Appeal Nos. 02-35994 & 02-35996 (Companion Appeals)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBSON BONNICHSEN, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellants,

and

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, ET AL.

Defendants-Intervenors-Appellants.

Appeal from the U.S. District Court for the District of Oregon, District Court No. 96-1481JE (D. Or.)

BRIEF OF *AMICUS CURIAE* THE SOCIETY FOR AMERICAN ARCHAEOLOGY IN SUPPORT OF PLAINTIFFS-APPELLEES AND SEEKING AFFIRMATION OF THE DISTRICT COURT DECISION

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STATEMENT OF IDENTITY OF *AMICUS CURIAE*

The Society for American Archaeology submits this brief pursuant to its pending motion to participate as *amicus curiae* and supporting memorandum filed on June 3, 2003. (Attached as the Appendix.) The Society for American Archaeology ("SAA") is the leading professional organization of archaeologists engaged in archaeological and related studies of the Native American archaeological record.

The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 *et seq.* was intended to reasonably balance Native American interests in human remains and cultural items with those of the scientific community and the broader public. 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 SAA believes to be plainly required by the letter and spirit of the Act. The Department of the Interior's decision regarding the disposition of the Kennewick remains epitomizes this divergence. Upholding the district court's decision will help restore and preserve the balance that was hoped to be achieved by NAGPRA's drafters. Conversely, if the district court's decision is overturned, such action will distort the intended balance of NAGPRA and have

potentially devastating consequences for science, archaeologists and the interested public.

For these reasons, SAA asks that the Court affirm the decision of the district court.

I. BACKGROUND

The Society for American Archaeology ("SAA") appears as *Amicus Curiae* to provide the Court with the 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 could have broad ramifications for the future interpretation and implementation of NAGPRA. SAA believes that the district court correctly set aside the Department of the Interior's ("DOI's") decision that the Kennewick remains are culturally affiliated with the claimant tribes because the DOI's application and interpretation of the legal standard for "cultural affiliation" and its assessment of the evidence in the record were fundamentally flawed.[1] If the DOI's decision on cultural affiliation is allowed to stand, it could undermine the balance of interests that the drafters of NAGPRA hoped to achieve, obstruct scientific discovery, and inhibit the growth and dissemination of archaeological knowledge to the public. SAA also believes that the district court correctly held that the plaintiffs had standing to challenge the DOI's decision.

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[1] SAA also believes the district court correctly held that NAGPRA's aboriginal lands provision is inapplicable.

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 the letter and spirit of the Act. The DOI's decision regarding the disposition of the Kennewick remains epitomizes this divergence. Although SAA believes that the DOI undertook appropriate studies of the Kennewick remains, the DOI's determination of the Kennewick remains' cultural affiliation was properly set aside by the district court. The DOI'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. If NAGPRA were intended to provide for universal repatriation, it would have been constructed quite differently. If the DOI's decision is allowed to stand, it will cripple the ability of scholars to document important aspects of our heritage and shift the balance struck by NAGPRA, to the detriment of science and the public's understanding of our nation's past.

Part II of this brief addresses the Appellant Tribes' contention that NAGPRA is legislation subject to Indian canons of construction. The purpose and construction of NAGPRA make clear that it is not. In Part III, we discuss why, contrary to the Appellant Tribes' contentions, the district court applied the correct legal standard for determining cultural affiliation under NAGPRA and rightly held

that the DOI's determination with respect to the Kennewick remains was arbitrary and capricious. In Part IV, we address the Appellant Tribes' erroneous assertion that the plaintiffs do not have standing.

II. NAGPRA IS NOT SUBJECT TO THE INDIAN CANON OF CONSTRUCTION

While there is no doubt that NAGPRA was intended to address important Native American concerns, it did so with a clear recognition of the scientific and public interests that were also at stake. The law applies to artifacts and human remains that comprise the American archaeological record, which is of value to all Americans who explore the past in museums, national parks and monuments, and the libraries and archives of the nation. NAGPRA was neither a piece of Indian legislation nor a piece of museum legislation—it was a piece of compromise legislation. See, e.g., Amicus Brief of Ass'n on American Indian Affairs as *Amicus Curiae* at 9 (Mar. 25, 2003); Jack F. Trope & Walter R. Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz. State L.J. 35, 60-61 (1992) ("The bill that was enacted reflected a compromise forged by representatives of the museum, scientific, and Indian communities."). This balance is clearly expressed in both the text of the statute, and its legislative history. For example, NAGPRA specifically contemplates the study of cultural items by the scientific community, as well as the possibility that museums may establish their right to permanently retain such

