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Student Note

# YOU'RE NOT NATIVE AMERICAN--YOU'RE TOO OLD!: BONNICHSEN V. UNITED STATES EXPOSES THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

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## I. Introduction

In July 1996, two young men stumbled upon a skull along the Columbia River near the town of Kennewick in Southern Washington. [1] They called the police, the police called the coroner, and the coroner called Dr. James Chatters, a local archaeologist. [2] Initially, Dr. Chatters believed the skull probably belonged to an early European settler. [3] The skull was accompanied by virtually the entire skeleton. [4] Dr. Chatters noticed something was embedded in the skeleton's pelvis. [5] After X-ray and CT scans, it appeared that the object was a stone projectile spear point, resembling a Cascade Point. [6] Chatters was confused; he could not understand how he could have a white European settler with a stone projectile point of that antiquity embedded in his pelvis. [7] The initial impression of the physical features of the skeleton indicated that this man had possibly been the first Western settler of the area, the stone point, however, indicated that this man was 5000 to 9000 years old. [8] Chatters decided to obtain a ***138** radiocarbon date for the skeleton, the best way to determine its age. [9]

The radiocarbon date was a complete shock. [10] Kennewick Man, so named because of the location in which his remains were found, was approximately 9500 years old. [11] This was no European settler; this was possibly the most significant find in the history of the Western Hemisphere--a find that could contribute significantly to the study of the peopling of the Americas. [12] Dr. Chatters and some of his colleagues excitedly made plans to send the skeleton to Washington, D.C., where it could be exhaustively studied at the Smithsonian Institution. [13] However, before that could happen, citing their authority under the Native American Graves Protection and Repatriation Act (NAGPRA), [14] a coalition of five Native American groups (the coalition) [15] claimed the skeletal remains and demanded that they be returned to them for a burial of their choosing. [16]

In October 1996, the United States Army Corps of Engineers (the Corps) stepped in, cited NAGPRA, claimed the skeleton, and by filing notice of intent to repatriate, announced its plans to repatriate the skeleton to the coalition. [17] Chatters and the scientific community, hoping for a chance to study Kennewick Man, discussed the disposition of the skeleton with the Corps. [18] The Corps, however, was firm in its decision to repatriate. [19] Seeing no other recourse, the scientific community filed suit in the United States District Court for the District of Oregon seeking to prevent the transfer of the skeleton to the coalition and seeking permission to study the remains. [20] Thus was born Bonnichsen v. United States. [21]

***139** Bonnichsen, at its most basic, was a fight over bones.[22] Bonnichsen was also the first case to fully test NAGPRA.[23] This note explores both Bonnichsen and NAGPRA. After developing the history of and inspiration behind this relatively young Act, the note explores the treatment NAGPRA received from the district court and the Ninth Circuit in Bonnichsen. Ultimately, after discussing various solutions and methods of statutory interpretation that the courts should have employed, this note concludes that NAGPRA was insufficient to resolve the Bonnichsen conflict, and, as it is currently worded, NAGPRA is insufficient to honor the intent and purpose behind its enactment.

## II. Cultural Property and the Inspiration Behind NAGPRA

During the 1980s, the concept of cultural property began to move forward in the conscience of America.[24] Specifically, the previously overlooked issue of Native American cultural property rights began to move toward treatment consistent with traditional American property law.[25] Prior to this time, various courts had faced issues relating to the destruction and misappropriation of Native American gravesites and other cultural items.[26] In many of these cases, the common law property rights that govern much of American property law failed to protect Native American interests.[27] The shift toward recognition of Native Americans' cultural property rights took place mainly in the legislature as a response to these failures of the judicial system.[28]

### A. Cultural Property Defined

Commentators define cultural property in various ways. They have ***140** described it as "an evolving, irreplaceable resource that defines the existence of a group of people . . . [and] . . . provides the underpinning of group identity."[29] Another description states that "[c]ultural property provides cultural, religious, historic, artistic, and scientific information about its creators and the context of its creation."[30] Still others suggest that cultural property includes such things as masks, sculptures, and engravings, as well as other antiquities, art, and artifacts.[31] It is a tremendously nebulous term.

One way to define cultural property is to look to the legal structure that exists to protect cultural property. The problem with this framework is that it allows only those people with access to the legal structure to be in position to define cultural property. As a result, entire categories of cultural property relating to particular groups of people are left out of the definition and are therefore lacking legal protection.[32] For far too long, that was the case with items of Native American cultural property.

### B. The Enactment of NAGPRA

Prior to the enactment of NAGPRA, much of the federal legislation concerning cultural property and items of historic significance failed to acknowledge the ownership rights of Native Americans in Native American items.[33] Beginning with the Antiquities Act of 1906,[34] and continuing with the National Historic Preservation Act (NHPA)[35] and the Archaeological Resources Protection Act (ARPA),[36] the United States has continually shown a desire to prevent the destruction of American history. While the legislation did attempt to help Native American groups with preservation of their own culture, the legislation was primarily concerned with the preservation of historic American culture for the benefit of all.[37]

Congressional findings associated with the NHPA note that it is in the ***141** public interest to protect "historical and cultural foundations" of America in order to give a "sense of orientation to the American people."[38] Similarly, Congress noted in

enacting the ARPA that archaeological resources are an "irreplaceable" aspect of American history.[39] While acknowledging the special historical significance of items of cultural property, none of the federal legislation prior to NAGPRA specifically noted the rights of Native Americans to custodianship and ownership of items of Native American cultural property.

The enactment of NAGPRA in 1990 signaled the United States' explicit recognition of Native American ownership rights in Native American cultural property and the extensive prior mistreatment of items of Native American cultural property.[40] Congress intended NAGPRA to make up for years of mistreatment of Native American burial sites, artifacts, and other items of cultural property.[41] Speaking before the Senate, Senator Inouye noted the enthusiasm with which Army medical personnel and private collectors responded to the directive from the Army Surgeon General to collect Indian remains in the 19th Century.[42] He noted that the human remains displayed in American museums are invariably those of Native Americans and never those of whites or European settlers.[43] He spoke of the message this sends to the rest of the world--a message that Native Americans are "inferior."[44] He called it racism.[45]

Congress enacted NAGPRA to address this past treatment of Native American ***142** cultural items and recognize the particular importance many Native groups place on the act of burying the dead.[46] Senator Inouye noted "the important role that death and burial rites play in Native American cultures," and that these "civil rights" have been violated far too often.[47] Senator Akaka called burial of Native Hawaiian ancestors the "epitome of cultural respect."[48] Senator Moynihan called the NAGPRA legislation "hugely important."[49] These statements from members of Congress make clear that NAGPRA was remedial legislation intended to redress the past wrongful treatment of Native American cultural items.

