

JAMES A. GOOLD (D.C. Bar # 430315)
MICHAEL J. FANELLI (D.C. Bar # 456717)
COVINGTON & BURLING
1201 Pennsylvania Avenue
Washington, D.C. 20004-2401
Telephone: (202) 662-5507
Facsimile: (202) 778-5507
E-mail: jgoold@cov.com

Attorneys for *Amicus Curiae*
Society for American Archaeology

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

<hr/>)	CV 96-1481-JE
BONNICHSEN, et al.,)	
)	
Plaintiffs,)	
)	MEMORANDUM OF LAW IN
)	SUPPORT OF THE SOCIETY
v.)	FOR AMERICAN
)	ARCHAEOLOGY'S
)	AMICUS CURIAE
UNITED STATES, et al.,)	SUBMISSION
)	
Defendants.)	
<hr/>)	

Amicus Curiae, the Society for American Archaeology (SAA), respectfully submits this Memorandum of Law and supporting Affidavit of Robert L. Kelly, President of the SAA, with associated exhibits.

TABLE OF CONTENTS

	<u>Page</u>
I. BACKGROUND	1
II. THE DOI PROPERLY DETERMINED THAT THE KENNEWICK REMAINS ARE “NATIVE AMERICAN” UNDER NAGPRA	4
A. DOI’s Interpretation is Consistent with the Plain Language of NAGPRA	5
B. Alternative Readings of “Native American” or “indigenous” are Problematic	7
III. THE DOI’S DETERMINATION OF CULTURAL AFFILIATION WAS ARBITRARY AND CAPRICIOUS	9
A. The DOI’s Decision with Respect to the Cultural Affiliation of the Kennewick Remains is Arbitrary and Capricious Because of Numerous Errors of Law	9
1. The DOI’s Entire Legal Analysis was Inappropriately Influenced by its Assumption that NAGPRA is “Indian Law”	10
2. The DOI Wrongfully Equated “Shared Group Identity” with “Cultural Continuity” and “Reasonable Cultural Connection” in its Analysis of Cultural Affiliation	11
a. The DOI’s Finding of Shared Group Identity is Inconsistent with the Plain Meaning of the Statute	12
b. The Secretary’s Interpretation of “Shared Group Identify” is Contrary to NAGPRA’s Legislative History	14
3. The DOI’s Decision Failed to Identify an “Identifiable Earlier Group” as Required by NAGPRA	16
4. The Secretary’s Determination of Joint Affiliation of the Claimant Tribes is Flawed.....	17
5. The DOI Failed to Establish a Shared Group Identity Between the Claimant Tribes in the Early-1800s and the Present-Day Claimants	20
6. The DOI’s Finding of Cultural Affiliation with an Unrecognized Tribe is Contrary to NAGPRA	21

	<u>Page</u>
B. The Secretary’s Weighing of the Evidence of Cultural Affiliation was Arbitrary and Capricious	21
1. The Review of Final Determination Demonstrates That a Reasonable Fact Finder Could Not Conclude on the Basis of the Evidence in the Record That the Kennewick Remains are Affiliated with the Claimant Tribes	23
2. The DOI’s Evaluation of the Evidence was Improperly Influenced by its Determination that NAGPRA is “Indian Law”	23
V. THE DOI’S APPLICATION OF NAGPRA’S ABORIGINAL OCCUPATION PROVISION WAS ARBITRARY AND CAPRICIOUS	25
A. The DOI’s Decision is Contrary to NAGPRA’s Plain Language	26
1. Whether or Not NAGPRA is “Indian Law” Has No Bearing on the Applicability of the “Aboriginal Land” Provision	27
2. The Preamble to NAGPRA’s Regulations Cannot Supersede its Clear Statutory Terms	28
B. There is No Basis Upon Which a Reasonable Person Could Have Concluded that the Kennewick Remains were Found on the Claimant Tribes’ Aboriginal Lands	28

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>Cases</u>	
<u>Alabama-Coushatta Tribe of Tex. v. United States</u> , No. 3-83, 2000 WL 1013532 (Fed. Cl. June 19, 2000)	24
<u>Bonnichsen v. United States</u> , 969 F. Supp. 628 (D. Or. 1997).....	4
<u>Chevron, U.S.A., Inc. v. Natural Res. Def. Council</u> , 467 U.S. 837 (1984)	5, 9
<u>County of Yakima v. Yakima Indian Nation</u> , 502 U.S. 251 (1992)	27
<u>Idaho Dep’t of Fish and Game v. National Marine Fisheries Serv.</u> , 850 F. Supp. 886 (D. Or. 1994), <u>vacated on other grounds</u> , 56 F.3d 1071 (9th Cir. 1995).....	22
<u>Inland Empire Pub. Lands Council v. Glickman</u> , 88 F.3d 697 (9th Cir. 1996).....	21, 22, 25
<u>Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.</u> , 463 U.S. 29 (1983).....	22
<u>Mt. Diablo Hosp. v. Shalala</u> , 3 F.3d 1226 (9th Cir. 1993).....	21-22
<u>Negonsott v. Samuels</u> , 507 U.S. 99 (1993).....	10
<u>Northwest Motorcycle Ass’n v. United States Dep’t of Agric.</u> , 18 F.3d 1468 (9th Cir. 1994)	5, 22
<u>South Carolina v. Catawba Indian Tribe</u> , 476 U.S. 498 (1986).....	10
 <u>Statutes</u>	
<u>Administrative Procedure Act</u> , 5 U.S.C. § 706(2)(A).....	21
<u>National Museum of the American Indian Act</u> , 20 U.S.C. § 80q-9(b).....	14, 16
<u>Native American Graves Protection and Repatriation Act</u> , 25 U.S.C. § 3001, <u>et seq.</u>	1, 20
25 U.S.C. § 3001(2).....	11, 15, 21

	<u>Page</u>
25 U.S.C. § 3001(9)	4, 8
25 U.S.C. § 3002(a)(2)(C)(1).....	1, 25, 26
25 U.S.C. § 3006(b)	10

Legislative Materials

H.R. 1646, 101st Cong. (1989).....	14, 16
S. 1980, 101st Cong. (1989)	14, 15, 16
S. 1021, 101st Cong. (1990)	14
H.R. 5237, 101st Cong. (1990).....	14
H.R. 2893, 105th Cong. (1998).....	3
H.R. Rep. No. 101-877 (1990).....	25
136 Cong. Rec. S17,173 (1990).....	10

Other Authorities

43 C.F.R. § 10.2(b)(2).....	20, 21
43 C.F.R. § 10.14 (c)(3).....	11
Native American Graves Protection and Repatriation Act Regulations, 60 Fed. Reg. 62134, 62140 (Dec. 4, 1995) (to be codified at 43 C.F.R. pt. 10)	29
65 Fed. Reg. 13298 (2000)	20, 21
<u>The Oxford English Dictionary</u> (2d ed. 1989)	5

I. BACKGROUND

The Society for American Archaeology (“SAA”) appears as *Amicus Curiae* to provide the Court with the considered view of a broad cross-section of the American archaeological community on the interpretation of the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. § 3001, *et. seq.*, and its application in this case. The precedent that will be set by this decision will not only determine the final disposition of the Kennewick remains but also will have broad ramifications for the future interpretation and implementation of NAGPRA. On one hand, SAA supports the Department of the Interior’s (DOI) position that the Kennewick remains are “Native American” under NAGPRA and believes the DOI generally has made a reasonable effort to compile the appropriate evidence to determine their cultural affiliation. On the other hand, the DOI’s decision that the Kennewick remains are culturally affiliated with the claimant tribes is fundamentally flawed in both its application and interpretation of the legal standard for “cultural affiliation” and its assessment of the evidence in the record. In addition, the DOI’s application of NAGPRA’s “aboriginal occupation” provision, 25 U.S.C. § 3002(a)(2)(C)(1), is contrary to law and wholly unsupported by the facts. If upheld, the DOI’s decision could forever shatter the delicate balance between the legitimate interests of Native Americans, science and the public that NAGPRA’s drafters hoped to achieve.

