For my family.
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PREFACE

This thesis examines the question, was the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) necessary? This question grew out of a combination of my first museum history and theory classes and my first experience working with the ethnographic collections at the Florida Museum of Natural History. Having a background in law, I was already familiar with existing legislation protecting cemeteries. After examining NAGPRA’s specifics, its purpose appeared to be redundant. Every state already had cultural heritage laws in place protecting archaeological sites, including Native American burials. So, why was NAGPRA necessary in 1990?

This thesis was constructed in a symmetrical fashion to facilitate ease of reading and flow of information. Chapters 1 and 5 are approximately the same length and contain similar figures and tables. Chapters 2 and 4 are also similar in length, but have slightly different figures and tables. Chapter 3 the longest chapter, contains the most case summaries and no figures or tables, enabling the reader to concentrate exclusively on the legal material presented.

Chapter 1 discusses the language used by museums to describe Native American objects and compares it with the language used by Native Americans for the same purpose.

Chapter 2 lays the groundwork for NAGPRA, giving a brief history of Native American artifact collection practices. It discusses NAGPRA as legislation and summarizes two federal cases where NAGPRA was used.
Chapter 3, the longest chapter, charts state legislation concerning cemeteries and cultural heritage laws. It also profiles four state cases from four different areas of the United States which cite NAGPRA.

Chapter 4 focuses on museum mission statements and their similarity to NAGPRA in purpose and sometimes in language. It compares exhibit labels in non-Native American owned and run museums and Native American owned and run museums, and traces artifact collection and repatriation patterns for more than a century.

Chapter 5, the last chapter, discusses Native American population trends and reviews current museum ethics in light of NAGPRA and other legislation. It examines the future of Native American exhibitions in non-Native venues. Finally, it answers the initial question, was NAGPRA necessary and, if so, why?
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This thesis examines the question, was the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) necessary. It focuses on the language used in museums, law, and Native American culture. It uses case law to compare NAGPRA with state-authored law similar to NAGPRA, and museum mission statements. It concludes with a description of how NAGPRA forged valuable and unexpected partnerships between museums and Native Americans.

Keywords: museums, NAGPRA, case law, artifacts, mission statements.
CHAPTER 1
SUBJECTS AND OBJECTS: THE LANGUAGE OF MUSEUMS

Introduction

The language of museums is essentially the language of interpretation. Usually, museum objects represent the ideas, beliefs, and life ways of many different cultures, including Native Americans. The interpretation and, ultimately, exhibition of these objects for public education purposes is a cornerstone of a museum’s mission statement. The wording of labels used by museum professionals to convey important information about objects on public display is vitally important. It is critical that that the language employed be understandable and informative to the museum’s visitors. Therefore, labels consist of words that are common to not only museum professionals, but also the public they serve.

Walk into any museum and subjects of interpretation are everywhere. Objects of art, prehistoric and historic objects, and ethnographic objects line the walls, shelves, display cases, and vitrines of museums around the world. Go to a fundraising event or exhibit opening, and the main topic of discussion that you will hear between museum specialists is the size, cost, and condition of their collections and troubles with donors. Of course, museum collectors are vitally important. Without objects, museums would have no purpose. Without human ingenuity, artistry, and creativity, museums would have few objects, and literally no artifacts. Someone at some time had to think about, construct, use, and discard in some manner each artifact that the museum professionals hold dear. And, while subjects such as ornithology, ichthyology, and paleontology offer
a look into natural environments, many museum goers enjoy viewing exhibits and
displays that focus on how humans coexist with their environment. In this respect, birds,
fish, and fossil species are critical to human history.

Academics and researchers use museum collections for research purposes. If this was the only purpose for collections, it would render mute the need for pubic
interpretation and translation. From their sometimes-ignoble beginnings, museums have constantly fought amongst, and within, themselves regarding the binary opposition
between collections and exhibits. Why have collections if not to exhibit them, argue some, while others counter with the question, why exhibit collections and remove them from study? Each generation of museum professionals find themselves faced with the monumental task of formulating answers acceptable to both camps, and museum mission statements attempt to find a workable balance.

**Effective Label Language**

As stated earlier, responsibility to public education is often reflected in a museum’s
mission statement, which is the statement of purpose required for accreditation by the American Association of Museums. It is for the visitor that the museum professional
must translate the objects and artifacts that are chosen for display. For the greatest educational benefit, museumspeak provides a general format easily understood by most
visitors. If exhibit label copy is unintelligible or uninformative, it may be the kiss of death for not only that exhibit, but possibly to the museum as well.

From their early inception, museums and their visitors have shared conceptual
responsibility. Because the wealthy were able to travel extensively enough to collect objects that would be of interest to friends, family, and colleagues, they deciphered the meaning of their collections and interpreted that meaning for others. They did so eagerly,
often reinforcing stereotypes and the prevailing social hierarchy. These “cabinets of curiosities” (Kohlstedt 1988; Cato and Jones 1991; Weil 1995) opened to the general public, they presented a world unchallenged. Early museums seldom found themselves faced with this challenge. Private collectors were eager to show off the treasures they obtained during their global travels. Louis Agassiz, founder of the Museum of Comparative Zoology at Harvard University, was perhaps one of the first to bring the argument to the forefront. Mary Pickard Winsor highlighted Agassiz's concepts about museums in her article "Agassiz's Notions of a Museum: The Vision and the Myth.” (2000). Here, Winsor addressed Agassiz's vision for his original museum and compares that to his son, Alexander Agassiz and the other curators and directors who came after him. She focuses on Agassiz's method of taxonomic arrangement of collections, both within the museum storage areas and its public exhibits. Agassiz believed that other museums of the day had noticed "the imperfections of the present arrangement of their collections…” (Annual Report 1864, p. 13) and were beginning to reformulate their exhibitions along his taxonomic lines. According to Agassiz, his intention was to separate research areas from public ones and place the collections in the same order throughout the entire museum:

It was there that I was struck with this idea, that a museum arranged only in order to exhibit all zoological facts fails in its purpose; … A collection which will put everything that is different under the observer's eyes in a small space…will answer much better the needs of those seeking to educate themselves. (Winsor 2000. Quoting L. Agassiz, 1862, p. 537.)
However, during the next century, the opinions of the public changed regarding not only their own social status, but also the status of “the Other.”\textsuperscript{1} “People of all ethnicities began to demand a more equitable picture of who they had been, who they were, and who they were becoming.\textsuperscript{2}

Agassiz was addressing public needs, and every museum expert knows that modern public opinion will either make or break an exhibit. After the United States Bicentenary in 1976, viewership became a critical element to be considered as well as exhibit concept, design, and materials. In *Opinion Polls: A Finger on the Public Pulse* (1979) and *Predicting Visitor Behavior* (1985) Paul DiMaggio and Michael Useem, and John Falk, respectively, discussed the truths and fallacies behind public opinion. They remind us that public opinion is mercurial and warn against placing too much trust in, or discrediting too quickly, the wants and wishes of the people.

In the 1970s, Gerald Krockover and Jeanette Hauck presented an overview of *Training for Docents: How to Talk to Visitors* (American Association of State and Local History Technical Leaflet 125). Krockover and Hauck offered insights into language, or museumspeak, invaluable to public interpretation of museum exhibits and themes. Who better to translate a complex exhibit or diorama for the public than one of themselves? The figure of the docent, a mere volunteer, not a paid member of the museum elite,

\textsuperscript{1} The Other” is an anthropological term meaning social and cultural groups different from the focus group. In other words, to a specific cultural group such as Native Americans, other cultural groups such as Europeans are viewed differently than their own and therefore are considered to be “the others.”

\textsuperscript{2} The public became more socially and politically aware after World War II, and with the advent of the civil rights movement in the 1960s, expanded social perception regarding recreational drug use and sexual interaction in the 1970s and ‘80s, and the growing trends toward political correctness, they began to question not only the context of museum exhibits but their content as well; i.e., stuffed dead animals used for nature dioramas and prehistoric exhibits featuring aggressive cavemen hunters on the verge of killing prey.
sometimes allowed more public trust than an official in a suit. In the financial climate of 2003, the public is wary of trusting CEOs and board members.

During the 1980s, museums continued to focus on community needs. Because many of today's museums rely at least in part on federal, state, or local funding to maintain operations, conforming to publicly held ideas regarding collections and exhibit design is required, at least in part. In this age of public financial support and scrutiny, museums are expected, and often bound by their mission statements, to exhibit at least a portion of their collection to the public on a regular schedule.

Exhibiting collections that were of interest to the public was one way museums took part in social change. Lawrence Levine, in *Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in America* (1988) and William Honon’s article *Say Goodbye to the Stuffed Elephant* (1990) discussed these early dioramas and their effects upon the viewing public. Both reorganized prevailing social concepts within the scope of museum exhibits, and offered an excellent snapshot of the some of the preeminent direction of public self-opinion, particularly toward mounted, or “stuffed,” animals.

George P. Horse Capture discussed the dilemma regarding the study of collections and exhibits in his article for the American Association for State and Local History entitled *Some Observations on Establishing Tribal Museum* (1981). Here, Horse Capture addressed collections and exhibits in a definitive manner, letting his reader know that he believed collections are for exhibition purposes first and foremost as he gave instructions for building museum collections. "Ironically, obtaining proper material to exhibit doesn't seem to be a frequent obstacle. Here are some sources for additions to your collections
that you cannot afford to overlook…” (p. 5). Horse Capture wrote that museums are all about exhibits, and therefore the collections should be exhibit-based.

In 1986, Helen Searing addressed collections and exhibits on a much larger scale in *The Development of a Museum Typology*. According to Searing, building design plays a major role in a museum's decision to either highlight its exhibits or cocoon its collections. A museum's architecture expresses its purpose. It can provide a haven for public visitors who seek to look, enjoy and appreciate, or for scholars and academics whose intention it is to learn and do research. Old-school buildings full of dusty, musty collections areas are being replaced with lighter, brighter, more welcoming public exhibit halls and steel-and-chrome plated, highly technically advanced research areas. "Bowels of the building"-like spaces are becoming rarer as curators and directors find themselves bowing to public and political convention that dictates modernity over the archaic.

By the 1990s, articles like *The Right Kind of Multiculturalism* (Paglia 1999) and *Multicultural by Design* (Appelbaum 1993) examined public discontent with standard exhibits and the growing outcry for greater accuracy and egalitarianism in museum exhibit design and presentation. Paglia and Appelbaum both discussed the pros and cons of dealing with public sentiment and beliefs, and remind the reader that pleasing everyone with any one particular museum exhibit was probably the very first “Mission Impossible.” It is, however, ultimately the responsibility of the museum professional to ensure that accurate, quality information is appropriately disseminated to the public by whatever means the museum chooses, whether written or verbal.

It is often easy to recognize a museum's purpose through its allocation of space for different aspects of museology, specifically collections and exhibits. For example, the
Florida Museum of Natural History (FLMNH) at the University of Florida (UF) only recently built an exhibits center separate from its collection and research facility. The Sam Noble Oklahoma Museum of Natural History (SNOMNH), a part of the University of Oklahoma at Norman (OU), moved into a brand-new four-story facility built specifically to house both collections and exhibits. An almost equal amount of space was allocated for both areas, and the public has had nothing but rave reviews for OU’s newest addition, while researchers and scholars clamor to use its state-of-the-art research facilities.3

Besides providing space to study and exhibit objects, accredited museums have the responsibility of interpreting artifacts for its visitors. According to the American Association of Museums (AAM), in order for a museum to receive accreditation, it must, among other things “…present regularly scheduled programs and exhibits that use and interpret objects for the public according to accepted standards…” (http://www.aam-us.org). Museums have the social role of breathing life into the past, giving context to the present, and sculpting the future into a believable and eagerly anticipated adventure. The fact that all artifacts passed through prehistoric or historic hands is of vital importance to any interpretation of those artifacts. To formulate a complete picture about humans and their physical, emotional, and cultural evolution, it is essential to look at almost every museum artifact as somebody’s personal belongings. For example, the cracked bowl on the back shelf in a particular museum’s collection is not just that – a

3 The new SNOMNH building officially opened in the fall of 2000, the year I transferred to OU to complete my bachelor’s degree in anthropology. I performed a six-month internship at SNOMNH, and am personally familiar with the SNOMNH’s building construction, having worked in both the collections located on the fourth floor of the facility and also in the education division as a docent, designing hands-on exhibits for the SNOMNH Discovery Room.
cracked bowl. It was somebody’s cracked bowl. It was something that someone, quite possibly someone’s mother, sister, or grandmother, thought about because they needed it. This person worked to gather the clay and other things necessary to create the bowl. She found the time between gathering food for an entire group, possibly caring for small children and an elderly or infirm member of the group, making clothing, cooking almost constantly, and playing the role of wife, mother, provider, protector, and companion to sit quietly, mix the gathered ingredients together, and carefully form and shape this bowl to her specific needs. She had to gather the wood for the fire that cooked the clay of this bowl to just the right temperature to ensure that it would be solid and waterproof, but not brittle or porous. She then found time to decorate this bowl and make it distinctly her own. She used her life experience, emotions, and personal beliefs to select the colors and designs she painted around the rim of this bowl. When she was finished, she probably looked at it critically to make sure that it was serviceable and would last for the length of time she needed to be able to gather, mix, and cook her group’s meals. Then she set to her work, fixing the meal that would give her group the strength and health to evolve with their ever-changing environment. With this bowl, she fed her family, ground grain for others in her group, and gathered herbs and vegetation to ensure their health and well-being. She carried it from camp to camp, on her back or perhaps on a sledge pulled behind her that was loaded with other of life’s necessities she had crafted. And, when this bowl finally cracked from constant use, she discarded it with other trash at a seasonal camp.

The above description is very interesting and offers a unique glimpse into a possible life of the cracked bowl. However, a museum label containing a bulky
Accurate, understandable label language is necessary to encapsulate as much information as possible.

What cannot be overlooked, however, is that this prehistoric woman was essential to the bowl’s creation, materially, emotionally, religiously, and culturally. It is critical that her existence be acknowledged through label copy, story boards, and a docent’s script. In other words, the subjectivity of the artifact is essential to its objectivity. And, responsible museumspeak integrates subjectivity into the interpretation of artifacts.
Defining Content and Context

The definition of “subject,” according to the *American Heritage Dictionary* (2001), is “The main theme of a work of art,” or “One that experiences or is subjected to something.” It also lists “To expose to something…To cause to experience” (pp. 817-818). In other words, the bowl is the subject of the woman’s thought processes and her subsequent labor. The shape of the bowl, however, its thickness, substance, design, and decoration fall under the definition of subjectivity: “Proceeding from or taking place within a person’s mind…Particular to a given person; personal…” (p. 818). Therefore, the bowl itself is the subject of its maker’s subjectivity. It is all about the woman who created it. It contains her personal history, her emotions, her beliefs, her artistic imagination, and yes, even her DNA from the sweat and oil from her fingertips. Unfortunately, this last is destroyed during the baking process; however, it was still there at one point. This bowl is truly a little bit of a once living, breathing human. Sometimes, however, the language chosen to describe the artifact, especially if there is a strong focus on the artifact’s geography, morphology, physical and chemical make-up, and temporal position, can change a visitor’s focus from who made the bowl to just the bowl itself.

Museum exhibits have been a trusted method of conveying information and knowledge. However, as the public becomes more aware of the intricacies and nuances of previously unknown topics, trust in the accuracy, even truth, of exhibits has changed. Gone is the open-mouthed awe at dramatic dioramas. According to Jane and Ed Bedno (1999):

…Today’s visitors expect to be included when any public institution is planning its exhibitions and programming to have their preferences taken into account. They expect sophistication in the presentation of stories and concepts in any medium. They know computers as information carriers and problem-solvers, even if not always from personal experience. They look for attention to be paid to their
physical comfort. They want to be allowed to handle objects, not to be passive in their experience. They want to discover for themselves, not be lectured to. They expect to read in a museum, but not too much.

A possible reason behind these new reactions to museum “truths” is heightened public awareness of the world around them and an increased access to sophisticated technology. Where natural history dioramas replete with taxidermied birds and animals once drew crowds of delighted children and adults, now they are viewed as repositories for “poor, dead animals.” Even though the idea of stuffing and mounting animals is no longer acceptable in today’s animal rights conscious society, an understanding of the techniques used in the past to preserve and exhibit animal specimens is necessary for museum professionals in order to ensure proper handling and, when necessary, dismounting and deaccessioning of these objects. Paul Russell Farber (1977) provided a historical overview of the practice of taxidermy in *The Development of Taxidermy and the History of Ornithology*. He described many of the techniques used to preserve many forms of animal life. While this article does not address popular concerns regarding animal rights, it does highlight historic individuals who were responsible for developing and perfecting the successful taxidermy techniques of the time.

During the 1980s, another point of public contention was the scientific “translation” of fossil material into tales of the prehistoric past. How, museum professionals have been asked recently, do we really know what a male *Tyrannosaurus rex* ate, or how often he mated, or exactly what color he was? Peter J. Whybrow and Francis Howie discussed the methodology and techniques used to recover, conserve, mount, and exhibit fossil material in their books, *A History of Fossil Collection and Preparation Techniques* (Whybrow 1985) and *Conserving and Mounting Fossils: A Historical Review* (Howie 1986). This methodology can be a part of the exhibition, and
with today’s technology, DNA analysis and other typing and dating techniques are possible.

When Agassiz’s public visited his museum, a primary goal was satisfaction of curiosity about exotic and exciting things they had often only read about or seen pictures of in books. Today, with the availability of state-of-the-art technology like the internet, and the relatively inexpensive means of global travel, exotic experiences are no longer merely dreams, but have become reality for many. Because of this, museums are faced with an ever-increasing public demand for out-of-the-ordinary or exotic objects and exhibits. If people are going to spend their time walking through a natural history museum, they expect to see exhibits and displays that can teach them something, not just give them something to look at.

In particular, ethnographic exhibits portraying people from historic and prehistoric times have become targets of antipathy for ethnic and native groups. Specifically, dioramas portraying Native Americans are often viewed with skepticism rather than with admiration and curiosity. Prolific literature describing how the artifacts were collected, and the passage of the Native American Graves Protection and Repatriation Act of 1990 (commonly known as NAGPRA), have created public concern and museum uproar about Native American collections. Jerald Milanich’s article *Prolific Pioneer or Mound Mauler? Why Scholars are Ambivalent about Clarence Bloomfield Moore* (2000) and Dr. James Nason’s *Finders Keepers?* (1973) are excellent examples of how the public and museum scholars have come together regarding Native American remains and artifacts and past tactics used to collect them. In these articles, the practices of burial mound desecration by treasure hunters claiming to be “amateur archaeologists” and the retaining
of objects specifically known to belong to particular Native American tribes are spotlighted. While archaeological sites are protected by cultural heritage laws in every state, it is the artifact poacher who has helped besmirch the reputation of legitimate scientists by flaunting the law and literally participating in the act of grave robbing when they loot protected Native American burial mounds and grave sites.

**Museum Labels for Native American Objects**

As discussed earlier, museum labels provide the public with particular data about an object’s materials, cultural affinity, and temporal and geographical location. To include this information is a conscious choice by museums, and is required of accredited museums by the AAM. However, Native American owned and managed museums are seldom accredited, perhaps because of financial constraints, or possibly because they choose to exhibit their objects differently from accredited museums. Some Native American owned and run museums even choose to exhibit their artifacts without labels. Such an exhibit from the Frisco Native American Museum in Frisco, North Carolina, is pictured in Figure 1-2.

![Basket Collection](image)

Figure 1-2. Basket Collection. Photo courtesy of Frisco Native American Museum, Frisco, NC.
Exhibit labels in most museums tend to use an English-based vocabulary. However, a suggestion for a broader interpretation of Native American objects might be to include the appropriate Native word for the exhibited object either within the English label, or perhaps on a label of its own. For example, the Lakota term “hanpikceka” could be used together with the English word “moccasin” to allow the public a deeper glimpse into the actual world of the Lakota people. Similarly, in an exhibit of footwear of the Alabaman group of the Muskogee Native American tribe (whose linguistic offshoots include the Seminole and the Miccosukee in Florida) the word “ichaffakchiwilo” might be included. The use of these Native words should probably be accompanied with a phonetic translation to enhance the visitor’s experience and allow them to participate even further in Native culture by being able to correctly pronounce Native language. Table 1-1 lists other common terms used in museum exhibit labels together with their Native American counterparts.

Conclusion

If a museum possesses Native American collections that contain human remains and associated burial artifacts, e.g., objects found either in the burial mound itself or around it, and they receive any kind of federal funding whatsoever, these collections come under the jurisdiction of the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA). This law was passed to facilitate the return of Native American remains and artifacts to tribes that can provide a viable, legal link to the objects by following NAGPRA’s guidelines. The passage of this legislation has not only served to return Native American objects to their rightful owners, it has also opened up a broader realm of communication between museum professionals and Native Americans. The enactment of NAGPRA has encouraged museums to aggressively seek out Native
Americans as technical consultants and collections managers for dioramas, exhibits, and displays to ensure that interpretation and translation of Native American artifacts for a non-Native American public is as accurate and complete as possible. NAGPRA, though, does not address label language or other museum terminology. It does not instruct museums regarding the construction of exhibits or the preparation of labels. It merely gives rules and regulations about the disposition of objects that fall under its jurisdiction. Museums must still pick and choose appropriate language to interpret objects from other cultures. And, they should choose language that gives their visitors the broadest possible understanding of those objects.

Chapter 2 focuses on NAGPRA by providing a short history of museum collecting practices before it was enacted, what happened to not only the museum community but also the Native American community once it was, and how the federal courts dealt with precedent-setting cases that were predicated on it
Table 1-1. Common Language for Native American Museum Objects Used in Museum Exhibit Labels.

<table>
<thead>
<tr>
<th>WORD</th>
<th>DEFINITION</th>
<th>ACTUAL DERIVATION</th>
<th>LAKOTA</th>
<th>MUSKOGE</th>
<th>HOPI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arrow</td>
<td>Straight, thin projectile designed to be shot from a bow &amp; used in hunting &amp; war.</td>
<td>English</td>
<td>Wahinkpe</td>
<td>&quot;aki, achosaoka</td>
<td>Hoolu</td>
</tr>
<tr>
<td>Clothing</td>
<td>Any number of items made from skins or cloth used to cover the body for a variety of reasons</td>
<td>English</td>
<td>Wok' oyake</td>
<td>llokfa(^5) hombayka(^5)</td>
<td>Yuwsi</td>
</tr>
<tr>
<td>Medicine bag</td>
<td>Package such as hide or cloth wrapping, pouch, or box containing one or more objects or materials considered to be sacred and have spiritual power</td>
<td>Navajo; Algonquian</td>
<td>Wot'awe</td>
<td>Aykachi(^6)</td>
<td>Ngamoki(^7)</td>
</tr>
<tr>
<td>Moccasin</td>
<td>Footwear of many Indian peoples of differing designs</td>
<td>Algonquian</td>
<td>Hanpiceeka</td>
<td>Ichaffakchiwil o</td>
<td>Tootsi</td>
</tr>
<tr>
<td>Parfleche</td>
<td>Rawhide w/hair removed/box or saddlebag</td>
<td>Plains Indians</td>
<td>Wiyakpan</td>
<td>Atohche(^5)</td>
<td>Tukpu</td>
</tr>
<tr>
<td>Powwow</td>
<td>He dreams/he uses divination</td>
<td>Algonquian</td>
<td>Wac'ipi</td>
<td>Ayolikp(^7)</td>
<td>Naatsovala(^10)</td>
</tr>
<tr>
<td>Quiver</td>
<td>Case/sheath used for carrying arrows, usually made from skins or wood &amp; decorated w/varieties of materials, including feathers, quills or beads</td>
<td>English</td>
<td>Wanj(^3)</td>
<td>(NONE)</td>
<td>Hotnga</td>
</tr>
<tr>
<td>Scalp(ing)</td>
<td>Cutting a small, circular portion of skin and hair from top of human head.</td>
<td>English</td>
<td>Ikakteg(^3)</td>
<td>Sokaff (^7)</td>
<td>Yovutpu, qaapukna</td>
</tr>
<tr>
<td>Smoke signal</td>
<td>Use of smoke as long distance signal</td>
<td>Plains Indians</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>(NONE)</td>
</tr>
<tr>
<td>Squaw</td>
<td>North American Indian woman</td>
<td>Algonquian</td>
<td>Winyan(^1)</td>
<td>Tayyi</td>
<td>Wuuti</td>
</tr>
</tbody>
</table>

\(^4\) Clothing worn above the waist.

\(^5\) Clothing worn below the waist.

\(^6\) Earthenware jug used to mix medicine.

\(^7\) Medicine bundle.

\(^8\) Bag, in Muskoge and Hopi.

\(^9\) Party.

\(^10\) Get together.

\(^11\) Woman/wife/married woman in Lakota, Muskoge, and Hopi.
Table 1-1 Continued.

<table>
<thead>
<tr>
<th>WORD</th>
<th>DEFINITION</th>
<th>ACTUAL DERIVATION</th>
<th>LAKOTA</th>
<th>MUSKOGEE</th>
<th>HOPI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tepee</td>
<td>Tent</td>
<td>Lakota</td>
<td>Tipi</td>
<td>Albinafa iisa</td>
<td>Kiihu</td>
</tr>
<tr>
<td>Tomahawk</td>
<td>A number of stone and wooden clubs used as tools or weapons</td>
<td>Algonquian</td>
<td>Wicat'e</td>
<td>Chaafo'si'</td>
<td>Pikya'ingwhoy a</td>
</tr>
<tr>
<td>Tom-tom</td>
<td>Popular term for hand drum</td>
<td>Hindu</td>
<td>Cancega</td>
<td>Bokoko</td>
<td>Pusuki'np</td>
</tr>
<tr>
<td>Totem</td>
<td>An animal, plant, natural object, natural phenomenon, or legendary being serving as the symbol of a tribe, clan, family secret society, or individual</td>
<td>Chippewa/Cree</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>Naatoyla</td>
</tr>
<tr>
<td>War paint</td>
<td>A misused term; body paint worn into battle</td>
<td>English</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>Qoma('at)</td>
</tr>
<tr>
<td>War bonnet</td>
<td>Headdress</td>
<td>Plains indians</td>
<td>Wapaha</td>
<td>Aayanchahka</td>
<td>Kwaatupatsa</td>
</tr>
<tr>
<td>Warrior</td>
<td>One who wages war</td>
<td>Roman</td>
<td>Zuya wie' asa</td>
<td>Ittilbafa aati</td>
<td>Qaleetaqa</td>
</tr>
</tbody>
</table>

12 Although popularly, "tomahawk" refers to an alike weapon w/an iron head, made by Europeans.

13 Killing tool.

14 Hatchet, in Muskogee and Hopi.

15 Tamtam.

16 Drum, in Lakota, Muskogee, and Hopi.

17 Body paint.

18 Not a Hopi cultural item.

19 Soldier.
CHAPTER 2
LETTER OF THE LAW: THE BIRTH OF NAGPRA

Introduction

The Native American Graves Protection and Repatriation Act of 1990, or NAGPRA, is an example of what happens when two diverse worlds collide.

Museums consist of three distinct parts: an inner museum that focuses on collections and research and the scholars, academics, and scientists who use and care for them, an outer museum that takes the product of the inner museum and presents it in an understandable way to the general public, and a middle museum comprised of museum administrators and other staff who liaison between the first two parts (Cato and Jones 1991, p. 6). This three-part entity serves to form a whole institution that is capable of serving a wide array of individuals. However, while the inner museum tends to be more protected from outside influence, the outer museum is often the recipient of external influences that create waves all the way down to its core. This is the case with NAGPRA. Museums were not consulted as this groundbreaking piece of legislation was being drafted. In fact, the only federally funded museum not addressed by NAGPRA was the Smithsonian Institute, which was covered by the National Museum of the American Indian Act of 1989 (NMAI).

The need for NAGPRA was preceded by years and years of unrestricted collecting by professional and amateur archaeologists and anthropologists alike (Thomas 2000). European-American settlers had few qualms about appropriating items that caught their
interest, no matter whom those items may have belonged to. In many cases, it was the
Native American community that suffered not only material losses, but also the
degradation of sacred sites, including ancient and even modern cemeteries. In answer to
these injustices, Native Americans would fight back in any way they could, even if it
meant resorting to violence. To appease Native tribes, the United States government
came to rely on treaties that acknowledged alleged European atrocities and atoned for
them by offering some form of protection or remuneration – at least on paper.
Throughout the nineteenth century, the United States government became notorious for
drafting and implementing treaties that were about as effective as the paper they were
written on (Thomas, 2000; Smith and Warrior, 1996).

In 1990, the United States government took steps to rectify this serious artifact
collection problem. On November 16, Public Law (P.L.) 101-601 (also known as 25
United States Code (U.S.C.) 3001 and House Rule (H.R.) 5237) passed through Congress
and became the Native American Graves Protection and Repatriation Act, commonly
referred to by its acronym, NAGPRA. The intent behind the law was to return to Native
Americans, Native Hawaiians, and Native Eskimo/Inuit objects from nationally held
collections that had been stolen from sacred burial and ceremonial sites.

**Before NAGPRA**

To understand the necessity of NAGPRA, it is critical to understand the history of
artifact collection, especially within the United States. In his book, *Skull Wars:
Kennewick Man, Archaeology, and the Battle for Native American Identity* (2000), David
Hurst Thomas lays out a collections past that would make any self-respecting museum
blush, if not cringe in fear of legal and/or tribal retribution. In the mid-nineteenth
century, Louis Agassiz, a Swiss naturalist and zoologist, ignited what became a fervent
desire in the field of American natural science to broaden their extremely narrow collection base. Agassiz believed that natural history collections could address larger questions of agency in nature (Winsor 1991). Through collecting, describing, classifying, studying, experimenting, and finally exhibiting to an educationally hungry country specimens representing his theories about life, Agassiz hoped that Americans would not only flock to satiate their curiosity, but would also clamor for more. What he also knew was that other scientists shared his museum ideas. Thomas Jefferson had practiced archaeology on his own plantation, excavating, studying, and writing about the Native American burial mounds he found. Charles Willson Peale and George Peabody were also great collectors of things, both natural and human alike (Alexander 1979, pp. 5, 48-49; Shapiro and Kemp 1990, pp. 2-9; Thomas 2000, pp. 54-56). James Smithson, an Englishman who had never even visited the United States, endowed its first repository of natural history, the Smithsonian Institute. However, the Smithsonian Institute found itself in stiff competition with Agassiz, who was curating Harvard’s Museum of Comparative Zoology (Shapiro and Kemp 1990, pp. 1-29; Thomas 2000, pp. 54-56). Peabody donated much of his personal wealth to both Harvard and Yale Universities in order to establish his own Peabody Museum, and other extremely wealthy patrons such as J. Pierpont Morgan, Joseph Choate, and Theodore Roosevelt, Sr. followed suit by providing considerable financial support to similar, competing institutions such as the American Museum of Natural History in New York City.

It was Agassiz, however, whose “solution” to providing new and different objects of natural history for study and comparison, who would go down as one of the most infamous collectors in scientific history. Realizing that the ever-increasing frenzy of
collecting would quickly cause a shortfall in useful archaeological objects, he contacted
the United States Secretary of War, Edward Stanton, in 1865 with a request that Stanton
provide him with as many Native American bodies as possible in order that he might add
some new stock to his collections (Thomas 2000, pp. 56-57). Stanton readily agreed, and
even William Hammond, America’s then Surgeon General, offered to assist by putting
out the word to all medical officers, anthropologists and archaeologists that they should
concentrate on retrieving not only Native American cultural artifacts, but also Native
American human remains from battlegrounds and burial mounds (Thomas 2000, pp. 52-
57). With all of this “professional” help, Agassiz felt confident his collection would
become the premier in the country. He also was able to relieve himself of one of the
more taxing parts of the art of collecting – deciding what was actually valuable and what
was not. Who better to provide material than “trained” professionals who would be able
to discern the valuable from the mundane?

What happened, however, caused civil rights repercussions that still reverberate
today. Once Agassiz’s plan was known, other collectors followed suit, even offering
rewards for what they termed “prime specimens.” Because many Native American tribes
had already been rooted from their homelands and herded onto federal reservations,
finding any Native American objects at all became difficult after the initial rush had
passed. By using Native American artifacts for institution building, Agassiz
inadvertently instigated the broad-based cannibalizing of Native American homes,
villages, and cemeteries. This practice continued throughout the nineteenth century and
into the early twentieth century. As American natural history museum shelves became
full, museums expanded and Native cultures disappeared. Anthropologists, with the
advent of scientific fieldwork and the depletion of local indigenous culture, began to travel overseas to study foreign native groups.

Between the 1920s and the late 1950s, the collection of Native American artifacts continued in earnest (Hill 1996). In the early 1960s, Native Americans’ vocal displeasure at having been exploited for so long grew louder (Smith and Warrior, 1996, pp. 114-115; 127-128). Using a tactic that had been successful in the past, Native American activists Ed Castillo, Anthony Turner, and Dennis Turner, who had been instrumental in organizing the 1969 Native American protest at Alcatraz, arranged what would be their last true tribal uprising, the Second Battle of Wounded Knee, in 1973 (Smith and Warrior 1996, pp. 194-268). There, the Native Americans protested the dehumanizing treatment of their heritage and ancestors by the United States government and their agents. Although the protest began peacefully, it ended in violence, prompting the government to draft legislation intended to prevent activism by the Native American community in the future.

The United States government has a history of creating legislative smokescreens, i.e. tribal treaties, to hide their true intent when it came to dealing with Native Americans, namely to remove them so that Europeans could move onto Native lands, depleting wild game and other natural resources Natives needed to survive (Cary et al. 1999; Kupperman 2000). However, public perception, together with public sentiment, had become heightened since the 1960s, and this time, Congress needed to generate a law that offered not only protection but reparation as well; something with “teeth” that would take a bite out of government supported entities that perpetrated civil rights violations through continued possession of illegally obtained objects, rather than out of Native American
victims. Whether NAGPRA could be, in fact, that sharp-toothed monster, however, remained to be seen.

**NAGPRA Unveiled**

In 1990, as the House of Representatives drafted this groundbreaking legislation, they knew that it must be structured to pass easily through Congress and across the desk of the President without causing an extraordinary amount of panic on the part of targeted entities. After many drafts, and countless committee reviews, the House was prepared to offer up the following for passage: a law that defined culturally charged terminology in order to effectively repatriate objects and artifacts in question. It also set out specific directions for this repatriation and penalties for both negligent and deliberate disobedience of the law. Finally, it pulled together specific cultural groups as its primary focus and set guidelines that federally funded institutions would be required to comply with.

NAGPRA applied to any agency that received federal grants or other federally funded financial support, such as public universities, teaching hospitals, and museums (with the exception of the Smithsonian Institute that is covered under the NMAI). NAGPRA was also narrowly focused on particular Native groups such as those living within the borders of the United States, Native Hawaiians, and Native Eskimos/Inuits.

NAGPRA was drafted to perform two specific functions: *first*, to protect existing cultural, ceremonial, and burial sites of the targeted groups; and, *second*, to repatriate objects held by qualifying governmental institutions. NAGPRA provided guidelines with respect to determination of “ownership of human remains…, associated funerary objects…, unassociated funerary objects…, sacred objects…, and objects of cultural patrimony…” (Appendix A, pp. 94-95). To determine if collections contained material
that would be subject to repatriation, all qualifying entities were instructed to perform detailed inventories of those collections. Once the inventories were complete, tribal affiliation had to be determined for each item, and then official notification must be made to both the federal government and the tribes involved. Upon receipt of notification, the tribes could then decide if they wished to have those objects repatriated. Nowhere within the structure of NAGPRA was there a mandate that tribes must repatriate all items contained in any letter of notification. Therefore, NAGPRA provided tribal representatives with an agency they had never before experienced when dealing with the United States government. They could actually make a choice without repercussions!

Lawmakers also built penalties into NAGPRA to deal with the noncompliance. The illegal practice of archaeological site looting was well known to museums and government officials alike. It was NAGPRA’s intent to impose stiff enough penalties for this behavior that the perpetrators would be adequately punished, if not ultimately deterred from such actions. Therefore, when someone was caught, the first time, attempting to sell, buy, transport for sale, or profit from any NAGPRA-qualified objects, they were subject to federal prosecution and, if convicted, could serve up to a year in federal prison together with paying an unspecified, although presumably hefty, amount in fines. If their first conviction was insufficient to dissuade them from similar pursuits, a second or greater offense carried with it a five-year federal prison term and much greater financial penalties (Appendix A, pp. 97-98).

While these deterrents were aimed at individuals, penalties also had to be written for institutions that balked at compliance with NAGPRA. Should a federally funded entity be found guilty of non-compliance, they would be subjected to “civil penalties as
determined by the Secretary of the Interior,” whose job it was to enforce the terms and conditions of NAGPRA. Agencies were allowed recourse, however, in the form of a hearing before the Secretary to determine whether or not the alleged breach of NAGPRA was indeed intentional. If the agency was found to be guilty of intentional breach, their penalty would be based on the following criteria: 1) the archaeological, historical, or commercial value of the item(s) involved; 2) the damages suffered, both economic and non-economic, by any pertinent party; and 3) the number of violations that had occurred involving the particular agency in question (Appendix A, pp. 98-99).

NAGPRA also gave United States Native Americans, Native Hawaiians, and Native Alaskans legal recourse to obtain objects that museums or other entities may not consider to be qualified under NAGPRA. Museums and other federally funded agencies seldom consider prehistoric objects as “qualifying” because it is difficult at best to formulate a convincing link between a modern Native American tribe and a tribe or group that lived as long as three or four million years ago. In fact, NAGPRA specifically states that an object qualifies for repatriation if “…there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.” (25 USC §3001(2), emphasis added.) Native groups, on the other hand, do not appear to recognize the term “reasonable,” and hold up a literal interpretation of NAGPRA’s language as the correct interpretation of the letter of the law, e.g., that all objects qualify for repatriation, whether their cultural affiliation can be specifically determined or not. Interpretation of the word “reasonable” is critical to interpretation of the entire concept behind NAGPRA. While “reasonable” is defined in the American Heritage Dictionary as
“…2. Governed by or in accordance with reason or sound thinking. 3. Within the bounds of common sense;…4. Not excessive or extreme; fair…” (2001, p.1031), the legal definition of the word carries with it a more objective focus, e.g., “in law, just, rational, appropriate, ordinary or usual in the circumstances. It may refer to care, cause, compensation, doubt (in a criminal trial), and a host of other actions or activities.” (Dictionary.law.com 2003.) For museums, the most reasonable course of action is often to continue to operate under the status quo and leave the objects in question in a safe, well protected, and academically accessible environment – the museum environment. For Native Americans, this word often does not exist in their vocabularies.

Case Studies

One of the most famous cases regarding the determination of reasonableness is that of Bonnichsen et al. v. United States of America (1996. Civil No. 96-1481-JE; 217 F.Supp.2d 1116) (Appendix C). In this matter, more commonly known as “In Re: The Matter of Kennewick Man,” James Chatters, an archaeologist, discovered what turned out to be an almost complete set of human remains along the Columbia River in Washington State. Scientific analysis determined that the individual in question had been a “Caucasoid” male who was between 40 and 55 years old when he died. He had been approximately 5’9” tall and had sustained a fractured skull, crushed chest, and a chipped left elbow sometime during his life. Although Chatters initially thought that the skeleton dated back perhaps 100 years or so (he assumed that it was probably an early American pioneer), preliminary aging analysis placed the time since death somewhere between 4,500 and 9,000 years ago. However, Chatters believed that a more definite date could be obtained using radiocarbon dating. He sent a piece of bone to a friend who worked at a research laboratory equipped to perform the requisite testing. When it was determined
that, in actuality, the remains were more than 9,400 years old, Chatters realized that he had an enormous research project on his hands. Accordingly, he sent out a global e-mail to his colleagues in the anthropology field requesting assistance with the project. The federal government and various northwest Native American groups also picked up the e-mail. Three days after receiving the radiocarbon dating analysis, a suit was filed in federal court by five separate Native American tribes, the Umatilla, the Yakima, the Nez Perce, the Wanapum, and the Colville, under the auspices of NAGPRA, claiming cultural affiliation to the remains and therefore the right to repatriation. After several years of legal wrangling, during which time the United States Army Corps of Engineers (ACE), a division of the United States Department of the Interior (DOI), “…buried the discovery site of the remains under approximately two million pounds of rubble and dirt, topped with 3700 willow, dogwood, and cottonwood plantings…” (Appendix C, p. 115). When asked why they had chosen such a course of action, ACE representatives claimed that they were simply attempting to prevent an erosion problem at the site (Thomas 2000, p. xxii). However, the court transcript states, “the 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….,” (Appendix C, p. 115). Finally, on January 13, 2000, the DOI ruled that Kennewick Man was indeed Native American. The DOI applied NAGPRA’s language in making their decision, stating:

As defined in NAGPRA, “Native American” refers to human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and, irrespective of whether some or all of these groups were or
were not culturally affiliated or biologically related to present-day Indian tribes. (DOI 5816.)

This interpretation appears to fly directly in the face of NAGPRA’s earlier definition of cultural affiliation, requiring “reasonable” evidence of a link between a present-day tribe and the remains or artifacts in question. However, using this newly drafted definition, the courts were able to grant the Native Americans’ petition for application of NAGPRA and therefore, repatriation of Kennewick Man’s remains.

The fight was not over. The anthropologists involved appealed the DOI’s decision to the U.S. District Court of Oregon and, on August 30, 2002, Judge John Jelderks reversed the DOI and declared that Kennewick Man was not, in fact, Native American and should therefore without delay be released into the waiting arms of scientific researchers. So far, the Native Americans who brought the initial suit have not filed any further legal documents with regard to this latest decision.

Another federal court case involving NAGPRA and the concept of reasonableness was Yankton Sioux Tribe et al. v. U.S. Army Corps of Engineers et al. (1999. Civil No. 99-4228; 194 F.Supp. 2d 977; 2002 U.S. Dist.) (Appendix D). In this matter, the problem was not the return of Native American objects, but the continued excavation of what the Corps allegedly knew was a recognized Native American burial site in defiance of federal law.

The original complaint filed by the Yankton Sioux tribe concerned allegations that the Army Corps of Engineers had discovered Native American remains while working on the Fort Randall Dam Site in South Dakota, but had refused to cease their water management activities in accordance with NAGPRA directives (Appendix D, p. 158).
According to the trial notes, the Yankton Sioux had requested a temporary injunction requesting that all water management be stopped until they could remove their ancestral dead from the St. Philip’s Cemetery, which was located adjacent to a local church, “in accordance with its own traditions and wishes under the NAGPRA” (Appendix D, p.159). They asked that the Army Corps of Engineers be enjoined from raising the water level in the Fort Randall Dam, which would cover and obliterate the St. Philips Cemetery, until they could remove the remains under ceremonial conditions, and consult with professionals regarding the disposition of those remains (Appendix D, p. 159). The Court complied with an injunction effective until January 13, 2000 “or when all of the loose human remains and any other loose cultural items were removed from the Lake’s shore” (Appendix D, p. 159).

Due to a year long problem with bad weather, the Sioux were unable to complete this project, and the Army Corps of Engineers agreed to hold off filling the dam until March of 2001. At that time, the Sioux informed the Court that they intended to complete their project in the fall of 2001, when the level of naturally accumulated water in the dam dropped low enough for them to retrieve the remainder of the cemetery contents.

Throughout 2001, the Army Corps of Engineers and the Yankton Sioux tribe continued to negotiate. In the meantime, all Corps activities with regard to the site in question remained in stasis. Finally, matters were settled enough that the Corps filed a motion to dismiss the original complaint, stating that all of the requirements of NAGPRA related to the incident in question, e.g., “…notification, certification, and cessation of activity for thirty days…” had been satisfied (Appendix D, p.160). The Corps also
asserted that the Yankton Sioux “no longer has standing to pursue this action…” and, therefore, the original matter was moot (Appendix D, p. 160).

The Yankton Sioux disagreed and filed an amended complaint in October of 2000. They contended that no permanent solution had been found, and therefore NAGPRA had not been satisfied. Their specific complaints were that:

…(1) the Corps has violated its duty under the NHPA [National Historic Preservation Act] to preserve the human remains at the St. Philip’s Cemetery because the cemetery is eligible to be listed on the National Register under the NHPA; (2) the Corps has violated its duty to consult with the Tribe in its preservation related activities at the St. Philip’s Cemetery; (3) the Corps is required to allow the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to any undertaking that will affect the St. Philip’s Cemetery; (4) the Corps has violated its preservation duties by managing the waters in the Lake in a manner that has eroded the ground around graves, exposing caskets, human remains and resulted in exposure and removal of artifacts. (Emphasis added.) (Appendix D, p. 160)

The Yankton Sioux also took the opportunity to include in their amended complaint an additional six prehistoric sites near the dam site, claiming that these areas had suffered erosion because of the Corps’ water management (Appendix D, p. 160). In response to this additional claim, the Corps continued to contend that the Court had no jurisdiction over the entire matter, and should therefore dismiss the entire matter for the following reasons:

…(1) the United States did not waive it[s] sovereign immunity under the [National Historic Preservation Act] NHPA so there is no private cause of action under the NHPA; (2) there has been no final agency action as required by the Administrative Procedures Act giving rise to a cause of action under the NHPA; (3) even if there is a private cause of action under the NHPA, the Tribe’s claim is not ripe for review; and (4) there is no case or controversy and the Tribe lacks standing to bring its claim under Article III, Section 2 of the United States Constitution. (Appendix D, p. 160.)

The Court’s decision was in favor of the Yankton Sioux tribe on all counts. It determined that all of the Corps’ allegations of lack of standing were unfounded and that
the Yankton Sioux had met their burden of proof that the Corps was responsible for damage and degradation not only to the St. Philip’s Cemetery, but also to the other six prehistoric sites located near the cemetery. According to the Court, it interpreted the language of NAGPRA to include the governance of “the inadvertent discovery of Native American cultural items on federal or tribal lands” (Appendix D, p.161). This decision included the St. Philip’s Cemetery find, and any other objects that came to light during any planned or unplanned renovation of federal lands.

**Legal Interpretations**

In both of the preceding cases, NAGPRA was used by Native Americans to attempt to regain control of objects that were of tribal significance. The case of *Bonnichsen et al. v. United States of America et al.* (1996) illustrates that the application of NAGPRA does not always guaranty that Native Americans will regain possession of sought after objects. The outcome here, perhaps, can be credited to the fact that the object in question was a set of skeletal remains that the court ultimately doubted had “reasonable” Native American ties. In the *Yankton Sioux Tribe v. U.S. Army Corps of Engineers et al.* (1999) matter, the remains in question were undoubtedly Native American as they were still interred in an already recognized sacred Native American burial ground. The courts made good use of the legislatively determined definition of what qualifies as a Native American object, which states:

(3) “cultural items” means human remains and ~

(A) “associated funerary objects” which shall mean objects that…are reasonably believed to have been placed with individual human remains either at the time of death or later…[including] other items exclusively made for burial purposes or…contain[ing] human remains…

(B) “unassociated funerary objects” which shall mean objects that…are reasonably believed to have been placed with individual remains either at
the time of death or later… and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, … as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe.

(C) “sacred objects” which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) “cultural patrimony” which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. (PL 101-601, §2, p.1.)

The courts are also bound by the legislative definition of “ownership,” which states:

(a)… The ownership or control of Native American cultural items… shall be…

(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 object[s] 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…

(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, … 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 … (PL 101-601, §3, p.3.)

Courts also rely on precedent when determining legal cases that come before them. In the Bonnichsen et al. v. United States of America et al. (1996) matter, while scientific evidence was offered to refute the claim of Native heritage, the plaintiffs’ opposing argument was legitimate in the eyes of the Department of the Interior because it presented the plaintiffs’ argument in their own terms in light of their own cultural heritage and beliefs. In fact, science has long concurred, at least in part, with the logic presented by the plaintiffs, namely that Native Americans were present in the United States at least as far back as 10,000 years ago (Kottak 2004; Schultz and Lavenda 1998; Fagan 1995; Scupin and DeCorse 1995; Ferraro et al. 1994; Ember and Ember 1990). Therefore, the DOI should have been correct in deciding that Kennewick Man was Native American. Unfortunately, a strong belief in cultural heritage and oral histories does not qualify as either “reasonable” or a “preponderance of the evidence” as required by law.

These two federal cases, while not directly involving museums or their collections, set precedence in dealing with Native American claims of wrongful treatment of their artifacts, objects, and ancestors. In Bonnichsen et al. v. United States of America et al. (1996), when the courts finally found in favor of the plaintiff scientists, the decision

\[1\] “We already know our history. It is passed on to us through our elders and through our religious practices…From our oral histories, we know that our people have been part of this land since the beginning of time. We do not believe that our people migrated here from another continent, as the scientists do” (Appendix C, p. 115).
carried the message that positive proof of Native American ethnic descent was necessary before objects in question would be relegated back to any tribe claiming legal possession under NAGPRA. As is the case with most museums with Native American skeletal collections, the majority are either prehistoric or early historic in age. Therefore, determining a definitive link between a modern tribe and an ancient one is extremely difficult since DNA is often either unavailable or so far degraded that testing is impossible. In *Yankton Sioux Tribe v. U.S. Army Corps of Engineers et al.* (1999), however, the fact that the remains were still interred on legally recognized land belonging to the Sioux Indians gave the plaintiff Native Americans the ability to pass the legal reasonableness test. For museums, this means that if a Native American tribe can prove, through records normally kept by museums for catalog and accession purposes, that remains or artifacts in question were obtained from an area legally recognized as belonging to a specific tribe, the return of those objects in question would be inevitable due to NAGPRA’s reliance on the ability of one side or the other to pass the legal test of reasonableness.

**Conclusion**

As the art of forensic science advanced, with more complex methods of determining guilt, innocence, and accountability, such as DNA fingerprinting, forensic anthropological analysis, computer facial regeneration, and improved trauma analysis, courts found themselves faced with much more technologically advanced arguments, arguments that sharply altered the idea of a “preponderance of the evidence.” Now, rather than straight logic, courts could rely on hard scientific evidence to uphold or slap down the logic placed before them. Therefore, it was a simple matter for the U.S. Court of Appeals to reverse the DOI’s decision, as by the year 2000, scientific analysis of
biological evidence had become a fixture in the courtroom and was in fact one of the
most common, and most trustworthy, elements used when determining biological
accountability. The forensic testing performed early on in the Bonnichsen et al. v. United
States of America et al. (1996) matter provided ample evidence that Kennewick Man
was, in fact, not of Native American descent and, therefore, did not fall under the
purview of NAGPRA. The Court of Appeals was under no obligation to disregard what
was now a precedent of accurate scientific evidence being considered first and foremost
in favor of less accurate, still debated scientific theories.

In the Yankton Sioux Tribe v. U.S. Army Corps of Engineers et al. (1999), scientific
evidence was unnecessary, as the physical evidence was enough to make the Yankton
Sioux’s case. When it became apparent that the Army Corps of Engineers was not only
constructing a dam on a recognized Native American burial site, but also wanted to
continue its construction there despite repeated pleas by the Yankton Sioux to stop just
long enough for the plaintiffs to excavate and move the site, the courts found little to
support the government’s argument. In this case, there was no question that the Native
Americans should prevail because the matter fell squarely under the jurisdiction of
NAGPRA.

States can choose to enact legislation of their own that reiterates federal mandates
but addresses issues that occur on state-owned and sometimes privately-owned property.
Chapter 3 examines individual states’ reactions to NAGPRA. It focuses on several
different cases that rely on state legislation mirroring NAGPRA in making decisions
regarding the removal and repatriation, of Native American artifacts. It also discusses the
concept of “ownership,” addressing the problem of objects found on privately owned land versus objects found on state-owned or federally-owned lands.
CHAPTER 3
THE GRAMMAR OF GRAVEROBBING: THE STATES RESPOND TO NAGPRA

Introduction

Grover Cleveland was a decent guy. In fact, in 1886 he vetoed precedent-setting legislation regarding grave desecration because it lacked “decency,” “care,” and “consideration” for the deceased:

I hereby return Senate bill No. 349…without my approval. Such disposition of the bodies of unknown and pauper dead is only excused by the necessity of acquiring by this means proper and useful anatomical knowledge, and the laws by which it is permitted should, in deference to a decent and universal sentiment, carefully guard against abuse and needless offense. (Emphasis added.) (1886, Cleveland, Special Message to the Senate and House of Representatives re: S.B. 49 S.439, pp. 4998-4999)

The District of Columbia’s attempt to safeguard the graves of “unknown and pauper dead” illustrates the recognition of a practice that was out of control. Because of their low social status, the graves of these individuals were often robbed of their bodies for purposes of sale to medical schools and university biology and anatomy departments.

There were no laws in effect at that time that addressed grave desecration. When these laws did finally reach the books beginning in the early twentieth century, they took the form of cultural heritage laws designed to protect archaeological sites that included everything from prehistoric Native American burial mounds to the African-American slave burial grounds of the 1800s. It is interesting to note that at no time are these places ever called “cemeteries” by lawmakers, even though this term is used by Native Americans and African-Americans alike. It is also of interest that one state in particular protects pet cemeteries but not human cemeteries (KRS § 381.6907 (2002)).
Cultural heritage laws do not offer retroactive protection to recognized archaeological and other culturally significant sites. NAGPRA, on the other hand, applies retroactively to all Native American, Native Hawaiian, and Native Alaskan objects and artifacts that were collected through time. Through the enactment of NAGPRA, Congress had also crafted legislation that gave legal recognition to the importance of Native American cultural heritage not only to the public at large, but also to the Native Americans specifically. The spirit of NAGPRA, and also much of its language, was reflected in state laws enacted by twelve states, Alabama, Arizona, Arkansas, California, Delaware, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Montana, New York, New Mexico, Oregon, Rhode Island, South Dakota, Washington state, and West Virginia, in addition to cultural heritage laws that were already in place. The other 38 states have no legislation that mirrors NAGPRA, but have cultural heritage laws that protect archaeological and other culturally significant sites. The addition of legislation mirroring NAGPRA to state law may appear to be redundant; however, it is the retroactive property of this type of legislation that is attractive to states choosing to create their own state-level protection for previously collected Native American objects.

With regard to the removal or relocation of human remains, whether in a cemetery or solitary setting, state laws vary greatly. For example, Washington State prohibits relocation of ancient human remains altogether. Many states require notice to some government commission or agency such as a state museum, state archeologist or archeological society, the department of anthropology at a state university, or a Native American board or commission. Some require governmental approval prior to relocating
the human remains. A few states require permission of the landowner. Five states, Idaho, Massachusetts, Minnesota, Missouri, and Oregon, give a Native American tribe veto power over the removal and reinterment of the human remains.

**Definitions**

Definitions are crucial to any legal language, NAGPRA included. The first three pages of the law define the key words and phrases upon which NAGPRA turns:


Of the twelve states having legislation that mirrors NAGPRA, Alabama, Illinois and West Virginia focus specifically on historic burial sites. Arkansas and Missouri have ambiguous language that might be interpreted as focusing on historic burials: “Chapter 6. Archaeological Research” A.C.A. § 13-6-408 (2002) (Arkansas); and, “Cultural items”, “General archaeological investigation” Title 12, §194.400 R.S.Mo. (2001) (Missouri).

Delaware specifically addresses the trading of human remains and funerary objects, and Indiana simply lists the disturbance of human remains, grave markers, etc. as a Level I offense under the Marion County Superior Court Rule on Admission to Bail and Pretrial Release.
Arizona, Montana, Oregon, and South Dakota use legislative language that is derived almost exclusively from NAGPRA. Montana never actually uses the term “Native American” in its legislative language; however, its application to Native American tribes and group is implied:

(e) the state of Montana acknowledges the paramount privacy right of a tribal group, lineal descendant, next of kin, agency, or museum to protect sensitive and sacred information that may be required to be disclosed to demonstrate cultural affiliation or lineal descent and therefore authorizes the protection of that information to the full extent allowed by the Montana constitution;… (Mont. Code Anno., § 22-3-902 (2002)(1)(e))

Oregon discusses archaeologically sites “…determined significant in writing by an Indian tribe” (ORS § 358.905(1)(b)(B)). Ironically, writing does not appear among most Indian tribes until long after European contact, effectively excluding sites whose “significance” is only noted in oral history. They also detail “funerary objects” as “…sacred objects or objects of cultural patrimony” or “arrowheads” (2001 Ore. ALS 739 § 2(e)(A)-(C)).
South Dakota lists the following definition: “[t]ribal group,’ a federally recognized Indian tribe” (S.D. Codified Laws § 34-27-21 (2002)(4)), even though they initially define “Funerary object,” as “…any artifact or object which was intentionally placed with a deceased person…” (S.D. Codified Laws § 34-27-21 (2002)(2)), and “Human skeletal remains,” as “…the bones of a human being.” (S.D. Codified Laws § 34-27-21 (2002)(1)) It is therefore evident that South Dakota is speaking specifically to Native American grave desecration rather than desecration in general.

Finally, Arizona focuses of several of NAGPRA’s definitions and adopts them as its own:

B. If the objects discovered are human remains, funerary objects, sacred ceremonial objects, or objects of national or tribal patrimony, the…Arizona state museum shall…give notice of the discovery to: 1. All individuals that may have a direct kinship relationship to the human remains. 2. All groups that…may have cultural or religious affinity to the remains or objects. 3. …members of the [museum] curatorial staff…. 4. Faculty members of…state universities who have a significant scholarly interest… 5. The state preservation officer. (A.R.S. § 41-844 (2002)B.1.-5)

Arizona then goes on to address “American Indian tribal governments…” and “American Indian human remains…” (A.R.S. § 41-844 (2002) C.-D). It appears that Arizona is seeking to protect a plethora of Native American sites in order to ensure not only the survival of early Native American heritage, but also the sanctioned archaeological fieldwork that either has been or is being done at various sites around the state. Because many regions such as Mesa Verde are open to the public, it is essential that items be safeguarded from those who would be searching for a priceless souvenir or looking to make a fast buck.

California and Washington State address Native American burials directly. California states that:
This bill would establish the Native American Historic Resource Protection Act, which would provide that any person who unlawfully and maliciously excavates upon, removes, destroys, injures, or defaces a Native American historic, cultural, or sacred site that is listed or may be listed in the California Register of Historic Resources, including any historic or prehistoric ruins, burial ground, any archaeological or historical site, any inscriptions made by Native Americans at the site, any archaeological or historic Native American rock art, or any archaeological or historic feature is guilty of a misdemeanor if the act was committed with the specific intent to vandalize, deface, destroy, steal, convert, possess, collect, or sell a Native American art object, inscription, or feature, or site and the act occurs on public land or, if on private land, is committed by a person other than the landowner, as described. (202 Cal ALS 1155(1))

Note the protection of items found on private land by private landowners. This particular statute states that private landowners are not required to notify anyone, or relinquish ownership of any object discovered by them under any circumstances. Therefore, if a particular individual has in his or her possession cultural items or human remains that were discovered on their privately owned land, the Native Americans would be unable to invoke state law to demand their cultural heritage back. Nor would they be able to use NAGPRA, as that law only covers federal lands and federally funded institutions. These objects would then be permanently lost to the Native Americans unless the landowner decided to voluntarily return them.

Washington State’s legislature addresses “Native Indian burial grounds and historic graves…” together with “Indian burial sites, cairns, [and] glyptic markings…” (Rev. Code Wash. (ARCW) § 27.44.030 (2002)(1) & (4)). While brief and to the point, it is almost a veritable copy of NAGPRA. In other words, it does not address private lands separately.

Finally, one of the more interesting aspects of state grave desecration law is the interpretation of Kentucky statues as including pet cemeteries. After careful inspection, any reference to pet cemeteries is absent. According to the Kentucky Legislature:
1) Every cemetery in Kentucky except private family cemeteries shall be maintained by its legal owner or owners, without respect to the individual owners of burial plots in the cemetery, in such a manner so as to keep the burial grounds or cemetery free of growth of weeds, free from accumulated debris, displaced tombstones, or other signs and indication of vandalism or gross neglect.

(2) The owner or owners of public or private burial grounds, regardless of size or number of graves, shall protect the burial grounds from desecration or destruction as stipulated in KRS 525.115(1) (a), (b), or (c) or from being used for dumping grounds, building sites, or any other use which may result in the burial grounds being damaged or destroyed. The provisions of this subsection shall not apply to the owner or owners of public or private burial grounds when the public or private burial grounds have been desecrated, damaged, or destroyed as the result of a crime by another as defined by KRS 500.080.

(3) The owner or owners of private burial grounds shall be required to construct cemetery protection structures only if the burial ground is located in a county with a county cemetery board and if the board provides compensation to the private burial ground owner for supplies, labor, and other expenses associated with such construction. (KRS § 381.6907 (2002)1)

In *Loid v. Kell* (844 S.W.2d 428, Ky.Ct. App. 1992), the language of this statute was interpreted by the trial court to include “every cemetery in Kentucky,” including pet cemeteries. The Kentucky legislature, however, soon narrowed the scope of interpretation by adding the following paragraph directly to the statute itself:

The language in this chapter indicates that the term “cemetery” contemplates places where dead persons are buried; therefore, the trial court erred in extending the definition of cemetery to include a pet cemetery. *Loid v. Kell*, 844 S.W.2d 428 (Ky.Ct. App. 1992). (KRS § 381.6907 (2002)1)

**Case Analyses**

As in the cases of federal prosecution for alleged violations of NAGPRA cited above, several states have prosecuted individuals. California provides two cases selected as examples. The first addresses a flagrant violation of NAGPRA by an individual, and the second involves an apparent set of errors and misinterpretations that resulted in a similar violation.
In the first case, *The People [of California], Plaintiff and Respondent v. Brian Jonathan Krantz, Defendant and Appellant* (67 Cal.App.4th 13; 78 Cal.Rptr.2d 718; 1998 Cal. App. LEXIS 838; 98 Cal. Daily Op. Svc. 7639; 98 Daily Journal DAR 10567) (Appendix E), the California Court of Appeals, Second Appellate District, Division Six, was charged with determining whether the defendant in the matter, Brian Krantz, had been entrapped by law enforcement during an undercover investigation regarding the alleged desecration and removal of archaeological artifacts and human remains from an ancient Chumash Native American village located on Santa Cruz Island, part of a designated national park (Appendix E, p. 171). According to court transcripts, Krantz worked as a guide on the island for vacationing hunters. He would escort them to appropriate campsites, cook meals, help butcher any game killed, and prepare the meat for shipment back to the mainland (Appendix E, pp. 171-172). For these services, Krantz received room and board from his employers, and tips from the hunters whom he was escorting.

It was well known that there were several archaeological sites on Santa Cruz Island, and all of the guides knew about these sites and were allowed to include visits to them in their island tours. They knew, however, that any disturbance of these sites was a federal crime, and were to instruct visitors not to remove anything from them (Appendix E, p. 172). Mr. Krantz, like his counterparts, was aware of these remonstrations from his employers, and had received instructions about what to do should any artifacts or human remains be discovered.

In the two years preceding the initial trial of Krantz, the government had been informed that “artifacts were disappearing off the island and that an international market
existed for the objects” (Appendix E, p. 172). Because of this information, it was determined that an undercover investigation was warranted, and two investigators were assigned to pose as hunters and book a hunting trip with Krantz’s employer in order to gain more insight into the alleged charges of theft of objects from the island’s archaeological sites for monetary gain.

According to the investigators, once they arrived at Santa Cruz Island, Krantz was assigned to them as their guide. He proceeded to take them on a tour around the island, pointing out the various archaeological sites, together with areas that were known to be good hunting grounds. On one particular evening, the three were out scouting for sheep. Krantz took them by a site that was designated as Midden Site 137, a fact that he conveyed to both of the undercover investigators. When the group approached the midden itself, Krantz “broke off several tennis-ball-sized clods of soil from the bank. He broke the pieces apart and explained that the shell material and dark-colored soil were midden. He then tossed the pieces onto the ground” (Appendix E, p. 173). He then admitted to his group that he had found artifacts such as shell beads and arrowheads at that location in the past. When questioned about the beads, Krantz reportedly stated: “it was a federal offense to collect those, but f*** it” (Appendix E, p. 173).

Krantz was also found guilty of, among other things, the deliberate disturbance and collection of archaeological human remains that were known to be Native American. In a separate incident, but on the same trip, Krantz returned to Midden Site 137 and uncovered a partial set of human remains for the investigators, which he offered to them for souvenirs. One of the investigators took possession of some teeth. Krantz then proceeded to rebury the remainder of the remains, “…put rocks and dirt in front of the
hole, jumped up and down on the spot, and scattered brush over the area” (Appendix E, p. 173). Krantz commented at the time of the incident to the investigators that he believed a whole body, perhaps many bodies, were buried at the site and “…that some day when the ranger was gone he was going to come back and bring a trowel” (Appendix E, p.173). “…Owens [the ranger] would ‘s*** [in] his pants if he knew’” Krantz claimed, and admitted that “…he was ‘probably f*** up Cro-Magnon Man or something like that’” (Appendix E, p.174).

In his initial trial, Krantz’s defense was simply that he did not believe he had committed any crime by his actions. However, his own words obviously belie his claim. In his appeal, Krantz claimed entrapment and lack of evidence in an attempt to overturn his original conviction. The appellate court, however, disagreed, stating, with regard to the entrapment allegation:

…”The sole evidence of entrapment in the instant record is appellant’s testimony that the investigators put him under constant pressure to violate the law, by continually expressing their interest in viewing and possessing Native American artifacts…Nevertheless, did appellant’s testimony constitute substantial evidence of an entrapment theory? No. …In view of …the insufficient evidence supporting an entrapment theory, the trial court properly refused to instruct the jury on an entrapment defense. (Appendix E, p. 176)

The court continued regarding the claim of lack of evidence:

[California] Penal Code section 622 ½ provides that ‘every person, not the owner thereof, who willfully injures, disfigures, defaces, or destroys any object or thing of archaeological or historical interest or value, whether situated on private lands or within any public park or place, is guilty of a misdemeanor. …There is substantial, indeed overwhelming, evidence in the record…that appellant violated the statute. (Id. at p. 792.) (Appendix E, p. 177)

The appellate court ultimately affirmed the trial court’s ruling, e.g., that Krantz was guilty as charged. While the offense in question was obviously against NAGPRA in this
case because the crime took place in a national park, the appellate court cites California’s own penal code, Public Resources Code § 5097.99, as an affirmation of federal law:

No person shall obtain or possess any Native American artifacts or human remains which are taken from a Native American grave or cairn on or after January 1, 1984, except as otherwise provided by law or in accordance with an agreement reached pursuant to subdivision (1) of Section 5097.94 [agreement between landowners and Indians] or pursuant to the provision of Section 5097.98 [descendents may recommend ‘the scientific removal and nondestructive analysis of human remains and items associated with North American burials’]. (Emphasis added.) (Appendix E, p. 171, fn. 1)

This Code, which was enacted more than six years before NAGPRA, is part of California’s cultural heritage management legislation which protects not only Native American archaeological sites, but other ancient and archaic sites as well. In the second case, The People [of California] et al., Plaintiffs and Respondents v. David Van Horn et al., Defendants and Appellants (218 Cal.App.3d 1378; 267 Cal.Rptr. 804; 1990 Call. App. LEXIS 278) (Appendix F), focuses on this particular portion of California’s Public Resources Code as it relates to the withholding of grave goods found in conjunction with a Native American burial.