items. See 25 U.S.C. § 3005(b) & (c). And, the composition of the NAGPRA Review Committee is required to include three representatives of the scientific and museum community, three representatives of the Native American community, and a seventh member to be nominated by the foregoing six. See 25 U.S.C. § 3006(b).

As reflected in the House Report that accompanied NAGPRA, the legislation grew out of the difficulties in balancing "the rights of the Indian versus the importance to museums of the retention of their collections and the scientific value of the items." H.R. Rep. No. 101-877 at 10 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4369 ("The Committee intends the provisions of this Act to establish a process which shall provide a framework for discussions between Indian tribes and museums and Federal agencies."). The balancing of these interests is best summarized in 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:

> 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 (Oct. 26, 1990).

While NAGPRA reflects a recognition for the respect that should be accorded to the rights of Native Americans in their historical cultural items, it also reflects

careful consideration of the interests of the scientific and museum communities. It is, therefore, a dubious proposition to characterize the law as intended solely to protect the rights of Native Americans.

Even if one were to assume that NAGPRA constitutes "Indian law," however, the district court correctly concluded that this canon of construction does not apply when legislation is unambiguous. See Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1138 n.40 (D. Or. 2002). When interpreting an unambiguous statute, even one that can be considered "Indian law," there is "no occasion to resort to this canon of statutory construction." Negonsott v. Samuels, 507 U.S. 99 110 (1993); see also South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress"). The district court properly held that DOI's legal analysis of the cultural affiliation of the Kennewick remains did not require the resolution of any ambiguities in the statute because, quite to the contrary, the DOI's construction of NAGPRA contradicted the plain language of the statute.

Moreover, the Indian canon of construction certainly should not be invoked in evaluating evidence. 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). As we discuss in Part III.D.3, the DOI improperly allowed its view that NAGPRA is intended to benefit solely Native American interests to influence its evaluation of the evidence of cultural affiliation.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE DOI'S DETERMINATION OF CULTURAL AFFILIATION WAS ARBITRARY AND CAPRICIOUS

Contrary to the arguments of the Appellant Tribes, the District Court applied the appropriate standard for determining cultural affiliation under NAGPRA and correctly held that the DOI's assessment of the evidence of cultural affiliation was arbitrary and capricious. *Indeed, the Federal Appellants themselves have not challenged any of the numerous bases for the district court's holding that the DOI's determination of cultural affiliation was improper.* In addition, the Appellant Tribes fail to address other errors in the DOI's analysis, including its failure to specify an "identifiable earlier group," its decision to repatriate the remains to a tribe that is not federally recognized and the improper influence that the DOI's determination that NAGPRA is "Indian law" had on its evaluation of the evidence. Each of these grounds provides independent bases for rejecting the DOI's determination of cultural affiliation.

A. The District Court Applied the Correct Legal Standard For Assessing the Evidence of Cultural Affiliation

The district court applied the proper standard in determining whether there was a relationship of shared group identity between the Kennewick remains and the claimant tribes. Contrary to Appellant Tribes' assertions, the district court did not require "scientific certainty" and properly relied upon DOI regulations that require shared group identity to be established by a "preponderance of the evidence." A showing of "shared group identity" under NAGPRA requires a claimant to demonstrate more than any "plausible connection" or "reasonable relationship," as the Appellant Tribes' claim.

1. "Preponderance of the Evidence" Is the Correct Standard

NAGPRA's definition of cultural affiliation stipulates that the cultural relationship to be demonstrated by a claimant tribe must meet the standard of a "shared group identity" that can be reasonably traced from the remains or objects at issue to the present day claimant:

> '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). The NAGPRA regulations thus 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)(2003).

As authorized by 25 U.S.C. § 3011, the DOI properly adopted and promulgated regulations describing the quantum of proof necessary to establish this relationship, providing in relevant part:

> (f) Standard of proof. . . . [C]ultural affiliation of a present-day Indian tribe . . . to human remains . . . must be established by a preponderance of the evidence. Claimants do not have to establish cultural affiliation with scientific certainty.