NAGPRA primarily addresses two areas. First, it protects Native American ownership of human remains and items of cultural significance in burial sites on federal and tribal land.[50] Second, it mandates an inventory and the repatriation of culturally significant items that are housed by federal agencies and museums that receive federal funding.[51] Additionally, a criminal statute accompanies NAGPRA that penalizes trafficking in Native American remains and cultural items.[52]

The sections of NAGPRA particularly implicated by Bonnichsen are §§ 3001-02.[53] NAGPRA begins with § 3001, a definitional section, wherein it defines terms such as "burial site,"[54] "cultural affiliation,"[55] "Indian tribe,"[56] and "Native American,"[57] among others. Section 3002 establishes the manner in which ownership of the remains and objects is established; it offers a prioritized list of the groups with whom ownership shall reside.[58]

***143** Section 3002 is very accessible and comprehensive. It clearly reflects the Congressional intent to return items of Native American cultural property to Native American groups. Section 3002 begins by stating that ownership of human remains should reside with the lineal descendants.[59] If the lineal descendants cannot be ascertained, ownership is determined through a prioritized list.[60] Congress' choice to create this list makes clear that its purpose was to ensure that these items of cultural property are returned to the appropriate Native American groups.

## III. History and Treatment of Bonnichsen v. United States

On October 23, 1996, the District Court for the District of Oregon held a hearing on the scientists' request for a temporary restraining order.[61] Instead of a formal injunction, the Corps agreed to give the scientists at least fourteen days notice before moving forward with any decision regarding disposition, to allow the scientists time to seek the desired relief with the court.[62]

The Corps then filed a motion to dismiss arguing that (1) the scientists lacked standing, (2) because the Corps had not made a final decision, the scientists' claims were not ripe, and (3) because the Corps' earlier decision was no longer in effect, the claims were moot.[63] The district court rejected each of these claims.[64]

### A. Specific Instructions on Remand

In addition to rejecting the Corps' claims and denying their motion to dismiss, the district court vacated all prior Corps determinations and remanded the case with very specific instructions for the Corps.[65] The Corps was to consider seventeen items specifically listed by the district court in making its determination of the skeletal remains' ultimate disposition.[66] The district court listed the items the Corps was to consider in its decision.[67]

### *144 B. The Department of the Interior's Determinations on Remand

In 1999, pursuant to the instructions from the district court, the Corps of Engineers and the United States Department of the Interior (DOI)[68] began to *145 reassess the evidence and the remains.[69] In addition to reassessing the existing evidence, the DOI ordered additional radiocarbon dating.[70] While the condition of the samples of skeletal remains in 1999 was worse than that of those in 1996, the 1999 radiocarbon dates were substantially similar to the initial 1996 date.[71]

#### 1. The Department of the Interior Correctly Described the Remains as Native American

In January of 2000, the DOI determined that the Kennewick remains are Native American under NAGPRA and, as such, began to resolve the question of proper disposition.[72] The analysis used by the DOI in its Native American determination is described in a January 11, 2000, memorandum from the Departmental Consulting Archaeologist, Francis P. McManoman, to the Assistant Secretary, Donald J. Barry (the memorandum).[73] On September 25, 2000, the DOI announced its final determination that the remains should be given to the coalition.[74] The evidence and rationale behind the DOI's determination are detailed in a September 21, 2000, letter written by then Secretary of the Interior, Bruce Babbit, to then Secretary of the Army, Louis Caldera (the letter).[75]

In the memorandum, the DOI states that "[w]e now have sufficient information to determine that these skeletal remains should be considered 'Native American' as defined by NAGPRA."[76] The DOI based this determination in large part on the radiocarbon dates.[77] The DOI found additional support for their determination in the "results of the earlier documentation, examination, and analysis of the remains themselves, sediment analysis . . ., analysis of the [projectile] point embedded in the [pelvis] of the remains, and geomorphologic studies near the discovery site."[78]

#### *146 2. The Department of the Interior Properly Found a Cultural Affiliation

In the letter regarding the cultural affiliation of the Kennewick remains, Secretary Babbit asserted that the DOI considered many factors in its analysis, including the purpose of the statute, the general emphasis NAGPRA places on returning Native American remains and cultural items to Indian tribes, and the guidance offered by the regulations associated with NAGPRA.[79] He stated that the "DOI finds that, in this specific case, the geographic and oral tradition evidence establishes a reasonable link between these remains and the present-day Indian tribe claimants."[80] Based upon these findings, Secretary Babbit stated that it is the DOI's determination that the appropriate disposition of the Kennewick remains is to repatriate the remains to the coalition.[81]

### C. The Claims Decided by the District Court

As a result of these findings by the Department of the Interior and its second determination to repatriate the Kennewick remains, the scientists filed an amended complaint in the district court.[82] The first claim sought judicial review of the DOI's determination on remand.[83] The second claim alleged various violations of NAGPRA.[84] The third and fourth claims alleged violations of the National Historic Preservation Act and the Archaeological Resource Protection Act.[85] The fifth alleged that the DOI violated the Freedom of Information Act.[86] The sixth claim was under the Declaratory Judgment Act, while the seventh sought mandamus relief through an order compelling access to the Kennewick remains for study.[87] As with the initial complaint, the scientists requested injunctive relief that would prohibit the repatriation of the Kennewick remains and declare their right to study them.[88]

The district court ruled that the Kennewick remains are not Native American within the meaning of NAGPRA.[89] As a result, the coalition appealed ***147** the district court's decision to the Court of Appeals for the Ninth Circuit.[90] The Ninth Circuit affirmed the district court's decision.[91]

### D. NAGPRA's Applicability to the Kennewick Remains

NAGPRA and its protections do not apply to remains not characterized as Native American.[92] As a result, the threshold question facing the district court and the Ninth Circuit was whether the skeleton is Native American within the meaning of NAGPRA.[93] Both courts answered this threshold question in the negative.[94] The district court reasoned that Native American, as used by NAGPRA, requires a nexus with a current Native American tribe.[95] The definition of Native American as used in NAGPRA reads: "Native American means of, or relating to, a tribe, people, or culture that is indigenous to the United States."[96] The district court interpreted this language to unequivocally mandate a clear connection from the skeleton to a present population.[97] As the court stated: "use of the words 'is' and 'relating' in the present tense requires a relationship to a presently existing tribe, people, or culture."[98]

The district court reached this conclusion by borrowing from other definitional sections of NAGPRA to support its contention that the present day requirement it created was indeed intended by Congress.[99] The court stated that the present day nexus requirement is "consistent with [NAGPRA]'s definition of the term 'sacred objects' as meaning 'ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents'" (emphasis by the court).[100]

Human remains are not the same as sacred objects, however.[101] Sacred objects are still utilized today by Native Americans in religious and cultural ***148** ceremonies.[102] In contrast, the coalition believes that human remains must remain buried and undisturbed and that it is their responsibility to ensure the protection of buried human remains.[103] The court's interpretation of the definition of Native American is in conflict with this belief.