According to trial transcripts, the defendants, David Van Horn and his wife, Ruth, were hired by the City of Vista, California, to perform an archaeological survey on some property on which the city wanted to build an industrial park. At some point during the survey, Van Horn ran across an “ancient grave” containing two separate sets of skeletal material. There was also an 80-pound metate fragment associated with one set of those skeletal remains, and a similar fragment weighing 30 pounds or so associated with the second set (Appendix F, pp. 179-180).

Van Horn reported his find to the local coroner, who according to state statute, was to have contacted “the Commission, a nine-member state agency…” (Appendix F, p.
However, because the coroner believed that the remains were indeed Native American, he “mistakenly” contacted the Bureau of Indian Affairs. Meanwhile, he told Van Horn to deliver the remains to the San Diego Museum of Man. Van Horn complied; however, he chose to keep the metates, taking them to his own company laboratory at Archaeological Associates in Sun City, California.

Eventually, a local newspaper published the story. In it, the paper “…implied that Van Horn had attempted to conceal [the discovery] from the public” (Appendix F, p. 180). Soon thereafter, several local Native American tribes requested a meeting with representatives of the City of Vista and with Van Horn himself to discuss further action regarding the find. At this meeting, it was agreed by the parties that the remains themselves would be returned to the Luiseno Tribe of Missioni Indians, who would re-inter the remains at the original site. The fate of the metates, however, required a second meeting, where Native Americans requested their return so that they might be reburied with the skeletal remains in the manner in which they were originally discovered. Van Horn refused this request, stating:

…it in his view, that it would be unethical to contribute to the loss of an archaeological collection which had been gathered at considerable expense to the public; that it was not certain that the remains were those of California Indians, and that the Indian claims to the metates were based on race rather than kinship or culture. (Appendix F, p. 180)

The claims on both sides at the original trial were simple: the State claimed that Van Horn had taken possession of, and was maintaining possession of, the metates illegally according to Public Resources Code § 5097.99. The defense, however, had two arguments in support of their contention that Van Horn was legally entitled to possess the metates. These were, 1) that the objects in question did not, in fact, belong to North American Native Americans, but to Mexican Indians, thereby rendering P.R.C. § 5097.99
invalid due to lack of jurisdiction; and, 2) that Van Horn himself did not have actual possession of the objects, but that the corporation did, therefore removing his liability (Appendix F, pp. 3-6). Summarily, the trial court issued an order which required Van Horn and his co-defendants to return the metates to the property owners and/or their official representatives. However, objections were filed and, upon their merit, that order was stayed and, instead, the metates were given into the custody of the curator for the San Diego Museum of Man, where the skeletal remains were originally held, until an appeal could be filed (Appendix F, pp. 181-184).

In the appeal, the State made three claims:

…(1) in its complaint, the State alleged that defendants’ continued possession of the metates was unlawful and in violation of § 5097.99; (2) § 5097.99 recites that “No person shall obtain or possess any Native American artifacts…which are taken from a Native American grave…,” and (3) in its amended answer, Archaeological Associates denied that its continued possession of the metates was unlawful, and denied that it was in violation of § 5097.99. (Appendix F, p. 184)

They also claimed that the defendants had no standing to bring the appeal and the appeal was frivolous. The appellants also made specific claims:

(1) in interpreting § 5097.99, the trial court failed to consider the purpose of the entire statutory scheme; (2) the trial court overlooked triable issues of material fact; (3) §§ 5097.98 and 5097.99 are unconstitutionally vague; (4) §§ 5097.98 and 5097.99 deprive defendants and all archaeologists of due process and equal protection of the law, and (5) chapter 1.75 of division 5 of the Public Resources Code (§ 5097.9 et seq.) violates the establishment of religion clause of the First Amendment. (Appendix F, p. 184)

After reviewing all of the evidence, the appellate court chose to uphold the trial court’s original order; however, they did deny the State the sanctions it had requested against the defendants for bringing what it termed a “frivolous” appeal. In coming to its decision, the court found itself reviewing the code in question in minute detail and determining not only whether it actually applied to the situation at hand but also if the
legislators had a situation just like this in mind when they drafted and passed such a law. Here, the P.R.C. § 5097.99 was interpreted in two completely different ways by the appellants and the appellees. The court then had three choices when performing their interpretation: 1) they could interpret for the appellants; 2) they could interpret for the appellees; or 3) they could make a third and completely different interpretation which would have brought the matter to an unexpected ending for both sides. In this case, the court apparently selected both the second and third choice since the State did not win its request for sanctions. However, it was clearly the Native Americans who achieved victory, receiving all of the objects in question on the grounds of NAGPRA and similarly worded California legislation. In this particular instance, the museum involved was little more than a “middle man” repository for the objects at bar while the case was decided.

**Burial Ground v. Cemetery**

In *State of Tennessee ex rel. Commissioner of Transportation v. Medicine Bird Black Bear White Eagle et al.* (63 S.W.3rd 734; 2001 Tenn. App. LEXIS 485) (Appendix G), not only were Native American remains and grave goods at issue, but also the State’s handling of the original case. In this matter, the event in question concerned the discovery of two ancient burials, complete with remains and grave goods, which were unearthed when the state decided to widen a busy intersection in a local county. The basic argument was that the burials should remain undisturbed and the state should cease and desist its actions. The trial court allowed the Tennessee Commission of Indian Affairs, its executive director, and fifteen individual Native Americans to intervene in order to oppose the relocation of the graves at issue. They also disqualified the state’s Attorney General and State Reporter from representing the Commission because of an implied conflict of interest since another of the state’s offices, the Department of
Transportation, was also involved. The court appointed two private attorneys to represent the Commission instead (Appendix G, p. 193).

The Department of Transportation appealed the trial court’s actions, requesting a decision on all three parts. Summarily, the appellate court found in favor of the Department of Transportation on all matters, “vacated the trial court’s orders, and remanded the case for further proceedings… (Appendix G, p. 194).

In the process of determining whether the Department of Transportation’s appeal had merit, an event occurred that illustrates how laws written for one group or purpose may be interpreted to pertain to another group or purpose. In this case, the Tennessee appellate court brought forth turn-of-the-century laws regarding cemeteries in general and applied them to archaeological Native American burial grounds. As discussed previously, until the 1960s and ‘70s, Native American burial grounds had little if any legal protection.

In its opinion, the Tennessee appellate court cites early twentieth century state laws pertaining to the desecration of graves and cemeteries:

Since antiquity, most societies have held burial grounds in great reverence. Memphis State Line R.R. v. Forest Hill Cemetery Co., 116 Tenn. 400, 418, 94 SW 69, 73 (1906) (observing that repositories of the dead are regared with veneration); … The early common law protected the sanctity of the grave by recognizing the “right” to a decent burial and the “right” to undisturbed repose. … Thompson v. State, 105 Tenn. 177, 180, 58 SW 213, 213 (1900). … In the words of Justice Cardozo…New York Court of Appeals, “the dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose.” Yome v. Gorman, 242 NY 395, 152 NE 126, 129 (N.Y. 1926). (Emphasis added.) (Appendix G, p. 196)

It should be noted that the court did not cite any existing cultural heritage protection laws or laws protecting archaeological sites in its opinion. However, it did display some prejudice toward archaeological burials later on:
B. Prehistoric humans showed indifference to the dead by abandoning their bodies here [sic] they died. Polson, at 3. … Superstition and religion played a significant role. Sir James G. Frazier, The Golden Bough, preface vii (1 vol. abridged ed. 1996); Polson, at 4-5; … The first active burials amounted to placing a pile of stones over the body or placing the body in a cave when one was available. … (Appendix G, p. 197)

Here, the court appears to be delineating between archaeological and modern burials. It also seems to be defining “human” in terms of presumed burial practices. Their comments suggest that, while they do affiliate the current situation with modern law, their prejudice lies with long-held beliefs that ancient burials were uncivilized, and therefore may not qualify for legal recognition under modern standards. In fact, in an additional case cited below, the idea that “there was no evidence presented …that…bones…had been interred” (State of Utah v. Redd et al. 2001 UT 113; 37 P.3d 1160; 437 Utah Adv. Rep. 46; 2001 Utah LEXIS 199) serves to enhance the concept that, unless human remains are discovered in what is recognized in a modern context as an intentionally created burial site, i.e., a marked cemetery or other readily identified and recognized burial ground, then the remains do not qualify for consideration under cemetery laws.

The court goes on to recite past history regarding burial traditions up through the case at bar. They then discuss case law and statutes pertaining to cemeteries and other burials (Appendix G, pp. 199-202). Of particular interest is the court’s admission that:


The court also decided that the Native Americans who were objecting to the removal of the remains and grave goods discovered when the State of Tennessee began to widen the
road in question could not be considered “interested persons” in the matter at bar because the appellate court believed the trial court had “misconstrued” the applicable Tennessee statute, Tenn. Code Ann. § 46-4-102(b), which states:

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 (1) or more deceased persons whose remains are buried in any burial ground. (Appendix G, pp. 202-203)

In other words, the appellate court concluded that the trial court had attached a much broader interpretation of the term “interested parties” than originally intended by the legislature that enacted the law.

The background of this particular case does not give details regarding the biological relationship, if any, of the appellees to the individuals buried in the two ancient graves discovered during road construction. It is possible that the appellees and their representatives were unable to afford DNA testing which would have rendered a conclusive decision regarding a consanguinal relationship to the deceased. Also, it is often the case that DNA from ancient remains is unusable due to severe degradation over time from normal exposure to natural elements. Even though NAGPRA had no jurisdiction over this matter, its requirement that a “reasonable” cultural or biological link between Native American claimants and the objects, in this case human remains, to which they are attempting to lay claim must be established is echoed by Tennessee law. The fact that the term “interested persons” was being interpreted in this context illustrates the narrow window through which the enacting legislature viewed such a claim.

However, the appellate court did give the appellees a way out. It stated that they could have been legally considered “interested persons” if the trial court had “permit[ted] them to participate as amicus curiae.” Amicus curiae, literally translated, means “friend
of the court.” In other words, if the appellees had presented themselves as individuals greatly concerned about the welfare of the deceased persons in question, rather than as possible descendents of those individuals, then they would have had legal standing as interested persons. However, the appellees’ attorney, Mr. McCaleb, was apparently either unaware of this course of action, or did not feel it was necessary to pursue it. His reasons for proceeding in the manner he did are unpublished, and therefore unknown.

The appellees also argued that to disturb the graves in question violated their First Amendment rights to religious freedom as:

First, they insist that denying them status as “interested persons” will interfere with their rights of conscience by preventing them from presenting their objections to the relocation of the Native American human remains. Second, they assert that disinterring the human remains is fundamentally inconsistent with their religious beliefs. Third, they assert that the removal of the human remains from their present location will prevent them from conducting traditional religious services.

(Appendix G, p. 207)

The court, while acknowledging that Native Americans have long suffered violations of their First Amendment rights with the continued plundering of their sacred lands and burial grounds, rejected this argument. They stated that, because the appellees were not asserting that the land in question was a well-known sacred place or burial ground, it not qualify for special consideration under their argument. In other words, just because a few Native American remains are discovered buried in a plot of ground, it does not mean that the ground was considered sacred just for that sake. Therefore, the court determined that the graves could legally be moved.

The dichotomy here appears to be two opposite points of view, e.g., “this ground is sacred because someone is buried here [the Native Americans]” versus “someone is buried here because this ground is sacred [the court].” Had the matter been heard in a Native American venue, a different outcome might logically been expected.
Similarly, the court held that, since the Native American appellees were not legally “interested persons,” then the Commission of Indian Affairs could also not be considered an “interested person.” They also noted that, “[a]s a general matter, state agencies should not be permitted to judicially challenge the constitutionality of the conduct of other state agencies” (Appendix G, p. 216). Finally, they rejected the notion that the State Attorney General and State Reporter would suffer a conflict of interest if they represented both sides of this particular argument. Their justification, that “[t]he majority rule is that the Attorney General, through his or her assistants, may represent adverse state agencies in intra-governmental disputes…” was based on the interpretation of several precedent-setting cases\(^1\) (Appendix G, p. 218). Such a decision, however, would have been inappropriate if the parties had been represented by private counsel. Therefore, the court enforced the idea that the government was able to fairly represent opposing parties while private citizens, in this case Native Americans, were not.

The final case revolves around the interpretation of the words “dead human body” “removal” and “inter.” While these words appear fairly straightforward on their face, it becomes evident here that even elementary ideas such as these can become convoluted when interpreted by different factions, even when those factions are part of the same group. \textit{State of Utah, Plaintiff and Appellant v. James Redd and Jeanne Redd, Defendants and Appellees} (2001 UT 113; 37 P.3d 1160; 437 Utah Adv. Rep. 46; 2001 Utah LEXIS 199) (Appendix H) discusses whether remains discovered on the surface of

the ground can be considered to have been “buried” at any point and therefore subject to state cultural heritage laws protecting archaeological burials.

In this case, the appellate court was asked to review the trial court’s decision to dismiss charges against the defendants since their actions of removing human remains found on the surface of the ground did not appear to be unlawful, and whether the State of Utah had cause to bring the matter back before the court on appeal.²

What brought the case before the court initially was a 1996 incident where the defendant/appellees “were charged with one count of abuse or desecration of a dead human body for allegedly disinterring human bones from an ancient Native American burial site near Bluff, Utah” (Appendix H, p. 222). The trial court ultimately dismissed the case because the plaintiff/appellant had not proven beyond a reasonable doubt that “…the body had been intentionally deposited ‘into a place designed for its repose’” (Appendix H, p. 223). The appellate court affirmed the trial court’s decision, but on alternative grounds. To make their decision, the court focused on the language upon which the original case turned, i.e., whether the bones discovered by the defendants qualified as a “dead human body” and whether their movement from the exact place of discovery constituted a case of “removal, concealment or destruction” of that human material or its in situ resting place (Appendix H, p. 223-224).

According to the trial court:

There is no evidence that [defendants] destroyed, concealed or removed a body or even a bone. The most that can be said is that they may have moved as many as

² State v. Brickey, 714 P.2d 644 (Utah 1986) which turned on the question of whether a matter could be reintroduced to an appellate court without the discovery of new evidence; and, State v. Morgan, 2001 UT 87, 34 P.3d 767 which “determined that when potential abusive practices are involved, the presumption is that due process will bar refiling.” (Appendix H, p. 224.)
seventeen bones a few feet. This is not removal, concealment or destruction…
(Appendix H, p. 224)

It therefore dismissed Count I of the State’s petition. When the State requested to refile
the matter with the trial court, the magistrate in charge declined, stating:

Lack of new evidence and innocent miscalculation as to the evidence required to
obtain a bindover are the two areas that Brickey and Morgan together set forth as
insufficient grounds to permit a refilling of charges after dismissal. It is those very
claims that the state sets forth in this case. While the practical application of these
cases may be unduly restrictive on the prosecution, in light of Brickey and Morgan,
this court is compelled to grant the Defendant’s Motion [to dismiss the bindover
based on Brickey]. (Appendix H, p. 224)

The appellate court ultimately upheld the dismissal of charges against the
appellees, citing lack of evidence to support appellant’s claims. In other words, the
definition of terms in the statute used by the appellant State to bring the initial charges
was not consistent with the definition of the same terms that was acceptable to the court.
The statute in question states:

(1) a person is guilty of abuse or desecration of a dead human body if the person
intentionally and unlawfully:

…

(b) disinters a buried or otherwise interred dead body, without authority of a

The trial court, in addressing the definition of the first set of terms, e.g., “dead
human body,” determined for undisclosed reasons that the “ancient bones were not a dead
body under the statute” (Appendix H, p. 225). They then moved on to the second set of
terms, “inter,” and declared that “even viewing the evidence in the light most favorable to
the prosecution, there was no evidence presented…that the bones…had been interred.”

Finally, they addressed the third set of terms, “removal, concealment, or
destruction,” using another portion of the same statute as reference:
(1) a person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

(a) removes, conceals, fails to report the finding of a dead body to a local law enforcement agency, or destroys a dead body or any part of it. Utah Code Ann. § 76-9-704(1)(a) (1995). (Appendix H, p. 225)

Unlike its earlier concurrence with the trial court’s decision, the appellate court disagreed with the trial magistrate and determined that the actions of the defendant/appellees met the definition of this portion of the statute. It therefore reversed this portion of the trial court’s order and remanded the appellees over for trial on this matter only. To make its decision, the appellant court relied on the fact that the definition of the final set of terms were similar to or the same as the definitions in the statute itself.

Here, it would seem, the court created a conundrum for itself by first declaring that the bones did not meet Utah’s legal definition of “a dead body,” but yet the actions of the appellees were unlawful as regards the “removal, concealment, or destruction” of a dead body. Again, the court’s actions appear to beg the question of how one can remove, conceal, or destroy something that does not meet the basic standard of what should not be removed, concealed or destroyed.

**Conclusion**

The use and interpretation of language and linguistics, specifically legal terms such as “reasonable”, “intentional”, and “practical”, or culturally sensitive terms like “cemetery”, “burial”, and “human” can be used to create situations that support, or defy, laws and statutes created to protect individuals even after death. Statistically, Native American parties to either a criminal or civil suit will probably be represented by
someone of European, ancestry. Chapter 4 discusses the concept of imparted cultural interpretation by individuals who, foreign to the culture, obtain their expertise from literature written by someone also foreign to the culture. It will specifically identify the “voices” involved, both the exhibitor and the exhibited, or museum communities and Native American communities, discuss how and by whom these pertinent voices are represented with regard to exhibitions, and how these representatives are selected, trained, employed, and evaluated, along with how often they are, and are not, effective.

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3 According to statistics released in May, 2000, only 10% of United States attorneys registered with the American Bar Association are of minority ethnicity. Of that 10%, 7% are of African-American or Hispanic descent. The remaining 3% combines Asian Americans, Native Americans and “other” fringe minorities. (2000. Chambliss, Elizabeth. Miles To Go 2000: Progress of Minorities in the Legal Profession. American Bar Association, Washington DC.)
CHAPTER 4
THE DICHOTOMY OF DISCOURSE: A HOUSE DIVIDED

Introduction

NAGPRA and museums have a synonymic relationship.

As defined by the *American Heritage Dictionary* (2001), a synonym is “1. A word having a meaning similar to that of another word in the same language. 2. A word or expression accepted as a figurative or symbolic substitute for another word or expression. 3. A taxonomic name of an organism that is equivalent to or has been superceded by another designation” (1991, p. 1233). Both NAGPRA and the museums it affects claim to desire the same things, e.g., protection, preservation, and control. For museums, these goals are focused on objects and artifacts. For NAGPRA, the same goals are focused on the Native American people, their culture, and the objects and artifacts that are to be repatriated.

Missions and Mission Statements

NAGPRA was designed to protect and preserve Native American culture by controlling the repatriation of Native American objects and artifacts within its domain. For instance, it states in its opening sentence that it was created “To provide for the protection of Native American graves, and for other purposes” (Emphasis added. P. L. 101-601 [H.R. 5237], p.1). Further, its concern with the return of "cultural items" [such as] human remains and… associated funerary objects…sacred objects…[and objects of] cultural patrimony” indicates the intention to preserve Native American, Native Hawaiian and Native Alaskan modern culture by repatriating those items of vital importance to
these groups. Finally, NAGPRA exerts control over not only qualifying objects but also federally funded institutions like museums, the public at large who may attempt to illegally obtain or sell qualifying objects, and the situation in general by having simply been passed into federal law which, as stated earlier, supercedes state and local laws.

Museums provide for the protection, preservation, and control of objects within their collections. They do this by way of their mission statements, required for accreditation by both the American Association of Museums and the International Council of Museums:

An accreditable museum has a clear sense of mission and organizes its governing authority, staff, financial resources, collections, public programs, and activities to focus on meeting its formally stated mission. (http://www.aam-us.org)

Museums may not realize that, through their own mission statements, they support the premise of NAGPRA. It is through the interpretation of the language of these mission statements that an unintentional but irrefutable link to the purpose of NAGPRA may be found.

In Arizona, where the Hopi Indians reside, the state museum’s mission statement is brief yet specific with regard to preservation and implicit with regard to protection and control. It includes a “vision statement”, a list of infinitives, perhaps a “to-do” list, that states what the museum is going to do:

The Arizona State Museum, an anthropology museum, promotes understanding of and respect for the peoples and cultures of Arizona and surrounding regions.

Vision Statement

The Arizona State Museum strives:

1. To collaborate with diverse communities to explore and celebrate the rich cultural heritage of Arizona and surrounding regions.
2. To be a premier anthropological research center that embraces the voices and cultures of all peoples of Arizona and surrounding regions through time.

3. To be a leader in fulfilling ethical and legal responsibilities for archaeological and cultural preservation.

4. To advance The University of Arizona's mission and relevant initiatives.

5. To practice and promote the highest professional standards in collecting, preserving, researching, interpreting and sharing objects and information. ([http://www.statemuseum.arizona.edu/about/mission_vision.shtml](http://www.statemuseum.arizona.edu/about/mission_vision.shtml))

In vision statement number three, the link to NAGPRA appears to be obvious. It should be recognized, however, that the Arizona State Museum’s mission statement was written before NAGPRA.

In Florida, home of the Seminole Indians who speak a dialect of Muskogee, the Florida Museum of Natural History has both a long and a short mission, drafted in 1983. The short version reads:

The Florida Museum of Natural History, located at the University of Florida, is Florida's state museum of natural history, dedicated to understanding and preserving biological diversity and cultural heritage. ([www.flmnh.ufl.edu/museum](http://www.flmnh.ufl.edu/museum))

Its stated purpose of “preserving…cultural heritage” may be interpreted as a link to NAGPRA in that the repatriation of qualifying objects and artifacts by the Florida Museum of Natural History will indeed help to preserve Native American cultural heritage. Its longer mission statement, however, does not appear to have any such interpretable tie:

The role of the Florida Museum of Natural History as the official natural history museum for the State of Florida is defined by Florida Statute §1004.56 which states:

"The functions of the Florida Museum of Natural History, located at the University of Florida, are to make scientific investigations toward the sustained development of natural resources and a greater appreciation of human cultural heritage,
including, but not limited to, biological surveys, ecological studies, environmental impact assessments, in-depth archaeological research, and ethnological analyses, and to collect and maintain a depository of biological, archaeological, and ethnographic specimens and materials in sufficient numbers and quantities to provide within the state and region a base for research on the variety, evolution, and conservation of wild species; the composition, distribution, importance, and functioning of natural ecosystems; and the distribution of prehistoric and historic archaeological sites and an understanding of the aboriginal and early European cultures that occupied them.

State institutions, departments, and agencies may deposit type collections from archaeological sites in the museum, and it shall be the duty of each state institution, department, and agency to cooperate by depositing in the museum voucher and type biological specimens collected as part of the normal research and monitoring duties of its staff and to transfer to the museum those biological specimens and collections in its possession but not actively being curated or used in the research or teaching of that institution, department, or agency.

The Florida Museum of Natural History is empowered to accept, preserve, maintain, or dispose of these specimens and materials in a manner which makes each collection and its accompanying data available for research and use to the staff of the museum and by cooperating institutions, departments, agencies, and qualified independent researchers.

The biological, archaeological, and ethnographic collections shall belong to the state with the title vested in the Florida Museum of Natural History. In collecting or otherwise acquiring these collections, the Florida Museum of Natural History, except as provided in s. 267.12(3) shall comply with pertinent state wildlife, archaeological, and agricultural laws and rules.

However, all collecting, quarantine, and accreditation permits issued by other institutions, departments, and agencies shall be granted routinely for said museum research study or collecting effort on state lands or within state jurisdiction which does not pose a significant threat to the survival of endangered wild species, habitats, or ecosystems.

In addition, the museum shall develop exhibitions and conduct programs which illustrate, interpret, and explain the natural history of the state and region and shall maintain a library of publications pertaining to the work as herein provided.

The exhibitions, collections, and library of the museum shall be open, free to the public, under suitable rules to be promulgated by the director of the museum and approved by the University of Florida.

Other statutes, FS §1004.57, 1004.575, 1004.576, establish the Program of Vertebrate Paleontology within the Florida Museum of Natural History to protect and preserve vertebrate fossils on state lands, and provide for the museum to
regulate the collection of those fossils by issuing permits for collecting on state lands. (http://www.flmnh.ufl.edu/museum)

The Sam Noble Oklahoma Museum of Natural History (SNOMNH), also a state natural history museum, boasts an impressive array of Native American objects and exhibits. Many tribes call Oklahoma home today, because of forced removal from their homelands between 1830 and 1892. Figure 4-1 shows the Trail of Tears.\(^1\)

![Figure 4-1. Map of Tribes Forced to Relocate. Courtesy of http://www.trailsoftears.org/](image)

The SHOMNH mission statement also has a short and long mission statement. The shorter version is available on its website, www.snomnh.ou.edu:

The curators and staff of the museum conduct scientific investigations to preserve and develop a greater understanding and appreciation of natural resources and human cultural heritage; they develop exhibitions and conduct educational programs that illustrate, interpret, and explain the natural history of the state and

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\(^1\) The tale of the forced Native American relocation is generally referred to as the Trail of Tears. Thousands of members of over 60+ American Indian tribes were removed from their native homelands and forcibly marched to the Indian territory now known as Oklahoma. Hundreds died along the way of exhaustion, starvation, illness, and injury. Although the story is embedded into tribal memory and the culture of Native Americans, it is less well known to the general American public.
region to bring a greater understanding of our world to the people of Oklahoma and others.

The link between SNOMNH’s short mission statement and NAGPRA may be interpreted through their declaration to “preserve…human cultural heritage;…” While this interpretation may be more of a stretch than, perhaps, the Arizona State Museum’s, a possible link to NAGPRA may still be inferred, especially since both SNOMNH’s version of its mission statement, long and short, were redrafted post-NAGPRA. Their longer version, however, does not provide the same language link to NAGPRA that the shorter version does:

The mission of the Museum is to conduct research, participate in higher education, especially at the upper division undergraduate and graduate levels, disseminate information to the people of Oklahoma, and collect and preserve the tangible record of Oklahoma’s natural and cultural history, which the Museum holds in trust for the people of Oklahoma. By its activities, the Museum preserves and interprets objects of cultural or scientific value, thus developing a greater understanding and appreciation of the natural and cultural heritage of the state, region, and world. The Museum has a responsibility to the University and the State of Oklahoma to prevent the loss or deterioration of its priceless collections through mismanagement, indiscriminate dispersal, or lack of proper curatorial care. The Museum functions as a research arm of the University, a service organization to the numerous departments, a major educational bridge between the University and the people of Oklahoma, and the principal protector of Oklahoma’s cultural and scientific heritage as reflected in tangible objects. (Cato and Jones, 1991, pp. 34-35)

A tribute to museums that have qualifying collections under NAGPRA is the fact that there has not yet been any litigation involving any repatriation violations, either intentional or unintentional, on the part of any museum. In fact, the only cases that exist regarding repatriation issues are between Native Americans and governmental entities or private individuals. The single case mentioning a museum is People et al. v. Van Horn et al. (218 Cal. App. 3d 1378; 267 Cal. Rptr. 804; 1990 Cal. App. LEXIS 278) discussed in Chapter Three. A review of relevant case law indicates museums have unconditionally
complied with NAGPRA; however, when an interpretation of museum mission statements reveals them to possibly be NAGPRA compliant even before NAGPRA was written, the question of whether NAGPRA was truly necessary legislation for museums must be addressed.

The Dichotomy

How are the intents and purposes of NAGPRA and museums different when their core concepts appear to be identical? NAGPRA seeks to preserve and protect Native American culture by controlling qualifying objects. Museums also seek to preserve and protect Native American culture by controlling qualifying objects. The answer to this question may lie in the one word found commonly among museum mission statements but absent from NAGPRA – interpretation. In the mission statements cited above, interpretation is part of the language. Museums unequivocally state that they believe it is their incumbent responsibility to interpret the objects in their care for their viewing public. NAGPRA, on the other hand, relies on the interpretation of Native Americans themselves to determine which objects qualify for repatriation. This leads to a dichotomy between the museum interpretation of Native American objects in collections based on scientific evidence and academic research and Native American knowledge of their cultural beliefs, rituals, practices, and history. Referring back to the story of the cracked bowl, a museum may include this artifact in its inventory of objects that qualify for repatriation under NAGPRA. The affiliated Native American tribe, however, may consider this bowl to be a common object, having no particular cultural or ceremonial significance. The tribe may then refuse this item for repatriation, and need not offer an explanation for its decision. In this instance, the difference in an object’s interpretation between museum professionals and Native American tribal members may be cause for
confusion during not only the initial instance, but also in future instances where other tribes may select a similar object for repatriation on the basis of a different cultural interpretation.

Another form of dichotomy may be the way in which exhibit information is disseminated to the viewing public between Native American owned and run museums, and non-Native American owned and run museums. Native American displays designed and built by non-Native museum experts give very detailed information regarding the objects displayed. The material from which the object is constructed, its possible use, its cultural affiliation, its historic significance (if any), and sometimes even a carefully constructed ethnographic reconstruction of the object’s life often appear on exhibit labels. Beverly Serrell (1996) cautions against disseminating too much information to the public, and notes:

Some exhibit developers do not exercise self-control when selecting content for an exhibition. They have no limits and do not resist the temptation to try to tell every story. As one developer admitted proudly, ‘I’m the one who was responsible for the 450 panels on the wall. I wouldn’t give up.’ But what is most interesting to that expert will not interest, engage, or positively impress most visitors. Faced with those 450, a visitor reported, ‘My heart sank when I saw all those labels.’ (p. 1)

This, of course, does not mean that all exhibitors and curators write excessive exhibit labels. Figure 4-2 is an example of exhibit labeling created for a recent exhibition of Native American artifacts at the Florida Museum of Natural History.²

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² This exhibit was the masters project-in-lieu-of-thesis of Ms. Sandra Starr, who is now the Assistant to the Director of the National Museum of the American Indian in Washington, D.C.
The information is succinct and informative, even though multiple labels appear in a single case.

In contrast, exhibitions designed by Native Americans for Native American museums may have few, if any, labels. When this occurs, the visitors are left to make
their own interpretation of the artifact, for better or worse. Such a label-less exhibit is pictured in Figure 4.4.

Figure 4-4. Basketry Exhibit. Note the mural, but nowhere in this exhibit can a visitor find labeling of any kind. Photo courtesy of Frisco Native American Museum, Frisco, NC

Figure 4.5 is an example of a labeled exhibit at the same Native American owned and run museum.

Figure 4-5. An Example of a Native American Scrimshaw Exhibit That Does Contain a Label Referent to Objects Made for Europeans. Photo courtesy of Frisco Native American Museum, Frisco, NC.
It should not be assumed from these illustrations that all Native American controlled museums apply the same use, or non-use, of exhibit labels, nor should it be assumed that all non-Native American controlled museums reflect label construction and usage similar to Figure 4.3.

**The Discourse**

In recent years, museums have made a strong effort to seek out and consult with Native Americans when designing exhibits that pertain to their culture. It is not unusual, however, for tribal consultants to give little if any in-depth information regarding rituals and ceremonies. As with NAGPRA repatriation issues, Native Americans are under no obligation to share any specific information regarding their life ways with individuals outside their tribal culture. It is then up to museum professionals to decide whether to go ahead with an exhibit without the technical input necessary from a Native American representative to ensure an appropriate interpretation, leaving the museum open to tribal criticism and possible public backlash over inaccuracies, or to scrap the exhibit idea altogether and proceed with a less invasive and perhaps less inviting display. When the Florida Museum of Natural History recently unveiled their newest exhibit, the Southwest Florida Hall, it was with the sanction of local Seminole and Miccosukee tribes who participated in the concept of the exhibit and donated many objects for display, together with oral histories specific to particular donated pieces. The added dimension of a Native American perspective gives visitors a broader cultural base from which to view one of the museum’s most popular exhibit.

In museum work, many individuals participate in the interpretation of objects as they go from museum shelves to public display cases. These individuals include exhibit designers, curators, collections managers and registrars, the sponsors, the museum board
(if there is one), as well as the preparators, construction crews, artists, sculptors, and writers, and, finally, the public and critics. Until recently, the one individual, or group of individuals, missing from the exhibit mix was the Native American or Native tribal group who gave up the objects in the first place, either by choice or by force. As noted earlier, many of today’s natural history museums are seeking more Native American consultants during exhibit projects involving Native American artifacts. Doing so has revealed another dichotomy between museum professionals and Native Americans – the way objects are perceived. Tessie Naranjo of the Santa Clara tribe described the Native American perspective on objects, in or out of a museum, during a meeting of the 1996 NAGPRA Review Committee:

Traditional Native Americans see an essential relationship between humans and the objects they create. A pot is not just a pot. In our community, the pots we create are seen as vital, breathing entities that must be respected as all other living beings. Respect for all life elements – rocks, trees, clay – is necessary because we understand our inseparable relationship with every part of the world.

This perspective is not a common one among museum specialists. Naranjo brings the dichotomy of purpose between Native Americans and museums into sharp focus when she says:

I have come to realize that the staffs of most museums do not share our basic values and philosophic views. Museums certainly have had a great impact on traditional Native Americans and our perceptions of who we are. But we do not share the assumptions underlying what museums do: collection, preservation, documentation, and exhibition. (NAGPRA Review Committee Meeting 1996)

With such diversity in perspectives between the museum and Native American communities, constructing a productive discourse in an attempt to develop a workable compromise might seem doubtful. However, with the continually evolving relationship between museums and Native Americans and the open and constructive discussions and ideas this relationship fosters, a new perspective may appear soon that comfortably melds
the Native American cultural concepts with the museum’s scientific data to create a more holistic view of all museum held Native American objects.

In the United States, the media also plays a large part in the general public’s perception of NAGPRA’s impact on both cultures. Initially, sentiment ran high against repatriation. For example, an article titled “Museum Set to Lose Indian Treasure” (1993) that appeared in *The New York Times* appears to lead its readers in a particular direction, simply by the title itself. The article follows suit:

For years, Audrey Stevens, the curator of a small one-room museum in the town library here [in Barre, MA], treasured the museum’s collection of Indian artistry: an array of beaded shirts and purses, suede leggings, wooden pipes and braided locks of human hair.

Farther along in the article, however, the reporter appears to give a conflicting opinion of who the victim of the story is – the Native American rather than the museum:

The fact that the items had been stripped from the bodies of Indians killed in the massacre at Wounded Knee in 1890 escaped her. ‘I always thought of them as artworks,’ she said. ‘…I didn’t realize the significance of these things.’

Another article appearing in a 1993 edition of *Newsday* gives a unique perspective to the quandary faced by Native Americans who must suddenly adapt age-old rites and ceremonies to modern day circumstances. It also puts a somewhat backward, simplified face on a group that obviously has some complex issues to resolve:

They are country people, these upstate New York Indians of the Haudenosaunee, the tribal name for the Iroquois confederacy. They are sitting around a large table, carefully passing around three carved wooden masks, touching, examining, quietly conferring and joshing one another about how they can improvise the essential sacred ritual of fire and homecoming to empower these masks, here in the middle of Manhattan.

“Maybe we should burn the furniture,” someone laughs. But the furniture is steel and glass…. [They] are here…to celebrate an awe-struck and precedent-setting moment of triumph. For the first time in decades of trying, they have rescued…some of the sacred masks that they view, not as objects, but as living spirits.
In the wording of this article, we see the impact of centuries of prejudicial ethnic classification. The first few words set the tone for the entire article – “They are country people.” Here, the reader is led to view the Native Americans at the heart of this scene as simple, unsophisticated people. Out of place in a glass-and-steel society, they appear “countrified”, befuddled and confused, like slow children waiting to be led by the hand by more educated non-Native Americans to perform some ancient ritual. The acquiring of their property is treated in an almost placating manner, as the ranking member of the Repatriation Foundation and the Chief of the Haudenosaunee are quoted as saying during the official signing of repatriation documents, “I’m signing, folks. It’s happening, they’re coming back to you,” rather like a parent pacifying a pouting child. Even the end of the article dredges up old, well-worn stereotypes:

And back at the Repatriation Foundation on Monday night, a door opens, spilling light onto 57th street, and the Haudenosaunee emerge, carrying a cardboard carton. And suddenly there’s a whoop, a war-whoop in the movies. Only nobody’s at war: this is pure triumph.

The enactment of NAGPRA, while seeking to rectify centuries of poor archaeological collections practices focused on Native Americans, does little to change public perception about the cultural groups whose heritage it was crafted to protect. NAGPRA was created to repatriate objects, not to eliminate prejudices or alter opinions.

Another point often overlooked by museums and government officials is the difficult and often uncomfortable position in which the repatriation of objects puts a Native American community. As is noted by Richard Hill, Sr., Special Assistant and Lecturer at the National Museum of the American Indian, “I have…been unable to get anyone to rebury some remains that were returned by a county historical society. Those remains in search of a reburial caused great discomfort to the Indians who worked at the
Indian museum that held them” (1996. p. 81). Perhaps these remains could not be
definitively tied to any one cultural group. Perhaps there was a taboo in effect that
permitted no interaction whatsoever with remains once they were initially buried.
Perhaps there was simply no money or no space for a reburial. Hill is not specific about
the reasons behind this particular dilemma.

Hill also draws attention to the struggle between ancient beliefs and practices
associated with repatriated pieces and modern problems already facing some Indian
nations:

The return of the sacred wampum to the Iroquois became my focus because of what
the represent in terms of our own identity and belief systems. After a century of
effort by many people, the wampum has been restored to the Grand Council at the
Six Nations Council at Onondaga. The wampum belts remain locked up in vaults
off the reservation…[but t]he impact of their return remains to be seen as the Six
Nations is currently torn apart over the issues of cigarettes, gasoline, and gambling.
The power of the messages of these sacred documents remains hidden. How the
Iroquois handle their spiritual responsibility now rests in their own hands. Only a
handful of people can interpret the message of the belts. It is hoped that the
Iroquois will concentrate on just that before it is too late. (1996, p. 81)

Repatriation can be a hardship on Native Americans because of the large amount of
objects and artifacts in museum possession. Table 4-1 indicates the immensity of artifact
removal and repatriation over time. Here, there is avid collection of Native American
artifacts from the early 1800s through the mid 1960s. During this time, Native American
burial goods evolved in importance from sources of new scientific data for museums with
sparse natural history collections to exotic art pieces for eccentric and nouveau riche
collectors and easy money for illegal “treasure hunters” to long-held possessions for
research, funding, and community pride.
Table 4-1. Chronology of Native American Object and Artifact Removal and Repatriation Since 1837

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1837-1841</td>
<td>The Smithsonian began to collect Native Material in earnest in 1863.</td>
</tr>
<tr>
<td>1891</td>
<td>Onondaga Chief Thomas Webster sold four wampum belts in his possession to General Henry B. Carrington, U.S. Indian Census Agent, for $75.</td>
</tr>
<tr>
<td>1899</td>
<td>The Onondaga filed suit against collector John Thatcher for the return of the wampum. They lost their case.</td>
</tr>
<tr>
<td>1906</td>
<td>The Federal Antiquities Act was passed. As a result, federal agencies came into possession of thousands of Indian remains and funerary items.</td>
</tr>
<tr>
<td>1921</td>
<td>Dan Cranmer held a large potlatch at Village Island. Over 450 items were confiscated and shipped east to the National Museum in Ottawa.</td>
</tr>
<tr>
<td>1960</td>
<td>The U.S. Reservoir Salvage Act allowed for the development of salvage archaeology to recover “relics and specimens” to be deposited in museums. This is when many of the current collections of ancient Indian objects began to grow in museums across the country.</td>
</tr>
<tr>
<td>1967</td>
<td>Kwakiutl Indians negotiated with the National Museum of Canada for the return of their potlatch materials. After many years of negotiations, the items were returned.</td>
</tr>
<tr>
<td>1973</td>
<td>The Museum of Anthropology at the University of Michigan returned ancient Indian remains for reburial.</td>
</tr>
<tr>
<td>1975</td>
<td>The Buffalo and Erie County Historical Society returned several thousand wampum beads to the Onondaga Nation.</td>
</tr>
<tr>
<td>1976</td>
<td>The Union of Ontario Indians performed a citizen’s arrest of archaeologist Walter Kenyon, who was excavating a Neutral Indian grave. The remains were reburied and the materials removed from the graves divided between the Royal Ontario Museum and the Woodland Indian Museum.</td>
</tr>
<tr>
<td>1978</td>
<td>Four Hopi Taalawtumsi were stolen from Second Mesa, Arizona. The idols were sold to a collection for $1,600, who later chopped them up and burned them in 1980-81 due to fear of being caught with them.</td>
</tr>
<tr>
<td>1979-1980</td>
<td>The National Museum of Canada returned potlatch materials to the Kwakiutl that had been removed in 1922.</td>
</tr>
<tr>
<td>1980</td>
<td>The Zuni negotiated with the Smithsonian to regain possession of the Ahayu:da (War Gods). They have been successful in the recovery of nearly all of the War Gods thought to exist.</td>
</tr>
<tr>
<td>1980</td>
<td>Chicago art dealer Meryl Platt sold three stolen Hopi masks to collectors, who in turn donated them to the Art Institute of Chicago and received an inflated tax deduction based upon Platt’s certification of value. The FBI confiscated the masks and returned them to the Hopi.</td>
</tr>
</tbody>
</table>

1 From “Mending the Circle: A Native American Repatriation Guide” (1996), pp.84-96. Note: only entries reflecting the acquisition, repatriation, or disposition of Native American objects are listed in Table 4-1.
<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>Two collections of Indian burial material were reinterred at the request of the Native American Heritage Commission of California. 840 human remains were reburied. Artifacts associated with the remains were not reinterred.</td>
</tr>
<tr>
<td>1983</td>
<td>Five ritual objects were stolen from the Museum of the American Indian as the market demand for sacred Indian objects actually increased with all the public outcry for repatriation.</td>
</tr>
<tr>
<td>1984</td>
<td>Five Modoc remains were returned to their descendants from the Smithsonian.</td>
</tr>
<tr>
<td>1985</td>
<td>The 20th Judicial District Court of Louisiana ordered two and one-half tons of artifacts recovered from Tunica-Biloxi Indian burials from 1967 to 1970 to be returned to the Tunica. The items were not returned until 1986.</td>
</tr>
<tr>
<td>1987</td>
<td>Real estate developer AMREP agreed to rebury five Anasazi Indian remains and the thousands of objects associated with them at the request of the Sandia Pueblo in New Mexico.</td>
</tr>
<tr>
<td>1987</td>
<td>The Smithsonian returned two War Gods to the Zuni that had been removed by anthropologists James Stevenson and Frank Cushing a century before.</td>
</tr>
<tr>
<td>1988</td>
<td>The North Dakota State Historical Society returned Indian remains for reburial, but the North Dakota Ethics Preservation Council sought a court injunction to stop the repatriation on the grounds that the remains contribute to knowledge of history.</td>
</tr>
<tr>
<td>1988</td>
<td>The University of Vermont returned ancient Abenaki Indian remains for reburial, provided the Abenaki Tribe purchased a site specifically for the reburial.</td>
</tr>
<tr>
<td>1988</td>
<td>A judge ordered the Glenbow Museum to remove an Iroquois medicine mask from an exhibition at the request of the Mohawk Nation.</td>
</tr>
<tr>
<td>1988</td>
<td>Indians from various tribes gathered in Uniontown, KY to rebury some of the 1,200 Indian remains that were unearthed by ten men who were charged with illegally disturbing the Indian burial ground.</td>
</tr>
<tr>
<td>1988</td>
<td>Eleven sacred wampum belts were returned from the Museum of the American Indian in New York City to the Six Nations Council of Chiefs in Ontario.</td>
</tr>
<tr>
<td>1988</td>
<td>Auctioneer Charles Brevard of Baltimore, MD returned three 1880s eagle feather headdresses to the Blackfeet after learning that they are considered sacred.</td>
</tr>
<tr>
<td>1989</td>
<td>The FBI seized a stolen Hopi mask at an antiques fair in New York. It was one of 60 ceremonial objects stolen in the 1960s.</td>
</tr>
<tr>
<td>1989</td>
<td>The Field Museum of Chicago adopted a repatriation policy and returned remains of Indians to tribes.</td>
</tr>
</tbody>
</table>
Table 4-1. Continued

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989</td>
<td>The Blackfeet Tribe in Montana conducted a reburial ceremony for 16 remains that the Smithsonian’s National Museum of Natural History had returned to the Blackfeet nine months earlier.</td>
</tr>
<tr>
<td>1989</td>
<td>Stanford University returned 550 Indian remains to the Ohlone People, requesting a “specific period for scholarly analysis before reburial.”</td>
</tr>
<tr>
<td>1989</td>
<td>The University of Minnesota agreed to return the remains of nearly 1,000 Indians to comply with a 1981 state law requiring repatriation of Indian remains.</td>
</tr>
<tr>
<td>1990</td>
<td>The Science Museum of Minnesota returned 68 Indian remains and associated materials to the Minnesota Indian Affairs Council for reburial as required by state law.</td>
</tr>
<tr>
<td>1990</td>
<td>The Missouri Historical Society returned a collection of incomplete skeletons that “had little ability to yield information of any value” to the American Indian center of Mid-America in St. Louis.</td>
</tr>
<tr>
<td>1990</td>
<td>The Omaha of Nebraska received the first of more than 200 objects to be repatriated from the Peabody Museum of Harvard University.</td>
</tr>
<tr>
<td>1991</td>
<td>A letter from the Smithsonian stated that skeletal material from Larson Bay should be repatriated. The remains were returned in September of 1991, and a reburial ceremony was held in October.</td>
</tr>
<tr>
<td>1991</td>
<td>Elizabeth Sackler purchased three ceremonial masks of the Hopi and Navajo for $39,050 at auction in New York City and returned them to the Indians who had protested and the Sotheby’s sale.</td>
</tr>
<tr>
<td>1992</td>
<td>The Smithsonian returned 144 associated funerary objects to Larsen Bay.</td>
</tr>
<tr>
<td>1992</td>
<td>The Heard Museum returned to the Hopi a ceremonial War Shield that had been stolen twenty years earlier.</td>
</tr>
<tr>
<td>1992</td>
<td>The NMAI Board of Trustees approved the return of nine potlatch objects to the Kwakiutl of British Columbia.</td>
</tr>
<tr>
<td>1993</td>
<td>The NMAI Trustees repatriated 87 sacred objects to the Pueblo of Jemez.</td>
</tr>
</tbody>
</table>

As the 1960s and ‘70s approached and the civil rights movement grew in intensity and popularity, the public began to see the continued possession of Native American objects and artifacts as a breech of Native American civil and cultural rights. After the second uprising at Wounded Knee, South Dakota in 1976, public outrage at the oppression of Native Americans reached fever pitch. Even the United States State Department issued directives to all of its embassies with the following instructions regarding overseas public demonstrations focused on Native Americans:
If Indians are killed, we can surely expect sharp and widespread foreign condemnation of this U.S. government action. (Smith and Warrior, 1996, p. 236)

It was in answer to overwhelming public demand that NAGPRA was crafted and museums, eager to be viewed as empathetic toward Native Americans, complied as quickly as possible.

**Conclusion**

Even before NAGPRA, some museums and universities voluntarily returned Native items to their rightful owners. Compliance with repatriation requests led to valuable discourse between museums and Native American groups. While some institutions still balk at the return of Native American items, most have complied with NAGPRA.

Chapter 5 focuses on Native American population growth, reviews current museum ethics in light of NAGPRA and other legislation, and finally, considers the future of Native American exhibitions in non-Native venues.
CHAPTER 5
FUTURE TENSE: CENSUS AND CONSENSUS

Introduction

The idiom “there is strength in numbers” is a fallacy.

It is a fallacy at least as far as Native Americans are concerned. In the year 2000, ten years after NAGPRA was enacted, the census bureau concluded that there were a total of 4,119,301 Native Americans and Native Alaskans living in the United States. This is a 52.4% increase over the 1990 figure of 1,959,234. Figure 5-1 illustrates the growth in top 35 states with Native American population from 1990 to 2000, and Table 5-1 lists the actual population figures and growth percentages for these states.

![Figure 5-1. Top 35 States with Native American Populations. U.S. Census Bureau 2000 Census.](image-url)
Table 5-1. Population and Percentage of Increase for the Top 35 States with Native American Populations. U.S. Census Bureau 2000 Census.

<table>
<thead>
<tr>
<th>State</th>
<th>1990</th>
<th>2000</th>
<th>Percent Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>California</td>
<td>627,562</td>
<td>242,164</td>
<td>61.5%</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>391,949</td>
<td>252,420</td>
<td>35.6%</td>
</tr>
<tr>
<td>Arizona</td>
<td>292,552</td>
<td>203,527</td>
<td>33.7%</td>
</tr>
<tr>
<td>Texas</td>
<td>215,599</td>
<td>65,877</td>
<td>69.4%</td>
</tr>
<tr>
<td>New Mexico</td>
<td>191,475</td>
<td>134,355</td>
<td>29.8%</td>
</tr>
<tr>
<td>New York</td>
<td>171,581</td>
<td>62,651</td>
<td>63.5%</td>
</tr>
<tr>
<td>Washington</td>
<td>158,940</td>
<td>81,483</td>
<td>48.6%</td>
</tr>
<tr>
<td>North Carolina</td>
<td>131,736</td>
<td>80,155</td>
<td>39.2%</td>
</tr>
<tr>
<td>Michigan</td>
<td>124,412</td>
<td>55,638</td>
<td>55.3%</td>
</tr>
<tr>
<td>Alaska</td>
<td>119,241</td>
<td>85,698</td>
<td>28.1%</td>
</tr>
<tr>
<td>Florida</td>
<td>117,880</td>
<td>36,335</td>
<td>69.2%</td>
</tr>
<tr>
<td>Oregon</td>
<td>85,667</td>
<td>38,496</td>
<td>55.1%</td>
</tr>
<tr>
<td>Minnesota</td>
<td>81,074</td>
<td>49,909</td>
<td>38.4%</td>
</tr>
<tr>
<td>Colorado</td>
<td>79,689</td>
<td>27,776</td>
<td>65.1%</td>
</tr>
<tr>
<td>Ohio</td>
<td>76,075</td>
<td>20,358</td>
<td>73.2%</td>
</tr>
<tr>
<td>Illinois</td>
<td>73,161</td>
<td>21,836</td>
<td>70.2%</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>69,386</td>
<td>39,387</td>
<td>43.2%</td>
</tr>
<tr>
<td>South Dakota</td>
<td>68,281</td>
<td>50,575</td>
<td>25.9%</td>
</tr>
<tr>
<td>Montana</td>
<td>66,320</td>
<td>47,679</td>
<td>28.1%</td>
</tr>
<tr>
<td>Missouri</td>
<td>60,099</td>
<td>19,835</td>
<td>67.0%</td>
</tr>
<tr>
<td>Georgia</td>
<td>53,197</td>
<td>13,348</td>
<td>74.9%</td>
</tr>
<tr>
<td>Virginia</td>
<td>52,864</td>
<td>15,282</td>
<td>71.1%</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>52,650</td>
<td>14,733</td>
<td>72.0%</td>
</tr>
<tr>
<td>New Jersey</td>
<td>49,107</td>
<td>14,970</td>
<td>69.6%</td>
</tr>
<tr>
<td>Kansas</td>
<td>47,363</td>
<td>21,965</td>
<td>53.6%</td>
</tr>
<tr>
<td>Alabama</td>
<td>44,449</td>
<td>16,506</td>
<td>62.9%</td>
</tr>
<tr>
<td>Louisiana</td>
<td>42,878</td>
<td>18,541</td>
<td>56.8%</td>
</tr>
<tr>
<td>Nevada</td>
<td>42,222</td>
<td>19,637</td>
<td>53.5%</td>
</tr>
<tr>
<td>Utah</td>
<td>40,445</td>
<td>24,283</td>
<td>40.0%</td>
</tr>
<tr>
<td>Maryland</td>
<td>39,437</td>
<td>12,972</td>
<td>67.1%</td>
</tr>
<tr>
<td>Indiana</td>
<td>39,263</td>
<td>12,720</td>
<td>67.6%</td>
</tr>
<tr>
<td>Tennessee</td>
<td>39,188</td>
<td>10,039</td>
<td>74.4%</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>38,050</td>
<td>12,241</td>
<td>67.8%</td>
</tr>
<tr>
<td>Arkansas</td>
<td>37,002</td>
<td>12,773</td>
<td>65.5%</td>
</tr>
<tr>
<td>North Dakota</td>
<td>35,228</td>
<td>25,917</td>
<td>26.4%</td>
</tr>
</tbody>
</table>

This pattern of growth appears impressive. However, these figures, obtained by the U.S. Census Bureau, were self-reported, which can sometimes skew population figures and the appearance of demographics. Individuals may claim ancestry that is questionable at best. For example, beginning in the 1980s and continuing into the new century, it was fashionable for non-Native Americans to claim Native American ancestry. For example,
the Lakota believe that an individual need only have an interest in Lakota heritage and culture to qualify for entry into the tribal roles. If this is the case, then the jump in Native American population figures between 1990 and 2000 for Minnesota, South Dakota, and North Dakota may be indicative of cultural affinity rather than actual race.

In light of these facts, the question arises, who does NAGPRA protect? Does it only cover those who can prove a definitive genetic link to Native American ancestry? How far back does this ancestry need to go? If someone says that his or her great-grandmother was Cherokee, or Apache, or Hopi, is that enough? Will the government require DNA testing for positive proof of a plaintiff’s or defendant’s Native American consanguinity before applying NAGPRA? Definitive requirements for biological proof of race vary among institutions. For example, colleges set their own standards of proof of Native American ancestry; the University of Arkansas requires that a student applying for financial aid as a Native American have a one-eighth blood quantum, e.g., have a great-grandparent who was full-blooded Native American. The Bureau of Indian Affairs requires a one-quarter Native American blood quantum (a full-blooded Native American grandparent) and an active enrollment on a federally recognized Native American tribal role for their scholarships. If you are a Native American from Canada wishing to attend a college in the United States, you must have a one-half Native American blood quantum, or have one parent who is full-blooded Native American. This collegiate proof of racial ancestry is not standard, however, and each college offering minority financial aid to Native Americans is free to determine its own level of proof required to receive funding.

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1 From http://www.uark.edu.

So far, no indication has been made by the courts hearing NAGPRA-based cases that they will require definitive proof of race before allowing the matter to proceed. It is, however, the distinction of Native American ancestry, bounded by no standard burden of proof as to who is truly “Native American”, which has sparked public interest and a call for civil rights reform for those who bear this cultural distinction.

**Public Opinion**

While public consensus regarding the Native Americans has changed over the last few centuries, they continue to struggle for equal recognition within American society (Smith and Warrior, 1996). Although they have received more respect, they continue to fight an uphill battle toward socioeconomic equality; the same battle, in fact, just only recently semi-successfully fought by African-Americans (Chandras 1978; Millet et al. 2001; Steinhorn 1999; Verney 2000). Native Americans do not have the advantage of so well-known, popular, and charismatic a leadership presence. Activists such as Vine Deloria have long been outspoken for Native American rights. Only after the final Native American uprising at Wounded Knee, South Dakota in 1976 did lawmakers finally take the matter seriously and craft the National Museum of the American Indian Act of 1989 and the Native American Graves Protection and Repatriation Act of 1990. However, while this ground-breaking legislation served to return to Native Americans objects they had been trying to reclaim for years, the question remains, did it achieve all that Native Americans were asking for? In other words, would these laws do for Native Americans what the Civil Rights Act of 1964 did for African-Americans? Native Americans were skeptical, at best. In fact, while many official Native tribal representatives heralded the NMAI and NAGPRA as a large step in the right direction,
others scoffed at the legislative effort, calling it too little, too late (Smith and Warrior, 1996).

Could NAGPRA, authored more than fourteen years after the Wounded Knee uprising in 1973, be more than a “band-aid” for a very deep wound? Universities, teaching hospitals, and museums around the country were overwhelmed at the daunting task before them required by NAGPRA. Because of the size of their collections, many institutions required extensions of deadlines for filing the necessary surveys, inventories, and reports with the federal government. Finally, all required paperwork had been received by both the government and affected Native American tribes, and remains and artifacts began to find their way back to their rightful owners.

**The Native American Dilemma**

NAGPRA also posed problems for Native Americans. Finding places for cultural and ceremonial objects to be stored, exhibited, or kept safely was not too difficult. It was the human remains that became an issue for many tribes due, in part, to the pragmatic problem of lack of space. Most modern Native Americans live either by necessity or by choice on crowded federal reservations. Some have become a part of thousands of local communities around the country. In either case, there is little, if any, unused land on which to bury ancient ancestors. Also, most tribes perform special ceremonies, requiring time and extra cultural and financial resources, so that the dead are properly interred.

NAGPRA has unintentionally created certain difficulties for Native Americans who wish to reclaim qualifying objects and artifacts. *First*, in order to claim items not listed on a qualifying institution’s inventory but discovered during a public construction or other excavation project, or to bring suit to stop destruction of allegedly sacred land, Native Americans must prove a legitimate cultural or racial tie between themselves, their
tribe, and the artifacts, remains, or land in question. In order to do that, testing acceptable in a court of law is required to determine dates and/or genetic links. Financial resources for this testing is hard to come by for Native Americans, therefore providing this data in a timely manner or in sufficient quantity can be prohibitive, putting the Native Americans’ claim(s) in jeopardy.

Second, the experts available for retention by Native Americans who are legally qualified to examine remains in order to determine race are almost exclusively European. While Native Americans have gained a greater presence in the fields of archaeology and biological anthropology, they have few, if any, representatives in either forensic anthropology or genetics. Whether this is due to a conflict with their belief systems or simply a lack of educational funding is not clear. However, a Native voice in these specialties would help to broaden the basis of understanding about why Native Americans are often reluctant to subject their ancestors, or even their modern deceased, to scientific inspection and/or genetics and DNA testing. As indicated earlier, Native Americans believe that every object on Earth is imbued with its own spirit, whether animal, vegetable, or mineral, animate or inanimate. These objects therefore deserve respect. Also, Native Americans have great faith in their belief systems. Consequently, if their cultural heritage says that Native Americans have occupied a certain area “forever,” then Native Americans take this point of view literally and see no further need for proof. Their heritage is proof enough. Unfortunately, cultural heritage or oral histories are not considered proof “beyond a reasonable doubt” by a court of law, and is therefore inadmissible as evidence.
In order to overcome these obstacles, a solution must be formulated that takes into consideration the beliefs of the Native Americans and the quest for knowledge and research parameters of academics and scientists. Because natural history museums are a part of both cultures, it becomes incumbent on those museums to assist in facilitating a partnership between these two diverse groups so that specific interests are acknowledged and compromises are constructed that are mutually beneficial for all parties concerned.

**Forging a Partnership**

A common voice and language need to be established in order to ensure that the most accurate translation of museum exhibits are presented to the public. While this would seem obvious, the languages involved are strikingly dissimilar. In Chapter 1, Table 1-1 presented some common museum terminology in conjunction with its Native American linguistic counterparts. Here, Table 5-2 compares legal language, all of which appears somewhere within the language of NAGPRA, with Native American language counterparts. It also shows the presence or absence of common legal words in Native American languages. It is interesting to note that, while Native American language does not have terminology for most of the common legal words used in NAGPRA (Lakota is the exception with a word for “probable”), Black’s Law Dictionary (the “Bible” for any attorney who writes legal documents) does not have definitions for the words “human”, “Native American”, or “Indian”. 
Table 5-2. Definitions of Legal Terminology from Black’s Law Dictionary Used in Cases Involving Possible Violations of NAGPRA

<table>
<thead>
<tr>
<th>WORD</th>
<th>DEFINITION</th>
<th>ACTUAL DERIVATION</th>
<th>LAKOTA</th>
<th>MUSKOGE</th>
<th>HOPI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence</td>
<td>Any species of proof or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.</td>
<td>Middle English from Old French from Late Latin</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>(NONE)</td>
</tr>
<tr>
<td>Preponderance</td>
<td>As standard of proof in civil cases, is evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a while shows that the fact sought to be proved is more probable than not.</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>(NONE)</td>
</tr>
<tr>
<td>Probable</td>
<td>Having the appearance of truth; having the character of probability; appearing to be founded in reason or experience. Having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely.</td>
<td>Middle English from Old French from Latin</td>
<td>Iteyakel(^3)</td>
<td>(NONE)</td>
<td>Kya, só onqae</td>
</tr>
</tbody>
</table>

\(^3\) Probably, in Lakota and Hopi.
<table>
<thead>
<tr>
<th>WORD</th>
<th>DEFINITION</th>
<th>ACTUAL DERIVATION</th>
<th>LAKOTA</th>
<th>MUSKOGEE</th>
<th>HOPI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reasonable</td>
<td>Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view. Having the faculty of reason; rational; governed by reason; under the influence of reason; agreeable to reason. Thinking, speaking, or acting according to the dictates of reason. Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.</td>
<td>Unknown</td>
<td>Canteyukeya</td>
<td>(NONE)</td>
<td>Hintiqw⁴</td>
</tr>
<tr>
<td>Burial</td>
<td>Act or process of burying a deceased person; sepulture, interment, act of depositing a dead body in the earth, in a tomb or vault, or in the water. The act of interring the human dead.</td>
<td>Middle English from Old English</td>
<td>Wahpi</td>
<td>Aati ombitíka</td>
<td>Aamiwpu⁵</td>
</tr>
<tr>
<td>Cemetery</td>
<td>A graveyard; burial ground. Place or area set apart for interment of the dead. Term includes not only lots for depositing the bodies of the dead, but also avenues, walks, and grounds for shrubbery and ornamental purposes.</td>
<td>Middle English from Old French from Medieval Latin from Late Latin from Greek</td>
<td>Owicahe</td>
<td>Aatilli ist’isa, ihaani, ihaanish’aho</td>
<td>Tu ‘āmqölö</td>
</tr>
</tbody>
</table>

⁴ Reason.  
⁵ Buried.
Table 5.2. Continued.

<table>
<thead>
<tr>
<th>WORD</th>
<th>DEFINITION</th>
<th>ACTUAL DERIVATION</th>
<th>LAKOTA</th>
<th>MUSKOGEE</th>
<th>HOPI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Human</td>
<td>(NONE)</td>
<td>Middle English from Old French from Latin</td>
<td>(NONE)</td>
<td>Aati</td>
<td>Hopi₁, sino⁶</td>
</tr>
<tr>
<td>Native American</td>
<td>(NONE)</td>
<td>Unknown</td>
<td>(NONE)⁷</td>
<td>Aati, aati aapihchi h&quot;mma, aatíhámma</td>
<td>Himusino</td>
</tr>
<tr>
<td>Indian</td>
<td>(NONE)⁸</td>
<td>Latin from Greek</td>
<td>(NONE)</td>
<td>Aati, aati aapihchi h&quot;mma, aatíhámma, nipih&quot;mma</td>
<td>Himusino, Yoota</td>
</tr>
</tbody>
</table>

Another interesting perspective with regard to Native Americans and museums is building architecture. Figure 5.2 A) and B) illustrate two distinctly different architecture styles. Figure 5.2 A) is a non-Native American owned and run Native American museum. Figure 5.2 B) is a Native American owned and run Native American museum. Figures 5.3 A), a non-Native American owned and run museum, and B) a Native American owned and run museum, illustrate additional architecture styles.


⁶ Human being.
⁷ The Lakota word for “the people” or “nation” is oyate.
⁸ There are definitions for the legal terms “Indian Claims Commission”, “Indian country”, “Indian lands”, “Indian reservation”, “Indian title”, “Indian tribal property”, and “Indian tribe.” There is no legal terminology defining the people itself.

A certain similarity can be seen between the architectural and label styles of the Native American owned and run museums and the architectural and label styles used by the non-Native American institutions profiled in this thesis profiled in this thesis. This is not to say that all Native American owned and run museums use the illustrated architectural and label styles. However, these illustrations lead to the question, do Native Americans prefer to use a more basic approach to exhibitions, both outer (architecture) and inner (exhibit displays), while Europeans perhaps prefer a more intricate, detailed approach? An accurate answer to this question would entail a much more in-depth study that was conducted here. However, the data collected during such a research project might lend an additional perspective to the idea of language, both spoken and unspoken, and its interpretation for the viewing public.

**Anthropology, Museums, Native Americans and NAGPRA**

Museum exhibits, whether art, science, history, or natural history, usually depict objects that tell something about humans, their ideas and concepts regarding the world around them. The responsibility for interpreting the objects in these exhibits falls upon the shoulders of museum professionals, who are often academics and, sometimes,
anthropologists. The language used by anthropology to facilitate interpretation of human objects for exhibition is complex and often unintelligible to anyone outside their academic genre. Table 5-3 illustrates some of the more common anthropological language used by museum anthropologists, together with similar Native American terminology for the same terms.

Table 5-3. Common Academic and Anthropological Terminology Used in Museum Practice.