43 C.F.R. § 10.14 (2003).

Contrary to the Tribal Appellants' assertions, the preponderance of the evidence standard does not set too high a bar for determining cultural affiliation.[2] The hundreds of determinations of cultural affiliation that have been made under NAGPRA demonstrate that the standard is workable in practice.[3] The

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[2] Nor, as the Appellant Tribes suggest, did the district court require the Appellant Tribes to make a showing of "scientific certainty" or "clear and convincing evidence." There is simply no suggestion in the district court's opinion that it adopted such an inappropriately high burden of proof. Indeed, as just one example that the court did not apply such a high standard of proof, the district court correctly observed that although the claimant tribes "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." Bonnichsen, 217 F. Supp. 2d at 1150.

[3] See e.g., Notices of Inventory Completion and Notices of Intent to Repatriate, available at <http://www.cr.nps.gov/nagpra/NOTICES/INDEX.HTM> (last visited June 8, 2003). As of June 8, 2003, the National Park Service web site contained 691 published Notices of Inventory Completion and 256 Notices of Intent to (continued...)

preponderance standard requires far less scrutiny than the "clear and convincing" and "beyond all reasonable doubt" tests. See Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 949 (9th Cir. 2002). And a standard greater than a preponderance would perhaps set too high a bar for evaluating the sometimes fragmentary nature of the archeological record and other evidentiary sources appropriate for making a determination of cultural affiliation.[4] Moreover, the level of scrutiny the preponderance standard provides helps ensure that remains and artifacts are not inappropriately turned over to groups with little or no relationship to them. To apply a more lenient standard would posit or presume a homogeneity to Native American cultures and world views where a considerable and vital diversity exists. Consequently, the district court properly relied upon the preponderance standard as set forth in the DOI regulations.

2. A Relationship of Shared Group Identity Requires a Showing of More Than Any "Plausible" or "Reasonable" Connection

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Repatriate. The former notice is a statement that a cultural affiliation exists, while the latter notice simply implies that a museum accepts a tribe's claim (which could be on a basis other than cultural affiliation). Moreover, these notices are not inclusive of the hundreds of repatriations that have occurred under NAGPRA's Section 3 (25 U.S.C. § 2002), i.e., from ongoing excavations and inadvertent discoveries. Although each determination of cultural affiliation should have been made on the basis of the preponderance standard, in practice this isn't always the case.

[4] A preponderance of the evidence standard is also commonly employed by archaeologists and anthropologists when evaluating archaeological evidence.

The Appellant Tribes also allege that any evidence establishing a "plausible" or "reasonable" connection should suffice to establish shared group identity. Appellant Tribes Br. at 41-42. This construction is supported by neither the language nor the purpose of NAGPRA. The district court correctly recognized that in order to establish "shared group identity" it is the claimant's burden to show "commonality" that "distinguishes the group and its members from other groups, and legitimizes the present-day group's authority to represent the interests of deceased members." Bonnichsen, 217 F. Supp. 2d at 1148. As the court explained:

> 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.

Id.

SAA believes that the district court's formulation is consistent with NAGPRA. NAGPRA's stipulation that the group identity must be "shared" implies that Congress intended the relationship between the groups to be a strong one, i.e., that the two groups must have the same identity. While some cultural change over time is, of course, inevitable, a "shared" identity must in some sense be an identity that has been carried on over time. Ideally, one would 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. To illustrate, while many Americans could legitimately argue a reasonable or plausible cultural relationship with English culture (arguably the dominant cultural tradition in the United States), few would claim to be English --- i.e., to have a shared group identity with the English.

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 is not sufficient to show this relationship of shared group identity. As noted previously, many Americans have English ancestry, but they no longer consider English as their cultural identity. Similarly, geographical continuity is not alone a proper criterion. For example, we know that historically, in the American Southwest, when some pueblos were vacated their residents moved to other occupied 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 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. Establishment of cultural affiliation would require, instead, identifying an

ancient group and tracing an identity from one or more modern tribes back to that group.

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 human remains or other material covered by this Act are derived, regardless of age or antiquity. . . .

