CULTURAL RESOURCE PROTECTION STRATEGIES: POST "KENNEWICK MAN"

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I. INTRODUCTION

Eight years ago, on July 28, 1996, two young men watching hydroplane races stumbled across an amazing discovery along the banks of the Columbia River near Kennewick, Washington. In this shallow water area known as Columbia Park was a set of remains that were later determined to be approximately 9200 years old.

The discovery of these ancient human remains, known as the "Kennewick Man" (or "Ancient One" to the four federally recognized tribes involved in *Bonnichsen*), immediately touched off a firestorm of controversy, pitting the professional interests of academics and scientists against the spiritual beliefs of Indian tribes who claim these remains as their ancestor. After contentious courtroom battles for almost a decade,[1] the plaintiff academics and scientists now stand poised to begin their long-awaited invasive and potentially destructive studies of these remains based on a recent decision of a three-judge panel of the Ninth Circuit Court of Appeals.

The tribes have sought rehearing *en banc* of this decision. Until the full court decides whether to rehear the case, the ultimate disposition of the remains will remain in limbo. A number of questions will also remain unanswered. What rights do tribes have to decide what happens to their ancestors? What will become of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.*, passed in 1990 to expressly protect remains such as these and facilitate their return to tribal homes? And, what will happen to the remains? In this awesome battle involving religious freedom, property rights, and the populating of the Americas, the 9200-year-old human remains of the "Kennewick Man" are an unwitting pawn in this struggle over our past and the future applicability of NAGPRA.

This presentation paper briefly addresses the salient facts and procedural history of the *Bonnichsen* litigation to create a framework of understanding and context in which to place the Ninth Circuit's recent decision, issued February 4, 2004, potentially clearing the way for the study of these "Native American" remains. This paper focuses on the panel decision discussing the various errors of the court and the dramatic impact the decision may have on the future of repatriations across the country. Finally, this paper concludes with a discussion of options available to remedy the panel's decision and looks generally at other means to protect ancient Indian remains and cultural items in the absence of NAGPRA's protections.

II. HOW DID WE GET HERE?

A. NAGPRA's History

NAGPRA culminated a long effort by Congress to protect the interests of indigenous people in burials made before European-style cemeteries were established in this country. *See* Jack F. Troupe & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. St. L.J. 35, 36 (1992). It signaled an important congressional recognition that Indian remains deserved the same respect that is accorded to non-native remains. However, NAGPRA has produced much confusion in both the Indian and scientific communities because of the conflicts between the professional

responsibilities of scientists and the spiritual beliefs of tribes inherent in the debate over ancient remains and artifacts.

The study of Native American human remains stretches back centuries. In the late 1700s, President Thomas Jefferson excavated an Indian burial mound to determine the context and the reasons behind the construction of the mound by the native people who constructed it. One of the most flagrant acts of organized desecration of Indian burials and burial sites came approximately one hundred years later when the United States officially collected Native American crania to determine whether Native Americans were inferior to white men. 136 Cong. Rec. H10988 (Oct. 22, 1990) (Statement of Sen. Campbell). The directive to complete this study was issued in 1869 by the Assistant U.S. Surgeon General to all Army medical officers seeking aid in the name of "progress of anthropological science" by obtaining measurements of a large number of skulls of aboriginal races of North America. *Id*. The purpose of the collection was chiefly designed to procure a large series of adult crania of the principle Indian tribes of the era. *Id.* By 1990, as a result of these and other unauthorized excavations of Indian burial sites, between 150,000 and 200,000 Indian remains were interred in museums across the country.

The first significant attempt to protect archaeological sites, including Native American burial grounds, was the Antiquities Act of 1906. 16 U.S.C. §§ 431-433. However, the Act deplorably defined Indian remains as "archaeological resources" and converted these dead persons into federal property to be held in museums. *Id*. § 432. In 1979, Congress enacted the Archaeological Resources Protection Act, 16 U.S.C. § 470aa *et seq*. The Act is one of general applicability covering all archaeological resources found on federal or tribal lands. In the mid-1980s, negotiations between museums and tribes for the return of remains became more common, indicating that legislation specifically addressing Indian human remains was necessary.

