returned to modern tribes sharing some demonstrable cultural or genetic nexus with them.<sup>172</sup> What is more, by proposing the rule, the Secretary has usurped authority that **NAGPRA** plainly does not confer. This error is exacerbated by the \*255 rule's failure to limit its application to CUHR that are clearly identifiable as Native American, a transparent attempt to circumvent *Bonnichsen*. By requiring museums and agencies to show a right of possession to CUHR that can never be acquired, the Secretary's rule effectively grants Native American tribes unilateral authority to control the disposition of even the most ancient North American human remains.

### V. Summary and Conclusion

As human rights legislation, **NAGPRA** was designed to counteract the effects of the ethnocentric American common law tradition, which for centuries afforded Native American burials virtually no protection.<sup>173</sup> At common law, a claimant seeking to exercise quasi-property rights in a dead body had to prove a blood relationship with the deceased.<sup>174</sup> Many Indian tribes buried their dead in unmarked graves or were forced to relocate away from traditional burial grounds, and so few could meet this demanding standard.<sup>175</sup> Common law cemetery protections were similarly construed by courts so as to provide little protection to unmarked Indian graves.<sup>176</sup> The failure of the common law in these respects, along with racist 19th century governmental policies promoting the looting of Indian graves, brought a great many Native American human remains into museum and Government curation.<sup>177</sup>

**NAGPRA** remedies the injustices wrought under the common law by empowering modern tribes to regain possession of wrongfully-acquired cultural items and to prevent similar misappropriations in the future.<sup>178</sup> The scientific community generally supported the passage of **NAGPRA**, believing that the statute's standard of cultural affiliation would ensure a \*256 fair balance between its own interests and those of modern tribes.<sup>179</sup> Indeed, as a general rule, the standard of cultural affiliation is well-suited to guide the disposition the Native American human remains subject to **NAGPRA** because most such remains

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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postdate the arrival of Europeans. The relative recentness of the remains makes it likely that there are culturally affiliated descendants which might be identified. Moreover, modern remains are typically of less scientific interest than more ancient remains. Thus, **NAGPRA**, as enacted, capitalizes on the naturally-occurring middle ground between the positions of scientists and Native Americans.<sup>180</sup>

The discovery of very ancient CUHR in recent years, however, gave rise to closer judicial examination of **NAGPRA**. In *Bonnichsen*, the Ninth Circuit concluded that Congress did not intend that **NAGPRA** should govern the disposition of remains having no cultural relationship to a presently-extant tribe.<sup>181</sup> Specifically, the Court found that the evidence of a relationship between Kennewick Man and the Umatilla was so attenuated as to not support a finding that the remains are Native American--let alone culturally affiliated with the claimant tribe.<sup>182</sup> The Secretary's rule, however, replaces **NAGPRA's** cultural affiliation criterion with one of "geographic affiliation."<sup>183</sup> This standard effectively removes all limitations on tribes' ability to demand possession of culturally unidentifiable remains.<sup>184</sup>

Such results are irreconcilable with the balancing principle at the heart of **NAGPRA** and which informed the Court's decision in *Bonnichsen*--as the antiquity of the human remains at issue becomes greater and their cultural affiliation less certain, the public interest in the study of such remains increases while the moral justification for reburial decreases. The proposed rule should therefore be withdrawn. The Secretary's persistence in promulgating the draft rule will only "foment divisiveness" and, as in *Bonnichsen*, beget many years of litigation between the Government and \*257 the scientific community.<sup>185</sup> Withdrawal is particularly appropriate in view of the Secretary's dubious authority to regulate CUHR under **NAGPRA**.<sup>186</sup>

If Congress desires that the Secretary draft rules disposing of CUHR, then such intent should be expressed unequivocally. Congress should further sketch out a skeletal framework to guide the agency in developing a process for disposing of CUHR, as it did in **NAGPRA**. Such legislation, however, does not appear to be on the horizon. Since the *Bonnichsen* litigation erupted more than a decade ago, Congress has declined to adopt a variety of amendments that would have rendered **NAGPRA** more favorable to one side or the other.<sup>187</sup> This fact evidences Congress's continuing commitment to **NAGPRA's** balancing principle and, in combination with *Bonnichsen*, indicates that a course of compromise will be followed into the foreseeable future.