The court also borrowed from NAGPRA's definition of cultural affiliation, which does require a relationship with a present day Indian tribe. [104] The court concluded that, given this consistent use of the present tense, it is reasonable to interpret NAGPRA as a manifestation of congressional intent to require a nexus with some presently existing, indigenous tribe. [105]

The Ninth Circuit affirmed the district court's analysis and its requirement that the human remains bear a relationship to a presently existing tribe before the remains will be characterized as Native American. [106] It noted that when interpreting a statute, courts are to give words their ordinary meaning. [107] Based on this, the Ninth Circuit affirmed the district court's analysis of Congress' use of the word 'is.' [108] The district court's analysis, however, was flawed. Given that the Ninth Circuit affirmed the district court in all respects, and effectively adopted its reasoning, this article's analysis focuses on the district court and its treatment of the issues.

### E. The District Court Erred in Its Analysis

The statutory interpretation employed by the district court was incorrect in two ways. First, the district court improperly imported the present tense requirement. Second, this interpretation went too far and defeated the purpose with which Congress enacted NAGPRA. NAGPRA is remedial legislation. [109] It is also Indian Law. [110] Both of which must influence the manner in which NAGPRA is interpreted. Additionally, when an agency is authorized to interpret and control the administration of a statute, courts should defer to the agency's ***149** interpretation. [111]

1. NAGPRA Is Remedial Legislation

Legislation whose purpose is to remedy some historical wrong must be construed broadly in order to effectuate its purpose. [112] Congress intended NAGPRA to remedy the past treatment of Native American burial sites, artifacts, and other items of cultural property. [113] The district court's incredibly restrictive reading of the text of NAGPRA, however, frustrates that purpose. It is clear from the difficulty the district court experienced that NAGPRA, and specifically the definition of the term Native American, contains some ambiguity. To resolve this ambiguity, the district court imported a present tense nexus requirement that was not written by Congress. The district court began its statutory analysis by stating "[t]he objective of statutory interpretation is to ascertain the intent of Congress." [114] The court went on to assert that an inquiry into the intent of Congress begins with the "plain language" of the statute and that words are to be given their "plain meaning." [115] Rather than follow its own roadmap, the district court instead imputed meaning to NAGPRA that does not appear in its text, and was not intended by Congress.

Had the district court interpreted NAGPRA in its remedial light, Congress' intent would not have been frustrated. The Kennewick remains are clearly pre-Columbian (pre-1492). [116] As such, the remains are not European, nor are they African. Simply put, the antiquity of these remains is sufficient to establish them as falling within the definition of Native American under NAGPRA. [117] NAGPRA requires simply that the remains be "of, or relating to, a tribe, people or culture that is indigenous to the United States." [118] The Kennewick Man remains lay in an area of the United States that is now the southern portion of the state of Washington. [119] The affiliation of these remains to any present day group is irrelevant to an inquiry into whether the remains are Native American.

***150** The Department of the Interior employed the correct analysis. The DOI found that Native American under NAGPRA "refers to human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group

may have begun to reside in this area." [120] The DOI also noted, appropriately, that issues relating to cultural affiliation, including a present day nexus, are inappropriate for an inquiry into whether or not the remains are Native American. [121]

2. NAGPRA Is Indian Law

In addition to being remedial legislation, NAGPRA is also Indian Law. [122] As such, the interpretation of the statute must be liberal. [123] In Yankton Sioux Tribe v. United States Army Corps of Engineers, the district court for the district of South Dakota properly interpreted NAGPRA as Indian Law. [124] In interpreting the "intentional excavation" and "inadvertent discovery" provisions of §§ 3002(c) and (d) of NAGPRA, the court stated: "[the defendant's] interpretation . . . is inconsistent with the canon of construction that statutes 'are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" [125]

The district court should have employed the Indian Law canon of statute interpretation. This is especially true considering that the language of the statute describes NAGPRA as Indian Law. [126] Section 3010 of NAGPRA, entitled "Special relationship between the Federal Government and Indian tribes and Native Hawaiian organizations" reads: "[t]his chapter reflects the unique relationship between the Federal Government and Indian tribes." [127] Had the district court acknowledged that NAGPRA is Indian Law and employed the Indian Law canon of construction, the Kennewick remains would be classified as Native American under NAGPRA and the remedial intent behind the statute would not have been frustrated. Considering the particular language included by Congress referring to the special relationship between the federal government ***151** and Indian tribes, the district court should have employed such an interpretation.

3. The Court Should Show Deference to the Department of the Interior's Findings

The DOI's determinations are entitled to judicial deference. In Chevron U.S.A. v. Natural Resources Defense Council, Inc., the United States Supreme Court discussed the deference due to agency determinations. [128] The Court stated: "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." [129] The Court particularly noted that when the interpretation involves opposing policies and an understanding of the statute requires more than "ordinary knowledge" of the legislation's subject matter, deference is especially appropriate. [130] While interpreting Chevron, the Court stated in United States v. Mead Corporation that when Congress has conferred authority to an agency respecting the administration of a statute, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." [131]

Contrary to the district court in Bonnichsen, other courts analyzing NAGPRA claims have correctly employed this type of deference. In Na Iwi O Na Kupuna O Mokapu v. Dalton, the United States District Court for the District of Hawaii described the type of deference that should be used. [132] Noting that the National Park Service (a bureau within the Department of the Interior) is the agency charged with implementing NAGPRA, the court stated that "substantial deference" is due to the Park Service. [133]

In the Bonnichsen dispute, the DOI's interpretation was not procedurally defective, arbitrary, capricious, or contrary to NAGPRA. The district court, however, noted six facts that "concerned" the court in regard to the DOI's treatment of the case. [134] The court expressed concern with the DOI's (1) furnishing the coalition with advance copies of documents, (2) meeting with the coalition throughout the decision-making process, (3) sending letters to the coalition regarding the decision-making process, (4) notifying the coalition that a particular issue was under consideration and giving the coalition time to ***152** supplement

the record, (5) refusing to allow the scientists access to some materials in the record before the record was closed, and (6) burying the site in which the Kennewick remains were found. [135] Using these concerns, the court concluded that the DOI's final determinations were not made by a "neutral and unbiased decision maker." [136]

None of these concerns, however, are sufficient to overcome the deference due to the DOI. The DOI asserted sufficient reasons for the district court's concerns. For example, the DOI noted that the Corps buried the discovery site for purposes of erosion control. [137] The fact that the district court remanded the case to the Corps, requesting that it make determinations regarding the disposition of the remains, suggests that the court should respect those determinations. [138]