The first legislative step was taken in 1989, one year prior to the passage of NAGPRA, when Congress enacted the National Museum of the American Indian Act, 20 U.S.C. § 80q *et seq*. The Act established the National Museum of the American Indian in the Smithsonian, noting that at the time approximately 18,000 Indian remains were interred in the Smithsonian alone. 136 Cong. Rec. H10989 (Statement of Sen. Campbell). The statute also required the Smithsonian to inventory human remains and funerary objects in order to eventually repatriate the remains to culturally affiliated tribes. This statute served as the model for NAGPRA.

When the Senate voted on the bill that was to become NAGPRA in 1990, Senator Inouye, then Chairman of the Select Committee on Indian Affairs, stated that the statute provided for the restoration of Native American rights and the undoing of an injustice that began long ago. Senator Inouye stressed that NAGPRA was passed as recognition of the civil rights and human rights of "America's first citizens that have been so flagrantly violated over the last century." *See*136 Cong. Rec. S17173-74 (Oct. 26, 1990). Both he and Senators such as John McCain noted the past treatment and display of Native American remains to the exclusion of non-native remains conveyed a message of the inferiority of Indian tribes, a message that was "racist." *Id.*

In sum, NAGPRA was passed as human rights legislation to comprehensively regulate "Native American" human remains in possession of federal agencies as well as museums and institutions of higher learning, both public and private that receive federal funds, and the regulation of remains discovered on federal or Indian lands after November 16, 1990. *Id*. at S17174-75.

B. Chronology of Discovery

One day after the remains were discovered, on July 29, 1996, the Umatilla and Yakama Tribes were notified of the discovery. The remains were taken by the county coroner to the house of his friend, archaeologist Dr. James Chatters. They began examining the remains, and quickly realized that this was an ancient skeleton. Two days after their investigation began, the Army Corps of Engineers issued an excavation permit retroactively to Dr. Chatters under the Archaeological Resources and Protection Act. These permits are supposed to issue before excavation takes place. Nonetheless, this cleared Dr. Chatters to seek DNA analysis of the remains and begin additional searches in the area.

The collection of artifacts at the site continued through September. On October 23, 1996, Dr. Chatters was informed by researchers at the University of California that the remains were between 8240 and 9200 years old. Further study revealed an age that may be closer to 9300 years old. Once the age of the remains was revealed, tribes began suspecting that the remains were those of an ancient ancestor. On September 17, 1996, these suspicions were confirmed when the Corps of Engineers published a notice of intent under NAGPRA to repatriate the remains with four Northwest Indian tribes and one non-federally recognized band that had each separately contacted the United States informing them that they believed the remains were related to them. Ultimately, the tribes filed a joint claim of ownership for the remains. As Armand Minthorn, an Umatilla tribal leader noted, the tribes believe that the "Ancient One" had to be treated with respect; that testing of the remains was a desecration; that spiritual journey of the Ancient One had been disrupted by its removal from the earth; and, the remains should be reburied as soon as possible. These tribal beliefs were in direct conflict with the scientific and media frenzy that was erupting at the same time.

By now, Dr. Chatters was already working on his infamous reconstruction of the Kennewick Man's skeletal cranium. Meanwhile, scientists from the Burke Museum all the way to the Smithsonian were lining up to study the remains. In fact, right before the remains were transferred to a federal repository for safekeeping on September 4, 1996, the remains were poised to be sent to the Smithsonian for further study by Dr. Owsley, who would soon become a leading plaintiff in the Kennewick Man case.

C. Chronology of Litigation

This action was originally filed by the plaintiff academics in 1996 seeking a temporary restraining order against the United States Army Corps of Engineers to prevent repatriation of the remains to the tribes and to demand a detailed scientific study of the remains. Rather than litigate, the Corps agreed to work with plaintiffs and provide them with sufficient notice of any final agency decision to seek relief from the Oregon District Court.