Footnotes

- <sup>a1</sup> Candidate for J.D., Washington & Lee University School of Law, May, 2009; B.A. University of Maine, 2004. I would like to thank Professor Tim Jost and my father, Dr. David Van Horn, for their thoughtful criticism and careful editing.
- <sup>1</sup> JEFF BENEDICT, *NO BONE UNTURNED: THE ADVENTURES OF A TOP SMITHSONIAN FORENSIC SCIENTIST AND THE LEGAL BATTLE FOR AMERICA'S OLDEST SKELETONS* 106 (2003) (quoting Armand Minthorn).
- <sup>2</sup> See Douglas W. Owsley & Richard L. Jantz, *Kennewick Man--A Kin Too Distant?*, in *CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY* 143 (Elazar Barkan & Ronald Bush eds., 2002) ("If this individual is over 9,000 years old, that only substantiates our belief that he is Native American. From our oral histories, we know that our people have been part of this land since the beginning of time.") (quoting Armand Minthorn, *Ancient Human Remains Need to Be Reburied*, TRI-CITY HERALD, Nov. 30, 1997, at D1).
- <sup>3</sup> See *id.* at 143-44 ("We never asked science to make a determination as to our origins. We know where we came from. We are the descendants of the Buffalo People. They came from inside the earth after supernatural spirits prepared the world for humankind to live here. If non-Indians choose to believe they evolved from an ape, so be it.") (quoting Sebastian Le Beau, Repatriation Officer for the Cheyenne River Sioux, in George Johnson, *Indian Tribes' Creationists Thwart Archeologists*, N.Y. TIMES, Oct. 22, 1996, at A1).

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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- 4 *See id.* at 143 (noting that the Umatillas' religious and cultural beliefs mandate burial of the skeleton as soon as possible); *see also* Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992), reprinted in REPATRIATION READER: WHO OWNS AMERICAN INDIAN REMAINS? 132 (Devon A. Mihe-suah ed., 2000) (asserting that Indian tribes “commonly believed that if the dead are disturbed or robbed, the spirit is disturbed and wanders--a spiritual trauma for the deceased that can also bring ill upon the living”).
- 5 *See* Owsley & Jantz, *supra* note 2, at 146 (contending that scientific study is required to determine whether Kennewick Man is actually similar to any living group, and to test new theories against traditional assumptions about the peopling of the Americas).
- 6 *See id.* at 141-42 (citing a preliminary examination of Kennewick Man by several physical anthropologists which concluded that the skeleton's cranial features could not be linked biologically to any existing tribal group).
- 7 *Id.* at 144.
- 8 25 U.S.C. §§ 3001-3013 (1994); 18 U.S.C. § 1170 (1990).
- 9 *See* Native American Graves Protection and Repatriation Act Regulations--Disposition of Culturally Unidentifiable Human Remains, 72 Fed. Reg. 58,582 (proposed Oct. 16, 2007) (to be codified at 43 C.F.R. pt. 10.11) [hereinafter Disposition of CUHR].
- 10 *See* 25 U.S.C. § 3005(a)(1) (2000) (“If ... the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe ... is established, then the Federal agency or museum ... shall expeditiously return such remains and associated funeral objects.”).
- 11 *See* Disposition of CUHR, *supra* note 9, at 58,585 (to be codified at 43 C.F.R. pt. 10.11(e)) (“A museum or Federal agency that is unable to prove that it has right of possession ... to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes.”).
- 12 H. MARCUS PRICE III, DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS 21 (1991).
- 13 *See id.* at 22 (observing that complex Native American burial structures “were variously attributed to survivors of Mu or Atlantis, or to wandering Scandinavians or the lost tribes of Israel”).
- 14 *Id.*
- 15 *See id.* (discussing an 1868 Surgeon General's order to his field officers to secure as many Indian skeletons as they were able); *see also* Trope & Echo-Hawk, *supra* note 4, at 126 (noting that the Surgeon General's order resulted in more than four thousand Native American heads being taken from battlefields, burial grounds, POW camps, hospitals, fresh graves and burial scaffolds across the country over several decades).
- 16 Trope & Echo-Hawk, *supra* note 4, at 130 (“Disputes between Native people and American citizens were usually settled on the battlefield, instead of in courtrooms.”).
- 17 PRICE III, *supra* note 12, at 22.
- 18 *Id.*
- 19 *See id.* at 21 (“[B]odies of decedents whose relatives and friends were too poor to bury them securely were freely dug up and sold by the thousands.”).
- 20 *See* Steve Russell, *Sacred Ground: Unmarked Graves Protection in Texas Law*, 4 TEX F. ON C.L. & C.R. 3, 10 (1998) (“Blackstone's ‘parson’ had the power and the duty to keep the sanctity of the place where most people were buried--the churchyard--and the ecclesiastical courts would provide a remedy against disturbers of the dead.”).
- 21 *See id.* (noting that the common law in the United States placed responsibilities for the dead upon the next of kin rather than with church parsons).