The district court should have deferred to the DOI in its interpretation of NAGPRA. This is especially true considering the relative level of expertise the DOI and the Corps possess regarding the relationship between the United States and Native American groups. This expertise is illustrated by the DOI's website welcome address that recognizes and honors the "special responsibilities to American Indians, Alaska Natives and affiliated Island communities." [139] Considering the vast scope of the projects and activities of the Corps and the fact that many of these projects involve work in and around Native American land, the Corps regularly interacts with Native American groups. [140] Additionally, at the time the Bonnichsen litigation began, sixteen claims had been filed invoking NAGPRA's civil remedies. [141] Of the sixteen, twelve claims included a Native American group as a party, and twelve included a federal agency as a party, with the Corps being the most common federal agency. [142]

**F. The Remains Show a Cultural Affiliation to the Coalition**

As noted above, the structure of NAGPRA allows cultural affiliation to determine the ownership of the remains if the remains cannot be determined to be the lineal descendants of any Native American group. [143] Having found the ***153** Kennewick remains to not be Native American as defined by NAGPRA, rendering the remains outside of NAGPRA's reach, the district court in Bonnichsen nevertheless analyzed whether a cultural affiliation exists between the remains and any Indian tribe. [144] While this was unnecessary to the final disposition of Bonnichsen, the district court performed the analysis in anticipation of appellate review and consideration for the interest of judicial economy and the creation of a complete record. [145]

Again, the court employed a more restrictive interpretation than Congress intended. The language of NAGPRA defines cultural affiliation as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe . . . and an identifiable earlier group." [146] While this definition clearly expresses congressional intent to require a connection with a present day Indian tribe, the district court was too restrictive in its analysis and determination that a cultural affiliation was lacking. The district court concluded that the DOI "(a) did not adequately determine 'an identifiable earlier group' to which the Kennewick [remains] . . . belonged . . ., (b) did not adequately address the requirement of a 'shared group identity,' (c) did not articulate a reasoned basis for the decision . . ., and (d) reached a conclusion that is not supported by the reasonable conclusions of the . . . record." [147]

These conclusions by the district court are contrary to both the purpose of NAGPRA and the procedure followed by the DOI. Following the hierarchical priority listing in NAGPRA's ownership section, the DOI first determined that a lineal descendant could not be determined, so a claim of custodianship could not be validated under § 3002(a)(1). [148] This was due in large part to the extreme antiquity of the remains. [149] The lack of a lineal descendant forced the DOI to examine whether the coalition's claim to the remains could be validated using the cultural affiliation analysis called for by § 3002(a)(2)(B). [150] The DOI "reviewed geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, and other relevant

information and expert opinion evidence" in making its determination. [151] Similar to its interpretation of Native American, the DOI employed the proper canons of statutory interpretation and correctly noted that "the determination is for the [DOI] to make as the one that, on the evidence, would best carry out the purpose ***154** of NAGPRA as enacted by Congress." [152]

The district court, contrary to both the DOI's method and the purpose of NAGPRA, employed a much too narrow interpretation of cultural affiliation under NAGPRA. If a lineal descendant cannot be ascertained, NAGPRA offers a prioritized list of those with whom ownership of Native American cultural items should lie. [153] The second of these listed options is the cultural affiliation option. [154] Ownership of the remains is to lie with the "Indian tribe . . . which has the closest cultural affiliation" with the remains (emphasis added). [155] The inclusion of the word "closest" suggests recognition on the part of Congress that determinations of cultural affiliation are not precise. Because such determinations are not precise, Congress intended to allow some latitude when deciding whether or not a particular cultural item possesses a cultural affiliation with a Native American group. Employing the type of interpretation Congress intended, the DOI determined that the tribal claimants had the closest cultural affiliation with the remains. [156] The district court should have recognized this affiliation.

Similar to the analysis of Native American, the district court should have employed the canons of construction, which allow for a broad interpretation of the statute. The court should have honored the remedial purpose of the legislation with a broad interpretation. The court should have also employed an interpretation consistent with the fact that NAGPRA is Indian law and all ambiguities are to be resolved in favor of and in benefit to the Native Americans. Additionally, the district court should have deferred to the DOI and its determinations that the skeletal remains are culturally affiliated with the tribal claimants. The court did none of these things, and as a result, the purpose of this remedial statute was entirely frustrated.

## IV. The Ninth Circuit's Treatment of Bonnichsen

The Ninth Circuit affirmed the district court's determination that the Kennewick remains are not Native American within the meaning of NAGPRA. [157] Having affirmed the district court in its determination that the remains are not Native American, and therefore NAGPRA does not apply, the Ninth Circuit did not address the district court's cultural affiliation determination. [158] In its decision, the Ninth Circuit echoed the analysis used by ***155** the district court. [159] It determined that Congress intended a present tense connection with an existing tribe and agreed that such a connection was lacking between the Kennewick remains and the coalition. [160]

## V. Current Status of Bonnichsen v. United States

Unfortunately, even given their disappointment with the Ninth Circuit's decision, [161] on July 19, 2004, the coalition announced its decision not to pursue the Kennewick Man dispute in the United States Supreme Court. [162] The coalition based its decision on "the availability of financial resources, the uncertainty of whether the Supreme Court would even hear the case, and the risk that an unfavorable Court decision could become law." [163] In the press statement accompanying the decision, Armand Minthorn, a member of the Confederated Tribes of the Umatilla Indian Reservation's Board of Trustees, noted that "NAGPRA needs to be strengthened so that it fulfills Congress' original intent." [164] Minthorn continued:

> The courts have failed NAGPRA, and the tribes as well. Our only option is to work with all tribes, beginning in 2005, on a strategy to strengthen the law so that inadvertent discoveries like [Kennewick Man] will be protected. In the administrative process and before the district court, we will continue to try and protect [Kennewick Man] as best we can from repetitive destructive testing. [165]

As it stands, from the perspective of custodianship litigation, Bonnichsen is dead. Unfortunately, it leaves behind a decision that will control future NAGPRA disputes within the Ninth Judicial Circuit and, given the decision's status as the first to fully explore NAGPRA, will likely inform other NAGPRA disputes across the country. The current status of NAGPRA is in jeopardy. The courts formally frustrated Congress' intent. Congress must now, again as a result of judicial failure, step in and repair NAGPRA.