The Society for American Archaeology, with more than 6600 members, is the leading professional society of archaeologists and others concerned with the advancement of archaeology in the Americas. For more than a decade, SAA has led the scientific community in addressing issues concerning repatriation of Native American human remains and objects of importance to contemporary Native American tribes. In 1990, SAA was the primary scientific organization involved in the negotiations among Native American organizations, museums, the

archaeological community and Congress that resulted in the landmark consensus represented by NAGPRA. Each party to these discussions made compromises consistent with Congress's intent to reasonably balance Native American interests with those of the scientific community and the broader public. SAA provided testimony at Senate and House committee hearings on NAGPRA and helped form a coalition of scientific organizations and Native American groups that, once the compromise had been reached, strongly supported NAGPRA's enactment. Since NAGPRA's passage, SAA has closely monitored its implementation and has worked on an ongoing basis with the NAGPRA Review Committee, DOI and other agencies. SAA has twice testified at hearings of the Senate Committee on Indian Affairs on the implementation of NAGPRA.

Over the last 10 years, SAA has been alarmed to see an increasing divergence between the actual practice of NAGPRA implementation by some Federal agencies and museums and what the Society believes to be plainly required by the letter and spirit of the Act. The DOI's September 21, 2000 decision regarding the disposition of the Kennewick remains crystallizes this divergence. DOI 10012. Although SAA believes that the DOI has undertaken appropriate studies of the Kennewick remains¹ and properly determined the Kennewick remains

¹ Although the DOI undertook appropriate studies of the Kennewick remains, the defendants take the position that under Section 3 of NAGPRA "study is permissible only to the extent necessary to determine whether the remains are 'Native American' and their appropriate disposition." (Def's. Br., p. 4.) To the contrary, NAGPRA does not contain any prohibitions against study prior to a determination of cultural affiliation or an otherwise valid claim under Section 3 (or prior to an actual repatriation claim under Section 7). Indeed, recent Congressional testimony of Katherine H. Stevenson (Associate Director of Cultural Resource Stewardship and Partnerships, National Park Service, Department of the Interior) given with respect to proposed changes to NAGPRA supports this view. She stated:

In its present form, NAGPRA cannot be used as 'authorization for . . . new scientific studies . . .' as part of the documentation for inventories of Native American human remains and funerary objects held in public agency or museum collections. *NAGPRA* (continued...)

to be “Native American” under NAGPRA, the DOI’s determination of the Kennewick remains’ cultural affiliation and the applicability of NAGPRA’s aboriginal lands provision contain numerous errors of law and fact and should be set aside. The Secretary’s reasoning in determining cultural affiliation was so flawed that, if similar reasoning were to be followed in the future, it would be difficult to imagine a case in which cultural affiliation could not be determined – which clearly was not Congress’s intent. By shifting the balance to the detriment of science, allowing the Secretary’s decision to stand would severely and unreasonably cripple the ability of the public to understand and scholars to document important aspects of our nation’s heritage.

This Memorandum sets forth SAA’s legal arguments with respect to the DOI’s decision. The attached affidavit of SAA President Robert Kelly, Ph.D, and Review of Secretary Babbitt’s Final Determination of Cultural Affiliation for Kennewick Man (hereinafter “Review of Final Determination”), Exhibit 1, prepared by the SAA’s Committee on Repatriation, Subcommittee on Cultural Affiliation, provides the Subcommittee’s assessment of the evidence

does not prohibit new scientific studies; it simply cannot be used as the authorization for them.

...

Public agencies and museums that hold such remains and objects are permitted to undertake or allow new studies under ARPA and other statutes and regulations. In the case of museums, they are permitted to undertake or allow new studies according to their articles of incorporation, statements of purpose, or other legal statements under which they were established.

Statement of Katherine H. Stevenson (Associate Director, Cultural Resource Stewardship and Partnerships, National Park Service, Department of the Interior) on H.R. 2893, a Bill to amend the Native American Graves Protection and Repatriation Act, Before the U.S. House of Representatives Committee on Resources (June 10, 1998) (emphasis added) (available at <http://www.kennewick-man.com/documents/testimony/stevenson.html>).

in the record with respect to the cultural affiliation of the Kennewick remains and a review of Secretary Babbitt's errors. For the convenience of the Court, included within the Review of Final Determination is a table (Table 1) that summarizes the evidence in the record pertaining to what is known about the "group" represented by the Kennewick human remains, the characteristics of the claimant groups circa 1805, the conclusions made by Secretary Babbitt, and the SAA's assessment of why the Secretary's conclusions are arbitrary and capricious.

II. THE DOI PROPERLY DETERMINED THAT THE KENNEWICK REMAINS ARE "NATIVE AMERICAN" UNDER NAGPRA

NAGPRA defines "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). In response to this Court's direction to the defendants to give further consideration to the meaning of "Native American" and the term "indigenous" as used in the statute, Bonnichsen v. United States, 969 F. Supp. 628 (D. Or. 1997), the DOI provided its views on these definitions in a December 23, 1997 letter, explaining:

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 2128. The Society for American Archaeology believes that this interpretation reasonably carries out Congress's intent, and, is consistent with the common-sense meaning of the terms "Native American" and "indigenous."

It is well established that when a federal agency's decision turns at least in part upon the construction of a statute or regulation, the court must consider whether the agency correctly interpreted and applied the relevant legal standards. When Congress has

unambiguously expressed its intent, that is controlling. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984). If the statute is silent or ambiguous concerning the issue in dispute, the court next inquires whether the agency is construing a statute that it administers or regulations that it has promulgated. Id. at 842-44. If the answer is yes, which it is with respect to the meaning of the term “Native American,” the agency's construction will be upheld if it is based upon a “permissible construction of the statute” or regulation. Id.; Northwest Motorcycle Association v. United States Dep’t of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994).