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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- 22 *See id.* at 11 (explaining that interference with others' quasi-property rights in dead bodies "constitute actionable wrongs"). Russell further observes that:  
The bundle of rights includes that of holding and protecting the body until it is processed for burial, cremation or other lawful disposition; selecting the place and manner of disposition, and carrying out the burial or other last rites; and the right to undisturbed repose of the remains in grave, crypt, niche, urn or elsewhere sanctioned by law. Unlawful violations of these rights constitute actionable wrongs.  
*Id.*
- 23 *See* PRICE III, *supra* note 12, at 21 (observing that American courts replaced the English church parson by substituting new principles of standing and by criminalizing the desecration of formal cemeteries and burials).
- 24 *See id.* at 23 (noting that "[a] moderate view allows action by the next of kin, and the strictest position allows only the direct heirs to bring an action").
- 25 *See* Trope & Echo-Hawk, *supra* note 4, at 130 (explaining that the law does not protect unmarked Native graves like it protects marked European graves).
- 26 PRICE III, *supra* note 12, at 23; *see also* Russell, *supra* note 20, at 12 ("[T]he age of some Native American remains and Native American burial practices make determining the 'next of kin' in the European sense problematic.").
- 27 496 So. 2d 601 (La. Ct. App. 1986).
- 28 *See* PRICE III, *supra* note 12, at 23 (positing that *Charrier* "is often cited as representing a new trend allowing greater freedom of standing for aborigines to claim buried grave goods"); *see also* Zhara S. Karinshak, Comment, *Relics of the Past: To Whom Do They Belong? The Effect of an Archaeological Excavation on Property Rights*, 46 EMORY L.J. 867, 874-76 (1997) (asserting that the *Charrier* court awarded the tribe possession of the funerary collection on the basis of the Indians' relation to the individuals buried in the graves).
- 29 *Charrier*, 496 So. 2d at 603-04.
- 30 *See id.* at 605 (rejecting in turn the plaintiff's contentions that the tribe had abandoned the funerary objects by burying them with the deceased and that giving the tribe possession of the collection would amount to unjust enrichment).
- 31 *See id.* at 607 (dismissing the plaintiff's claim of unjust enrichment on the ground that "descendants have a right to enjoin the disinterment of their deceased relatives, as well as to receive damages from the desecration involved. Such a right would be subverted if the descendants were obliged to reimburse for the costs of excavation").
- 32 PRICE III, *supra* note 12, at 23. ("Confused reasoning by the [*Charrier*] court mingles principles of title to the goods and to the underlying land.").
- 33 *See* Comm'r. of Transp. v. Medicine Bird Black Bear White Eagle, 63 S.W.3d 734, 757 (Tenn. Ct. App. 2001) (holding that Native American intervenors were not "interested persons" within the meaning of a state statute requiring that such persons be joined as defendants in a proceeding to close a burial ground).
- 34 *Id.* at 742.
- 35 *See id.* at 753 (paraphrasing TENN. ANN. CODE § 46-4-102). The statute defines "interested persons" as follows:  
any and all persons who have any right or easement or other right in, or incident or appurtenant to, a burial ground as such, including the surviving spouse and children, or if no surviving spouse or children, the nearest relative or relatives by consanguinity of any one or more deceased persons whose remains are buried in any burial ground.  
*Id.*
- 36 *Id.*