## VI. Congress Must Address the Flaws in NAGPRA

Regardless of any court determinations, NAGPRA remains fundamentally ***156** flawed. Beyond the textual insufficiencies exposed by the Bonnichsen litigation, NAGPRA has contributed other frustrations. As one critic notes:

> [P]assage of the law has created practical problems for tribal governments struggling to address the sad, frustrating, and expensive consultation and repatriation process. It has created an added layer of cynicism about American intentions as some museums drag their feet in meeting the law, therein placing the burden of action on the already strapped tribes. And what may be even worse, it has created new sources of conflict between and among Native American peoples themselves over issues of procedure, jurisdiction, affiliation, and interpretation. The law, which was designed to redress longstanding wrongs, has been nothing less than a nightmare for many of its participants, even as it stands as one of the most powerful human rights mechanisms in United States history. [166]

The treatment NAGPRA received by the Bonnichsen courts has certainly contributed to this growing frustration and cynicism. If it remains unaddressed, these frustrations surrounding NAGPRA will eventually function to defeat the purpose with which it was enacted. Congress must not allow NAGPRA to be crushed under the weight of its own insufficiency.

Specifically, from a textual perspective, NAGPRA is inexcusably ambiguous. Congress must address this ambiguity. The Bonnichsen court imputed a present day nexus requirement to the definition of Native American that Congress did not intend. The court noted that while "courts do not assume that Congress intended to create odd or absurd results," treating all pre-Columbian remains as Native American could create some odd results. [167] The court hypothesized that such an application could result in remains which were clearly not Native American being classified as such for purposes of NAGPRA. [168] The district court was aware of a situation where African-American skeletal remains of significant historical value were nearly hastily repatriated as Native American under NAGPRA until the mistake was noticed and corrected by Dr. Douglas Owsley, one of the Bonnichsen scientist litigants. [169] This may have contributed to the court posing this extreme ***157** hypothetical and its decision to impute the present day nexus requirement. While this contention may initially seem extreme and highly unlikely, it further exposes NAGPRA's insufficiency. Congress needs to amend the statute and in doing so must deal with all of the issues brought to light by Bonnichsen.

### A. Congress Must Address the Definition of Native American

A particularly problematic section of NAGPRA is the definition of Native American. The definition calls for a relation to a "tribe, people, or culture that is indigenous to the United States." [170] NAGPRA defines fifteen terms, none of which are the term indigenous. [171] Indigenous and Native American both must be defined in such a way so as to make clear that no present-day nexus is required for the disposition of the disputed remains to be governed by NAGPRA. By changing the definition of Native American to read "or culture that is or was indigenous to the United States," [172] it would be clear that no present day

nexus is required for an item to be classified as Native American and governed by NAGPRA. As it reads now, potential exists for more frustration of Congress' intent.

A Congressional solution must also include a definition of the term indigenous. Congress needs to define the term so that those interpreting NAGPRA are not forced--as was the district court in Bonnichsen--to look up the term in a dictionary.[173] Indigenous means "having originated in and being produced, growing, living, or occurring naturally in a particular region or environment."[174] The definition relied upon by the district court included the words "not introduced."[175] Such a definition is particularly problematic when dealing with skeletal remains of the antiquity of those at issue in Bonnichsen. Every human being who has ever been in North America was introduced at some point in time.[176] As a result, under such a definition of indigenous, no human or human remains in North America could be considered indigenous. This cannot be what Congress intended when enacting NAGPRA. To prevent ***158** further confusion and multiple interpretations of the term indigenous, Congress must define it.

### B. Congress Must Describe the Requirements of Cultural Affiliation

Congress must also review the treatment the courts have given to the term cultural affiliation. In particular, Congress must address the level of affiliation NAGPRA requires. Finds like the Kennewick remains certainly are rare,[177] but the rarity of such occurrences does not excuse Congress from addressing the issues brought to light by Bonnichsen.

### C. Congress Must Consider the Concerns of Science

This note has argued that not only did both the district court and the Ninth Circuit interpret NAGPRA improperly in dealing with the Bonnichsen litigation, but also that Congress must address the language of NAGPRA, also in favor of claimants in the position of the coalition in Bonnichsen. The courts and Congress should not wholly discard the desires and claims of the scientific community, however. As one scientist noted: "[one] of this country's highest values [is] the objective pursuit of knowledge using scientific methods."[178] He went on to note that another of the country's highest values is "respect for people's religious traditions and convictions."[179] Bonnichsen is exemplary of what can happen when these two values come in conflict with each other.

The Kennewick remains are, from an archaeological and scientific perspective, phenomenal. They are the most well preserved and most complete ancient North American skeletal remains.[180] They have the potential, if studied, to shed much needed light on the questions of who the first Americans were, when they arrived, from where they came, and, possibly, why they came.[181] Currently, the theories about when the peopling of the Americas began range from 150,000--200,000 years ago to within the last 12,000 years.[182] These remains can contribute significantly to an area of science in which there is very little agreement.

Congress has spoken on the issue, although it has done so somewhat ambiguously. In enacting NAGPRA, Congress intended to create a mechanism through which Native American groups could obtain custody of items of cultural ***159** significance. In speaking to the Senate about the NAGPRA legislation, Senator Inouye stated that the NAGPRA legislation "is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights."[183] Congress intended to create an environment of dialogue and cooperation between the scientific/museum community and Native American groups, something that prior to NAGPRA, had been all too often lacking.[184]

Congress, however, did not speak to the disposition of the cultural items once custodianship is determined through **NAGPRA**.[185] From the statute, it is clear that Congress intended decisions involving ultimate disposition, whether it be final interment or otherwise, to be made by those obtaining custody.[186] If a determination under **NAGPRA** results in the Native American custodianship of an item of cultural property, contrary to the wishes of a group of scientists, the scientists are nevertheless able to enter into discussions with the Native American group regarding the possibility of study. Congress took note of one example of an agreement between a Native American group and a museum.[187] In that agreement, a Nevada state museum agreed to return Native American human remains to the Fallon Paiute Tribe for a burial in accordance with their customs and beliefs.[188] In return, the Fallon Paiute Tribe placed the remains in a special burial chamber that allows for periodic scientific study.[189] Nothing in **NAGPRA** precludes post-determination discussions.[190]

Post-determination discussions necessarily imply some type of cooperation between the opposing sides. One of the purposes behind the enactment of **NAGPRA** was to foster cooperation between traditionally opposing groups.[191] Cooperation is difficult to realize when surrounded by ambiguity and litigation. **NAGPRA** supporters could increase the likelihood of cooperation by ensuring that **NAGPRA** becomes clear, relevant, and reliable. **NAGPRA** needs to become a mechanism through which Native American groups and the scientific community can have dialogue about the future of finds and of the two groups' occasionally disparate goals. An environment of cooperation and trust would further signify that past abuses of Native American cultural property are, in fact, merely relics of the past.