Subsequently, the Corps moved to dismiss the lawsuit on two separate occasions. First, the Corps moved to dismiss the action for failure to exhaust administrative remedies and to state a claim. This motion was granted in part, dismissing the plaintiffs' civil rights claims, but denied in part, finding that the plaintiffs' claims were legally sufficient and ripe for adjudication. *Bonnichsen v. United States*, 969 F. Supp. 614 (D. Or. 1997). After the ruling, the Corps withdrew its "Notice of Intent to Repatriate" and again moved to dismiss, arguing that the academics lacked standing to pursue the action, that the claims were not ripe because no final agency decision had been made, and that the claims were moot because the original "Notice of Intent to Repatriate" was no longer in effect. The district court rejected the Corps' arguments, vacated the Corps' earlier decision regarding the disposition of the remains, and directed the Corps to reopen the decision-making process and address seventeen specific questions posed by the court. *Bonnichsen*, 969 F. Supp. 628, 651-54 (D. Or. 1997). The court also denied without prejudice the plaintiffs' motion to study the remains. *Id*. at 632.

Recognizing the need for expert agency review of the affiliation evidence, the Corps officially transferred the task of determining the final disposition of the remains to DOI. On January 13, 2000, after reviewing the government studies and archaeological, linguistic, and other evidence of cultural affiliation, DOI announced its determination that the remains are "Native American" as defined by NAGPRA. On January 25, 2000, the tribal claimants formally requested repatriation. On September 21, 2000, DOI issued a final agency decision finding the remains to be culturally affiliated with the claimant tribes, awarding the final disposition of the remains to the claimant tribes, and rejecting plaintiffs' request to conduct additional studies of those remains. Plaintiffs filed an amended complaint on January 2, 2001 seeking APA judicial review of DOI's final determination, and asserting statutory and constitutional violations.

Upon review of the 22,000 page administrative record and after oral argument, at which the claimant tribes participated as amicus curiae, the district court ruled for the plaintiffs and vacated the decision awarding the remains to the claimant tribes, enjoined the transfer of the remains to the claimant tribes, and rather than remanding to the agency, required that plaintiffs be allowed to study the remains upon the submission of a study plan. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Or. Aug. 30, 2002). Plaintiffs' other statutory requests for relief were dismissed with prejudice.

The tribes were granted intervention for purposes of appeal on October 21, 2002. Immediately thereafter, the tribes filed a motion seeking a stay of study pending appeal with the Oregon District Court that was denied on January 8, 2002. Subsequently, the tribes sought a stay pending appeal with this court that was granted on February 12, 2003. After oral argument on September 10, 2003, a three-judge panel of the Ninth Circuit affirmed the district court's decision on February 4, 2004. *Bonnichsen*, 357 F.3d 962 (9th Cir. Feb. 4, 2004) (Gould, J., Graber, J., and Aldisert, J.). The tribes, but not the United States, filed a Petition for Rehearing *En Banc* on March 18, 2004.

III. THE NINTH CIRCUIT'S ERRORS

The tribes' Petition for Rehearing was grounded on the belief that this case of first impression presents national questions of exceptional importance concerning the balance that

Congress struck between the spiritual beliefs of Indian tribes and the limits of academic exploitation of the dead. The tribes specifically challenged four aspects of the panel's decision in their rehearing petition.

A. The Panel Rewrote the Definition of "Native American" and Collapsed the "Native American" and "Cultural Affiliation" Determinations.

To be considered "Native American" for purposes of NAGPRA, the panel held that human remains must:

> share[] special and significant genetic or cultural features with presently existing indigenous tribes, peoples or cultures.[2]

Slip Op. at 1608. This holding is at odds with the plain language of NAGPRA. Congress defined "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). Thus, the first question the tribes presented for the full court to consider was whether Congress intended to limit the scope of "Native American" to remains that have a "significant genetic" relationship with "presently existing" tribes.[3]

NAGPRA requires two distinct inquires: (1) determining the statute's applicability (i.e., whether remains are "Native American") and (2) determining the disposition of the "Native American" remains (i.e., whether there is "cultural affiliation"). Remains must be both "Native American" and culturally affiliated for ownership to transfer to a tribal clamant.[4]

First, to trigger the statute, the land management agency or museum must determine whether remains are "Native American." Congress defined "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States."[5] 25 U.S.C. § 3001(9) (emphasis added). Second, and only if remains are "Native American," the agency or museum conducts additional studies to test "cultural affiliation" between the "Native American" remains and tribal claimants. *Id*. § 3002(a). "Cultural affiliation" is "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe . . . and an identifiable earlier group." *Id*. § 3001(2) (emphasis added).