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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- 37 *Id.* at 757.
- 38 *Id.*
- 39 180 Cal. Rptr. 423, 427 (Cal. Ct. App. 1982) (holding that an Indian burial ground was not a “cemetery” within the meaning of an 1872 statute protecting cemeteries from desecration because no interments were being made at the time of the statute's enactment).
- 40 *Id.* at 424.
- 41 *Id.* at 424-25.
- 42 *Id.* at 426.
- 43 *See id.* (citing CAL. POL. CODE §§ 3105-3107 (codified at CAL. HEALTH & SAFETY CODE §§ 8100 et seq. (1939)). Section 3105 created a public cemetery on lands situated in or near any city and used by the inhabitants “continuously and without interruption, as a burial ground for five years.” *Id.* Section 3106 was similar to the 1854 statute in that it provided that “[s]ix or more bodies buried at one place constitutes the place a cemetery.” *Id.* Finally, § 3107 set out a procedure for dedicating public lands for cemetery purposes. *Id.*
- 44 *Id.* at 425.
- 45 *Id.* at 426.
- 46 *Id.* at 426-27.
- 47 Russell, *supra* note 20, at 11.
- 48 *See Medicine Bird*, 63 S.W. 3d at 749 (noting that “[w]hen the needs and convenience of the living required it, abandoned cemeteries could be closed and the human remains therein reinterred elsewhere”).
- 49 *E.g.*, CAL. HEALTH & SAFETY CODE §§ 8100 et seq., *supra* note 43; TEX. HEALTH & SAFETY CODE ANN. §§ 711.001 et seq.
- 50 52 N.E. 126 (Ohio 1898); *see also State v. Glass*, 273 N.E.2d 893, 896 (Ohio 1971) (affirming *Carter*).
- 51 *See Carter*, 52 N.E. at 127 (ruling that a statute creating a civil cause of action against one who unlawfully takes possession of the body of a deceased person does not apply where the human remains were buried long ago and are largely decomposed).
- 52 *See id.* at 126 (setting out that the plaintiff's mother's remains were “taken up and ... commingled with many other remains, so as to make identification impossible ... and carted off to some unknown spot in said cemetery”).
- 53 *Id.* at 127 (quoting repealed OHIO REV. STAT. § 3764).
- 54 *Id.*
- 55 *Id.*
- 56 *See supra* Part II.B.
- 57 *Id.*
- 58 *See supra* notes 39-46 and accompanying text.
- 59 *See supra* notes 50-55 and accompanying text.
- 60 Trope & Echo-Hawk, *supra* note 4, at 135.
- 61 *See id.* (“The five states are California, Hawaii, Kansas, Nebraska and Arizona.”).

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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- 62 *Id.* at 136.
- 63 *See id.* (stating that “[i]n 1986, a number of Northern Cheyenne leaders discovered that almost 18,500 [Native American] human remains were warehoused in the Smithsonian Institution”).
- 64 25 U.S.C. §§ 3005-3006 (1990) (providing for the repatriation of Native American human remains and objects possessed by federal agencies and museums).
- 65 *See id.* § 3003 (setting mandatory inventory requirements applicable to federal agencies and museums).
- 66 *See* REPUBLICAN STUDY COMMITTEE, FEDERAL LAND AND BUILDING OWNERSHIP 1, available at <http://johnshadegg.house.gov/rsc/FedLandsOwnership603.pdf> (revealing that the federal government owns more than 670 million acres, or 29.7% of the land in the United States, more than 90% of which is located in the American West).
- 67 25 U.S.C. § 3002.
- 68 *See generally* 18 U.S.C. § 1170 (1990).
- 69 Trope & Echo-Hawk, *supra* note 4, at 140.
- 70 *See* 25 U.S.C. § 3001(9) (explaining that “‘Native American’ means of, or relating to, a tribe, people, or culture that is indigenous to the United States”).
- 71 *Id.* § 3005(a)(4).
- 72 *Id.* § 3005(13).
- 73 *See id.* (reflecting the concern of the drafters). Section 3005(13) reads:  
The acquisition of a Native American [cultural object] from an Indian tribe with ... the voluntary consent of an individual or group with authority to alienate such object is deemed to give the right of possession of that object, *unless the phrase so defined would ... result in a Fifth Amendment taking by the United States* (emphasis added).  
*Id.*
- 74 *See* Daniel J. Hurtado, *Native American Graves Protection and Repatriation Act: Does it Subject Museums to a Fifth Amendment Taking?*, 6 HOFSTRA PROP. L.J. 1, 18 (1993) (asserting that because human remains are quasi-property rightfully possessed by the descendants for the limited purpose of burial, it may be legally impossible for a museum to acquire a property interest in them).
- 75 *See* 25 U.S.C. § 3001(13) (“The original acquisition of Native American human remains ... obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe ... is deemed to give right of possession to those remains.”).
- 76 *See* 18 U.S.C. § 1170(a) (“Whoever knowingly sells purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains as provided in [NAGPRA], is guilty of a misdemeanor.”).
- 77 Hurtado, *supra* note 74, at 19.
- 78 *Id.* at 20.
- 79 25 U.S.C. § 3001(13).
- 80 367 F.3d 864 (9th Cir. 2004). In *Bonnichsen*, a group of scientists sought judicial review of the DOI’s decision that the nearly 10,000 year old remains of Kennewick Man were culturally affiliated with a coalition of Indian tribes. *Id.* at 868-69. The issue before the Court of Appeals was whether Kennewick Man’s remains were “Native American” and therefore subject to NAGPRA. *Id.* at 875. To be “Native American” under the statute, remains must be “of, or relating to, a tribe or culture that is indigenous to the United States.” *Id.* Thus, the Court reasoned, Kennewick Man is subject to NAGPRA only if the remains can be shown to bear some genetic or