Both Bonnichsen courts noted that the Kennewick remains are those of a ***160** man who was alive during a time predating recorded history.[192] The Ninth Circuit's opinion went so far as to romanticize the time during which Kennewick Man lived, writing about a time "so ancient that the pristine and untouched land and the primitive cultures that may have lived on it are not deeply understood."[193] The notion that these remains are prehistoric and not well understood, and therefore not Native American, runs through both the district court's and the Ninth Circuit's opinions.[194] Ironically, these opinions promulgate exactly the type of treatment at which Congress aimed.

By allowing the extreme age of these remains to be the dispositive factor in determining that they are not Native American, both courts ignored the fact that Native Americans have always had their own history, and that because Europeans did not write that history, it has too often been ignored. The notion of prehistory is problematic for Native Americans.[195] Prehistory connotes no history. But Native Americans have a history. As one archaeologist noted: "Indian people have been in America for thousands and thousands of years . . . [t]hey have always had a history and they always will."[196] The Ninth Circuit's disposition of the Kennewick remains ignores this history.

## VII. Conclusion

All future **NAGPRA** disputes involving inadvertently discovered remains must be resolved differently than the Bonnichsen dispute. Courts should employ broad interpretations of **NAGPRA** both in the Native American analysis and the cultural affiliation analysis. The remedial nature of the legislation, its character as Indian Law, and the traditions of deference afforded to federal agencies all require such treatment. Broad interpretations by the courts will bring final disposition of the remains in a manner that honors the Congressional intent behind **NAGPRA**.

While the coalition's decision to end the Bonnichsen litigation does end the inquiry into the Kennewick Man remains, it cannot end the inquiry into **NAGPRA**. Congress needs to address the flaws in **NAGPRA** that the Kennewick remains exposed. Congress needs to amend the statute, clarifying both the definition of Native American and the requirements of cultural

affiliation, as well as including a definition of indigenous. Until Congress acts, the potential exists for more finds to appear, the disposition of which will be determined by this frustratingly insufficient statute.

Footnotes

a1 J.D. 2005, University of Iowa College of Law. The author would like to thank the editorial board and student writers of The Journal of Gender, Race & Justice for their insight and assistance.

1 James C. Chatters, Ancient Encounters: Kennewick Man and the First Americans 23-24 (2001).

2 Id. at 19-25.

3 Id. at 20.

4 Id. at 32-33.

5 Id. at 31.

6 Id. at 31-41. A Cascade Point is a type of stone projectile point used during the Cascade phase, which occurred approximately 7500 years ago. Id.

7 Chatters, supra note 1, at 31-41.

8 Id. at 43-44.

9 Id. at 50.

10 Id. at 53.

11 Id.

12 Chatters, supra note 1, at 54.

13 Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1121 (D. Or. 2002) [hereinafter Bonnichsen II].

14 The Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2003).

15 The five tribal claimants that make up the coalition are four federally recognized tribes: the Confederated Tribes & Bands of the Yakama Indian Nation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes of the Colville Reservation; as well as the Wanapam Band, a tribe that is not federally recognized. Bonnichsen II, 217 F. Supp. 2d at 1121 n.8.

16 Id. at 1121.

17 Id. at 1122.

18 Id.

19 Id.

20 Id.

21 Four judicial opinions have been published dealing with the Bonnichsen conflict. The first district court opinion, Bonnichsen v. United States, 969 F. Supp. 628 (D. Or. 1997) [hereinafter Bonnichsen I], remanded the dispute to the Corps of Engineers with specific requests. See infra Part III.A. and accompanying notes. After remand, the second district court opinion, Bonnichsen v. United

States, 217 F. Supp. 2d 1116 (D. Or. 2002), previously identified as Bonnichsen II, held that the remains were not Native American as defined by **NAGPRA** and that the remains lacked a cultural affiliation with the tribal claimants. The first Ninth Circuit opinion, Bonnichsen v. United States, 357 F.3d 962 (9th Cir. 2004) [hereinafter Bonnichsen III], was amended and superseded by Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004) [hereinafter Bonnichsen IV]. This paper primarily cites Bonnichsen II and Bonnichsen IV. Occasional reference is made to Bonnichsen I.

22 Bonnichsen II, 217 F. Supp. 2d at 1122.

23 See C. Timothy McKeown & Sherry Hutt, In the Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years After, 21 UCLA J. Envtl. L. & Pol'y 153, 171-75 (2002-03); Ryan M. Seidemann, Time for a Change? The Kennewick Man Case and its Implications for the Future of the Native American Graves Protection and Repatriation Act, 106 W. Va. L. Rev. 149, 160 (2003).

24 Sherry Hutt & C. Timothy McKeown, Control of Cultural Property as Human Rights Law, 31 Ariz. St. L.J. 363, 363-67 (1999).

25 Id.

26 For a discussion of a sampling of cases to face these issues, see id. at 363-70.

27 Id.

28 Id. at 363-67.

29 Id. at 364.

30 Antonia M. De Meo, More Effective Protection for Native American Cultural Property Through Regulation of Export, 19 Am. Indian L. Rev. 1, 1 (1994).

31 Id. at 1-2.

32 Through much of the 19th and early 20th Centuries, Native Americans, like other racial minorities, were without meaningful access to the American legal system. For example, Native Americans were not "persons" within the meaning of federal law until 1879. United States ex rel. Standing Bear v. Crook, 25 F.Cas. 695 (C.C.D. Neb. 1879). Native Americans were not allowed American citizenship until Congress enacted the Citizenship Act of 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401 (2000)).

33 See Antiquities Act, 16 U.S.C. §§ 431-433 (2000); National Historic Preservation Act, 16 U.S.C. § 470 (2000); Archaeological Resources Protection Act, 16 U.S.C. § 470bb (2000).

34 16 U.S.C. §§ 431-433.

35 16 U.S.C. § 470.

36 16 U.S.C. § 470bb.

37 See 16 U.S.C. §§ 431-433; 16 U.S.C. § 470; 16 U.S.C. § 470bb.

38 16 U.S.C. § 470(b)(2).

39 16 U.S.C. § 470aa(a)(1).

40 25 U.S.C. § 3002.

41 McKeown & Hutt, supra note 23, at 154-55.

42 136 Cong. Rec. 35,678 (1990) (statement of Sen. Inouye).

43 Id. (statement of Sen. Inouye).

44 Id. (statement of Sen. Inouye).

45 Id. (statement of Sen. Inouye).

46 Id. at 35,677-81 (statement of Sen. Inouye).

47 Id. at 35,678 (statement of Sen. Inouye).

48 136 Cong. Rec. 35,678 (1990) (statement of Sen. Akaka).

49 Id. at 35,679 (statement of Sen. Moynihan).

50 25 U.S.C. § 3002.

51 25 U.S.C. §§ 3003-3005.