<table>
<thead>
<tr>
<th>WORD</th>
<th>DEFINITION</th>
<th>ACTUAL DERIVATION</th>
<th>LAKOTA</th>
<th>MUSKOGEE</th>
<th>HOPI</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accredit</td>
<td>To supply with credentials or authority; authorize; to certify as meeting a prescribed standard.</td>
<td>French</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>(NONE)</td>
</tr>
<tr>
<td>Anthropology</td>
<td>The scientific study of the origin and of the physical, social, and cultural development and behavior of man.</td>
<td>Unknown</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>(NONE)</td>
</tr>
<tr>
<td>Curate</td>
<td>To act as the curator of, to organize, oversee.</td>
<td>Unknown</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>(NONE)</td>
</tr>
<tr>
<td>Museology</td>
<td>The discipline of museum design, organization, and management.</td>
<td>Unknown</td>
<td>((NONE)</td>
<td>(NONE)</td>
<td>(NONE)</td>
</tr>
<tr>
<td>Museum</td>
<td>An institution for the acquisition, preservation, study, and exhibition of works of artistic, historical, or scientific value.</td>
<td>Latin from Greek in Indo-European roots.</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>(NONE)</td>
</tr>
<tr>
<td>Repatriate</td>
<td>To restore or return to the country of birth or citizenship.</td>
<td>Late Latin from Latin</td>
<td>(NONE)</td>
<td>(NONE)</td>
<td>(NONE)</td>
</tr>
</tbody>
</table>

It is common among anthropologists to utilize the language of indigenous people to describe that group’s objects, especially when writing ethnographies (details about the lives and life ways of a particular indigenous group) or interpreting objects for natural history or anthropological museum displays. However, in order to obtain the appropriate information from natives, whether Native Americans or foreign natives, it is necessary to convey the reason behind the need for information. If an anthropologist were to attempt to use the Hopi language tell a native Hopi tribal representative that an object qualifying under NAGPRA needed to be “repatriated”, according to the previous table, that anthropologist would have a difficult time, since no Hopi word exists for “repatriate”
And, while this example may seem outdated, there are Hopi tribal elders today who prefer to discuss tribal matters in their native language. In this particular case, one of the most crucial words in that particular discussion does not even exist.

One of the premier responsibilities of an anthropologist is to interpret foreign or exotic cultures for the general public. While this was not the case for early anthropologists, those who are working in today’s modern field readily acknowledge that their number one goal is to have a positive effect on people, whether it is through working one-on-one with third world populations, or interpreting objects and artifacts for museums. Many anthropologists prefer to remain in the inner-most sanctum of a museum, among the collections and fellow researchers, scientists, and scholars. However, they are discovering that there is more to a museum’s collections than research and have begun taking a more active part in public education through helping to interpret museum artifacts and objects for exhibit labels.

A final thought about exhibit contexts is offered by Alan Friedman in *The Human Context of Objects* (1983) and echoed by Ivan Karp in *Exhibiting Cultures: The Poetics and Politics of Museum Display* (1991). In their articles, both Friedman and Karp addressed the most recent, yet most foundational, idea behind museum artifacts, e.g., that they were thought about, made by, used by, and discarded by people on every level. People come to museums to learn about people. An accurate, in-depth, and culturally relevant interpretation of objects requires the use of common and appropriate language that also gives the public as broad a picture as possible about the objects on display and the people and culture related to those objects. The fact that there are much fewer Native American objects left within museum collections to be interpreted and exhibited should
create an atmosphere of cultural sensitivity around those objects and the people from whom they came. NAGPRA has given museums, anthropologists, and Native Americans a wake-up call regarding the government’s view on Native American cultural significance. Whatever is left after repatriation has occurred should be treated with honor, respect, and deference to the culture that allowed these objects to remain behind.

**Conclusion**

The final question to be answered is, can Native Americans and museums overcome the dichotomy of language, object significance, and cultural interpretation inherent in their current relationship and form an alliance mutually beneficial to all concerned? If this can be accomplished, then will NAGPRA become obsolete? A successful partnership requires a common language, be it shared technical terminology or common label language, formulated and agreed upon by both parties. Acknowledgement of cultural similarities and differences in both worlds is crucial. Once Native Americans and museum professionals have agreed upon each other’s cultural heritage, a new language must be developed, officially recognized, and used in the inner and outer museum, museum mission statements, museum labels, and if necessary, the courtroom.

NAGPRA is on record to dissuade present and future “treasure hunters” and archaeological site poachers from practicing their illegal trade. Unless penalties are increased substantially for convicted lawbreakers, there will always be a black market for illegally obtained Native American objects and artifacts.

The future partnership between Native Americans and museums should be a bright prospect. It is a challenge requiring mutual respect and cultural consensus for informed public education. Whether this respect and consensus is possible, only time and effort on the part of all concerned will tell. If compliance with NAGPRA achieves this
partnership, then NAGPRA was necessary legislation for museums to understand their own mission statements. It was necessary to give Native Americans legal leverage to protect their endangered cultural heritage. And, it was necessary to provide a growing Native American population a new cultural recognition from museums that continue to provide a public window into the Native Americans’ cultural past.
An Act

To provide for the protection of Native American graves, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[*1] SECTION 1. <25 USC 3001 note> SHORT TITLE.

This Act may be cited as the "Native American Graves Protection and Repatriation Act".

[*2] SEC. 2. <25 USC 3001> DEFINITIONS.

For purposes of this Act, the term –

(1) "burial site" means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) "cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(3) "cultural items" means human remains and –

(A) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.

(B) "associated funerary objects" which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at
the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

(C) "sacred objects" which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) "cultural patrimony" which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) "Federal agency" means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) "Federal lands" means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971.

(6) "Hui Malama I Na Kupuna O Hawai'i Nei" means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) "Indian tribe" means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) "museum" means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) "Native American" means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) "Native Hawaiian" means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) "Native Hawaiian organization" means any organization which –

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(12) "Office of Hawaiian Affairs" means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.
(13) "right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 7(c), result in a Fifth Amendment taking by the United States as determined by the United States Claims Court pursuant to 28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) "Secretary" means the Secretary of the Interior.

(15) "tribal land" means –

(A) all lands within the exterior boundaries of any Indian reservation;

(B) all dependent Indian communities;

(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

[*3] SEC. 3. <25 USC 3002> OWNERSHIP.

(a) NATIVE AMERICAN HUMAN REMAINS AND OBJECTS. -- The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after the date of enactment of this Act 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.

(b) UNCLAIMED NATIVE AMERICAN HUMAN REMAINS AND OBJECTS. -- Native American cultural items not claimed under subsection [*3051] (a) shall be disposed of in accordance with
regulations promulgated by the Secretary in consultation with the review committee established under section 8, Native American groups, representatives of museums and the scientific community.

(c) INTENTIONAL EXCAVATION AND REMOVAL OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS. -- The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if –

(1) such items are excavated or removed pursuant to a permit issued under section 4 of the Archaeological Resources Protection Act of 1979 (93 Stat. 721; 16 U.S.C. 470aa et seq.) which shall be consistent with this Act;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); and

(4) proof of consultation or consent under paragraph (2) is shown.

(d) INADVERTENT DISCOVERY OF NATIVE AMERICAN REMAINS AND OBJECTS. -- (1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after the date of enactment of this Act shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native Claims Settlement Act of 1971, the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.

(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.

(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.

(e) RELINQUISHMENT. -- Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

[*3052] [*4] SEC. 4. ILLEGAL TRAFFICKING.

(a) ILLEGAL TRAFFICKING. -- Chapter 53 of title 18, United States Code, is amended by adding at the end thereof the following new section:

"§ 1170. Illegal Trafficking in Native American Human Remains and Cultural Items

"(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 the Native American Graves Protection and Repatriation Act shall be fined in accordance with this title, or imprisoned
not more than 12 months, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, or imprisoned not more than 5 years, or both.

"(b) Whoever knowingly sells, purchases, uses for profit, or transports for sale or profit any Native American cultural items obtained in violation of the Native American Grave Protection and Repatriation Act shall be fined in accordance with this title, imprisoned not more than one year, or both, and in the case of a second or subsequent violation, be fined in accordance with this title, imprisoned not more than 5 years, or both."

(b) TABLE OF CONTENTS. -- The table of contents for chapter 58 of title 18, United States Code, is amended by adding at the end thereof the following new item:

"1170. Illegal Trafficking in Native American Human Remains and Cultural Items.

[*5] 5. <25 USC 3003> INVENTORY FOR HUMAN REMAINS AND ASSOCIATED FUNERARY OBJECTS.

(a) IN GENERAL. -- Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

(b) REQUIREMENTS.(1) THE INVENTORIES AND IDENTIFICATIONS REQUIRED UNDER SUBSECTION (A) SHALL BE –

(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;

(B) completed by not later than the date that is 5 years after the date of enactment of this Act, and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 8.

(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term "documentation" means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this Act shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.

(c) EXTENSION OF TIME FOR INVENTORY. -- Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B). The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.

(d) NOTIFICATION. -- (1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.
(2) The notice required by paragraph (1) shall include information –

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

(e) INVENTORY. -- For the purposes of this section, the term “inventory” means a simple itemized list that summarizes the information called for by this section.

[*6] SEC. 6. <25 USC 3004> SUMMARY FOR UNASSOCIATED FUNERARY OBJECTS, SACRED OBJECTS, AND CULTURAL PATRIMONY. (P:1) (a) LN GENERAL. -- Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

(b) Requirements. -- (1) The summary required under subsection (a) shall be –

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

[**3054] (C) completed by not later than the date that is 3 years after the date of enactment of this Act.

(2) Upon request, Indian Tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

[*7] SEC. 7. <25 USC 3005> REPATRIATION.

(a) REPATRIATION OF NATIVE AMERICAN HUMAN REMAINS AND OBJECTS POSSESSED OR CONTROLLED BY FEDERAL AGENCIES AND MUSEUMS. -- (1) If, pursuant to section 5, the cultural affiliation of Native American human remains and associated funerary, objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 6, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural
patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this Act shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 5, or the summary pursuant to section 6, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e), sacred objects and objects of cultural patrimony shall be expeditiously returned where –

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable [**3055] lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this Act.

(b) SCIENTIFIC STUDY. -- If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

(c) STANDARD OF REPATRIATION. -- If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this Act and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) SHARING OF INFORMATION BY FEDERAL AGENCIES AND MUSEUMS. -- Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) COMPETING CLAIMS. -- Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this Act, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this Act or by a court of competent jurisdiction.
(f) MUSEUM OBLIGATION. -- Any museum which repatriates any item in good faith pursuant to this Act shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of this Act.

[**8]** SEC. 8. <25 USC 3006> REVIEW COMMITTEE.

(a) ESTABLISHMENT. -- Within 120 days after the date of enactment of this Act, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 5, 6 and 7.

(b) MEMBERSHIP. -- (1) The Committee established under subsection (a) shall be composed of 7 members,

   (A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

   (B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

   (C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

[**3056**] (2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

(c) RESPONSIBILITIES. -- The committee established under subsection (a) shall be responsible for –

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 5 and 6 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to –

   (A) the identity or cultural affiliation of cultural items, or

   (B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for such remains;
(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;

(7) consulting with the Secretary in the development of regulations to carry out this Act;

(8) performing such other related functions as the Secretary may assign to the committee; and

(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.

(d) Any records and findings made by the review committee pursuant to this Act 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 section 15 of this Act.

(e) RECOMMENDATIONS AND REPORT. -- The committee shall make the recommendations under paragraph (c)(5) in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.

(f) ACCESS. -- The Secretary shall ensure that the committee established under subsection (a) and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.

(g) DUTIES OF SECRETARY. -- The Secretary shall –

(1) establish such rules and regulations for the committee as may be necessary, and

[**3057] (2) provide reasonable administrative and staff support necessary for the deliberations of the committee.

(h) ANNUAL REPORT. -- The committee established under subsection (a) shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(i) TERMINATION. -- The committee established under subsection (a) shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

[*9] SEC. 9. <25 USC 3007> PENALTY.

(a) PENALTY. -- Any museum that fails to comply with the requirements of this Act may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.

(b) AMOUNT OF PENALTY. -- The amount of a penalty assessed under subsection (a) shall be determined under regulations promulgated pursuant to this Act, taking into account, in addition to other factors –

(1) the archaeological, historical, or commercial value of the item involved;

(2) the damages suffered, both economic and noneconomic, by an aggrieved party, and

(3) the number of violations that have occurred.

(c) ACTIONS TO RECOVER PENALTIES. -- If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil
action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.

(d) SUBPOENAS. -- In hearings held pursuant to subsection (a), subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

[*10] SEC. 10. <25 USC 3008> GRANTS.

(a) INDIAN TRIBES AND NATIVE HAWAIIAN ORGANIZATIONS. -- The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.

(b) MUSEUMS. -- The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 5 and 6.

[*11] SEC. 11. <25 USC 3009> SAVINGS PROVISIONS.

Nothing in this Act shall be construed to –

(1) limit the authority of any Federal agency or museum to –

(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and

[**3058] (B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;

(2) delay actions on repatriation requests that are pending on the date of enactment of this Act;

(3) deny or otherwise affect access to any court;

(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or

(5) limit the application of any State or Federal law pertaining to theft or stolen property.

[*12] SEC. 12. <25 USC 3010> SPECIAL RELATIONSHIP BETWEEN FEDERAL GOVERNMENT AND INDIAN TRIBES.

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

[*13] SEC. 13. <25 USC 3011> REGULATIONS.

The Secretary shall promulgate regulations to carry out this Act within 12 months of enactment.

[*14] SEC. 14. <25 USC 3012> AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated such sums as may be necessary to carry out this Act.
[*15] SEC. 15. <25 USC 3013> ENFORCEMENT.

The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this Act and shall have the authority to issue such orders as may be necessary to enforce the provisions of this Act.

Speaker of the House of Representatives.
Vice President of the United States and President of the Senate.

DESCRIPTORS: INDIANS; HAWAIIAN NATIVES; ALASKAN NATIVES; NATIVE AMERICANS; ART; CEMETERIES AND FUNERALS; RELIGIONS; PUBLIC LANDS; RIGHT OF PROPERTY; ADMINISTRATIVE LAW AND PROCEDURE; ARCHEOLOGY; ANTHROPOLOGY; SENTENCES, CRIMINAL PROCEDURE; FEDERAL DEPARTMENTS AND AGENCIES; MUSEUMS; FEDERAL AID TO ARTS AND HUMANITIES; DEPARTMENT OF INTERIOR; FEDERAL ADVISORY BODIES; JUDGMENTS, CIVIL PROCEDURE
APPENDIX B
NMAI

UNITED STATES PUBLIC LAWS
101ST CONGRESS-FIRST SESSION
(C) 1989, REED ELSEVIER INC. AND REED ELSEVIER PROPERTIES INC.

PUBLIC LAW 101-185 [S. 978]
NOVEMBER 28, 1989
NATIONAL MUSEUM OF THE AMERICAN INDIAN ACT

101 P.L. 185; 103 Stat. 1336; 1989 Enacted S. 978; 101 Enacted S. 978

BILL TRACKING REPORT: 101 Bill Tracking S. 978
FULL TEXT VERSION(S) OF BILL: 101 S. 978

An Act

To establish the National Museum of the American Indian within the Smithsonian Institution, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

[*1] SECTION 1. <20 USC 80q note> SHORT TITLE.

This Act may be cited as the "National Museum of the American Indian Act".

[*2] SEC. 2. <20 USC 80q> FINDINGS.

The Congress finds that --

(1) there is no national museum devoted exclusively to the history and art of cultures indigenous to the Americas;

(2) although the Smithsonian Institution sponsors extensive Native American programs, none of its 19 museums, galleries, and major research facilities is devoted exclusively to Native American history and art;

(3) the Heye Museum in New York, New York, one of the largest Native American collections in the world, has more than 1,000,000 art objects and artifacts and a library of 40,000 volumes relating to the archaeology, ethnology, and history of Native American peoples;

(4) the Heye Museum is housed in facilities with a total area of 90,000 square feet, but requires a minimum of 400,000 square feet for exhibition, storage, and scholarly research;

(5) the bringing together of the Heye Museum collection and the Native American collection of the Smithsonian Institution would --

(A) create a national institution with unrivaled capability for exhibition and research;
(B) give all Americans the opportunity to learn of the cultural legacy, historic grandeur, and contemporary culture of Native Americans;

(C) provide facilities for scholarly meetings and the performing arts;

(D) make available curatorial and other learning opportunities for Indians; and

(E) make possible traveling exhibitions to communities throughout the Nation;

(6) by order of the Surgeon General of the Army, approximately 4,000 Indian human remains from battlefields and burial sites were sent to the Army Medical Museum and were later transferred to the Smithsonian Institution;

(7) through archaeological excavations, individual donations, and museum donations, the Smithsonian Institution has acquired approximately 14,000 additional Indian human remains;

(8) the human remains referred to in paragraphs (6) and (7) have long been a matter of concern for many Indian tribes, [*1337] including Alaska Native Villages, and Native Hawaiian communities which are determined to provide an appropriate resting place for their ancestors;

(9) identification of the origins of such human remains is essential to addressing that concern; and

(10) an extraordinary site on the National Mall in the District of Columbia (U.S. Government Reservation No. 6) is reserved for the use of the Smithsonian Institution and is available for construction of the National Museum of the American Indian.

[*3] SEC. 3. <20 USC 80q-1> NATIONAL MUSEUM OF THE AMERICAN INDIAN.

(a) ESTABLISHMENT. -- There is established, within the Smithsonian Institution, a living memorial to Native Americans and their traditions which shall be known as the "National Museum of the American Indian".

(b) PURPOSES. -- The purposes of the National Museum are to --

(1) advance the study of Native Americans, including the study of language, literature, history, art, anthropology, and life;

(2) collect, preserve, and exhibit Native American objects of artistic, historical, literary, anthropological, and scientific interest;

(3) provide for Native American research and study programs; and

(4) provide for the means of carrying out paragraphs (1), (2), and (3) in the District of Columbia, the State of New York, and other appropriate locations.

[*4] SEC. 4. <20 USC 80q-2> AUTHORITY OF THE BOARD OF REGENTS TO ENTER INTO AN AGREEMENT PROVIDING FOR TRANSFER OF HEYE FOUNDATION ASSETS TO THE SMITHSONIAN

The Board of Regents is authorized to enter into an agreement with the Heye Foundation, to provide for the transfer to the Smithsonian Institution of title to the Heye Foundation assets. The agreement shall --

(1) require that the use of the assets be consistent with section 3(b); and

(2) be governed by, and construed in accordance with, the law of the State of New York.
The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over any cause of action arising under the agreement.


(a) IN GENERAL. -- The National Museum shall be under a Board of Trustees with the duties, powers, and authority specified in this section.

(b) GENERAL DUTIES AND POWERS. -- The Board of Trustees shall --

(1) recommend annual operating budgets for the National Museum to the Board of Regents;

(2) advise and assist the Board of Regents on all matters relating to the administration, operation, maintenance, and preservation of the National Museum;

(3) adopt bylaws for the Board of Trustees;

(4) designate a chairman and other officers from among the members of the Board of trustees; and

[**1338] (5) report annually to the Board of Regents on the acquisition, disposition, and display of Native American objects and artifacts and on other appropriate matters.

(c) SOLE AUTHORITY. -- Subject to the general policies of the Board of Regents, the Board of Trustees shall have the sole authority to --

(1) lend, exchange, sell, or otherwise dispose of any part of the collections of the National Museum, with the proceeds of such transactions to be used for additions to the collections of the National Museum or additions to the endowment of the National Museum, as the case may be;

(2) purchase, accept, borrow, or otherwise acquire artifacts and other objects for addition to the collections of the Natural Museum; and

(3) specify criteria for use of the collections of the National Museum for appropriate purposes, including research, evaluation, education, and method of display.

(d) AUTHORITY. -- Subject to the general policies of the Board of Regents, the Board of Trustees shall have authority to --

(1) provide for restoration, preservation, and maintenance of the collections of the National Museum;

(2) solicit funds for the National Museum and determine the purposes to which such funds shall be applied; and

(3) approve expenditures from the endowment of the National Museum for any purpose of the Museum.

(e) INITIAL APPOINTMENTS TO THE BOARD OF TRUSTEES. --

(1) MEMBERSHIP. -- The initial membership of the Board of Trustees shall consist of --

(A) the Secretary of the Smithsonian Institution;

(B) an Assistant Secretary of the Smithsonian Institution appointed by the Board of Regents;

(C) 8 individuals appointed by the Board of Regents; and
(D) 15 individuals, each of whom shall be a member of the board of trustees of the Heye Museum, appointed by the Board of Regents from a list of nominees recommended by the board of trustees of the Heye Museum.

(2) SPECIAL RULE. -- At least 7 of the 23 members appointed under subparagraphs (C) and (D) of paragraph (1) shall be Indians.

(3) TERMS. -- The trustee appointed under paragraph (1)(B) shall serve at the pleasure of the Board of Regents. The terms of the trustees appointed under subparagraph (C) or (D) of paragraph (1) shall be 3 years, beginning on the date of the transfer of the Heye Foundation assets to the Smithsonian Institution.

(4) VACANCIES. -- Any vacancy shall be filled only for the remainder of the term involved. Any vacancy appointment under paragraph (1)(D) shall not be subject to the source and recommendation requirements of that paragraph, but shall be subject to paragraph (2).

(f) SUBSEQUENT APPOINTMENTS TO THE BOARD OF TRUSTEES. --

(1) MEMBERSHIP. -- Upon the expiration of the terms under subsection (e), the Board of Trustees shall consist of --

(A) the Secretary of the Smithsonian Institution;

(B) an Assistant Secretary of the Smithsonian Institution appointed by the Board of Regents; and

(C) 23 individuals appointed by the Board of Regents from a list of nominees recommended by the Board of Trustees.

[**1339] (2) SPECIAL RULE. -- A least 12 of the 23 members appointed under paragraph (1)(C) shall be Indians.

(3) TERMS. -- The trustee appointed under paragraph (1)(B) shall serve at the pleasure of the Board of Regents. Except as otherwise provided in the next sentence, the terms of members appointed under paragraph (1)(C) shall be 3 years. Of the members first appointed under paragraph (1)(C) --

(A) 7 members, 4 of whom shall be Indians, shall be appointed for a term of one year, as designated at the time of appointment; and

(B) 8 members, 4 of whom shall be Indians, shall be appointed for a term of 2 years, as designated at the time of appointment.

(4) VACANCIES. -- Any vacancy shall be filled only for the remainder of the term involved.

(g) QUORUM. -- A majority of the members of the Board of Trustees then in office shall constitute a quorum.

(h) EXPENSES. -- Members of the Board shall be entitled (to the same extent as provided in section 5703 of title 5, United States Code, with respect to employees serving intermittently in the Government service) to per diem, travel, and transportation expenses for each day (including travel time) during which they are engaged in the performance of their duties.

[*6] SEC. 6. <20 USC 80q-4> DIRECTOR AND STAFF OF THE NATIONAL MUSEUM.

(a) IN GENERAL. -- The Secretary of the Smithsonian Institution shall appoint --

(1) a Director who, subject to the policies of the Board of Trustees, shall manage the National Museum; and
(2) other employees of the National Museum, to serve under the Director.

(b) OFFER OF EMPLOYMENT TO HEYE FOUNDATION EMPLOYEES. -- Each employee of the Heye Museum on the day before the date of the transfer of the Heye Foundation assets to the Smithsonian Institution shall be offered employment with the Smithsonian Institution --

(1) under the usual terms of such employment; and

(2) at a rate of pay not less than the rate applicable to the employee on the day before the date of the transfer.

c) APPLICABILITY OF CERTAIN CIVIL SERVICE LAWS. -- The Secretary may --

(1) appoint the Director, 2 employees under subsection (a)(2), and the employees under subsection (b) without regard to the provisions of title 5, United States Code, governing appointments in the competitive service;

(2) fix the pay of the Director and such 2 employees without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates; and

(3) fix the pay of the employees under subsection (b) in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates, subject to subsection (b)(2).

[SEC. 7. <20 USC 80q-5> MUSEUM FACILITIES.]

(a) NATIONAL MUSEUM MALL FACILITY. -- The Board of Regents shall plan, design, and construct a facility on the area bounded by Third Street, Maryland Avenue, Independence Avenue, Fourth Street, and Jefferson Drive, Southwest, in the District of Columbia to house the portion of the National Museum to be located in the District of Columbia. The Board of Regents shall pay not more than 2/3 of the total cost of planning, designing, and constructing the facility from funds appropriated to the Board of Regents. The remainder of the costs shall be paid from non-Federal sources.

(b) NATIONAL MUSEUM HEYE CENTER FACILITY. --

(1) LEASE OF SPACE FROM GSA. --

(A) TERMS. -- Notwithstanding section 210(j) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 490(j)), the Administrator of General Services may lease, at a nominal charge, to the Smithsonian Institution space in the Old United States Custom House at One Bowling Green, New York, New York, to house the portion of the National Museum to be located in the city of New York. The lease shall be subject to such terms as may be mutually agreed upon by the Administrator and the Secretary of the Smithsonian Institution. The term of the lease shall not be less than 99 years.

(B) REIMBURSEMENT OF FEDERAL BUILDINGS FUND. -- The Administrator of General Services may reimburse the fund established by section 210(f) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 490(f)) for the difference between the amount charged to the Smithsonian Institution for leasing space under this paragraph and the commercial charge under section 210(j) of such Act which, but for this paragraph, would apply to the leasing of such space. There are authorized to be appropriated to the Administrator such sums as may be necessary to carry out this subparagraph for fiscal years beginning after September 30, 1990.

(2) CONSTRUCTION. --

(A) MUSEUM FACILITY. -- The Board of Regents shall plan, design, and construct a significant facility for the National Museum in the space leased under paragraph (1).
(B) AUDITORIUM AND LOADING DOCK FACILITY. -- The Administrator of General Services shall plan, design, and construct an auditorium and loading dock in the Old United States Custom House at One Bowling Green, New York, New York, for the shared use of all the occupants of the building, including the National Museum.

(C) SQUARE FOOTAGE. -- The facilities to be constructed under this paragraph shall have, in the aggregate, a total square footage of approximately 82,500 square feet.

(3) REPAIRS AND ALTERATIONS. -- After construction of the facility under paragraph (2)(A), repairs and alterations of the facility shall be the responsibility of the Board of Regents.

(4) REIMBURSEMENT OF GSA. -- The Board of Regents shall reimburse the Administrator for the Smithsonian Institution's pro rata share of the cost of utilities, maintenance, cleaning, and other services incurred with respect to the space leased under paragraph (1) and the full cost of any repairs or alterations made by the General Services Administration at the request of the Smithsonian Institution with respect to the space.

(5) COST SHARING. --

[*1341] (A) GENERAL RULES. -- The Board of Regents shall pay 1/3 of the costs of planning, designing, and constructing the facility under paragraph (2)(A) from funds appropriated to the Board of Regents. The remainder of the costs shall be paid from non-Federal sources.

(B) RESPONSIBILITIES OF NEW YORK CITY AND STATE. -- Of the costs which are required to be paid from non-Federal sources under this paragraph, the city of New York, New York, and the State of New York have each agreed to pay $8,000,000 or an amount equal to 1/3 of the costs of planning, designing, and constructing the facility under paragraph (2)(A), whichever is less. Such payments shall be made to the Board of Regents in accordance with a payment schedule to be agreed upon by the city and State and the Board of Regents.

(C) LIMITATION ON OBLIGATIONS OF FEDERAL FUNDS. -- Federal funds may not be obligated for actual construction of a facility under paragraph (2)(A) in a fiscal year until non-Federal sources have paid to the Board of Regents the non-Federal share of such costs which the Board of Regents estimates will be incurred in such year.

(6) DESIGNATION. -- The facility to be constructed under paragraph (2)(A) shall be known and designated as the "George Gustav Heye Center of the National Museum of the American Indian".

(c) MUSEUM SUPPORT CENTER FACILITY. -- The Board of Regents shall plan, design, and construct a facility for the conservation and storage of the collections of the National Museum at the Museum Support Center of the Smithsonian Institution.

(d) MINIMUM SQUARE FOOTAGE. -- The facilities to be constructed under this section shall have, in the aggregate, a total square footage of at least 400,000 square feet.

(e) AUTHORITY TO CONTRACT WITH GSA. -- The Board of Regents and the Administrator of General Services may enter into such agreements as may be necessary for planning designing and constructing facilities under this section (other than subsection (b)(2)(B)). Under such agreements, the Board of Regents shall transfer to the Administrator, from funds available for planning, designing, and constructing such facilities, such amounts as may be necessary for expenses of the General Services Administration with respect to planning, designing, and constructing such facilities.

(f) LIMITATION ON OBLIGATION OF FEDERAL FUNDS. -- Notwithstanding any other provision of this Act, funds appropriated for carrying out this section may not be obligated for actual construction of any facility under this section until the 60th day after the date on which the Board of Regents transmits to Congress a written analysis of the total estimated cost of the construction and a cost-sharing plan projecting
the amount for Federal appropriations and for non-Federal contributions for the construction on a fiscal year basis.

[*8] SEC. 8. <20 USC 80q-6> CUSTOM HOUSE OFFICE SPACE AND AUDITORIUM.

(a) REPAIRS AND ALTERATIONS. -- The Administrator of General Services shall make such repairs and alterations as may be necessary in the portion of the Old United States Custom House at One Bowling Green, New York, New York, which is not leased to the Board of Regents under section 7(b) and which, as of the date of the enactment of this Act, has not been altered.

[**1342] (b) AUTHORIZATION OF APPROPRIATION. -- There is authorized to be appropriated to the Administrator of General Services $25,000,000 from the fund established pursuant to section 210(f) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 490(f)) to carry out this section and section 7(b)(2)(B).

[*9] SEC. 9. <20 USC 80q-7> AUDUBON TERRACE.

(a) IN GENERAL. -- The Board of Regents shall --

(1) assure that, on the date on which a qualified successor to the Heye Foundation at Audubon Terrace first takes possession of Audubon Terrace, an area of at least 2,000 square feet at that facility is accessible to the public and physically suitable for exhibition of museum objects and for related exhibition activities;

(2) upon written agreement between the Board and any qualified successor, lend objects from the collections of the Smithsonian Institution to the successor for exhibition at Audubon Terrace; and

(3) upon written agreement between the Board and any qualified successor, provide training, scholarship, technical, and other assistance (other than operating funds) with respect to the area referred to in paragraph (1) for the purposes described in that paragraph.

(b) DETERMINATION OF CHARGES. -- Any charge by the Board of Regents for activities pursuant to agreements under paragraph (2) or (3) of subsection (a) shall be determined according to the ability of the successor to pay.

(c) DEFINITION. -- As used in this section, the terms "qualified successor to the Heye Foundation at Audubon Terrace", "qualified successor", and, "successor" mean an organization described in section 501(c)(3) of the Internal Revenue Code of 1986, and exempt from tax under section 501(a) of such Code, that, as determined by the Board of Regents --

(1) is a successor occupant to the Heye Foundation at Audubon Terrace, 3753 Broadway, New York, New York;

(2) is qualified to operate the area referred to in paragraph (1) for the purposes described in that paragraph; and

(3) is committed to making a good faith effort to respond to community cultural interests it such operation.

[*10] SEC. 10. <20 USC 80q-8> BOARD OF REGENTS FUNCTIONS WITH RESPECT TO CERTAIN AGREEMENTS AND PROGRAMS.

(a) PRIORITY TO BE GIVEN TO INDIAN ORGANIZATIONS WITH RESPECT TO CERTAIN AGREEMENTS. -- In entering into agreements with museums and other educational and cultural organizations to --

(1) lend Native American artifacts and objects from any collection of the Smithsonian Institution;
(2) sponsor or coordinate traveling exhibitions of artifacts and objects; or

(3) provide training or technical assistance;

the Board of Regents shall give priority to agreements with Indian organizations, including Indian tribes, museums, cultural centers, educational institutions, libraries, and archives. Such agreements may provide that loans or services to such organizations may be furnished by the Smithsonian Institution at minimal or no cost.

(b) INDIAN PROGRAMS. -- The Board of Regents may establish –

[*1343] (1) programs to serve Indian tribes and communities; and

(2) in cooperation with educational institutions, including tribally controlled community colleges (as defined in section 2 of the Tribally Controlled Community College Assistance Act of 1978), programs to enhance the opportunities for Indians in the areas of museum studies, management, and research.

(c) INDIAN MUSEUM MANAGEMENT FELLOWSHIPS. -- The Board of Regents shall establish an Indian Museum Management Fellowship program to provide stipend support to Indians for training in museum development and management.

(d) AUTHORIZATION OF APPROPRIATIONS. -- There is authorized to be appropriated $2,000,000 for each fiscal year, beginning with fiscal year 1991, to carry out subsections (b) and (c).

[*11] SEC. 11. <20 USC 80q-9> INVENTORY, IDENTIFICATION, AND RETURN OF INDIAN HUMAN REMAINS AND INDIAN FUNERARY OBJECTS IN THE POSSESSION OF THE SMITHSONIAN INSTITUTION.

(a) INVENTORY AND IDENTIFICATION. -- The Secretary of the Smithsonian Institution, in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes, shall --

(1) inventory the Indian human remains and Indian funerary objects in the possession or control of the Smithsonian Institution; and

(2) using the best available scientific and historical documentation, identify the origins of such remains and objects.

(b) NOTICE IN CASE OF IDENTIFICATION OF TRIBAL ORIGIN. -- If the tribal origin of any Indian human remains or Indian funerary object is identified by a preponderance of the evidence, the Secretary shall so notify any affected Indian tribe at the earliest opportunity.

(c) RETURN OF INDIAN HUMAN REMAINS AND ASSOCIATED INDIAN FUNERARY OBJECTS. -- If any Indian human remains are identified by a preponderance of the evidence as those of a particular individual or as those of an individual culturally affiliated with a particular Indian tribe, the Secretary, upon the request of the descendants of such individual or of the Indian tribe shall expeditiously return such remains (together with any associated funerary objects) to the descendants or tribe, as the case may be.

(d) RETURN OF INDIAN FUNERARY OBJECTS NOT ASSOCIATED WITH INDIAN HUMAN REMAINS. -- If any Indian funerary object not associated with Indian human remains is identified by a preponderance of the evidence as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe, the Secretary, upon the request of the Indian tribe, shall expeditiously return such object to the tribe.

(e) INTERPRETATION. -- Nothing in this section shall be interpreted as --
(1) limiting the authority of the Smithsonian Institution to return or repatriate Indian human remains or Indian funerary objects to Indian tribes or individuals; or

(2) delaying actions on pending repatriation requests, denying or otherwise affecting access to the courts, or limiting any procedural or substantive rights which may otherwise be secured to Indian tribes or individuals.

(f) AUTHORIZATION OF APPROPRIATIONS. -- There is authorized to be appropriated $1,000,000 for fiscal year 1991 and such sums as may be necessary for succeeding fiscal years to carry out this section.

[**1344] [*12]  SEC. 12. <20 USC 80q-10> SPECIAL COMMITTEE TO REVIEW THE INVENTORY, IDENTIFICATION, AND RETURN OF INDIAN HUMAN REMAINS AND INDIAN FUNERARY OBJECTS.

(a) ESTABLISHMENT; DUTIES. -- Not later than 120 days after the date of the enactment of this Act, the Secretary of the Smithsonian Institution shall appoint a special committee to monitor and review the inventory, identification, and return of Indian human remains and Indian funerary objects under section 11. In carrying out its duties, the committee shall --

(1) with respect to the inventory and identification, ensure fair and objective consideration and assessment of all relevant evidence;

(2) upon the request of any affected party or otherwise, review any finding relating to the origin or the return of such remains or objects;

(3) facilitate the resolution of any dispute that may arise between Indian tribes with respect to the return of such remains or objects; and

(4) perform such other related functions as the Secretary may assign.

(b) MEMBERSHIP. -- The committee shall consist of five members, of whom --

(1) three members shall be appointed from among nominations submitted by Indian tribes and organizations; and

(2) the Secretary shall designate one member as chairman. The Secretary may not appoint to the Committee any individual who is an officer or employee of the Government (including the Smithsonian Institution) or any individual who is otherwise affiliated with the Smithsonian Institution.

(c) ACCESS. -- The Secretary shall ensure that the members of the committee have full and free access to the Indian human remains and Indian funerary objects subject to section 11 and to any related evidence, including scientific and historical documents.

(d) PAY AND EXPENSES OF MEMBERS. -- Members of the committee shall --

(1) be paid the daily equivalent of the annual rate of basic pay payable for grade GS-18 of the General schedule under section 5332 of title 5, United States Code; and

(2) be entitled (to the same extent as provided in section 5703 of such title, with respect to employees serving intermittently in the Government service) to per diem, travel, and transportation expenses; for each day (including travel time) during which they are engaged in the performance of their duties.

(e) RULES AND ADMINISTRATIVE SUPPORT. -- The Secretary shall prescribe regulations and provide administrative support for the committee.

(f) REPORT AND TERMINATION. -- At the conclusion of the work of the committee, the Secretary shall be so certify by report to the Congress. The committee shall cease to exist 120 days after the submission of the report.
(g) NONAPPLICABILITY OF THE FEDERAL ADVISORY COMMITTEE ACT. -- The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the committee.

[**1345] (h) AUTHORIZATION OF APPROPRIATIONS. -- There is authorized to be appropriated $250,000 for fiscal year 1991 and such sums as may be necessary for succeeding fiscal years to carry out this section.


(a) IN GENERAL. -- The Secretary of the Smithsonian Institution shall --

(1) in conjunction with the inventory and identification under section 11, inventory and identify the Native Hawaiian human remains and Native Hawaiian funerary objects in the possession of the Smithsonian Institution;

(2) enter into an agreement with appropriate Native Hawaiian organizations with expertise in Native Hawaiian affairs (which may include the Office of Hawaiian Affairs and the Malama I Na Kupuna O Hawai‘i Nei) to provide for the return of such human remains and funerary objects; and

(3) to the greatest extent practicable, apply, with respect to such human remains and funerary objects, the principles and procedures set forth in sections 11 and 12 with respect to the Indian human remains and Indian funerary objects in the possession of the Smithsonian Institution.

(b) DEFINITIONS. -- As used in this section --

(1) the term "Malama I Na Kupuna O Hawai‘i Nei" means the nonprofit, Native Hawaiian organization, incorporated under the laws of the State of Hawaii by that name on April 17, 1989, the purpose of which is to provide guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues; and

(2) the term "Office of Hawaiian Affairs" means the Office of Hawaiian Affairs established by the Constitution of the State of Hawaii.

[*14] SEC. 14. <20 USC 80q-12> GRANTS BY THE SECRETARY OF THE INTERIOR TO ASSIST INDIAN TRIBES WITH RESPECT TO AGREEMENTS FOR THE RETURN OF INDIAN HUMAN REMAINS AND INDIAN FUNERARY OBJECTS.

(a) IN GENERAL. -- The Secretary of the Interior may make grants to Indian tribes to assist such tribes in reaching and carrying out agreements with --

(1) the Board of Regents for the return of Indian human remains and Indian funerary objects under section 11; and

(2) other Federal and non-Federal entities for additional returns of Indian human remains and Indian funerary objects.

(b) AUTHORIZATION OF APPROPRIATIONS. -- There is authorized to be appropriated $1,000,000 for fiscal year 1991 and such sums as may be necessary for succeeding fiscal years for grants under subsection (a).

[*15] SEC. 15. <20 USC 80q-13> GRANTS BY THE SECRETARY OF THE INTERIOR TO ASSIST INDIAN ORGANIZATIONS WITH RESPECT TO RENOVATION AND REPAIR OF MUSEUM FACILITIES AND EXHIBIT FACILITIES.
(a) Grants. -- The Secretary of the Interior may make grants to Indian organizations, including Indian tribes, museums, cultural centers, educational institutions, libraries, and archives, for renovation and repair of museum facilities and exhibit facilities to enable such organizations to exhibit objects and artifacts on loan from the collections of the Smithsonian Institution or from other sources. Such grants may be made only from the Tribal Museum Endowment Fund.

(b) INDIAN ORGANIZATION CONTRIBUTION. -- In making grants under subsection (a), the Secretary may require the organization receiving the grant to contribute, in cash or in kind, not more than 50 percent of the cost of the renovation or repair involved. Such contribution may be derived from any source other than the Tribal Museum Endowment Fund.

(c) Tribal Museum Endowment Fund. --

(1) ESTABLISHMENT. -- There is established in the Treasury a fund, to be known as the "Tribal Museum Endowment Fund" (hereinafter in this subsection referred to as the "Fund") for the purpose of making grants under subsection (a). The Fund shall consist of (A) amounts deposited and credited under paragraph (2), (B) obligations obtained under paragraph (3), and (C) amounts appropriated pursuant to authorization under paragraph (5).

(2) DEPOSITS AND CREDITS. -- The Secretary of the Interior is authorized to accept contributions to the Fund from non-Federal sources and shall deposit such contributions in the Fund. The Secretary of the Treasury shall credit to the Fund the interest on, and the proceeds from sale and redemption of obligations held in the Fund.

(3) Investments. -- The Secretary of the Treasury may invest any portion of the Fund in interest-bearing obligations of the United States. Such obligations may be acquired on original issue or in the open market and may be held to maturity or sold in the open market. In making investments for the Fund, the Secretary of the Treasury shall consult the Secretary of the Interior with respect to maturities, purchases, and sales, taking into consideration the balance necessary to meet current grant requirements.

(4) EXPENDITURES AND CAPITAL PRESERVATION. -- Subject to appropriation, amounts derived from interest shall be available for expenditure from the Fund. The capital of the Fund shall not be available for expenditure.

(5) AUTHORIZATION OF APPROPRIATIONS. -- There is authorized to be appropriated to the Fund $2,000,000 for each fiscal year beginning with fiscal year 1992.

(d) ANNUAL REPORT. -- Not later than January 31 of each year, the Secretary of the Interior, in consultation with the Secretary of the Treasury, shall submit to the Congress a report of activities under this section, including a statement of --

(1) the financial condition of the Fund as of the end of the preceding fiscal year, with an analysis of the Fund transactions during that fiscal year; and

(2) the projected financial condition of the Fund, with an analysis of expected Fund transactions for the six fiscal years after that fiscal year.
SEC. 16. <20 USC 80q-14> DEFINITIONS.

As used in this Act --

(1) the term "Board of Regents" means the Board of Regents of the Smithsonian Institution;

(2) the term "Board of Trustees" means the Board of Trustees of the National Museum of the American Indian;

(3) the term "burial site" means a natural or prepared physical location, whether below, on, or above the surface of the earth, into which, as a part of a death rite or ceremony of a culture, individual human remains are deposited;

(4) the term "funerary object" means an object that, as part of a death rite or ceremony of a culture, is intentionally placed with individual human remains, either at the time of burial or later;

(5) the term "Heye Foundation assets" means the collections, endowment, and all other property of the Heye Foundation (other than the interest of the Heye Foundation in Audubon Terrace) described in the Memorandum of Understanding between the Smithsonian Institution and the Heye Foundation, dated May 8, 1989, and the schedules attached to such memorandum;

(6) the term "Heye Museum" means the Museum of the American Indian, Heye Foundation;

(7) the term "Indian" means a member of an Indian tribe;

(8) the term "Indian tribe" has the meaning given that term in section 4 of the Indian Self-Determination and Education Assistance Act;

(9) the term "National Museum" means the National Museum of the American Indian established by section 3;

(10) the term "Native American" means an individual of a tribe, people, or culture that is indigenous to the Americas and such term includes a Native Hawaiian; and

(11) the term "Native Hawaiian" means a member or descendant of the aboriginal people who, before 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii.

SEC. 17. <20 USC 80q-15> AUTHORIZATION OF APPROPRIATIONS.

(a) FUNDING. -- There is authorized to be appropriated to the Board of Regents to carry out this Act (other than as provided in sections 7(b)(1)(B), 8, 10, 11, 12, 14, and 15(c)(5))-

(1) $ 10,000,000 for fiscal year 1990; and

(2) such sums as may be necessary for each succeeding fiscal year.

(b) PERIOD OF AVAILABILITY. -- Funds appropriated under subsection (a) shall remain available without fiscal year limitation for any period prior to the availability of the facilities to be constructed under section 7 for administrative and planning expenses and for the care and custody of the collections of the National Museum.

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.
APPENDIX C

BONNICHSEN ET AL. V. UNITED STATES OF AMERICA ET AL.

ROBSON BONNICHSEN; C. LORING BRACE; GEORGE W. GILL; C. VANCE HAYNES, JR.; RICHARD L. JANTZ; DOUGLAS W. OWSLEY; DENNIS J. STANFORD; and D. GENTRY STEELE, Plaintiffs,

- vs -

UNITED STATES OF AMERICA; DEPARTMENT OF THE ARMY; U.S. ARMY CORPS OF ENGINEERS; U.S. DEPARTMENT OF THE INTERIOR; NATIONAL PARK SERVICE; FRANCIS P. McMANAMON; ERNEST J. HARRELL; WILLIAM E. BULEN, JR.; DONALD R. CURTIS; LEE TURNER; LOUIS CALDERA; BRUCE BABBITT; DONALD J. BARRY; CARL A. STROCK; and JOE N. BALLARD, Defendants.

Civil No. 96-1481-JE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

217 F. Supp. 2d 1116; 2002 U.S. Dist. LEXIS 16972

August 30, 2002, Decided

DISPOSITION: [**1] Decision awarding the remains to the Tribal Claimants set aside, transfer of the remains to the Tribal Claimants enjoined, and Plaintiffs allowed to study the remains. Plaintiffs' request for other relief granted in part and denied in part.

COUNSEL: Paula A. Barran, Barran Liebman LLP, Alan L. Schneider, Portland, OR, for Plaintiffs.


OPINION BY: John Jelderks

OPINION: [*1119]

OPINION AND ORDER

JELDERKS, Magistrate Judge:

Plaintiffs bring this action seeking judicial review of a final agency decision that awarded the remains of the "Kennewick Man" to a coalition of Indian tribes and denied the Plaintiffs' request to study those remains. Plaintiffs assert other claims based upon alleged statutory violations.

Plaintiffs seek to vacate the administrative decision which was made after an earlier decision was remanded to the agency for further proceedings. For the reasons set out below, I set aside the decision awarding the remains [**2] to the Tribal Claimants, enjoin transfer of the remains to the Tribal Claimants, and require that Plaintiffs be allowed to study the remains. Plaintiffs' request for other relief is granted in part and denied in part.
PARTIES

The Plaintiff scientists are highly regarded experts in their fields. Plaintiff Bonnichsen is Director of the Center for the Study of the First Americans at Oregon State University. Plaintiff Brace is Curator of Biological Anthropology at the University of Michigan Museum of Anthropology. Plaintiffs Gill, Haynes, Jantz, and Steele are anthropology professors. Plaintiff Owsley is division head for physical anthropology at the Smithsonian Institution's National Museum of Natural History. Plaintiff Stanford is Director of the Smithsonian's Paleo-Indian Program.

The Defendants are the Army Corps of Engineers, the United States Department of the Interior, the Secretary of the Interior, and other federal officials. Amici curiae have also participated.

I. BACKGROUND

A. Pre-Litigation Events

In July 1996, a human skull and scattered bones were discovered in shallow water along the Columbia River near Kennewick, Washington. The remains were found on federal property under the management of the United States Army Corps of Engineers (Corps), and were removed pursuant to an Archeological Resources Protection Act (ARPA) permit dated July 30, 1996. Local anthropologists who examined the find at the request of the county coroner initially believed the remains were of an early European settler or trapper, based upon physical features such as the shape of the skull and facial bones, and certain objects which were found nearby.

However, the anthropologists then observed a stone projectile point (aka "lithic object") embedded in the ilium (i.e., upper hip bone). The object's design, when viewed with x-rays and CT scans of the hip, resembled a style that was common before the documented arrival of Europeans in this region. Further examination of the remains revealed characteristics inconsistent with those of a European settler, yet also inconsistent with any American Indian remains previously documented in the region.

[**5]

35 Amici curiae include four of the Tribal Claimants (the Yakama, Umatilla, Colville, and Nez Perce of Idaho), the National Congress of American Indians, and the Society for American Archaeology ("SAA").

36 A summary of some early events in this case, prepared by the Corps of Engineers, is at DOI 2759-64. The administrative record in this case includes more than 22,000 pages. Cites to "DOI nnnn" refer to the record compiled by the US Department of Interior ("DOI"). "COE nnnn" refers to the record compiled by the US Army Corps of Engineers ("Corps"). "SUP nnn" is the supplemental record compiled by the Corps, and "FOIA nnn" is the record compiled by the Corps concerning Freedom of Information Act ("FOIA") requests. "ER nnn" is the supplemental excerpts of record filed by Plaintiffs.

37 In a letter to Plaintiffs' counsel dated January 24, 1997, Corps District Engineer Lt. Colonel Donald Curtis, Jr. acknowledged that the remains were subject to ARPA. Plaintiffs cite ARPA as the "principal controlling statute" relevant to this case. Memorandum in Support of Motion for Order Granting Access to Study at 17.

38 Experts have since determined that these objects are unrelated to the human remains.

39 This Opinion uses the terms "American Indian" because the definition of "Native American," as used in a particular statute, is a disputed issue in this case.
To resolve this ambiguity, a minute quantity of metacarpal bone was radiocarbon dated. The laboratory initially estimated that the sample was between 9265 and 9535 calendar years old, COE 8715, but later adjusted that estimate to between 8340 and 9200 calendar years old after factoring in several corrections. COE 4030, DOI 10023.40

Human skeletons this old are extremely rare in the Western Hemisphere, [**6] and most [*1121] found to date have consisted of very fragmented remains. Here, by contrast, almost 90% of this man's bones were recovered in relatively good condition, making "Kennewick Man"--as he was dubbed by the news media--"one of the most complete early Holocene41 human skeletons ever recovered in the Western Hemisphere." R.E. Taylor, Amino Acid Composition and Stable Carbon Isotope Values on Kennewick Skeleton Bone.

The discovery also attracted attention because some physical features, such as the shape of the face and skull, appeared to differ from modern American Indians. Many scientists believed the discovery could shed considerable light on questions such as the origins of humanity in the Americas. According to Plaintiff Dr. Douglas Owsley of the Smithsonian Institution, "well-preserved Paleo-American remains are extremely rare. The Kennewick Man skeleton represents an irreplaceable [**7] source of information about early New World populations, and as much data should be obtained from it as possible." DOI 1585. Arrangements were made to transport the remains to the Smithsonian Institution for scientific study by a team including Plaintiffs Owsley, Jantz and Stanford. COE 7905, 9461-62.

Local Indian tribes opposed scientific study of the remains on religious grounds:

When a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are at unrest.... To put these spirits at ease, the remains must be returned to the ground as soon as possible.

Joint Tribal Amici Memorandum (1997) at 4-5.

In response to arguments that scientific study could provide new information about the early history of people in the Americas, the Confederated Tribes of the Umatilla asserted, "We already know our history. It is passed on to us through our elders and through our religious practices." DOI 1376. "From our oral histories, we know that our people have been part of this land since the beginning of time. We do not believe that our people migrated here from another continent, as the [**8] scientists do." Id.

Five Indian groups (hereafter, the "Tribal Claimants")42 demanded that the remains be turned over to them for immediate burial at a secret location "with as little publicity as possible," and "without further testing of

40 It is important to distinguish between radiocarbon ages and dates expressed in calendar years. The radiocarbon age obtained from the metacarpal bone tested in 1996 was 8410 +/- 60 B.P. (before present). Id. By convention, "present" is fixed at 1950 A.D. COE 5024. To arrive at a date in calendar years, a radiocarbon age must be corrected to compensate for various factors. The administrative record contains numerous texts and affidavits explaining the theory, procedures, and potential pitfalls of radiocarbon dating. See, e.g., DOI 399-410, 614-620, 4294, 4302, 4348-61, 4412-4478, 4746-83, 5584-5591.

41 "Holocene" refers to the most recent geological epoch, which began about 10,000 years ago. Oxford English Dictionary, 1989.

42 The Tribal Claimants are the Confederated Tribes & Bands of the Yakama Indian Nation ("Yakama"), the Nez Perce Tribe of Idaho ("Nez Perce"), the Confederated Tribes of the Umatilla Indian Reservation ("Umatilla"), the Confederated Tribes of the Colville Reservation ("Colville"), and the Wanapam Band ("Wanapam"), which is not a federally
Citing NAGPRA, [**9] the Corps seized the remains shortly before they could be transported to the Smithsonian for study. The Corps also ordered an immediate halt to DNA testing, which was being done using the remainder of the bone sample that had been submitted earlier for the radiocarbon dating. After minimal investigation, the Corps decided to give the remains to the Tribal Claimants for burial. [*1122] As required by NAGPRA, the Corps published a "Notice of Intent to Repatriate Human Remains" in a local newspaper.43 [**10] Plaintiffs and others, including the Smithsonian Institution, objected to the Corps' decision, asserting that the remains were a rare discovery of national and international significance. They questioned whether NAGPRA was applicable because certain skeletal traits did not resemble those of modern American Indians, and argued that the Tribal Claimants did not meet the statutory requirements to claim the remains. In late September 1996, several of the Plaintiffs asked Major General Ernest J. Herrell, Commander of the Corps' North Pacific Division, to allow qualified scientists to study the remains.

When the Corps failed to respond to these objections and requests, and evidenced its intent to repatriate the remains, Plaintiffs commenced this litigation.44 Plaintiffs have consistently sought two primary objectives: to prevent the transfer of the remains to the Tribal Claimants for burial, and to secure permission for Plaintiffs to study the remains.  [**11]

It is undisputed that if the Tribal Claimants gain custody of the remains, they will prohibit all further scientific study and documentation of the remains, whether by Plaintiffs or by other scientists. See, e.g., DOI 3362, 3386.

B. First Phase of the Litigation

On October 23, 1996, this court held a hearing on Plaintiffs' request for a temporary restraining order. In lieu of a formal injunction, Defendants agreed to give Plaintiffs at least 14 days notice before any disposition of the remains to allow Plaintiffs time to seek relief from this court. Defendants later moved to dismiss this lawsuit. In an Opinion issued February 19, 1997, I denied the motion. Bonnichsen v. United States, 969 F Supp 614 (D Or 1997).

43 The Notice stated, in relevant part, that (1) it was issued pursuant to NAGPRA, (2) the Corps had determined the remains were of Native American ancestry, (3) the remains were inadvertently discovered on federal land recognized as aboriginal land of an Indian tribe, (4) a relationship of shared group identity can be reasonably traced between the human remains and five Columbia River basin tribes and bands, (5) the Corps intended to repatriate the remains to those tribes, (6) notice had been given to certain Indian tribes, (7) representatives of any other Native American Tribe that believed itself to be culturally affiliated with these human remains should contact the Corps of Engineers before October 23, 1996, and (8) repatriation might begin after that date if no additional claimants came forward.

44 A second lawsuit was filed by members of the Asatru Folk Assembly, which was described in the complaint as a legally-recognized church "that represents Asatru, one of the major indigenous, pre-Christian, European religions." The Asatru action has since been abandoned.
Defendants then moved to dismiss this lawsuit on the grounds that Plaintiffs lacked standing to maintain this action, that the claims were not ripe because the Corps had not made a final decision, and that the claims were moot because the Corps' earlier decision was no longer in effect. In an Opinion issued on June 27, 1997, I rejected each of those contentions. Bonnichsen v. United States, 969 F. Supp. 628 (D Or 1997). In addition, [**12] I found "that the agency's decision-making procedure was flawed" and its decision "premature," that the Corps "clearly failed to consider all of the relevant factors or all aspects of the problem," "did not fully consider or resolve certain difficult legal questions," "assumed facts that proved to be erroneous," and "failed to articulate a satisfactory explanation for its actions." Id. at 645. I also questioned whether "the Corps has entirely abandoned its earlier decision and [*1123] is now objectively considering the evidence and the law without any preconceived notions concerning the outcome." Id. at 641.

I vacated the Corps' earlier decision regarding disposition of the remains, and remanded the issues to the Corps for further proceedings. The Corps was directed "to fully reopen this matter, to gather additional evidence, to take a fresh look at the legal issues involved," and to reach a decision that was based upon all of the evidence. Id. at 645. Relevant legal standards were to be applied and the Corps was to provide a clear statement of the reasons for its decision. Id. In addition, I provided the Corps with a non-exclusive list [**13] of issues to consider on remand, and ordered Defendants to continue storing the remains "in a manner that preserves their potential scientific value" pending a final determination of the Plaintiffs' claims. Id. at 646, 648, 651-54.

In the same decision, I denied, without prejudice, Plaintiffs' motion to study the remains, and directed the Corps to consider, on remand, "whether to grant Plaintiffs' request for permission to study the remains."45 Id. at 632, 651.

C. Events Following Remand

1. Curation

Storage of the remains in a manner that preserves their potential scientific value has been a topic of considerable concern. In September 1996, the femurs apparently disappeared. It was 18 months before the Corps discovered that the femurs were missing, and almost five years before they were recovered.46 [**14]

Only weeks after the Corps disclosed that the femurs were missing, a box with a small quantity of bones believed to be from the Kennewick skeleton was taken by Tribal representatives from the Corps' "secure" storage facility and secretly buried, under circumstances the Corps has never satisfactorily explained.47

The remaining bones were initially stacked on top of each other in a plywood box--the cover held in place with strips of duct tape--with inadequate padding, environmental controls, or other precautions necessary to

45 Plaintiffs' motion cited several statutes, but relied primarily on ARPA, 16 USC § 470aa et seq.

46 The missing femurs apparently spent those years in a box in the county coroner's evidence locker. Despite some early suggestions of criminal activity, the misplacement of the femurs now appears to have been an innocent oversight.

47 The box which was taken contained one or more items that were probably from the Kennewick skeleton but were being stored separately with some unrelated items. DOI 2840-42, 4921, COE 3863, 5608, 5651, 5397-99, 5832, but cf., DOI 3667-68.
fully preserve their potential scientific value. COE 2470-79, 2506-07, 2521, 5332-49, DOI 1867-01889. A few bones were stored in a paper sack. COE 5334. [**15]

The Corps allowed Tribal representatives to visit the remains to conduct religious ceremonies without notifying the court or opposing parties, and allowed the remains to be handled and stored in a manner that failed to protect them from possible contamination by modern DNA. This potentially jeopardized, and certainly complicated, subsequent efforts to identify the ancestry of the Kennewick Man through DNA analysis. During ceremonies, the Corps allowed Tribal representatives to place plant materials in the container with the remains, and to burn additional plant material (reportedly cedar or sage) on, or close to, the remains. DOI 2907, COE 2471, 5334, 7931. After it became apparent that the Corps lacked the expertise, facilities, and perhaps the commitment to properly curate the remains, the court ordered that the remains be transferred to a climate-controlled secure storage room at the Burke Museum in Seattle. [**16]

2. Limited Study of the Discovery Site

In December 1997, a team composed of representatives from the Tribal Claimants, the Corps and other federal agencies, and a team from Washington State University led by Dr. Gary Huckleberry, performed a very limited investigation of the site where the remains had been found. COE 4895-A to 5036, 5815-64. The study focused on determining whether the sediment record was consistent with the radiocarbon date obtained, and whether the remains were buried intentionally or by natural causes such as a flood. Neither question was conclusively resolved, but initial indications were that the sediment record was generally consistent with the radiocarbon date. [**17]

The scope of the 1997 study was severely restricted because the Tribal Claimants strongly opposed any study of the site. COE 4509, 4547-48, 4553-54, 4562-63, 4924, 5672-73, 5838-40, 5925-26, 6713-14, 6718a-b. According to Dr. Huckleberry, less than 0.0001 % of the easily-testable sediment volume was examined. SUP 7.

Dr. Huckleberry, among others, has strongly recommended additional investigation of the site to confirm the accuracy of the radiocarbon date, to ascertain whether the remains may have been contaminated with "old" or "new" carbon (which could distort the radiocarbon results), and to ascertain whether any artifacts

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48 It is unclear whether curation played a role, but the bone sample tested in 1996 proved to be far better preserved--and more suitable for DNA and radiocarbon testing--than the bone samples tested in 1999 and 2000. DOI 5795, 5811, 5837, 5843.

49 See, e.g., DOI 9442-43, 9581 (presence of even small amounts of modern DNA from sources such as shed skin cells and aerosolized saliva can easily overwhelm a small quantum of ancient DNA), DOI 02750-51 (to ensure accurate DNA testing, it is essential that the bone not be touched with an ungloved hand); DOI 05603 ("Identification of contamination has emerged as the single most critical issue in ancient DNA extraction"); DOI 6773, 6788-91. But cf., DOI 10002 (improvements in technique make contamination a lesser issue today than in the past).

50 Dr. Chatters, who originally collected the remains, was also a member of that team. Plaintiff Bonnichsen was present for part of the investigation.

51 In assembling the administrative record, the Corps reused a block of numbers; after page 4899, the pagination reverts to 4801. The citation to page "4895-A" refers to the first document numbered page 4895, while page "4895-B" is the second document assigned that number.
were present that might furnish clues to the cultural affiliation of the Kennewick Man. COE 4273-95, 4872-74-B, 5837-38, SUP 2-24. See also, COE 4998 (initial test of ground-penetrating radar "shows great promise" for detecting any cultural artifacts that might be present at the site). However, the Corps has refused to authorize any further study of the site, and has taken affirmative steps to prevent any future study. [**18]

3. Burial of the Discovery Site

In April 1998, the Corps buried the discovery site of the remains under approximately two million pounds of rubble and dirt, topped with 3700 willow, dogwood, and cottonwood plantings. COE 5873-74, DOI 2347-51, 2515. The lengthy administrative record that Defendants filed with this court documents only a portion of the process by which the decision to bury the [*1125] site was made. Nevertheless, that 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 Defendants have represented to this court.

The proposal to bury the site originated in September 1996, COE 4542, SUP 930-36, not in the fall of 1997 as the Corps has represented. The Corps told the Tribal Claimants it shared their concern "that continuing erosion may result in more exposures" and that it would proceed with plans to shore up the site "as soon as possible." SUP 934-36. The Tribal Claimants expressed dissatisfaction with the Corps' original proposal for a temporary "soft" erosion control project. [**19] warning that other human remains could be uncovered or that pothunters might loot the site in search of artifacts. SUP 907-11, 913, COE 4542, 5678-79, 5766.

The project to cover the site was initially deferred while this litigation proceeded, but was revived in 1997 after this court vacated the Corps' original decision to turn over the remains to the Tribal Claimants. The Tribal Claimants demanded, and the Corps eventually agreed, that the site be "armored" to provide "permanent protection" against disturbances. SUP 886-93, 907-11, 913, COE 4542, 5678-79, 5766, 5798.

On or about November 6, 1997, the "White House" ordered Lt. Colonel Donald Curtis, Jr., Corps District Engineer, to proceed with the armoring project. SUP 323, 821. The project was to be completed by January 1, 1998, and the Corps was given a budget of $200,000 to accomplish the task. SUP 821, COE 5873.

The Corps consulted extensively with the Tribal Claimants, but told Plaintiffs nothing about plans to bury the site. The Plaintiffs heard rumors about this project, and beginning in November 1996, repeatedly asked Defendants about it. See, e.g., COE 5900-02 (letter dated July 29, 1997), 5903 (Dec. 12, 1996), and 5904 (letter of Nov. 6, 1996). Defendants withheld from Plaintiffs all information regarding the project until December 26, 1997, COE 5732, after the final decision had been made.

52 There is also evidence that a Corps expert recommended further study of the site, but, after protests from the Tribal Claimants, the expert was ordered to remove this language from the final report. SUP 489. See also, SUP 552 (instructing a Corps employee to alter recommendation for further study).

53 Although Defendants argued that the numerous references in the record to White House involvement concerned only a low-level visiting scientist monitoring the Kennewick controversy for his own curiosity, it is difficult to believe that an Army Colonel would follow orders from a low-level visiting scientist on an issue of this magnitude.

54 Some documents do refer to the archaeological sensitivity of the site, but this appears to be a euphemism for the Tribal Claimants' concern that additional remains might be uncovered.
When the Corps' intentions became known, legislation was introduced to prohibit the Corps from undertaking the project without approval from this court. COE 6004, 6316-20, 6341. This legislation passed both houses of Congress, and awaited only a conference committee to resolve differences in unrelated provisions of the bills. SUP 329-31. The Corps initially told the local congressional delegation that it would comply [**21] with the legislation, but in a decision made at the highest levels of the Corps, the agency reversed its course within 24 hours. COE 4535, 4654-57, SUP 279-80, 291, 320-23, 332, 334-36. Taking advantage of a brief congressional recess, the Corps announced it would proceed with the project unless enjoined. COE 5762-63, 5771a, 5772-76, 5791, SUP 273-74, 286-87, 345, 359, 381.**55

[*1126]  

When Plaintiffs did not immediately move for injunctive relief, the Corps proceeded with the project despite an "almost. [**22] ... steady stream of calls" from citizens opposing the project as well as from some members of Congress. SUP 273-74. The Commander of the Corps, General Joe Ballard, predicted that "the din will die out very quickly." SUP 273-74.

Burial of the discovery site hindered efforts to verify the age of the Kennewick Man remains, and effectively ended efforts to determine whether other artifacts are present at the site which might shed light on the relationship between the remains and contemporary American Indians. DOI 2648-49, 4019-42, COE 5138. See also, SUP 950-53 (discussion of harm that can result from burial of an archaeological site). Although the Corps has represented that it buried the site to preserve its archaeological value for future study, the Corps has denied all requests to study the site. COE 4084, 4160, 4163, 4167-80, 4300-01, 5139, 5254, 5550, 5664, 5833, SUP 001-26.

4. Interagency Agreement with the Department of Interior  

On March 24, 1998, the Corps and the Department of Interior (DOI) entered into an Interagency Agreement that effectively assigned the DOI responsibility for deciding whether the remains are "Native American" under NAGPRA, and for determining [**23] their proper disposition. DOI 2676-78. Thereafter, the DOI assumed the role of lead agency on most issues concerning this case.**56

5. The Agency's Examination of the Remains  

Almost two years after this matter was remanded for reconsideration, Defendants began to examine the remains in detail. The Secretary's experts first attempted to ascertain, through non-destructive**57 examination of the remains, approximately when the Kennewick Man had lived, his ancestry, and whether he could be linked to a modern tribe or people. Those experts estimate that he was 5' 9" to 5' 10" tall, was 45 to 50 years of age when he died, DOI 10677, and was 15 to 20 years old when the projectile point became embedded in his hip, DOI 10681. Red stains were found on several bones, which Defendants initially attributed to ochre that was sometimes used in mortuary rituals. It was later determined that the stains "are unlikely to be of cultural origin" [**24] and appeared to be the result of natural post-mortem processes. DOI 9766.

**55 Though the Corps argues that it had to complete the project before April 15, 1998, due to salmon-related restrictions, there is no evidence that the deadline was inflexible. At oral argument, Defendants also argued that the Corps was rushing to complete the project before the funding appropriation expired, but there is nothing in the record to substantiate that contention. Rather, it appears that the Corps was hurrying to complete the project before final passage of the legislation that would have prohibited it.