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 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. See Native American Graves Protection and Repatriation Act (P.L. 101-601): Oversight Hearing before the Committee on Indian Affairs, United States Senate (July 25, 2000); Senate Hearing 106-708, U.S. Government Printing Office, Washington, D.C., 2000 (pp. 133-135). The joint memo, like the statute, states:

> "[C]ultural 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).

Through its substitution of the statutory definition involving "shared group identity," Congress clearly rejected the notion that any "reasonable relationship" or "plausible connection" suffices to establish shared group identity.[5]

B. The District Court Properly Found That the DOI's Assessment of the Evidence of Cultural Affiliation Was Arbitrary and Capricious

The district court correctly found that the DOI's assessment of the evidence was 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).

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[5] We briefly note a mischaracterization of the district court's opinion by the Tribal Appellants, government and their amici as it relates to the standard for determining cultural affiliation. They argue that to accept the district court's definition on Native American would be inconsistent with other parts of NAGPRA because it would essentially require a determination of cultural affiliation in order to establish whether remains meet the threshold determination of being "Native American." Appellant Tribes Br. at 27; Amici AAIA and Morning Star Institute Br. at 12.

This argument is incorrect in that it conflates a more general "cultural relationship" with the narrowly defined "cultural affiliation." In fact, the district court is quite clear about distinguishing a cultural relationship from the more demanding definition of cultural affiliation:

> 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.

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

Simply because an agency's decision may involve an evaluation of scientific evidence does not insulate it from judicial review. See, e.g., Idaho Department of Fish and Game v. National Marine Fisheries Service, 850 F. Supp. 886, 898 (D. Or. 1994), remanded on other grounds, 56 F.3d 1071 (9th Cir. 1995) ("[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").

The district court properly held that the DOI drew arbitrary and capricious conclusions regarding the evidence of cultural affiliation. The Appellant Tribes' arguments in favor of reversal are as conclusory as the DOI's opinion. SAA acknowledges that the DOI conducted extensive studies, tests and investigation with respect to the Kennewick remains. However, as the district court held, the DOI's mere assertion in its opinion that it examined the voluminous studies and reports with focus on the "geographical, biological, archaeological, anthropological, linguistic, and oral tradition evidence" in making its determination of cultural affiliation cannot suffice to justify its decision when the conclusions it reached have no rational connection to the evidence before the agency. Indeed, the government itself has not sought to defend its decision before this court.

The district court identified numerous deficiencies in the DOI's analysis, each sufficient on its own or taken in their totality that make clear that the

decision was arbitrary and capricious. The court's findings included that (i) the DOI's stated reliance upon the geographic and oral history evidence was insufficient to establish a relationship of shared group identity; (ii) the DOI's analysis ignored significant parts of the evidence; and (iii) the DOI's findings ran counter to the weight of the evidence. In response to the district court's findings, the Appellant Tribes neither articulate a cogent rationale in support of the DOI's conclusions or offer a single substantive argument contradicting the numerous errors identified by the court in its careful review of the evidence.

The only criticism of the district court's analysis offered by the Appellant Tribes is the assertion that the district court was demanding an "exacting scientific connection" because it found that "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." Tribal Appellants Br. at 47. Far from exacting scientific scrutiny, the district court was seeking *any* rational basis to support the DOI's decision by a preponderance of the evidence. Simply put, NAGPRA does not authorize universal repatriation. Rather, it employs a reasonable and workable standard of "shared group identity," which is intended to facilitate human remains being repatriated to an appropriately affiliated tribe entitled to represent the interests of its deceased members, not any tribe that states a claim. While, as the

district court notes, the age of the Kennewick remains and the gaps in archaeological record make a finding of cultural affiliation more difficult here, such results were contemplated by NAGPRA's drafters. Consequently, the court should uphold the district court's conclusion that the Secretary's analysis of the evidence of cultural affiliation was arbitrary and capricious.

C. The District Court Correctly Found That DOI Improperly Recognized a Joint Tribal Claim

The Tribal Appellants argue that the district court erred as a matter of law by foreclosing joint tribal claims under NAGPRA. However, the court did not, in fact, foreclose joint claims. Bonnichsen, 217 F. Supp.2d at 1142 n. 45. Like the district court, SAA believes that joint claims are permissible only in well-defined circumstances and that, here, each claimant tribe individually was required to show that it was culturally affiliated with the Kennewick remains.