52 18 U.S.C. § 1170 (2003).

53 Bonnichsen II, 217 F. Supp. 2d at 1134-66; Bonnichsen IV, 367 F.3d at 874-82.

54 25 U.S.C. § 3001(1).

55 25 U.S.C. § 3001(2).

56 25 U.S.C. § 3001(7).

57 25 U.S.C. § 3001(9).

58 The full text of § 3002 reads:
The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed) --
(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or
(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony --
(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe --
(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or
(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph(1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.
25 U.S.C. § 3002.

59 Id.

60 Id.

61 Bonnichsen II, 217 F. Supp. 2d at 1122.

62 Id.

63 Bonnichsen I, 969 F. Supp. at 632.

64 Id.

65 Id.

66 Id. at 651-54.

67 The issues as put forth by the district court were:
(a) Whether these remains are subject to **NAGPRA**, and why (or why not);
(b) What is meant by terms such as "Native American" and "indigenous" in the context of **NAGPRA** and the facts of this case; (footnote omitted)
(c) Whether, if there was more than one wave of ancient migration to the Americas, or if there were sub-populations of early Americans, **NAGPRA** applies to remains or cultural objects from a population that failed to survive (footnote omitted) and is not directly related to modern Native Americans;
(d) Whether **NAGPRA** requires (either expressly or implicitly) a biological connection between the remains and a contemporary Native American tribe;
(e) Whether there has to be any cultural affiliation between the remains and a contemporary Native American tribe--and if yes, how that affiliation is established if no cultural objects are found with the remains; (footnote omitted)
(f) The level of certainty required to establish such a biological or cultural affiliation, e.g., possible, probable, clear and convincing, etc.; (footnote omitted)
(g) Whether any scientific studies are needed before the Corps can determine whether these particular remains are subject to **NAGPRA**, (footnote omitted) and if so, whether such studies are legally permissible; (footnote omitted)
(h) Whether there is evidence of a link, either biological or cultural, between the remains and a modern Native American tribe or to any other ethnic or cultural group including (but not limited to) those of Europe, Asia, and the Pacific islands;
(i) Whether the "study" provisions of 25 U.S.C. § 3005(b) are limited to objects that were in the possession or control of a federal agency or museum prior to November 16, 1990; (footnote omitted)
(j) Whether there is any other law, e.g., the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. § 470aa, or any other section of **NAGPRA** such as 25 U.S.C. § 3002(c) or § 3003(b)(2), that either permits or forbids scientific study of these remains;
(k) Whether scientific study and repatriation of the remains are mutually exclusive, or if both objectives can be accommodated;
(l) What law controls if the remains are not subject to **NAGPRA**;
(m) What happens to the remains if no existing tribe can establish a cultural affiliation;
(n) Whether plaintiffs have a right (under the First Amendment or otherwise) to study the remains;
(o) Whether there is any merit to the contention... that non-Indians should be permitted to file a claim to the remains, or any merit to the equal protection arguments asserted by the plaintiffs (if the Corps decides it has authority to address that issue);
(p) What role, if any, the **NAGPRA** Review Committee should play in resolving the issues presented by this case; and
(q) Whether **NAGPRA** is silent on important issues raised by this case, and whether Congressional action will be required to clarify the law regarding "culturally unidentifiable ancient remains." (footnote omitted)
Id.

68 On March 24, 1998, the Corps and the DOI entered into an Interagency Agreement that assigned the DOI the task of determining whether the Kennewick Man remains are "Native American within the meaning of **NAGPRA**." Interagency Agreement Between the Department of the Army and the Department of the Interior on the Delegation of Responsibilities under Section 3 of the Native American Graves Protection and Repatriation Act pertaining to Human Remains Discovered Near the City of Kennewick, Washington, (March 24, 1998), available at http:// www.cr.nps.gov/aad/kennewick/agree.htm. Additionally, the DOI was asked to determine the final disposition of the remains, and essentially became the lead agency with respect to the issues raised by this case. Id.

69 Bonnichsen II, 217 F. Supp. 2d at 1126.

70 Id. at 1128.

71 Id.

72 Id. at 1130.

73 Memorandum from the Departmental Consulting Archaeologist, Francis P. McManoman, to the Assistant Secretary, Fish and Wildlife and Parks, Donald J. Barry (January 11, 2000), available at http:// www.cr.nps.gov/aad/kennewick/c14memo.htm [hereinafter McManoman Memorandum].

74 Bonnichsen II, 217 F. Supp. 2d at 1130.

75 Letter from Bruce Babbit, United States Secretary of the Interior, to Louis Caldera, United States Secretary of the Army (September 21, 2000), available at http://www.cr.nps.gov/aad/kennewick/babb_letter.htm [hereinafter Babbit Letter].

76 McManoman Memorandum, supra note 73.

77 Id.

78 Id.

79 Babbit Letter, supra note 75.

80 Id.

81 Id.

82 Bonnichsen II, 217 F. Supp. 2d at 1131.

83 Id.

84 Id.

85 Id.

86 Id.

87 Id.

88 Bonnichsen II, 217 F. Supp. 2d at 1131.

89 Id. at 1167.

90 Bonnichsen IV, 367 F.3d at 864.

91 Id. at 882.

92 25 U.S.C. § 3002.

93 Bonnichsen II, 217 F. Supp. 2d at 1134; Bonnichsen IV, 367 F.3d at 875.

94 Bonnichsen II, 217 F. Supp. 2d at 1139; Bonnichsen IV, 367 F.3d at 882.

95 Bonnichsen II, 217 F. Supp. 2d at 1138.

96 25 U.S.C. § 3001(9).

97 Bonnichsen II, 217 F. Supp. 2d at 1136.

98 Id.

99 Id.

100 Id. (citing 25 U.S.C. § 3001(3)(c)).

101 Steven Platzman, Comment, Objects of Controversy: The Native American Right to Repatriation, 41 Am. U. L. Rev. 517, 521-22 (1992).

102 Id.; see also S. Rep. No. 101-473 (1990).

103 Position Paper, Donald Sampson, (former) Tribal Chair Questions Scientists' Motives and Credibility (Nov. 21, 1997), available at http:// www.umatilla.nsn.us/kman2.html.

104 25 U.S.C. § 3001(2).

105 Bonnichsen II, 217 F. Supp. 2d at 1136.

106 Bonnichsen IV, 367 F.3d at 875.

107 Id.

108 Id.

109 See generally Maura A. Flood, "Kennewick Man" or "Ancient One" ? - A Matter of Interpretation, 63 Mont. L. Rev. 39 (2002); McKeown & Hutt, supra note 23; Robert W. Lannan, Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Remains, 22 Harv. Envtl. L. Rev. 369 (1998).