A. DOI’s Interpretation is Consistent with the Plain Language of NAGPRA

NAGPRA’s definition of “Native American” turns on the meaning of the word “indigenous.” As neither the statute nor the regulations provide a definition of “indigenous” the Court should consider its plain meaning in the context of the statute. Volume 7 of the Oxford English Dictionary (2d ed. 1989) (hereinafter “OED”) identifies two principal meanings for “indigenous”:

1. Born or produced naturally in a land or region; native or belong naturally *to* (the soil, region, etc.). (Used primarily of aboriginal inhabitants or natural products.)

and,

2. Of, pertaining to, or intended for the natives; ‘native’, vernacular.

The first meaning clearly links “indigenous” to “aboriginal inhabitants.” The same dictionary gives the following meanings for “aboriginal” used as an adjective (Id. at Vol. 1):

1. First or earliest so far as history or science gives record; primitive; strictly native, indigenous. Used both of the races and natural features of various lands . . .

2. *spec.* Dwelling in any country before the arrival of later (European) colonists . . .

3. a. Of or pertaining to aborigines, to the earliest known inhabitants, or to native races.

Both meanings of “indigenous” also make use of the term “native.” This word has many meanings, among which the most pertinent is the fourth (Id. at Vol. 10):

4. One of the original or usual inhabitants of a country as distinguished from strangers or foreigners; now *esp.* one belonging to a non-European race in a country in which Europeans hold political power.

These definitions show that “indigenous” commonly refers to the original or early inhabitants of a region, *particularly as distinct from later European colonists*. Consequently, DOI’s interpretations of “Native American” and “indigenous,” which turn in part on whether the remains or items in question are related to tribes, peoples or cultures that predated the historically documented arrival of European explorers, are consistent with the standard meanings of the terms.

The DOI’s reliance on the concept of the Europeans’ historical arrival in interpreting the definition of “Native American” is neither arbitrary nor unreasonable. The plaintiffs argue that the “defendants’ choice of 1492 ignores the fact that there is no special significance to Columbus for these purposes.” (Pls. Br., p. 6.)² However, for the purposes of NAGPRA, Christopher Columbus indeed has special significance, because it was his voyages into the Caribbean that initiated the period of sustained European exploration and colonization of the Americas. Regardless of whether Columbus himself set foot in the United States, his explorations provide a widely known and appropriate benchmark for the “historically documented arrival of European explorers” that quickly followed.

² This characterization does not relate directly to the wording of DOI’s interpretation as articulated in the Secretary’s September 21, 2000 decision, but results from a clarification in which DOI stated that the phrase “historically documented arrival of European explorers” refers to Christopher Columbus. (Pls. Br., p. 2.)

The DOI's interpretation is further bolstered by the fact that, as a practical matter, remains and artifacts commonly understood not to be "Native American" will not be covered by the DOI's definition. The plaintiffs argue that the "1492 rule would indiscriminately and unreasonably sweep into NAGPRA's ambit remains and objects that have no logical relationship to the purposes of the statute" such as the Vikings and Japanese fishermen. (Pls. Br., p. 6.) In the ten years since NAGPRA became law, however, no such problem has arisen nor is any such problem likely to arise. Although the Vikings are known to have briefly colonized Newfoundland around AD 1000 (*outside* the United States and NAGPRA's jurisdictional reach), to date, no medieval Viking settlements have ever been persuasively documented in the United States. Nor is there any generally accepted evidence of Japanese fishermen in the United States in pre-Columbian times.

But even if the remains of pre-Columbian Vikings or Japanese fishermen were someday to be found in the United States, they would not present any undue problems under NAGPRA. Such visitors should not be considered "Native American" under DOI's interpretation if the word "indigenous" is understood, as it should be, to refer to a long-term, rather than temporary, presence. Moreover, the dictionary definition of "indigenous" quoted above includes the phrase "born ... in a land or region." Thus, if the DOI were confronted with such an extraordinary case in the future, SAA believes DOI would be acting in accordance with NAGPRA if it determined that remains of African, Asian or European individuals that reflect temporary presence in the United States are not "Native American."

B. Alternative Readings of "Native American" or "indigenous" are Problematic

The DOI's interpretation of "Native American" is further bolstered by the fact that alternate readings of "Native American" or "indigenous" are problematic. Any reading of

“indigenous” that gives primacy to its connotations of “first or earliest,” followed to an extreme, leads to a paradox, in that it would exclude later descendants, including present-day tribes. This was clearly not Congress’s intent in enacting NAGPRA. Most scholars today believe that the initial, prehistoric peopling of North America was a long and complex process. Contemporary Native Americans are the descendants of people who arrived in many waves from multiple places of origin. Thus a definition of a “Native American” that would include only the “first or earliest” peoples to inhabit the United States would be inconsistent with the common understanding of “Native American.”

Nor can “Native American” sensibly be interpreted, as plaintiffs do, to “require proof of a relationship to present day Native peoples.” (Pls. Br., pp. 1-2.) Such an interpretation would be contrary to the plain language of the statute, which requires the remains or artifacts to have a relationship to “a tribe, people or culture indigenous to the United States,” *not* a relationship to “present day Native peoples.” 25 U.S.C. §3001(9). Moreover, it would be inconsistent with the common-sense understanding of the term “Native American” to exclude a particular group simply because it had not survived as a people to the present day. There are many historically documented and prehistorically known groups that would commonly be thought of as “Native American” but no longer have present-day descendants.

* * *

In sum, SAA believes that DOI’s interpretation of “Native American,” the so-called “1492 rule,” is generally consistent with a standard English reading of the definition that appears in NAGPRA. The plaintiffs point out theoretical (and rather unlikely) scenarios under which the interpretation might yield results inconsistent with common sense, but as we suggest, these could be dealt with easily. Ultimately the question of whether the Kennewick remains are

Native American must be decided with reference to the definition that appears in NAGPRA itself. Given the Kennewick remains' pre-Columbian antiquity, the fact that they were found well within the boundaries of the United States, and the absence of any reason to believe that this man was either born outside these boundaries or not a permanent resident of the land within these boundaries, it is eminently reasonable to conclude that he was indigenous and therefore "Native American."

III. THE DOI'S DETERMINATION OF CULTURAL AFFILIATION WAS ARBITRARY AND CAPRICIOUS

Although SAA agrees that the Kennewick remains are Native American, SAA believes that the Secretary's decision on cultural affiliation is fundamentally flawed in its understanding of the term "cultural affiliation" and in its assessment of the evidence presented for cultural affiliation. This decision sets a precedent that, if it remains in effect, largely eliminates the compromise between the scientific and Native American interests that was embodied in NAGPRA.

A. The DOI's Decision with Respect to the Cultural Affiliation of the Kennewick Remains is Arbitrary and Capricious Because of Numerous Errors of Law

At each stage of its analysis, the DOI's determination of cultural affiliation is riddled with legal errors and fundamentally at odds with the statute. In Chevron, 467 U.S. at 842 (1984), the Supreme Court explained that when congressional intent is clear, the agency must "give effect to the unambiguously expressed intent of Congress." Id. at 843. Here, the DOI repeatedly disregarded the clear language of the statute in finding that the claimant tribes are affiliated with the Kennewick remains.