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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cultural relationship to a presently existing tribe, people or culture. *Id.* Noting the great physical dissimilarity between the Kennewick Man and the tribal claimants, as well as the utter lack of evidence of cultural similarities, the Court ruled that the DOI's decision was not supported by substantial evidence. *Id.* at 880-81. Because **NAGPRA** did not apply, the scientists would be permitted to study the remains under the Archaeological Resource Protection Act. *Id.* at 882.

81 *See id.* at 882 (“We thus hold that Kennewick Man's remains are not Native American human remains within the meaning of **NAGPRA** and that **NAGPRA** does not apply to them.”).

82 *See id.* at 869 (noting that less than twelve crania older than 8,000 years have been found in the U.S., whereas Kennewick Man's skeleton was 90% intact).

83 *Id.* at 870.

84 *Id.*

85 *See id.* at 871 (referring to *Bonnichsen v. United States*, 969 F.Supp. 628, 645 (D. Or. 1997) “*Bonnichsen II*”).

86 *Id.* at 872.

87 *Id.*

88 *See id.* (describing the procedural history and outcome in *Bonnichsen v. United States*, 217 F.Supp.2d 1116 (D. Or. 2002) “*Bonnichsen III*”).

89 *See id.* at 875 (noting that “[t]he first inquiry is whether human remains are Native American within the statute's meaning”).

90 *Id.* at 875 (citing 25 U.S.C. § 3001(9)).

91 *Id.* (emphasis added).

92 *Id.* at 876.

93 *See id.* at 877 (stating that “[t]he Secretary by regulation has defined ‘Native American’ to mean ‘of, or relating to a tribe, people or culture indigenous to the United States’” (quoting 43 C.F.R. § 10.2(d))).

94 *See id.* (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” (explaining *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984))).

95 *Id.* at 876.

96 *Id.* at 880.

97 *Id.*

98 *See id.* at 881 (“One of the Secretary's experts ... concluded that modern day Plateau tribes' oral histories--some of which can be interpreted to refer to ancient floods, volcanic eruptions, and the like--are ‘highly suggestive of long-term establishment of the present-day tribes.’”).

99 *See id.* at 881 (discussing the inherent unreliability of such ancient oral histories). Specifically, the Court relied upon evidence in the record suggesting that oral histories change relatively quickly; that they may be based upon later observation of geological features rather than on eyewitnesses' accounts of ancient events; and that the oral histories introduced at trial may have come from a culture or group other than the one to which Kennewick Man belonged. *Id.*