110 25 U.S.C. § 3010; see also Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs, 83 F. Supp. 2d 1047 (2000) (interpreting **NAGPRA** as Indian Law for purposes of statute interpretation).

111 United States v. Mead Corp., 533 U.S. 218, 227-28 (2001); Chevron U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844-45 (1984).

112 See Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151 (1972) ("[an Act is] to be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." (quoting S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963))); Chandris, Inc. v. Latsis, 515 U.S. 347 (1995) (stating that the terms of a statute "must be read in the light of the mischief and the end to be attained." (quoting Warner v. Goltra, 293 U.S. 155, 158 (1934))).

113 136 Cong. Rec. 35,677-81 (1990).

114 Bonnichsen II, 217 F. Supp. 2d at 1135.

115 Id.

116 Chatters, supra note 1, at 53-54 (stating that the Kennewick remains are 9500 years old).

117 25 U.S.C. § 3001(9).

118 Id.

119 Bonnichsen II, 217 F. Supp. 2d at 1120.

120 McManoman Memorandum, supra note 73.

121 Id.

122 Yankton Sioux, 83 F. Supp. 2d at 1056 (interpreting **NAGPRA** as Indian Law for purposes of statute interpretation).

123 See Bryan v. Itasca County, Minn., 426 U.S. 373, 392 (1976) (affirming that "statutes passed for the benefit of dependent Indian tribes... are to be liberally construed, doubtful expressions being resolved in favor of the Indians." (quoting Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)); see also Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976) (characterizing the Indian Law canon as "eminently sound and vital").

124 Yankton Sioux, 83 F. Supp. at 1056.

125 Id. (quoting County of Yakima v. Yakima Indian Nation, 502 U.S. 251 (1992)).

126 25 U.S.C. § 3010.

127 Id.

128 Chevron U.S.A., 467 U.S. at 844.

129 Id.

130 Id.

131 Mead Corp., 533 U.S. at 227.

132 Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1416 n.15 (D. Haw. 1995).

133 Id.

134 Bonnichsen II, 217 F. Supp. 2d at 1133.

135 Id.

136 Id.

137 Id.

138 See supra notes 65-67 and accompanying text.

139 Gale Norton, U.S. Department of the Interior, Welcome Statement, available at http://www.doi.gov/welcome.html (last visited January 23, 2005).

140 U.S. Army Corps of Engineers Mission Statement, available at http://www.usace.army.mil/who.html#Mission (last visited January 23, 2005).

141 See McKeown & Hutt, supra note 23, at 171-75 (giving a brief description of the sixteen claims filed under **NAGPRA** since its enactment).

142 Id. at 175.

143 25 U.S.C. § 3002.

144 Bonnichsen II, 217 F. Supp. 2d at 1138.

145 Id. at 1139.

146 25 U.S.C. § 3001(2).

147 Bonnichsen II, 217 F. Supp. 2d at 1143-44.

148 Babbit Letter, supra note 75.

149 Id.

150 Id.

151 Id.

152 Id.

153 25 U.S.C. § 3002.

154 25 U.S.C. § 3002(a)(2)(B).

155 Id.

156 Babbit Letter, supra note 75.

157 Bonnichsen IV, 367 F.3d at 878-82.

158 Id. at 880-82.

159 Id. at 872-82.

160 Id. at 879.

161 Press statement, Confederated Tribes of the Umatilla Indian Reservation, Reaction to 9th Circuit ruling (Feb. 4, 2004), available at http://www.umatilla.nsn.us/kman13.html.

162 Press statement, Confederated Tribes of the Umatilla Indian Reservation, CTUIR will not pursue case in the US Supreme Court (July 19, 2004), available at http://www.umatilla.nsn.us/kman14.html.

163 Id.

164 Id.

165 Id.

166 Kathleen S. Fine-Dare, Grave Injustice: The American Indian Repatriation Movement and **NAGPRA** 7 (2002).

167 Bonnichsen II, 217 F. Supp. 2d at 1136.

168 Id.

169 Three burials at the Jamestown Colony that were initially identified as Native American were re-identified as African American. These skeletons became the earliest known Africans in the British North American Colonies. They predated the 1670 Virginia Colony law which made all African servants slaves for life. The significance of this re-identification lay in the fact that after study, it appeared that the individuals had lived with whites in the Colony and had been cared for during and after death in a manner inconsistent with the typical treatment of African slaves, thus indicating a time pre-dating 1670 during which the Colony was racially diverse yet free of the indications of violence and harsh treatment typical of forced slavery. The district court learned of this through Dr. Owsley's affidavit offered to indicate the importance and historical value of scientific study of ancient remains. Jeff Benedict, No Bone Unturned: The Adventures of a Top Smithsonian Forensic Scientist and the Legal Battle for America's Oldest Skeletons 181-87, 251-52 (2003).

170 25 U.S.C. § 3001(9).

171 25 U.S.C. §§ 3001(1)-(15).

172 NAGPRA currently defines Native American as meaning "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). The suggested definition simply adds the words "or was" after "is."

173 Benedict, supra note 169, at 163.

174 Merriam-Webster's Collegiate Dictionary 592 (Frederick C. Mish et al. eds., 10th ed. 1993).

175 Benedict, supra note 169, at 163.

176 E. James Dixon, Bones, Boats, & Bison: Archeology and the First Colonization of Western North America 19 (1999).

177 Prior to the discovery of the Kennewick remains, study of North American skeletal remains older than 8500 years had been limited to four individual sets of remains. Chatters, supra note 1, at 53-54.

178 Lannan, supra note 109, at 369.

179 Id.

180 Benedict, supra note 169, at 190; see also Chatters, supra note 1 at 55-57.

181 Benedict, supra note 169, at 190; see also Chatters, supra note 1 at 55-57.

182 Dixon, supra note 176, at 19.

183 136 Cong. Rec. 35,678 (1990) (statement of Sen. Inouye).

184 136 Cong. Rec. 35,677-81 (1990); S. Rep. No. 101-473 (1990).

185 See 25 U.S.C. §§ 3001-3013.

186 Id.

187 S. Rep. No. 101-473 (1990).

188 Id.

189 Id.

190 See 25 U.S.C. § 3009(1)(B).

191 136 Cong. Rec. 35,678 (1990) (statement of Sen. Inouye).

192 Bonnichsen II, 217 F. Supp. 2d at 1138-39; Bonnichsen IV, 367 F.3d at 868.

193 Bonnichsen IV, 367 F.3d at 868.

194 See Bonnichsen II, 217 F.Supp.2d at 1120-22, 1136-39; Bonnichsen IV, 367 F.3d at 868-69, 882.

195 David Hurst Thomas, Exploring Native North America vii (2000).

196 Id. at viii.