1. The DOI's Entire Legal Analysis was Inappropriately Influenced by its Assumption that NAGPRA is "Indian Law"

The DOI's assumption that NAGPRA is "Indian Law" improperly influenced its determination of cultural affiliation. The Secretary explained that "DOI construes the statute as Indian legislation. Therefore, any ambiguities in the language of the statute must be resolved liberally in favor of Indian interests." DOI 10013. However, even if one were to accept the argument that NAGPRA is Indian legislation as true, that would only matter where there is ambiguity in the law.³ Where the statutory language of Indian legislation is unambiguous, the Supreme Court has said there is "no occasion to resort to this canon of statutory construction." See Negonsott v. Samuels, 507 U.S. 99, 110 (1993); South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in

³ In fact, it is by no means clear that NAGPRA should be construed as "Indian Law." Although there is no question that NAGPRA was intended to address important Indian concerns, it did so with a clear recognition of the scientific and public interests that were also at stake. It was neither a piece of Indian legislation nor a piece of museum legislation—it was a piece of compromise legislation. See, e.g., Mem. in Support of Motion of the National Congress of American Indians for Leave to Participate as *Amicus Curiae* at 2 (May 4, 2001) ("Congress in enacting NAGPRA sought to strike a balance between scientists' interests in studying ancient human remains and tribal interests in the repatriation and reburial of such remains.") This balance is clearly expressed in the text of the statute itself and its legislative history. For example, the composition of the NAGPRA Review Committee is required by law to include three representatives of the Native American community and three representatives of the scientific and museum community. 25 U.S.C. § 3006(b). The remarks of Senator McCain—one of the primary sponsors of NAGPRA—on the floor of the Senate on the day of NAGPRA's passage are also illuminative:

The passage of this legislation marks the end of a long process for many Indian tribes and museums. The subject of repatriation is charged with high emotions in both the Native American community and the museum community. I believe this bill represents a true compromise. . . . In the end, each party had to give a little in order to strike a true balance and to resolve these very difficult and emotional issues."

136 Cong. Rec. S17,173 (1990).

favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.”)

As discussed in Sections III.A.2-6 below, the DOI’s legal analysis of the cultural affiliation of the Kennewick remains does not rest on the reasonable resolution of ambiguities, but on apparent disregard of the plain language of the statute. Under the law, any decision on cultural affiliation should rest on Congress’s definition of that term and on the available evidence. In contrast, the argument advanced by DOI appears to reflect a tenuous attempt to find a legal justification to defend a decision that was not based on the language of the statute.

2. The DOI Wrongfully Equated “Shared Group Identity” with “Cultural Continuity” and “Reasonable Cultural Connection” in its Analysis of Cultural Affiliation

The DOI’s opinion failed to apply the correct legal standard concerning the strength of the relationship that must be present between the claimant tribes and the Kennewick remains for there to be a finding of “cultural affiliation” under NAGPRA. NAGPRA’s definition of cultural affiliation stipulates that the cultural relationship must meet the standard of a “shared group identity” that can be reasonably traced:

“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.

25 U.S.C. § 3001(2). Moreover, the regulations stipulate that “[e]vidence to support this requirement must establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group.” 43 C.F.R. § 10.14(c)(3).

Although the DOI’s decision recites NAGPRA’s statutory definition of cultural affiliation, the actual standard applied by the DOI diverges substantially in a manner inconsistent

with the statute’s plain meaning. The DOI’s decision inappropriately equates “cultural affiliation” with “reasonable cultural connection” and then goes on to associate “reasonable cultural connection” with “cultural continuity.” The DOI states, in relevant part:

Consequently, the cultural affiliation determination must focus on whether there is evidence establishing a *reasonable cultural connection* between the Indian tribes inhabiting the Columbia Plateau region approximately 2000-3000 years ago and the cultural group, represented by the Kennewick human remains, which inhabited the same region 8500-9500 years ago.

DOI 10015 (emphasis added).

The collected oral tradition evidence *suggests a continuity* between the cultural group represented by the Kennewick human remains and the modern-day claimant tribes. . . . DOI has determined that the evidence of *cultural continuity* is sufficient to show by a preponderance of the evidence that the Kennewick remains are culturally affiliated with the present-day Indian tribe claimants.

DOI 10015 (emphases added). The analytical leap taken by the DOI from the language of the statute to the watered-down standard actually applied is wholly inconsistent with the unambiguous terms of NAGPRA and its legislative history.

a. The DOI’s Finding of Shared Group Identity is Inconsistent with the Plain Meaning of the Statute

The DOI’s use of “continuity” or “reasonable relationship” as the relevant criterion is manifestly different from “a shared group identity that can be reasonably traced,” in terms of both everyday meaning and anthropological usage. “Cultural continuity” implies a more or less continuous occupation of an area, but little more, and a “reasonable cultural connection” with some group might be said to exist even though an individual’s group identity is quite different. For example, while many Americans could legitimately argue a reasonable cultural connection with 18th-century English culture (the origin of the arguably dominant cultural tradition in the United States), few would claim to have a shared group *identity* with the English.

NAGPRA's stipulation that the group identity must be "shared" clearly implies that Congress intended the relationship between the groups to be a strong one. While some cultural change over time is, of course, inevitable, a "shared" identity must in some sense be the same identity as represented at two different times. Ideally, one would like to show that the earlier group maintained an identity as a "people" with a particular language, customs, and beliefs, and that this same group identity continued into the present with a language, customs and beliefs that developed from the earlier ones.

The concept of "shared group identity" also ought to exclude certain relationships. For example, it is clear that *simple individual descent* of members of the group (biological or cultural) is not sufficient to show this relationship of shared group identity. As noted previously, many Americans have English ancestry, but they do not claim to be English as their cultural identity. Nor does intermarriage necessarily create social relationships between groups. Even with large scale intermarriage, quite distinct group identities often remain intact. Similarly, geographical continuity is not alone a proper criterion. We know historically that, in the American Southwest, when some pueblos were abandoned their residents moved to other pueblos. In some cases these group identities have been maintained over a long period of time. In other cases, groups were absorbed and their original identities essentially disappeared.

Thus, even if it could be shown that contemporary Native American residents of an area were descended from earlier residents who lived in the same area 10,000 years ago, that in itself would not be *sufficient* to show shared group identity between modern

tribes and ancient remains or objects.⁴ Establishment of cultural affiliation would require, instead, identifying an ancient group and tracing that *group's* identity through several thousand years to one or more modern tribes.

b. The Secretary's Interpretation of "Shared Group Identity" is Contrary to NAGPRA's Legislative History

Although a straightforward reading of NAGPRA's definition of cultural affiliation makes clear that it was intended to be restrictive and to include only situations in which the links between an earlier group and a present-day tribe are direct and clear-cut, this interpretation also is supported by NAGPRA's legislative history, which shows that the definition evolved from a much less rigorous to a *more restrictive* standard.

In 1989, Representative Udall and Senator Inouye introduced bills (H.R. 1646, 101st Cong. (1989) and S. 1980, 101st Cong. (1989), respectively) that used the term "cultural affiliation" synonymously with "tribal origin," a term apparently borrowed from the National Museum of the American Indian Act, 20 U.S.C. 80q. Neither term was defined in these bills. A 1990 bill from Senator McCain (S. 1021, 101st Cong. (1989)) also used both terms without explicit definition.