In stark contrast to the panel's reformulated definition, Congress' definition of "Native American" does not reference "special or significant genetic or cultural features," a "presently existing" tribe, nor require any demonstrated relationship. However, these terms and concepts are part of the statutory definition of "cultural affiliation." *Id.* A comparison between NAGPRA's language and the panel's new definition demonstrates that the panel radically rewrote the definition of "Native American" by importing the relationship test and "present day" requirements from NAGPRA's "cultural affiliation" determination.

The panel's "Native American" definition also dramatically shrinks the set of "cultural items" available for repatriation under NAGPRA and creates a circular vortex of reasoning from which there is no escape. Remains are now not "Native American" unless potentially destructive

studies go forward to prove they are genetically and culturally related to presently existing tribes. Slip Op. at 1608. However, agencies and museums dealing with remains cannot comply with Congress' intent to consider the concerns of Indian tribes in conducting these studies unless NAGPRA applies. *See* S. Rep. No. 101-473 at 2, 4, 10 (1990). NAGPRA cannot apply unless the remains are "Native American." The simple temporal and geographic threshold inquiry is gone. *See* Slip Op. at 1599.

In other words, tribes must now consent to studies to prove remains are "Native American" in order to trigger the statute to have the right to stop the studies. *Id.* at 1587 n.8. Congress could not have intended such an absurd result. *See Na Iwi O Na Kapuna O Mokapu v. Dalton*, 894 F. Supp. 1397 (D. Haw. 1995) (finding that Congress sought to foster the goal of efficient repatriation); S. Rep. No. 101-473 at 10 ("The Committee does not intend this Act to require museums or Federal agencies to conduct exhaustive studies and additional scientific research to conclusively determine the cultural affiliation of human remains . . . ."); 25 U.S.C. § 3003(b)(2) (stating inventory provisions "shall not be construed to be an authorization for the initiation of new scientific studies").

B. The Panel Has Rendered Superfluous Portions of NAGPRA's "Ownership" Provision and Provisions Concerning "Unclaimed" and "Unidentifiable" "Native American" Remains.

Congress established two separate inquiries under NAGPRA. Collapsing the two determinations, [6] the panel radically restricted Congress' requirements for proving "ownership" under section 3002.[7]

The panel held that "cultural affiliation" requires a "more specific finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe." Slip Op. at 1599 (emphasis added). This is not the "ownership" standard under section 3002. Not only is it unclear what a "more specific finding" might be, the panel has written out three provisions of section 3002.

Section 3002(a) returns remains to (1) "lineal descendants" or (2) when "lineal descendants cannot be ascertained," to the (A) tribe on whose land the remains were discovered, (B) the tribe with the "closest cultural affiliation," or (C) if cultural affiliation "cannot reasonably be ascertained," to the tribe (1) "recognized as aboriginally occupying the area" or (2) the tribe with the "strongest demonstrated relationship" with the remains as shown by a "preponderance of the evidence." 25 U.S.C. § 3002(a)(1)-(2)(C)(2). The panel's arbitrary limitation to "lineal descendants" or "a specific Indian tribe" eviscerates sections 3002(a)(2)(B) ("closest cultural affiliation"), 3002(a)(C)(1) ("aboriginal lands"), and 3002(a)(C)(2) ("strongest demonstrated relationship"). *Compare id.* § 3002(a) *with* Slip Op. at 1599.

The panel's definition of "Native American" also renders NAGPRA's provisions regarding unclaimed remains (25 U.S.C. § 3002(b)) and culturally unidentifiable remains (25 U.S.C. § 3006(c)(5)) meaningless. Section 3002(b) provides that "Native American cultural items not claimed under [section 3002(a)] shall be disposed of in accordance with regulations." This provision applies when remains are "Native American," but are not claimed because "cultural affiliation" cannot be determined. The panel's definition of "Native

American" renders this provision unnecessary because, to be "Native American," remains must share "special and significant genetic or cultural features with presently existing indigenous tribes." Slip Op. at 1608. Thus, there can be no "unclaimed" remains because a relationship with a claimant must exist just to trigger the statute.