The DOI'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 Tribal Appellants argue that this position is justified by NAGPRA's use of the phrase "closest cultural affiliation," which the DOI construed to mean that "more than one, and perhaps, many, tribes may have a cultural affiliation with remains discovered on Federal land." Id. On the other hand, NAGPRA's definition of cultural affiliation uses the word "tribe" only in the

singular construction, suggesting that cultural affiliation can be recognized between an earlier group and only one present-day tribe. § 3001(2).

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. To move from the restricted form of joint claims anticipated by the district court to the notion that cultural affiliation can inhere in a coalition of tribes when it cannot be demonstrated for any individual tribe in the coalition, requires a leap that lacks any statutory or logical foundation. Also, *even if* there were a tribe with a demonstrated cultural affiliation, that status cannot be extended to another tribe simply by virtue of an alliance formed to make a claim. 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 the appellants and 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 for the purpose of seeking custody of remains or funerary objects. Moreover, simple intermarriage and interaction, such as trade, 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.[6]

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[6] The Tribal Appellants also argue that joint claims are routine under NAGPRA today and thus should have been recognized by the district court. Even if true, this argument has no merit. First, it is not clear from the cited statistics how many of the joint tribal claims were found to be permissible because the joint claims each (continued...)

Given DOI's failure to make a determination as to the cultural affiliation between each of the claimant tribes and the Kennewick remains, the district court correctly reversed DOI's decision to repatriate the remains to the group of claimant tribes.

D. The DOI's Analysis of Cultural Affiliation Contained Other Legal Errors

The district court also correctly held that the DOI's legal analysis of cultural affiliation was deficient in a number of other respects, unaddressed by the Tribal and Federal Appellants in their appeals, including the DOI's failure to identify an "identifiable earlier group," as required by the statute and regulations' plain language, and its decision to repatriate the remains to a coalition of tribes, which included a Native American tribe that has not been recognized by the Federal government. In addition, reversal also was justified because DOI improperly allowed its perception that NAGPRA is "Indian law" to influence its assessment of the evidence.

1. The District Court Correctly Found That the DOI Failed to Identify an "Identifiable Earlier Group"

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were in fact determined to be separately meritorious or if they were made without a showing of any relationship of cultural affiliation with an individual tribe. Moreover, SAA believes that there has been widespread misinterpretation of NAGPRA allowing inappropriate repatriations pursuant to joint claims, which this Court should not ratify.

The district court correctly held that NAGPRA and its regulations dictate that there be evidence for the existence of an identifiable earlier group. Although the Secretary's opinion acknowledges the need to establish an identifiable earlier group to which the Kennewick remains belonged, the district court correctly found that *the Secretary never identifies the earlier group*. As the district court recognized, DOI appeared to assume 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 period. Bonnichsen, 217 F. Supp. 2d at 1144-45; DOI 10054. However, such a broad classification as to the "earlier group" is at odds with the requirements of NAGPRA.

NAGPRA's construction and legislative history imply that Congress intended the earlier "group" 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.

In discussing the requirement to establish the existence of an identifiable earlier group, 43 C.F.R. § 10.14(c)(2) of the NAGPRA regulations state:

> 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.

If we consider the evidence in the record relating to each of these criteria in turn, the following conclusions are apparent: (i) There is *no evidence* that bears on the identity of any earlier group to which Kennewick Man may have belonged. As the district court noted, "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." Bonnichsen, 217 F. Supp. 2d at 1144. The DOI identified neither the identity or characteristics of these groups. (ii) Kennewick Man was found *without any associated artifacts which might be used to associate him with a particular group*, other than a projectile point fragment embedded in his pelvis, which may or may not have come from his own group. Lacking a single item of material culture that ties Kennewick Man to the group to which he belonged, it is not possible to identify

the patterns of material culture associated with a group or whether the Kennewick remains are associated with the group. And (iii), the evidence is plainly insufficient to establish the existence of the earlier group as a biologically distinct population. Such an identification would require reference to characteristics shared by more than one individual.