Next, a 1990 successor (H.R. 5237, 101st Cong. (1990)) to Representative Udall's original bill defined cultural affiliation for the first time, in an expansive way, as a "reasonable relationship" between earlier people and modern tribes:

The term "cultural affiliation" means that there is a reasonable relationship, established by a preponderance of the evidence, between a requesting Indian Tribe or Native Hawaiian organization and the Native Americans from which the

⁴ As discussed further in the Review of Final Determination, we have the added factors here that the Kennewick remains likely belonged to a group that was highly mobile and fluid and has physical differences from the claimant tribes.

human remains or other material covered by this Act are derived, regardless of age or antiquity. . . . In the absence of clear and convincing evidence to the contrary, there shall be a presumption of a cultural affiliation between an Indian tribe or Native Hawaiian organization and human remains or funerary objects, sacred objects, and objects of inalienable communal property which were obtained, discovered, excavated, or removed from the tribe's or organization's tribal or aboriginal lands.

Senator Inouye's subsequent amendment to his original bill (S.1980) introduced a much more restrictive definition that more closely resembles the final definition in NAGPRA:

The term "cultural affiliation" means a relationship between a present-day Indian tribe or Native Hawaiian organization and an identifiable historic or prehistoric Indian tribe or Native Hawaiian group that reasonably establishes a continuity of group identity from the earlier to the present-day group.

The definition that appears in NAGPRA as enacted was suggested, verbatim, in a September 12, 1990 joint memo (Affidavit of Robert Kelly, Exhibit 2) to the Senate Select Committee on Indian Affairs from the SAA, the Native American Rights Fund (NARF), the Association on American Indian Affairs (AAIA), and the National Congress of American Indians (NCAI), based on a meeting in NARF's Washington headquarters between SAA representatives and representatives of NARF and AAIA. The joint memo, like the statute, states:

"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.

Exhibit 2, p. 4; 25 U.S.C. § 3001(2). Through its substitution of the statutory definition involving "shared group identity," Congress clearly rejected the "reasonable relationship" definition.

* * *

The Secretary's decision fails to justify the substitution of "reasonable cultural relationship" and "continuity" for a traceable "relationship of shared group identity" in interpreting the law. DOI 10015. By substituting these less restrictive terms for the statutory

language, the Secretary's decision ignores the plain language of the statute and undermines Congress' effort to balance scientific and Native American interests by limiting repatriation to cases where there is a relatively strong connection with a modern tribe.

3. The DOI's Decision Failed to Identify an "Identifiable Earlier Group" as Required by NAGPRA

NAGPRA and its regulations dictate that there be evidence for the existence of an identifiable earlier group. Although the precise nature of the "earlier group" is not specified in the law or its regulations, NAGPRA's legislative history and common sense imply that Congress intended it to be something on the scale of a modern tribe. This interpretation is supported by the prior use of "tribal origin" as the analogous term in the National Museum of the American Indian Act, 20 U.S.C. § 80q-9(b), which served as a model for NAGPRA. It is also supported by the synonymous use of the terms "tribal origin" and "cultural affiliation" in the 1989 bills introduced by Rep. Udall and Sen. Inouye (H.R. 1646 and S. 1980, respectively) that ultimately evolved into NAGPRA.⁵

Although the Secretary's opinion explicitly acknowledges the need to establish "an identifiable earlier group" to which the Kennewick remains belonged, *the Secretary never identifies the earlier group*. DOI 10015. Instead, there appears to be an assumption that all inhabitants of the Middle Columbia River Basin circa 9000 years ago were members of a single group associated with the Windust and Early Cascade periods. Id. As discussed in the SAA

⁵ From an archaeological perspective, it is often difficult to identify groups in the same way that tribes identify themselves today or can be identified in the historical sources. Instead, archaeologists generally recognize "cultures" that are defined in terms of regionally restricted styles of pottery, architecture, and other traits that survive in the archaeological record. While the distributions of such traits may relate in some fashion to group identities, archaeological "cultures" may or may not correspond exactly with "tribes." The association of archaeological (continued...)

Review of Final Determination, such broad classifications of archaeological patterning do not identify a specific group in the sense required by NAGPRA's clear terms. Nor on the basis of the available evidence, as discussed in the attached Review of Final Determination, could the DOI reasonably distinguish the meaningful cultural group to which the Kennewick remains belonged. Although some might object that identifying such a group so far back in time is too difficult -- that is precisely the point. Because Congress intended only to provide for repatriation of remains that are reasonably closely related to the modern groups, it set a rigorous standard for cultural affiliation. Consequently, because the Secretary's decision fails to apply and satisfy NAGPRA's requirement of evidence of the existence of an identifiable earlier group, the Court should set aside the decision.

4. The Secretary's Determination of Joint Affiliation of the Claimant Tribes is Flawed

The Secretary's decision to allow the claimant tribes to make a joint claim for the Kennewick remains without a showing that each claimant tribe is itself culturally affiliated with the Kennewick remains is a legal error. The Secretary's decision posits that NAGPRA "permits finding cultural affiliation with one or more of multiple tribes where, as here, they submit a joint claim." DOI 10014. The Secretary argues that this position is justified by NAGPRA's use of the phrase "closest cultural affiliation," which the Secretary construes to mean that "more than one, and perhaps, many, tribes may have a cultural affiliation with remains discovered on Federal land." *Id.* Plaintiffs, on the other hand, contend that because NAGPRA's definition of cultural

cultures with identifiable earlier groups has to be done with considerable care, based on the totality of the evidence.

affiliation uses the word “tribe” only in the singular construction, cultural affiliation can be recognized between an earlier group and only one present-day tribe. (Pls. Br., pp. 7-9.)

SAA believes that joint affiliations may be valid under NAGPRA, but only where the evidence shows a “shared group identity” between the earlier group to which the remains belonged and *each* of the joint claimants. NAGPRA unequivocally states that cultural affiliation must be based on a traceable relationship of shared group identity between the earlier group and the present-day tribe with which the cultural affiliation is said to exist. Thus, cultural affiliation cannot be said to exist purely by virtue of the fact that a tribe belongs to a coalition making a claim, *even if* another tribe in the coalition has established a relationship of shared group identity with the earlier group. The relationship of shared group identity must be established for *each* present-day tribe independently. This interpretation is consistent both with the singular construction of “tribe” as argued by the plaintiffs and with the notion of “closest cultural affiliation” relied upon by DOI.

The clearest instance in which joint affiliations may be valid is one in which all the present-day tribes constitute a single “people”--who share the same language, culture, and tribal history--but now exist as separate, federally recognized entities. For example, there are three federally recognized Cherokee tribes, one in North Carolina and two in Oklahoma, which were geographically separated by U.S. government actions in the 1830s. Another example is provided by the White Mountain and San Carlos Apache tribes, which became distinct only with the administrative separation of their reservations in 1897. In each case, it may be possible to trace joint affiliations between an earlier group and the present day set of closely related tribes.