Section 3006(c)(5) directs the compilation of "an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains." The panel's definition of "Native American" forecloses this inventory because, if a museum cannot find a "genetic or cultural" relationship, the remains would not be "Native American" in the first place, and thus, cannot be "culturally unidentifiable." The panel's decision erroneously discards 413 inventories of "culturally unidentifiable" remains that have been logged from 329 museums and 84 federal agencies since 1990. *National NAGPRA FY03 Annual Report* ("Annual Report") at 2, *available at* http://www.cr.nps.gov/nagpra/DOCUMENTS/NNReport0310.pdf.

C. The Panel Misapprehended the Importance of the Terms Congress Chose to Define "Native American," Failing to Give Effect to the Whole Statute.

The panel held:

> Congress's use of the present tense [in the "Native American" definition] is significant . . . . We conclude that Congress was referring to *presently existing* Indian tribes when it referred to a 'tribe, people or culture *that is* indigenous to the United States.

Slip Op. at 1596-97 (emphasis in original). The panel's construction turns NAGPRA on its head, dramatically foreclosing the statute's applicability to older remains.

1. "Native American" is Not Limited to "Presently Existing" Tribes.

i. Other NAGPRA Provisions Demonstrate Congress' Expansive Intent.

"Native American" is a term of art with a meaning distinct from the way the term is used in common parlance. There is no evidence that Congress confused the statutory term "Native American" with an American Indian. Yet, the panel's reading presumes that Congress was simply being politically correct and defines "Native American" with reference to "Indian tribes." *See* Slip Op. at 1584 n.3, 1596-7. The panel's reasoning elevates the term "is" to talismanic proportions, while ignoring other parts of the statute that refute its reading.

"Native American" is uniquely and broadly defined. For instance, Congress defined "Native American" using the phrase "tribe, people or culture," instead of the more limiting term "Indian tribe," denoting a modern political entity. 25 .S.C. § 3001(9). Congress separately defined "Indian tribe" and did not use the term within the definition of "Native American," indicating that the two terms are mutually exclusive. *Id.* § 3001(7). The panel ignores this salient distinction and erroneously uses the term Congress omitted: "[w]e conclude that Congress was referring to presently existing Indian tribes when it referred to 'tribes, people, or culture,'" in the definition of "Native American." Slip Op. at 1596-97 (emphasis added).

Moreover, Congress defined "sacred objects" to require a "present day" relationship but omitted a similar requirement from the definition of "Native American." *Id.* § 3001(3)(C). Finally, Congress' decision, after careful consideration, to define "Native American" with the more expansive "of or relating to" markedly departs from the definition of "Native Hawaiian" which requires a relationship to an "individual who is a descendant." *Compare id.* § 3001(9) *with id.* § 3001(10) (emphasis added). This suggests that Congress foreclosed the panel's requirement of a "genetic" relationship to determine "Native American." Slip Op. at 1608. In other words, Congress knew how to require an exacting relationship to an "Indian tribe," but chose not to do so with "Native American." The panel overlooked this distinction.

ii. Congress Rejected More Limiting Definitions.

Congress' intent that the statute apply broadly is also evident from the legislation that pre-dated NAGPRA. Congress rejected restrictive definitions of "Native American" that had been contained in four previous bills that would have narrowly defined "Native American" as including only "American Indians . . . Native Alaskans, Native Hawaiians . . . and the descendants of such individuals."[8] The definition Congress ultimately adopted is more expansive, eliminating the term "Indian" as a modifier of "tribe" and eliminating a familial relationship to a present-day political entity. 25 U.S.C. § 3001(9). The panel erroneously put back in the statute words Congress deliberated left out.

iii. The Panel's Definition is at Odds with a Natural Reading of "Native American."

The panel erred by solely focusing on the term "is" in the abstract, rather than seeking the meaning of the entire phrase "tribe, people, or culture that is indigenous." Slip Op. at 1595-96.