**56 Hereafter, "Secretary" refers to the Secretary of the Department of Interior.

**57 The Tribal Claimants prefer the term "non-destructive" rather than "non-invasive" because they consider handling, viewing, or photographing remains to be invasive.
The condition of the remains strongly suggests that the body was not left exposed on the surface after death, but Defendants' experts were unable to determine whether the body was buried intentionally or by a catastrophic event such as a flood. DOI 9765, 10664. One group of experts thought intentional burial was the most probable scenario, but ultimately concluded that "given the currently available evidence, the issue of whether or not this individual was intentionally buried remains unresolved." DOI 9765. A second group of experts, who conducted limited studies on the site before it was covered, concluded that the[*1127] skeleton most likely was buried by natural processes. DOI 2647, 02651. The Corps' decision to bury the site has prevented further examination of this issue. [**25]

Defendants' experts were unable to determine, from non-destructive examination alone, when the Kennewick Man lived. However, analysis of sediment layers where he was found supports the hypothesis that he was buried not less than 7600 years ago, and could have been buried more than 9000 years ago (the date indicated by the initial radiocarbon dating). DOI 2647, 10053. Further study of the sediments was strongly recommended, DOI 2647-51, but Defendants' decision to bury the site prevented completion of those studies. The experts compared the physical characteristics of the remains--e.g., measurements of the skull, teeth, and bones--with corresponding measurements from other skeletons. They concluded that the Kennewick remains are unlike any known present-day population, American Indian or otherwise.58 DOI 10665, 10685-92.

Like other early American skeletons, the Kennewick remains exhibit a number of morphological features that are not found in modern populations. For all craniometric dimensions, the probabilities of membership in modern populations were zero, indicating that Kennewick is unlike any of the reference samples used. Even when the least-conservative inter-individual [**26] distances are used to construct typicality probabilities, Kennewick has a low probability of membership in any of the late Holocene reference samples ... [These results] are not surprising considering that Kennewick is separated by roughly 8,000 years from most of the reference samples [in the database]. DOI 10691.

The most craniometrically similar samples appeared to be those from the south Pacific and Polynesia as well as the Ainu of Japan, a pattern observed in other studies of early American crania from North and South America ... Only the odontometric data suggested a connection between Kennewick and modern American Indians, but the typical probabilities for this analysis were all very low. Clearly the Kennewick individual is unique relative to recent American Indians, and finds its closest association with groups of Polynesia and the Ainu of Japan. Id. [**27]

Although the "strongest morphological affinities for the Kennewick remains are with contemporary or historic 'populations in Polynesia and southern Asia, and not with American Indians or with Europeans in the reference samples' ... even the 'strongest' morphological affinities with modern human populations" are "not particularly robust." DOI 10067-68. "The Kennewick individual can be excluded, on the basis of dental and cranial morphology," not just "from recent American Indians" but "from all late Holocene human groups." DOI 10692 (emphasis in original).

Defendants' experts cautioned, however, that an apparent lack of physical resemblance between the Kennewick Man and present-day Indian people "does not completely [*1128] rule out the possibility that

58 These experts did not conclude that the Kennewick individual was "Caucasian." Although terms such as "white male" and "caucasian-like" appear in his notes of preliminary impressions when the remains were first discovered, DOI 1227-32, Dr. Chatters then observed some anomalies, such as the projectile point and tooth wear, that led him to recommend radiocarbon dating. After reviewing this additional information, Dr. Chatters revised his assessment. DOI 8186, 8196 ("I did not state, nor did I intend to imply, once the skeleton's age became known, that he was a member of some European group.").
these ancient remains might be biologically ancestral to modern American Indian populations." DOI 10684. Moreover, although the Kennewick Man's morphological traits do not closely resemble those of modern American Indian populations, Defendants' experts note that the Kennewick Man's traits are generally consistent with the very small number of human remains from this period that have been found in North America. DOI 10067-68, 10691. [**28] They also note potential similarities to certain Archaic populations (between 2,000 and 8,000 years old) from the northern Great Basin and eastern woodlands of North America. DOI 10068, 10688, 10692.

Because they concluded that the non-destructive examination did not furnish a definitive answer to the question whether the Kennewick Man is "Native American" for purposes of NAGPRA, Defendants sent several small bone samples to selected laboratories for additional radiocarbon dating. Whether due to differences in how long a particular bone had been exposed to the elements, technique in selecting the samples, deterioration while in storage, or some other reason, the samples tested in 1999 were in much poorer condition than the sample tested in 1996, and there were considerable variations in the results. DOI 5809-48. The best preserved sample yielded a radiocarbon age of 8410 +/- 40 BP, virtually identical to the results of the 1996 testing. DOI 10020. After adjustments, the age of that sample was estimated at between 9370 and 9560 calendar years, although that date might be "several hundred years" too old if the Kennewick Man had a mostly marine diet. DOI 10027-29. [**29]

The 1996 and 1999 tests, coupled with an analysis of sediments and the lithic object embedded in the ilium, established to the Secretary's satisfaction that the remains are probably between 8500 and 9500 years old. DOI 10015, 10018-22.

Relying simply on the age of the remains, and the fact that they were found inside the United States, Defendants formally pronounced the remains "Native American." DOI 10018-22. In an effort to determine whether DNA could establish a link between the remains and any particular Tribal Claimant, and to answer other questions regarding the ancestry of the remains, Defendants authorized DNA testing. The selected laboratories were unable to isolate uncontaminated DNA within the allotted time, though it is not clear why the testing failed. It is also unclear whether, given more time, different samples, or technological advances, it would be possible to isolate uncontaminated DNA from the Kennewick remains. [**31] [*1129]

59 Another laboratory tested a sample from the same bone, and obtained a radiocarbon age of 8130 +/- 40 BP, a difference of about 300 years. DOI 10020. Samples from several other bones were tested, but they were poorly preserved and the laboratories expressed little confidence in the results. One yielded a radiocarbon date of 5570 +/-100 BP (or about 6360 to 6800 calendar years) DOI 10042, while another yielded a radiocarbon date of 6940 +/- 30 BP. DOI 10020, 10040.

60 Before deciding to proceed with the DNA analysis, Defendants commissioned a study which concluded that, for a variety of reasons, it was unlikely that uncontaminated DNA suitable for testing would be isolated from these remains given the limits of current technology.DOI 6770-6806. [**30]

61 Cf., DOI 9860-61 ("the lack of success in amplifying ancient DNA from one sample has little bearing on the probability of success in the analysis of another"); DOI 9732, 10560 (failure to extract DNA from this one sample "should not preclude further DNA testing using future novel methods on other, perhaps more DNA-rich, bone samples from the Kennewick remains"); DOI 8555 (Defendants "are making a huge mistake by not [testing] a tooth" from the Kennewick remains in addition to any other bone samples); DOI 10001 ("it is unlikely that further analysis of other elements (e.g., teeth or a much
6. Other Studies by Defendants' Experts

In addition to examining the remains, Defendants' experts researched and prepared reports on a variety of topics, including archaeological evidence regarding pre-historic human habitation in the southwestern Columbia Plateau, oral histories of the claimant tribes, linguistic studies, and an analysis of the lithic object embedded in the ilium. The experts' conclusions are discussed later in this Opinion.

7. Procedural Issues on Remand

Without disclosure to the public or the Plaintiffs, Defendants furnished the Tribal Claimants with advance copies of the cultural affiliation reports prepared by their experts. DOI 6982 (gave Tribal Claimants copies of draft expert reports no later than February 9, 2000); DOI 8695 (gave Tribal Claimants copies of Secretary's "final" expert reports no later than June 21, 2000, to be used in preparing their own submissions and comments, but requested that they restrict access to the reports because "we are not planning to release these reports to the public until the Department of the Interior has made its decisions and recommendations in this matter").

The Tribal Claimants also received a private letter prepared by Dr. McManamon, a key decision maker for the Defendants, which articulated Defendants' concerns regarding the evidence supporting the claim for the remains. DOI 6982, 8695-96, 8703-05, 8713-19, 9101-02. Defendants urged the Tribal Claimants to supplement the record with expert reports of their own, and to otherwise address the issues that Defendants had identified. The Tribal Claimants responded by furnishing numerous reports to Defendants. Despite Plaintiffs' repeated requests for clarification of the issues and access to the administrative record, they were not given a similar opportunity. See, e.g., ER 400-01, DOI 8228-29; June 20 Tr. at 320-21.

larger portion of bone) would be successful"); DOI 10002 ("it is possible that methods developed in the near future could be successful in extracting suitable DNA for analysis from the Kennewick remains"). The bone samples used for the most recent DNA analysis were quite brittle and heavily mineralized, which is indicative of poor preservation of organics. DOI 9853. The poor condition of the bone is in marked contrast to the bone sample used for the 1996 testing. Similar differences were observed between the samples used for the 1996 and 1999 radiocarbon datings. DOI 5795, 5811, 5837, 5843. See also, DOI 5005 (collagen content of 1999 bone sample so low "that if this were any other bone the lab would have halted the AMS testing process").

See, e.g., DOI 7592 (letter from Umatilla, dated March 2, 2000, stating that "our staff has reviewed the documentation prepared by Interior on the cultural affiliation" and is submitting its own expert reports); DOI 7621-30 (report from Umatilla's expert, submitted on March 2, 2000, specifically commenting upon the reports prepared by Defendants' experts, even though the latter were not revealed to Plaintiffs or the public until after the final decision was announced in late September, 2000); DOI 9003-54 (report, submitted by Yakama on August 10, 2000, commenting upon the reports prepared by Defendants' experts); DOI 9055-9240 (reports, submitted by Colville on August 10, 2000, "submitted in response to Dr. F. McManamon's letter of July 24, 2000"); DOI 7304-10 (comments submitted by Nez Perce on February 28, 2000, in response to draft cultural affiliation reports by Defendants' experts that Plaintiffs were not allowed to see until seven months later).
Plaintiffs were permitted to submit documents, but had to do so without knowing specifically what they were commenting upon.

While preparing their final decision in this case, Defendants met privately with the Tribal Claimants at least once to discuss [**1130] the merits of the cultural affiliation determination.63 DOI 8695-8705, 9101-02, 9499. Defendants did not invite Plaintiffs to participate, nor did they otherwise disclose the substance of these communications. Plaintiffs point to other documents which support the inference that Defendants are biased in favor of the Tribal Claimants. See, e.g., COE 7905 ("I told [Armand [**34] Minthorn] we will do what the tribes decide to do with the remains"); COE 9311 ("the colonel has made [turning over the remains to the Tribal Claimants] his top priority"); COE 9471a, ER 396 (internal Corps memo stating that "the District needs to make [a] clear, unequivocal demonstration of its commitment to the tribes as being a compassionate and supportive partner in restoring the remains to a condition of proper interment with dignity and respect ..."); ER 398 ([Dr. Owsley] "and all other members of the scientific community have been denied direct access [to the Kennewick remains] because of the district's commitment to the tribal coalition"); COE 8663-77 (minutes of meeting between tribal representatives and Corps regarding management and construction of dams, fishing rights, and stream management, during which Kennewick Man issues were repeatedly raised). A number of these documents precede this court's Order vacating the Corps' original decision to award the remains to the Tribal Claimants.

D. The Challenged Decisions

On January 13, 2000, the DOI announced its determination that the Kennewick remains are "Native American" as defined by NAGPRA. DOI 5816-21. The [**35] decision was premised on only two facts: the age of the remains, and their discovery within the United States. The agency's Opinion stated:

As defined in NAGPRA, "Native American" refers to human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and, irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian tribes. DOI 5816. Applying that definition, the DOI concluded that the remains were "Native American" because they were "clearly pre-Columbian." DOI 5819.

On September 25, 2000, the DOI announced its final decision to award the Kennewick remains to a coalition of the Tribal Claimants. DOI 10012-17. The decision letter, signed by then-Secretary of the Interior Bruce Babbitt, found by a "preponderance of the evidence that the Kennewick remains are culturally affiliated with the present-day Indian tribe claimants." DOI 10016. The Secretary "further determined that [**36] a claim based on aboriginal occupation ... is also a basis for the disposition of the Kennewick remains to the claimant Indian tribes." Id. Relying upon their determination that the remains were subject to NAGPRA, and that the remains should be awarded to the Tribal Claimants, Defendants again denied Plaintiffs' request to study the remains. DOI 10017, COE 0001-07. Defendants also rejected the contention that the study prohibition violates Plaintiffs' constitutional rights under the First and Fifth Amendments. Id. [*1131]

Plaintiffs then filed an Amended Complaint challenging these decisions, and asserting additional claims. The parties and the amici curiae fully briefed the issues, and the court heard two days of oral argument.

E. Claims

Plaintiffs bring seven claims for relief. The first claim, brought pursuant to the Administrative Procedure Act (APA), 5 USC §§ 701-706, seeks judicial review of Defendants' decision on remand.

63 The meetings at issue here are in addition to the earlier consultation meetings with Tribal representatives, such as those conducted in May and July of 1998. DOI 10661.
The second claim alleges several specific violations of NAGPRA.

The third claim alleges that Defendants violated the National Historic Preservation Act (NHPA), 16 USC § 470 et seq., by burying the [**37] site where the remains of the Kennewick Man were found.

The fourth claim alleges that Defendants violated the Archaeological Resource Protection Act (ARPA), 16 USC § 470aa et seq., by failing to maintain the Kennewick Man remains "for the benefit of the American people," failing to make the remains of the Kennewick Man available for scientific and educational purposes, and failing to properly curate the remains to ensure their long-term preservation as required by an earlier Order of this court.

The fifth claim alleges that Defendants violated the Freedom of Information Act (FOIA), 5 USC § 552, by failing to respond to Plaintiffs' requests for information.

The sixth claim, brought pursuant to the Declaratory Judgment Act, 28 USC § 2201, sets out Plaintiffs' demand for declaratory and injunctive relief based upon violations alleged in other claims.

The seventh claim, brought pursuant to 28 USC § 1361, seeks mandamus relief in the form of an Order compelling Defendants to allow Plaintiffs access to the remains of the Kennewick Man "for purposes of study, publication, teaching and scholarly [**38] debate."

In their prayer for relief, Plaintiffs request seventeen separate elements of declaratory and injunctive relief, and assert the right to recover the costs, disbursements, and reasonable attorney fees incurred in this action.

II. JUDICIAL REVIEW OF DECISIONS MADE ON REMAND

A. Legal Standards

Under the Administrative Procedure Act, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 USC § 706(2)(A); Northwest Motorcycle Ass'n v. United States Dept. of Agriculture, 18 F3d 1468, 1471 (9th Cir 1994). The court is not empowered to substitute its judgment for that of the agency, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416, 28 L. Ed. 2d 136, 91 S. Ct. 814 (1971), or to set aside the agency's decision simply because the court, as an original matter, might have reached a different result. See, Arizona Cattle Growers' Ass'n v. United States Fish & Wildlife, 273 F3d 1229, 1236 (9th Cir 2001). [**39] However, the court is not relegated to the role of a "rubber stamp." Id.

An agency's decision must be based upon a "reasoned evaluation of the relevant factors." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989). The agency must "articulate[ ] a rational connection between the facts found and the choice made," Arizona Cattle Growers', 273 F3d at 1236, and an "agency's explanation must be sufficient to permit effective judicial review." Northwest Motorcycle, 18 F3d at 1478. See also, In re Sang [*1132] Su Lee, 277 F3d 1338, 1342 (Fed Cir 2002). Although the court may uphold a decision "of less than ideal clarity if the agency's path may reasonably be determined," the court cannot infer an agency's reasoning from mere silence. See, Beno v. Shalala, 30 F3d 1057, 1073-76 (9th Cir 1994) (setting aside agency decision where there was no indication that the Secretary had considered materials submitted by the plaintiffs). [**40] An agency decision will not be upheld unless it is based upon the arbitrary and capricious standard unless the court finds that the evidence before the agency provided a rational and ample basis for its decision. Northwest Motorcycle, 18 F3d at 1471. An agency's decision may also be set aside if it has relied on factors that Congress has not intended the agency to consider, has entirely failed to consider an important aspect of the issue, has offered an explanation for its decision that runs counter to the evidence before the agency, or if the decision is so implausible that it could not be based on a difference in view or be the product of agency expertise.

Inland Empire Public Lands Council v. Glickman, 88 F3d 697, 701 (9th Cir 1996). In some circumstances,
an agency's failure to gather or to consider relevant evidence is also grounds for setting aside the decision. See, Mt. Diablo Hospital v. Shalala, 3 F3d 1226, 1232 (9th Cir 1993).

When an agency's decision turns upon the construction of a statute or regulation, the court must consider whether the agency correctly interpreted and applied the relevant legal standards.

B. Compliance with Administrative Procedures Act

Plaintiffs contend that agency decision makers had improper ex parte contacts with other agencies, the Tribal Claimants, and Defendants' trial attorneys; foreclosed Plaintiffs' meaningful participation in the decision-making process; furnished the Tribal Claimants with advance copies of key reports and gave the Tribal Claimants an opportunity to rebut the reports and supplement their claims without affording those opportunities to Plaintiffs; failed to act as neutral and fair arbiters of the claim; and predetermined their decisions. Plaintiffs also assert that agency decision makers improperly failed to document all information on which the decision was based, including ex parte communications.

Adjudication of the Tribal Claimants' request for repatriation of the remains of the Kennewick Man presents somewhat unusual issues of administrative procedure. In a typical adjudication, ex parte contacts between agency employees involved in the decision-making process and "interested persons" outside the agency are not allowed. See, 5 USC § 557(d)(1); Portland Audobon Society v. Endangered Species Committee, 984 F2d 1534, 1543 (9th Cir 1993) ("We think it is a mockery of justice to even suggest that ... decisionmakers may be properly approached on the merits of a case during the pendency of an adjudication."). However, consultation with tribal claimants is specifically mandated under the regulations applicable to NAGPRA. See, 43 CFR §§ 10.4, 10.5 (federal agency to notify tribal organizations likely to be culturally affiliated with human remains; agency must share variety of information pertaining to resolution of cultural affiliation determination).

The parties have cited, and I have found, no reported decisions addressing these particular circumstances. In addition, the parties disagree as to whether a contested NAGPRA claim is an adjudication governed by 5 USC §§ 554 and 557(d)(1), and as to what procedural requirements apply if agency proceedings are not governed by those statutes. [*1133]

I need not determine precisely what procedures were required, because the agency's decision must be vacated for substantive reasons regardless of the exact procedures that should have been followed. It is sufficient to note that decisions addressing the obligations of agencies under the APA in various contexts appear to uniformly require that, regardless of the particular method used to reach a decision, the decision-making process must be fair to all affected parties. E.g., Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F2d 897, 910 (5th Cir 1983) (critical question in any challenge to the propriety of the method used by agency in reaching decision is whether procedure used is fair).

Based upon a familiarity with this litigation developed over a number of years and a thorough review of the record, I conclude that the final decisions challenged here were not made by neutral and unbiased decision makers in a fair process as is required under the APA. Though I am satisfied that the agency's ex parte contacts with the government's trial attorneys did not violate Plaintiffs' rights, I am concerned by the largely undisputed evidence that agency decision makers:

(1) secretly furnished the Tribal Claimants with advance copies of documents such as expert reports, which allowed the Claimants (and only the Claimants) to rebut the reports and submit responsive expert reports of their own before the administrative record closed; 64

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64 DOI 6982, 8695. See also, DOI 7304-10, 7592, 7621-30, 9003-54, 9055-9240 (commenting on the expert reports long before they were made public).
(2) secretly met with the Tribal Claimants at a critical time in the decision-making process to discuss the mental impressions of the decision makers and potential weaknesses in the claims, and gave the Claimants an ex parte opportunity to influence the decision makers and to supplement the record in response to these concerns.  

(3) secretly sent letters to the Tribal Claimants regarding the same;  

(4) secretly notified the Tribal Claimants that the aboriginal lands issue was under consideration so they could supplement the record before it closed;  

(5) refused to allow Plaintiffs to see any of the expert reports or other materials in the record before the administrative record was closed and the final decision was made, and refused to clarify the issues under consideration.  

I am also concerned about the decision to cover the site where the remains of the Kennewick Man were found. Though the Corps cited erosion control as the purpose of the project, it appears that the Tribal Claimants' concern about further site investigation was the principal factor in the decision to cover the site. That action was consistent with Defendants' approach throughout this litigation, which has been marked by an appearance of bias. This course of conduct is especially troubling because the court set aside the original agency decision in this matter after determining that the Corps had prejudged the outcome and had suppressed any doubts about the proper result "in the interests of fostering a climate of cooperation with the tribes." Bonnichsen, 969 F Supp at 642.

Resolution of the present dispute concerning Defendants' decision-making process does not require a full explication of the consultation requirements of the relevant regulations. It is sufficient to note that the primary purpose of consultation appears to be to inform those who may be affiliated with cultural items of their discovery and proposed disposition. Nothing in these regulations requires an agency to assume that particular items meet the statutory definitions of "Native American" or "cultural affiliation," or to side with claimants in any dispute or litigation, or prevents an agency from furnishing the same information to tribal claimants and others interested in the agency's determination. Nothing in NAGPRA or related regulations appears to allow an agency to collude with a claimant when a third party challenges a proposed disposition.

Under the APA, a court may set aside an agency action which it determines is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure required by law." 5 USC § 706(2)(A) & (D); Natural Resources Defense Council v. Houston, 146 F3d 1118, 1125 (9th Cir 1998).  

65 DOI 8695-8705, 9101-02, 9247-54, 9499.  


67 On August 11, 2000, only weeks before the Secretary announced the final decision and shortly after the Tribal Claimants met privately with Defendants to discuss the merits of the case, the Yakama placed 170 pages of documents regarding the ICC issue into the administrative record. COE 2774-75, 2826-2995.  

68 ER 400-01, DOI 8228-29.
be set aside on substantive grounds, and it appears that a remand with instructions to fairly reevaluate the issues again would be futile. The Secretary has developed a voluminous record which the court has reviewed, and the parties have vigorously litigated this matter over the course of several years. Under these circumstances, judicial economy and the parties' interest in resolving this litigation favor addressing the substantive issues.

No useful purpose would be served by remanding the decision to the Secretary with instructions to again reevaluate the issues and to again revisit Plaintiffs' request to study in light of the court's analysis set out below. Defendants have had ample opportunity to develop and fairly evaluate the record and to make an unbiased decision, and there is no reason to believe that another remand would yield a different approach or result.

C. Definition of Native American

As the first step in his determination that the Tribal Claimants are entitled to the remains, the Secretary found that the Kennewick Man is "Native American" within the meaning of NAGPRA.

NAGPRA defines "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 USC §3001(9). However, in determining that the Kennewick Man is "Native American," the Secretary defined this term as referring to human remains and cultural items that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and, irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian Tribes.

DOI 10018. Defendants have clarified that, according to this definition, "Native American" refers to any remains or other cultural items that existed in the area now covered by the United States before 1492. Under this definition, regardless of their origins or history, all remains and other cultural items found in the United States that are now more than 510 years old are deemed "Native American" for the purposes of NAGPRA, even if they have no relationship to a present-day "tribe, people or culture."

In analyzing the Secretary's determination that the remains are "Native American," the threshold question is whether the Secretary's definition is binding on this court. Defendants and the Tribal Claimants cite Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), in support of their contention that the court should defer to the Secretary's definition. They also contend that the court should defer to the agency's "longstanding" interpretation of the statute.

Defendants' arguments are not persuasive. "Chevron deference" is the deference to which an agency's reasonable statutory interpretation is entitled where Congress has "delegated authority to the agency, generally to make rules carrying the force of law, and ... the agency interpretation claiming deference was promulgated in exercise of that authority." United States v. Mead Corp., 533 U.S. 218, 226-27, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001). In most cases where Chevron deference has been applied, the agency's interpretation has been the result of a process of notice and comment rule-making or formal adjudication, which the agency did not undertake here. See, Christensen v. Harris County, 529 U.S. 576, 587, 146 L. Ed. 2d 621, 120 S. Ct. 1655 (2000) (interpretations "in opinion letter--like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law--do not warrant Chevron-style deference"); Martin v. Occupational Safety and Health Review Com'n, 499 U.S. 144, 157, 113 L. Ed. 2d 117, 111 S. Ct. 1171 (1991) (interpretive rules are not entitled to Chevron deference); Hall v. United States Environmental Protection Agency, 273 F3d 1146, 1155-56 (9th Cir 2001).

Although the Secretary has rule-making authority, the interpretation at issue here was not enacted by any formal process. Instead, it is a statutory interpretation that was first announced by the Secretary's counsel during the course of this litigation. Accordingly, the interpretation is not the type of decision to which Chevron deference ordinarily applies.
Defendants' contention that the court should defer to the agency's "longstanding" interpretation of the statute that allows for classification of the remains based solely upon age also fails. I find no support for the assertion that the agency has consistently taken the position that age alone suffices to determine "Native American" status. In response to a hypothetical posed during a hearing on June 2, 1997, Defendants indicated that NAGPRA would not govern the disposition of pre-Columbian remains that, for example, were clearly African and not American Indian. COE 7360-61. The Secretary's subsequent decision that all remains and other cultural items predating 1492 are "Native American" cannot be fairly characterized as "longstanding."

The objective of statutory interpretation is to ascertain the intent of Congress. [*53] United States v. Daas, 198 F3d 1167, 1174 (9th Cir 1999). The inquiry begins with the plain language of the statute. Id. Courts look to the entire statutory scheme to determine the plain meaning and congressional intent of a particular statutory provision, and give terms that [*1136] are not defined by statute their ordinary meaning. Id. When interpreting statutes, courts do not assume that Congress intended to create odd or absurd results. United States v. X-Citement Video, Inc., 513 U.S. 64, 69-70, 130 L. Ed. 2d 372, 115 S. Ct. 464 (1994) (citing Public Citizen v. United States Department of Justice, 491 U.S. 440, 453-455, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989)).

As noted above, NAGPRA defines "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States." § 3001(9) (emphasis added). Giving the "plain language" of this provision its ordinary meaning, use of the words "is" and "relating" in the present tense requires a relationship to a presently existing tribe, people, [*545] or culture. This is consistent with the Act'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." 25 USC § 3001(3)(C) (emphasis added).

From this consistent use of the present tense, it is reasonable to infer that Congress intended the term "Native American" to require some relationship between remains or other cultural items and an existing tribe, people, or culture that is indigenous. The present-day people who are indigenous to the 48 contiguous states of the United States are, of course, the people who have been known as American Indians for hundreds of years. Interpreting the statute as requiring a "present-day relationship" is consistent with the goals of NAGPRA: Allowing tribes and individuals to protect and claim remains, graves, and cultural objects to which they have some relationship, but not allowing them to take custody of remains and cultural objects of persons and people [*55] to whom they are wholly unrelated.

The literal statutory definition of Native American, as applied to the continental United States, is also consistent with the common usage of the term. When the statute was enacted in 1990, the term "Native American" had become synonymous with "American Indian." [*56] It is obvious from the text of NAGPRA that Congress intended to include Alaska Natives and Native Hawaiians within the definition. However, as to the contiguous 48 states, nothing in the statute indicates that Congress intended to define Native American as including people or objects with no relationship to present-day American Indians.

As noted above, courts do not assume that Congress intends to create odd or absurd results. The potential for such results under the Defendants' definition [*56] of "Native American" further supports the conclusion that their definition is incorrect. Under that definition, all pre-Columbian remains and objects would be treated as Native American, "irrespective of when" a group arrived and regardless of whether the individuals are related in any way to present-day American Indians. Application of this definition could yield some odd results. The origin of the earliest Americans is an unresolved question. According to one theory with some support in the record, beginning up to 30,000 to 40,000 years ago, multiple waves of immigrants separated by thousands of years, with different points of origin and modes of travel, came into this hemisphere. See, e.g., DOI 0631, 0956, 1508, 2143-45, 2177-85, 2786-99, 3203, 3425-26, 3930, 3940-69

For example, the 1989 Encyclopedia Edition of the New Lexicon Webster's Dictionary defines "Native American" as "American Indian."
Limited studies conducted on very old remains suggest that the peopling of the Americas was complex. See, e.g., DOI [*1137] 9548 (very ancient skulls found on this continent "more closely resemble southern Asian and Pacific Rim populations, while modern Native Americans bear close resemblance to northern Asian groups"). Some studies of [**57] ancient remains show little apparent affinity between ancient skulls and present-day American Indians (or any other modern group), and often show little affinity among the ancient remains themselves. See, e.g., DOI 1721-22, 2251-52, 3863-67, 3930, 8186, 8944, 9548, 10441-42. There is also evidence in the record that differences in appearance may reflect genetic differences between ancient samples and more recent American Indians and northern Asian populations. DOI 3930-31, 5944-46.

Under the Defendants' interpretation, possibly long-extinct immigrant peoples who may have differed significantly--genetically and culturally--from any surviving groups, would all be uniformly classified as "Native American" based solely upon the age of their remains. All pre-Columbian people, no matter what group they belonged to, where they came from, how long they or their group survived, or how greatly they differed from the ancestors of present-day American Indians, would be arbitrarily classified as "Native American," and their remains and artifacts could be placed totally off-limits to scientific study. This court cannot presume that Congress intended that a statutory definition of [**58] "Native American" requiring a relationship to a "tribe, people, or culture that is indigenous to the United States" yield such far-reaching results.

The Secretary erred in defining "Native American" to automatically include all remains predating 1492 that are found in the United States. Nevertheless, the Secretary's ultimate determination that the remains of the Kennewick Man are "Native American" under NAGPRA is erroneous only if the administrative record contains insufficient evidence to support the conclusion that the remains are related to a present-day tribe, people, or culture that is indigenous to the United States as required by the statute. NAGPRA recognizes two distinct kinds of relationships: The first is the general relationship to a present-day tribe, people, or culture that establishes that a person or item is "Native American." The second, more narrowly [**60]

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70 At a hearing held on September 14, 1999, Defendants acknowledged that, under their definition, 12,000-year-old European remains found in the United States would be classified as "Native American." Though Defendants later retreated somewhat from that position, their definition could have far reaching implications. Consider, for example what would happen if a 25,000 year old skeleton that could be conclusively proven to be totally unrelated to any American Indians was found on "aboriginal land." Under the Secretary's definition, those remains would be conclusively presumed to be "Native American" under NAGPRA. As the DOI Solicitor noted in a letter to the Secretary, under 25 USC § 3002 remains that are so defined go to a tribe "regardless of whether the available evidence shows any connection whatsoever between the remains and the tribe ... no further questions asked ...." DOI 10088.

71 Under 25 USC § 3002(a)(2)(C), objects defined as "Native American" found on federal land recognized as the "aboriginal land" of a tribe may be given to that tribe without any showing of cultural affiliation. Vast tracts of federal land are subject to such judgments. As discussed later in this Opinion, recognition of an area as "aboriginal land" does not necessarily mean that it has been the domain of a tribe for a long period of time. (See Aboriginal Lands section below.) [**59]

72 Even if Chevron-style deference were otherwise appropriate, this conclusion would not change: Courts defer only to an agency's "permissible" and "reasonable" statutory interpretations. See, e.g., Arizona Cattle Growers' Ass'n, 273 F3d at 1236.
defined relationship establishes [*1138] that a person or item defined as "Native American" is also "culturally affiliated" with a particular present-day tribe.

The requirements for establishing "Native American" status under NAGPRA are not onerous. They may be satisfied not only by showing a relationship to existing tribes or people, but also by showing a relationship to a present-day "culture" that is indigenous to the United States. The culture that is indigenous to the 48 contiguous states is the American Indian culture, which was here long before the arrival of modern Europeans and continues today.

It is clear from the full text of NAGPRA that the cultural relationship required to meet the definition of "Native American" is less than that required to meet the definition of "cultural affiliation," which is discussed in detail later in this Opinion. For example, American Indian groups that became extinct since 1492 are no doubt culturally related to current American Indians, and are therefore [*61] "Native American" under the terms of NAGPRA. It is also clear from the record that a cultural relationship could be established for many people and items from prehistoric times. However, this case involves one particular set of 9,000-year-old remains, and it is the relationship to those remains that must be analyzed here.

The term "Native American" requires, at a minimum, a cultural relationship between remains or other cultural items and a present-day tribe, people, or culture indigenous to the United States. A thorough review of the 22,000-page administrative record does not reveal the existence of evidence from which that relationship may be established in this case. The evidence in the record would not support a finding that Kennewick Man is related to any particular identifiable group or culture, and the group and culture to which he belonged may have died out thousands of years ago. Though the cranial measurements and features of Kennewick Man most closely resemble those of Polynesians and southern Asians, these characteristics differ from those of any modern group living in North America or anywhere else. DOI 05879, 05885, 10067-68, 10665, 10685-92. Kennewick Man's culture is unknown and apparently unknowable.

As is perhaps not surprising with remains more than 9,000 years old, there is not evidence that will support the conclusion that the remains are "of, or relating to, a tribe, people, or culture that is indigenous to the United States." The record would not support a finding that the ancestors of the American Indians were the only people here in prehistoric times, or that only one culture existed throughout prehistoric times. Congress did not create a presumption that items of a particular age are "Native American." Therefore, the Secretary did not have sufficient evidence to conclude that the remains are "Native American." The exhaustion of evidence in the record does not support a finding that the remains are "Native American." The record would not support a finding that the ancestors of the American Indians were the only people here in prehistoric times, or that only one culture existed throughout prehistoric times. Congress did not create a presumption that items of a particular age are "Native American." Therefore, the Secretary did not have sufficient evidence to conclude that the remains are "Native American."
Kennewick Man remains are "Native American" under NAGPRA. Without such a finding, NAGPRA does not apply to the remains. See, 25 USC § 3002(a) (setting out priority of "ownership or control of Native American cultural items") (emphasis added); DOI 10012 (initial determination that remains were Native American "triggered" application of NAGPRA). Therefore, the disposition of the remains is governed by the application of other Federal law as set forth later in this Opinion.

D. Cultural Affiliation

The Secretary misinterprets the term "Native American" and the record will not support the conclusion that the remains are "Native American" under the terms of NAGPRA. It is therefore arguably unnecessary to review the Secretary's related conclusion that the remains are culturally affiliated to a coalition of tribal claimants. I conclude that review of the Secretary's cultural affiliation analysis is nevertheless appropriate. As noted above, it was necessary to review all the material related to the Secretary's cultural affiliation analysis to determine whether that material included evidence that would support the conclusion that the remains satisfied the definition of "Native American." Because I have thoroughly reviewed this record, judicial economy favors creating a complete record for possible appellate review, and perhaps avoiding more delays in this litigation.

NAGPRA provides that the "ownership or control" of Native American cultural items (including human remains) 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

Even assuming that NAGPRA is the kind of "Indian legislation" to which the canon might apply, there is no ambiguity in the Act that would permit a presumption that items of a certain age found on federal land are "Native American." Moreover, the issue is not whether Indian tribes are entitled to recover the remains and cultural objects of their own ancestors, but whether they also are entitled to claim remains and cultural objects having no demonstrated link to any present-day tribe or to modern American Indians in general. The Indian canons of construct Indian self-ion offer little help in resolving that question, which does not implicate the validity, interpretation, or abrogation of a treaty or the right to government. Nor is there a "unique trust relationship" between the United States and an unknown group to which the Kennewick Man belonged 9,000 years ago. Yankton Sioux Tribe v. United States Army Corps of Engineers, 83 F Supp 2d 1047, 1055-56 (D SD 2000), cited by both Defendants and the Tribal Claimants, is readily distinguishable. The remains in Yankton were definitively linked to the Sioux tribe, which has a special relationship with the United States. In addition, since the burials occurred between 1874 and 1900, the deceased were themselves "wards" of the United States entitled to its protections.

It is not the role of the court to determine whether the Kennewick Man is or is not "Native American" under the terms of NAGPRA. Instead, it is the role of the court to determine whether the Secretary correctly applied the law and whether the record will support the Secretary's findings. The court is simply concluding that the record will not support the Secretary's affirmative finding that the remains are "Native American" as defined under NAGPRA.
(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 [*1140] 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 [**66] 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 USC § 3002(a).

The parties agree that the lineal descendants of the Kennewick Man, if any, cannot be ascertained, and the remains were not found on tribal land. Consequently, the next question is whether the "cultural affiliation" of the remains can be "reasonably ascertained."

[**67] "Cultural affiliation" is defined as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe ... and an identifiable earlier group." 25 USC § 3001(2).

The Secretary has promulgated regulations describing how cultural affiliation is established. Under these regulations, "cultural affiliation is established when the preponderance of the evidence--based on geographical, kinship, biological, archeological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion--reasonably leads to such a conclusion." 43 CFR § 10.2(e). The regulations further provide:

(c) Criteria for determining cultural affiliation. Cultural affiliation means a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe or Native [**68] Hawaiian organization and an identifiable earlier group. All of the following requirements must be met to determine cultural affiliation between a present-day Indian tribe ... and the human remains, funerary objects, sacred objects, or objects of cultural patrimony of an earlier group:

(1) Existence of an identifiable present-day Indian tribe ... with standing under these regulations and the Act; and

(2) Evidence of the existence of an identifiable earlier group. Support for this requirement may include, but is not necessarily limited to evidence sufficient to:

(i) Establish the identity and cultural characteristics of the earlier group,

(ii) Document distinct patterns of material culture manufacture and distribution methods for the earlier group, or
(iii) Establish the existence of the earlier group as a biologically distinct population; and

(3) Evidence of the existence of a shared group identity that can be reasonably traced between the present-day [*1141] Indian tribe ... and the earlier group. Evidence to support this requirement must establish that a present-day Indian tribe ... has been identified from prehistoric or historic times to the present [**69] as descending from the earlier group.

(d) A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

(e) Evidence. Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe ... and human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by using the following types of evidence: Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.

(f) Standard of proof. Lineal descent of a present-day individual from an earlier individual and cultural affiliation of a present-day Indian tribe ... to human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established by a preponderance of the evidence. Claimants do not have to establish cultural affiliation with scientific certainty. 43 CFR § 10.14.

The Secretary found [**70] a cultural affiliation between the remains and the Tribal Claimants. In his decision awarding the remains to the Tribal Claimants, he stated that there is "a reasonable link between these remains and the present-day Indian tribe claimants." DOI 10015.

1. Coalition as Claimant

To create a full record, before addressing the Secretary's cultural affiliation determination, this court must review the Secretary's conclusion that a coalition of four federally recognized Indian tribes and a band that is not federally recognized Indian tribe ... (together the Tribal Claimants)76 is a proper claimant for purposes of 25 USC § 3002.77 The Secretary asserted that this coalition is a proper claimant because: The statute and regulations do not specifically answer whether cultural affiliation with a single identifiable tribe is required, or whether such affiliation may be established with a group of modern-day Indian tribes filing a joint claim. Section 3002(a)(2)(B) speaks of an Indian tribe with the "closest cultural affiliation," which suggests a congressional recognition that more than one, and perhaps many, tribes may have a cultural affiliation with remains discovered [**71] on federal land. We believe the statute permits finding cultural affiliation with one or more of multiple tribes where, as here, they submit a joint claim. DOI 10014.

The Secretary's analysis contradicts the plain language of the statute, which identifies the appropriate recipient in the singular as "the Indian tribe ... which has the closest cultural affiliation." 25 USC § 3002(a)(2)(B) (emphasis added). Use of the term "tribe" in the singular in 25 USC § 3002 [**72] (a)(2)(B) is also consistent with references to a single tribe in other NAGPRA [*1142] provisions and the Secretary's own regulation addressing cultural affiliation. Cultural affiliation requires proof of a relationship of shared group identity "between a present day Indian tribe ... and an identifiable earlier group." 25 USC § 3001(2) (emphasis added). See also, 25 USC § 3005(a)(1) (providing for repatriation if "the cultural affiliation of

76 A non-federally recognized band is not a proper NAGPRA claimant. See, 25 USC § 3001(7). The Secretary acknowledged this in his decision letter, but reasoned that the coalition as a whole had standing to assert a NAGPRA claim because the other four members are federally recognized tribes. DOI 10017, n 1.

77 Given this court's other decisions in this Opinion, this issue is relatively insignificant.
Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established...”) (emphasis added); 43 CFR § 10.14(c)(3)(C) ("Evidence ... must establish that a present-day Indian tribe ... has been identified from prehistoric or historic times as descending from the earlier group.").

The Secretary's analysis could render part of the statute meaningless. Carried to the logical end, coalition claims would effectively eliminate the statutory requirement that cultural affiliation be established with a particular modern tribe. The more members in a coalition, the greater the likelihood that the remains or objects are affiliated with some member of the coalition, despite a lack of evidence establishing cultural affiliation with any particular member of the coalition.

The plain language of the statute does not support the conclusion that joint claims by a number of tribes--based on little more than some degree of contact with the general region at some prior time--are generally sufficient to satisfy NAGPRA's cultural affiliation requirement. There may be some circumstances under which joint claims are proper. However, a fair reading of the statute and related regulations supports only the conclusion that, under any circumstances, the claims of coalition members must be independently meritorious. Accordingly, the Tribal Claimants' joint claim for the Kennewick Man remains cannot be sustained unless at least one member of the coalition independently satisfies the cultural affiliation standard.

The Secretary asserts that separate analysis of the relationship of the remains and each individual Tribal Claimant is not legally required, DOI 10014, and appears to have made no real effort to analyze the claims separately. Instead, the Tribal Claimants were treated as a single entity that collectively comprises the present-day embodiment of the ancient group to which the Kennewick Man assertedly belonged. See, e.g., DOI 10015 (evaluating "the cultural relationship between the two groups," i.e., the ancient group and the Tribal Claimants collectively) (emphasis added).

Defendants now assert, however, that the Secretary "evaluated each tribe's claim individually." Defendants' Brief at 22. That assertion is contradicted by both the Secretary's written decision and the administrative record. The reports from the Secretary's experts make little effort to separately evaluate the

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79 For example, there may be instances in which two tribes both have valid claims because they descended from the same identifiable earlier group and have a shared group identity. A tribe may have been forcibly separated by the United States government, with its members sent to different reservations. In such circumstances, the intent of Congress would not be served by denying repatriation to either tribe, or by forcing the tribes to compete with each other if both satisfy the cultural affiliation standard and neither wishes to contest the other's claim. Many of the cultural affiliation determinations published in the Federal Register apparently involve multiple claimants. See, Defendants' Brief at 22. However, the propriety of dispositions to coalitions appears to be a question of first impression. The parties have cited, and I have found, no decisions addressing the question whether NAGPRA allows for disposition to coalitions.

80 See also, DOI 5164 (memo from one of the Secretary's experts requesting clarification regarding scope of cultural affiliation study).

81 Defendants treated the claimants as a "coalition" from the earliest days of this case, even before a formal coalition claim was filed. See, DOI 01598 (letter from Corps describing early events in this case); COE 4805-AA. See also, DOI 1440-49 (letters from
relationship of the remains to the individual claimants, and the Secretary's decision awarding the
remains does not separately weigh the evidence of cultural affiliation for each claimant tribe. In addition,
the claim states that it is asserted collectively, not individually. See, DOI 4109 (claim is filed "jointly" and
"supercedes all prior separate individual claims made by [the five claimants]).

Under the terms of NAGPRA and relevant regulations, coalition claims are inappropriate except under
exceptional circumstances that are not relevant here. Though the Secretary now asserts that the claims of
the coalition members were analyzed individually, it is clear from the record that the Tribal Claimants
asserted their claim collectively, and that Defendants did not separately evaluate the relationship of each
individual claimant tribe to the remains of the Kennewick Man. Accordingly, I conclude that the Secretary
erred in assuming that the coalition was a proper claimant and in failing to separately analyze the
relationship of the particular Tribal Claimants to the remains.

Corps requesting clarification regarding nature of claim); DOI 1450 (1996 letter from
Umatilla to Corps clarifying that the individual claim was filed "only to preserve" a claim
pending the filing of the coalition claim); DOI 1373 (letter from Yakama declining to
assert individual claim and confirming that claim is joint); DOI 1498 (1997 letter from
Corps to Plaintiffs regarding coalition claim); DOI 3376 (letter from Colville indicating
that "the Tribes will request repatriation as a coalition, thus negating the need for tests to
clarify affiliation" and also asserting that "an agreement on methods of determining
[cultural] affiliation should not need to appease either the Court or any other parties");
DOI 3610 (1998 letter from Umatilla to Dr. McManamon, with multiple references to the
"Tribal Coalition").
2. Cultural Affiliation Determination

a. Introduction

A finding of "cultural affiliation" with human remains requires proof of "a relationship of shared group identity which can reasonably be traced ... between a present day Indian tribe ... and an identifiable earlier group" of which the decedent was a member. 25 USC § 3001(2) (emphasis added). See also, S Rep [**78] No 101-473 at 8 (claimant must show "a continuity of group identity from the earlier to the present day group").

Linking an individual who died more than 9,000 years ago to an identifiable ancient group presents a difficult challenge. Going beyond that and establishing a shared group identity between that ancient group and a present-day Indian tribe greatly compounds the difficulty.

The Secretary's task was especially difficult here because the only information concerning the Kennewick Man consists of his skeletal remains, the location where the remains were found, the projectile point embedded in his pelvis, and the age of the remains. By prohibiting detailed scientific investigation of the discovery site, and then burying it, the Corps foreclosed the possibility that other cultural artifacts or information associated with this individual might be found that could aid in determining cultural affiliation.

Based on a careful review of the record, I conclude that the Secretary's cultural affiliation determination cannot be sustained. The Secretary: (a) did not adequately determine "an identifiable earlier group" to which the Kennewick Man allegedly belonged, or even establish that [**79] he belonged to a particular group, (b) did not [*1144] adequately address the requirement of a "shared group identity," (c) did not articulate a reasoned basis for the decision in light of the record, and (d) reached a conclusion that is not supported by the reasonable conclusions of the Secretary's experts or the record as a whole.

Based upon the record, the Secretary could have reasonably concluded that ancestors of the Tribal Claimants have resided in this region for a very long time. However, the Kennewick remains are so old, and information as to his era so limited, that it is impossible to say whether the Kennewick Man is related to the present-day Tribal Claimants, or whether there is a shared group identity between his group and any of the Tribal Claimants. The record simply does not establish the requisite link by a preponderance of the evidence. Thus, this record will not support a finding of cultural affiliation.

b. Defining the Identifiable Earlier Group

Although it is essential to the analysis, the Secretary never specified the "identifiable earlier group" to which the Kennewick Man belonged. Instead, the Secretary focused primarily on establishing that some [**80] ancestors of the Tribal Claimants probably resided in this general region 9,000 years ago or, at least, that this possibility cannot be ruled out. This hypothesis is plausible because there is reason to believe that ancestors of the Tribal Claimants may have been present in this hemisphere 9,000 years ago. However, even if the Secretary succeeded in establishing that ancestors of the Tribal Claimants resided in this general region 9,000 years ago, that in itself would not establish by a preponderance of the evidence that the Kennewick Man was one of those ancestors, which group he belonged to, or a continuity of group identity during the intervening 9,000 years.

The Secretary's decision refers to "the cultural group that existed in the Columbia Plateau region during the lifetime of the Kennewick Man" as if there were only one group in this large area (which encompasses substantial parts of two states) during that time. DOI 10015. However, the record indicates that as many as 20 different highly mobile groups, each including anywhere from 175 to 500 members, may have resided in the region around this time. DOI 10058, 10136. The Secretary appears to assume, without pointing to any [**81] support in the record, that these groups were culturally identical. In another document, the Secretary attempts, in the most general terms, to describe possible characteristics and activities of the "human cultural groups, of which Kennewick Man would have been a member." See, e.g., DOI 10058-60. In other words, the record indicates that an unknown number of groups were in the region, and the Secretary assumes the Kennewick Man was affiliated with one of those groups. However, because the Secretary is unable to
determine which group he was affiliated with, the Kennewick Man's group cannot be classified as an identifiable earlier group as required to establish cultural affiliation under NAGPRA.

The Secretary does not explain how it is possible to analyze "continuity between the cultural group represented by the Kennewick human remains and the modern-day claimant Indian tribes," DOI 10015, without first identifying the group that the Kennewick Man belonged to and that group's cultural characteristics. The closest the Secretary comes to designating the "identifiable earlier group" to which he believes the Kennewick Man belonged is to assert that this group would have been part of either the "Windust Phase" or "Early Cascade Phase." DOI 10054. These phases are broad labels used to demarcate eras of several thousand years each, based largely upon the predominant types and styles of projectile points and tools that have been found at various locations in the Pacific Northwest. These locations include parts of Idaho, Oregon, Washington, and British Columbia, but are primarily in the Lower Snake River Canyon (and its tributaries) in eastern Washington and western Idaho. DOI 9073-74. The Secretary indicates that the period from approximately 13,000 years ago until 9,000 years ago has been labeled the Windust Phase, and the period from approximately 9,000 until about 7,000 years ago has been labeled the Early Cascade Phase. DOI 10054. Others have apparently assigned different names and/or dates to these periods, or have applied these terms to different locations in the region. Cf., DOI 9071, 10112-13, 10133-35, 10224-26.

There are several problems with characterizing people from the entire "Windust Phase" and "Early Cascade Phase" as a single identifiable earlier group for purposes of NAGPRA. Even assuming that people associated with a broad "phase" could be characterized as an "identifiable earlier group," the record does not contain sufficient evidence to link the Kennewick Man to that "group." Further, the Secretary does not identify which of the "phases" the Kennewick Man is associated with. Scholars do not agree whether the "Early Cascade Phase" was a continuation of the "Windust Phase" by the same population with minor changes in tools, or whether the two phases represent different origins and populations. Evidence that the Kennewick Man was morphologically distinct from present-day populations in this region lends some support to the theory that more than one population may have been present during that time period. The Secretary acknowledges the difficulties this morphological data poses, but never explains how he resolves that issue in reaching his final decision. DOI 10015.

The Secretary's attempt to equate the Windust and Early Cascade phases to an "identifiable earlier group" assumes that, because ancient tools and projectile points were discovered at sites some distance from where the remains of the Kennewick Man were found, a single group or culture fabricated all of those objects, and that the Kennewick Man was part of that group. Such an assumption is not supported either by logic or the administrative record. On this record, it is impossible to say whether the Kennewick Man was a member of a group that fabricated those particular items, whether he spent most of his life near the site where he died, whether any other groups or cultures existed in the region during that time period, or whether similarities in tools or weapons equate to similarities in other respects or to a shared group identity.

There are also problems with the Secretary's assumption that the Kennewick Man's group lived near where the remains were found, with the significance accorded to the projectile point embedded in the Kennewick Man's pelvis, and with the analysis of the significant physical differences between the Kennewick Man and modern American Indians. The Secretary's analysis implicitly presumed, without explanation, that the Kennewick Man's group resided (and continues to reside) near where his remains were discovered. However, as the Secretary acknowledged, there were no villages or permanent settlements in this region 9,000 years ago. DOI 10076. The "more or less sedentary settlement system"--which the Secretary's experts believe was the antecedent of the villages and bands aggregated into the present

82 Few, if any, of those ancient sites are closer than 40 miles from the discovery site, and most are considerably farther away. See, DOI 9073-76, 10228. See also, DOI 2117 (while there are many archaeological sites in the "Tri-Cities" area where the Kennewick Man was found, none is older than the Cayuse Phase (250-2500 years BP), and many are no more than 200 years old).
tribes during the 19th Century—was not established until "between about 3000 and 2000 years ago." DOI 10058. Groups occupying this region 9,000 years ago are thought to have been nomadic, traveling long distances in search of food or raw materials such as obsidian and shells. DOI 10058-61, 10136. The remains of the Kennewick Man were found at a natural crossroads near the confluence of several major river systems. DOI 10274, 10283.

Though Defendants assert that the projectile point embedded in the Kennewick Man's pelvis established that he [**86] belonged to the group that made it, evidence regarding the point is inconclusive at best. The record does not tell us whether the wound was inflicted by a member of the Kennewick Man's own group or if it was inflicted by a rival group or culture. As the Yakama Nation observed, in objecting to studies of the point:

Further analyses of the lithic object may provide some few facts about the object itself, but, can say precious little about whether the person in which it is embedded is or is not "Native American." DOI 3370.

If this particular point is related to subsequent versions of the projectile style spanning the millennia, it might suggest that the Tribal Claimants are linked to someone who resided in this region 9,000 years ago. But it is impossible to determine whether they are linked in any way to the particular group to which the Kennewick Man belonged. Moreover, as one of the Secretary's experts observed, continuity in weapons technology does not necessarily equate to cultural continuity or the maintenance of a shared group identity. DOI 10127. [**87]

The physical features of the Kennewick Man appear to be dissimilar to all modern American Indians, including the Tribal Claimants. DOI 10067-68. That does not preclude the possibility of a relationship between the two. However, absent a satisfactory explanation for those differences, it does make such a relationship less likely, and suggests that the Kennewick Man might have been part of a group that did not survive or whose remaining members were integrated into another group. The Secretary acknowledged the morphological incongruities, DOI 10015, 10067-69, without addressing this critical issue in depth, stating only that it "may indicate a cultural discontinuity ... or may indicate that the cultural group associated with the Kennewick Man may have subsequently intermixed with other groups migrating into or through the region ...." DOI 10015. [*1147]

NAGPRA was intended to reunite tribes with remains or cultural items whose affiliation was known, or could be reasonably ascertained. At best, we can only speculate as to the possible group affiliation of the

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83 At oral argument, the government theorized that because the projectile is a "Cascade" point, and the wound is believed to have occurred 20 or 30 years before the Kennewick Man died, he must have resided in this location most of his life. (June 19 Tr. at 63-64). However, the Secretary cannot say where or how that wound was sustained. There also is some question whether it is a "Cascade" point. Defendants withheld from Plaintiffs critical data regarding the projectile point until after the administrative record closed, and then furnished that data only after this court ordered that it be disclosed. (Docket # 397.) Upon reviewing this data, Plaintiffs—who are generally recognized as possessing considerable expertise regarding many of the technical issues in this case—have questioned the Secretary's assumption that the object is a Cascade point. (June 19 Tr. at 114-15, June 20 Tr. at 319, 340-41.) The Secretary's lithic expert, Dr. Dagan, concluded that it was "a possible or probable Cascade point," but was unable to give an unqualified opinion because the x-rays and CT scan images he reviewed lacked sufficient detail, and he was not permitted to remove the point for examination. DOI 10811. See also, DOI 10666 (characteristics observed "are not exclusive to Cascade points").
Kennewick Man, whether his group even survived for very long after his death, and whether that group is related to any of the Tribal Claimants.

From this record, the Secretary could not reasonably have found, by a preponderance of the evidence, that the Kennewick Man was associated with a particular "identifiable earlier group." 43 [**90] [**90]

c. Shared Group Identity

As a threshold matter, without proof of a link between Kennewick Man and an "identifiable earlier group," there is no reasoned starting point from which to evaluate whether a shared group identity exists between the present-day Tribal Claimants and a particular earlier group. Perhaps that is why the Secretary focused on showing that ancestors of the Tribal Claimants could have resided in this region 9,000 years ago. This approach gave only cursory consideration to the statutory requirement that "shared group identity" be established, and impermissibly shifted the burden of proof from the Tribal Claimants. Even if the Secretary had properly identified an "identifiable earlier group," the requirement of "shared group identity" must also be met.

1. Definition of Shared Group Identity

Proof of 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" is an essential element of a cultural affiliation claim under NAGPRA. 25 USC § 3001(2). NAGPRA does not define the phrase "relationship of shared group identity," and the Secretary makes no attempt to define this term in his decision letter.

The Secretary's regulations offer limited guidance, stating only that "evidence to support this requirement must establish that a present-day Indian tribe ... has been identified from prehistoric or historic times to the present as descending from the earlier group." 43 CFR § 10.14(c)(3). Though the regulations do not explain what is meant by "descending from the earlier group," they clearly infer that the group has remained relatively intact through the years.

84 Defendants and the Tribal Claimants argue that the agency is entitled "to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Marsh, 490 U.S. at 378. However, none of the four experts retained by the Secretary purports to identify the specific earlier group of which the Kennewick Man was a member, or to demonstrate that he was, in fact, part of that group. In any event, such an opinion would not be "reasonable" given how little we know about this person and the era in which he lived. For instance, Dr. Ames was asked to identify an "earlier group" with which the Kennewick Man could be associated, which was "defined chronologically ... as the archaeological manifestations contemporary with the skeleton's age." DOI 10107. Ames never claims to have identified the Kennewick Man's actual group. Instead, he summarizes the predominant archaeological phases of that era, and draws some possible inferences regarding the lifestyle of the people who created those artifacts, and then examines the subsequent archaeological record in search of continuities and discontinuities. Though Dr. Hunn concluded that ancestors of the present-day Tribal Claimants have lived in this region for a long time, DOI 10326, that is very different from stating that the Kennewick Man, specifically, was a member of a particular group. Hunn does speculate that the Kennewick Man may have spoken a Proto-Penutian language, but the Secretary properly declined to endorse that theory. DOI 10069-70.
The statutory language also implies that the members must perceive themselves as [*1148] part of a group and function as such. There must be at least some common elements of language, religion, customs, traditions, morals, arts, cuisine, and other cultural features; a common perspective on the world and the group's role within it; and shared experiences that are part of the group's perception of its history. See, e.g., DOI 3021-24, 7512, 8992, 9031-33, 10309. [**91] This commonality distinguishes the group and its members from other groups, and legitimizes the present-day group's authority to represent the interests of deceased members. See, S Rep No 101-473 9, DOI 0581, ("The requirement of continuity between present day Indian tribes and material from historic or prehistoric Indian tribes is intended to ensure that the claimant has a reasonable connection with the materials"). Retention of group identity over time also requires transmission of "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society" along with adaptations to the group's habitat and its means of subsistence to succeeding generations. DOI 10309.
2. The Expert Reports

As part of the process of evaluating the cultural affiliation claims, the Secretary retained four experts to produce reports on specific topics. Their work is summarized below.

a. Bio-Archaeological Data and Mortuary Practices

Dr. Steven Hackenberger summarized studies concerning bio-archaeological data and mortuary practices in the region. His report indicates that little is known about either the physical characteristics of the inhabitants, or their mortuary practices, before 5,000 years ago. DOI 10015, 10067, 10336-38.

For the period before 3,000 years ago, no consistent pattern of mortuary practices has been observed. See, e.g., DOI 10067 ("major temporal gaps in Plateau human burial patterns between 7000 and 3000 years ago"). Some remains were burned and fragmented while others were buried. Dogs were interred in human graves in some locations, and at some sites partly cremated remains were covered by rock cairns. DOI 10336-38, 10498-500.

The Secretary concluded that the evidence regarding historical mortuary patterns is "too limited to draw any conclusions." DOI 10015. However, the wide range of practices observed, even based upon a limited sample, casts doubt upon the Secretary's larger implied assumption that this entire region encompassed a stable, monolithic culture (i.e., a single "identifiable earlier group") for the past 9,000 years.

Though limited, the osteological data likewise suggests considerable variation among populations in the region. The perceived cranial and dentition characteristics of remains thought to be 9,000 to 11,000 years old found in and near the Marmes Rock Shelter appear to differ from the Kennewick Man, but the remains may be too incomplete and in too poor condition to draw many inferences. DOI 10336-38, 10442-50.

Only a small number of other human remains believed to be more than 3,000 years old have been found in this general region, mostly in Idaho and British Columbia. These include the "Buhl woman" (Idaho) and "Gore Creek man" (British Columbia), both of whom were repatriated and reburied, though some data was preserved. DOI 10336-37. The Gore Creek remains did not include a skull, so cranial and dental comparisons could not be made. DOI 10428. Carbon isotope studies on that skeleton suggested a diet largely composed of terrestrial plants and animals, whereas a similar test on the Kennewick remains suggested a diet very high in marine resources. DOI 10337. There are conflicting opinions regarding the morphology of the Buhl woman. Cf., DOI 3194, 10354, 10432-33, 10456 (exhibits characteristic mongoloid morphology) and DOI 6179, 10354, 10441 (not mongoloid, and unlike any present-day Indian population).

Hackenberger also reports that a skull--possibly resembling that of the Kennewick Man, and perhaps between 8,000 and 9,000 years old--was found during a recent NAGPRA inventory of remains held by Central Washington University. DOI 10355. Initial reports indicated that the skull was found somewhere in eastern Washington, but details were still scarce when Hackenberger wrote his report. Id.

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85 For simplicity, I refer to each of the four expert reports by the name of the lead author, while recognizing that others made important contributions to those reports.

86 See also, DOI 10015 ("very little evidence of burial patterns during the 9500-8500 period and significant temporal gaps exist in the mortuary record for other periods"); DOI 10336-38.

87 Neither repatriation was pursuant to NAGPRA.
The bio-archeological data and evidence [*95] concerning mortuary practices included in the administrative record do not support the conclusion that cultural affiliation is established by a preponderance of the evidence. As noted above, the wide range of mortuary practices casts doubt on the Secretary's implied assumption that a monolithic, stable culture existed during the relevant period. Osteological data suggests significant variations among populations in the region.

b. Archaeological Record

Dr. Kenneth Ames reviewed and summarized the archaeological record, with emphasis on possible continuities and discontinuities over time in the people who inhabited the area where the Kennewick man was found. In his report, which relies primarily on published studies, DOI 10107-12, Dr. Ames concludes that "the empirical gaps in the record preclude establishing cultural continuities or discontinuities, particularly before about 5000 B.C." DOI 10171. Dr. Ames found that "the major changes that occurred after 4000 B.C. also make it exceedingly difficult to trace connections forward in time." Id. Dr. Ames noted that, though there was overwhelming evidence that many aspects of the "Plateau Pattern" were present between 1000 B.C. and A.D. 1, "the empirical record precludes establishing cultural continuities or discontinuities across increasingly remote periods." Id. He added that, if the evidence that was available could not be used to show continuity, it likewise could not be used to demonstrate discontinuity. Id. In other words, the available evidence is insufficient to either prove or disprove cultural or group continuity dating back 9,000 years.

Dr. Ames' report identifies a number of significant gaps or discontinuities in the known archaeological record. Portions of the Columbia Plateau, including the Central Columbia Basin, may have been abandoned for thousands of years, given that "extensive survey has failed to uncover sites dating to this period." DOI [*97] 10058-59. There is also evidence that major [*1150] cultural changes occurred in the Columbia Plateau around 6,000 years ago, and again between 3,000 and 3,500 years ago. DOI 10059-60, 10153, 10172, 10242, 10245-46. Though it is insufficient to support any firm conclusions, evidence also suggests a "pause in land use" between 3200 and 2000 BC in central and northeastern Oregon. DOI 10148. There is also evidence that changes, some of which were quite substantial, occurred in settlement, housing, diet, trade, subsistence patterns, technology, projectile point styles, raw materials, and mortuary rituals at various times between the estimated date when the Kennewick man lived and the beginning of the "Plateau Culture" some 2,000 to 3,000 years ago. DOI 10059-67, 10153, 10172. [*98]
Leonhardy and Rice, who constructed the most commonly used chronology of the region and named the phases (e.g., Windust, Cascade), "thought that the varied point forms found in the late Cascade represented different cultural traditions." DOI 10062. They also assumed a cultural discontinuity between the Cascade and Tucannon phases, because "compared to both earlier and later phases, the technology of the Tucannon Phase seems crude and impoverished." DOI 9081-82. Cressman also perceived a "cultural discontinuity represented by a clear shift in projectile point technological style." DOI 10062.

Though they bear the burden of establishing their claim to the remains, the Tribal Claimants are not required to prove an unbroken "chain of custody" or kinship in order to establish cultural affiliation with the Kennewick Man, and the existence of some "reasonable gaps" in the record will not automatically bar their claim. See, S Rep No 101-473 at 9 DOI 0581; 43 CFR § 10.14(d). However, the significant unexplained gaps and discontinuities in the archaeological record before the DOI make it impossible to assume continuity of group identity between the present occupants and any group that existed 9,000 years ago. Without evidence satisfactorily explaining the significant gaps in the archeological record, it is simply impossible to find that cultural affiliation has been established by a preponderance of the evidence.

c. Linguistics

Dr. Eugene Hunn prepared a report discussing the linguistic evidence. In Hunn's opinion, the linguistic evidence suggests that the ancestors of the Sahaptin-speaking Tribal Claimants--who are a subset of the Tribal Claimants--have resided in this region for at least 2,000 years. DOI 10069, 10309-10, 10315-17, 10326. Hunn acknowledged that the linguistic evidence does not preclude the possibility of a shorter residency period, but considered that scenario unlikely. DOI 10317, 10326. 

Hunn theorizes that "proto-Sahaptian or some immediate genetic predecessor was spoken throughout the Columbia Plateau approximately 4,000 years ago." DOI 10310, 10322.

Hunn also attempts to establish that an ancient precursor to these Sahaptin dialects, "proto-Penutian," was spoken on the Columbia Plateau at least 8,000-9,000 years ago, and that it "is more than likely that Kennewick Man spoke a proto-Penutian dialect." DOI 10310-11, 10323, 10326. Though he acknowledged it is possible that the Kennewick Man's group spoke another language, and that the ancestors of the Tribal Claimants "either displaced this earlier group or arrived after that group had moved elsewhere or had died out," Hunn saw "no evidence to suggest such an alternative." DOI 10326.

The Secretary accepted Hunn's conclusion that the ancestors of the

90 Several of the claimant tribes were formed in the 19th century by aggregating previously separate groups, even if they spoke different languages. Thus, the "Indians who were subsumed into the Yakama Nation spoke three different languages, Sahaptin, Salish and Chinookan and had many dialects within the two principal language groups." United States v. Washington, 384 F Supp 312, 381 (WD Wash 1974). See also, DOI 0708. Many of the groups on the Colville Reservation speak Interior Salish. DOI 0706-08, 5042. "The Sahaptin and Salishan linguistic stocks are mutually unintelligible." DOI 7414-15. The language of the Palus is reportedly very different from either the Nez Perce or the Cayuse (a component of the Umatilla confederation). Id. But cf., DOI 7338 (arguing that their languages were very similar). The language of the Nez Perce is thought to have diverged from Sahaptin 2,000 years ago. DOI 10323. See also, http://www.umatilla.nsn.us/histl.html (Umatilla Reservation web site) ("each tribe [that is part of the present Confederated Tribes of the Umatilla Reservation] spoke a distinct and separate dialect of Sahaptin"); DOI 10323 (at least 15 dialects of Sahaptin language family recognized)
Sahaptin-speaking peoples have likely resided in this region for at least 2,000 years and perhaps for much longer. DOI 10015, 10069. However, the Secretary declined to endorse some of Hunn's other conclusions, noting that certain of the techniques underlying those conclusions are "highly controversial" and "not widely accepted, even among linguists," and that attempting [**101] to determine what language was spoken on the Columbia Plateau beyond 2,000 to 4,000 years ago "is a difficult and questionable proposition." DOI 10015, 10069-70. [**102]

The Secretary's determination that linguistics could not establish cultural affiliation in this case was appropriate. Given the limited information available regarding the Kennewick Man and his era, linguistics cannot tell us what language the Kennewick Man spoke, what group he was personally affiliated with, who else was in the region, or whether the Tribal Claimants are related to the Kennewick Man's group.

d. Oral Histories and Traditions

Dr. Daniel Boxberger reviewed the oral histories and traditions of the Tribal Claimants. DOI 10265-10299. Though he acknowledged that attempting to use oral traditions to create a time line or establish particular dates "does not meet with much success," Boxberger opined that these traditions supported several conclusions. Without identifying what he meant by the phrase, Boxberger opined that the Tribal Claimants are the "heirs of succession to the area" where the remains of the Kennewick Man were found. DOI 10298. Boxberger noted there was no evidence of "in-migration causing cultural transformation," and concluded that, when used in [*1152] conjunction with protohistoric, ethnographic, and historic databases, oral traditions "suggest a cultural [**103] continuity in the southern Plateau extending into the prehistoric past."[92] Id. He stated that, though they could not be dated with precision, oral traditions relating to geological events that occurred in the distant past are "highly suggestive of long-term establishment of the present-day tribes." Id. Boxberger added that ethnographic and historic data placed the Tribal Claimants in the area, and that oral traditions placed them there "since the beginning of time." DOI 10299.