If one accepts this view, then a corollary follows: if the earlier group and each tribe in a present-day set share a group identity, then the tribes in the present-day set must, in

some sense, also share an identity with each other. This identity should be rooted in history and culture; it should not be an identity that is formed solely as a “marriage of convenience” for the purpose of seeking custody of remains or funerary objects. Moreover, as noted previously, intermarriage and interaction do not, in themselves, constitute a sufficient condition for establishing a shared group identity. For example, many French people have married into English families, and vice versa, yet the French and English remain distinct as group identities.

Contrary to the defendants’ assertion that the DOI evaluated each tribe’s claim of cultural affiliation individually (Def. Br., p. 22), the DOI made no such analysis nor determination with respect to each tribe. Although the defendants may have separately considered each tribe’s *standing* under NAGPRA (DOI 10015) and addressed correspondence to each tribe, the Secretary’s decision is devoid of any analysis of cultural affiliation or shared group identity with respect to the Kennewick remains and *each* individual tribe. The Secretary consistently refers to the group of claimant “tribes” in his consideration of cultural affiliation, making no distinction whatsoever between the unique characteristics of these tribes and no suggestion that he considered *each* tribe separately. DOI 10015.

Given the failure of the Secretary to make a determination as to the cultural affiliation between each of the claimant tribes and the Kennewick remains or to make a determination as to cultural affiliation among the claimant tribes themselves, the Secretary’s decision to repatriate the remains to the group of claimant tribes should be found arbitrary and capricious.⁶

⁶ In addition, the defendants’ suggestion that the “coalition” of claimant tribes constitutes an appropriate “Indian tribe” claimant under section 3001(7) of NAGPRA is misguided. (Def. Br., p. 21.) Section 3001(7) provides that an “Indian tribe” includes “any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special (continued...) ”

5. The DOI Failed to Establish a Shared Group Identity Between the Tribes in the Early 1800s and the Present-Day Claimants

The DOI also committed legal error by failing to establish that the present day claimant tribes have a shared group identity with the tribes at circa 1805. That 1805 date was set as a basis for the expert reports commissioned by the DOI because the Lewis and Clark Expedition recorded villages at that time that DOI presumed were associated with the claimant groups.

The DOI is required to demonstrate that a relationship of shared group identity (not “continuity”) obtains between the 1805 villages and the present-day claimant groups. The DOI’s decision is devoid of any finding that links the present-day tribes to the claimant groups. This in itself is a dispositive gap in the record because establishment of cultural affiliation requires that a relationship of shared group identity be reasonably traced all the way from the Kennewick remains to a contemporary tribe, not just to that tribe as it existed in 1805. Worldwide, many group identities have been lost or transformed in periods of 200 years or less (for example, many large groups of European immigrants to the US have assumed an American identity and lost any significant identity with their country of origin). The DOI neglected to satisfy its legal obligation to address the issue.

programs and services provided by the United States to Indians because of their status as Indians.” The group of claimant tribes falls outside of this definition. Foremost, the regulations implementing NAGPRA explicitly state that the National Park Service will distribute a list of Indian tribes “for the purposes of carrying out this statute.” 43 C.F.R. § 10.2 (b)(2). The present coalition does not appear on this list, and therefore cannot be considered a “Indian tribe” under NAGPRA. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13298 (2000). In addition, the defendants are misconstruing the language of NAGPRA’s definition to apply to coalitions formed solely for the purpose of making joint repatriation claims. NAGPRA’s clear language indicates that certain organized groups or communities of Indians may be proper claimants under NAGPRA only if they are together “recognized as eligible for special programs and services provided by the United States.” 25 U.S.C. § 3001.

6. The DOI's Finding of Cultural Affiliation with an Unrecognized Tribe is Contrary to NAGPRA

NAGPRA makes no provision for permitting non-federally recognized tribes to make claims under NAGPRA nor for including them in a cultural affiliation determination, either alone or as part of a coalition of tribes. NAGPRA defines “present-day Indian tribe” in terms that refer to what are usually called “federally recognized” tribes. 25 U.S.C. § 3001(2). The NAGPRA regulations add: “The Secretary [of the Interior] will distribute a list of Indian tribes for the purposes of carrying out this statute through the Departmental Consulting Archeologist.” 43 C.F.R. § 10.2(b)(2). To date, that list has been the Bureau of Indian Affairs (“BIA”) list of federally recognized tribes. See Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13298 (2000).

There is no dispute that the Wanapum Band is not a Federally recognized Indian group. DOI 10013-14. Permitting non-recognized tribes to make claims under NAGPRA and allowing findings of cultural affiliation under NAGPRA with non-recognized tribes could set a precedent that expands the statute’s scope beyond its plain language. Consequently, the Court should enforce NAGPRA’s clear terms.

B. The Secretary’s Weighing of the Evidence of Cultural Affiliation was Arbitrary and Capricious

In addition to the legal errors with respect to the DOI’s determination of cultural affiliation, the DOI’s weighing of the evidence of cultural affiliation was itself arbitrary and capricious. Under the Administrative Procedure Act (“APA”), the Court is required to “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 law. . . .” 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if the agency fails to consider or omits from consideration relevant evidence. See *Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1232 (9th

Cir. 1993) (“We review agency actions under the APA to determine if the agency has adequately considered ‘all relevant factors,’” and “an action will not be upheld where the agency has intentionally omitted evidence from consideration”) (internal citations omitted). Additionally, an agency’s decision is arbitrary and capricious if the agency offers “an explanation for its decision that runs counter to the evidence before the agency. . . .,” Id. (citations omitted), or if the agency fails to make “a rational connection between the facts found and the choice made.” Northwest Motorcycle, 18 F.3d at 1471 (internal quotations and citations omitted). Agency action is also arbitrary and capricious if the agency fails to articulate a satisfactory explanation of its action or if there is no “rational and ample basis for its decision.” Id.; see generally Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 701 (9th Cir. 1996) (explaining that agency action is arbitrary and capricious “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”)

Nor does the fact that the DOI’s assessment involved the evaluation of scientific evidence immunize it from judicial review. For example, in Idaho Department of Fish and Game v. National Marine Fisheries Service, 850 F. Supp. 886, 898 (D. Or. 1994), vacated on other grounds, 56 F.3d 1071 (9th Cir. 1995), the court explained that, in the scientific realm, judicial review focuses upon “whether there has been a reasoned evaluation of the best scientific data available and a rational connection between the facts found and the conclusions drawn.” If a reasoned explanation and a rational connection are missing, then the agency action is arbitrary and capricious. The court also explained that “[s]cientific uncertainty may contribute to the

complexity of a problem, but the existence of a scientific dispute should not insulate an agency from meaningful, but limited, judicial review.” *Id.* Thus, a court should not hesitate to examine the scientific data relied upon by the DOI in its decisionmaking process.

1. The Review of Final Determination Demonstrates That a Reasonable Fact Finder Could Not Conclude on the Basis of the Evidence in the Record That the Kennewick Remains are Affiliated with the Claimant Tribes

As demonstrated by the analysis contained in the Review of Final Determination (Exhibit 1 to the Kelly Affidavit), as summarized for the Court in Table 1 (Exhibit 1, Tab B), the Secretary’s evaluation of the evidence of cultural affiliation was arbitrary and capricious for the following reasons:

- The Secretary failed to consider, or omitted from consideration, significant geographic, archaeological/historical, biological, and linguistic evidence that weighed against a finding of cultural affiliation;
- Even if the Secretary did consider all the relevant factors, which he did not, his determination ran counter to the evidence against cultural affiliation before him and did not represent a rational connection between the facts found and the choice made; and
- The Secretary did not provide a satisfactory explanation or a rational and ample basis for his determination that evidence against cultural affiliation should have been discounted.