"Tribe" means "a political, ethnic, or ancestral division of ancient states and cultures." American Heritage Dictionary at 1909 (3d ed. 1992). "People" means "a body of persons living in the same country." *Id.* at 1341. "Culture" means "patterns, traits, and products . . . of a particular period." *Id.* at 454. "Indigenous" means "originating . . . in an area . . . native." *Id.* at 919. Thus, the natural meaning of the phase "tribe, people, or culture that is indigenous" is more broad than a "genetic" relationship to "presently existing" political entities. Congress was using "Native American" in the way ordinary people in common usage might speak of indigenous peoples, unbounded by time and political designation.

2. "Native American" Applies to "Ancient" Remains.

The panel starkly departed from NAGPRA's purposes when it found that NAGPRA does not apply to "bones of such great antiquity," thereby creating a loophole for museums and federal agencies to avoid complying with NAGPRA. Slip Op. at 1598 n.17. The language of the statute, its legislative history, and its references to the Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470cc ("ARPA"), all of which the panel ignored, indicate NAGPRA applies to ancient remains.

NAGPRA defines "human remains" within the category of "cultural items." 25 U.S.C. § 3001(3) ("'cultural items' means human remains and—"). "Cultural items" include, *inter alia*,

"cultural patrimony," defined as "an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself." *Id*. § 3001(3)(D). Read together pursuant to the canon *noscitur a sociis*, "a word is known for the company that it keeps," "human remains" includes historical remains of "cultural importance."

This interpretation is buttressed by the language of ARPA, which NAGPRA cites for the authority to issue a permit "for excavation of Native American cultural items." *Id*. § 3002(c) (citing 16 U.S.C. § 470cc). ARPA permits are "for the purpose of furthering archaeological knowledge in the public interest." 16 U.S.C. § 470cc(b)(2). Read together in light of the canon *in pari materia* to give effect to both related statutes, NAGPRA applies to "human remains" that are historical and culturally and archaeologically significant. The panel acknowledges the importance of the remains but ignores these portions of the statute to effectively give the opposite reading to NAGPRA, permitting only recent and archaeologically unimportant remains to be "Native American." *See* Slip Op. at 1584, 1602.

NAGPRA's legislative history confirms that Congress sought to include ancient remains. Discussing "cultural affiliation," Congress stated "[w]here human remains . . . are concerned . . . it may be extremely difficult . . . for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record." Congress rejected "scientific certainty" and anticipated that "prehistoric remains" would be within NAGPRA's reach.

The panel erred by divorcing NAGPRA's plain words from the context in which Congress intended them to function. The panel should have concluded that the Kennewick remains are "Native American" because "the term 'human remains' was intended to mean ancient human remains with some sort of cultural or archaeological interest." *Kickapoo Traditional Tribe v. Chacon*, 46 F. Supp. 2d. 644, 650 (W.D. Tex. 1999) (emphasis added) (finding NAGPRA inapplicable to recent burial because of NAGPRA's language and ARPA references).

D. The Panel Has Rendered Unconstitutionally Vague NAGPRA's Criminal Provision Prohibiting the Trafficking of "Native American" Cultural Items.

NAGPRA's criminal provision provides: "Whoever knowingly sells, purchases, uses of profit, or transports for sale or profit any Native American cultural items obtained in violation of [NAGPRA] shall be fined . . . imprisoned not more than for one year, or both . . . ." 18 U.S.C. § 1170(b) (emphasis added). This provision is described as the "teeth" of Congress' "statutory mission" to provide "[r]espect for Native human rights." *United States v. Corrow*, 119 F.3d 796, 800 (10th Cir. 1997); *United States v. Tidwell*, 191 F.3d 976, 980 (9th Cir. 1999) (adopting the reasoning of *Corrow*).

The panel's "Native American" definition renders the criminal provision of NAGPRA unenforceable and unconstitutionally vague. A court must strike down any statute that fails to "sufficiently define the offense so that ordinary people can understand the prohibited conduct." *Tidwell*, 191 F.3d at 979 (internal citation omitted) (holding "cultural patrimony" not unconstitutionally vague). An ordinary person cannot know whether a cultural item "shares special and significant genetic or cultural features with presently existing indigenous tribes,

people, or cultures." Slip Op. at 1608. A "pot hunter" would have known whether a cultural item predated European conquest, however. Thus, the panel's "Native American" definition makes this provision unconstitutionally vague. The panel has also made it virtually impossible to prove the requisite *mens rea* in a NAGPRA prosecution.