100 *Id.* at n.10

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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- 101 *See* [Bonnichsen III](#), 217 F. Supp. 2d at 1124-25 (“[T]he lengthy administrative record ... strongly suggests that the Corps' primary objective in covering the site was to prevent additional remains or artifacts from being discovered, not to preserve the site's archaeological value or to remedy a severe erosion control problem as [the Corps] has represented to this court.”).
- 102 *See id.* at 1125 (“The Tribal Claimants demanded, and the Corps eventually agreed, that the site be ‘armored’ to provide ‘permanent protection’ against disturbances.”).
- 103 *See id.* (noting that the bill was awaiting the conference committee to resolve unrelated provisions when the Corps buried the site).
- 104 *See* [Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.](#), 455 F. Supp. 2d 1207 (D. Nev. 2006). In this case, the Native American Fallon Paiute-Shoshone Tribe requested that the United States Bureau of Land Management return the mummified body of a man now known as the Spirit Cave Man to the Tribe for reburial. *Id.* at 1209. The remains were inventoried and analyzed by the Nevada State Museum pursuant to the requirements of the [NAGPRA](#). *Id.* at 1210. The court found that the Bureau of Land Management's decision not to repatriate the Spirit Cave Man's remains was arbitrary and capricious because the agency failed to “fairly and adequately consider the evidence provided by the Tribe,” and gave “no cogent explanation why [the agency] chose to deny the repatriation request.” *Id.* at 1223.
- 105 *See id.* at 1223 (finding that the Bureau of Land Management's determination that the Spirit Cave Man's remains were not affiliated with any Native American tribe was arbitrary and capricious).
- 106 *See id.* at 1209 (describing the discovery, excavation, and placement of the Spirit Cave Man's remains in the Nevada State Museum).
- 107 *Id.* at 1210.
- 108 *Id.*
- 109 *Id.*
- 110 *Id.*
- 111 *See id.* at 1210-11 (explaining that the BLM had “implied that notification of the [Museum's] determination would be followed by a brief period for responses before a final determination [by BLM] was made”).
- 112 *See id.* at 1211 (“Finally, in August 2000, BLM released a 111 page report determining that the Spirit Cave Man remains were to be classified as unaffiliated.”).
- 113 *Id.*
- 114 25 U.S.C. § 3006(a) (1990).
- 115 *See id.* § 3006(b) (providing that the Committee is to comprise seven members). The members are to include three Indian religious leaders appointed by the Secretary of the Interior, three members selected by the Secretary from a list submitted by museum and scientific organizations, and one member appointed by the Secretary from a list of persons developed and consented to by the other six members. *Id.*
- 116 *Id.* § 3006(c)(4).
- 117 *See id.* § 3006(d) (“Any records or findings made by the review committee ... relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under ... this Act.”).
- 118 [Fallon Paiute-Shoshone Tribe](#), 455 F. Supp. 2d at 1212.
- 119 *See id.* (finding that in February of 2004 the tribe received a letter from the Director of the BLM stating that no further course of action was being contemplated at that time).

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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- 120 See *id.* at 1217 (“The Tribe claims both that BLM failed to observe procedures required by law and that its decision was arbitrary and capricious.”).
- 121 *Id.* at 1216.
- 122 *Id.*
- 123 See BENEDICT, *supra* note 1, at 89 (“[T]he [Spirit Cave Man’s] skull had a long, narrow vault, very atypical of Native Americans .... It was very uncommon for what one might find in the Great Basin or in any Indian in the past three thousand years.”).
- 124 See *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1221-22 (explaining that the BLM’s choice not to defend its position before the Review Committee was not unreasonable and did not fail to observe **NAGPRA’s** procedures).
- 125 See *id.* at 1222 (“[T]he Review Committee findings are indeed relevant when determining whether a government agency’s determination of non-affiliation is arbitrary or capricious.”).
- 126 See *id.* (“[I]nterested tribes may seek to prove affiliation by a preponderance of the evidence when a finding of non-affiliation is made.”); see also 25 U.S.C. § 3005(a)(4) (2008) (providing Native American tribes an opportunity to show cultural affiliation by a preponderance of the evidence); 43 C.F.R. § 10.9(b)(4) (requiring the government agency to request appropriate information from interested parties).
- 127 *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1223.
- 128 *Id.* at 1226.
- 129 *Id.* at 1225.
- 130 25 U.S.C. § 3001(2) (1990).
- 131 *Bonnichsen v. United States*, 367 F.3d 864, 877 (9th Cir. 2004).
- 132 See Owsley & Jantz, *supra* note 2, at 149 (asserting that the Spirit Cave Man’s “craniofacial morphology” falls outside the range of variation of all modern groups and so has a low probability of belonging to any modern group).
- 133 *Bonnichsens*, 367 F.3d at 881 (concluding that the “accounts [of oral history] are just not specific enough or reliable enough or relevant enough to show a significant relationship of the Tribal Claimants with Kennewick Man”).
- 134 See Owsley & Jantz, *supra* note 2, at 147 (explaining that data derived from the study of ancient remains discloses the complexity of the colonization of the Americas between 15,000 and 5,000 years ago). The data also suggests that “the populating of the Americas is likely to have involved higher levels of diversity than were present later, and consequently, high levels of extinction of some of the earlier groups.” *Id.* (internal citations omitted).
- 135 William A. Lovis, et al., **NAGPRA**: *Principles, History and Issues*, in LEGAL PERSPECTIVES ON CULTURAL RESOURCES 180 (Jennifer R. Richman & Marion P. Forsyth eds., Altamira Press 2004).
- 136 *Id.*
- 137 See 25 U.S.C. § 3006(c)(5) (1990) (discussing CUHR only under a recitation of the Review Committee’s responsibilities).
- 138 *Id.* § 3006.
- 139 *Id.*