Given these deficiencies, the Secretary’s decision must be set aside.

2. The DOI’s Evaluation of the Evidence was Improperly Influenced by its Determination that NAGPRA is “Indian Law”

The DOI’s decision should also be set aside as arbitrary and capricious because its entire factual analysis was wrongly influenced by the Secretary’s assumption that NAGPRA is Indian law. As discussed above, the canon of construction applicable to so-called “Indian law” is limited in scope and applies *only* in the case of resolving legal ambiguities. As explained recently by the United States Court of Claims, the canon of construction “is a rule of statutory

construction, to aid in determining the meaning of legislation, *not a rule for the weighing of evidence and shifting of the normal burden of proof.*” Alabama-Coushatta Tribe of Texas v. United States, No. 3-83, 2000 WL 1013532 at *7 (Fed. Cl. June 19, 2000) (emphasis added).

The Secretary’s weighing of the evidence of cultural affiliation was undoubtedly driven by his misapplication of the Indian law doctrine. At the outset of his analysis, he states:

The standard of proof under NAGPRA is the “preponderance of evidence.” This is a threshold that many scholars hesitate to use for interpretations based upon archaeological, anthropological, and historical evidence. The determination to be made here is informed by, but not controlled by, the evidence as a scholar would weigh it. Instead, the determination is for the Secretary of the Interior to make as the one that, *on the evidence, would best carry out the purposes of NAGPRA as enacted by Congress.*

DOI 10014 (emphasis added). Later, the Secretary again explains:

In examining the issue of cultural affiliation for this very ancient set of Native American human remains, DOI considered the purpose of the statute, the general emphasis of NAGPRA’s Section 3 on returning Native American remains and cultural items to Indian tribes, and the guidance set forth in the regulations at 43 C.F.R. §10.14. While some gaps regarding continuity are present, DOI finds that, in this specific case, the geographic and oral tradition evidence establishes a reasonable link between these remains and the present day Indian tribe claimants.

DOI 10015 (emphasis added).

The Secretary improperly allowed his preconceptions about “the purposes of NAGPRA” to influence his evaluation of the evidence. The Secretary appears to believe that NAGPRA’s purpose, as Indian law, is to repatriate all ancient human remains found on Federal lands. However, the plain language of the statute and its legislative history make clear this is not the case. As stated in the House Committee report on NAGPRA:

The first objective [of NAGPRA] deals with Native American human remains, funerary objects, sacred objects and objects of cultural patrimony which are excavated or removed from Federal or tribal lands after the enactment of the Act. . . . If any of such remains or objects are found on Federal Lands *and it is known which tribe is closely related to them*, that tribe is given the opportunity to reclaim the remains or objects.

H.R. Rep. No. 101-877, p. 12 (1990) (emphasis added). As explained in Sections II.A.2-6 above, NAGPRA's clear terms reflect Congress' desire to promote repatriation where a close cultural relationship between the remains or artifacts and a present-day tribe exists. NAGPRA does not reflect a policy of wholesale repatriation.

In addition, the Secretary's belief that archaeologists, anthropologists, and historians hesitate to make interpretations based on the preponderance of the evidence is incorrect. Quite the contrary, when evaluating archaeological evidence, which is typically fragmentary and incomplete, the preponderance standard is the one that scholars most commonly use (and the one used in the attached Review of Final Determination). The Secretary's implication that scholars weigh evidence differently than government officials is misleading, as the principles of logic and reasonable inference remain the same no matter who applies them.

Given the Secretary's reliance on factors he should not have considered, his decision must be set aside as arbitrary and capricious. See Inland Empire Pub. Lands, 88 F.3d at 701 ("An agency's decision is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . .") (citations omitted).

IV. THE DOI'S APPLICATION OF NAGPRA'S ABORIGINAL OCCUPATION PROVISION WAS ARBITRARY AND CAPRICIOUS

The DOI alternatively based its repatriation decision upon NAGPRA's aboriginal occupation provision, which provides in pertinent part that "if the cultural affiliation of the objects [at issue] 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" then "the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered [shall receive ownership and control of the objects]." 25 U.S.C. § 3002(a)(2)(C)(1). Here too, the

decision contain errors of law and fact. Most significantly, the DOI substantially rewrites NAGPRA by disregarding its express requirement that the objects at issue be found on land recognized *by a final judgment* of the Indian Claims Commission or the United States Court of Claims to be the aboriginal land of an Indian tribe. *Id.* In addition, even if the Secretary were correct in ignoring this statutory requirement, which he was not, the Secretary could not have reasonably concluded from the evidence he purports to rely upon that the land at issue was the aboriginal land of the claimant tribes.

A. The DOI's Decision is Contrary to NAGPRA's Plain Language

NAGPRA's clear and unambiguous language requires that if a repatriation decision is to be based on the aboriginal occupation of a claimant tribe on the land where the objects at issue are found, that land *must* be 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. In the case at hand, as the DOI plainly admits (DOI 10087), the site upon which the Kennewick remains were discovered does not fall within an area of Federal land that has been recognized by a final judgment of the ICC or United States Court of Claims as the aboriginal land of any Indian tribe. The DOI's analysis should have ended here. Nonetheless, the DOI disregarded the bright line rule established by Congress and relied upon factors wholly outside the bounds of NAGPRA to circumvent the requirement of a final judgment.

The DOI's decision declares that "[D]isposition 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." Rather, it asserts, "if the ICC's findings of facts 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)." This reasoning has no statutory foundation nor

support from NAGPRA's legislative history. Its only support is an opinion letter of the DOI Office of the Solicitor, which concludes that NAGPRA's requirement of an appropriate final judgment is not mandatory because NAGPRA ought to be construed as "Indian Legislation" and because the DOI's regulations "seem to acknowledge" that final judgments of the ICC may not fully reflect a specific delineation of aboriginal land claims. Both bases are unsound.

1. Whether or Not NAGPRA is "Indian Law" Has No Bearing on the Applicability of the "Aboriginal Land" Provision

Central to the Office of the Solicitor's opinion letter is the conclusion that NAGPRA "ought to be construed as Indian legislation, and any ambiguities in it resolved in favor of Indian interests." For the reasons explained in Section III(A)(1), *supra*, however, this premise cannot be read to obviate NAGPRA's clear requirements. Even if NAGPRA constituted "Indian Law," the most liberal rules of statutory construction would not empower the Secretary to disregard the unqualified and unambiguous language of NAGPRA which *requires* a final judgment recognizing the aboriginal territory of a tribe. Although, in the context of Indian jurisprudence, some courts have recognized that when faced with two possible constructions, the choice between them is dictated by construction in favor of the Indians. See, e.g., County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 269 (1992). Here, however, Congress's language is not subject to multiple constructions and thus cannot be construed in a manner inconsistent with its clear meaning.