In sum, the DOI was not able to identify an "identifiable earlier group" that was associated with Kennewick remains and thus there can be no finding of cultural affiliation under NAGPRA.

2. The District Court Properly Held That the DOI's Finding of Cultural Affiliation with an Unrecognized Tribe is Contrary to NAGPRA

The district court properly held that 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). Bonnischsen, 217 F. Supp.2d at 1141 n. 42.

There is no dispute that the Wanapum Band is not a Federally recognized Indian tribe. 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 reject affiliation with a claimant tribe that lacks independent standing.

3. The DOI's Evaluation of the Evidence Was Improperly Influenced by its Determination That NAGPRA is "Indian Law"

Although it was not an explicit reason for the district court's reversal of the DOI finding of cultural affiliation, we note that the DOI improperly considered the Indian canon of construction in weighing the evidence. As discussed above, the canon of construction applicable to "Indian law" 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 DOI's weighing of the evidence of cultural affiliation was undoubtedly driven by its misapplication of the Indian law doctrine. At the outset of the analysis, the opinion 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 opinion again states:

> *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).

These statements make clear that preconceptions about "the purposes of NAGPRA" improperly influenced the evaluation of the evidence. The DOI appeared 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, at 12 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4368 (emphasis added). As explained above, NAGPRA's clear terms reflect Congress's 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 universal repatriation.

Given the DOI's reliance on factors it should not have considered, the district court should also have set aside the DOI's finding of cultural affiliation as arbitrary and capricious on this basis. See Inland Empire Pub. Lands Council v. Glickman, 88 F.3d 697, 701 (9th Cir. 1996) ("An agency's decision is arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . .") (internal citations omitted).

IV. THE PLAINTIFFS-APPELLEES HAVE STANDING TO CHALLENGE THE DOI'S DECISION

SAA believes the district court correctly held that the plaintiffs-appellees have standing to challenge the DOI's determination of cultural affiliation. NAGPRA was intended to benefit and reasonably balance both Native American and scholarly interests, and both Native Americans and scholars can be injured by erroneous decisions by the federal agencies charged with implementing NAGPRA. Repatriation discussions under NAGPRA impact the everyday work of scientists, anthropologists and archaeologists. In order to maintain NAGPRA's balance, members of the scientific community whose work is impacted by decisions under NAGPRA, such as the appellees, must be able to hold federal agencies accountable for their decisions carrying out NAGPRA. Indeed, a case such as this one, where the government has not even chosen to actively defend its

decision on cultural affiliation, exemplifies the concern that unchecked agency authority will lead to abuses of NAGPRA and will injure the ability of scholars to study important aspects of our nation's past and ultimately to make that knowledge available to the general public.

The Idrogo v. United States Army, 18 F. Supp. 2d 25 (D.D.C. 1998), decision cited by the Tribal Appellants is inapposite. Idrogo involved specious claims seeking the repatriation of the remains of Geronimo brought by plaintiffs who admitted they were not a federally recognized tribe entitled to state a claim for repatriation under NAGPRA. The Idrogo decision has no bearing on the very different circumstances of this case, which involve a group of scientists who, as the district court found, had a detailed and imminent plan to conduct studies of the Kennewick remains and whose ability to do so was directly foreclosed by the government's decision to repatriate. Bonnichsen v. United States, 969 F. Supp. 628, 633 (D. Or. 1997). The interest of these scientists in challenging the DOI's action is thus certainly more than the "generalized interest of all citizens" that was at issue in Idrogo. Consequently, the court should affirm the district court's ruling that the appellees have standing.

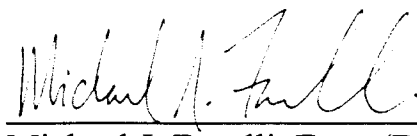
V. CONCLUSION

This is the first case to address the meaning of cultural affiliation under NAGPRA and it will set a precedent for the repatriation of Native American

human remains and artifacts for years to come. If the DOI'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 in the absence of legitimate claims of affiliation. Had that been the case, the law would have been constructed quite differently.

Scholarly 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 indispensable 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, the statute must be implemented with careful attention to its specific demands.

Dated this 11th of June, 2003.