In his review of the evidence concerning cultural affiliation, the Secretary in turn concluded that "collected oral tradition evidence suggests a continuity between the cultural group represented by the Kennewick human remains and the modern-day claimant Indian tribes." DOI 10015. The Secretary added that [**104] "oral tradition evidence reveals that the claimant Indian tribes possess similar traditional histories that relate to the Columbia Plateau's past landscape," and that the oral tradition evidence lacked any reference to migration into or out of that area. Id.

Before addressing whether oral traditions support the Secretary's cultural affiliation determination, I must briefly address Plaintiffs' contention that the narratives in question cannot be used as evidence. Plaintiffs

[91] See also, DOI 7041, 7229-30 (critique of Hunn's more controversial assumptions); DOI 812 (questioning method on which Hunn relies in part); DOI 816 (attempting to draw conclusions from the languages spoken during the historic period can be very misleading, because many languages may have come and gone during the preceding thousands of years; what remains are only the survivors); DOI 9002 (affidavit from linguistics professor, submitted by Plaintiffs, stating that "I am not aware of a single instance in which linguistic affiliation has been established with any degree of confidence between a modern population and human remains as old as the Kennewick skeleton"); DOI 10072 ("It is impossible to provide an absolute date for such a people's entrance into or continued occupation of a specific geographic area using these forms of linguistic information.").

[92] In the context of the Plateau, "historic" refers to events after 1805 AD; "protohistoric" refers to the period between about 1720 AD and 1805 AD, and the "prehistoric past" refers to the time before 1720 AD. DOI 10279-82.
assert that, because oral narratives are intertwined with spiritual beliefs, the Secretary's consideration of them violates the Establishment Clause of the First Amendment.

This argument fails. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion ...." As a general rule, government conduct does not violate this provision if it (1) has a secular purpose, (2) does not have as its principal or primary effect advancing or inhibiting religion, and (3) does not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971); American Family Ass'n, Inc. v. City and County of San Francisco, 277 F3d 1114, 1121 (9th Cir 2002), petition for cert. filed, 71 USLW 3129 (July 29, 2002). The Establishment Clause might have been violated here if the Secretary had assumed that the narratives were true because they are religious in nature. However, the Secretary did not do so, but instead used the narratives for purely secular purposes.

Narratives can provide information regarding the history of Indian cultures, and Congress clearly intended that, where appropriate, this evidence should be considered in establishing cultural affiliation. See 25 USC § 3005(a)(4). However, reliance upon oral narratives under the circumstances presented here is highly problematic. If the Tribal Claimants' narratives are as old as the claimants contend, they would have been orally conveyed through hundreds of intermediaries over thousands of years. For ancient events, we cannot know who first told a narrative, or the circumstances, or the identity of the intervening links in the chain, or whether the narrative has been altered, intentionally or otherwise, over time. The opportunity for error increases when information is relayed through multiple persons over time. Intervening changes in language may alter meanings, as might the process of translation into other languages. Other considerations affecting reliability of the narratives include the expertise of the source of the narrative and the circumstances under which the particular narrative was traditionally transmitted. See, DOI 7658 ("Each legend or 'story' has a specific place or time to be told"); DOI 8989-92 (method of telling story may affect reliability).

Some of the narratives cited in the record show signs of having been adapted to reflect recent events or perhaps the experiences of the person transcribing or translating the narrative. Other narratives may have been influenced by political considerations or biases. The narratives might furnish important insights into

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93 The court has reviewed the numerous narratives included in the administrative record, and this Opinion refers to a few representative examples.

94 In addition to the report by Boxberger, the record contains a number of affidavits and articles on the evaluation of oral narratives. See, e.g., DOI 8147-70, 8985-93.

95 Thus, one narrative begins, "In the days of the animal people, the Columbia River used to flow through the Grand Coulee. Coyote had a big steamboat then." DOI 6946. It proceeds to describe how Coyote cut a hole through the place where Coulee Dam is now, which caused the river to leave its old channel and flow through its present one. Coyote's steamboat was left in the dry channel. Jack Rabbit laughed at Coyote, and was turned into a rock. "You can see him sitting there today, at the left of Steamboat Rock ...." (Id.) Although this narrative has obviously been adapted, other narratives also speak of a time when the Columbia River flowed down the Grand Coulee instead of its present channel. DOI 10292. That event may have been the subject of the original narrative.

96 In one version of the monster story, Coyote carved up the body of the monster and created the tribes, designating where they were to live and what they were to be:

From the body he made the people who live along the shores of the Big River and the streams that flow into it. From the lower part of the body he made the Chinook Indians of
the people who originated and conveyed the narratives, and the Secretary could properly consider them for that purpose. However, their adaptability and political utility suggest that narratives are of limited reliability in attempting to determine truly ancient events. [**109]

Boxberger reviewed a number of narratives addressing geological events, such as the change in the flow of the Columbia River from the Grand Coulee. He opined that a narrative which states that in the old days the Columbia River flowed down [**1154] the Grand Coulee instead of its present channel "tells the listener where and how long ago an event occurred. It connects it to an event that occurred over 10,000 years ago when geologists tell us the Columbia River did flow through Grand Coulee." DOI 10292.

This conclusion assumes too much. The origins of the narrative are unknown, and the narrative does not establish a link between the Tribal Claimants and anyone who may have witnessed the Columbia River in the Grand Coulee or a change in the channel. Someone may have simply deduced what happened by observing the physical evidence, or the ancestors of the Tribal Claimants might have arrived on the Columbia Plateau a "mere" 4,000 years ago and learned of the event from people whose ancestors had actually witnessed it, or in turn had heard of it from an even earlier group. No shared group identity between the present-day Tribal Claimants and the people who may have been in the area more than 10,000 [**1110] years ago can be established through such narratives.

Two of the Secretary's experts also suggest that various narratives about taking refuge on mountain tops when the earth flooded and similar stories may show that the Tribal Claimants' ancestors were here during the enormous floods that periodically devastated this region between about 12,800 and 15,000 years ago. DOI 5817, 7627, 7662-65, 8174, 9431-32, 10056, 10076, 10292, 10324-25. However, it is unclear whether

the coast. Clark quotes Coyote: "You shall live near the mouth of the Big River and shall be traders. You shall always be short and fat and have weak legs."

From the legs he made the Klickitat Indians. Again Coyote spoke: "You shall live along the rivers that flow down from the big white mountain north of Big River. You shall be swift of foot and keen of wit, famous runners and great horsemen."

From the arms he made the Cayuse Indians, and Coyote said: "You shall live along the Big River. You shall be powerful with bow and arrows and with war clubs."

From the ribs he made the Yakama Indians. Coyote declared: "You shall live near the new Yakama River, east of the mountains. You shall be the helpers and the protectors of all the poor people."

From the head he created the Nez Perce Indians. Coyote decreed: "You shall live in the bellies of the Kookooskia and Wallowa rivers. You shall be men of brains, great in council and in speechmaking. You shall also be skillful horsemen and brave warriors."

Then he gathered up the hair, blood and waste and hurled them far eastward over the big mountains, Coyote decreed: "'You shall be the Snake River Indians. You shall be people of blood and violence. You shall be buffalo hunters and shall wander far and wide." DOI 7660 (citations omitted).

From this narrative, it is not difficult to discern which groups had amicable relations with each other and which were enemies. However, although there are multiple versions of this narrative, the underlying story of Coyote and the Monster is present in all.
people actually resided in the region at that time, or if they did, whether they survived the massive floods, which are believed to have produced a wall of water up to 1,000 feet high and dramatically altered the landscape of eastern Washington and northwestern Oregon. See, e.g., DOI 9431 (describing floods).

Even if someone did witness and survive such a flood, it does not necessarily follow that the ancestors of the Tribal Claimants were present. In addition, the legend of a great flood is a common theme of global mythology, DOI 7229, 7664, 10325, and the Secretary noted that the area that has been occupied by the Tribal Claimants has been subjected to large floods during the past 5,000 years, and has been regularly subjected to floods more recently. DOI 10074-76. These more recent events could account for stories about a great flood. DOI 10074. Similarly, narratives thought to be based upon an eruption of Mt. Hood could be based upon an eruption that occurred 15,000 years ago, 1,800 years ago, or only 200 years ago. DOI 7665, 10292. Narratives describing a battle between "Warm weather and Cold weather," DOI 10289, could refer, as Boxberger suggests, to the end of the great ice age, or to climate changes that have occurred more recently in the region. See, e.g., DOI 10056-57. There is no way to know.

The significance that the Secretary and Boxberger attribute to the absence of a "migration tradition" among the Tribal Claimants and the oral traditions placing these tribes in their present location since the beginning of time is also misplaced. As the Secretary noted, "origin stories without migration are not always affirmed by investigations using other independent data." DOI 10074. Even if it is correct, the Secretary's observation that these aspects of the Tribal Claimants' narratives "may suggest that the ancestors of the present-day tribes have lived in the region a very long time" tells us little. In human terms, even two or three thousand years is a very long time: A much longer interval exists between the present and the lifetime of the Kennewick Man.

In sum, though narratives can provide information relevant to a cultural affiliation determination in appropriate circumstances, the narratives cited in the record here do not provide a substantial basis for concluding that the Tribal Claimants have established a cultural affiliation between themselves and an earlier group of which the Kennewick Man was a member. If, as Boxberger opines, the oral traditions help to establish a "cultural continuity ... extending into the prehistoric past," the narratives do not help to establish how far into the "prehistoric past" such continuity extends. The 9,000 years between the life of the Kennewick Man and the present is an extraordinary length of time to bridge with evidence of oral traditions.

Even if they could be relied upon to establish that the ancestors of the Tribal Claimants have resided in this region for more than 9,000 years, the narratives cited by the Secretary do not establish a relationship of shared group identity between those ancestors and the Kennewick Man's unidentified group.

e. Conclusion

The Secretary did not articulate a cogent rationale that supports his finding of cultural affiliation. The Secretary neither identified the earlier group to which the Kennewick Man belonged, nor explained how he inferred a "shared group identity" over a span of 9,000 years between the Tribal Claimants and this unknown earlier group. The Secretary did not explain how there is the required relationship with the Tribal Claimants, even though the remains appear to be morphologically dissimilar from all modern American Indians, including the Tribal Claimants. Instead, the Secretary offered only this cryptic explanation for his conclusion:

While some gaps regarding continuity are present ... the geographic and oral tradition evidence establishes a reasonable link between these remains and the present-day Indian tribe claimants. DOI 10015.

The Secretary did not explain what he means by the "geographic" evidence, or offer any examples. If the Secretary meant that the Tribal Claimants have strong ties to the Columbia Plateau, and the Kennewick Man lived there 9,000 years ago, that is insufficient to satisfy the statutory requirement. [*114] If the Secretary was referring to the topics covered in Dr. Ames' report, that report was inconclusive. As for oral traditions, the Secretary's discussion of this evidence indicated only that the Tribal Claimants "possess similar traditional histories that relate to the Columbia Plateau's past landscape" and that these traditions
"lack[ ] any reference to a migration of people into or out of the Columbia plateau." DOI 10015. The Secretary does not explain how those facts lead to his ultimate conclusion. Similarly, the Secretary's brief states only:

Taking into account the tribal claimants' oral history that they had always inhabited this area, as well as the absence of any migration stories, and all of the other relevant evidence, the Secretary determined that there was a shared group identity between the earlier group and the present day claimants.

Defendants' Brief at 16. See also, id. at 17, n 16 (citing oral traditions as the justification for the decision). The Secretary provides little explanation of how this "other relevant evidence" reasonably supports his conclusions. [**115]

"In order for an agency decision to be upheld under the arbitrary and capricious [*1156] standard, a court must find that evidence before the agency provided a rational and ample basis for its decision. "Bicycle Trails Council of Marin v. Babbitt, 82 F3d 1445, 1462 (9th Cir 1996); Northwest Motorcycle Ass'n, 18 F3d at 1471. "After considering the relevant data, the agency must articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Id. (emphasis added, citations and internal punctuation omitted).

The Secretary's decision does not meet this standard. The present record does not provide a sufficient basis from which the Secretary could identify the "earlier group," or show that the Kennewick Man was likely part of that group, and establish by a preponderance of the evidence a relationship of shared group identity between the present-day Tribal Claimants and that earlier group. The Secretary has not articulated an adequate rationale for such conclusions. Consequently, even if the Secretary's [**116] conclusion that the remains are "Native American" had been correct, the decision to award these remains to the Tribal Claimants could not stand.

The Tribal Claimants argue that, under NAGPRA, the remains must be awarded to the claimant with the "closest cultural affiliation"--no matter how attenuated that relationship--if no other tribe has filed a claim or established that it has a closer affiliation. See, e.g., (June 20 Tr. at 226-28, 237-39); Tribal Claimants' Brief at 24-25. A careful reading of the statute does not support this interpretation. Read in context, the reference in § 3002(a)(2)(B) to the tribe that has the "closest cultural affiliation" is implicitly qualified by the requirement that the claimant must first satisfy the cultural affiliation standard. §§ 3002(a)(2), 3005(a). The term "closest" is implicated only if there are multiple claimants, each of which successfully establishes the requisite degree of cultural affiliation. NAGPRA does not mandate that every set of remains be awarded to some tribe, regardless of how attenuated the relationship may be. On the contrary, the Act expressly contemplates instances in which no claimant can establish the requisite [**117] degree of cultural affiliation to be entitled to claim the remains. See, §§ 3002(a)(2)(C) and 3002(b). The Tribal Claimants' reading of the statute would eliminate the requirement that a claimant establish, by a preponderance of the evidence, a shared group identity with the identifiable earlier group.

Based on a thorough review of the record, I conclude that the evidence before the Secretary was insufficient to establish cultural affiliation by a preponderance of the evidence. The Secretary's finding that the Tribal Claimants have satisfied the cultural affiliation requirement of 25 USC § 3001(2) is arbitrary and capricious, and must be set aside.

97 The Secretary's brief also states that his decision was premised, in part, upon a finding "that the tribal claimants' oral traditions often corresponded to known ancient geological events that occurred in the Plateau region." Defendants' Brief at 17-18, n 16. In actuality, the Secretary declined to make such a finding, noting that floods and volcanic eruptions have occurred on many occasions in the region, and we cannot assume a narrative depicts a specific geological event that occurred 10,000 years ago. DOI 10072-76.
3. Aboriginal Lands

As an alternative basis for the decision awarding the remains to the Tribal Claimants, the Secretary declared that "a claim based on aboriginal occupation, 25 USC § 3002(a)(2)(C)(1), was also a basis for the disposition of the Kennewick remains to the claimant Indian tribes in this case." DOI 10016. I disagree with the Secretary's assertion that this section provides a legitimate basis for disposition under the circumstances here.

Under 25 USC § 3002 (a)(2)(C), the "ownership or control" of Native American cultural items (including human remains) excavated or discovered on Federal or tribal lands after November 16, 1990, is determined, in relevant part, as follows:

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 ... When the Corps decided to give the remains to the Tribal Claimants in September 1996, it cited this section as one basis for that decision. COE 4805-AA, 9275. See also, DOI 1417-19. However, on January 24, 1997, the Corps informed Plaintiffs it had determined that the site where the remains were found "was not the subject of a final judgment of the ICC as originally believed." DOI 1598. In a response to Plaintiffs' Request for Admissions dated February 5, 1997, Defendants acknowledged that:

To the best of current knowledge and belief, the lands upon which the human remains were discovered are not on lands that are recognized by a final judgment of the Indian Claims Commission (ICC) or the United States Court of Federal Claims as the aboriginal land of some Indian tribe. COE 8244. Defendants have never sought leave to withdraw or amend that admission.

On July 1, 1998, Defendants formally notified the court that:

The Department of the Interior ("DOI") has determined that the site of discovery does not fall within any area recognized as the aboriginal land of any Indian Tribe in a final judgment of the Indian Claims Commission or the United States Court of Federal Claims .... The determination was made at this time solely to streamline the possible decision-making process and to clarify this issue since it had been raised in the initial federal register notice issued by the Corps shortly after the remains were discovered. DOI 3174. Thereafter, in the numerous status reports and briefs filed with the court, Defendants never indicated that the "aboriginal lands" issue was under active consideration. On the contrary, in a report dated October 1999, Dr. Francis McManamon--who was leading the Secretary's efforts regarding the Kennewick man--unequivocally stated:

A careful legal analysis of the judicial decisions by the Indian Land Claims Commission and the Court of Claims shows that the land where the remains were discovered has not been judicially determined to be the exclusive aboriginal territory of any modern Indian tribe. This means that Section 3(a)(2)(C) of NAGPRA (25 U.S.C. 3002(a)(2)(C)) that permits disposition of Native American remains recovered from federal lands that have been subject to such a decision does not apply in this case. It is recognized by many, including the tribes, that the area around Kennewick was used heavily by many tribes and bands, so much so that the Commission found that no single tribe had a claim to exclusive use or occupancy. DOI 10660.

In keeping with Defendants' admissions, the joint claim to the remains filed by the coalition of Tribal Claimants expressly states that it is a "cultural affiliation claim" made pursuant to 25 USC § 3002(a)(2)(B). DOI 4110. It does not cite or assert a claim under § 3002(a)(2)(C). (Id.)
Given this consistent reiteration that § 3002(a)(2)(C) did not apply, the Secretary's subsequent reliance on this statute as an independent basis for the decision to award the remains to the Tribal Claimants was surprising,98 and deprived the Plaintiffs [*1158] of the opportunity to submit materials or comments regarding this issue. However, even if the Secretary could properly take a contrary position without notice or leave to withdraw or amend the earlier admissions, his conclusion that "aboriginal occupation" provided an alternative basis for disposition to the Tribal Claimants was contrary to law. The Secretary concedes that the remains were not discovered on federal land that is recognized by a final judgment of the ICC or Court of Claims99 as the aboriginal land of one of the Tribal Claimants. DOI 3174, 10016. The Solicitor's memorandum, upon which the Secretary relies, similarly acknowledges that:

NAGPRA's text refers to a "final judgment" of the ICC that "recognize[s]" the land where human remains or other cultural items are recovered "as the aboriginal land of some Indian tribe." In the case of the Kennewick remains, there is no such final judgment. [**122] COE 108 (emphasis added).

Though that should have been the end of the matter, the Secretary has chosen to treat the language of the statute as merely precatory, asserting that:

The final judgments of the Indian Claims [**123] Commission (ICC) and the United States Court of Claims that encompass the Kennewick remains' recovery site and other judicially established Indian land areas have been extensively reviewed. For reasons explained in Enclosure 4, disposition under § 3002(a)(2)(C)(1) may not be precluded when an ICC final judgment did not specifically delineate aboriginal territory due to a voluntary settlement agreement. If the ICC's findings of fact and opinions entered prior to the compromise settlement clearly identified an area as being the joint or exclusive aboriginal territory of a tribe, this evidence is sufficient to establish aboriginal territory for purposes of § 3002(a)(2)(C)(1).

The Federal land where the Kennewick remains were found was the subject of several ICC cases brought by the Confederated Tribes of the Umatilla Reservation, a tribe composed of multiple Indian bands, in the 1950s and 1960s. These cases culminated in a final judgment in accordance with a compromise settlement. Although the compromise settlement did not delineate the aboriginal territory of the Umatilla, the ICC had previously determined in its opinion and findings of fact that several Indian tribes, including [**124] the Umatilla (Walla Walla and Cayuse) and Nez Perce, used and occupied this area were [sic] the Kennewick remains were found. (14 Ind. Cl. Comm. 14, (1964)). Because the Umatilla and Nez Perce, as well as the neighboring Yakama Tribe and Confederated Tribes of the Colville Reservation, have jointly filed a claim for custody of the remains under NAGPRA, DOI has determined that disposition to the claimant tribes is appropriate under 25 USC 3002(a)(2)(C)(1). DOI 10016 (footnote omitted).

The Secretary's interpretation is contrary to the express terms of NAGPRA, which explicitly limit its applicability to situations in which the object in question was found on land that is recognized by a final judgment of the ICC or the Court of [*1159] Claims as aboriginal lands. Judicial deference to an agency's interpretation is inapposite where, as here, the language of the statute is unambiguous. See, Chevron,

98 There are indications that the Tribal Claimants were secretly notified that this issue was "back on the table." On August 11, 2000, shortly before the Secretary announced the final decision and shortly after the Tribal Claimants met privately with Defendants to discuss the merits of their claim, the Yakama placed into the administrative record 170 pages of documents regarding the ICC issue. COE 2826-2995.

99 Pursuant to statute, the ICC ceased operations in 1978 and transferred its remaining cases to the Court of Claims. Arizona v. California, 530 U.S. 392, 402, n 1, 147 L. Ed. 2d 374, 120 S. Ct. 2304(2000). The Court of Claims also heard appeals from the ICC. For simplicity, a judgment entered by either entity is referred to herein as an "ICC judgment."
467 U.S. at 842-43 ("If [**125] 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"). Even if the statute were ambiguous, the Secretary's interpretation would not be entitled to Chevron deference because it was not promulgated through notice and comment procedures, was announced for the first time four years into this litigation, and is not a permissible interpretation of the statute.

The interpretation is also contrary to the DOI's earlier position that § 3002(a)(2)(C) would not always be a sound basis to establish affinity to contemporary groups where it could not be otherwise established. In testimony to Congress regarding this issue in 1990, the Department of Interior stated:

We believe it would not be proper to use aboriginal occupation as the sole criteria for establishing affinity where no affinity to contemporary groups can be established. In some cases this criterion will be reasonable, in other cases it will not. Therefore, we recommend section 3(a)(2)(C) be deleted. S Rep No 101-877 at 31, 1990 USCCAN at 4390, DOI 0612.

The skepticism expressed in that testimony about [**126] relying on aboriginal title as the basis for determining ownership and control over cultural items is well-founded, and the statute should not be expanded beyond its plain meaning. The Indian Claims Commission was created, in part, to compensate Indian tribes whose lands had been acquired by the United States for inadequate value, and to quiet "Indian title" to those lands. Pub L 79-726, 60 Stat 1049, 1050, 1055; United States v. Dann, 470 U.S. 39, 45, 84 L. Ed. 2d 28, 105 S. Ct. 1058 (1985); Sioux Tribe of Indians v. United States, 8 Cl Ct 80, 84-85 (1985). Given this narrow purpose, the ICC was primarily concerned with determining which tribe was occupying the land at the time that land was acquired by the United States, typically during the 19th century, and during the period immediately preceding the acquisition.100 [**127]

Occupancy for as little as a few decades has been held sufficiently long to establish aboriginal title. Alabama-Cassidy Tribe of Texas v. United States, 28 Fed Cl 95 (1993), and on appeal, 2000 WL 101352, Ct Cl 2000 (exclusive occupancy for 30 years held sufficient to establish aboriginal title); United States v. Seminole Indians of the State of Florida, 180 Ct Cl 375, 387 (1967) (period of more than 50 years deemed "sufficient, as a matter of law, to satisfy the 'long time' requirement essential for Indian title").101 In addition, [*1160] there are numerous exceptions to the general rule that a tribe must establish exclusive use

100 Cf., Confederated Tribes of the Umatilla Reservation v. United States, 8 Ind Cl Comm 513, 530-39 (1960), and 14 Ind Cl Comm 14, 15-103 (1964) reprinted at DOI 178-87, COE 2873-2916)(focusing upon which tribes occupied which areas near the time of the taking, not in the distant past).

101 Other authorities confirm that an ICC determination of aboriginal title does not necessarily mean that a tribe has occupied the land, to the exclusion of all others, for thousands of years:

Indian title ... requires use of the area "for a long time." The decisions reflect an unwillingness to find ownership of a specified tract in a nomadic tribe wandering over many areas; some degree of continuous association with an area has been required. However, no example comes to mind of a tribe so nomadic that it was denied having Indian title lands located somewhere. Perhaps 20 to 50 years seems judicially acceptable as "a long time" under appropriate circumstances. Indian Claims Commission Final Report at 129. COE 9800. See also, Cohen, Handbook of Federal Indian Law at 492 (while the claimant must show a "substantial period of exclusive occupancy," the fact "that the occupancy commenced after discovery or after the assertion of territorial claims by European powers does not defeat the Indian title."
and occupancy in order to secure aboriginal title. Alabama-Cassidy Tribe, 2000 WL 101352 at *12-13. Consequently, the fact that an ICC judgment designates a particular tribe as holding "aboriginal" title to the land does not necessarily mean the land was used only by that tribe, or that human remains found on the land are necessarily the remains of tribal members. As the Department of Interior testified [128] before Congress, in some instances that assumption will be reasonable, and in other cases it will not be. [129]

The Secretary erred in interpreting § 3002(a)(2)(C) in a manner that would apply it to situations not included within its plain language. Even if the Secretary's interpretation of the statute were legally correct, and reference to a "final judgment" of the ICC or the United States Court of Claims actually referred to something other than such a final judgment, I would still hold that the Secretary erred as a matter of law in concluding that the statute applies here. The Secretary relied on factual findings which were vacated as part of a settlement entered into while the underlying decision was on appeal. The settlement dismissed the appeal and expressly provided that it "shall not be intended by either party as an affirmance of the findings or decisions of the Indian Claims Commission, but otherwise shall be with prejudice." 16 Ind Cl Comm 484, 486 (1966), DOI 222. The settlement further provides that:

This stipulation, dismissal of the appeal and entry of the Final Judgment shall not be construed as an admission of either party as to any issue for purposes of precedent in any other case or otherwise. 16 Ind Cl Comm at 487; DOI 223 [130] (emphasis added).

In finding that there is a valid final ICC judgment recognizing the discovery site as the aboriginal lands of one of the Tribal Claimants, the Secretary ignores that language and another crucial fact: the ICC did not find that any of the tribal claimants have aboriginal title to the discovery site. On the contrary, the ICC found that this location--near the confluence of three major rivers--was used in common by many Indian groups, and that none of the claimants held aboriginal title.

The Commission finds that the evidence is insufficient to establish exclusive use and possession for a long time, or from time immemorial, in any of the three tribes comprising the Confederated Tribes of the Umatilla Indian Reservation at the critical times in this proceeding. There is substantial evidence to the contrary that the three Umatilla tribes, the Wayampam bands, the Nez Perce tribe, the Snake Indians, sometimes referred to as the Northern Pauites--an unidentifiable group of Indians -- or the Shoshonean peoples, and other miscellaneous Indians have traveled, gathered, and hunted over said area and have taken fish from its streams; said use was in common with said [131] tribes and bands. The Umatilla tribes and their allies jointly began a campaign of conquest in the 1820's against the Snake Indians, as above described, to acquire the disputed areas, which at said times and for a long period prior thereto were in the possession and use of said Snake Indians.

We also find that the tribes attempting the said conquest and use met with determined resistance; that they did penetrate [1161] some parts of the said areas but their progress was very slow, and the war between the rival groups continued unresolved at the date of the Umatilla Treaty with the United States and for a considerable period beyond said date. At no time within the period were the said Snake Indians entirely excluded from the claimed areas. 14 Ind Cl Comm 14, 102-03 (1964), COE 2915-16. See also, DOI 10086 (letter from Solicitor to the Secretary, acknowledging that the ICC had determined that the discovery site was used by the Umatilla, Cayuse, Walla Walla, Wayampam, Nez Perce, Snake Indians, "and other Indians" during the time relevant to the ICC's inquiry); DOI 1418 (letter from Umatilla to Corps, acknowledging that the ICC "determined that the [Umatilla] had failed to prove the exclusive use and occupation required for a determination of aboriginal ownership"); DOI 10660 (report by Dr. McManamon acknowledging that the ICC found that the area around the discovery site "was used heavily by many tribes and bands, so much so that the Commission found that no single tribe had a claim to exclusive use or occupancy"). Consequently, even if this ICC claim had not been settled, the factual findings would not have qualified as a determination of aboriginal occupancy for purposes of § 3002(a)(2)(C).

The Secretary also contends that, because some of the tribes that used the area are now members of the coalition of Tribal Claimants, the coalition is a proper claimant even if no tribe, in its own right, would be a
proper claimant. The sole basis cited by the Secretary for this contention is some vague language in the preamble to the enabling regulations.

The Secretary misconstrued § 3002(a)(2)(C) to include cases in which no valid final judgment established aboriginal title, and misinterpreted the statute by applying it to cases in which the ICC had specifically found that the tribe failed to establish its aboriginal title. The statute cannot [**133] be construed in this manner. The Secretary's argument also demonstrates, once again, the problems potentially posed by recognition of coalition claims. The Secretary's determination that § 3002(a)(2)(C)(1) furnishes a valid alternative basis for awarding the Kennewick remains to the Tribal Claimants was arbitrary and capricious, contrary to law, in excess of the Secretary's authority.

4. Constitutional Issue

As noted above, Plaintiffs assert that Defendants have violated their First Amendment "rights to freedom of speech and access to information" by refusing to allow them to study the remains of the Kennewick Man and the site where the remains were found. In an earlier decision remanding this action, I did not decide whether scholars have a First Amendment right of access to primary research materials in the government's possession, or the extent of such a right if it does exist. Bonnichsen, 969 F Supp at 648. The decision instructed the Corps to consider whether Plaintiffs have a First Amendment right to study. Bonnichsen, 969 F Supp at 646, 654. Because Defendants again concluded on statutory grounds that Plaintiffs were not entitled [**134] to study the remains, it was necessary for them to reach the constitutional issue on remand. Defendants again concluded that Plaintiffs do not have a right to study pursuant to the First Amendment.

If I had also decided that Plaintiffs were not entitled to study the remains on other grounds, it would be necessary to address Plaintiffs' constitutional claim now. However, courts avoid reaching constitutional questions unless it is necessary to do so. E.g., New York Transit Authority v. Beazer, [*1162] 440 U.S. 568, 582-83, 59 L. Ed. 2d 587, 99 S. Ct. 1355 (1979); Clark v. City of Lakewood, 259 F3d 996, 1016 n 12 (9th Cir 2001) ("courts should avoid making federal constitutional decisions unless and until necessary").

Because Plaintiffs are entitled to study on statutory grounds, I need not and do not decide the Constitutional question.

III. OTHER CLAIMS

The decision that Plaintiffs must be allowed access to the remains for study, set out later in this Opinion, addresses the most significant issue in this litigation, and grants the most important [**135] of the various types of relief sought. The remaining, less significant issues are addressed briefly below.

A. Curation Claim

Plaintiffs contend that the curation of the remains of the Kennewick Man violates the requirements of ARPA because Defendants have failed to develop a "long-term preservation plan" and have not assured that the remains are kept in appropriate conditions. Defendants assert that the curation conforms to the requirements of ARPA, and that actions to date involving the remains have not been the kind of "repeatable events" that would ordinarily be covered by a long-term preservation plan, but instead have been "unique."

They contend that, under the present circumstances, "it would have been foolhardy to develop a long-term preservation plan while the long-term conditions or status of the collection had not been identified and the events of intense handling were continuing to occur."

The record does not establish that Defendants' curation techniques have been deficient since the remains were transferred to the Burke Museum. Accordingly, no relief will be granted on this claim. However, as discussed below, ARPA applies. Accordingly, Defendants must [**136] curate the remains in conformance with that Act.

B. The National Historic Preservation Act (NHPA) Claim
NHPA requires federal agencies to "take into account the effect" of any "undertaking" on any site included or eligible for inclusion in the National Register. 16 USC § 470f; 36 CFR § 800.1(c). An “undertaking” is "any project, activity, or program that can result in changes in the character or use of historic properties." 36 CFR § 800.2(o).

Federal agencies are required to consult with "interested parties" before carrying out an "undertaking" that affects eligible property. 36 CFR § 800.1(c). "Interested parties" include "individuals that are concerned with the effects of an undertaking on historic properties." 36 CFR § 800.1(c)(2). Agencies are also required to assess whether an undertaking will adversely affect property that is subject to the Act, 36 CFR §§ 800.4(e), 800.5, 800.9, determine whether there will be any destruction, damage, or alteration of the property that will diminish certain qualities of the property, 36 CFR §§ 800.5(c), 800.9(b), and avoid or mitigate any adverse effects, 36 CFR §§ 800.5(e).

Plaintiffs allege that Defendants violated NHPA by failing to consult with them before burying the site where the remains of the Kennewick Man were found, failing to adequately assess whether burial of the site would detrimentally alter the site, and failing to avoid or mitigate adverse effects of the project. Plaintiffs contend that, though they were "interested parties," Defendants [*1163] largely ignored their assertions that the site was important to determining the status of the remains of the Kennewick Man pursuant to NAGPRA, and that Plaintiffs were not given an adequate opportunity to receive information and express their views about plans to cover the site. They also assert that Defendants ignored regulations requiring them to assess the contents of the site, including cultural components, and to mitigate the potential loss of important data from the site.

Defendants note that the relevant State Historic Preservation Officer (SHPO) and Advisory Council on Historic Preservation (ACHP) concurred with the Corps' conclusion that covering the site would have no "adverse effect" on that location. They contend that, as "interested" rather than "consulting" parties, Plaintiffs [*1163] largely ignored their assertions that the site was important to determining the status of the remains of the Kennewick Man pursuant [**138] to NAGPRA, and that Plaintiffs were not given an adequate opportunity to receive information and express their views about plans to cover the site. They also assert that Defendants ignored regulations requiring them to assess the contents of the site, including cultural components, and to mitigate the potential loss of important data from the site.

The record supports the conclusion that Plaintiffs were not afforded the opportunity [**139] that is required under NHPA to present their views concerning the burial of the site, and that relevant information they provided was not considered before the decision was made to cover the site. Plaintiffs were not told of the expanded project to cover the site until nearly two months after the decision to proceed with it had been made. Plaintiffs received information about that project on December 26, 1997, in response to a request for information they made on November 10, 1997, and were allowed only until December 29, 1997, to respond. See, ER 306, SUP 614. The Corps did not delay its decision after Plaintiffs' counsel informed it that the letter had arrived too late to allow time for discussion with his clients. See, ER 302, SUP 596. The record does not support Defendants' contention that the Corps adequately considered the effects of the project and how the damage to the [**140] archeological value of the site could be minimized. As noted in the Background section above, the Corps was primarily interested in burying the site before further investigation could be carried out and before legislation became effective that would stop the project. It appears that protecting the archeological value of the site in a manner consistent with NHPA was not a major concern. A Corps scientist noted that the erosion at the site was "not as serious as that occurring at many other Corps of Engineers Reservoirs," and advised that "it would seem advisable to be cautious about long term deleterious effects of engineering site protection measures." SUP 432, ER 279.

The regulations cited are those in effect when the site was covered. The regulations were substantially modified in 1999. 64 Fed Reg 27,071 (May 18, 1999).

Plaintiffs' counsel began seeking information about plans to cover the site as early as November 1996. See, ER 270.
project proceeded without significant study to determine the characteristics of the site, including what archaeological resources might exist, and there is little evidence that alternative methods of erosions control that might mitigate potential data loss were seriously considered. See, ER 293, SUP 487, ER 370, ER 345-47.

In sum, I conclude that the Corps violated the NHPA requirements that the views of "interested parties" be considered, that potential loss of archaeological data be mitigated, and that the potentially negative effects of the project be fully and carefully considered. Though the Court concludes that NHPA was violated, no relief other than this declaration is appropriate at this time.

C. Freedom of Information Act (FOIA) Claim

Plaintiffs' counsel submitted six FOIA requests seeking information that could be used during the administrative process. Though there is no question that Defendants failed to provide all of the material sought during that process, they now assert that Plaintiffs' FOIA claim is moot because all of the "non-privileged responsive documents" Plaintiffs have requested are included in the 22,000 page administrative record.

Under FOIA, courts have jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly held." 5 USC § 552(a)(4)(B). Such an order is the only remedy expressly authorized under FOIA. E.g., Tax Analysts v. Internal Revenue Service, 326 U.S. App. D.C. 53, 117 F3d 607, 610 (DC Cir 1997). Therefore, a challenge to a denial of a FOIA request becomes moot when the material requested is reduced. E.g., Carter v. Veterans Admin., 780 F2d 1479, 1481 (9th Cir 1986).

It appears that the material Plaintiffs sought in their FOIA request has been provided in the administrative record. Accordingly, the substantive FOIA claim is moot, and the request for relief pursuant to that Act is denied.

IV. REMEDY AS TO DECISIONS ON REMAND

The court is well aware that, in actions involving judicial review of an agency's final administrative decision, the ordinary remedy when a decision is set aside is remand to the agency for further proceedings. E.g. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985) ("If the record before the agency does not support the agency action ... the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.").

However, in the usual case, the court is called upon to review the final decision of an apparently neutral and unbiased agency that has reached a final decision through a fair process. This is not the usual case. Here, the record establishes that the decision makers did not deal with the issues and the interested parties in a fair and neutral manner. Defendants' procedures, actions, and decisions have consistently indicated a desire to reach a particular result. I have already remanded this action once, in an Opinion noting that the agency had failed to consider all the relevant factors, had acted before it had all of the evidence, had failed to fully consider legal questions, had assumed facts that proved to be erroneous, had failed to articulate a satisfactory explanation for its action, had followed a "flawed" procedure, and had prematurely decided the issue before it. Bonnichsen, 969 F Supp at 645. Defendants' conduct since that initial remand (including burial of the site where the remains were recovered [*1165]), provides no basis for concluding that, if this action were remanded yet again, Plaintiffs' request to study would be evaluated in a fair and appropriate manner. [*144]

104 Here, such a remand would require Defendants to consider Plaintiffs' request to study in light of the court's determination that the Secretary errred in concluding that NAGPRA applies.
Remand is not required in those unusual cases where the court cannot be confident of an agency's ability to decide a matter fairly. See, e.g., Guerrero v. Stone, 970 F2d 626, 636 (9th Cir 1992) (court may substitute own judgment for that of agency and order "substantive relief sought" in appropriate circumstances); Alvarado Community Hosp. v. Shalala, 155 F3d 1115, 1125 (9th Cir 1998), amended, 166 F3d 950 (9th Cir 1999) (ordering relief rather than remand to avoid "further recondite litigation"); Greene v. Babbitt, 943 F Supp 1278, 1288 (WD Wash 1996) (court has no obligation to remand, may fashion equitable remedy, when it has no confidence in agency's ability to decide matter expeditiously and fairly). There is no reason to believe that Plaintiffs' request to study would be evaluated any differently if this action were remanded for further consideration. Therefore, it is the court's role to decide the legal issues and determine the appropriate relief.

Defendants denied Plaintiffs' repeated requests to study [**145] on the grounds that the remains of the Kennewick Man were subject to NAGPRA. For the reasons set out above, NAGPRA does not apply to the remains of the Kennewick Man. In determining the relief to which Plaintiffs are entitled based upon this conclusion, the relevant issues are: what law applies in the absence of NAGPRA, and what is the Corps' legal responsibility given that NAGPRA does not apply.105

As noted in the Background section above, the remains were initially collected pursuant to a permit [**146] issued to Dr. Chatters under ARPA. "Human skeletal materials" constitute an "archaeological resource" subject to that Act if they (1) are discovered on federal land, (2) are more than 100 years old, and (3) are "capable of providing scientific or humanistic understanding of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques...." 16 USC § 470bb; 43 CFR § 7.3(a)(1), (3)(vi). The remains of the Kennewick Man satisfy these requirements, as Corps District Engineer Lt. Colonel Curtis, Jr. tacitly acknowledged when he cited ARPA as a source of federal jurisdiction over the remains. E.g., Affid. of Alan Schneider, Exh. A, filed in support of Plaintiffs' motion for access to study.

ARPA provides for issuance of permits before archaeological resources are excavated and removed, and requires that objects be curated and preserved after excavation or removal. 16 USC § 470cc [**147] (b); 43 CFR § 7.8. The Secretary of the Interior has promulgated regulations that federal agencies are to follow to preserve "collections of prehistoric and historic material remains ... recovered under the authority of ... [ARPA]...." 36 CFR § 79.1(a). These regulations apply to "collections," which include "material remains that are excavated or removed during a survey, excavation or other study of a prehistoric or historic resource...." 36 CFR § 79.4(a). The responsible agency official is required to place archaeological resources removed [*1166] from federal land in a repository that (1) has adequate long-term curational capabilities, 36 CFR § 79.5; (2) uses "professional museum and archival practices," 36 CFR § 79.9(a); and (3) will make the collection available "for scientific, educational and religious uses," including scientific analysis and scholarly research by qualified professionals. 36 CFR §§ 79.10(a), (b).

ARPA permit requirements are binding [**148] on the Corps under regulations adopted by the Secretary of Defense. 32 CFR Pt. 229. These regulations provide for issuance of permits when particular requirements are satisfied. See, 32 CFR § 229.8(a). These requirements include a determination that the activity authorized "is to be undertaken for the purpose of furthering archaeological knowledge in the public interest which may include ... scientific or scholarly research, and preservation of archaeological data...." 32 CFR § 229.8(a)(2) Accordingly, issuance of a permit providing for the collection of the remains of the

105 That does not mean that Plaintiffs would have no right to study if the remains were properly determined to be "Native American" for purposes of NAGPRA, but cultural affiliation could not be established. NAGPRA and its implementing regulations are silent on this point, and a reasonable argument could be made that ARPA is applicable under those circumstances. However, that is an issue that need not be addressed, given the court's conclusion that the Secretary erred in finding that the remains are "Native American."
Kennewick Man, was at least an implicit determination that doing so might further archaeological knowledge in the public interest.\textsuperscript{106} [**149] Given that they were collected pursuant to a permit issued under ARPA and are of obvious archaeological significance, it appears that, but for the assumption that they were subject to NAGPRA, the remains of the Kennewick Man would have been placed in a repository with "adequate long-term curational capabilities" that would have made them available to qualified professionals for scientific study. Plaintiffs are clearly the kind of "qualified professionals" referenced in the regulations.\textsuperscript{107} The record establishes that Plaintiffs are eminent scientists in the field of "First American Studies" who have written hundreds of scientific articles, papers, and monographs, and have examined thousands of human skeletal remains. The record also establishes that, but for Defendants' assumption that NAGPRA applies, Plaintiffs almost certainly would have been allowed access to study the remains. In an earlier Opinion, I noted my conclusion that, but for Defendants' intervention, Plaintiff Owsley would have been allowed to study the remains, and that it was "highly probable that some or all of the other Plaintiffs also would have been allowed to conduct ... studies." Bonnichsen, 969 F Supp at 635. [**150] That conclusion was based upon evidence that study requests like those made by Plaintiffs are routinely granted. Id.\textsuperscript{108} [**151] [*1167] Nothing that has subsequently transpired in this litigation and nothing I have found in a careful examination of the administrative record undermines my earlier conclusion that, in the normal course of events, Plaintiffs would have been allowed to study the remains. Allowing study is fully consistent with applicable statutes and regulations, which are clearly intended to make archeological information available to the public through scientific research. Allowing study is also consistent with the usual practice of federal agencies under circumstances in which NAGPRA does not apply. Accordingly, I will order that Plaintiffs' request for access to study be granted, subject to the type of reasonable terms and conditions that normally apply to studies of archaeological resources under ARPA.

In reviewing the record, it appears that some of the studies that Plaintiffs intended to carry out have been done as part of the cultural affiliation analysis. The request to study is not moot, however, because Plaintiffs have pointed out that further study may yield additional information and serve as a check on the

\textsuperscript{106} The ARPA permit allowing Dr. Chatters to collect the remains of the Kennewick Man required that copies of "all published journal articles ... and other published or unpublished reports and manuscripts resulting from work conducted under this permit" be filed with the Corps.

\textsuperscript{107} For example, an internal Corps e-mail identifies Brace as "a GIANT in the physical anthropology world. He literally writes the books on the subject." COE 7927.

\textsuperscript{108} In earlier proceedings in this action, Defendants argued that Plaintiffs had no right to study because the ARPA permit was issued to Dr. Chatters, not to Plaintiffs, because no agency decision to place the remains in a "collection" had been made, and because there is no absolute obligation to allow study by any particular scientists. These arguments are not well founded. The record supports only the conclusion that scientists are routinely allowed to study material actually obtained pursuant to permits issued to others, that permission to study does not depend on having been named in a permit to excavate or remove, and that study is generally carried out without issuance of a formal study permit. Under the regulations, it appears that an object does not become part of a "collection" because it is so designated by an agency, but because it is excavated or removed under the authority of ARPA. See, 36 CFR § 79.3(a). Though there is not an absolute obligation to allow particular scientists access to study, there is ample reason to believe that Plaintiffs would have been allowed to study under normal circumstances.
validity of earlier results. I therefore will require Plaintiffs to submit a proposed [**152] study protocol to the agency within 45 days of the entry of this Order. Defendants shall respond to that proposed protocol within 45 days of its receipt. Defendants' response shall allow for study, subject to the terms and conditions normally imposed when studies subject to ARPA are carried out.

CONCLUSION

For the reasons set out above, Plaintiffs' motion for an order vacating Defendants' decision on remand (# 416-1) is GRANTED. Plaintiffs shall submit a proposed study protocol to the agency within 45 days of the entry of this Order, and Defendants shall respond to that proposed protocol within 45 days of the receipt of the proposed protocol. The parties’ joint memorandum of agreement concerning curation (# 170) shall remain in effect pending development of a study protocol. Defendants shall not transfer the remains to the Tribal Claimants.

Plaintiffs' request for relief based upon alleged violations of other statutes (# 416-2) is GRANTED in part and DENIED in part. Plaintiffs' request for a declaration that Defendants had violated NHPA is GRANTED, and the Plaintiffs' request for other relief is DENIED.

DATED this 30th day of August, 2002.

/s/ John Jelderks
U.S. Magistrate [**153] Judge

ORDER

JELDERKS, Magistrate Judge:

Defendants move to strike four affidavits and pages 321 through 529 of the excerpts of record submitted by Plaintiffs.

As a general rule, judicial review of an administrative decision is limited to the administrative record. Animal Defense Council v. Hodel, 840 F2d 1432, 1436 (9th Cir 1988), amended, 867 F2d 1244 (9th Cir 1989). However, in limited circumstances, the court may also consider materials outside the official administrative record. Animal Defense Council, 840 F2d at 1432, 867 F2d 1244 (citing some examples); Public Power Council v. Johnson, 674 F2d 791, 793-95 (9th Cir 1982) (same); Murakami v. United States, 46 Fed Cl 731, 735 (2000) (listing seven exceptions).

As a practical matter, the outcome of this case does not turn on any of the documents to which Defendants object. Most of the disputed material is either of limited relevance to the core issues in this case, or is included in documents already in the record. Nevertheless, I will briefly address Defendants' objections in order to create a clear record of the materials I have considered [**154] in deciding this case.

ER 321-31 is a privilege log prepared by Defendants listing documents that the government redacted from the official administrative record on grounds of attorney-client privilege. Plaintiffs offered that log in support of their assertion that Defendants violated procedural requirements, and not as extra-record evidence contesting the merits of the agency's decision. Ex parte communications, by definition, typically involve an extra-record communication that should have been made on the record. Therefore, proof of such communications will often require supplementation of the record. Portland Audubon Society, 984 F2d at 1548-49.

E331-337 are published decisions by the Indian Claims Commission. The record reflects that the Secretary did consider these items. Moreover, these materials are analogous to judicial opinions, of which a court can take judicial notice.
ER 338 is a newspaper account of a speech by the Secretary, offered for the purpose of establishing bias, which can sometimes be a valid ground for supplementing the record. Because this document does not have significant probative value, I will not analyze its admissibility in greater detail.

ER 339-68 are Corps documents and manuals regarding proper stabilization techniques, which Plaintiffs have offered in connection with their site destruction claim. Presumably, the Corps was aware of, and considered, its own manuals. See Public Power Council, 674 F2d at 794. ER 369-70 are documents prepared by the Corps regarding the discovery site of the Kennewick remains which should have been in the official compilation of the record.

ER 371-74 are datalogger readings from the Burke Museum, which record temperature and humidity. Those documents are part of the record in this case, and also concern Plaintiffs' claim alleging improper curation, not the Secretary's decision being reviewed under the APA.

ER 375-79 are excerpts from a United States Attorney General's manual discussing ex parte contacts and interpreting the APA, offered to help establish the applicable legal standard.

ER 380-83 and 386-87 are documents from the Department of Interior offered to show that the agency has established a limited public forum or is advocating a particular point of view. Though not very probative, the documents are relevant to Plaintiffs' First Amendment claim, and there is no basis for striking them.

ER 384-85 are excerpts from the legislative history of a federal statute. Courts routinely take judicial notice of such materials.

ER 388-95 are articles describing possible voyages to America by ancient Vikings and Japanese. These articles appear to have been published after the administrative record closed, and were never presented to the agency for consideration. I grant the motion to strike those documents, to the extent they are offered to dispute the agency's decision on the merits. To the extent that the documents are related to Plaintiffs' First Amendment claim, they are not stricken.

ER 396 is an internal Corps e-mail discussing the Corps' need to make a "clear, unequivocal demonstration of its commitment to the tribes" in connection with the Kennewick matter. This document is obviously relevant, and excerpts from it were quoted in an earlier Opinion in this case. A printed version of this memo is included in the record at (COE 9471a).

ER 397-99 are also internal Corps e-mails relevant to this case that were inexplicably omitted from the official administrative record compiled by Defendants.

ER 400-01 is a letter from Plaintiffs to defense counsel that should have been included in the record compiled by Defendants.

ER 402-24 includes correspondence regarding the FOIA claim, which should be in the record compiled by Defendants regarding the FOIA claim. Some of these documents have also been offered to establish Defendants' refusal to provide Plaintiffs with information regarding the issues under consideration, even though Defendants were secretly furnishing the same information to the Tribal Claimants.

ER 425-80, 483-87, 494-508, and 514-29, are excerpts from briefs and other documents filed during the earlier phases of this case. These were considered by Defendants, and are properly part of the record.

ER 481-82 is an excerpt from a report submitted to Defendants, which is already in the official record at (COE 5815).

ER 491-93 is an excerpt from the transcript of an earlier oral argument in this case.
ER 509-13 is a joint claim for the remains filed by the tribal coalition, which is already in the record at (COE 4222-26).

The affidavit of Alan Schneider merely identifies the excerpts of record above. The affidavits of Douglas Owsley and Richard Jantz do not pertain to the merits of the challenged decision. [*158] Rather, they are offered to show that the government has allegedly created a limited public forum regarding the issues in this case, and has given preferred speakers access to data while denying access to non-preferred speakers.

The affidavit of James Chatters depicts the vegetation planted by the Corps after it buried the discovery site. To the extent that the site-burial claim is limited to an administrative record, a question I do not decide here, the Corps is aware of its own work, even if the agency did not document that information in the official administrative record. The present condition of the site is also relevant to the question of what remedy, if any, the court could order if it found in favor of the Plaintiffs on the site-burial claim.

The Chatters Affidavit also documents a conversation with Corps employees that occurred at the discovery site in December 1997. Assuming, without deciding, that the site burial claim is limited to the administrative record, the Corps had knowledge of this alleged conversation with Chatters. Therefore, the document is properly part of the record.

CONCLUSION

Defendants' motion to strike (# 431) is DENIED with the exception [*159] of ER 388-95, which is stricken to the extent it is offered to dispute the agency's decision on the merits.

DATED this 30th day of August, 2002.

/s/ John Jelderks
U.S. Magistrate Judge

JUDGMENT

Pursuant to the Opinion and Order entered this date, it is hereby ORDERED that Defendants' decision to award the remains of the Kennewick Man to the Tribal Claimants is set aside, and the Defendants are enjoined from transferring the remains to the Tribal Claimants. It is further ORDERED that Defendants shall allow Plaintiffs to study the remains of the Kennewick Man as specified in the Opinion and Order entered this date.

It is further ORDERED that Plaintiffs' claim pursuant to the Freedom of Information Act is MOOT, Plaintiffs' claim for a Declaration that Defendants violated the National Historic Preservation Act is GRANTED, and Plaintiffs' claim that Defendants violated the Archaeological Resources Preservation Act is DISMISSED with prejudice.

To the extent that Plaintiffs' Complaint alleges additional claims not specified herein, these, and pending motions, if any, are DISMISSED with prejudice.

DATED this 30th day of August, 2002.

John Jelderks
U.S. Magistrate Judge
YANKTON SIOUX TRIBE V. UNITED STATES ARMY CORPS OF ENGINEERS ET AL.

YANKTON SIOUX TRIBE, and its individual members, Plaintiffs,

-vs-

UNITED STATES ARMY CORPS OF ENGINEERS; JOE N. BALLARD, Chief Engineer, Army Corps of Engineers; TOM CURRAN, Operations Manager, Army corps of Engineers Fort Randall Project; and JOHN DOE, past Chief Engineer, Army Corps of Engineers, Defendants.

CIV 99-4228

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

194 F. Supp. 2d 977; 2002 U.S. Dist. LEXIS 6842

March 21, 2002, Decided
March 21, 2002, Filed

DISPOSITION: [**1] Defendants' Motion to Dismiss, or alternatively, Motion for Summary Judgment, and defendants' Motion to Dismiss denied as to plaintiff's reasonable efforts to protect claim and granted as to plaintiff's preservation and consultation claims. Plaintiff's preservation and consultation claims dismissed without prejudice.

COUNSEL: For YANKTON SIOUX TRIBE, plaintiff: Mary Turgeon Wynne, Okanogan, WA.

For UNITED STATES ARMY CORPS OF ENGINEERS, JOE N. BALLARD, TOM CURRAN, JOHN DOE, defendants: Bonnie P. Ulrich, U.S. Attorney's Office, Sioux Falls, SD.

JUDGES: Lawrence L. Piersol, Chief Judge.

OPINION BY: Lawrence L. Piersol

OPINION: [*980]

MEMORANDUM OPINION AND ORDER

The defendants filed a Motion to Dismiss Complaint, or in the alternative, Motion for Summary Judgment, Doc. 53, relating to the original complaint in this action. The Court then granted the Yankton Sioux Tribe's (the "Tribe") request to file an amended complaint. The defendants filed a Motion to Dismiss Amended Complaint, Doc. 61. These motions have been fully briefed by the parties and they will be decided based upon the written record herein. The motions will be denied as to the Tribe's claims under the Native American Grave Protection and Repatriation Act ("NAGPRA"), codified at 25 U.S.C. § 3001, et seq. (2001), and will be granted as to the Tribe's claims under the National Historic Preservation Act ("NHPA"), codified at 16 U.S.C. § 470, et seq. (2000).
BACKGROUND

The original complaint in this action, filed on December 23, 1999, alleged the defendants had violated and were continuing to violate the NAGPRA, because the defendants had inadvertently 
**3** discovered Native American human remains but did not cease activities in the area as required by 25 U.S.C. § 3002(d)(1). The remains were discovered in December 1999 on the shore of Lake Francis Case (the "Lake"), which is that portion of the Missouri River behind the Fort Randall Dam in Charles Mix County, South Dakota. The Court previously found that the remains were those of Sioux Tribal members who were buried in the St. Philip's Cemetery adjacent to the White Swan Church. (See Memorandum Opinion and Order, Doc. 16, January 10, 2000.) In its original complaint, the Tribe requested that the Court issue a temporary restraining order, preliminary injunction and a permanent injunction prohibiting defendants from raising the water level in the Lake and providing the required written notice to the Tribe. The Court issued a temporary restraining order on December 23, 1999, prohibiting the defendants from raising the water level of the Lake higher than 1340.3 feet above sea level. (Doc. 7.) The temporary restraining order was in effect until the hearing scheduled on January 3, 2000.

The Court conducted a hearing on the Tribe's motion for a preliminary injunction on January 3-4, 2000. During the hearing, the Tribe orally modified its request for relief to allow the Tribe time to remove the remains in accordance with its own traditions and wishes under the NAGPRA. The Tribe requested an injunction preventing the defendants from raising the water level until it had sufficient time to complete unspecified religious ceremonies, consult with anthropologists, decide what to do with the human remains, and remove the human remains from the Lake's shore. The temporary restraining order was continued until January 11, 2000. A written opinion was issued on January 10, 2000, prohibiting the defendants from raising the water level of the Lake higher than 1340.3 feet above sea level until the latter of January 13, 2000, or when all of the loose human remains and any other loose cultural items were removed from the Lake's shore.

In a report to the Court, the parties stated that they agreed the human remains exposed in November 2000 would remain in place and be covered with a combination of filter fabric, soil and rocks. (See Report to the Court, Doc. 40, November 8, 2000.) The defendants preferred removal and repatriation of any and all human remains, which could be identified at the site, but defendants acceded to the Tribe's wishes to cover the remains as a short term solution for the year 2000. (Id.) Due to severe weather and heavy snow, the parties were unable to implement their plan in December 2000. (See Report to the Court, Doc. 44, March 1, 2001.)

As of March 2001, the parties informed the Court that they intended to implement their plan in the fall of 2001 when the water level again dropped. (Id.) This plan, of covering the remains with fabric, soil and rocks, is a temporary solution to the potential exposure of remains. The parties have also been negotiating to develop a plan for permanent site protection.

An engineer selected by the Tribe was reviewing the remedial action plan prepared by the defendants for permanent site protection and was scheduled to provide a final report to the Tribe and the defendants on or about March 30, 2001. (Id.) The Tribe filed a separate report with the Court indicating there were some unresolved issues regarding the engineer's services. (See Report to the Court, Doc. 45, March 5, 2001). In an October 3, 2001 affidavit, Thomas Curran, the operations manager for the Fort Randall Project, U.S. Army Corps of Engineers, stated that the contract with the Tribe's proposed engineering consultant was cancelled due to lack of response from the consultant. (Doc. 65.) During a meeting between

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109 The Tribe objected to the Corps' use of the description "St. Philip's Cemetery" in a letter dated July 11, 2000. (See Declaration of Sandra Barnum, Doc. 63, Exhibit 13.) The Tribe, however, has variously referred to the site as the "St. Philips Cemetery" (Doc. 66, p. 1), the "St. Philips Cemetery site" (Doc. 60, p. 1), the "White Swan Church site" (Doc. 56, P 5), the "White Swan Church cemetery" (Doc. 56, P 12), the "White Swan Church graveyard" (Doc. 56, P 31), the "White Swan gravesites" (Doc. 56, P 41). To ensure clarity in this opinion, the Court will refer to the site where the human remains were discovered by the Corps in December 1999 as the "St. Philip's Cemetery." **4**

110 A more detailed recitation of the facts in this action is contained in the Court's Memorandum Opinion and Order issuing a preliminary injunction. See Doc. 16, January 10, 2000.
the parties on July 31, 2001, the parties agreed that the defendant would contact an engineering firm in Mitchell to review the permanent site protection alternatives. (Id.) Randy Behm, the Cultural Resources Project Manager for the Corps, is responsible for coordinating and executing a contract with the engineering consultant and it was expected that he would execute that contract in early October 2001. (Id.)

Defendants filed a motion to dismiss the original complaint, or in the alternative, motion for summary judgment. (Doc. 53.) The original complaint should be dismissed, contend defendants, because all of the statutory [*7] requirements of NAGPRA relating to the inadvertent discovery of human remains at the St. Philip's Cemetery in December 1999 have been satisfied. Defendants maintain that the NAGPRA requirements of notification, certification, and cessation of activity for thirty days were satisfied. The final NAGPRA requirement of taking reasonable efforts to protect the remains before resuming activity was satisfied, according to defendants, when the parties collaboratively removed all of the loose and scattered remains at the St. Philip's Cemetery between January [*982] 10, 2000 and February 17, 2000. In compliance with the Court's preliminary injunction issued on January 10, 2000, the defendants did not raise the water levels of the Lake until after all of the loose and scattered remains that had been discovered had been removed from the lakeshore.

In support of their motion to dismiss defendants argue that the Tribe no longer has standing to pursue this action and that there is no longer a case or controversy. Defendants assert that all of the relief available under NAGPRA has been granted to the Tribe and fulfilled by the defendants. Although the Tribe argues a case or controversy exists because a permanent [*8] solution has not been developed to ensure the protection of any remains exposed in the future, the defendants maintain that the Court does not have the authority under NAGPRA to address long-term protection of remains that may be exposed in the future.

The Tribe contends that neither the removal of the loose and scattered remains in February 2000, nor the temporary solution for covering the remains in place renders the continuing injury moot for purposes of judicial review. Rather, the Tribe asserts that continued exposure of the ancestors located at St. Philip's Cemetery is an event capable of repetition, yet evading review. Thus, the Tribe maintains that it has standing in this action and there is a live case or controversy under NAGPRA. The Tribe asserts that defendants are required to provide permanent site protection pursuant to their NAGPRA obligation to make a reasonable effort to protect the discovered remains before resuming activity.

The Court granted the Tribe's request to file an amended complaint in October 2000. The amended complaint was served on the defendants in September 2001. (See Certificate of Service, Doc. 58.) The amended complaint contains the same allegations [*9] under NAGPRA as the original complaint and adds a claim for a writ of mandamus, injunctive relief and attorneys fees under the NHPA. The new claim under the NHPA is stated in paragraphs 35 through 54 of the amended complaint. The Tribe contends that (1) the Corps has violated its duty under the NHPA to preserve the human remains at the St. Philip's Cemetery because the cemetery is eligible to be listed on the National Register under the NHPA; (2) the Corps has violated its duty to consult with the Tribe in its preservation related activities at the St. Philip's Cemetery; (3) the Corps is required to allow the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to any undertaking that will affect the St. Philip's Cemetery; (4) the Corps has violated its preservation duties by managing the waters in the Lake in a manner that has eroded the ground around graves, exposing caskets, human remains and resulted in exposure and removal of artifacts. (See Amended Complaint, Doc. 56, PP 35-51.) The Tribe seeks mandamus and injunctive relief under the NHPA to (1) direct the Corps to comply with section 110 of the NHPA by requiring the Corps to preserve [*10] the St. Philip's Cemetery; and (2) require the Corps to consult with the Tribe to preserve and protect the St. Philip's Cemetery. In paragraphs 4 and 6 of the prayer for relief, the [*983] Tribe requests that the Corps be ordered to protect all remains and artifacts at the St. Philip's Cemetery. The Tribe also seeks a writ of mandamus "ordering the Corps to remove all further graves and remains from the White Swan gravesite [i.e., the St. Philip's Cemetery] as soon as the lake can be practicably drawn down sufficiently, but no later than January 1, 2001." (Doc. 56, P 5.) This requested relief is inconsistent with the Tribe's position in the responses to defendants' motions to dismiss, wherein the Tribe requests that the Corps be ordered to leave the remains at the St. Philip's Cemetery in their place and permanently protect them from erosion by the Lake.
The amended complaint contains allegations regarding six additional prehistoric sites on or near the Lake that the Tribe alleges are eroded by the management of the waters in the Lake. The Court previously bifurcated the claims regarding the six additional sites from the claim regarding burials in the vicinity of the old St. Philip's Cemetery. (See Order, Doc. 38, October 23, 2000.)

In their motion to dismiss the amended complaint regarding the NHPA claim, defendants contend that (1) the United States did not waive its sovereign immunity under the NHPA so there is no private cause of action under the NHPA; (2) there has been no final agency action as required by the Administrative Procedures Act giving rise to a cause of action under the NHPA; (3) even if there is a private cause of action under the NHPA, the Tribe's claim is not ripe for review; and (4) there is no case or controversy and the Tribe lacks standing to bring its claim under Article III, Section 2 of the United States Constitution.

DECISION

Contending that the Court lacks jurisdiction over the subject matter of this action, the defendants move to dismiss all of the Tribe's claims pursuant to Federal Rule of Civil Procedure 12(b)(1). Both sides have presented materials, including affidavits, outside the pleadings in support of their respective positions on the motions to dismiss. The Court may consider matters outside the pleadings when considering a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction without converting the defendants' motions to motions for summary judgment. See Deuser v. Vecera, 139 F.3d 1190, 1191, n.3 (8th Cir. 1998).

A federal court must have subject matter jurisdiction at the time it considers issuing injunctive relief, because "federal courts are courts of limited jurisdiction and can only hear actual 'cases or controversies' as defined under Article III of the Constitution." Hickman v. Missouri, 144 F.3d 1141, 1142 (8th Cir. 1998) (quoting Neighborhood Transp. Network, Inc. v. Pena, 42 F.3d 1169, 1172 (8th Cir. 1994)). "When a case ... no longer presents an actual, ongoing case or controversy, the case is moot and the federal court no longer has jurisdiction to hear it." Id. To satisfy the case or controversy requirement, the Tribe must establish it has standing to pursue this action. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992) (holding that the party invoking federal jurisdiction carries the burden of demonstrating the elements of the doctrine of standing). The three elements of standing are that plaintiff show (1) he has suffered an injury in fact - "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical;"'" (2) there is "a causal connection between the injury and the conduct complained of - the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court;"" and (3) that it is "'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Id. (citations omitted).

I. NAGPRA

NAGPRA governs the inadvertent discovery of Native American cultural items on federal or tribal lands. In pertinent part, NAGPRA provides:

[*984] Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the [Interior], or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe . . . with respect to tribal lands, if known or readily ascertainable . . . If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming this activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe . . . that notification has been received, the activity may resume within 30 days of such certification.
25 U.S.C. § 3002(d)(1). Native American cultural items that are inadvertently discovered are subject to the "ownership and control" provisions of 25 U.S.C. § 3002(a).