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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- 140 See [Recommendations Regarding the Disposition of Culturally Unidentifiable Native American Human Remains](#), 65 Fed. Reg. 36,463 (June 8, 2000) (“Within each region, the appropriate Federal agencies, museums [and] Indian tribes ... [should] consult together and propose a framework and schedule to develop and implement the most appropriate model for their region.”).
- 141 See Disposition of CUHR, *supra* note 9, at 58,588 (claiming that **NAGPRA** authorizes the Review Committee to consult with the Secretary of the Interior in the development of regulations for the disposition of culturally unidentifiable human remains).
- 142 See Society for American Archaeology, Comments on 2007 Proposed Rule Relating to CUHR under **NAGPRA** (Jan. 14, 2008) [hereinafter SAA Comments], available at <http://www.saa.org/NEW/SAACUHRcomments.pdf> (contending that “[i]nsofar as CUHR is concerned, **NAGPRA** as enacted begins and ends with submission of [the Review Committee’s] recommendations”).
- 143 See *id.* (noting that it is an axiom of administrative law that “an agency’s ‘power to promulgate ... regulations is limited to the authority delegated’ to it by Congress” (quoting [Amalgamated Transit Union v. Skinner](#), 894 F.2d 1362, 1368 (D.C. Cir. 1990))).
- 144 See Patty Gerstenblith, *Cultural Significance and the Kennewick Skeleton: Some Thoughts on the Resolution of Cultural Heritage Disputes*, in CLAIMING THE STONES, NAMING THE BONES: CULTURAL PROPERTY AND THE NEGOTIATION OF NATIONAL AND ETHNIC IDENTITY 177 (Elazar Barkan & Ronald Bush eds., 2002) (asserting that § 3002(b) “provides that disposition of culturally unidentifiable Native American human remains will be determined by regulations to be promulgated by” the Review Committee and the Secretary).
- 145 25 U.S.C. § 3002(b) (providing that “Native American cultural items not claimed under subsection (a) shall be disposed of in accordance with regulations promulgated by the Secretary”).
- 146 *Id.* § 3001(3) (defining Native American cultural items as including human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony).
- 147 Section 3002(a) applies to “cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990 ....” *Id.* § 3002(a). Section 3002(b) applies only to those “cultural items not claimed under subsection (a).” *Id.* § 3002(b).
- 148 See Disposition of CUHR, *supra* note 9, at 58,588-58,589 (to be codified at 43 C.F.R. pt. 10.11(2)(i-iii)(A)) (providing that tribes which must be consulted include groups: (i) from whose tribal lands the remains were removed; (ii) from whose aboriginal lands the remains were removed; and (iii) bearing a cultural relationship to the land from which the remains were removed).
- 149 *Id.* at 58,589 (to be codified at 43 C.F.R. pt. 10.11(b)(2)(iii)(B)).
- 150 See *id.* at 58,585 (to be codified at 43 C.F.R. pt. 10.11(c)(1)(i-iii)) (establishing a hierarchy of claimants). The hierarchy is as follows: (i) tribes from whose land the remains were removed; (ii) tribes recognized as aboriginally occupying the area in which the remains were found; and (iii) tribes with (A) a cultural relationship to the region from which the remains were removed, or (B) where geographic affiliation cannot be determined, tribes with a cultural relationship to the region in which the museum or agency repository is located. *Id.*
- 151 *Id.*
- 152 See SAA Comments, *supra* note 142, at 4 (“[T]he proposed regulations are contrary to the administrative structure and policies that Congress enacted into law through **NAGPRA**.”).
- 153 Am. Ass’n. of Physical Anthropologists, Position Statement on the Dep’t. of the Interior’s Proposed Rule for the Disposition of Culturally Unidentifiable Human Remains 2 (Oct. 26, 2007) [hereinafter AAPA Position Statement], available at <http://www.friendsofpast.org/nagpra/0711AAPAcomment.pdf>.
- 154 *Id.*