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STATEMENT OF RELATED CASES

Ninth Circuit Nos. 02-35994 and 02-35996 are companion appeals. This appeal is also related to 9th Cir. No. 02-35970, an appeal from a district court order in this case denying Joseph Siofele's motion to intervene.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(e), 32(a)(7) and Ninth Circuit Rule 32-1, counsel for the Society for American Archaeology certifies that this brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,997 words.

Michael J. Fanelli

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served by U.S. priority mail the foregoing Brief of *Amicus Curiae* the Society for American Archaeology in Support of Plaintiffs-Appellees and Seeking Affirmation of the District Court Decision, this 11th day of June, 2003, to the following:

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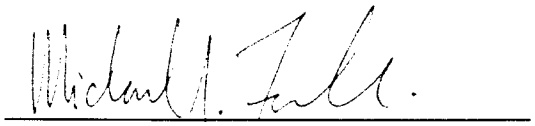

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Appendix -
Motion to Participate as Amicus Curiae (filed June 3, 2003)

Appeal Nos. 02-35994 & 02-35996 (Companion Appeals)

IN THE UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

ROBSON BONNICHSEN, ET AL.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellants,

and

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, ET AL.

Defendants-Intervenors-Appellants.

Appeal from the U.S. District Court for the District of Oregon, District Court No. 96-1481JE (D. Or.)

MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE OF THE SOCIETY FOR AMERICAN ARCHAEOLOGY SUPPORTING PLAINTIFFS-APPELLEES AND SEEKING AFFIRMATION OF THE DISTRICT COURT DECISION

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The Society for American Archaeology ("SAA") is the leading professional organization of archaeologists engaged in archaeological and related studies of the Native American archaeological record. SAA is a Section 501(c) (3) non-profit association with more than 6,600 members. For more than a decade, SAA has led the scientific community in national discussions about the repatriation of Native American human remains and cultural items. In 1990, SAA was the primary scientific organization involved in the negotiations among Native American organizations, museums, scientific organizations and Congress that resulted in the statute at issue in this appeal, the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 *et seq.* SAA has provided testimony at U.S. Senate and House of Representatives committee hearings on the bill and helped form a coalition of scientific organizations and Native American groups that, once a compromise had been reached, strongly supported NAGPRA's enactment. Since NAGPRA's passage, SAA has closely monitored its implementation and has consistently provided comment to the NAGPRA Review Committee established by the statute, to the Department of the Interior, and to other agencies. SAA has twice testified at oversight hearings of the U.S. Senate Committee on Indian Affairs on the implementation of NAGPRA and, in 1998, testified before the U.S. House Resources Committee on a proposed amendment to NAGPRA. SAA has closely followed this case from the outset and was granted leave to participate in the district court proceeding as *amicus curiae.*

The legislative record shows that NAGPRA was intended to reasonably balance Native American interests in human remains and cultural items with those of the scientific community and the broader public. Over the last 10 years, SAA has been alarmed to see an increasing divergence between the actual practice of NAGPRA implementation by some

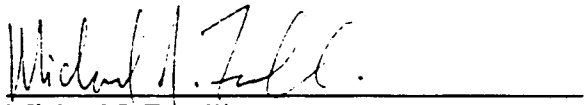
Federal agencies and museums and what SAA believes to be plainly required by the letter and spirit of the Act. Affirmance of the district court's decision will help restore and preserve the balance that was hoped to be achieved by NAGPRA's drafters. Conversely, if the district court's decision is overturned, such action will distort the intended balance of NAGPRA and have potentially devastating consequences for science, archaeologists and the interested public. This case provides an important opportunity to clarify a number of key issues in the interpretation of the law and the interests and the opinions of the SAA are not adequately represented by the parties.

As the leading scientific organization of American archaeologists, SAA respectfully submits that it can provide the Court with the considered view of a broad cross-section of the American archaeological community on interpretation of NAGPRA and its application in this case. SAA requests permission to appear and participate in this case as *amicus curiae* for the purpose of providing this Court with its views.

For the foregoing reasons, this motion for leave to file a brief as *amicus curiae* should be granted.

DATED this 2nd day of June 2003.

Respectfully submitted,



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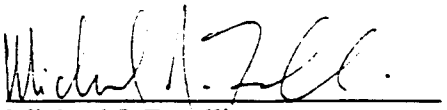

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