As the inadvertent discoverer of remains protected by § 3002(d), the Corps has three duties. First, the Corps must meet certain notification and certification requirements, which the Court previously found the Corps has satisfied at least relating to the Tribe. (See Doc. 16, p. 15-17.) Second, the Corps [**15] must refrain from raising and lowering the water levels of the Lake over the St. Philip's Cemetery for at least thirty days from the date of certification. The Corps satisfied its second duty by complying with the Court's temporary restraining order and preliminary injunction issued in December 1999 and January 2000. Third, as the discoverer of the remains, the Corps has a duty to make "a reasonable effort to protect them." The Corps contends it has satisfied its third duty. The Tribe, on the other hand, asserts that the Corps has not satisfied this duty.

In addition to the duties imposed by § 3002(d) upon the discoverer of Native American cultural items, the regulations implementing § 3002(d) impose six additional obligations on responsible federal agency officials who receive notification that Native American cultural remains have been inadvertently discovered on federal lands. See 43 C.F.R. § 10.4(d)(1). In this case, the Corps is the federal agency with primary management authority over the land on which the human remains were discovered. Thus, the regulations provide that the Corps must, within three working days from notification: (1) certify receipt [**16] of the notification; (2) take "immediate steps, if necessary, to further secure and protect inadvertently discovered human remains ... including, as appropriate, stabilization or covering;" (3) notify Indian tribes which might be entitled to ownership or control of the cultural items under NAGPRA; (4) initiate consultation on the inadvertent discovery pursuant to 43 C.F.R. § 10.5 (governing consultation with Indian tribes); (5) follow the provisions of 43 C.F.R. § 10.3(b) (governing intentional excavation or removal) if the cultural items must be excavated or removed; and (6) ensure that the disposition of the cultural items is carried out following 43 C.F.R. § 10.6 (governing custody of Native American cultural items). 43 C.F.R. § 10.4(d)(1).

The motion to dismiss the Tribe's NAGPRA claim is based upon the Corp's contentions that (1) there is a lack of jurisdiction over the subject matter under Rule 12(b)(1); (2) the Tribe lacks standing to bring its claims under Article III, Section [**985] 2 of the United States Constitution; and (3) there is no remaining case or controversy under NAGPRA, Article [**17] III, Section 2 of the United States Constitution. The essence of the Corps' position is that this case no longer presents a live case or controversy because it has satisfied all of its duties under NAGPRA and the Tribe has received all of the relief available to it under NAGPRA.

For purposes of the motion to dismiss, the Court assumes the exposed bones at the St. Philip's Cemetery are remains of deceased Native Americans, which are "human remains" within the meaning of NAGPRA. Such bones clearly fall within the regulations' definition of human remains as "the physical remains of a person of Native American ancestry . . . [excluding] remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into rope or nets." 43 C.F.R. § 10.2(d)(1).

The Court previously ruled that the defendants' re-observation of the cemetery site in 1999 constitutes an inadvertent discovery of human remains. (See Doc. 16.) The regulations define an inadvertent discovery as "the unanticipated encounter or detection of human remains, funerary objects, sacred objects, [**18] or objects of cultural patrimony found under or on the surface of Federal or tribal lands." 43 C.F.R. § 10.2(g)(4). Further, the Court held that § 3002(d) and its regulations apply to the Corps' discovery and that the Corps' regulation of the Lake's water level, and its consequent effect upon the lakeshore, is an "activity" under § 3002(d). (See Doc. 16.)

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[111] The Corps concedes that it and its employees are "persons" within the meaning of § 3002(d), see 43 C.F.R. § 10.2(a)(5) (defining "person"), and that the cemetery is located on federal land, see 25 U.S.C. § 3001(5) (defining "federal lands").
The Court finds that the Tribe has standing to pursue its claim under NAGPRA and that there is a live case or controversy in this action. It is clear from the record in this action that the Corps has satisfied its duty to protect the loose and scattered remains which were discovered at the St. Philip's Cemetery, because those remains were removed from the site and reburied in January and February 2000. It is not clear, however, that the Corps has satisfied its duty imposed by 43 C.F.R. § 10.4(d)(ii) to secure and protect the remains that were embedded in the frozen soil, but known to the Corps in December 1999. The Tribe has alleged an injury in fact, because the remains embedded in frozen soil, which were inadvertently discovered in December 1999, were not removed and reburied and the record at this point supports the Tribe's contention that some of the embedded remains continue to exist and are exposed at the St. Philip's Cemetery when the Lake's waters do not cover the cemetery. The Tribe points out, however, that while it wishes to leave all known remains in place, rather than remove and rebury the remains, the parties agreed in November 2000 to cover the remains as temporary protection until a permanent solution could be developed. There is nothing in the record to establish that the parties' agreement to temporarily cover the embedded remains has been executed to protect the known remains. Without protection, the remains continue to be subject to being exposed, scattered, desecrated in a variety of ways and washed downstream. This is sufficient to find an injury in fact for purposes of the standing inquiry.

Finally, the third requirement of standing is satisfied in this case. The Court has the authority to require the Corps to comply with its duties under NAGPRA and its implementing regulations by issuing a writ of mandamus under 28 U.S.C. § 1361. See Borntrager v. Stevas, 772 F.2d 419, 420 (8th Cir.), cert. denied, 474 U.S. 1008, 88 L. Ed. 2d 464, 106 S. Ct. 533 (1985) (holding that "mandamus may issue against an officer of the United States only when the plaintiff has a clear right to relief, the defendant has a clear duty to perform the act in question, and the plaintiff has no adequate alternative remedy."). The Corps argues that the plaintiffs have received all of the relief they may obtain under NAGPRA and, thus, a favorable judgment in this action will not likely redress the Tribe's alleged injury. The essence of the Corps' argument is that its cessation of activity in accordance with the Court's temporary restraining order and preliminary injunction and removal of the loose and scattered remains in January and February 2000 relieved it of all duties under NAGPRA and its implementing regulations. Contrary to the Corps' argument, neither NAGPRA nor its implementing regulations relieve the Corps of its duty to secure and protect inadvertently discovered human remains upon the lapse of the thirty-day cessation-of-activity period. See 25 U.S.C. § 3002; 43 C.F.R. § 10.4. In addition to the cessation of activity requirement imposed upon the discoverer of remains by 25 U.S.C. § 3002(d) and 43 C.F.R. § 10.4(c), the Corps has the additional duty under 43 C.F.R. § 10.4(d)(ii) to "take immediate steps, if necessary, to further secure and protect inadvertently discovered human remains, [**22] funerary objects, sacred objects, or objects of cultural patrimony, including, as appropriate, stabilization or covering." 43 C.F.R. § 10.4(d)(ii). This regulation does not specify a time period within which the Corps is relieved of its duty to secure and protect inadvertently discovered human remains. At least for purposes of the standing inquiry on the Corps' motion to dismiss, the Court concludes that it is likely that the Tribe's injury will be redressed by a favorable decision in this action.

The Court concludes that the Tribe has standing to pursue its claim for injunctive relief under NAGPRA and that this case presents an Article III case or controversy. Thus, defendants' Motion to Dismiss the original complaint, Doc. 53, will be denied.

II. NHPA

The amended complaint adds a claim for injunctive relief under the NHPA. Before a federal agency may authorize the expenditure of any federal funds on an "undertaking" and prior to the issuance of any license, the agency must "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. [**23] " 16 U.S.C. § 470f. The agency must allow the Advisory Council on Historic Preservation ("Advisory Council") established under
the NHPA, a reasonable opportunity to comment on the undertaking. Id. The NHPA also requires a federal agency to develop a preservation program to ensure that historic properties under the agency's control are identified, evaluated and nominated to the National Register of Historic Places ("National Register"), and that properties listed or eligible for listing on the National Register are identified, evaluated and nominated to the National Register of Historic Places ("National Register") in a way that considers the preservation of their historic, archaeological, architectural and cultural values. See 16 U.S.C. § 470h-2(a). In addition, a federal agency must carry out its preservation-related activities in consultation with other federal, state and local agencies, Indian Tribes and the private sector. Id. The NHPA further requires the federal agency to provide a process to identify and evaluate historic properties for listing in the National Register and to provide a process to develop and implement agreements, by consulting with State Historic Preservation Officers ("SHPO's"). ([**24**]) local governments, Indian tribes and the interested public, regarding the means by which adverse effects on such properties will be considered. Id. The federal agency must also comply with NAGPRA's requirements regarding the disposition of Native American cultural items from Federal or tribal land. See 16 U.S.C. § 470h-2(a)(2)(E)(iii) (requiring compliance with 25 U.S.C. § 3002(c)).

The Tribe's NHPA claims stated in the amended complaint are that the Corps has not given the Advisory Council a reasonable opportunity to comment regarding its activity at the St. Philip's Cemetery and the Corps has failed to perform its preservation duties, including consulting with the Tribe, imposed by the NHPA. The duty to afford the Advisory Council a reasonable opportunity to comment on an undertaking is provided in 16 U.S.C. § 470f. The NHPA preservation duties the Tribe contends the Corps has violated are stated in 16 U.S.C. § 470h-2(a).

The grounds asserted by the defendants in their motion to dismiss the NHPA claims are that there is no private right of action under the NHPA; there has been no final agency action; the claims are not ripe for review; and, the Tribe lacks standing to bring the NHPA claims.

In support of the motion to dismiss, the defendants submitted a written Cultural Resource Management Plan ("CRMP"), dated August 30, 1984, which is represented as the Corps' current cultural resource program for historic properties on all of the Missouri River mainstem reservoirs under its management in compliance with the NHPA. (See Declaration of Sandra Barnum, Doc. 63, Exhibit 1.) The CRMP establishes a program to identify, evaluate and protect historic properties on reservoirs, including the Lake, and it includes a process for nominating eligible sites for the National Register. (Id.) The Corps is currently in the process of revising the CRMP and there will be a separate cultural resource program for the Lake. (Id., Doc. 63 at PP 3 and 4.) Before the CRMP for the Lake is finalized, the Corps will afford the opportunity to comment on the plan to the SHPO, the Advisory Council, any interested tribes and the interested public. (Id. P 4.)

In addition to the CRMP, the defendants submitted a 1993 Programmatic Agreement ("PA") signed by the Corps, ([**26**]) the Advisory Council and the SHPO's of Montana, North Dakota, South Dakota and Nebraska regarding the effects of operation and management of the six Missouri River mainstem reservoirs, which includes the Fort Randall Dam and the Lake. (See Doc. 63, Exhibit 2.) The purpose of the PA was to demonstrate that the Advisory Council and the relevant SHPO's agreed with the Corps' plan to manage the reservoirs and that the PA satisfied the Corps' responsibilities under the NHPA for all aspects of managing the reservoirs. The PA also explicitly states that the execution and implementation of the PA evidenced that the Corps afforded the Advisory Council a reasonable opportunity to comment on the effects on historic properties of the Corps' administration of the Missouri River Main Stem Reservoir projects, as required by 16 U.S.C. § 470f.

([*988*]) The Tribe first claimed that the Corps was not complying with its asserted preservation and consultation duties under the NHPA in a letter to the Corp dated January 27, 2000. In the January 27, 2000 letter, the Tribe stated that it was concerned the Corps was not complying with the NHPA by failing to consult with the Tribe and failing ([**27**]) to take measures to protect the St. Philip's Cemetery as required by 16 U.S.C. § 470h-2. (See Doc. 63, Exhibit 8.) The Tribe further expressed its concern that the Corps was not complying with the 1993 PA. (Id.) The Tribe demanded that the Corps immediately comply with the consultation requirements of 16 U.S.C. § 470f and its responsibilities under 16 U.S.C. § 470h-2. (Id.) A
meeting of all interested parties was requested by the Tribe. (Id.) Nothing in the record demonstrates that such a meeting occurred.

The record in this action does not contain a letter from the Corps in response to the Tribe's January 27, 2000 letter. The Corps, however, sent a letter dated February 1, 2000 to the Tribe as well as several other parties informing all recipients that the Corps had made an initial determination that the St. Philip's Cemetery was not eligible for listing on the National Register. (See Doc. 63, Exhibit 7.) The Corps sent the letter to the South Dakota SHPO, the Advisory Council and seven area tribes, including the Tribe, the South Dakota State Archaeologist, and the Bureau of Indian Affairs. [**28] (Id.) That letter explained the reasons for the Corps' initial determination that the St. Philip's Cemetery was not eligible for listing on the National Register and requested concurrence from the recipients of the letter. (Id.)

On March 6, 2000, the South Dakota SHPO sent a letter to the Corps stating that it did not have sufficient information to concur with the Corps determination that the St. Philip's Cemetery was not eligible for listing on the National Register. (See Doc. 63, Exhibit 9.) The Corps supplied the requested information to the South Dakota SHPO in June 2000. (Doc. 3, Exhibit 10.) The South Dakota SHPO then requested site forms from the Corps by letter dated June 30, 2000. (Doc. 63, Ex.12.) The Corps does not have site forms for the St. Philip's Cemetery and was attempting to supply those in the fall of 2001. (Doc. 63, P 10.) There is nothing in the record to indicate whether the South Dakota SHPO has concurred with the Corps determination that the St. Philip's Cemetery is not eligible for listing on the National Register.

Not having received a response from the Tribe to its February 1, 2000 letter, the Corps sent a second letter to the Tribe dated June 2, 2000, explaining [**29] the reasons for its eligibility decision and requested a letter of agreement or disagreement from the Tribe within 20 days. (Doc. 63, Exhibit 11.) The Tribe responded by letter dated July 11, 2000, sharply disagreeing with the Corps' eligibility determination. (Doc. 63, Exhibit 13.) But the Tribe did not supply any information in the letter to support its conclusion that the St. Philip's Cemetery is eligible for listing on the National Register. (Id.) The Tribe did not address any of the criteria for eligibility or present any substantive arguments on how the St. Philip's Cemetery satisfies those criteria. (Id.)

The Advisory Council informed the Corps by letter dated July 17, 2000, that it voted to terminate the 1993 PA. The reason cited for terminating the PA was that the Corps' handling of the situation at the St. Philip's Cemetery served "to illustrate the degree to which the [Corps] has disregarded commitments it made in the PA and the resulting consequences this has had for irreplaceable resources under its care. The Council is forced to conclude [**989] that the Corps is unable, or unwilling to carry out the terms of the PA." (See Doc. 63, Exhibit 3.) By terminating the PA, the Advisory Council informed the Corps that it believed the Corps was required to comply with 36 C.F.R. § 800, Subpart B, for all individual undertakings previously covered by the PA.

The Corps sent a letter dated September 6, 2000 to the Advisory Council in response to the July 17, 2000 letter, stating that the Corps' initial decision was that the St. Philip's Cemetery was not eligible for listing on the National Register, but that the eligibility status was "unresolved" at that time. (See Doc. 63, Exhibit 4.) In the July 17, 2000 letter, the Corps recognized that the Advisory Council could "withdraw" from the PA, but informed the Advisory Council that pursuant to the PA a 90-day discussion period was to follow any formal withdrawal. (Id.) The Corps offered to work with the Advisory Council to resolve the dispute during the 90-day discussion period. (Id.)

The last communication between the Advisory Council and the Corps contained in the record in this action is the letter from the Corps dated September 6, 2000, recognizing that the Advisory Council could withdraw from the PA. The record does not establish whether the Advisory Council formally withdrew from the PA, or whether a subsequent agreement was reached between the Corps and the Advisory Council. Thus, it is not clear from the record whether the PA is still in effect or whether the Corps and the Advisory Council have reached a compromise to allow the Council to comment.

A. Private Cause of Action
The defendants contend that a private cause of action does not exist under the NHPA. In support of this argument, the defendants cite National Trust for Historic Preservation v. Blanck, 938 F. Supp. 908 (D.D.C. 1996), aff'd, 340 U.S. App. D.C. 183, 203 F.3d 53 (D.C. Cir. 1999), which held that the NHPA does not create a private right of action against the government. The Blanck court held that the Army's decision at issue in that case could be reviewed under the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. § 706. 938 F. Supp. at 915-16.

The Tribe contends that Congress clearly intended to create a private right of action under NHPA pursuant to 16 U.S.C. § 470w-4, which provides:

In any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

16 U.S.C. § 470w-4. In support of its argument that a private right of action exists, the Tribe cites to decisions from the Second, Third, Fourth, Fifth and Ninth Circuit Courts of Appeals where private individuals and groups sought injunctive relief against a federal agency under the NHPA. See Boarhead Corp v. Erickson, 923 F.2d 1011, 1017 (3d Cir. 1991); Presidio Golf Club v. National Park Service, 155 F.3d 1153 (9th Cir. 1998); Vieux Carre Property Owners, Residents & Assocs. v. Brown, 875 F.2d 324 (5th Cir. 1989) (subsequent history omitted); National Center for Preservation Law v. Landrieu, 635 F.2d 324 (4th Cir. 1980) (per curiam); WATCH v. Harris, 603 F.2d 310 (2d Cir.), cert. denied, 444 U.S. 995 (1979).

The Eighth Circuit implicitly recognized that a private right of action exists under the NHPA in Ringsred v. City of Duluth, 828 F.2d 1305, 1309 (8th Cir. 1987). The plaintiff in Ringsred was an individual seeking to prevent the construction of a parking ramp in downtown Duluth, Minnesota, until the effects of the project on the environment and on historic properties were more formally considered. Id. at 1306. The Eighth Circuit concluded that plaintiff's claim was outside the scope of the NHPA because the project plaintiff sought to enjoin was not an "undertaking" pursuant to 16 U.S.C. § 470f. See id. Thus, although the plaintiff's NHPA claim lacked merit, the Eighth Circuit did not find a jurisdictional bar to a private right of action under the NHPA. See id.

The authority cited by the Tribe is more persuasive than Blanck, 938 F. Supp. at 915 on the issue of whether a private right of action exists under the NHPA for an individual seeking injunctive relief against a federal agency. Moreover, the Eighth Circuit implicitly recognized that a private right of action exists under the NHPA. See Ringsred, 828 F.2d at 1309. The Court finds that a private right of action exists under the NHPA and that the Tribe may seek injunctive relief against the Corps.

B. Final Agency Action

The Corps contends that because there is no private right of action under the NHPA, the Tribe can only seek judicial review under the Administrative Procedures Act. This argument is moot in light of the Court's finding above that a private right of action does exist under the NHPA and that the Tribe may seek injunctive relief against the Corps.

C. Ripeness of NHPA Claim

The test for determining whether a claim is ripe for review was set forth by the Supreme Court in Abbott Laboratories v. Gardner, 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (abrogated on other grounds by Califano v. Sanders, 430 U.S. 99, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977)): whether the issue is fit for judicial decision, and second, whether withholding court consideration would result in hardship to the parties. The first factor contains two elements, whether the issue presented is a legal one, and whether the agency action in question is final within the meaning of the APA, 5 U.S.C. § 704. See 387 U.S. 136, 149. [**35] Citing Abbott, the Eighth Circuit set forth four factors that the Court is to consider in determining whether a claim is ripe for judicial review in the administrative context: "(1) the issues presented are purely legal, (2) the issues are based on final agency action, (3) the controversy has a direct
and immediate impact on the plaintiff's business, and (4) the litigation is calculated to expedite final resolution rather than delay or impede effective agency enforcement." Lane v. United States Department of Agriculture, 187 F.3d 793 (8th Cir. 1999).

Asserting that it is in the midst of its compliance with 16 U.S.C. § 470h-2 by revising the CRMP for the Lake, the Corps contends that the Tribe's claim under the NHPA is not ripe for review. To the contrary, the Tribe contends its NHPA claim is ripe and should not be dismissed. The Tribe asserts that the Court has the authority under the NHPA to issue restraining orders, injunctions and writs of mandamus against the defendants, requiring the defendants to preserve, protect, stabilize, maintain and properly manage the St. Philip's Cemetery. It appears the Tribe contends this authority is derived from 16 U.S.C. §§ 470h-2(a)(1) and 470w(8).

[*991] The Tribe's two claims under the NHPA will be evaluated separately to determine if they are ripe for review. The first claim is that the Corps has not complied with 16 U.S.C. § 470f, which states in relevant part:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State ... shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation ... a reasonable opportunity to comment with regard to such undertaking.

16 U.S.C. § 470f (emphasis added). The plain meaning of this statute is that the duty to allow the Advisory Council an opportunity to comment on an undertaking does not arise unless the property on which the undertaking will occur is "included in or eligible for inclusion in the National Register." Id.

Although the Corps made an initial determination, the Corps has not made a final decision on whether the St. Philip's Cemetery is "eligible for inclusion in the National Register." Id. The Corps has given several entities, including the Tribe, the opportunity to present evidence and arguments in support of the position that the cemetery is eligible for listing on the National Register. The Corps identified and analyzed the criteria in written communication to the Tribe on at least two occasions and sought the Tribe's concurrence with the eligibility determination. In response to the Corp's written communication, the Tribe summarily informed the Corps that it disagrees with the Corps' initial eligibility determination. The record does not establish, however, that the Tribe has supplied the Corps with evidence or substantive arguments regarding the cemetery's eligibility. The South Dakota SHPO is in the process of determining whether it will concur with the Corps' eligibility determination. In summary, the record establishes that the Corps has made an initial determination that the St. Philip's Cemetery is not eligible for listing on the National Register, but that determination is not final.

Upon considering the ripeness test set forth in Abbott, 387 U.S. at 149, and in Lane, 187 F.3d at 795, the Court finds the Tribe's NHPA claim based on 16 U.S.C. § 470f is not ripe for review. The issue of whether the St. Philip's Cemetery is eligible for listing on the National Register, which would trigger the Corps' duty to consult under 16 U.S.C. § 470f, is more a factual than a legal issue. A factual record must be established to determine whether the site meets the criteria listed in 36 C.F.R. part 63. In addition, the Corps' action is not final, as discussed above, because the Corps has not made a final determination that the St. Philip's Cemetery is not eligible for inclusion on the National Register. Moreover, the Tribe has not pursued its statutory right to appeal to the Secretary of the Interior the Corps' failure to nominate the St. Philip's Cemetery for inclusion on the National Register. See 16 U.S.C. § 470a(a)(5) (providing that any

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112Section 470w(8) provides that:

"Preservation" or "historic preservation" includes identification, evaluation, recordation, documentation, curation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, research, interpretation, conservation, and education and training regarding the foregoing activities, or any combination of the foregoing activities.
person may appeal to the Secretary of the Interior a nominating authority's refusal to nominate a property for listing on the National Register). Ultimately, the Secretary of the Interior has the responsibility for determining whether a property is included on the National Register, and the Secretary has not been given the opportunity to decide whether the St. Philip's Cemetery meets the eligibility criteria. See 16 U.S.C. § 470a. Thus, the first two factors in the ripeness test are not satisfied in this case.

The third and fourth factors in the ripeness test enunciated by the Eighth Circuit in Lane, 187 F.3d at 795, are derived from the second factor set forth by the Supreme Court in Abbott, 387 U.S. at 152-54. These factors are not satisfied in this case. The Tribe will not suffer hardship by the Court's dismissal of its NHPA claim under 16 U.S.C. § 470f at this juncture. The Corps has offered on at least two occasions to consider any evidence supplied by the Tribe in support of its claim that the St. Philip's Cemetery is eligible for listing on the National Register. The Tribe has the option of providing any such evidence to the Corps. If the Tribe is unsuccessful in persuading the Corps to nominate the site, the Tribe may file an appeal with the Secretary of the Interior to challenge the Corps' failure to nominate the St. Philip's Cemetery for inclusion on the National Register. See 16 U.S.C. § 470a(a)(5) (providing that any person may appeal to the Secretary of the Interior a nominating authority's refusal to nominate a property for listing on the National Register). If the Secretary of the Interior disagrees with the Corps' initial determination, and the St. Philip's Cemetery is listed on the National Register, the Corps will then be required to comply with the consultation duties under 16 U.S.C. § 470f.

In addition to lack of ripeness, the Tribe has failed to exhaust its administrative remedies. The record does not demonstrate that the Tribe has pursued its statutory right to an appeal of the Corps' refusal to nominate the St. Philip's Cemetery for listing on the National Register. An appeal to the Secretary of the Interior is expressly provided in 16 U.S.C. § 470a(a)(5), which states: "any person or local government may appeal to the Secretary a nomination of any historic property for inclusion on the National Register and may appeal to the Secretary the failure or refusal of a nominating authority to nominate a property in accordance with this subsection." The Corps is a nominating authority and the Tribe has failed to appeal any decision of the Corps regarding the nomination of the St. Philip's Cemetery for inclusion on the National Register.

The NHPA does not require the Tribe to exhaust its administrative remedies prior to seeking judicial review. See 16 U.S.C. § 470a(a)(5). Thus, it is within the Court's discretion whether this action should be dismissed for failure to exhaust administrative remedies. See Missouri v. Bowen, 813 F.2d 864, 871 (8th Cir. 1987); McCarthy v. Madigan, 503 U.S. 140, 144, 117 L. Ed. 2d 291, 112 S. Ct. 1081 (1992) (recognizing that where Congress has not mandated exhaustion of administrative remedies, "sound judicial discretion governs" the exhaustion inquiry). Explaining the exhaustion doctrine, the Eighth Circuit stated:

The basic concept underlying the requirements of the exhaustion doctrine is that of judicial economy. Encouraging exhaustion serves to avoid premature interruption of the administrative process by allowing an agency to apply its special expertise, to discover and correct errors, and to develop a factual background on the issue in question. Moreover, requiring exhaustion discourages the "frequent and deliberate flaunting of the administrative process."

Id. In this case, if the Tribe were allowed to pursue judicial review of the Corps' initial determination to refuse to nominate the St. Philip's Cemetery for listing on the National Register, it would certainly create a "premature interruption of the administrative process." Id. The Secretary of the Interior, who has the ultimate authority to determine whether a property is listed on the National Register, has not been given the opportunity to discover or correct errors or to develop a factual background on the cemetery's eligibility. Therefore, the Court concludes that the Tribe's failure to exhaust administrative remedies in this case requires the dismissal without prejudice of its NHPA claim under 16 U.S.C. § 470f.

The Tribe's second NHPA claim is under 16 U.S.C. § 470h-2(a), which provides in relevant part:

(1) The heads of all Federal agencies shall assume responsibility for the preservation of historic properties, which are owned or controlled by such agency. ... Each agency shall undertake, consistent with the preservation of such properties and the mission of the agency and the professional standards established pursuant to section 470a(g) of this title, any preservation, as may be necessary to carry out this section.
(2) Each Federal agency shall establish ... in consultation with the Secretary, a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties. Such program shall ensure -

(A) that historic properties under the jurisdiction or control of the agency, are identified, evaluated, and nominated to the National Register;

(B) that such properties under the jurisdiction or control of the agency as are listed in or may be eligible for the National Register are managed and maintained in a way that considers the preservation of their historic, archaeological, architectural, and cultural values in compliance with section 470f of this title and gives special consideration to the preservation of such values in the case of properties designated as having National significance;

(C) that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning;

(D) that the agency's preservation-related activities are carried out in consultation with other Federal, State, and local agencies, Indian tribes ... carrying out historic preservation planning activities, and with the private sector; and

(E) that the agency's procedures for compliance with section 470f of this title-

(i) are consistent with regulations issued by the Council pursuant to section 470s of this title;

(ii) provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with State Historic Preservation Officers, local governments, Indian tribes ... and the interested public, as appropriate, regarding the means by which adverse effects on such properties will be considered; and

(iii) provide for the disposition of Native American cultural items from Federal or tribal land in a manner consistent with section 3002(c) of Title 25.

16 U.S.C. § 470h-2(a). It appears from the Tribe's arguments, that it is claiming the Corps has violated its preservation duty under subsection (a)(1) and that the Corps has violated its consultation duty in relation to preservation of the St. Philip's Cemetery under subsection (a)(2).

As to the Tribe's claim under subsection (a)(1), the statute does not impose on the Corps any preservation duty regarding the St. Philip's Cemetery unless it is determined that the cemetery is eligible for listing on the National Register. The Corps' preservation duties under 16 U.S.C. § 470h-2(a)(1) are for "historic properties" it owns or controls. The term "historic properties" under the NHPA is defined in 16 U.S.C. § 470w(5) as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource." 16 U.S.C. § 470w(5) (emphasis added). Thus, the preservation duties in 16 U.S.C. § 470h-2(a)(1) are not triggered until it is determined that the St. Philip's Cemetery is eligible for listing on the National Register. As explained above, the issue of whether the St. Philip's Cemetery is eligible for listing on the National Register is not ripe for review and the Tribe has not exhausted its administrative remedies on this issue. Therefore, the Tribe's NHPA claim under 16 U.S.C. § 470h-2(a)(1) will be dismissed without prejudice.

As to the Tribe's claim under subsection (a)(2), the Corps has submitted the CRMP, which covers the Lake and the area of the St. Philip's Cemetery. The Corps is in the process of updating the CRMP and will have a specific CRMP for the Lake. The consultation duty under subsection (a)(2) relates to the preservation of historic properties that are eligible for inclusion on the National Register. Like the Tribe's other NHPA claims, the claim under 16 U.S.C. § 470h-2(a)(2) is not ripe for review and the Tribe has not exhausted its administrative remedies. Accordingly,

IT IS ORDERED:

(1) That the defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment, Doc. 53, and the defendants' Motion to Dismiss Amended Complaint, Doc. 61, are denied as to the

(2) That the plaintiff's claims under the National Historic Preservation Act, 16 U.S.C. § 470 et seq., as stated in the First Amended Complaint (Doc. 56) relating to the St. Philip's Cemetery are dismissed without prejudice because they are not ripe for judicial review and the plaintiff has failed to exhaust its administrative remedies on this claim as stated in this opinion.

(3) That the plaintiff's claims under the National Historic Preservation Act, 16 U.S.C. § 470 et seq., as stated in the First Amended Complaint (Doc. 56) relating to six additional sites, which were earlier bifurcated by the Court, are dismissed without prejudice for the same reasons that plaintiff's NHPA claims relating to the St. Philip's Cemetery are dismissed.

Dated this 21ST day of March, 2002

BY THE COURT:

Lawrence L. Piersol
Chief Judge
OPINION: [*16] [**714] Brian Jonathan Krantz appeals his convictions following a jury trial for injury or destruction of an archeological object [*17] (count 1--Pen. Code, § 622 1/2), taking a migratory non-game bird (count 3--Fish & G. Code, § 3513), and obtaining or possessing Native American remains from a grave (count 4--Pub. Resources Code, § 5097.99, subd. (b)). The jury acquitted appellant of guiding without a license (counts [****2] 2 & 6--Fish & G. Code, § 2536), and taking a migratory non-game bird (count 5--Fish & G. Code, § 3513). He was granted three years probation.
Appellant contends: he was denied his due process right to have the jury consider the defense of entrapment, the trial court failed to adequately respond to the jury's requests for information, the trial court abused its discretion by denying his motion for new trial, and there is insufficient evidence supporting his count 1 conviction. We affirm the judgment.

FACTS

At the time of his offenses, appellant was employed as a guide on Santa Cruz Island by Island Adventures, a hunting and camping operation owned by Jaret Owens. Appellant lived on the island. He met hunters from the mainland and took their belongings to a campsite located at Smuggler's Ranch. He cooked meals for the hunters. He brought the animals the hunters shot back to the campsite, where he butchered the carcasses and prepared them for shipment to the mainland. Island Adventures paid for appellant's room and board, in addition to $200 for each [**715] guide trip he conducted. He also depended on tips from hunters.

Santa Cruz Island (the island) is one of five channel islands [***3] encompassing a national park. Chumash Native Americans populated the island for 5,000 years. They left the island about 200 years ago. The name "Chumash" means makers of shell-bead money. The Chumash created beads out of shells, which they used as money, ornamentation, and sacred objects.

There are a number of visible Chumash village sites on the island. The graves of the Chumash are usually grouped together in areas outside of, but adjacent to, the village sites. Visitors to the Channel Islands are provided literature instructing them that all historical features of the Channel Islands are protected, and warning them not to disturb or remove archeological resources.

Besides graves, Chumash artifacts can be found within layers of dirt or sediment called "midden." Midden contains the physical remains of the living activities of individuals who resided at a particular location. Native American midden can be thousands of years old and normally includes pieces of animal bone, shellfish, remains of homes, fire pits, and various [*18] artifacts. Midden is readily recognizable in archeological excavations because of the changes in the dirt due to the presence of the organic material.

Generally, [***4] the archeological record of the Channel Islands is in excellent condition, and the layers of midden are intact. On the island, midden is very noticeable due to its thick concentration of shells and dark-colored soil.

During the relevant incidents herein, the National Park Service owned 75 percent of the island and was a tenant-in-common with Francis Gherini. Island Adventures conducted its business on Gherini's land pursuant to a lease. Gherini distributed a portion of the money he earned under the lease to the park service.

Appellant was told by Owens and the federal ranger on the island, Ronald Massengill, not to disturb midden sites and not to dig up human remains. Appellant was notified that, if he found archeological material, he was to leave it in place and notify the park service.

On March 6, 1995, appellant told ranger Massengill that hunters had found a human skull, and he was worried they would be accused of disturbing a Native American gravesite. Massengill told appellant he had done the right thing. Massengill found the skull as appellant directed; it was located 25 yards away from Midden Site 137, the place where appellant later committed two of his offenses. Appellant [***5] suspected the skull was planted by the National Park Service as part of a sting operation.

In 1994 or 1995, word spread that artifacts were disappearing off the island and that an international market existed for the objects. Paul Starbard, also a guide for Island Adventures, told the chief ranger of the Channel Islands National Park, Jack Fitzgerald, that Owens had instructed him in 1986 or 1987 that high-paying customers or "high rollers" could collect Native American artifacts as part of their trips to the island. Based on this information and other incidents regarding archeological resources, Fitzgerald decided that an undercover investigation was required.
Todd Swain and Jeff Sullivan, criminal investigators with the National Park Service, posed as wealthy excursionists seeking a hunting trip from Island Adventures. Their job was to investigate the possible theft and trafficking of Native American artifacts and human remains from the island. Swain and Sullivan were instructed to avoid the possibility of entrapment. They were simply to collect and document evidence for the park service. Appellant himself was not under investigation.

The investigators made their first excursion [*6] to the island with Island Adventures in August 1995. Nothing of significance occurred during that trip.

[*19] Swain and Sullivan again were assigned to conduct an undercover visit to the island in September 1996. The information at the time indicated that Owens was still involved in illegal activity relating to the taking or destruction of archeological resources. Again, the investigators were cautioned not [*716] to entrap anyone, but to merely observe as alleged wealthy hunters. Appellant was their guide, as on their earlier trip.

Count 1

One evening, appellant took the investigators on a walk to scout for sheep. At one point, he showed the men a large boulder with holes in it and explained that the Native Americans had used it for grinding plant matter. As they walked further, appellant pointed to Midden Site 137 and described the area as an archeological site. When the men approached a bank at the site, appellant pulled off several tennis-ball-sized clods of soil from the bank. He broke the pieces apart and explained that the shell material and dark-colored soil were midden. He then tossed the pieces onto the ground. Appellant told the investigators that he had found shell beads and [*7] arrowheads at that location in the past. Earlier in the trip, Swain had asked appellant about the history of the shell beads he had noticed at Smuggler's Ranch. Appellant had replied that "it was a federal offense to collect those, but f*** it."

[*20] The evidence at the trial revealed that taking any portion of midden out of its stratigraphic context may forever ruin the ability of archeologists to reconstruct the way of life of the people who inhabited the area. Midden Site 137 was part of a Chumash village, which was one of the longest in existence. The site provided a whole history of the village and was an important piece of information on Chumash history. Breaking off a piece of midden from Site 137 large enough to hold in one's hand could destroy the potential of the site for archeological purposes. Even a handful of midden can contain valuable evidence not contained within the rest of the archeological site.

Count 3

On another day, after the investigators killed a sheep, they commented on the number of ravens, which had gathered on the animal's remains. Appellant told them they could shoot at the ravens. He himself shot at the ravens with his rifle. He said he hated ravens [*8] and liked to shoot at them. The incident was tape-recorded, and the tape was played for the jury. On another occasion, appellant twice fired his rifle down a canyon at a flock of ravens and commented that he had killed one. Sullivan photographed appellant as he was shooting.

[*717] The evidence at the trial revealed that ravens are commonly found on the island and are protected by law. The appearance of ravens on the island is extremely rare. Appellant and Massengill had several conversations about raven behavior. Appellant told Massengill about his dislike of ravens. Massengill told him that ravens were protected by law.

Count 4

Further facts show that appellant took the investigators to an area he described as containing human bones or a grave. This was again in the area of Midden Site 137. Appellant had offered to show the men human remains on four separate prior occasions. He led the men to a rock, tilted the rock forward, and pulled out several bones, including a portion of a jaw bone, an arm bone, and part of a skull. He handed the remains to the investigators.
Appellant dug into the ground and removed more human fragments, including some teeth. He offered the remains to the [***9] investigators as souvenirs. Swain took some teeth. Appellant placed the rest of the uncovered bones into the hole he had dug, put rocks and dirt in front of the hole, jumped up and down on the spot, and scattered brush over the area.

This incident also was tape-recorded, and the tape was played for the jury. Appellant stated on the tape that the bones he showed the investigators were human and that the teeth were "typical Indian teeth." He further stated that he thought the whole body was there, and that some day when the ranger was gone he was going to come back and bring a trowel. He said the area could be a burial ground and there could be "body after body." He told the investigators not to tell Owens about the incident, stating that Owens would "s*** [in] his pants if he knew." Appellant also said he was "probably f*** up Cro-Magnon Man or something like that."

The evidence at the trial revealed that experts for the prosecution visited the site where appellant had picked up the bones. The experts observed that the site had been disturbed, but not by an archeologist. Part of the soil was loose, muddy and broken into little chunks, and there were a large number of insects.

It was not unusual for Chumash burial grounds to be in a low-lying area near a water course. Bodies were not buried deeply into the ground because the Chumash did not have metal tools. The location from which appellant dug up the remains for the investigators was unquestionably a Chumash burial site. The large number of bones found in that location, including the arm bones and the mandible, were located where one would expect to find [*21] Chumash remains in a place of primary interment. The human teeth appellant gave to Swain showed exposure down to the dentin, the layer underneath the tooth enamel. The Chumash living on the Channel Islands ate roots, fibers, shellfish and other abrasive material which ground down their teeth.

Prosecution experts removed three pieces of jaw, an arm bone, and part of a skull from the spot dug up by appellant. The surrounding soil in which the bones were situated was very hard and compacted, which also indicated the site was a grave. Radiocarbon testing of the bones determined they were approximately 1,800 years old. The three pieces of jaw were pieced together with the jaw fragment appellant had dug up for the investigators, and were found to comprise [***11] a complete lower jaw of one individual.

The experts also determined that the remains located at the site were not left in that location through erosion or other natural forces. That the pieces of jaw and the teeth were found together was consistent with the bones arriving there through burial and not water erosion. With water erosion, different parts of the skeleton would be distributed over a long distance due to the differing weights and densities of the various bone fragments. Furthermore, bones transported by water become rounded and retain alterations along their edges, features which the bones at the site did not exhibit. In addition, there was no secondary soil present with the bones, which would have been washed down along with the bones in the event of water erosion.

Defense

The sole defense theory presented at the trial was that appellant did not believe when he committed the crimes that he was violating any law.

Midden Site 137 was located on Gherini's land. He used the land as an operational ranch, primarily for sheep and cattle grazing. Gherini did not protect the site, and his animals were not prevented from grazing there. Agricultural machinery also was used [***12] near Midden Site 137. There also was oil exploration at the Gherini ranch in the past, and oil companies used bulldozers and earth grading equipment, at times turning up human remains. Vehicle traffic also turned up Native American artifacts. There were frequent storms on the eastern end of the island where Midden Site 137 was located, and the creek bed near the site flooded when it rained.

Appellant testified that Swain told him he was decorating his house with Native American artifacts. Swain implied he would pay appellant for artifacts. However, appellant did not think the investigators had a great
deal of [*22] money. But, since they were friends of Owens and appeared to be very interested in artifacts, appellant took them to Midden Site 137. The bank where he took out some soil had shifted often in the past because of erosion, and the entire area flooded every year. Appellant removed only a cupful of dirt from which small shell pieces crumbled off. He did not know the area was designated by a midden site number.

Once during the trip, when appellant was taking the investigators to scout for sheep, Swain found a Native American donut stone on the trail. Appellant was surprised; the [***13] stone was an exceptionally beautiful one, and he had just walked over the same place and had not seen it. Appellant testified that Swain asked him over and over if he could have it, but appellant told him no. Appellant [**718] testified he later put the stone back near the place where Swain had picked it up.

Because of the investigators' interest in artifacts, appellant also took them to the place where he had earlier found some bones. Appellant believed the bones were from a pig, and did not believe the area was an undisturbed Native American burial site. He told the investigators the remains were human only to impress them and give them a good time, as Owens would have done. Swain asked appellant if he could take one of the bones. Appellant told him removing things from the island was illegal. He believed Swain, nonetheless, took a piece of jaw with teeth in it.

Appellant testified he shot at ravens once in a while because they attacked baby lambs and pigs. He did not kill any ravens while he was with the investigators. He may have been aiming at a wounded sheep when he was photographed by Sullivan.

Consistent with appellant's testimony, defense counsel theorized during his closing argument [***14] that the prosecution had not proved appellant had violated the law. Counsel belittled the "Mickey Mouse" charges against appellant. He characterized count 1 as a ridiculous charge, commenting, "Picking up a handful of dirt is destruction of an archaeological site? Give me a break." Counsel condemned the amount of time spent by the prosecution on count 3, remarking, "I mean, for crying out loud, we need the US government to prosecute people for shooting at ravens?"

Defense counsel focused his arguments on count 4. He stated the prosecution had not established that the bones appellant found were from a gravesite, or even that the bones were Native American. Counsel further argued that appellant had not taken any remains himself, and that "it's not against the law to show somebody Native American remains or even to touch them or pick them up." [*23]

DISCUSSION

Entrapment

Appellant first contends the trial court prejudicially denied defense counsel's request for jury instructions on the defense of entrapment.

In a criminal case, a trial court has the duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence. (People v. Estrada [***15] (1995) 11 Cal. 4th 568, 574, 904 P.2d 1197.) The trial court is under no duty to give a requested instruction when there is no substantial evidence to support it. (People v. Hendricks (1988) 44 Cal. 3d 635, 643, 244 Cal. Rptr. 181, 749 P.2d 836.) This rule applies to defense theories. Although defendant has the right to an instruction that pinpoints the theory of his defense, the trial court is not required to instruct on a defense unless (1) defendant appears to rely on such defense, or (2) there is substantial evidence supportive of such defense which is not inconsistent with defendant's theory. (People v. Mincey (1992) 2 Cal. 4th 408, 437, 827 P.2d 388; People v. Sedeno (1974) 10 Cal. 3d 703, 716, 112 Cal. Rptr. 1, 518 P.2d 913.)

Here, appellant did not rely on the defense of entrapment, nor did defense counsel specifically argue such theory before the jury. Hence, the issues are whether there is substantial evidence supportive of an entrapment theory, and whether such a theory is consistent with appellant's offered defense. (People v. Sedeno, supra, 10 Cal. 3d at p. 716.)
The proper test for entrapment in California is whether the conduct of the law enforcement official was likely to induce a normally law-abiding person to commit the offense. (People v. Barraza (1979) 23 Cal. 3d 675, 689-690, 153 Cal. Rptr. 459, 591 P.2d 947.) It is presumed that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity—for example, a decoy program—is permissible. Overbearing conduct, such as badgering, cajoling, or other affirmative acts likely to induce a normally law-abiding person to commit the crime, is not permissible. (Id., at p. 690.)

[*24] An entrapment defense is not inconsistent with appellant's theory offered at the trial that he did not believe he was doing anything illegal. It would not have subverted his defense theory to also argue that the law enforcement conduct directed at him constituted entrapment. (People v. Barraza, supra, 23 Cal. 3d at pp. 690-691.) A defendant need not admit his guilt in order to raise the issue of entrapment. (Id., at p. 691.) Nevertheless, did appellant's testimony constitute substantial evidence of an entrapment theory? No.

"Substantial evidence," in the context of determining whether certain evidence warranted a requested instruction, is defined as evidence which was sufficient to deserve consideration by the jury, that is, evidence from which a reasonable jury could have concluded that the particular facts underlying the instruction did exist. (People v. Lemus (1988) 203 Cal. App. 3d 470, 477, 249 Cal. Rptr. 897.) Defendant's testimony alone may constitute substantial evidence to warrant a requested instruction. (Ibid.; People v. Sullivan (1989) 215 Cal. App. 3d 1446, 1450, 264 Cal. Rptr. 284.)

Here, the jury could not have concluded from appellant's testimony that facts existed which permitted it to reasonably conclude he was entrapped. His testimony did no more than point out that a decoy program was utilized (the investigators were presented as Owens' friends), and that the decoy program provided him with the mere opportunity to commit crime (the investigators continually expressed their interest in viewing and possessing Native American artifacts). Appellant did not corroborate his opinion of the investigators' conduct with any affirmative acts committed by them, from which the jury could have concluded that they acted impermissibly.

The only evidence in the record hinting at any affirmative conduct by law enforcement officials is the skull and the donut stone episodes. These episodes do not reasonably tend to establish entrapment. Appellant implied on the witness stand that the skull and the stone were "planted" to ensnare him. However, the skull incident occurred prior to the instant investigation and is therefore irrelevant. As appellant's testimony reveals, he did not pick up the donut stone, and he refused to let Swain take it off the island. This leads to the reasonable inference that appellant had the ability to say no to the investigators' alleged requests for artifacts. In addition, no criminal charges against appellant resulted from the stone incident.

In view of the insufficient evidence supporting an entrapment theory, the trial court properly refused to instruct the jury on an entrapment defense. We further hold the trial court did not err by instructing the jury, in response to their request during deliberations for the "definition of entrapment and its relevance to the case," that "the legal defense of entrapment is not involved in this case. It should not be considered by you in your deliberations." Nor did the trial court err by denying appellant's new trial motion on the ground he was denied a fair trial by the court's refusal to instruct on entrapment.

Jury's Additional Request

Appellant next contends the trial court erred in answering the jury's second request for information during deliberations for a "further definition of the word ['obtain']." The judge responded: 'The word 'obtain' is a
commonly used word in the English language. It has no special meaning in the instructions which have been given to you."

The jury was instructed: "Defendant is accused in Count 4 of having violated section 5097.99 [subdivision (b)] of the Public Resources Code, a felony. [P] Every person who knowingly or willfully obtains or possesses [***20] Native American human remains [**720] which are taken from a Native American grave after January 1, 1988 is guilty of a felony. [P] In order to prove this crime, each of the following elements must be proved: [P] 1. A person knowingly or willfully obtained or possessed Native American human remains; [P] 2. The remains were taken from a Native American grave after January 1, 1988. [P] A 'grave' is an excavation in the earth for use as a place of burial or a place of interment. [P] 'Native American' includes all Indians of the western hemisphere."

Appellant argues the word "obtain" in the instruction is ambiguous, and therefore confused the jurors. He also claims that, if he merely handled the remains without the intent to possess them, he is not criminally liable. Not so.

Appellant did not request the instruction to be amplified or clarified by including a definition of the word "obtain." A trial court is not required sua sponte to give an instruction defining a particular word or phrase used in a statute, if the word or phrase is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law. (People v. Estrada, [***21] supra, 11 Cal. 4th at p. 574.)

We agree with the trial court that the word "obtain" has no peculiar legal meaning. It therefore required no sua sponte definition by the trial court.

Nor, under the instruction, did appellant need to possess the remains in order to have violated the statute. As stated in the instruction, the statute uses [*26] the disjunctive word "or." Hence, appellant could be guilty either by obtaining or possessing the Chumash remains.

The jurors were provided with a legal definition of the term "possession" (CALJIC No. 1.24 (6th ed. 1996 bound vol.)), and thus were given a legal definition with which to compare with the non-legal, disjunctive word "obtain." The dictionary defines "obtain" as to get, acquire, procure, attain or reach, or to take hold of. (Webster's College Dict. (1992) p. 935.)

The evidence reveals that appellant dug up, acquired, took out, and got hold of human remains. With or without his intention to possess the remains, his conduct was violative of the statute as defined by the instruction.

Substantial Evidence

Appellant finally contends there is insufficient evidence to support his count 1 conviction, injury or destruction of an archeological [***22] object. (Pen. Code, § 622 1/2.) He claims it cannot be determined from the record that the dirt he picked up was a piece of midden. He states Midden Site 137 had the appearance of a natural gully or creek bed, through which rains would flow and material from the banks would be washed out to sea. He points out that the site also was subject to human and animal movements from ranching, and was not roped off or protected as an archeological site.

Appellant further argues that criminal sanctions should not be imposed for his "de minimis" conduct.

Penal Code section 622 1/2 provides that "every person, not the owner thereof, who willfully injures, disfigures, defaces, or destroys any object or thing of archeological or historical interest or value, whether situated on private lands or within any public park or place, is guilty of a misdemeanor."

Here, appellant merely presents evidence which might be reconciled with a contrary finding. It is the jury, not the appellate court, which must be convinced of defendant's guilt beyond a reasonable doubt. (People v.
Stanley (1995) 10 Cal. 4th 764, 792-793, 897 P.2d 481.) There is substantial, indeed overwhelming, evidence in the record [*23] that appellant violated the statute. (Id., at p. 792.)

Appellant was not an inexperienced guide. He lived on the island and was familiar with its history and its terrain. He knew what midden looked like, and he knew the whereabouts of Midden Site 137 and its archeological [*27] significance. He bragged to the investigators about his knowledge of Chumash artifacts, and even admitted he previously had taken artifacts from the site. He voluntarily and willfully took a piece of midden [*721] from the ground, containing shells and dark-colored soil typical of Chumash midden, to show the investigators. He indicated his disrespect for the law protecting the artifacts.

Whether his conduct was worthy of criminal sanctions or not is a matter which has already been decided by the Legislature.

The judgment is affirmed.

STONE, P.J.

We concur:

GILBERT, J.

COFFEE, J.
OPINION:

[*1384] [**805] In an action by the Attorney General of the State of California (the State) and the State of California's Native American Heritage Commission (the Commission) against defendants David Van Horn and Archaeological Associates, Ltd., seeking to recover possession of "Native American artifacts . . . taken from a Native American grave" (Pub. Resources Code, § 5097.99, subd. (a)), defendants have appealed from a summary judgment in favor of plaintiffs which judgment granted plaintiff's application for a permanent mandatory injunction requiring [**806] defendants to [***2] surrender possession of certain artifacts. In our view, the trial court rightly granted the motion for summary judgment, and so we shall affirm.

113 At the time the complaint was filed, section 5097.99 recited in its entirety: "No person shall obtain or possess any Native American artifacts or human remains which are taken from a Native American grave or cairn on or after January 1, 1984, except as otherwise provided by law or in accordance with an agreement reached pursuant to subdivision (1) of Section 5097.94 [agreement between landowners and Indians] or pursuant to the provisions of Section 5097.98 [descendants may recommend 'the scientific removal and nondestructive analysis of human remains and items associated with North American burials']." In 1987, section 5097.99 was amended to provide that knowingly or willfully to obtain or possess such artifacts or remains is a felony.
Background

As reflected by the pleadings, along with the several filings in support of and in opposition to the State's motion for summary judgment, the following events led to this litigation. The City of Vista hired Archaeological Associates, Ltd., to conduct an archaeological survey on private property which the city planned to acquire for use as an industrial park. David Van Horn is an archaeologist who is an employee and vice-president of Archaeological Associates, and who resides in Sun City. The president of Archaeological Associates is Ruth Van Horn, David's wife. The survey was to be conducted to develop data for part of an environmental impact report on the environmental consequence of the proposed development of the property. During the survey, David Van Horn (Van Horn) uncovered an ancient grave dating from precolonial times and containing the skeletons of two males. One of the skeletons had an 80-pound metate (millstone) fragment on his chest; the other skeleton had a 30-pound metate fragment and another rock on his chest.

Van Horn contacted the county coroner, as required by Health and Safety Code section 7050.5, subdivision (b). Under subdivision (c) of that section, if the coroner has reason to believe that the human remains are those of a "Native American," he or she is required to telephone the Commission, a nine-member state agency, within twenty-four hours. Thereupon, per section 5097.98 of the Public Resources Code, the Commission is required to notify "those persons it believes to be most likely descended from the deceased Native American," in order that the descendants may recommend the disposition of the remains "and any associated grave goods." This section further requires, if the Commission cannot identify a descendent, or if the identified descendent fails to make a recommendation, that "the landowner or his or her authorized representative shall reinter the human remains and items associated with Native American burials with appropriate dignity on the property . . . ." (Pub. Resources Code, § 5097.98, subd. (b); unless otherwise noted, all further statutory references will be to the Public Resources Code.)

In the case here, however, after Van Horn contacted the coroner, the coroner mistakenly called the Bureau of Indian Affairs instead of the Commission. The coroner otherwise instructed Van Horn to excavate the remains and to place them in the custody of the San Diego Museum of Man. Van Horn did so, and the remains were examined by the museum's curator of physical anthropology, Rose Tyson. Tyson concluded that one of the skulls had features which were characteristic of inhabitants of a particular area of Baja California. Otherwise, the metates were removed from the grave by Van Horn and were taken by him to Archaeological Associates' laboratory in Sun City.

Sometime thereafter, the Oceanside Blade-Tribune reported the discovery, and apparently implied that Van Horn had attempted to conceal it from the public. (The newspaper articles are not in the record.) After several Indian groups in northern San Diego County had learned of the discovery, a meeting was held which included a representative of the city, a representative of the local Luiseno Tribe of Mission Indians (Henry Rodriguez), and Van Horn. At the meeting, it was agreed that the remains would be taken from the museum and reburied at the site where they had been found; however, the metates were not discussed at the meeting.

Shortly afterwards, a second meeting was held. That meeting included a representative from the museum, Van Horn, Rodriguez, and two members of the group inhabiting the Pechanga Indian Reservation, one of whom, Vincent Ibanez, is also a member of the Commission. Ibanez asked Van Horn to give up the metates in order that they could be reburied with the remains. Van Horn refused to do so, asserting, in his view, that it would be unethical to contribute to the loss of an archaeological collection which had been gathered at considerable expense to the public; that it was not certain that the remains were those of California Indians, and that the Indian claims to the metates were based on race rather than kinship or culture.

[*1386] Then, about a year after the remains had been discovered, the State and the Commission (hereinafter referred to collectively as the State) filed the underlying action for injunctive relief against Van Horn and Archaeological Associates (defendants).
Synopsis of Trial Court Proceedings

In the complaint, the State alleged that defendants had possession of the metates; that defendants' continued possession of the metates was in violation of section 5097.99, and that defendants should be compelled to return the metates to the landowners.

Van Horn and Archaeological Associates, each acting in propria persona, filed separate answers to the complaint. Van Horn alleged in his answer that he was not [***7] in violation of section 5097.99 because he had never been in possession of the "artifacts," and that the artifacts were in the sole possession of Archaeological Associates. Van Horn also alleged that he was a member of the Society of Professional Archaeologists, and that the society's code of ethics required him actively to support conservation of the archaeological resource base.

Archaeological Associates alleged in its answer that it was not in violation of section 5097.99 because it was not certain that the grave was Native American, and that the artifacts were not "associated grave goods" within the meaning of section 5097.94, subdivision (k) (covering agreements between landowners and descendents regarding disposition of Native American remains and associated grave goods).

Archaeological Associates also filed a cross-complaint for injunctive relief against the State and the landowners. In the cross-complaint, Archaeological Associates alleged that the Commission and the landowners' decision to rebury the remains and the artifacts was in violation of Health and Safety Code section 7054 (disposal of human remains in any place other than a cemetery a misdemeanor), and that the [***8] Commission and the landowners should be restrained from burying the remains and the artifacts in any place which was not a cemetery.

The State answered the cross-complaint, denying its allegations, and requesting expenses and attorney's fees on the grounds that the cross-complaint was frivolous and intended solely to cause unnecessary delay. Apparently no disposition has been made of the issues raised by the cross-complaint and the answer thereto.

After it had filed its answer and cross-complaint, Archaeological Associates, now represented by an attorney, filed an amended answer to the [*1387] complaint, denying its allegations and raising two affirmative defenses. The first affirmative defense alleged that the Commission had no jurisdiction to direct the reburial of the metates, because, among other things, it had never determined whether the metates constituted "items associated with Native American burials" (§ 5097.94, subds. (k), (l)), or "associated grave goods" (§ 5097.94, subd. (k)). The second affirmative defense raised several constitutional objections to sections 5097.9 through 5097.99 relating to Native American historical cultural and sacred sites (see post [***9]).

About a year later, the State noticed a motion for summary judgment and for an order imposing sanctions pursuant to Code of Civil Procedure section 128.5, the latter on the ground that defendants had engaged in frivolous and dilatory tactics. The motion included a statement of undisputed facts which recited, in relevant part:

"2. Defendant Archaeological Associates, Ltd. . . . is presently in possession of two metates or metate fragments which were taken from a grave after January 1, 1984.

"3. The grave from which the aforesaid metates were taken was the grave of two members of the aboriginal peoples of [**808] North America, including the area now known as Baja California.

"4. Defendant Van Horn has exercised dominion and control over the aforesaid metates, with the knowledge and acquiescence of defendant Associates, by refusing to return them to the owners of the land from which they were taken, after demand by plaintiff Attorney General and others.

"[5.] Defendants do not allege any provision of law authorizing their retention of the metates; they do not allege that their continued possession of the metates is in accordance with an agreement entered into
pursuant to subdivision ([***10] l) of Public Resources Code section 5097.94; and they do not allege that their retention of the metates is pursuant to section 5097.98 of the Public Resources Code."

The State's motion was supported by, among other things, Archaeological Associates' answers to the State's interrogatories, and several declarations of a deputy attorney general. In its answer to the State's interrogatories as to whether it contended that there was a distinction between the terms "Indian" and "Native American," and, if it did so contend, to state the nature of the distinction, Archaeological Associates stated that it contended there was a distinction between the two terms, and that the distinction was that "'Indian,' when used as a noun, means a member of any of the aboriginal peoples of the western hemisphere. . . . 'Native American,' when used as a noun, means any individual who is a citizen of the United States and who is a descendent of aboriginal peoples whose tribal territory is located within the boundaries of the continental United States."

In one of his declarations, the deputy attorney general representing the State stated that Van Horn had told him it was an "open question" [***11] as to whether the metates were grave goods, and that he, Van Horn, personally felt that the metates had been placed on the chests of the skeletons not as grave goods, but simply to weigh the bodies down.

Archaeological Associates filed opposition to the State's motion for summary judgment. The opposition included a separate statement in response to the State's statement of undisputed material facts. Responding to the earlier statement, the opposition statement recited, in relevant part:

"2. [Responding to the statement that Archaeological Associates was in possession of metates taken from a grave:] Defendant agrees it has possession of metate fragments but disagrees that the same were taken from a 'grave' as that term is defined by statute.

"3. [Responding to the statement that the grave was that of two members of the aboriginal peoples of North America:] Defendant agrees except for its reservations, set forth in paragraph 2 above, concerning the term 'grave.'

"4. [Responding to the statement that Van Horn had exercised dominion and control over the metates, with the knowledge and consent of Archaeological Associates:] Defendant disagrees, and asse[†]ts it has exercised dominion [***12] and control over the metate fragments with the knowledge and acquiescence of defendant Van Horn rather than the reverse as set forth by plaintiff.

"5. [Responding to the statement that defendants did not allege any provision of law authorizing their retention of the metates.] 'Defendant disagrees.'"

Archaeological Associates' opposition also included a statement of material facts, which it contended were disputed. That statement recited:

"[1.] The site where the metate fragments were taken by defendant was not a 'grave' as that term is employed in § 5097.99 of the Public Resources Code and § 7014 of the Health and Safety Code.

"[2.] The metate fragments are not 'Native American' artifacts as that term is employed in § 5097.99 of the Public Resources Code.

"[3.] The metate fragments are neither 'associated grave goods' nor 'items associated with Native American burials' as such [**809] terms are employed in § 5098.98 of the Public Resources Code."

"[*1389] "[4.] Defendant's possession of the metate fragments is lawful.

"[5.] The owner of the site where the metate fragments were removed does not have a genuine desire for their return."
Archaeological Associates' opposition also included a declaration by Van Horn, a declaration by Clement Meighan, professor of anthropology at UCLA, and the Commission's responses to Archaeological Associates' interrogatories.

Van Horn stated, in his declaration, that, in his opinion, the remains were those of members of Mexican Indians societies rather than local Indian tribes, because: (1) the mortuary practice of local tribes was cremation rather than burial; (2) the burial of two people in a single grave created the inference that their deaths had occurred in a single traumatic event while they were travelling together, and (3) the cranial features of one of the remains suggested that he was from Baja California. Van Horn also stated, in the declaration, that it was his opinion that the metates were not "grave goods" because: (1) "grave goods" represented personal items buried with the deceased which were personal to the deceased and intended to accompany him in his journey in the afterlife; (2) it was rare to find any such items in a prehistoric Indian burial; (3) metates as grave goods were customarily found with female remains, because milling was done by the female members of prehistoric Indian societies; (4) such metates were customarily broken by poking holes in their centers, rather than fracturing them across their faces, as was done in the grave here, and (5) in his experience in excavating prehistoric Indian burials, grave goods were at the bottom of the burial pit and had no physical relationship to the remains.

Professor Meighan's declaration emphasized the importance of preserving prehistoric tools or artifacts, and recited that "current practice [was] to retain all artifactual specimens so that they will be available to future scholars."

In its interrogatories to the Commission, Archaeological Associates had asked the Commission to state the definition of "Native American" which the Commission used in its administration of section 5097.99 of the Public Resources Code, and to identify any authorities on which it relied for such definition. In its response, the Commission stated that it had not formally adopted a definition of "Native American"; that it had not needed such a definition in order to carry out its responsibilities under section 5097.99, and, for purposes of the current litigation, that it accepted as a definition of "Native American" the definition Archaeological Associates had given of "Indian," namely, "a member of any of the aboriginal peoples of the western hemisphere."

Archaeological Associates had also, in the interrogatories, asked the Commission to state its definition of "items associated with Native American burials" (§ 5097.98), "associated grave goods" (ibid.), and "artifacts" (§ 5097.99). The Commission's response to those questions was that the information was not relevant to the subject matter of the action.

After a hearing on the State's motion for summary judgment, a hearing which was not reported, the trial court granted the motion, and ordered the State to prepare a statement of facts. The State did so; Van Horn and Archaeological Associates each filed objections thereto, and the State filed replies to the objections. After a hearing on the foregoing, an order was entered granting the motion and stating the reasons therefor and denying the State's motion for sanctions. A second order was entered directing defendants to deliver the metates to the landowners or their authorized representatives.

The first order, granting the motion, recited, in relevant part: "1. The undisputed material facts establish that defendants possess Native American artifacts in violation of Public Resources Code section 5097.99.

"... [**810]

"(f) Under a common-sense reading of section 5097.99, consistent with the evident purpose of the Legislature [citations], the court finds [sic] that the Indian grave from which the metate sections were taken constitutes a Native American grave within the meaning of 5097.99 and that the metate sections constitute Native American artifacts within the meaning of that statute."

Defendant Van Horn, as already noted, has variously asserted that he is not in possession of the metates, but that the corporate defendant has them in its possession. Without going into a rationalization to
demonstrate the absurdity of such contention at this point (see post), it is enough to note here that the trial court's order of January 15, 1988, recited that "[d]efendant Van Horn exercised dominion and control over the metate sections by personally refusing to return them to the owners of the property from which they were taken after demand to do so, and, therefore, has sufficient possession of the artifacts for purposes of section 5099.99." Later in its order, the trial court otherwise observed that "[s]ummary judgment is appropriate against defendant Van Horn for failure to submit a statement of undisputed material facts." (Code Civ. Proc., § 437c, subd. (b).) Because the trial court was correct in such recital and its later observation, with reference to the alleged violation of section 5097.99, we shall hereafter refer to the defendants collectively. The second order, in regard to the metates, was stayed, and the metates were placed in custody of the director of the San Diego Museum of Man. This appeal followed.

Discussion

Defendants contend: (1) in interpreting section 5097.99, the trial court failed to consider the purpose of the entire statutory scheme; (2) the trial court overlooked triable issues of material fact; (3) sections 5097.98 and 5097.99 are unconstitutionally vague; (4) sections 5097.98 and 5097.99 deprive defendants and all archaeologists of due process and equal protection of the law, and (5) chapter 1.75 of division 5 of the Public Resources Code (§ 5097.9 et seq.) violates the establishment of religion clause of the First Amendment. For its part, the State contends: (1) defendants have no standing to bring the appeal, and (2) the appeal is frivolous, and sanctions should be awarded therefor. We address the standing issue first.

I. Standing

The State contends that defendants have no standing to bring their purported appeal, because they are not "aggrieved" parties within the meaning of Code of Civil Procedure section 902 ("Any party aggrieved may appeal in the cases prescribed in this title . . . .") The State's standing argument is that defendants are not "aggrieved" because they have no legal possessory interest in the metates, in that they took the metates from the real property of others, and do not claim any ownership interest therein. However, as defendants recognize, ante, the interest which was litigated in the current action was a possessory rather than an ownership interest. Specifically: (1) in its complaint, the State alleged that defendants' continued possession of the metates was unlawful and in violation of section 5097.99; (2) section 5097.99 recites that "No person shall obtain or possess any Native American artifacts . . . .," and (3) in its amended answer, Archaeological Associates denied that its continued possession of the metates was unlawful, and denied that it was in violation of section 5097.99.

Further, although the trial court ruled that defendants' possession of the metates was unlawful, for the State to argue that defendants' have no standing to challenge that ruling because they have no legal possessory interest in the metates is to beg the question, i.e., to assume the issue which is being challenged.

Finally, it ill behooves the State to attempt to abridge the remedial rights of parties whom, by suing, the State has forced to invoke such rights. Accordingly, we reject the State's standing contention and proceed to the merits of the appeal.

II. The Statutory Scheme

Defendants contend, by interpreting "artifacts" in section 5097.99 literally, that the trial court failed to consider the purpose of the entire statutory scheme. Hardly.