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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- 155 See Disposition of CUHR, *supra* note 9, at 58,585 (changing the regulations so as to “require[] a museum or Federal agency to offer to transfer control of culturally unidentifiable human remains for which it cannot prove right of possession to Indian tribes or Native Hawaiian organizations”).
- 156 *Id.* at 58,589 (requiring that an agency that cannot prove a right of possession must return CUHR to tribes based on their geographical affiliation to the land or region where the remains were found). This geographic hierarchy for the disposition of human remains may be challenged if a different tribe can show a stronger cultural affiliation despite its lesser geographic connection to the remains under the regulations hierarchy. *Id.*
- 157 See generally Disposition of CUHR, *supra* note 9.
- 158 *Id.* at 58,588.
- 159 Ohio Archaeological Council, OAC Comments on **NAGPRA** Rule for the Disposition of Culturally Unidentifiable Human Remains (Jan. 6, 2008) [hereinafter OAC Comments], available at [http://www.ohioarchaeology.org/joomla/index.php?option=com\\_content&task=view&id=230&Itemid=45](http://www.ohioarchaeology.org/joomla/index.php?option=com_content&task=view&id=230&Itemid=45).
- 160 See *id.* (“[T]he proposed rule’s broadening of the intent of **NAGPRA** appears to be an attempt to circumvent the Ninth Circuit Court’s ruling in the Kennewick Man case ....”).
- 161 [Bonnichsen v. United States](#), 367 F.3d 864, 876 (9th Cir. 2004).
- 162 See SAA Comments, *supra* note 142, at 5 (“A finding that remains or items are Native American is the first step to trigger **NAGPRA’s** applicability.”).
- 163 *Id.* at 16.
- 164 AAPA Position Statement, *supra* note 153, at 3 (“The definition of right of possession in the proposed regulations makes it logically impossible for museums to have a legal right of possession to any of their [CUHR].”).
- 165 25 U.S.C. § 3001(13).
- 166 SAA Comments, *supra* note 142, at 16 (asserting that CUHR “are *by definition* culturally unidentifiable, which means that it is *impossible* to have obtained ‘voluntary consent of an individual or group that had authority of alienation’” (internal citations omitted)).
- 167 See Comment Letter from Ryan M. Seidemann, Esq., to Sherry Hutt, Manager of the Nat’l. **NAGPRA** Program, Nat’l. Park Serv. (Nov. 19, 2007) [hereinafter Seidemann’s Comment Letter], available at <http://www.friendsofpast.org/nagpra/0711Seidemannletter.pdf> (“Congress did not intend for **NAGPRA** to simply give any remains to any existing group with no consideration for cultural affiliation.”).
- 168 Trope & Echo-Hawk, *supra* note 4, at 141 (quoting H.R. REP. NO. 101-877, at 14 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4373).
- 169 See 25 U.S.C. § 3005(a)(4) (providing that a tribe may show cultural affiliation on the basis of a variety of factors, including geography).
- 170 Seidemann’s Comment Letter, *supra* note 167, at 5.
- 171 SAA Comments, *supra* note 142, at 12.
- 172 See OAC Comments, *supra* note 159 (explaining that the final disposition of human remains to culturally unaffiliated tribes is a result expressly not intended by Congress).
- 173 See generally Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and the Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175 (1992).

THE NATIVE AMERICAN GRAVES PROTECTION AND..., 15 Wash. & Lee J....

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- 174 *See supra* notes 20-26 and accompanying text.
- 175 *See supra* note 25 and accompanying text.
- 176 *See supra* notes 12, 18 and accompanying text.
- 177 *See* Trope & Echo-Hawk, *supra* note 4, at 125 (“National estimates are that between one hundred thousand and two million deceased Native people have been dug up from their graves for storage or display by government agencies, museums, universities, and tourist attractions.”).
- 178 *See supra* note 136 and accompanying text.
- 179 *See, e.g.*, AAPA Position Statement, *supra* note 153, at 1 (describing the APAA's initial support for **NAGPRA**).
- 180 *See supra* note 95 and accompanying text.
- 181 *See supra* note 96 and accompanying text.
- 182 *See supra* notes 96-99 and accompanying text.
- 183 *See supra* note 167 and accompanying text.
- 184 *See supra* notes 165-169 and accompanying text.
- 185 SAA Comments, *supra* note 142, at 21.
- 186 *See supra* notes 154-163 and accompanying text.
- 187 *See e.g.*, S. 2843, 105th Cong. § 14 (2004) (proposing to add the words “or was” after the word “is” in 25 U.S.C. § 3001(9), effectively expanding **NAGPRA's** definition to potentially include ancient CUHR); H.R. 2893, 105th Cong. (1997) (proposing to amend **NAGPRA** by adding provisions specifically authorizing the study of CUHR found on federal lands).

15 WLLCRSJ 227