2. The Preamble to NAGPRA's Regulations Cannot Supersede its Clear Statutory Terms

The Secretary's opinion also relies on the Office of the Solicitor's finding that a DOI statement⁷ contained in the preamble accompanying DOI's regulations implementing NAGPRA "seems to acknowledge" that "[o]ther sources of information regarding aboriginal occupation should also be consulted" in addition to an appropriate Final Judgment in applying NAGPRA's aboriginal land provision. DOI 10087. However, this agency statement carries neither the force of law nor even regulation. Thus, to the extent that the Secretary's opinion relies upon this statement, it is in error because it is simply contrary to the clear language of the statute, which requires an appropriate Final Judgment. However, even if this statement had some validity, its significance, at most, is that the fact finder should "consult" other sources of information in addition to the appropriate final judgment. It does not and cannot obviate Congress' requirement of a final judgment.

B. There is No Basis Upon Which a Reasonable Person Could Have Concluded that the Kennewick Remains were Found on the Claimant Tribes' Aboriginal Lands

Even if it were legally permissible for the Secretary to consider factual findings of the ICC outside of a final judgment by that agency, which it was not, the findings of the ICC relied upon by the Secretary contain no conclusion, as the Solicitor to the DOI even admits (DOI 10088), that the Kennewick remains were found on the aboriginal land of the group of claimant tribes.

⁷ That statement merely reads: "The drafters consider the final judgments of the Indian Claims Commission a valuable tool for identifying area occupied aboriginally by a present-day Indian tribe. Other sources of information regarding aboriginal occupation should also be consulted." 60 Fed. Reg. 62134, 62140 (Dec. 4, 1995).

The summary prepared by the DOI itself of the ICC proceedings provides abundant reason why NAGPRA's requirement of a final judgment is necessary. As DOI's own summary notes, the findings of fact entered at various points in connection with claims over the land have specifically found that "the evidence is insufficient to establish exclusive use and possession for a long time, or from time immemorial . . ." DOI 10094. Indeed, these findings note that various groups and other miscellaneous Indians traveled, gathered, and hunted over the land. Id.

DOI's summary of the ICC evidence also notes that *the United States itself* has recognized that the land "was not exclusively and continuously occupied by any one tribe, band, or group of Indians from time immemorial . . ." DOI 10092. Moreover, the findings of fact on which the DOI relies included an express provision that they should not be construed as a precedent in any other proceeding. DOI 10094 ("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.") The findings merely confirm (consistent with other anthropological evidence discussed, *supra*, and in the Review of Findings) the area where the Kennewick Man was found, was a "crossroads" for many peoples. DOI 10269. This is simply insufficient to establish under NAGPRA that the lands were the aboriginal land of the claimants, or to substantiate cultural affiliation between the Kennewick Man and the claimants.

Nor does the Solicitor's attempt to rewrite the history of the ICC findings and give them more significance than they deserve change this conclusion. The Solicitor argues "[b]ecause the ICC occasionally made shared aboriginal land-holder determinations, it might have done so for the discovery site of the Kennewick remains in the cases that the Umatilla

brought before the ICC, had the Umatilla filed a joint claim with the other tribes (which it did not).” DOI 10088. However, the fact remains that the ICC *did not* make such a finding nor can we know whether it would have if the Umatilla had filed a joint claim with the other claimant tribes -- three of which (the Colville, the Yakama, and Wanapum Band) were not even identified by the ICC in its decision.

If anything, the strained reasoning demonstrated by the Secretary’s decision only confirms the wisdom of NAGPRA’s bright line rule requiring a determination of aboriginal land based on a final judgment. The DOI’s decision to ignore the plain language of the final judgment requirement contained in NAGPRA in addition to its irrational evaluation of the evidence more than demonstrates that its decision was arbitrary and capricious.

* * *

As the first case to address the meaning of cultural affiliation under NAGPRA, this decision will set a precedent for the repatriation of Native American human remains and artifacts for years to come. If the Secretary’s analysis of cultural affiliation is allowed to stand, it is difficult to imagine cases in which it would not be possible to establish cultural affiliation or to otherwise provide for disposition to tribes. However, it is clear that NAGPRA was not intended to provide for universal repatriation. Had that been the case, the law would have been constructed quite differently. By ignoring the statutory definition of cultural affiliation and substituting a much less restrictive one, the balance of interests that was fundamental to NAGPRA has been eliminated.

Scientific interests in human remains and cultural items derive from their ability to tell us about our nation’s and, indeed, our human heritage. There is enormous scientific and public interest in understanding the original peopling of the Americas and the history of Native

American groups. The study of Native American human remains, along with those from cultural groups both inside and outside of the Americas, will be essential to these and other worthy efforts. SAA does not suggest that public interests necessarily outweigh those of tribes. Indeed, it has been SAA's position that Native American interests in repatriation must be taken into account and balanced with the public interest in scientific study. Congress designed this law to effect a careful balance between the interests of tribes in attending to the remains of their ancestors and the interests of science in expanding our knowledge of the past. If this balance is to be maintained, it is essential that the statute be implemented with careful attention to its specific demands.

Dated this 1st of June, 2001.

/s/ Michael J. Fanelli
James A. Goold, Esq. (D.C. Bar # 430315)
Michael J. Fanelli, Esq. (D.C. Bar # 456717)
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-2401
Telephone: (202) 662-5507
Facsimile: (202) 778-5507
E-mail: jgoold@cov.com

Attorneys for *Amicus Curiae* Applicant
Society for American Archaeology

CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing Memorandum of Law in Support of the Society for American Archaeology's *Amicus Curiae* Submission and associated Affidavit of Robert Kelly and exhibits on the parties herein by causing to be deposited in the United States mail at Washington, D.C., on June 4, 2001, a true copy thereof, enclosed in an envelope with postage thereon prepaid, addressed to:

Paula A. Barran
Barran & Liebman
601 SW Second Ave., Suite 2300
Portland, OR 97204-3159

David J. Cummings
Nez Perce Office of Legal Counsel
PO Box 305
Lapwai, ID 84540-0305

Audie Huber
Confederated Tribes of the Umatilla
Indian Reservation
PO Box 638
Pendleton, OR 97801

Thomas A. Zeilman
Yakima Nation Office of Legal Counsel
Fort Rd., PO Box 151
Toppenish, WA 98948

Tim Brewer
Reservation Attorney
Coville Confederated Tribes
PO Box 150
Nespelem, WA 99155

Tim Simmons
U.S. Department of Justice
1000 SW Third Ave., Ste. 600
Portland, OR 97204

Dan Hester
Fredericks Pelzyger Hester & White LLC
1075 South Boulder Rd., Ste. 305
Louisville, CO 80027

Alan Schneider
1437 SW Columbia Street, Ste. 200
Portland, OR 97201

Tim Weaver
Cockrill & Weaver, PS
316 N. Third Street, PO Box 487
Yakima, WA 98907

David Shuey
U.S. Department of Justice
Environment and Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663

Yvonne T. Knight
Walter R. Echo-Hawk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302-6296

/s/ Michael J. Fanelli
Michael J. Fanelli