IV. THE FUTURE OF NAGPRA AFTER *BONNICHSEN*

The panel has created different standards governing NAGPRA's applicability in this circuit from the rest of the Nation, thereby obstructing the repatriation of "Native American cultural items," and causing rampant uncertainty as to the statute's application.

National uniformity is of paramount importance for NAGPRA's repatriation program. NAGPRA applies to cultural items found on federal and tribal lands, and to all federal agencies and museums receiving federal funds, except the Smithsonian, within the United States. *Id.* §§ 3001(4)-(5), (15). As a result of NAGPRA's broad reach, hundreds of thousands of "Native American cultural items" have been returned to their tribal homes since 1990. Last year alone, 710 notices of inventory completion were filed by museums, accounting for 27,863 human remains and 564,726 associated funerary objects; 263 notices of intent to repatriate were filed accounting for 77,587 unassociated funerary objects, 1185 sacred objects, and 267 objects of cultural patrimony; and 36 notices of intended disposition of cultural items were filed accounting for 108 human remains, 586 funerary objects, and 5 objects of cultural patrimony. *Annual Report* at 2, 4.

The future of these and other repatriations have been cast into doubt by the panel's sweeping and disruptive opinion narrowing the statute's applicability.

V. WHAT CAN BE DONE?

While the tribes wait to see if a majority of the Ninth Circuit's active judges will vote in favor of rehearing and, ultimately, reverse the district court's and the panel's erroneous decisions, the rest of Indian Country must look beyond *Bonnichsen* to seek other means of resurrecting NAGPRA and protecting ancient remains. Current statutes addressing ancient remains (ARPA) and the rights of tribes to have access to sacred sites (American Indian Religious Freedom Act of 1978 ("AIRFA"), 42 U.S.C. § 1996), are inadequate to protect ancient Native American remains. Thus, tribes are left with three options for remains found on federal or tribal lands: the judiciary, the executive branch, and Congress.

One option is to create a split in the circuits over the application of NAGPRA to enable possible U.S. Supreme Court review. A number of tribes in Oklahoma and the Midwest have been very active in seeking repatriations under NAGPRA and pushing federal agencies to stretch the bounds of NAGPRA. Litigation concerning ancient remains and artifacts as a result of these actions is certainly possible. However, many tribes would be loath to approach the current U.S. Supreme Court with a NAGPRA case.

Seeking rule changes is another, and potentially more viable, option. Certainly, if the panel's decision remains in place, Interior will have to revisit its definition of "Native American," as well as its treatment of NAGPRA's "cultural affiliation" analysis. It will be incumbent on tribes to actively participate in the rulemaking process. While the agency's

definition of "Native American" will likely be narrowed from the current "pre-European" temporal threshold, tribes must not relent from their position against using invasive studies to answer the "Native American" question. It may also be possible to amend other portions of the implementing regulations, including, seeking clarification of when the "preponderance of the evidence" standard applies.

Finally, tribes can turn to Congress. Previously, two pro-science amendments (introduced in response to the *Bonnichsen* litigation) that would have specifically provided for private scientific study of remains in government custody, failed. *See, e.g.*, Testimony of Rep. Doc Hastings, H.R. 2893 (June 19, 1998), *available at* 1998 WL 307156 (F.D.C.H.). Potentially, tribes may be able to seek a legislative fix to *Bonnichsen*. However, such a fix is not likely this election year. Moreover, changes in the make-up of Congress could affect the ability of tribes to pass a pro-tribal NAGPRA amendment. Senator Ben Nighthorse Campbell is retiring and Senator Daniel Inouye is rumored to be leaving the Senate Indian Affairs Committee. Nevertheless, Congress may present the best opportunity for the tribes to protect NAGPRA. Regardless of the tribal decision, it will be necessary for tribes across the country to consider all of their options and move forward with a unified strategy.