Section 5097.99 is part of chapter 1.75 ("Native American Historical, Cultural, and Sacred Sites"), which was added to Division 5 ("Parks and Monuments") of the Public Resources Code in 1976. At that time, chapter 1.75 consisted of eight sections, 5097.9 through 5097.97. Those sections concerned the establishment of the Commission, and they delineated the Commission's powers and duties with respect to places of special religious or social significance to Native Americans on public property.
In 1982: (1) language was added to subdivision (a) of section 5097.94 to extend the Commission's powers and duties to private lands; (2) subdivisions (k) and (l) were added to section 5097.94 and a new section, 5097.98, was added, to extend the Commission's powers and duties to the disposition of Native American human remains and associated grave goods, and (3) another new section, 5097.99, the section under review here, was added to prohibit the obtaining or possessing of Native American artifacts or human remains taken from graves except as provided in subdivision (1) of section 5097.94 or section 5097.98.\footnote{The earliest state legislation requiring Indian remains to be reburied was enacted in Iowa in 1974. Currently, almost half of the states have adopted such legislation or are considering doing so, and the United States Congress is also considering such legislation. (Wolinsky, Unburying Indian Bones: Science vs. Spirituality (1989) 9 Am.C. Physicians Obs. 1.)}

Defendants contend that section 5097.99, and specifically the word "artifacts" in that section, must be interpreted in the context of the other 1982 additions to chapter 1.75, particularly subdivisions (k) and (l) of section 5097.94 and section 5097.98, and in the light of the express legislative purpose of the addition. We set forth the legislative purpose and the statutes in question.

The legislative purpose of the 1982 additions is stated in a historical note following section 5097.94. The note recites:

"(a) The Legislature finds as follows:

"(1) Native American human burials and skeletal remains are subject to vandalism and inadvertent destruction at an increasing rate.

"(2) State laws do not provide for the protection of these burials and remains from vandalism and destruction.

"(3) There is no regular means at this time by which Native American descendents can make known their concerns regarding the treatment and disposition of Native American burials, skeletal remains, and items associated with Native American burials.

"(b) The purpose of this act is:

"(1) To provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction.

"(2) To provide a regular means by which Native American descendents can make known their concerns regarding the need for sensitive treatment and disposition of Native American burials, skeletal remains, and items associated with Native American burials."

Subdivisions (k) and (l) of section 5097.94 give the Commission the following additional powers and duties:

"(k) To mediate, upon application of either of the parties, disputes arising between landowners and known descendents relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials.

"(l) To assist interested landowners in developing agreements with appropriate Native American groups for treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials."
Section 5097.98 recites:

"(a) Whenever the commission receives notification of a discovery of Native American human remains from a county coroner pursuant to subdivision (c) of Section 7050.5 of the Health and Safety Code, it shall immediately notify those persons it believes to be most likely descended from the deceased Native American. The descendents may, with the permission of the owner of the land, or his or her authorized representative, inspect the site of the discovery of the Native American remains and may recommend to the owner or the person responsible for the excavation work means for treating or disposing, with appropriate dignity, the human remains and any associated grave goods. The descendents shall complete their inspection and make their recommendation within 24 hours of their notification by the Native American Heritage Commission. The recommendation may include the scientific removal and nondestructive analysis of human remains and items associated with Native American burials. [Italics added.]

"(b) Whenever the commission is unable to identify a descendent, or the descendent identified fails to make a recommendation, or [***24] the landowner or his or her authorized representative rejects the recommendation of the descendent and the mediation provided for in subdivision (k) of Section 5097.94 fails to provide measures acceptable to the landowner, the landowner or his or her authorized representative shall reinter the human remains and items associated with Native American burials with appropriate dignity on the property in a location not subject to further subsurface disturbance. [Italics added.]

"(c) Notwithstanding the provisions of Section 5097.9, the provisions of this section, including those actions taken by the landowner or his or her authorized representative to implement this section and any action taken to implement an agreement developed pursuant to subdivision (1) of Section 5097.94, shall be exempt from the requirements of the California Environmental Quality Act (Division 13 (commencing with Section 21000)).

"(d) Notwithstanding the provisions of Section 30244, the provisions of this section, including those actions taken by the landowner or his or her authorized representative to implement this section, and any action taken to implement an agreement developed pursuant to subdivision (1) [***25] of Section 5097.94 shall be exempt from the requirements of the California Coastal Act of 1976 (Division 20 (commencing with Section 30000))."

Defendants contend that the trial court erred in defining the metates to be "artifacts" as referred to in section 5097.99, without also defining metates to be "associated grave goods" or "items associated with Native American burials" as referred to in section 5097.98. Such latter definition is necessary, defendants argue, because only "associated grave goods" or [***26] "items associated with Native American burials" are subject to mandatory reburial under statutory law.

Defendants misread the pertinent statutes. The mandatory reburial provisions appear in section 5097.98 and not in section 5097.99; in the case before us defendants' possession of the metates was challenged only under section 5097.99. Section 5097.99 in clear and unambiguous language makes it unlawful to possess a Native American artifact taken from a Native American grave, unless the possession is either in accordance with an agreement between the landowner and appropriate Native American groups (§ 5097.94, subd. (1)), or pursuant to a recommendation by the descendents [***26] of the deceased Native American (§ 5097.98). Thus, the possession is unlawful not because the artifacts must be reburied, but because the decision [**813] as to whether the artifacts will be reburied or preserved must be controlled by the Commission. It is this control which defendants seek to transfer from the Commission to the courts.

However, while we appreciate defendants' desire to preserve archaeological specimens in general, and these metates in particular, for the benefit of the public at large, the language of section 5097.99, including the references in that section to sections 5097.94 and 5097.98, clearly gives the choice of preservation or reburial to Native Americans, namely descendents of the Native American deceased or members of Native American groups, acting under the supervision of a commission which is controlled by Native Americans. As to the composition of the Commission, section 5097.92 recites that at least five, i.e., a majority, of its nine members "shall be elders, traditional people, or spiritual leaders of California Native American tribes,
nominated by Native American organizations, tribes, or groups within the state." Significantly, because
section 5097.92 [***27] does not refer to the ethnic or occupational status of the remaining four members
of the Commission, the obvious inference to be drawn from such omission is that the Legislature did not
intend to give archaeologists any statutory powers with respect to Native American burials.

In view of the foregoing, it was unnecessary for the trial court to determine whether metates are "associated
grave goods" or "items associated with Native American burials," before, or in conjunction with, its
defining the metates (which defendants referred to repeatedly as artifacts) to be "artifacts" within the
meaning of section 5097.99. Defendants contend next that section 5097.99 should not have been applied to
them, because the stated purpose of the 1982 additions to chapter 1.75 was to "provide protection to Native
American human burials and skeletal remains from vandalism and inadvertent destruction," whereas,
[*1396] Van Horn, as an archaeologist engaged in the lawful practice of his profession, was not engaged in
any such vandalism or inadvertent destruction.

However, the foregoing vandalism language was used with respect to human burials and skeletal remains,
which are not at issue in the [***28] case here. Moreover, the second stated purpose of the 1982 additions
to chapter 1.75, which is relevant to the case here, is to provide a regular means for Native American
descendants to voice their concern about the disposition of skeletal remains and items associated with
Native American burials, and that language does not include any references to vandalism. Accordingly,
defendants' contention that section 5097.99 does not apply to them because Van Horn was not vandalizing
human remains is without merit.

Defendant also argues that it is "significant" that the only mandate in the legislative purpose, directed to
items associated with Native American burials, is one designed to provide Native American descendants
with a means of voicing their concerns about the disposition of such items, and that there is no reference to
any legislative intention to "bury such articles forever," or to "prohibit the scientific study of such artifacts
by the professional archaeological community." However, nothing in sections 5097.94, 5097.98 or 5097.99
either mandates the burial of such artifacts or prohibits their scientific study -- except at the request of the
Native American descendant or [***29] at the Commission's failure to identify a descendent. Further, the
reason the artifacts must be reburied if the Commission fails to identify a descendent is, as Van Horn
acknowledged in a letter to his colleagues, because in cases where descendant groups were selected,
virtually all such groups decided to rebury the bones and the accompanying "finds."

In view of the foregoing, we attach no significance to the Legislature's failure to include any references
either to mandatory burial or scientific study in its statement of purpose, and the trial court's application of
section 5097.99 to defendants was manifestly not inconsistent with the stated purpose of the statutory
scheme. [***814]

III. Triable Issues of Material Fact

Defendants contend that the trial court erred in granting the State's motion for summary judgment because
there were triable issues of material fact presented by the filings against the motion.

In reviewing the propriety of granting a motion for summary judgment, the applicable guidelines are well
established and frequently stated. In Golden West Broadcasters, Inc. v. Superior Court (1981) 114
Cal.App.3d 947 [*1397] [171 Cal.Rptr. 95], [***30] we said, "In approaching such a decision the trial
court is guided by well settled and clearly defined rules. 'Summary judgment is proper only if the affidavits
in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent does
not by affidavit show such facts as may be deemed by the judge hearing the motion sufficient to present a
triable issue.' [Citing Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal.2d 412, 417 (42 Cal.Rptr.
449, 398 P.2d 785).]" (Id. at p. 954.)

In other words, as to the first requirement to be met by the moving party, only if it can be determined that
the moving party's declaration, "'considered in light of the issues raised by the pleadings . . . would,
standing alone[,] support the summary judgment motion[,] does the court look to any counteraffidavits and
Once the court [***31] has considered the filings before it and found that there are no triable issues of fact presented by such filings, determination of the motion for summary judgment then becomes a determination of an issue of law which the court must make. (Shields v. County of San Diego (1984) 155 Cal.App.3d 103, 108 [202 Cal.Rptr. 30].)

In short, as observed by the court in Reid v. State Farm Mut. Auto Ins. Co. (1985) 173 Cal.App.3d 557 [218 Cal.Rptr. 913], "...an issue which is abstractly one of fact may be resolved by summary judgment if the moving party's declarations fully establish the claim or defense and his opponent's declarations fail to rebut it. [Citation.] To put the matter otherwise, the issue of fact becomes one 'of law' and loses its 'triabale' character if the undisputed facts leave no room for a reasonable difference of opinion." (Id. at pp. 570-571.)

Whenever a court must rule on a motion for summary judgment, the factual issue guidelines for such motion are fixed by reference solely to the pleadings.

In the case here, the factual basis for the State's action against defendants [***32] is limited indeed. It consists solely of an effort to obtain injunctive relief to redress defendants' alleged violation of section 5097.99. Such violation consists of possessing any "Native American artifacts ... taken from a Native American grave ... after January 1, 1984, except as otherwise provided by law or in accordance with an agreement reached pursuant to subdivision (1) of Section 5097.94 or pursuant to Section 5097.98."

[*1398] In making its prima facie showing in support of the motion for summary judgment, the State, by pointing to the corporate defendant's amended answer, was able to show that it is in possession of the two metates. The State showed by means of defendants' answers to interrogatories that the metates were removed from an Indian grave. The questions thus posed are whether the metates are "artifacts" and whether an Indian is a "Native American," both within the meaning of section 5097.99.

The trial court, in ruling upon the motion, purported to make findings that the "Indian grave from which the metate sections were taken constitutes a Native American grave within the meaning of 5097.99 and that the metate sections constitute Native American [***33] artifacts within the [***815] meaning of that statute." The trial court misspoke itself; findings play no part in ruling upon a motion for summary judgment. In reality, what the trial court did was to make a legal determination, as a matter of statutory construction (in which we concur), that the designations metates and artifacts are interchangeable for purposes of applying section 5097.99, just as are the designations Indian and Native American.

The remainder of the State's prima facie case, with the exception of a point noted hereafter, amounted to proving a negative, namely that there is no agreement in force reached either pursuant to subdivision (1) of section 5097.94 or pursuant to section 5097.98. In its complaint, the State alleged that there are no such agreements. Defendants did not specifically deny this allegation and by implication admitted it when they alleged in their amended answer that the metates are not "within the purview of either § 5097.94 or § 5097.98 of the California Public Resources Code . . . . "

As earlier noted in our synopsis of trial court proceedings, defendant Van Horn variously insisted that he was not and had never been in possession [***34] of the metates, with the result that he himself could not have violated section 5097.99. As part of its prima facie showing, the State demonstrated that the physical retrieval and transportation of the metates had been accomplished by the defendant Van Horn.

With respect to his contention, nevertheless, that the metates were in the possession of the corporate defendant, Archaeological Associates, the State argued to the trial court, "Defendant Associates is a corporation whose board of directors comprises two persons, viz., David Van Horn and Ruth Van Horn. Ruth Van Horn is the president of the corporation, and David Van Horn is the vice-president and secretary. (Defendant Associates' answers to interrogatories, exhibits B and C attached hereto, interrogatory Nos. 1, 2.) If defendant Associates possesses the metates, it must obviously be with the concurrence of defendant Van Horn."
David Van Horn has been the officer of defendant Associates who has repeatedly refused demands to return the artifacts. (See, defendant Associates' 'Memorandum in Support of Answer,' pp. 7-10.) To borrow a slogan: 'Corporations do not possess things; people do.' People assert dominion over things, even if on behalf of their corporations.

"Possession consists of actual or constructive custody of an item with knowledge of such custody and an intent to exercise dominion or control over the item directly or through other persons.' (People v. Scheib (1979) 98 Cal.App.3d 820, 828 [159 Cal.Rptr. 665]; see also, People v. Estes (1983) 147 Cal.App.3d 23, 27 [194 Cal.Rptr. 909].)

"In view of defendant Van Horn's conduct necessitating the initiation of these proceedings, there can be little doubt that he has possession of the metates.

"Thus, the undisputed facts establish that defendants possess the metates here in issue in violation of Public Resources Code section 5097.99." (Italics in original.) Such argument was and is precisely correct, and so in reality it was and is undisputed, as a matter of law, that it was defendant Van Horn who took and has retained possession of the metates.

Thus, with reference to the State's entire prima facie showing, as hereinabove recounted, unless defendants submitted to the trial court counterdeclarations which disputed that they were in possession of artifacts taken from a Native American grave, they would thereby fail to raise a disputed material issue of fact. Defendants submitted no such counterdeclarations; accordingly, they failed to raise any triable issues of material fact.

Instead, in an exercise of obfuscation, defendants urged that the triable issues of fact were: (1) whether the metates are "associated grave goods" or "items associated with Native American burials" and, as such, subject to the reburial provisions of section 5097.98; (2) whether the site from which defendants took the metates is a "grave" pursuant to section 5097.99 and section 7014 of the Health and Safety Code, and (3) whether defendants' possession of the artifacts is lawful because of defendants' contract with the City of Vista and the landowners' consent.

With respect to the first issue, for the reasons we have already noted, whether the metates are items defined in section 5097.98 and subject to the reburial provision of that section is wholly immaterial to whether defendants' possession of the metates is lawful under section 5097.99.

As to the second issue, whether the site in question is a statutory "grave," defendants argue that Health and Safety Code section 7014 defines "grave" as "a space of ground in a burial park, used, or intended to be used, for burial," whereas Van Horn stated, in his declaration, that the site in question is "characterized as a small, well developed midden (literally, a refuse heap)," i.e., not "a space of ground in a burial park." In other words, their argument goes, the possession of Native American artifacts from a prehistoric site which contains Native American remains is not covered by section 5097.99, because the site is not a historic "burial park," which is defined in section 7004 of the Health and Safety Code as a "tract of land for the burial of human remains in the ground, used or intended to be used, and dedicated, for cemetery purposes."

However, included in the general statutory scheme of division 7 of the Health and Safety Code ("Dead Bodies"), of which sections 7014 and 7004 are a part, is section 7050.5, which concerns human remains in locations other than a dedicated cemetery, and requires a county coroner to notify the Commission of any such Native American remains. Accordingly, neither the Commission's duties under section 5709.98 nor, inferentially, section 5709.99, can be invoked unless the burial site is not a burial park, and thus defendants' contention that section 5097.99 does not apply to the metates because the metates were not taken from a "burial park" is without merit.

Finally, as to the third issue, neither defendants' contract with the City of Vista nor the landowners' consent is relevant to the lawfulness of defendants' possession of the metates under section 5097.99, because, under
section 5097.99 and section 5097.98, neither the city nor the landowners have the right to authorize such possession; only a Native American descendent has such a right.

In view of the foregoing, defendants' contention that there were triable issues of material fact is without merit; none of the issues defendants point to are material to the unlawfulness of their possession of the metates under section 5097.99. As a consequence, the motion for summary judgment was properly granted unless there be a constitutional infirmity underlying the statute which the State sought to enforce.

IV. Vagueness

Attacking the statutes themselves, defendants contend that sections 5097.98 and 5097.99 are so vague that they violate the due process clause of the Fourteenth Amendment. We need not address defendants' arguments as to section 5097.98, because the State's action against defendants is framed solely in terms of section 5097.99, and not section 5097.98.

[*1401] Turning to section 5097.99, defendants argue that: (1) the term "Native American" is not defined by the statute; (2) the term "grave" is not defined, and (3) the statute did not give Ibanez, the commissioner who asked Van Horn to return the artifacts to the landowner, jurisdiction to do so.

Initially, we set forth the standard which the United States Supreme Court has established in discussing the due process requirement of legislative specificity. That standard is: "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (Connally v. General Const. Co. (1926) 269 U.S. 385, 391 [70 L.Ed. 322, 328, 46 S.Ct. 126], italics added.)

Applying the foregoing standard to defendants' argument as to "Native American," it is clear from the record that: (1) Van Horn is not a man of "common intelligence" in the field of Native American artifacts; he is an expert; (2) when he discovered the remains and artifacts, Van Horn knew that they belonged to Indians, and (3) at the time of the discovery, Van Horn knew, because the remains and the artifacts belonged to Indians, that they were governed by the statutes relating to Native Americans. This final observation is based on the following statements Van Horn made in a letter to his colleagues: "As many of you may know, current California law requires that anyone finding human remains must contact the coroner immediately. If, in the coroner's opinion, the remains are Indian, he is to contact the Native American Heritage Commission (NAHC) in Sacramento, which then decides which group of local Indians should be advised of the situation. Once a group has been selected, the disposition of the remains is entirely up to them."

In view of the foregoing, defendants cannot, and do not, argue either that a person of common intelligence would not know that section 5097.99's prohibition against possession of "Native American" remains or artifacts does not apply to Indian remains or artifacts, or that Van Horn did not have such knowledge. What defendants do argue is that: (1) Van Horn did not know whether "Native American" applied to Indians who were not from the United States; (2) he believed, in the application of his professional expertise, that at least one of the skeletal remains was that of a person from Mexico, and (3) the statute does not provide either a definition of "Native American" or a provision for a determination of the question.

However, defendants did seek a determination of these questions in the trial court, when they contended, in their statement of disputed facts, that the metates were not Native American artifacts pursuant to section 5097.99. The court ruled, as a matter of law in the form of statutory [*1402] interpretation, that the metates are Native American artifacts within the meaning of that section. Significantly, defendants do not challenge that ruling on appeal. In other words, defendants apparently do accept the State's definition of Native American, namely an Indian from any part of the Western Hemisphere.

Moreover, whether "Native American" applies to Indians from any part of the western hemisphere, as the State argued, or only to Indians from the United States, as defendants argued, is not a vagueness question, or, if it is, it is not a vagueness question in relation to defendants. That is because the danger of
vague laws is that they "may trap the innocent by not providing fair warning." (Grayned v. City of
Rockford (1972) 408 U.S. 104, 108-109 [33 L.Ed.2d 222, 227, 92 S.Ct. 2294].) Here, defendants were
neither "innocent" in viewing the law governing the discovery of Native American artifacts, nor were they
"trapped" thereby. Accordingly, their contention that the legislature's failure to define the term renders the
statute unconstitutionally vague is without merit.

As to the term "grave," defendants argue only that its definition in the Health and Safety Code ("burial
park," see ante) is inapplicable to the "interment" here. However, defendants do not, and cannot credibly,
contend that such inapplicability renders the word "grave" in section 5097.99 "so vague that men of
common intelligence must necessarily guess at its meaning. . . ." (Connally v. General Const. Co., supra,
269 U.S. 385, 391 [70 L.Ed. 322, 328].) Moreover, Webster's Third New International Dictionary
defines "grave" as "an excavation in the earth for use as a place of burial . . . a place of interment" (italics
added), and, as noted, defendants call the site of the remains here an "interment." Accordingly, because the
dictionary's recital ("common intelligence") of a definition of "grave," is the same as defendants' definition
of "grave," defendants' contention that the word is vague, i.e., has no commonly acceptable meaning, is
without merit.

Finally, defendants argue that section 5097.99 is vague because the statute does not give Ibanez, the
commissioner who asked Van Horn to return the artifacts to the landowner, jurisdiction to enforce
the statute. However, the statute is not being enforced by Ibanez, in that the action brought here against
defendants was brought in the name of the entire Commission. Moreover, because defendants' argument
relates to the enforcement rather than the wording of the statute, such argument as a matter of logic is
clearly not addressed to the issue of vagueness.

In view of all the foregoing, defendants' contention that section 5097.99 is impermissibly vague, as
measured by constitutional standards, is without merit.

[*1403] V. Due Process and Equal Protection

1. Due Process

Defendants contend that sections 5097.98 and 5097.99 violate the due process clause of the Fifth and
Fourteenth Amendments, because the statutes "deprive defendants and all other archaeologists practicing
here of the raw material of their profession." However, defendants do not explain either: (1) what
archaeologists do when they practice their profession; (2) whether, or to what extent, archaeologists need to
"possess" (§ 5097.99) raw material in order to practice their profession, or (3) how, in the case here,
defendants were deprived of their right to practice their profession by the State's request that they return
metates which they had possessed for over a year. (The State did not allege that defendants had no right to
possess the artifacts, but that defendants' "continued" possession of the artifacts at the time the complaint
was filed was unlawful.)

In other words, defendants did not show, and do not argue, that archaeologists have a right to possess raw
material from the property of others for an indefinite period of time. Moreover, in the trial court, defendants
argued that the metates should be preserved for the benefit of the public, i.e., that the public, not
defendants, had the right to their ultimate possession. More specifically, Van Horn stated in his declaration
that: (1) his custom with respect to artifacts recovered during California Environmental Quality Act
(CEQA) surveys was to remove the artifacts to his laboratory for cleaning, cataloging and analysis; (2) the
custom of his profession was to regard the landowners as having the right to control the disposition of the
artifacts, and (3) defendants and the City of Vista had agreed that the city would exhibit to the public
artifacts which defendants possessed from their earlier CEQA surveys for the city.

Similarly, on appeal, defendants maintain "there is nothing . . . of personal gain involved in the position
taken by Dr. Van Horn." However, the cases defendants rely on in which the constitutional right to practice
a profession was raised did involve personal gain. More specifically, Board of Regents v. Roth (1972) 408
U.S. 564 [33 L.Ed.2d 548, 92 S.Ct. 2701], concerned a nontenured assistant professor who had not been
rehired, and Greene v. McElroy (1959) 360 U.S. 474 [3 L.Ed.2d 1377, 79 S.Ct. 1400], concerned
an engineer who had been discharged after his security clearance had been revoked. In the case here, however, defendants did not even allege that section 5097.99 or the court's order thereunder had caused them to lose any money, much less any present or future employment.

[*1404] Moreover, in Roth, the Supreme Court held that Roth, the nontenured assistant professor, was not deprived of a liberty interest when he was "simply . . . not rehired in one job but remain[ed] as free as before to seek another" (Board of Regents v. Roth, supra, 408 U.S. 564, 575 [33 L.Ed.2d 548, 560]), and that he was not deprived of a property interest because he had "no possible claim of entitlement to re-employment . . . [but merely] an abstract concern in being rehired." (Id. at p. 578 [33 L.Ed.2d at p. 561].) Accordingly, in their attempt to invoke Roth, defendants, who did not even allege that they had lost or would lose any future work because of section 5097.99, were not deprived of either a liberty or a property right by that statute. In the absence of such deprivation, defendants' contention [**47] that the statute violates the due process clause of either the Fifth or the Fourteenth Amendments is without merit. [**819]

2. Equal Protection

Defendants contend that sections 5097.98 and 5097.99 deprive them of equal protection of the laws under the Fourteenth Amendment. This is so, defendants argue, because the statutes discriminate in favor of members of the Indian race by treating their random, isolated remains and graveyards more favorably than those of "Spanish explorers or soldiers, padres, English sailors, prospectors, miners or pioneers of any other racial or national origin or alienage." However, as the California Supreme Court said in Estate of Horman (1971) 5 Cal.3d 62 [95 Cal.Rptr. 433, 485 P.2d 785], in response to an equal protection challenge: "[appellants' argument] avails [them] nothing, for the discrimination charged is not against them. To challenge the constitutionality of a statute on the ground that it is discriminatory, the party complaining must show that he is a party aggrieved or a member of the class discriminated against." (Id. at pp. 77-78.) In the case here, defendants [**48] do not contend that Van Horn is a descendent of a Spanish explorer, soldier or padre, or an English sailor, prospector, miner or pioneer. Accordingly, because they have not been aggrieved in the constitutional sense by sections 5097.98 and 5097.99, defendants' equal protection contention is without merit.

VI. The Establishment Clause

Defendants contend that, "[v]iewed as a whole, Chapter 1.75 violates the establishment clause of the First Amendment, because it enhances the rights of Native Americans to practice their religions." In support of this contention, defendants argue that section 5097.9 prohibits the damaging of Native American religious sites, and section 5097.91 gives the [*1405] Commission powers with respect to religious sites. However, as noted, those sections were enacted in 1976, and the State's action against defendants was based on section 5097.99, which was enacted in 1982 as part of legislation designed to protect Native American skeletal remains from vandalism and to give Native American descendents an opportunity to be involved in the disposition of those remains and items associated therewith. There is no reference to religion either in section 5097.99, [***49] or in any of the other 1982 amendments. Accordingly, those amendments do not violate the establishment clause of the First Amendment.

VII. Sanctions

The State contends that it should be awarded sanctions, because defendants' appeal is frivolous. However, we cannot say that the appeal was "prosecuted for an improper motive . . . or . . . [that] it indisputably has no merit." (In re Marriage of Flaherty, 31 Cal.3d 637, 650 [183 Cal.Rptr. 508, 646 P.2d 179].) Accordingly, we decline to award sanctions.

The judgment is affirmed, and the State's request for sanctions is denied.
APPENDIX G

STATE OF TENNESSEE EX REL V. MEDICINE BIRD ET AL.

STATE OF TENNESSEE EX REL. COMMISSIONER OF TRANSPORTATION

-v-

MEDICINE BIRD BLACK BEAR WHITE EAGLE, ET AL.

No. M1999-00300-COA-R10-CV

COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE

63 S.W.3d 734; 2001 Tenn. App. LEXIS 485

July 11, 2001, Filed


DISPOSITION: Judgment of the Chancery Court Reversed.


Virginia Lee Story, Franklin, Tennessee and John E. Herbison, Nashville, Tennessee, for the Tennessee Commission of Indian Affairs and Toye Heape, Executive Director of the Tennessee Commission of Indian Affairs.


Joseph H. Johnston, Nashville, Tennessee, for the appellees, Gilbert Cupp, Dan Kirby, and Marion Dunn.

JUDGES: WILLIAM C. KOCH, JR., J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S. and WILLIAM B. CAIN, J., joined.

OPINION BY: WILLIAM C. KOCH, JR.

OPINION: [*742] This appeal involves the efforts of the Tennessee Department of Transportation to widen the intersection of Hillsboro Road and Old Hickory Boulevard in Williamson County. After the discovery of two ancient graves near the intersection, the Department filed suit in the Chancery Court for Williamson County seeking permission to relocate the human remains found on the property and to discontinue the use of the property as a burial ground. Over the Department's objection, the trial court permitted the Tennessee Commission of Indian Affairs, its executive director, and fifteen individual Native Americans to intervene to oppose the relocation of the graves. After disqualifying the Attorney General and Reporter from representing the Commission, the trial court appointed two private lawyers to represent the Commission. We granted the Department's application for an extraordinary appeal to determine (1) whether the Commission, its executive director, and the individual Native Americans meet the qualifications in Tenn. Code Ann. § 46-4-102 [**2] (2000) to participate in these proceedings as "interested persons," (2) whether the Attorney General and Reporter should have been disqualified from representing the Commission and its
executive director, and, if so, (3) whether the trial court has authority to appoint private counsel to represent the Commission and its executive director. We have determined that neither the Commission, nor its executive director, nor the fifteen individual Native Americans meet the statutory requirements to participate as "interested persons" in these proceedings and that denying "interested person" status to the individual Native Americans does not interfere with their free exercise rights or rights of conscience guaranteed by U.S. Const. amend. I and Tenn. Const. art. I, § 3. We have also determined that the trial court erred by disqualifying the Attorney General and Reporter from representing the Commission and its executive director and by appointing private attorneys to represent the Commission. Accordingly, we reverse and vacate the trial court's orders and remand the case for further proceedings consistent with this opinion.

Hillsboro Road runs essentially north and south and connects the cities of Nashville and Franklin. Like many roads, it began as a pathway used by bears and buffalo looking for salt licks. Later, it became a main artery for Native Americans in the area. Following statehood, the Tennessee General Assembly chartered it as a toll road. Eventually, Hillsboro Road was designated as a public road in 1902. It has continued to be one of the principal links between Nashville and Franklin even after the construction of the interstate highways in Middle Tennessee.

During the last several decades of the twentieth century, Hillsboro Road became increasingly congested because of the significant population growth south of Nashville. By 1995, the intersection of Hillsboro Road and Old Hickory Boulevard was operating above capacity at peak hours. Accordingly, the Tennessee Department of Transportation began preparing plans to improve the intersection and also began acquiring the property needed for the planned improvements. One of these tracts, owned by the Kelly family, is located on the southeast side of Hillsboro Road where it intersects Old Hickory Boulevard near the boundary between Davidson and Williamson Counties.

The area in the general vicinity of the project was known to have Native American artifacts. Accordingly, the Department began a preliminary archeological examination of the Kelly tract even before the condemnation proceedings were completed. In October 1998, an archeological crew discovered several Native American artifacts of varying ages in the southeast corner of the proposed right-of-way. In late January 1999, after construction had commenced, the Department's archeological crew discovered an unmarked, ancient Native American grave in a portion of the project located in Williamson County. The Department's crew left the grave undisturbed and, as required by law, notified the State Archeologist of its discovery.

Shortly after the discovery of the first grave, a second unmarked, ancient Native American grave was discovered on the Williamson County portion of the project. This discovery prompted a meeting at the construction site to determine how to proceed. The participants in this meeting included representatives of the Department, representatives of the contractor and its subcontractors, and Toye Heape, the executive director of the Tennessee Commission of Indian Affairs ("Commission"). The representatives of the Department and the contractor determined that construction of the improvements could proceed because it would not disturb the two graves.

During the next month, the Department completed its acquisition of the Kelly tract. The Department's surveyors also determined that the grave sites were actually five to six feet nearer to the proposed roadway than had been previously thought. The surveyors and engineers also concluded that even though the graves would not be paved over when Hillsboro Road was widened, they would be disturbed by the necessary construction of a slope next to the road and the installation of utilities and a water drainage pipe. On May 4, 1999, the State Archeologist signed the order of possession on March 31, 1999.
1999, the Department filed a petition in the Chancery Court for Williamson County seeking to relocate the two graves and to terminate the use of the property as a cemetery in accordance with Tenn. Code Ann. §§ 46-4-101 to -104 (2000). In late May 1999, a third grave was discovered on a portion of the Kelly tract in Davidson County. The trial court initially took up the Department's petition on June 2, 1999, but continued the hearing after Mr. Heape suggested that notice of the proceedings should be sent to fifty other Native American organizations. The Department provided the additional notice as directed by the trial court. When the hearing reconvened on June 14, 1999, the Commission and Mr. Heape, acting in his official capacity as the Commission's executive director, and fifteen individual Native Americans requested permission to join the suit as "interested persons" under Tenn. Code Ann. § 46-4-102. On June 17, 1999, the trial court entered an order, over the Department's objection, adding the commission, Mr. Heape, and the fifteen individual Native Americans as "interested persons." The trial court also concluded that a "conflict of interest" existed between the Department and the Commission and set a hearing for June 25, 1999, to determine "whether the Attorney General can and should proceed as counsel in this case and whether independent counsel should and can be provided at any state individual and or agency by appointment of the Governor, the Tennessee Supreme Court or otherwise."

Within days after the entry of the June 17, 1999 order, the Department filed a motion requesting reconsideration of the trial court's conclusion that the Commission and Mr. Heape, as well as the fifteen individual Native Americans, were "interested persons" under Tenn. Code Ann. § 46-4-102. The Department also filed an application for permission to pursue a Tenn. R. App. P. 9 interlocutory appeal regarding the decision to accord "interested person" status to sixteen of the seventeen persons or entities included in the trial court's decision. The trial court declined to act on the Department's motion or application at a June 28, 1999 hearing, but on June 29, 1999, entered a "supplemental order" expressly reaffirming the conclusions in its June 17, 1999 order that the Commission, Mr. Heape, and the fifteen individual Native Americans were "interested persons" for the purpose of Tenn. Code Ann. § 46-4-102.

On June 30, 1999, the trial court entered another order addressing the perceived "conflict of interest" between the Department and the Commission. Relying on its conclusion that the Commission and Mr. Heape were "interested persons" for the purpose of Tenn. Code Ann. § 46-4-102, the trial court determined that they were entitled to "independent, non-conflicted legal advice" and that the Office of the Attorney General could not provide this advice because it was statutorily obligated to represent the Department. Accordingly, the trial court appointed Virginia Lee Story, a lawyer practicing in Franklin, as "attorney general pro tem" or 'outside counsel' to represent the Commission and Mr. Heape in this proceeding.

On July 20, 1999, the Department filed an application for a Tenn. R. App. P. 10 extraordinary appeal with this court. On July 21, 1999, this court entered an order directing the Commission, Mr. Heape, and the fifteen individual Native Americans to respond to the Department's application and staying all proceedings in the trial court. On July 22, 1999, the trial court filed an "Order to the Court of Appeals Requesting Remand and Lifting of Stay" to allow it to "reconsider" its June 29 and 30, 1999 orders and to act on the Department's Tenn. R. App. P. 9 application for an interlocutory appeal. On July 26, 1999, this court entered an order modifying its stay to permit the trial court to reconsider its conclusion that the

118 The Department thereafter filed a petition in the Chancery Court for Davidson County similar to the petition it filed in the Chancery Court for Williamson County seeking to terminate the use of the property as a cemetery. The Chancery Court for Davidson County later temporarily enjoined any further construction of the project in Davidson County. State ex rel. Comm'r of Transp. v. Any and All Parties With An Interest in the Property Identified as Tax Map 158, Parcel 34, Tax Assessor's Office, Davidson County, Tennessee, slip op., No. 99-1278-III (Sept. 24, 1999).

119 The Department did not include the Commission in this application.

120 Ms. Story later requested additional assistance, and on July 20, 1999, the trial court entered another order appointing John E. Herbison of Nashville as "Second Chair" to assist Ms. Story in the trial and appellate courts.
Commission, Mr. Heape, and the fifteen individual Native Americans were "interested persons" under Tenn. Code Ann. § 46-4-102 and its decision to appoint an "attorney general pro tem" to represent the Commission and Mr. Heape.

The trial court conducted another hearing on August 5, 1999. During this hearing, the individual Native Americans introduced additional evidence regarding their status as "interested persons" under Tenn. Code Ann. § 46-4-102. They also presented evidence that representatives of the State had attempted to interfere with the religious ceremonies they were conducting at the construction site. On August 6, 1999, the trial court filed a lengthy order reaffirming its earlier decisions that the Commission, Mr. Heape, and the fifteen individual Native Americans were "interested persons" under Tenn. Code Ann. § 46-4-102 and to appoint an "attorney general pro tem" to represent the Commission and Mr. Heape. The trial court also found that interfering with the religious [*12] ceremonies at the construction site was "totally inappropriate" and invited the individual Native Americans to apply to this court for permission to pursue an injunction pending appeal.121

On August 16, 1999, the Department filed with this court a renewed and amended application for a Tenn. R. App. P. 10 extraordinary appeal. The Department asserted that the trial court erred by concluding that the Commission, Mr. Heape, and the fifteen individual Native Americans were "interested persons" under Tenn. Code Ann. § 46-4-102 and that the trial court lacked authority to appoint an "attorney general pro tem" to represent the Commission and Mr. Heape. On August 27, 1999, this court granted the Department's application for an extraordinary appeal and directed the parties to address five issues.

I. COMMON-LAW PROTECTION OF BURIAL GROUNDS

We deal [*13] here with a most sensitive matter. Disputes regarding burial and disinterment touch deep-seated human emotions and evoke strongly held personal and religious beliefs. Where once persons looked to religion or custom for resolution of these disputes, now they look to the law to provide the neutral principles for resolving among the living disputes involving the disposition of the dead and the rights surrounding their remains.

A. Since antiquity, most societies have held burial grounds in great reverence. Memphis State Line R.R. v. Forest Hill Cemetery Co., 116 Tenn. 400, 418, 94 S.W. 69, 73 (1906) (observing that repositories of the dead are regarded with veneration); see also In re Widening of Beekman Street, 4 Bradf. Sur. 503, 522-23 (Sur. Ct. of N.Y. County 1856); Mills v. Carolina Cemetery [*746] Corp., 242 N.C. 20, 86 S.E.2d 893, 898 (N.C. 1955). The early common law protected the sanctity of the grave by recognizing the "right" to a decent burial and the "right" to undisturbed repose. Carney v. Smith, 222 Tenn. 472, 475, 437 S.W.2d 246, 247 (1969); Thompson v. State, 105 Tenn. 177, 180, 58 S.W. 213, 213 (1900). [*14] Accordingly, unless a good and substantial reason existed, the common law strongly disfavored disturbing a body once it had been suitably buried. Estes v. Woodlawn Mem'l Park, Inc., 780 S.W.2d 759, 763 (Tenn. Ct. App. 1989); Mallen v. Mallen, 520 S.W.2d 736, 737 (Tenn. Ct. App. 1974). In the words of Justice Cardozo, then a member of the New York Court of Appeals, "the dead are to rest where they have been laid unless reason of substance is brought forward for disturbing their repose." Yome v. Gorman, 242 N.Y. 395, 152 N.E. 126, 129 (N.Y. 1926).

The right to undisturbed repose was not, however, absolute. Mallen v. Mallen, 520 S.W.2d at 737. The aphorism "Once a graveyard, always a graveyard" reflects custom only, not a rule of substantive law. Trustees of First Presbyterian Church v. Alling, 54 N.J. Super. 141, 148 A.2d 510, 514 (N.J. Super. Ct. Ch. Div. 1959); Percival E. Jackson, The Law of Cadavers 395 (2d ed. 1950) ("Jackson"). Thus, American common law recognized that human remains could be disinterred and reinterred elsewhere when their burial place is no longer under the care of the living [*15] or has lost its character as a burial ground. Hines v. State, 126 Tenn. 1, 6, 149 S.W. 1058, 1060 (1911); Memphis State Line R.R. v. Forest Hill Cemetery, 116 Tenn. at 419, 94 S.W. at 73-74; Boyd v. Ducktown Chem. & Iron Co., 19 Tenn. App. 392,

121 Neither the individual Native Americans nor the Commission have requested this court's permission to pursue such an injunction.
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401, 89 S.W.2d 360, 365-66 (1935). The relatives of persons buried in an abandoned burial ground had only the right to due notice and the right to a reasonable opportunity to move their relative's body to some other place of their own selection. If the relatives declined to take responsibility for moving the human remains, others could see to it that the remains were disinterred and reinterred in a decent manner. Dutto v. Forest Hill Cemetery, 8 Tenn. Civ. App. 120, 133 (1917) (quoting Bessemer Land & Improvement Co. v. Jenkins, 111 Ala. 135, 18 So. 565 (Ala. 1895)).

The common law permitted the disinterment of human remains when the demands of the living outweighed the right of undisturbed repose. Henry Y. Bernard, The Law of Death and Disposal of the Dead 4 (2d ed. 1979) ("Bernard"); Jackson, at 111. Accordingly, the common law did not place burial grounds beyond the power of eminent domain. United States v. Unknown Heirs of All Persons Buried in Post Oak Mission Cemetery, 152 F. Supp. 452, 453 (W.D. Okla. 1957) (authorizing the reinterment of the widow and children of the last chief of the Comanche Indians); In re Widening of Beekman Street, 4 Bradf. Sur. at 503; Bernard, at 4; Jackson, at 404; C.J. Polson, et al., The Disposal of the Dead 205-06 (1953) ("Polson"). The Tennessee Supreme Court recognized this principle approximately one hundred years ago but, in the absence of a statute, limited the power of eminent domain to abandoned burial grounds. Justice Neil stated:

True it is the dead must give place to the living. In process of time their sepulchers are made the seats of cities, and are traversed by streets, and daily trodden by the feet of man. This is inevitable in the course of ages. But while these places are yet within the memory and under the active care of the living, while they are still devoted to pious uses, they are sacred, and we cannot suppose that the Legislature intended that they should be violated, in the absence of special provisions upon the subject, authorizing such invasion, and indicating a method for the disinterment, removal, and reinterment of the bodies buried, and directing how the expense thereof shall be borne. Memphis State Line R.R. v. Forest Hill Cemetery Co., 116 Tenn. at 419, 94 S.W. at 73-74.

B. Prehistoric humans showed indifference to the dead by abandoning their bodies here they died. Polson, at 3. As time passed, the fear of death, the belief in life after death, and the unclean nature of dead bodies began to shape human burial practices. Superstition and religion played a significant role. Sir James G. Frazier, The Golden Bough, preface vii (1 vol. abridged ed. 1996); Polson, at 4-5; Note, Criminal Law - Right to Autopsy in Murder Prosecutions, 24 Tenn. L. Rev. 385, 385 (1956). The first active burials amounted to placing a pile of stones over the body or placing the body in a cave when one was available. These practices were later replaced by burial in the earth, which has continued to be the principal method of disposing of human remains throughout the world. Polson, at 3.

In pre-Christian England, the dead were buried far from towns and cities. With the arrival of Christianity came the custom of burial in and around church buildings. Prominent persons were buried in the churches themselves. Eventually, every person in England, except executed felons, heretics, and persons who took their own lives, had a right to be buried in the consecrated ground of a parish churchyard. In re Widening of Beekman Street, 4 Bradf. Sur. at 518; Jackson, at 12-13, 24, 57-58.

Between the sixth and thirteenth centuries, as the custom of burial in churchyards became more widespread, the church's ecclesiastical courts gradually extracted jurisdiction over all matters relating to burial from the common-law courts. Eventually, the ecclesiastical courts exercised exclusive temporal jurisdiction over these matters. In re Widening of Beekman Street, 4 Bradf. Sur. at 518; Jackson, at 22. Disinterring human remains without lawful authority was a common-law misdemeanor and was also an ecclesiastical offense. Polson, at 187. For human remains buried in consecrated ground, permission to disinter could be obtained only from the bishop of the diocese having jurisdiction over the burial ground and then only if the remains were to be reinterred in consecrated ground. For human remains not buried in consecrated ground, permission had to be obtained from the coroner, and the coroner granted permission only for the purpose of conducting an inquest. The ecclesiastical courts' jurisdiction did not begin to wane until Parliament enacted the Burial Acts of 1855 which invested the Crown's Principle Secretaries of State with authority over human remains buried in unconsecrated ground and any other exhumation for purposes other than reburial in consecrated ground. Polson, at 187-205; see also Anne R. Schiff, Arising From the Dead: Challenges to Posthumous Procreation, 75 N.C.L. Rev. 901, 923 (1997). Many of the English burial customs found their way to America. Even though the colonists did not have the

One of the earliest and most authoritative decisions confirming that the civil secular courts in America had jurisdiction to resolve disputes involving burial and reinterment involved the City of New York's decision to widen Beekman Street. To complete this project, the city condemned a portion of the cemetery located in the churchyard of the Brick Presbyterian Church, thereby requiring the relocation of the graves of one hundred persons buried in the cemetery "to give place to the cart- ways and foot-walks of Beekman street." In re Widening of Beekman Street, 4 Bradf. Sur. at 507. The city paid the church [**21] $28,000 for the property, but a dispute arose between the church and the descendants of the persons buried in the cemetery regarding the disposition of the funds and the church's plans to reinter the remains in a common grave. One of the parties was the daughter of Moses Sherwood who had been buried in the cemetery in 1801 who insisted that she and the other members of Mr. Sherwood's family had the right to require the church to reinter Mr. Sherwood in a separate grave with the separate monument that had been erected on his grave in the church cemetery.

The Supreme Court of New York appointed Samuel B. Ruggles to serve as referee to resolve the dispute. Mr. Ruggles's report has become a cornerstone of the development of the common law of burial in the United States. Arthur L. H. Street, Street's Mortuary Jurisprudence § 184, at 96 (1948); Bernard, at 14-15; William Bouler, Sperm, Spleens and Other Valuables: the Need to Recognize Property Rights in Human Body Parts, 23 Hofstra L. Rev. 693, 707 (1995); Diana D. Thomas, Indian Burial Issues: Preservation or Desecration, 59 U.M.K.C.L. Rev. 737, 748 (1991). One of the Ruggles Report's essential [**22] conclusions is that the secular American courts have jurisdiction over disputes involving the disposition of the dead and the rights surrounding their remains. In re Widening of Beekman Street, 4 Bradf. Sur. at 526. [*749] The Special Term of the Supreme Court confirmed the Ruggles Report in April 1856 and directed the church to pay Mr. Sherwood's daughter $100 to reinter his remains in a separate grave and to re-erect his monument. The court also directed the church to separately reinter any other human remains whenever identified by the next of kin. [**23]

[*749] In this country today, the civil courts have unquestioned jurisdiction to resolve disputes involving the burial and reinterment of human remains. Wolf v. Rose Hill Cemetery Ass'n, 832 P.2d 1007, 1008 (Colo. Ct. App. 1991); Louisville & Nashville R.R. v. Wilson, 123 Ga. 62, 51 S.E. 24, 25-26 (Ga. 1905); Sherman v. Sherman, 330 N.J. Super. 638, 750 A.2d 229, 233 (N.J. Super. 1999); Whitehair v. Highland Memory Gardens, Inc., 327 S.E.2d at 441. It is now commonly said that human remains, after internment, 122 Specifically, the report states:

It certainly is not for us to interfere with the ecclesiastical law of England, nor needlessly to criticize its claims to the respect of the people whom it binds. We only ask to banish its maxims, doctrines, and practices from our jurisprudence, and to prevent them from guiding, in any way, our judicial action. The fungous excrescence, which required centuries for its growth, may need an efflux of ages to remove. Burial, in the British Islands, may possibly remain, for many generations, subject exclusively to "ecclesiastical cognizance," but in the new, transplanted England of the Western continent, the dead will find protection, if at all, in the secular tribunals, succeeding, by fair inheritance, to the primeval authority of the ancient, uncorrupted common law.

In re Widening of Beekman Street, 4 Bradf. Sur. at 526.

The courts must employ neutral legal principles to resolve disputes among the living involving the disposition of human remains. Mallen v. Mallen, 520 S.W.2d at 737. In the search for these principles, the courts should not close their eyes to the customs and necessities of civilizations in dealing with the dead and the sentiments connected with the decent care and disposal of human remains. Mallen v. Mallen, 520 S.W.2d at 737; see also Louisville & Nashville R.R. v. Wilson, 51 S.E. at 25; Goldman v. Mollen, 168 Va. 345; 191 S.E. 627, 632 (Va. 1937). However, while the courts should respect the rights of persons to freely exercise their religion, Wolf v. Rose Hill Cemetery Ass'n, 832 P.2d at 1009, they must not permit the civil law to be circumscribed or superceded by the canon law of any particular religion. Mallen v. Mallen, 520 S.W.2d at 737. Religious customs, laws, and beliefs regarding the disposition of human remains are to be considered only for the purpose of producing an equitable result. Wolf v. Rose Hill Cemetery Ass'n, 914 P.2d 468, 472 (Colo. Ct. App. 1995).

II. STATUTES PERTAINING TO BURIAL GROUNDS

The common law is, of course, not the only source for the rules and procedures governing the burial, custody, and disposition of human remains. The Tennessee General Assembly, as the principal architect of this state's public policy, may, and in fact has, fashioned rules and procedures governing the termination of burial grounds in general and Native American burial grounds in particular.

A. Until approximately fifty years ago, the rules and principles governing burials and the disposition and reinterment of human remains were chiefly court-made. When the needs and convenience of the living required it, abandoned cemeteries could be closed and the human remains therein reinterred elsewhere. See Hines v. State, 126 Tenn. at 6, 149 S.W. at 1060; Boyd v. Ducktown Chem. & Iron Co., 19 Tenn. App. at 401, 89 S.W.2d at 365-66. The power of eminent domain could be exercised to acquire land containing a burial ground, but the acquiring authority could not compel the closure of the burial ground and the reinterment of the remains unless the burial ground was abandoned. Memphis State Line R.R. v. Forest Hill Cemetery, 116 Tenn. at 419, 94 S.W. at 73-74. The common law did not give the relatives and descendants of persons buried in an abandoned burial ground the power to block reinterring the human remains in another location. Rather, it recognized that these persons had a right to timely notice of the plans to relocate the human remains and the right to make their own arrangements for the reinterment of the relative's remains at a place of their choosing. Dutto v. Forest Hill Cemetery, 8 Tenn. Civ. App. at 133.

[*750] The late 1940's and early 1950's marked dramatic growth in the construction of roads in the nation and in Tennessee. In 1949, most likely to facilitate the construction of an expanded network of rural roads, the General Assembly expanded the power of public authorities to condemn real property containing burial grounds, to relocate the human remains in the burial grounds, and to put the property to other uses. As if in direct response to the Tennessee Supreme Court's Memphis State Line R.R. v. Forest Hill Cemetery Co. opinion, this bill specifically authorized the closure of burial grounds, required definite arrangements for the reinterment of the human remains in the burial grounds, and required prior court approval of the allocation of costs.

123 The bill was a companion to the bill establishing the state rural road system and appropriating $22,000,000 for rural road construction. Act of Feb. 11, 1949, ch. 16, 1949 Tenn. Pub. Acts 91. The bills were introduced on the same day, received consecutive bill numbers, and shared sponsors. The bill relating to burial grounds passed the Senate on February 9, 1949; while the bill creating the rural road system passed the Senate on February 10, 1949. The bills were placed together on the calendar of the House of Representatives and were passed unanimously on February 11, 1949. The House of Representatives first passed the rural road bill and then passed the bill permitting the closure of burial grounds. [*27]

The General Assembly expanded the circumstances permitting the closure of a burial ground beyond those recognized by the common law. While the Tennessee Supreme Court had limited closure to abandoned burial grounds, the statute authorized closure and reinterment when (1) the burial ground was abandoned [Tenn. Code Ann. § 46-4-101(1)], (2) when the burial ground was in a neglected or abandoned condition [Tenn. Code Ann. § 46-4-101(2)], (3) when "conditions or activities about or near the burial ground...render the further use of same...inconsistent with due and proper reverence or respect for the memory of the dead" [Tenn. Code Ann. § 46-4-101(3)], and (4) when the continued use of the property as a burial ground became "unsuitable" for any other reason [Tenn. Code Ann. § 46-4-101(3)]. The statutory procedure devised by the General Assembly for closing a burial ground is straightforward. Any "interested person or persons" or any municipality or county in which the burial ground is situated may file suit in the chancery court sitting in the county where the burial ground is located. Tenn. Code Ann. § 46-4-103(a). The plaintiff or plaintiffs must name as defendants (a) "interested persons" who are not plaintiffs and (b) the owners of the land or of any right or interest in the land. Tenn. Code Ann. § 46-4-103(b).

Following a hearing, the trial court "shall" grant the request to close the burial ground if the following four conditions are met:

1. any one of the conditions specified in Tenn. Code Ann. § 46-4-101 exist;
2. the property is unsuitable for use as a burial ground for any reason or the continued use of the property as a burial ground is inconsistent with due and proper reverence or respect for the memory of the dead;
3. definite and suitable arrangements have been made or will be made for the reinterment of the human remains; and
4. the removal and reinterment of the human remains will be "done with due care and decency, and that suitable memorial or memorials will be erected at the place of reinterment."

Tenn. Code Ann. § 46-4-104.125

B. In addition to these generally applicable statutes, the General Assembly of Tennessee, like the federal government and many other states, has also enacted statutes specifically governing the disposition of Native American human remains and funerary objects. These statutes were in long-overdue response to the common practice, over two centuries old, of digging up and removing the contents of Native American graves for reasons of profit and curiosity.126 During this time, massive numbers of Native American human remains were removed from their graves for storage or display by government agencies, museums, universities, and tourist attractions. The practice became so widespread that virtually every Native American tribe or group in the country was affected by the grave looting.127

For decades, various Native American groups repeatedly sought the repatriation of these human remains and funerary objects without much success. John B. Winksi, Note, There Are Skeletons in the Closet: The

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125 Tennessee's statutes are consistent with similar statutes in other states. Forty-one other states, excluding Alaska, Idaho, Maine, Massachusetts, Mississippi, Nebraska, Utah, and Wyoming, have enacted statutes permitting the closure of cemeteries and the reinterment of the human remains. Massachusetts is the only state that explicitly proscribes closing burial grounds and reinterring the human remains. All of the forty-one states allowing closure of a cemetery place a variety of conditions on the manner in which the reinterment is carried out. Thirty-five of the states require notice to the deceased person's family, relatives, heirs, or next of kin, and two of the thirty-five states with notice provisions permit notice to the deceased person's "friends." None of the thirty-five states requiring notice give the persons with notice an absolute right to veto the closure of the burial ground and reinterment of the human remains.


In 1990, both the General Assembly of Tennessee and the Congress enacted additional statutes governing Native American human remains and funerary objects. First, the Tennessee General Assembly strengthened the State's protection of these artifacts. This legislation added three Native American members to the Archeological Advisory Committee [Tenn. Code Ann. § 11-6-103(c)(4) (1999)] and outlawed the display of Native American human remains except when used as evidence in judicial proceedings [Tenn. Code Ann. §§ 11-6-104(b), -117 (1999)]. It also required prompt reporting of the discovery of human remains to the Department of Environment and Conservation [Tenn. Code Ann. § 11-6-107(d)(3) (1999)] and gave Native Americans the right to be present during the excavation of Native American human remains [Tenn. Code Ann. § 11-6-116(a)].

Unlike statutes in other states giving Native Americans veto power over the disinterment of Native American remains, Tennessee's statutes envision that human remains and funerary objects may be removed and appropriately reinterred. Tenn. Code Ann. § 11-6-107(d)(4) requires the State to take control of Native American human remains and that they be reinterred as provided in Tenn. Code Ann. § 11-6-119 (1999) or Tenn. Code Ann. §§ 46-4-101, -104. Tenn. Code Ann. § 11-6-116(c) requires persons intending to close a burial ground containing Native American human remains to give ten days written notice to the State Archeologist and requires the State archeologist to promptly notify the Native American members of the Archeological Advisory Commission and the chair of the Commission of Indian Affairs. Finally, Tenn. Code Ann. § 11-6-119 provides that Native American human remains and funerary objects "shall be properly reburied . . . in accordance with procedures formulated by the advisory council which are

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130 Tenn. Code Ann. § 11-6-116(b) empowered the Department of Conservation and Environment to promulgate regulations governing Native American representatives at excavation sites. In 1991, the Department promulgated a regulation providing that at least one Native American member of the Archeological Advisory Commission is entitled to be present during the removal, excavation or disinterment of Native American human remains. Tenn. Comp. R. & Regs. r. 0400-9-1-.05 (1999).
131 Every state has enacted statutes pertaining to ancient or historic human remains, including Native American remains. Only one state, Washington, prohibits relocation of ancient human remains altogether. Most states require notice to some government commission or agency such as a state museum, state archeologist or archeological society, the department of anthropology at a state university, or a Native American board or commission. Thirty-four of these states require some sort of governmental approval prior to relocating the human remains. Seventeen states require permission of the landowner. Five states, Idaho, Massachusetts, Minnesota, Missouri, and Oregon, give a Native American tribe veto power over the removal and reinterment of the human remains. [**34]
133 See also Tenn. Comp. R. & Regs. r. 0400-9-1-.04 (1999).
appropriate to Native American traditions."\textsuperscript{134} Seven months later, the 101st Congress enacted the Native American Graves Protection and Repatriation Act ("NAGPRA"). The \textsuperscript{135} National Museum of the American Indian Act had proved unsatisfactory because it applied only to human remains and funerary objects held by the Smithsonian Institution.\textsuperscript{136} NAGPRA expanded federal protection to cover human remains and items found on federal or tribal land and to items held by federally funded agencies and museums,\textsuperscript{136} but does not apply to items found on private or state land, items held by museums that do not receive federal funds, or items purchased by a museum or archeologist in good faith.\textsuperscript{137} Like the National Museum of the American Indian Act, NAGPRA requires the return of human remains and funerary objects to lineal decedents and to Native American tribes that the museum or government agency determines to be culturally affiliated.\textsuperscript{138} If a museum or government agency has not established cultural affiliation with a particular Native American tribe, the tribe may still be entitled to the human remains and funerary objects if it proves by a preponderance of the evidence that it is culturally affiliated with the human remains or items.\textsuperscript{139}

### III. INTERESTED PERSON STATUS UNDER STATE LAW

As its first issue, the Department asserts that the trial court erred by permitting fifteen individual Native Americans, the Tennessee Commission of Indian Affairs, and the executive director of the Tennessee Commission of Indian Affairs to intervene in the case as "interested parties" under Tenn. Code Ann. § 46-4-102. The Department argues that the trial court's interpretation of Tenn. Code Ann. § 46-4-102 is inconsistent with its plain meaning and with the interpretation of the statute by other courts.\textsuperscript{140} We agree that the trial court has misconstrued the statute. However, even though none of the individual Native American parties qualify for mandatory or permissive intervention as "interested persons," the trial court could have appropriately granted a request to permit them to participate as amicus curiae.

The provisions for notice in the statutory procedures for closing a burial ground reflect the common law. In 1917, the Court of Civil Appeals, citing the Supreme Court of Alabama with approval, observed that the relatives of persons buried in an abandoned burial ground had a right to "due notice and an opportunity to

\textsuperscript{134} The Department has promulgated regulations intended to assure that Native American human remains are properly reinterred in accordance with "original and/or traditional customs." When documentation exists that specifies the original manner of burial, reburial must be carried out in the same manner. Tenn. Comp. R. & Regs. r. 0400-9-1-.01(1) (1999). When documentation does not exist, reburial must be done in subsurface grave pits at such a depth to prevent further disturbance, and the human remains must be placed directly into the soil. Tenn. Comp. R. & Regs. r. 0400-9-1-.01(2). These reburial areas must be as close to the original burial area as possible, Tenn. Comp. R. & Regs. r. 0400-9-1-.02 (1999), and must be suitably recorded and demarcated. Tenn. Comp. R. & Regs. r. 0400-9-1-.02, -03.

\textsuperscript{135} Michelle Hibbert, Comment, Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment, 23 Am. Indian L. Rev. 425, 429 (1998/1999) ("Hibbert").


\textsuperscript{137} 25 U.S.C.A. § 3001(13).


\textsuperscript{140} JDN Dev. Co. v. Unknown Defendants, slip op., No. 97-3529-II (Davidson Ch. Feb. 15, 1998); State ex rel. Comm'r of Transp. v. Any and All Parties With an Interest in the Property Identified as Tax Map 158, Parcel 34, Tax Assessor's Office, Davidson County Tennessee, No. 99-1278-II, at 6 (Davidson Ch. Sept. 24, 1999).
remove the bodies to some other place of their own selection." Dutto v. Forest Hill Cemetery, 8 Tenn. Civ. App. at 133. Similarly, Tenn. Code Ann. § 46-4-103(b) requires that "all interested persons" and "the owner or owners [**38] of the land or of any right of reversion or other right or interest therein" be given notice of an action to close a burial ground by being named as defendants. Tenn. Code Ann. § 46-4-102 defines the term "interested persons" as:

[*754] 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 (1) or more deceased persons whose remains are buried in any burial ground.

The Native American parties seeking to intervene in this proceeding claim "interested person" status under Tenn. Code Ann. § 46-4-102. Accordingly, we must employ the neutral rules of statutory construction to determine whether Tenn. Code Ann. § 46-4-102 can be extended to apply to persons who claim no interest in the real property on which the burial ground is located and who cannot prove that they are relatives by consanguinity of any of the persons buried in the burial ground.


The traditional canons of statutory construction guide a court's inquiry into a statute's purpose and effect. Judicial construction of a statute will more likely hew to the General Assembly's expressed intent if the court approaches the statutory text believing that the General Assembly chose its words deliberately, Tidwell v. Servomation-Willoughby Co., 483 S.W.2d 98, 100 (Tenn. 1972);


Accordingly, our search for a statute's purpose and effect should begin with the words of the statute. Blankenship v. Estate of Bain, 5 S.W.3d 647, 651 (Tenn. 1999); [**41] Neff v. Cherokee Ins. Co., 704 S.W.2d 1, 3 (Tenn. 1986); Realty Shop, Inc. v. RR Westminster Holding, Inc., 7 S.W.3d at 602. We must give the words used in the statute their natural and ordinary meaning unless their context requires otherwise. State v. Fitz, 19 S.W.3d 213, 216 (Tenn. 2000); State ex rel. Metropolitan Gov't v. Spicewood Creek Watershed Dist., 848 S.W.2d 60, 62 (Tenn. 1993); SunTrust Bank v. Johnson, 46 S.W.3d 216 at ____, 2000 WL 1817199, at *5. In addition, because words are known by the company they keep, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 694, 115 S. Ct. [*755] 2407, 2411, 132 L. Ed. 2d 597 (1995), we must construe a statute's language in the context of the entire statute and in light of the statute's general purpose. State v. Flemming, 19 S.W.3d 195, 197 (Tenn. 2000); Lyons v. Rasar, 872 S.W.2d 895, 897 (Tenn. 1994); SunTrust Bank v. Johnson, 46 S.W.3d 216 at ____, 2000 WL 1817199, at *5.
B. The trial court's expansive interpretation of Tenn. Code Ann. § 46-4-102 \[**42\] results from its focus on the literal meaning of the phrase "any right" without considering the phrase in the context of the words surrounding it or in the context of the entire statutory scheme for terminating burial grounds. Of course, the phrase "any right," when considered in a vacuum, is expansive enough to encompass every sort of right - legal, contractual, moral, and constitutional. However, the General Assembly did not use the phrase in a vacuum, and thus we must consider the phrase in context. When the General Assembly set out in 1949 to create a statutory procedure for terminating burial sites, it knew that the courts had recognized that persons owning an interest in the real property and the decedent's relatives have certain legally protected rights.\[141\] King v. Elrod, 196 Tenn. 378, 383, 268 S.W.2d 103, 105 (1953) (holding that "relatives of a deceased" are entitled to insist upon legal protection for any disturbance); Dutto v. Forest Hill Cemetery, 8 Tenn. Civ. App. at 132 (recognizing causes of action by the "family" and the "owner of the lot"). Accordingly, the General Assembly drafted Tenn. Code Ann. § 46-4-102 \[**43\] to assure that family members of the deceased persons buried in the burial ground and the persons who owned any sort of interest in the burial ground had notice of the termination proceedings.

The language chosen by the General Assembly to identify the family members entitled to notice of the termination proceeding is straightforward. Tenn. Code Ann. § 46-4-102 defines these persons as "the surviving spouse and children, or if no surviving spouse or children, the nearest relative or relatives by consanguinity"\[142\] of any of the persons interred in the burial ground. To define the persons entitled to notice because of their interest in the property, the General Assembly chose words traditionally associated with conveyances \[**44\] of real property.\[143\] The General Assembly defined these persons as "persons who have any right or easement or other right in, or incident or appurtenant to, a burial ground as such." The terms "incident" \[*756\] and "appurtenant" are essentially synonymous.\[144\] Rights, easements, and other interests are incident or appurtenant to real property when they are necessary to the full enjoyment of the real property itself. Bain v. Doyle, 849 P.2d 910, 912 (Colo. Ct. App. 1993); Pine v. Gibraltar Sav. Ass'n, 519 S.W.2d 238, 241 (Tex. Civ. App. 1974).

The Tennessee General Assembly chose its words carefully when it enacted Tenn. Code Ann. § 46-4-102. Based on the common meaning of the words themselves, it is evident that the General Assembly desired to make sure that any person with any sort of legally recognized possessory or nonpossessory interest or expectancy in the real property where the burial ground was located, as well as the blood relatives of the

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\[141\] The courts must presume that the General Assembly knows the existing state of the law when it enacts new legislation. Blakenship v. Estate of Bain, 5 S.W.3d at 651; Still v. First Tennessee Bank, N.A., 900 S.W.2d 282, 285 (Tenn. 1995).


\[143\] One old text observes that "the word 'appurtenances' which in former times at least was so generally employed in deeds and leases is derived from the word apparentir which is Norman French and means to belong to. Speaking broadly, the word means anything corporeal or incorporeal, which is an incident of, and belongs to some other thing as principle. At a time when the construction of conveyances was of a more technical character than it is at present the word was considered of much greater importance than it is now and it was considered that in its absence from a lease or other conveyance a very restricted meaning should attach to the words of the description of the premises conveyed." 1 H.C. Underhill, A Treatise on the Law of Landlord and Tenant § 291, at 442-43 (1909). \[**45\]

deceased, would receive notice of the termination proceeding by being made a party defendant under Tenn. Code Ann. § 46-4-103(b).

Our interpretation of the language [**46] in Tenn. Code Ann. § 46-4-102 is confirmed when that statute is considered in light of related provisions in Tenn. Code Ann. § 46-4-103. The purpose of these statutory proceedings, according to Tenn. Code Ann. § 46-4-103(a)(2) is "to terminate the use of, and all rights and easements . . . incident or appurtenant to the ground as a burial ground." In addition, Tenn. Code Ann. § 46-4-103(b) reiterates that "the owner or owners of the land or of any right of reversion or other right or interest therein" must be made defendants if they are not already parties. These provisions reinforce our conclusion that the "rights" and "interests" referred to in both Tenn. Code Ann. § 46-4-102 and Tenn. Code Ann. § 46-4-103 are limited to rights and interests in real property.

Later statutes specifically relating to Native American human remains and funerary objects reflect that the General Assembly's understanding of the scope of the term "interested persons" in Tenn. Code Ann. § 46-4-102 is the same as [**47] ours. The General Assembly was aware of the general statutes governing the closure of burial grounds when it enacted the 1990 statutes specifically governing the care and handling of Native American human remains. Had Tenn. Code Ann. § 46-4-102 already afforded Native Americans "interested person" status in proceedings to close a burial ground, it would not have been necessary to enact elaborate and specific notice procedures to be followed upon the discovery of Native American human remains. However, the General Assembly understood that Native Americans could not be "interested persons" under Tenn. Code Ann. § 46-4-102 unless they could prove that they possessed an interest in the real property or that they were related by blood to a person buried in the burial ground. Accordingly, it enacted Tenn. Code Ann. § 11-6-116(c) requiring that timely notice of the discovery of Native American human remains be given to the Native American members of the Archeological Advisory Commission and the executive director of the Commission of Indian [*757] Affairs.

The trial court's result-oriented exegesis of Tenn. Code Ann. § 46-4-102 is inconsistent with the most rudimentary principles of statutory construction. It cannot be supported by the plain language of the statute itself, and it unreasonably expands the scope of the phrase "interested persons" when Tenn. Code Ann. § 46-4-102 is considered in light of the statutory scheme for closing burial grounds and the related statutes governing the reinterment of Native American human remains. Adopting the trial court's expansive interpretation of "any right" in Tenn. Code Ann. § 46-4-102 would essentially permit any person able to articulate some sort of right or interest in a burial ground to claim "interested person" status in a proceeding to close a burial ground. The General Assembly could not [**49] have intended such a result.

Accordingly, we have determined that by enacting Tenn. Code Ann. § 46-4-102, the General Assembly intended to codify rather than discard [**48] the common-law rule requiring that persons with any sort of

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145 The courts presume that the General Assembly is aware of its prior enactments when it enacts legislation. Washington v. Robertson County, 29 S.W.3d 466, 473 (Tenn. 2000); State ex rel. Metro. Gov't v. Spicewood Creek Watershed Dist., 848 S.W.2d at 63; Neff v. Cherokee Ins. Co., 704 S.W.2d at 4.

146 The General Assembly could just as easily have amended the definition of "interested person" in Tenn. Code Ann. § 46-4-102 to include culturally affiliated Native American tribes, but it chose the notice procedure instead.

147 The courts presume that the General Assembly did not intend an absurdity, and thus the courts should avoid using their power to construe statutes to produce absurd results. Barnett v. Barnett, 27 S.W.3d 904, 908 (Tenn. 2000); Fletcher v. State, 951 S.W.2d 378, 382 (Tenn. 1997); Wachovia Bank of North Carolina, N.A. v. Johnson, 26 S.W.3d 621, 627 (Tenn. Ct. App. 2000).

148 Statutes in derogation of the common law are to be strictly construed, Perry v. Sentry Ins. Co., 938 S.W.2d 404, 406 (Tenn. 1996); Cardwell v. Bechtol, 724 S.W.2d 739, 744 (Tenn. 1987), and should be confined to their express terms. Worley v. Weigels, Inc., 919 S.W.2d at 593. Accordingly, unless the plain meaning of a statute requires otherwise, the courts will presume that the General Assembly did not intend
ownership interest in a burial ground and the family of the deceased persons buried there were entitled to notice of proceedings to terminate the use of the real property as a burial ground. [**50]

Based on our interpretation of Tenn. Code Ann. § 46-4-102, neither the individual Native Americans seeking to intervene in this proceeding nor the executive director of the Commission of Indian Affairs, nor the Commission itself qualify as "interested persons" entitled to be made parties to this proceeding. By their own admission, they own no legally recognized interest of any sort in the property at the intersection of Hillsboro Road and Old Hickory Boulevard where the three ancient graves were discovered. Further, they have been unable, and in fact did not attempt, to prove that they are related by blood to any of the persons buried in these graves. Accordingly, the trial court erred when it gave these parties "interested person" status in the proceeding brought by the Department to remove and reinter these human remains.

C. Our inquiry regarding the role of the fifteen individual Native Americans in this proceeding is not completed, even though we have concluded that the trial court misconstrued Tenn. Code Ann. § 46-4-102 when it granted them "interested person" status. Had these individuals requested permission to [**51] appear as amicus curiae in this proceeding, the unique circumstances of this case would have provided [*758] the trial court a sound basis for granting their request.

The courts have inherent authority to appoint an amicus even in the absence of a rule or statute. Martinez v. Capital Cities/ABC-WPVI, 909 F. Supp. 283, 286 (E.D. Pa. 1995); James Square Nursing Home, Inc. v. Wing, 897 F. Supp. 682, 683 n.2 (N.D.N.Y. 1995); Mausolf v. Babbitt, 158 F.R.D. 143, 148 (D. Minn. 1994), rev'd on other grounds, 85 F.3d 1295 (8th Cir. 1996). The role of an amicus is to provide timely and useful information, Hoptowit v. Ray, 682 F.2d 1237, 1260 (9th Cir. 1982); Sciotto v. Marple Newtown Sch. Dist., 70 F. Supp. 2d 553, 554 (E.D. Pa. 1999), that will assist the court in reaching the proper resolution of the issues it is being called upon to decide. Ferguson v. Paycheck, 672 S.W.2d 746, 747 (Tenn. 1984); Vanderbilt Univ. v. Mitchell, 162 Tenn. 217, 227, 36 S.W.2d 83, 86 (1931).

As a general matter, appointing an amicus is reserved for rare and unusual cases, Ferguson v. Paycheck, 672 S.W.2d at 747; [**52] Mayhew v. Wilder, 46 S.W.3d 760, 778-779 (Tenn. Ct. App. 2001), that involve questions of general or public interest. Russell v. Board of Plumbing Examiners, 74 F. Supp. 2d 349, 350-51 (S.D.N.Y. 1999); Ciba-Geigy Ltd., BASF A.G. v. Fish Peddler, Inc., 683 So. 2d 522, 523 (Fla. Dist. Ct. App. 1996); In re Interest of M.B., 101 Wn. App. 425, 3 P.3d 780, 785 (Wash. Ct. App. 2000). An amicus can assist the court by (1) providing adversarial presentations when neither side is represented, (2) providing an adversarial presentation when only one point of view is represented, (3) supplementing the efforts of counsel even when both sides are represented, and (4) drawing the court's attention to broader legal or policy implications that might otherwise escape the court's consideration. Giammalvo v. Sunshine Mining Co., 644 A.2d 407, 409 (Del. 1994).


Determining the extent of an amicus curiae's participation in a case is also a discretionary decision. Russell v. Board of Plumbing Exam'rs, 74 F. Supp. 2d at 351; Waste Management of Pa., Inc. v. City of New York, 162 F.R.D. 34, 36 (M.D. Pa. 1995). However, an amicus must not intrude on the rights of the parties. Accordingly, [*759] courts considering whether to designate an amicus and the role the amicus should play should consider, among other things, (1) the nature of the litigation and the issues presented, (2) the nature of the person or organization seeking amicus status, (3) the role that the amicus has played in other cases and the manner in which it has carried out its role, (4) the objections of the parties, and (5) whether the person or organization seeking amicus status is manipulating this role as a substitute for intervention. Wyatt v. Hanan, 868 F. Supp. at 1359-60.

This case is one of those rare cases [**55] in which the participation of an amicus curiae could assist the court in properly resolving the issues before it. The closure of burial grounds in general and the treatment and disposition of Native American human remains and funerary objects are matters of general public interest and of great cultural significance to Native Americans. In these proceedings, no property owner or blood relative of the persons whose remains were discovered has been identified. Thus, the Department is currently the only party before the court. Granting a request from responsible and interested parties to participate as amicus will assure an adversarial presentation of whatever evidence there may be to rebut the Department's case for terminating the use of the real property as a burial ground. Accordingly, on remand, the trial court may exercise its discretion to permit an amicus to appear in the proceedings to assist the court in properly resolving the issues raised by the Department's petition.149 [***56]

IV. INTERFERENCE WITH THE NATIVE AMERICANS' FREE EXERCISE RIGHTS

We now turn to the Native Americans' free exercise claims under the Religion Clauses of the First Amendment to the United States Constitution and Tenn. Const. art. I, § 3. These claims are essentially three-fold. First, the Native Americans insist that denying them status as "interested persons" in this litigation will interfere with their rights of conscience by preventing them from presenting their objections to the relocation of the Native American human remains in the only legal forum available to resolve disputes regarding the termination of burial grounds. Second, they assert that disinterring the human remains is fundamentally inconsistent with their religious beliefs. Third, they assert that the removal of the human remains from their present location will prevent them from conducting traditional religious services.

At the outset, we must acknowledge the long history of the mistreatment of Native Americans at the hands of European settlers and their governments. We are not unmindful of the removal of the eastern tribes that was pursued so vigorously and cruelly in the early nineteenth century. [**57] These federal and state policies undermined the Native Americans' religion and way of life by removing them from their ancestral homelands that were their source of strength.151 We are likewise aware that [*760] historically Native American human remains and funerary objects have not received the same consideration and respect

149 For reasons more fully discussed in Section V, neither the Tennessee Commission of Indian Affairs nor its executive director, acting in his official capacity, have the authority to participate in this case as amicus curiae.


generally accorded to human remains of other races and nationalities. The widespread removal, retention, and display of Native American human remains and funerary objects has had a tremendous impact on Native Americans, causing them emotional trauma and spiritual distress. For most of the twentieth century, the Native Americans have sought redress for this historical discrimination, dehumanization, and commodification of their human remains and funerary objects, but their efforts did not begin to meet with success until the past two decades.

This litigation is not an appropriate vehicle for addressing these historical indignities. That sort of relief must be obtained from the Congress, the Tennessee General Assembly, and other legislative bodies. The responsibility of the courts is to resolve the concrete disputes between the parties using the principles of law provided by the state and federal constitutions, the General Assembly, and the common law. However, as we fashion a legally supported resolution of the disputes before us, we should take into consideration the evidence regarding the Native Americans' traditional religious beliefs and practices.

A. Both the United States Constitution and the Constitution of Tennessee protect an individual's free exercise rights and rights of conscience. The Religion Clauses of the First Amendment provide that the federal and state governments "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Likewise, Tenn. Const. art. I, § 3 provides:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship.

The protections afforded to Tennesseans' religious freedoms by the Constitution of Tennessee share the contours of the protections afforded by the Bill of Rights of the United States Constitution. Both provisions were written to acknowledge various liberties and to protect the free exercise of these liberties from government intrusion. Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d 1, 12 (Tenn. 2000). However, the Constitution of Tennessee may provide greater protection and may even protect rights that are not protected by the United States Constitution. State v. Barnett, 909 S.W.2d 423, 430 n.6 (Tenn. 1995); Miller v. State, 584 S.W.2d 758, 760 (Tenn. 1979). Thus, differences between the language of provisions in the Constitution of Tennessee [*761] and the United States Constitution may prompt Tennessee's courts to recognize substantial differences in the degree of protection that Tenn. Const. art. I, § 3 may provide.

The Tennessee Supreme Court has characterized Tenn. Const. art. I, § 3 as "practically synonymous" with the Religion Clauses in the First Amendment. Carden v. Bland, 199 Tenn. 665, 672, 288 S.W.2d 718, 721 (1956). More recently, however, the Court has noted that "practical synonymy does not necessarily

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153 Winski, 34 Ariz. L. Rev. at 188.

154 Hibbert, 23 Am. Indian L. Rev. at 434.

155 The First Amendment's Free Exercise and Establishment Clauses have been made applicable to the states by incorporation into the Fourteenth Amendment. Everson v. Board of Educ., 330 U.S. 1, 8, 67 S. Ct. 504, 508, 91 L. Ed. 711 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940).
correspond to coextensive expressions of liberty, even as to individual express guarantees under the constitution." Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d at 14. Thus, we must determine whether Tenn. Const. art. I, § 3 provides different or greater protections for individual religious freedom than those provided in the Religion Clauses of the First Amendment.

The Tennessee Supreme Court has addressed this question on two occasions. In 1959, the Court stated that Tenn. Const. art. I, § 3 is "broader and more comprehensive in its guarantee of freedom of worship and freedom of conscience." Carden v. Bland, 199 Tenn. at 672, 288 S.W.2d at 721. Sixteen years later, the Court repeated without elaboration that Tenn. Const. art. I, § 3 "contains [**62] a substantially stronger guaranty of religious freedoms." State ex rel. Swann v. Pack, 527 S.W.2d 99, 107 (Tenn. 1975). The conclusion that the protections in Tenn. Const. art. I, § 3 are substantially stronger than those in the First Amendment must rest on something more than the greater length and specificity of Tennessee's constitutional provision. Planned Parenthood of Middle Tenn. v. Sundquist, 38 S.W.3d at 28 (Barker, J., dissenting in part).

While the Court has characterized Tenn. Const. art. I, § 3 as "substantially stronger" than the Religion Clauses in the First Amendment, it has not, as yet, explained directly how the degree of protection of religious liberties afforded by Tenn. Const. art. I, § 3 differs from the First Amendment's protections. The Carden v. Bland decision provides two reasons for concluding that the Court was referring to Tenn. Const. art. I, § 3's prohibition against governmental establishment of religion. First, the Carden v. Bland case involved an establishment challenge to a state statute requiring public school teachers to read a section from The Bible at the beginning of every school day. Second, the Court illustrated its conclusion that Tenn. Const. art. I, § 3 is "broader and more comprehensive" than the First Amendment by citing the following language: "no preference shall ever be given, by law, to any religious establishment or mode of worship." The Court's citation of this provision to the exclusion of Tenn. Const. art. I, § 3's free exercise provisions indicates that the Court had the establishment of religion in mind when it characterized Tenn. Const. art. I, § 3 as stronger than its federal counterpart.

The Tennessee Supreme Court has never held that Tenn. Const. art. I, § 3's protection of the right of conscience and free exercise of religion are more expansive than the Free Exercise Clause of the First Amendment. To the contrary, the Court has consistently construed and applied the free exercise protections in Tenn. Const. art. I, § 3 using the same principles employed by the United States Supreme Court to interpret the Free Exercise Clause of the First Amendment. Thus, for the purpose of this opinion, we conclude that the degree of protection that [*762] Tenn. Const. art. I, § 3 provides for the religious freedoms of the Native Americans is the same as that provided [**64] by the Free Exercise Clause of the First Amendment.

B. Both the First Amendment and Tenn. Const. art. I, § 3 are the products of the historic struggle to balance the demands of the secular world of government and the conscience of individuals. Girouard v. United States, 328 U.S. 61, 68, 66 S. Ct. 826, 829, 90 L. Ed. 1084 (1946); Wolf v. Sundquist, 955 S.W.2d 626, 630 (Tenn. Ct. App. 1997). In the United States, the federal and state courts maintain this constitutional equilibrium by recognizing that religious liberty embodies two complementary concepts. First and foremost, religious liberty includes the right to believe and to profess whatever religious doctrine one desires. Employment Div., Dep't of Human Servs. v. Smith, 494 U.S. 872, 877, 110 S. Ct. 1595, 1599, 108 L. Ed. 2d 876 (1990). Second, it includes the right to act, or to refrain from acting, in a manner consistent with one's religious beliefs.

The federal and state constitutions place the freedom of belief (or rights of conscience) beyond government control or interference. Accordingly, under the Free Exercise Clause of the First Amendment and Tenn. Const. art. [**65] I, § 3 the freedom of belief is absolute and inviolate. Bowen v. Roy, 476 U.S. 693, 699, 106 S. Ct. 2147, 2152, 90 L. Ed. 2d 735 (1986); State ex rel. Swann v. Pack, 527 S.W.2d at 107; Goodwin v. Metropolitan Bd. of Health, 656 S.W.2d 383, 389 (Tenn. Ct. App. 1983). As Justice Jackson stated in another First Amendment context:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force

On the other hand, laws are made to govern actions, and while they cannot interfere with religious beliefs and opinions, they may interfere with religiously motivated conduct. Employment Div., Dept. of Human Servs. v. Smith, 494 U.S. at 879, 110 S. Ct. at 1600; Reynolds v. United States, 98 U.S. 145, 166, 25 L. Ed. 244 (1879). Thus, the freedom to engage in religiously grounded conduct is not absolute. Cantwell v. Connecticut, 310 U.S. at 304, 60 S. Ct. at 903. Some religious acts and practices by individuals must yield to the common good. Bowen v. Roy, 476 U.S. at 702, 106 S. Ct. at 2153; United States v. Lee, 455 U.S. 252, 259, 102 S. Ct. 1051, 1056, 71 L. Ed. 2d 127 (1982); Wolf v. Sundquist, 955 S.W.2d at 630.

The free exercise protections in the federal and state constitutions are intended to apply to the widest possible scope of religious conduct. Michael W. McConnell, Free Exercise As the Framers Understood It, in The Bill of Rights: Original Meaning and Current Understanding 54, 67 (Eugene W. Hickok, Jr. ed. 1991). They do not, however, permit "every citizen to become a law unto himself," Reynolds v. United States, 98 U.S. at 167, and they do not require the government to conduct its affairs in ways that comport with the religious beliefs of particular citizens. Bowen v. Roy, 476 U.S. at 699, 106 S. Ct. at 2152.


Claims based on religious convictions or rights of conscience do not automatically entitle persons to establish unilaterally the terms and conditions of their relations with the government. Bowen v. Roy, 476 U.S. at 702, 106 S. Ct. at 2153. For the past fifty years, the courts have consistently declined to mechanically subordinate society's interests to individual religious conscience. To do so would be to make individual religious beliefs superior to the law of the land, Reynolds v. United States, 98 U.S. at 166-67, and would thereby destroy the rule of law on which our pluralistic society is based. Developments in the Law - Religion and the State, 100 Harv. L. Rev. 1606, 1704 (1987). Neither the federal nor the state constitutions give individuals a veto power over government actions that do not prohibit the free exercise of religion. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. at 452, 108 S. Ct. at 1327.

Recognizing that religiously motivated conduct may, in proper circumstances, be subordinated to the common good does not mean that government actions are free from constitutional constraint. The government cannot enact laws that have no purpose other than to prohibit particular religious practices unless these laws are justified by a compelling interest and are narrowly tailored to advance that interest. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 113 S. Ct. 2217, 2227, 124 L. Ed. 2d 472 (1993). Likewise, the government cannot enact laws that discriminate against some or all religious beliefs or that regulate or prohibit conduct simply because it is undertaken for religious reasons. Braunfeld v. Brown, 366 U.S. 599, 607, 81 S. Ct. 1144, 1148, 6 L. Ed. 2d 563 (1961); Fowler v. Rhode Island, 345 U.S. 67, 69-70, 73 S. Ct. 526, 527, 97 L. Ed. 828 (1953). Finally, the government cannot interpret, apply, or enforce facially neutral laws in a discriminatory manner. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. at 533-34, 113 S. Ct. at 2227.

Government may, however, enact and enforce facially neutral and uniformly applicable laws that have the incidental effect of burdening a religious practice. When this sort of law faces a free exercise challenge, the government is not required to justify it with a compelling governmental interest. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. at 351, 113 S. Ct. at 2226; Kickapoo Traditional Tribe of Tex. v. Chacon, 46 F. Supp. 2d at 653; Decker v. Carroll Academy, 1999 Tenn. App. LEXIS 336, No. 02 A01-9709-CV-00242, 1999 WL 332705, at *5 (Tenn. Ct. App. May 26, 1999) (No Tenn. R. App. P. 11 application filed). The enforcement of a facially neutral and uniformly applicable law that only incidentally burdens religious practice will be upheld if the government demonstrates that the law is a reasonable means for promoting a legitimate public interest. Bowen v. Roy, 476 U.S. at 707-08, 106 S. Ct. at 2156.

C. It is not our prerogative to inquire into the truth, validity, or reasonableness of the Native Americans' professed religious beliefs. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. at 449, 108 S.
Ct. at 1325; Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 n.9, 107 S. Ct. 1046, 1051 n.9, 94 L. Ed. 2d 190 (1987). Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to merit constitutional protection. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. at 531, 113 S. Ct. at 2225; Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714, 101 S. Ct. 1425, 1430, 67 L. Ed. 2d 624 (1981). Nor must religious groups be numerically strong or their religious practices be consistent with prevailing views. State ex rel. Swann v. Pack, 527 S.W.2d at 107. Thus, for the purposes of this opinion, we accept without question the legitimacy of the Native Americans' religious beliefs and the sincerity with which they profess them.

The Native Americans themselves testified that there is no single belief or absolute religious truth among the numerous Native American tribes. There are a great number of tribes, many of which have been in existence for thousands of years, and all of which exhibit diverse forms religious beliefs and customs. Sam D. Gill, Native American Religions: An Introduction 15 (1982). Many Native Americans believe, as reflected by the witnesses testifying during the June 14, 1999 and August 5, 1999 hearings, that life is a journey that should not be interrupted. Jeannie Barbour testified that "life is a journey, there isn't really a death, there is a journey that is ongoing." Medicine Bird Black Bear White Eagle, a spiritual advisor to the Native American Spiritual Alliance, explained:

The journey is not complete because life does not end here, it's a continuing journey. It's just that our remains are here, and they go back to Mother Earth and Mother Earth claims it and turns it back into dust. And we are a part of Mother Earth but our spirit goes on and makes a journey.

We are from the star people. When we pass on, we make the journey back into the . . . stars where we come from; that's where our ancestors are.

Native Americans also believe that the Native American human remains and related funerary objects are links between the physical world and the spiritual world. They also believe that a person's spirit is released when his or her remains are disturbed and that the spirit cannot rest or resume its journey until the remains are reinterred. Accordingly, Toye Heape explained that "when you disturb the dead, you interrupt the cycle of life, and that person returns back to the place that it came from, going back into the earth. And, thereby, you disturb the journey that that person's soul takes on its way to the spirit world." Marion Dunn added that the spirit of a deceased person "can't rest" when the burial site is disturbed. And when asked to explain what happened to a spirit when a burial site is disturbed, Dan Kirby testified that the best way I could explain it in English terms, if you was going to somewheres and you were going a long way and I just snatch you back and pull you back to the beginning. You [are] just taking a journey to what you would call heaven, [and] you're just pulling them back.

Thus, Native Americans believe that disturbing Native American burial sites causes spiritual trauma to the deceased and ill-effects to the living. Kickapoo Traditional Tribe of Tex. Chacon, 46 F. Supp. 2d at 651; Trope & Echo-Hawk, 24 Ariz. St. L.J. at 49; Hibbert, 23 Am. Indian L. Rev. at 431-32.

D. We will now examine Tenn. Code Ann. §§ 46-4-101, -104 to determine whether they violate the religious rights of the Native Americans either on their face or as the Department seeks to apply them in this case. Our first task is to determine whether these statutes were enacted for the purpose of suppressing religion or religious conduct. We begin with the statutes' text because a minimum requirement of neutrality


is that the law does not discriminate on its face. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. at 533, 113 S. Ct. at 2227. [**74] These statutes pass constitutional muster. Their operation does not depend on religious practices or on belief of any sort, and they do not discriminate among religions. They do not target any particular religious conduct or belief for disparate treatment. Accordingly, we conclude that these statutes are, on their face, neutral and equally applicable to unmarked Native American graves, Protestant cemeteries, family burial grounds, and confederate graves.

Next, we must determine whether these statutes compel Native Americans to abandon or violate their religious beliefs. Again, there is no evidence in this record that they do. These statutes do not control religious beliefs or rights of conscience. They do not require Native Americans to abandon their belief that disturbing a burial site is immoral because it causes spiritual trauma to the deceased. Neither do these statutes penalize Native Americans for their beliefs or traditions by denying them rights or benefits available to others in the same or similar circumstances.

Likewise, these statutes do not prevent Native Americans from practicing their religion or from performing their traditional religious rituals. There is no evidence [**75] that the property surrounding the intersection of Hillsboro Road and Old Hickory Boulevard is a traditional sacred site for area Native Americans.159 There is no evidence that this site is intimately and inextricably connected with their ability to practice their religion or that relocating the human remains found at this site will doom their religion or prevent them from continuing to practice it. To the contrary, the evidence shows that Native Americans had no interest in this particular site until the human remains were inadvertently discovered. Thus, the Native Americans' complaints in this case are based, not on the intrinsic sacredness of the area surrounding the intersection of Hillsboro Road and Old Hickory Boulevard,160 but rather on the sacredness of the human remains buried there.

Accordingly, we find that Tennessee's statutes governing the termination of burial grounds are facially neutral and uniformly applicable and that they only incidentally burden the Native Americans' religious practices and rights of conscience. Therefore, we must uphold the constitutionality of these statutes if the Department has demonstrated that they [*766] are a reasonable means to promote a legitimate public interest.

Almost one hundred years ago, the Tennessee Supreme Court recognized that "the dead must give place to the living," Memphis State Line R.R. v. Forest Hill Cemetery Co., 116 Tenn. at 419, 94 S.W. at 73-74. And so it is today. The continuing, inexorable growth of our populated areas has created increasing demands for convenient housing, new retail centers, and roadways to connect them. The construction required to meet these demands, like the construction of the TVA dams that displaced so many residents of Appalachia during the early [**77] twentieth century, continues to displace the living and the dead. This burden has not fallen just on Native Americans.161

This record contains undisputed evidence that widening Hillsboro Road between Franklin and Nashville has become necessary. The State has expended public funds to acquire property for this purpose, including the tract at the intersection of Hillsboro Road and Old Hickory Boulevard. This roadway has been sited and designed in a competent and professional manner, and the construction was well underway when these

159 Free exercise claims based on the sacredness of geographical locations were made in Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. at 442, 108 S. Ct. at 1322; Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1160 (6th Cir. 1980). [**76]

160 A detailed discussion of Native American beliefs regarding sacred places can be found in Rose, 7 Va. J. Soc. Pol'y & L. at 109.

unmarked graves were discovered. Accordingly, completing this project as designed serves a legitimate public purpose.

Over fifty years ago, the Tennessee General Assembly balanced the competing interests of property owners and those who favored change with those who favored preserving burial grounds undisturbed. The General Assembly determined that the courts should consider these matters on a case-by-case basis and that the courts should permit governments to close burial grounds and to relocate the human remains interred there as long as the government demonstrated compliance with the four requirements in Tenn. Code Ann. § 46-4-104. We find nothing in this procedure or the possible results of the procedure that unconstitutionally interferes with Native American rights of conscience or free exercise rights protected by the First Amendment and Tenn. Const. art. I, § 3.

Our decision should not be read as countenancing governmental insensitivity to the religious beliefs of any citizen. Plainly, many of the Native Americans' concerns about this project stem from past governmental disdain for their ancestors and traditional beliefs. Throughout his testimony during two days of hearings, Medicine Bird Black Bear White Eagle referred to the Native American human remains being stored in museums and the research that has been conducted on these remains and requested the repatriation of these remains. He testified that he "hears their cries all the time" and that Native American remains in repositories and museums "need to be reburied into Mother Earth." We respect these concerns but find nothing in the record indicating that the human remains and funerary objects involved in this case will meet the same fate.

Two prerequisites for obtaining judicial authorization to close a burial ground are the preparation of definite arrangements for the reinterment of the human remains and the reinterment of the remains "with due care and decency." Tenn. Code Ann. § 46-4-104. Tenn. Code Ann. § 11-6-119 supplements Tenn. Code Ann. § 46-4-104 by requiring that the reinterment conform to applicable Native American customs, and Tenn. Comp. R. & Regs. r. 0400-9-1-.01, -.02 reinforces this requirement. This record contains no evidence that the Department or any other state agency has ignored or intends to ignore these legal obligations.

Accordingly, Tenn. Code Ann. § 46-4-104 provides the court with the ability to prevent inappropriate treatment of the Native American human remains and funerary objects by requiring the Department to abide by the applicable statutes and regulations governing the disposition of Native American human remains.

V. THE ROLE OF THE TENNESSEE COMMISSION OF INDIAN AFFAIRS

The Department also asserts that the trial court erred by authorizing the Commission and its executive director to participate in this proceeding as "interested persons." The trial court based its decision on its belief that the statutes creating the Commission and the administrative regulations defining its authority


163 One of the briefs submitted by Native American parties asserts that "obviously, the removal of the very object of worship, the remains of the ancestor from the earth, stored in a cardboard box, removed to a laboratory for testing and later, at the convenience of the State, offered for reinterment is a direct, violent and obtrusive interference with and a prohibition of that religious worship."

164 We do not share the trial court's dismay over the presence of the state archeologist when the Native Americans were conducting religious rituals at the gravesites. The property belongs to the State, and the human remains, by operation of Tenn. Code Ann. § 11-6-107(d)(4), are in the custody of the state archeologist. Whatever interests the Native Americans have in conducting rituals at this site cannot divest the government of its ownership rights to this property, including the right to control access to the property and to use the property as it sees fit. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. at 453, 108 S. Ct. at 1327. It is not at all clear that the Native Americans had proper authorization to enter the construction site. Accordingly, the state archeologist cannot be faulted for being present to monitor their activities.
gave the Commission a "right" in the burial grounds for the purpose of Tenn. Code Ann. § 46-4-102. We have reviewed these statutes and regulations and can find no legal or factual basis for the trial court's decision.


The Commission's statutory purposes, broadly stated, are to "deal fairly and effectively with Indian affairs," to "assist Indian communities in social and economic development," and to "promote recognition of, and the right of Indians to pursue, cultural and religious traditions considered by them to be sacred and meaningful to Native Americans." Tenn. Code Ann. § 4-34-102(1), (5), (6). To accomplish these purposes, the General Assembly gave the Commission the power to "meet," to "investigate," to "confer with appropriate officials," to "encourage and implement coordination of applicable resources," and to "review proposed legislation." Tenn. Code Ann. § 4-34-103(1), (2), (3), (4), (7). The General Assembly also empowered the Commission to conduct public hearings on matters relating to Indian affairs, Tenn. Code Ann. § 4-34-103(8), to establish rules and procedures for officially recognizing Native American groups, tribes, and communities, Tenn. Code Ann. § 4-34-103(9), (10), and to prepare an annual report. Tenn. Code Ann. § 4-34-106.

The Commission was not mentioned in the 1990 statutes pertaining specifically to Native American human remains and funerary objects. These statutes provided that the inadvertent discovery of human remains must be reported to the Division of Archeology once the coroner or medical examiner determines that there is no forensic interest in the remains. Tenn. Code Ann. § 11-6-107(d)(3). The purpose of the notice provision was to enable the Division to assure that Native American groups could see to it that a Native American would be present on site during the excavation and removal of the remains under Tenn. Code Ann. § 11-6-116(a). In 1991, the Department of Environment and Conservation promulgated rules limiting the Native Americans entitled to be present at the site to one of the Native American members of the Archeological Advisory Commission. Thus, at this point, the Commission still had no statutory role in the closing of burial grounds or the reinterment of the human remains.

In 1999, the Tennessee General Assembly amended the statutes authorizing the closure of a burial ground to require the State Archeologist to notify not only the Native American members of the Archeological Advisory Commission but also the chair of the Commission. The General Assembly did not explicitly specify what either the Native American members of the Archeological Advisory Commission or the chair of the Commission were supposed to do with this information. Similarly, the General Assembly chose not to expand the Commission's powers.  

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166 The governor is ultimately responsible for twenty of the twenty-four departments. The remaining four, the Department of Audit, the Department of State, the Department of Treasury, and the Legal Department are under the control of other constitutional officers. Tenn. Code Ann. § 4-3-111(1), (23), (24), (25) (Supp. 2000).

167 We note that the Commission is one of the governmental bodies slated for termination on June 30, 2001 unless the General Assembly authorizes it to continue. Tenn. Code Ann. § 4-29-222(a)(9) (Supp. 2000). The 102nd General Assembly did not reauthorize the Commission before July 1, 2001. We have
B. It is a fundamental rule of law that the departments, agencies, and commissions of government have no inherent or common-law power of their own. General Portland, Inc. v. Chattanooga-Hamilton County Air Pollution Control Bd., 560 S.W.2d 910, 914 (Tenn. Ct. App. 1976). They are purely creatures of statute. Accordingly, governmental agencies have only those powers expressly granted by statute and those powers required by necessary implication to enable them to fulfill their statutory mandate. Sanifill of Tenn., Inc. v. Tennessee Solid Waste Disposal Control Bd., 907 S.W.2d 807, 810 (Tenn. 1995); Tennessee Pub. Serv. Comm'n v. Southern Ry., 554 S.W.2d 612, 613 (Tenn. 1977). Actions taken by a governmental agency without the required authority are nullities. Johnson v. Alcoholic Beverage Comm'n, 844 S.W.2d 182, 186 (Tenn. Ct. App. 1992); Madison Loan & Thrift Co. v. Neff, 648 S.W.2d 655, 657 (Tenn. Ct. App. 1982).

The Tennessee General Assembly has not explicitly given the Commission the authority to bring suit in its own name or to intervene in legal proceedings involving other parties. Accordingly, if the Commission is to have the power to intervene in legal proceedings, the power must arise by necessary implication to enable the Commission to fulfill its statutory mandates or to carry out its statutory duties. We have concluded that intervening in pending judicial proceedings is not necessary to enable the Commission to accomplish the purposes for which it was created.

Concluding that the Commission lacks authority to intervene in pending lawsuits does not prevent the Commission from continuing to "promote recognition of, and the right of Indians to pursue, cultural and religious traditions considered by them to be sacred and meaningful to Native Americans." It means only that the Commission must promote this recognition in public fora other than the courts. Likewise, it does not mean that the Commission cannot continue to study, confer, or hold hearings on matters relevant to Indian affairs. It means only that the Commission cannot engage in these activities in the context of litigation involving other parties.

The trial court's decision to give "interested person" status to the Commission and its executive director is based on two dubious interpretations of the Commission's enabling statutes. First, the trial court extrapolated the Commission's power to intervene in judicial proceedings from its power under Tenn. Code Ann. § 4-34-103(8) to "conduct public hearings." There is, of course, a palpable difference between the Commission conducting administrative hearings on its own and the Commission's intervening in judicial proceedings in a court of record. The two are completely unrelated and, therefore, Tenn. Code Ann. § 4-34-103(8) does not support the trial court's decision to permit the Commission to intervene as an "interested person."

Second, the trial court appears to have inferred the power to intervene in lawsuits to close a burial ground from the statute and regulation requiring the state archeologist to notify the chair of the Commission when the archeologist is informed that such a suit has been filed. Tenn. Code Ann. § 11-6-

determined that the demise of the Commission in its present form on July 1, 2001 does not render the question of the Commission's involvement in this case moot. Tenn. Code Ann. § 4-29-112 (1998) provides that the Commission shall continue in existence until June 30, 2002 "for the purpose of winding up its affairs." Until June 30, 2002, the Commission's "termination shall not diminish, reduce, or limit the powers or authorities of each respective governmental entity."


169 The trial court noted in its June 29, 1999 "supplemental order" that "this case most likely will include 'a public hearing' or trial 'on matters relating to Indian affairs.'"
The trial court determined that the purpose of the notice provision was "so that the Commission may assert any right in or incident to burial grounds made the subject of litigation." It is one thing to interpret these provisions to give the Commission the right to timely notice of legal proceedings to close a burial ground. It is, however, quite another thing to read the right to intervene into the mere right to notice.

The trial court seems to have concluded that the only possible reason for requiring that notice be given to the chair of the Commission must be to enable the Commission to intervene as an "interested person" in the pending closure proceedings. There are, however, at least two more plausible purposes for this notice provision. First, the notice provision enables the Commission to promote the recognition of Native American religious traditions by consulting with the state archeologist and others to assure that Native American human remains removed from a closed burial ground are reinterred in accordance with the appropriate Native American traditions as required by Tenn. Code Ann. § 11-6-119. Second, the notice requirement furthers the Commission's ability to provide aid and protection to Native Americans and to prevent undue hardship by enabling the Commission to assist in locating relatives of the deceased Native Americans whose identities or whereabouts are unknown. These relatives, if located, would then have standing to claim "interested person" status in a pending closure proceeding. In light of these salutary reasons for requiring notice to the Commission, the trial court went too far when it concluded that the purpose of the notice provision must have been to enable the Commission to intervene.

The Commission's enabling statutes demonstrate that the Commission is a subordinate agency of the Department of Environment and Conservation. Rather than being simply affiliated with the department for administrative purposes, Tenn. Code Ann. § 4-34-101(b) provides that the Commission is "administered under the direction and supervision of the department of environment and conservation." The plain import of this provision is that the Commission is under the direction and supervision of the Commissioner of Environment and Conservation.

In a June 23, 1999 letter to the Commission's executive director, the Commissioner of Environment and Conservation declined to authorize the Commission to intervene in this proceeding and refused to request a special counsel to represent the Commission in this endeavor. Thus, in addition to the lack of explicit statutory authority to intervene, the head of the department with direct supervisory power over the Commission has explicitly declined to permit the Commission to intervene. The lack of authorization to proceed from its superior provides another reason for concluding that the Commission cannot intervene in this proceeding.

Finally, one important prudential consideration supports our conclusion that the Commission should not be permitted to intervene in this proceeding. As a general matter, state agencies should not be permitted to judicially challenge the constitutionality of the conduct of other state agencies. Star-Kist Foods, Inc. v. City of Los Angeles, 42 Cal. 3d 1, 719 P.2d 987, 990-91, 227 Cal. Rptr. 391 (Cal. 1986); Romer v. Board of County Comm'rs, 779 P.2d 1317, 1323 (Colo. 1989). It is especially applicable to disputes between two executive branch agencies that ultimately must answer to a single decision-maker - the governor. Thus, in the absence of an express statutory authority, one executive branch agency does not have the authority to intervene in a pending

170 The language in Tenn. Code Ann. § 4-34-101(b) is not typically found in statutes creating other boards and commissions. In virtually every other circumstance, the General Assembly has preserved the board's or commission's independence by stating that it is "attached" to a particular department for "administrative purposes." E.g., Tenn. Code Ann. § 4-3-5003(a)(3) (1998) (Tennessee Film, Entertainment and Music Commission); Tenn. Code Ann. § 4-14-208 (1998) (Tennessee Science and Technology Advisory Council); Tenn. Code Ann. § 4-50-102(i) (1998) (Economic Council on Women); Tenn. Code Ann. § 62-18-103(b) (1997) (Board of Examiners for Land Surveyors). In other instances, the General Assembly also recites specifically that the board or commission is autonomous or independent. E.g., Tenn. Code Ann. § 2-10-203(b)(1) (Supp. 2000) (Registry of Election Finance); Tenn. Code Ann. § 9-8-301(b), (e) (1999) (Tennessee Claims Commission).
judicial proceeding to challenge the legality or constitutionality of another executive branch agency's actions.

A justiciable controversy can only be presented by a party with capacity and standing to litigate. Silver v. Pataki, 274 A.D.2d 57, 711 N.Y.S.2d 402, 404-05 (App. Div. 2000). Based on the record before us, we conclude, as a matter of law and fact, that the Commission lacks capacity to intervene or to otherwise participate in judicial proceedings to close a burial ground and to relocate the human remains. We also conclude that the Commission has no standing in this proceeding because, as a statutory creature, it has no rights or interests of its own entitled to constitutional protection. In addition, it has neither alleged nor demonstrated that any of its proprietary interests as a state agency are being jeopardized by this proceeding. Accordingly, we find that the trial court erred by permitting the Commission and its executive director to participate in these proceedings as "interested persons."

VI. THE DISQUALIFICATION OF THE ATTORNEY GENERAL AND REPORTER AND THE APPOINTMENT OF AN ATTORNEY GENERAL PRO TEM

The final issue presented by this appeal is the trial court's unprecedented decision to disqualify the Attorney General and Reporter ("Attorney General") from representing the Commission and to appoint two private lawyers to represent the Commission in this proceeding. Our decision that the Commission and its executive director are not entitled to participate in this proceeding as interested parties ordinarily would resolve this question because it obviates the Commission's need for a lawyer. However, because the two lawyers appointed by the trial court have actually provided professional services to the Commission, we must address the legality of the trial court's conduct.

[*772] We have determined that the trial court decision to appoint private lawyers to represent the Commission was erroneous for three reasons. First, the Commission did not need a lawyer because it was not entitled to participate in this proceeding. Second, the trial court erroneously interpreted and applied the Code of Professional Responsibility when it concluded that the Attorney General had a conflict of interest requiring disqualification. Third, even if the trial court had been correct regarding the Attorney General's disqualification, the trial court has no authority to appoint an Attorney General pro tem to replace the Attorney General.

A. The Attorney General became a constitutional officer with the adoption of the 1853 amendments to the Constitution of 1835. Tenn. Const. art. VI, § 5. The Attorney General is the chief executive officer of the Legal Department of state government. Tenn. Code Ann. § 4-3-111, -1502; Tenn. Code Ann. § 8-6-102 (1993). In this role, the Attorney General has both extensive statutory power and the broad common-law powers of the office except where these powers have been limited by statute. State v. Chastain, 871 S.W.2d 661, 664 (Tenn. 1994); State v. Heath, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990).

By statute, the Attorney General is responsible for "the trial and direction of all civil litigated matters and administrative proceedings in which the state of Tennessee or any officer, department, agency, board, commission or instrumentalities of the state may be interested." Tenn. Code Ann. § 8-6-109(b)(1) (1993). In this regard, the Attorney General "shall represent all offices, departments, agencies, boards, commissions or instrumentalities of the state now in existence or which may hereafter be created," Tenn. Code Ann. § 8-6-301(a) (1993), and shall "direct and supervise all investigations and litigation necessary to the administration of the duties of the various offices, departments, agencies, boards, commissions or instrumentalities of the state now in existence or which may hereafter be created." 172

171 It is unnecessary to analyze in detail the Commission's executive director's capacity and standing to intervene because the executive director has no authority beyond the authority granted to the Commission. Tenn. Code Ann. § 4-34-108(a). If the Commission lacks the authority to intervene, its executive director likewise lacks authority to intervene.

172 The officer identified as the "Attorney General for the State" was included in the 1853 amendments to the Constitution of 1853. The name of the officer was changed to "Attorney General and Reporter" with the adoption of the Constitution of 1870.
instrumentalities of the state, and no such entities shall institute any civil proceeding except through the Attorney General and Reporter." Tenn. Code Ann. § 8-6-301(b).

In addition to the Attorney General's role as the State's principal civil litigator, the Attorney General is obligated to give the governor, secretary of state, state treasurer, comptroller of the treasury, members of the general assembly and other state officials, when called upon, legal advice and formal written opinions regarding the official discharge of their duties. Tenn. Code Ann. § 8-6-109(b)(5), (6). Thus, "all legal services [**98] required by such offices, departments, agencies, boards, commissions or instrumentalities of the state shall be rendered by, or under the direction of, the Attorney General and Reporter." Tenn. Code Ann. § 8-6-301(a).

B. As other courts have noted, the office of the Attorney General is a unique position. Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n, 174 Conn. 308, 387 A.2d 533, 537 (Conn. 1978). As a member of the bar, the Attorney General is held to high standards of professional conduct. As a constitutional officer, the Attorney General has been entrusted with broad duties as the State's [*773] chief civil law officer and is expected to discharge these public duties to the best of his or her abilities. As a lawyer, the Attorney General must by statute provide legal representation to all departments and agencies of state government.


By statute, the General Assembly has mandated a relationship akin to the traditional attorney-client relationship between the Attorney General and the state officials and agencies the Attorney General represents. Attorney General v. Michigan Pub. Serv. Comm'n, 625 N.W.2d at 27; Munchin v. Browning, 296 S.E.2d at 920. Thus, the Attorney General owes a duty of undivided loyalty [**100] to his or her clients and must exercise the utmost good faith to protect their interests. Alexander v. Inman, 974 S.W.2d 689, 693-94 (Tenn. Ct. App. 1998). The Attorney General must (1) preserve client confidences to the extent public clients are permitted confidences, (2) exercise independent judgment on his or her client's behalf, and (3) represent his or her clients zealously within the bounds of the law. Tenn. S. Ct. R. 8, Canons 4, 5, & 7.

Unlike the conflict-of-interest rules governing the conduct of lawyers representing private clients, the Attorney General is not necessarily prohibited from representing governmental clients whose interests may be adverse to each other. The majority rule is that the Attorney General, through his or her assistants, may represent adverse state agencies in intra-governmental disputes. Chun v. Board of Trustees of Employees' Retirement Sys., 952 P.2d at 1237; Attorney General v. Michigan Pub. Serv. Comm'n, 625 N.W.2d at 29-30; State ex rel. Allain v. Mississippi Pub. Serv. Comm'n, 418 So. 2d 779, 783 (Miss. 1982). This rule applies, however, only when the Attorney General is not [**101] an actual party to the litigation.

The trial court decided to disqualify the Attorney General from representing the Commission in this proceeding because it believed there was a "conflict of interest" between the Department of Transportation and the Commission. Because the Attorney General has a specific statutory obligation to represent the Department in condemnation proceedings, the trial court apparently reasoned that the Attorney General somehow owed a greater duty of loyalty to the Department than to the Commission. This conclusion is not well founded. In addition to the general duty of the Attorney General to represent all state offices, departments, and agencies, Tenn. Code Ann. § 8-6-301(a), the Attorney General must perform all such other duties as may devolve upon him or her by law. Tenn. Code Ann. § 8-6-109(b)(14). Throughout the years, the General Assembly has frequently added to the Attorney General's duties and responsibilities. It is not uncommon for the General Assembly to instruct the Attorney General to provide legal advice and representation to specific governmental entities. Thus, the Attorney General's specific statutory responsibility to represent the Department in condemnation matters is not unique and does not have the significance the trial court attached to it. The Attorney General owes the same duty of loyalty and professionalism to the Commission that he or she owes to the Department.

If the Commission were entitled to participate in this proceeding as an "interested person," we perceive no basis for preventing the Attorney General's assistants from representing both the Department and the Commission. The Attorney General himself is not a party to these proceedings, and therefore, his assistants could have appropriately represented both the Department and the Commission even though their interests were adverse. Accordingly, the trial court erred by concluding that the Code of Professional Responsibility required the disqualification of the Attorney General.

Even if the circumstances of this case required the Attorney General's disqualification, which they do not, the trial court plainly exceeded its authority by undertaking to appoint two private lawyers to represent the Commission in this proceeding. The power to appoint district attorneys general pro tempore in Tenn. Const. art. VI, § 5 does not, by its plain terms, apply to the state Attorney General. Thus, the Tenn. Const. art. VI, § 5 provides no justification for the trial court's action, and the trial court's reliance on Goddard v. Sevier County, 623 S.W.2d 917 (Tenn. 1981) is clearly misplaced. In light of the constitutional stature and statutory duties of the Attorney General, we decline to impute to the courts an implied power to appoint lawyers to represent officers and agencies of state government. There are three well-defined procedures for obtaining a lawyer to represent a state officer or agency - two of which are plainly inapplicable in circumstances where the Attorney General cannot represent a state


175 Tenn. Const. art. VI, § 5 states, in part, that: "In all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the Court shall have the power to appoint an Attorney pro tempore." [emphasis added].
officer or agency because of a conflict of interest.\footnote{176} In circumstances involving a conflict of interest due to the Attorney General's personal involvement in a case, Tenn. Code Ann. § 8-6-106 (1993) provides:

> In all cases where the interest of the state requires, in the judgment of the governor and attorney general and reporter, additional counsel to the attorney general and reporter or district attorney general, the governor shall employ such counsel, who shall be paid such compensation for services as the governor, secretary of state, and attorney general and reporter may deem just, the same to be paid out of any money in the treasury not otherwise appropriated, upon the certificate of such officers certifying the amount to the commissioner of finance and administration.

Thus, the governor, with the Attorney General's concurrence, may retain additional counsel in all circumstances where the governor and the Attorney General jointly determine that the interests of the state require additional counsel.

The trial court appears to have devalued this statutory procedure because of its belief that the Attorney General would not exercise his authority under Tenn. Code Ann. § 8-6-106 in a responsible and professional manner. However, the courts must always presume that public officials, including the Attorney General, will discharge their duties in good faith\footnote{107} and in accordance with the law. Mitchell v. Garrett, 510 S.W.2d 894, 898 (Tenn. 1974); Reeder v. Holt, 220 Tenn. 428, 435-36, 418 S.W.2d 249, 252 (1967); 421 Corp. v. Metropolitan Gov't, 36 S.W.3d 469, 480 (Tenn. Ct. App. 2000). The Attorney General is an officer of the court and has the statutory responsibility to assure that the various departments of state government receive appropriate legal representation when they are entitled to it. Were a circumstance to arise that prevented the Attorney General from representing a state office or agency in a civil legal proceeding, we presume that the Attorney General would act professionally, ethically, and in good faith and would exercise his or her discretion under Tenn. Code Ann. § 8-6-106 to authorize the governor to employ additional counsel to represent the office or agency entitled to representation.

The trial court attaches great significance to the fact that the Solicitor General, on the Attorney General's behalf, informed the court that the Attorney General did not intend to certify the need for appointing additional counsel to represent the Commission\footnote{108} in this proceeding. However, as we have already determined, the Attorney General's position in this case was legally sound because the Commission and its executive director were not entitled to participate in the proceeding as "interested parties." Because they were not entitled to participate in the case, they had no need for a lawyer to represent them. Thus, on the face of the record, the Attorney General did not abuse his discretion by declining to accede to the Commission's request for the appointment of special counsel at the taxpayers' expense to represent the Commission in this proceeding.

The law on this matter is crystal clear. Nonetheless, the trial court appointed an "attorney general pro tem" and a second lawyer to act as "Second Chair" to the Attorney General pro tem. These lawyers, acting pursuant to the trial court's mandate, have undertaken to provide legal services to the Commission both at trial and on appeal and have provided competent representation in this proceeding. However, notwithstanding these lawyers' skill and diligence, their appointment was plainly void ab initio because it was without legal authority.

Because their appointments are void, we vacate the trial court's order appointing an Attorney General pro tem and the "Second Chair" to the Attorney General pro tem. The law provides no basis for compensating these lawyers for their efforts in this matter. Accordingly, we thank them for their willingness to accept the trial court's appointment and discharge them from any further responsibility to represent either the Commission or its executive director in this proceeding.

\footnote{176} The two procedures not applicable here are removing the Attorney General by impeachment under Tenn. Const. art. VI, § 6 and retaining special counsel to defend the constitutionality of a state statute that the Attorney General has declined to defend. Tenn. Code Ann. § 8-6-109(e).
VII. In conclusion, we reverse the decision authorizing the fifteen individual Native Americans, the Commission of Indian Affairs, and the Commission's executive director to participate in this proceeding as "interested persons" under Tenn. Code Ann. § 46-4-102. Likewise, we reverse and vacate the order disqualifying the Attorney General and Reporter from representing the Commission of Indian Affairs and appointing an Attorney General pro tem and a "Second Chair" to the Attorney General pro tem. We remand this case to the trial court for further proceedings in strict compliance with this opinion. In accordance with Tenn. R. App. P. 42(a) we direct that the mandate be issued thirty days after the filing of this opinion unless stayed [**110] by the Tennessee Supreme Court. We tax the costs of this appeal, jointly and severally, to the fifteen individual Native Americans who sought to intervene in this proceeding as "interested persons" under Tenn. Code Ann. § 46-4-102, for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE
INTRODUCTION

The State refiled an information against defendants for violating section 76-9-704(1)(b) of the Utah Code (1995), and filed for the first time charges under section 76-9-704(1)(a), arising from defendants' alleged removal or desecration of ancient human bones at an archeological site. Dismissing both charges, the magistrate held that State v. Brickey, 714 P.2d 644 (Utah 1986), combined with the magistrate's interpretation of a Utah Court of Appeals case, State v. Morgan, 2000 UT App 48, 997 P.2d 910, barred refiling of the previously dismissed charge.

BACKGROUND

In 1996, defendants were charged with one count of abuse or desecration of a dead human body for allegedly disintering human bones from an ancient Native American burial site near Bluff, Utah. The section under which defendants were charged provides:
A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

(b) disinters a buried or otherwise interred body, without authority of a court order.


Following a preliminary hearing in March 1997, the magistrate dismissed the charge, reasoning that ancient human remains did not constitute a "dead human body" within the meaning of the statute. The State appealed.

Interpreting the statute, the court of appeals affirmed the dismissal on an alternative ground. See State v. Redd, 954 P.2d 230, 233-34 (Utah Ct. App. 1998). Focusing on the statute's reference to dead bodies "buried or otherwise interred," the court held that this phrase required proof that the body had been intentionally deposited "into a place designated for its repose." Redd, 954 P.2d at 234. The court concluded that the State had not adduced evidence that the human remains had been "previously buried or otherwise interred." Id. at 236. Based on its interpretation of the statutory elements, the court affirmed the magistrate's dismissal of the charge.

In June 1998, the State refiled charges against defendants under subsection (1)(b) and then added an additional charge under subsection (1)(a) that specifically referred to "a dead body or any part of it." Utah Code Ann. § 76-9-704(1)(a), (b) (1995). The two charges tracked the statutory subsections as follows:

(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

(a) removes, conceals, fails to report the finding of a dead body to a local law enforcement agency, or destroys a dead body or any part of it;

(b) disinters a buried or otherwise interred dead body, without authority of a court order.

Defendants moved to dismiss the case, alleging due process violations under State v. Brickey, 714 P.2d 644 (Utah 1986). They argued that refiling should not be permitted because the charges were the same and no new evidence had been discovered. Defendants contended that where the State had failed to adduce evidence necessary to establish probable cause for a bindover, good cause for refiling had not been established. The parties stipulated that the ruling on this motion would be reserved until after the preliminary hearing.

In October 1998, at the preliminary hearing on the refiled charges, the State adduced evidence addressing "interment," the element that the court of appeals had earlier defined and found the evidence supporting the element lacking. The magistrate then bound defendants over on the original charge of disinterring a buried or otherwise interred body. See Utah Code Ann. § 76-9-704(1)(b) (1995). In so doing, the magistrate stated:

177 Revisions to this section effective May 1999 do not affect this appeal. See Utah Code Ann. § 76-9-704 (1999).

178 The State filed a petition for rehearing, focusing on a single narrow legal issue. Although the resolution of that issue has no bearing at this juncture, the court of appeals included a footnote in its order denying the petition, which stated, "No party to this action should construe our opinion or this order to preclude the State from refiling the charges under the same or a more appropriate subsection of the statute."
Were this magistrate to rule on the Brickey issue solely on the basis of the language in Brickey, he would consider himself compelled to prohibit further prosecution of defendants. However, the language of footnote 2 of the Utah court of appeals [sic] order on the state's petition for rehearing strongly suggests the creation of an additional Brickey exception where the prosecutor failed to recognize the need for proof of an element of the offense. This court takes that language as announcing an intention to create such an exception under the "other good cause" prong of Brickey and accordingly denies defendants' motion to dismiss. However, the magistrate did dismiss the new charge of "removing, concealing . . . or destroying a dead body or any part of it." Id. § 76-9-704(1)(a). In so doing, the magistrate wrote:

There is no evidence that [defendants] destroyed, concealed or removed a body or even a bone. The most that can be said is that they may have moved as many as seventeen bones a few feet. This is not removal, concealment or destruction. Count I is accordingly dismissed.

[*P9] In response to the dismissal of the "removal" charge, the State filed a petition for permission to file an interlocutory appeal. The single issue presented was whether the magistrate erred in determining that moving human bones from their place of interment could not, as a matter of law, establish probable cause to believe the bones had been "removed," as that term is used in section 76-9-704(1)(a). The court of appeals granted the petition and then immediately certified the case to this court. We held that the State had shown probable cause to believe the bones had been "removed," as that term is commonly used, and that, consequently, defendants should have been bound over on the charge. State v. Redd, 1999 UT 108, P11, 992 P.2d 986. Accordingly, we reversed and remanded the case back to the magistrate. Id. at P16, 992 P.2d 986. We expressly reserved judgment on whether the State was permitted to refile the information under section 76-9-704(1)(b) as that issue was not properly before us. Id. at P9, 992 P.2d 986. We refer the reader to State v. Redd, 1999 UT 108, 992 P.2d 986, for a more particular account of the underlying facts of this case.

[*P10] Back before the magistrate, defendants moved to dismiss the bindover based on Brickey. They argued that the evidence of interment presented by the State at the second preliminary hearing was not new or previously unavailable and did not provide good cause for refiling. Defendants contended that a decision issued by the court of appeals in State v. Morgan, 2000 UT App 48, 997 P.2d 910, effectively precluded interpreting good cause to include an innocent miscalculation of the quantum of evidence necessary to obtain a bindover.

[*P11] The magistrate agreed with defendants and granted the motion to dismiss both counts of the information. The court stated:

Lack of new evidence and innocent miscalculation as to the evidence required to obtain a bindover are the two areas that Brickey and Morgan together set forth as insufficient grounds to permit a refiling of charges after dismissal. It is those very claims that the state sets forth in this case. While the practical application of these cases may be unduly restrictive on the prosecution, in light of Brickey and Morgan, this court is compelled to grant the Defendants' Motion.

[*P12] We noted in Redd that there was not a Brickey question before us at that time. Redd, 1999 UT 108 at P9, 992 P.2d 986. We now address this legal issue.

ANALYSIS

[*P13] We must determine whether the magistrate correctly dismissed the two charges against defendants under the Brickey rule. In Brickey we held that for due process considerations, unless the State offered new or previously unavailable evidence or demonstrated other good cause, charges could not be refiled after a dismissal at a preliminary hearing. State v. Brickey, 714 P.2d 644, 647 (Utah 1986). We refer the reader to State v. Redd, 1999 UT 108, 992 P.2d 986, for a more particular account of the underlying facts of this case.
revisited and refined the Brickey rule in State v. Morgan, 2001 UT 87, 34 P.3d 767. In Morgan we determined that when potential abusive practices are involved, the presumption is that due process will bar refiling. Id. at P16, 34 P.3d 767. Therefore, "fundamental fairness," the touchstone of due process, precludes, without limitation, a prosecutor from seeking an unfair advantage over a defendant through forum shopping, repeated filings of groundless and improvident charges, or from withholding evidence." Id. at P15, 34 P.3d 767. However, we determined that when a prosecutor innocently miscalculates the quantum of evidence necessary to bind over a defendant, due process violations are not necessarily implicated when charges are refiled. Id. at P19, 34 P.3d 767. We therefore held that an innocent miscalculation is a subset of "other good cause" under the Brickey rule, allowing refiling, while emphasizing that the miscalculation must be innocent and not used for purposes which would violate due process rights of the defendant. Id. In light of this interpretation, we turn to the case before us and address each charge in turn. A proper interpretation of case law is a question of law, which we review for correctness, according no deference to the magistrate's legal conclusion. See State v. Morgan, 2001 UT 87 at P, 34 P.3d 767.

I. UTAH CODE § 76-9-704(1)(b)

[*P14] Defendants were initially charged with the violation of section 76-9-704(1)(b), which provides:

(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

...[***11]

(b) disinters a buried or otherwise interred dead body, without authority of a court order.


The magistrate dismissed the charge on the basis that the ancient bones were not a dead body under the statute. The State appealed, and the court of appeals outlined the clear elements of a prima facie case based on the statute. First, the State must show that the dead body was "buried or otherwise interred." Redd, 954 P.2d at 234. Second, the State must show that the defendant disinterred the body. Id. Third, the State must establish the mens rea that the defendant acted intentionally when he or she disinterred the interred dead body. Id. Although not labeled first through third in the statute, the State's experienced legal counsel should have been able to extrapolate these three simple elements and provide evidence sufficient for a bindover.

[*P15] The court of appeals rebuffed the State's contention that the first element cannot be separate from the second, stating:

We presume that when the Legislature chose the terms "disinter" and "inter" in its prohibitions, it intended to use both terms as they are normally understood. Accordingly, we must conclude that the Legislature intended this subsection to prohibit the disinterment only of dead bodies shown to have been intentionally deposited in a place of repose. Further, any interpretation that would eliminate the interment requirement would render the language of subsection 76-9-704(1)(a), which specifically prohibits the removal or destruction of any dead body, mere surplusage. See Utah Code Ann. § 76-9-704(1)(a) (1995) (prohibiting "intentionally and unlawfully . . . removing . . . or destroying a dead body or any part of it."). Id. at 235.

[*P16] The court continued that "even viewing the evidence in the light most favorable to the prosecution, there was no evidence presented at the preliminary hearing which would support the first required element that the bones . . . had been interred." Id. at 235-36 (emphasis added). Moreover, the court also held that

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180 We granted certiorari to review the court of appeals' decision in State v. Morgan, 2000 UT App 48, 997 P.2d 910.
"the State called no witnesses, expert or otherwise, to establish that these bones were intentionally deposited in the earth in a place of repose." Id. at 236. [***13] The court concluded that the "State failed to present a quantum of evidence sufficient to submit the case to a trier of fact on an essential element of the crime charged." Id.

[*P17] While we agree with the court of appeals that the State failed to present evidence on an essential element of the crime, we disagree with the court's conclusion that this is an instance where the State innocently miscalculated the quantum of evidence necessary for a bindover. Indeed, the State failed to provide a scintilla of evidence on the element of interment. We hold that a potentially abusive practice exists where the State refiles a charge when it has been dismissed for the State's failure to provide any evidence on a clear element of the relevant criminal statute, as the record bears out in this instance. Accordingly, the presumption is that the State has violated the due process rights of defendant and is barred from refiling in such an instance excepting new or previously unavailable evidence or other good cause. The State has provided no new or previously unavailable evidence or other good cause to justify refiling section 76-9-704(1)(b) in this case. Our holding is consistent with [***14] our decision in Brickey where the prosecutor failed to introduce any evidence of an element of forcible sexual assault, and we held that due process rights of the defendant were therefore violated when the prosecutor refiled the charge. Brickey, 714 P.2d at 645, 647-48. We affirm the dismissal of this charge.

[**1165] II. UTAH CODE § 76-9-704(1)(a)

[*P18] In State v. Redd, 1999 UT 108, 992 P.2d 986, the only issue before us on appeal was the interpretation of section 76-9-704(1)(a), which provides:

(1) A person is guilty of abuse or desecration of a dead human body if the person intentionally and unlawfully:

(a) removes, conceals, fails to report the finding of a dead body to a local law enforcement agency, or destroys a dead body or any part of it.


[*P19] As we noted in Redd, this subsection is subject to two different readings.

First, it can be read as prohibiting only (i) the removal, concealment, or failure to report the finding of an intact body, or (ii) the destruction of an intact body or any part of it. . . . Alternatively, [***15] the statute could be read as prohibiting (i) the removal, concealment, failure to report the finding of, or the destruction of (ii) a dead body or any part of it.

Redd, 1999 UT 108 at P12, 992 P.2d 986. For public policy reasons, we concluded that the legislature must have intended the second alternative. By so doing, we determined that the statute "will protect partial remains of many people buried long ago in crude graves such as pioneers, war dead, or victims of horrendous accidents or crimes." Id. at P14, 992 P.2d 986. Reviewing the ample evidence in the record, we concluded that defendants had "removed" parts of a "dead body" and held that the magistrate erred in not binding over defendants for trial under section 76-9-704(1)(a).

[*P20] As referenced above, in Morgan we determined that when potential abusive practices are involved, the presumption is that due process will bar refiling. Morgan, 2001 UT 87 at P16, 34 P.3d 767. These potential abusive practices include forum shopping, repeated filings of groundless and improvident charges for the purpose to harass, or withholding evidence. Id. at P15, [***16] 34 P.3d 767. Earlier in this opinion, see P 17 supra, we added to the list another potentially abusive practice that would prevent refiling because of due process concerns: A presumptively abusive practice occurs when a prosecutor refiles a charge after providing no evidence for an essential and clear element of a crime at a preliminary hearing. As with the other potentially abusive practices, the presumption against refiling can be overcome by showing that new or previously unavailable evidence or other good cause justifies refiling.
[*P21] Turning to the present case, the State has not employed any of these abusive practices relating to the charges filed under section 76-9-104(1)(a). We held in the previous Redd case that the State provided sufficient evidence for a bindover on section 76-9-704(1)(a), and we do not need to reanalyze that issue here. Redd, 1999 UT 108 at PP11-15, 992 P.2d 986. Therefore, we presume that the due process rights of defendants were not implicated by refiling where the State did not employ an abusive practice because "the dismissal and discharge do not preclude the State from instituting a subsequent prosecution [***17] for the same offense." Utah R. Crim. P. 7(h)(3). We conclude that the magistrate erred in not binding over defendants on this charge.

CONCLUSION

[*P22] We affirm the dismissal of the charge in the information based on section 76-9-704(1)(b). We reverse the dismissal of the charge based on section 76-9-704(1)(a) and direct the magistrate to bind over defendants on this charge.


[*P24] Having disqualified himself, Justice Wilkins does not participate herein; District Judge David L. Mower sat.
LIST OF REFERENCES

American Association of Museums

Alexander, Edward P. 1979. Museums in Motion: An Introduction to the History and Functions of Museums. American Association for State and Local History: Nashville, TN.


Census Bureau of the United States Government


Florida Museum of Natural History


General Publishing Group


Houghton Mifflin Company

Curator v.1, pp. 5-24.


Karp, Ivan and Steven D. Lavine (eds). 1991. Exhibiting Cultures: The Poetics and

Kohlstedt, Sally Gregory. 1988. Curiosities and Cabinets: Natural History Museums and
Education on the Antebellum Campus. ISIS, v.79, pp. 405-426.


Krockover, Gerald, and Jeanette Hauck. 1980. Training for Docents: How to Talk to
Visitors. American Association of State and Local History Technical Leaflet 125.


Levine, Lawrence. 1988. Highbrow/Lowbrow: The Emergence of Cultural Hierarchy in

Milanich, Gerald T. 2000. Prolific Pioneer or Mound Mauler? Why Scholars are

Miller, Patrick B., Therese Frey Steffen, and Elisabeth Schäfer-Wünsche (eds.) 2001. The
Civil Rights Movement Revisited: Critical Perspectives on the Struggle for Racial

Museum Set to Lose Indian Treasure: a curator’s objects of art but a tribe’s objects of

Naranjo, Tessie. 1996. Musing on Two World Views, In Mending the Circle: A Native
American Repatriation Guide. American Indian Ritual Object Repatriation


Paglia, Camile. 1999. The Right Kind of Multiculturalism. The Wall Street Journal,
September 30.

Reed Elsevier, Inc.
http://web.lexis-nexis.com/universe/form/academic/legalresearch.html  Last
SIL International

the Human Condition (2nd ed.). Mayfield Publishing Co.: Mountain View, CA.


Serrell, Beverly. 1996. Exhibit Labels: An Interpretive Approach. Alta Mira Press:
Walnut Creek, CA.


Smith, Paul Chaat, and Robert Allen Warrior. 1996. Like a Hurricane: The Indian
Movement from Alcatraz to Wounded Knee. New Press, distributed by W.W.

Stehinhorn, Leonard and Barbara Diggs-Brown. 1999. By the Color of Our Skin: The

Thomas, David Hurst. 2000. Skull Wars: Kennewick Man, Archaeology, and the Battle

50-61.

University of Arizona
http://www.statemuseum.arizona.edu/about/mission_vision.shtml  Last accessed


File, Inc.: New York.

Wallach, Amei. 1993. Haudenosaunee Reclaim Their Heritage: Sacred Masks Go Back to
Tribe. In Mending the Circle: A Native American Repatriation Guide. American

Prospects. Smithsonian Institution Press: Washington DC.


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