VI. CONCLUSION.

During the congressional hearings in advance of NAGPRA's passage, a tribal faithkeeper poignantly remarked:

> We have been disposed of our land rights, we have been forcibly removed from our homeland, we have been slaughtered in our beds. We have been stripped of our languages and cultures. We have had our children taken away from us and made strangers to us. And still today, the very bones of our ancestors are kept from us, many locked away in simple green cardboard containers stacked one upon the other.

Statement of Oren Llyons, Faithkeeper of the Onodaga Nation, before the Select Committee on Indian Affairs (1988). Sixteen years later, the scientific community continues to thwart the return of tribes' ancestors to their tribal homes.

This case is about tribal sovereignty. It is not about preventing scientific study, because significant scientific study has already occurred. This case is about who gets to decide and who has the right to decide whether the study of ancient native remains takes place--private academics and scientists, the United States, or Indian tribes. Clearly, decisions concerning the final resting place of "Native American" remains and artifacts must lie with Indian tribes and tribal governments.

[1] Bonnichsen v. United States, 696 F. Supp. 614 (D. Or. Feb. 19, 1997), Bonnichsen v. United States, 969 F. Supp. 628 (D. Or. June 27, 1997), appeal after remand, Bonnichsen v. United States, 217 F. Supp. 2d 1116 (D. Or. Aug. 30, 2002),aff'd, 357 F.3d 962 (9th Cir. Feb. 4, 2004) (Petition for Rehearing En Banc Pending).

[2] The panel's definition varies throughout the Opinion, none of which comports with Congress' definition in NAGPRA. Other formulations include: (1) "some relationship to a presently existing tribe, people, or culture;" Slip Op. at 1596, 1597 (emphasis in original); (2) "a significant relationship to a presently existing tribe, people, or culture;" id. at 1600 (emphasis in original); (3) "special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture;" id. at 1603; and (4) seeking "cultural continuity between Kennewick Man and modern Indians." Id. at 1604, 1606.

[3] In another perversion of Congress' terminology, the panel defined "presently existing" as extant since 1789, when the United States Constitution was signed. Slip Op. at 1602. Under the panel's definition, no remains older than 215 years could be "Native American" under NAGPRA. This restricted reading is irreconcilable with Congress' intent that NAGPRA apply to "prehistoric" remains.

[4] The panel misunderstood that NAGPRA does not transfer title to "Native American" remains that are not "culturally affiliated" with present day tribes. Slip Op. at 1598, 1604 n.21. The panel was concerned that remains of a tribe "that had ceased to exist thousands of years before the remains were found" could be "Native American." Id. at 1601. Why not? While such remains could be "Native American," they would not be culturally affiliated because "cultural affiliation" can only be with "present day" tribes. 25 U.S.C. § 3001(2). An "extinct" tribe cannot be a claimant for "cultural affiliation" purposes. As a result, the "Native American" remains could be studied under NAGPRA. C.f. Slip Op. at 1604 n.21. Appellees' studies were prevented here because the Kennewick remains are both "Native American" and culturally affiliated with the tribes, not because the remains are "Native American."

[5] Interior chose a temporal and spatial test (pre-European and found in an area now part of the United States) to apply Congress' definition. 43 C.F.R. § 10.2(d).

[6] The lip service the panel paid to NAGPRA's two inquiries fails to rectify its error. The panel attempted to distinguish between a "general finding [of a] significant relationship to a presently existing 'tribe'" for "Native American" and a "more specific finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe" for "cultural affiliation." Slip Op. at 1599 (emphasis added). Neither "relationship" test is found in the words of the statute. 25 U.S.C. §§ 3001(2), (9); 3002(a).

[7] The panel committed two fundamental errors concerning the 22,000-page record. First, the panel misused evidence in the record. Section IV of the panel's decision purports to "address the Secretary's determination that the Kennewick Man's remains are Native American, as defined by NAGPRA." Slip Op. at 1603. However, the panel never considered the

Secretary's evidence that the remains are "Native American." See id. at 1590. Instead, the panel solely reviewed the Secretary's oral traditional evidence of "cultural affiliation." Id. at 1605-07. Second, the panel applied the wrong standard of review to consider the "Native American" evidence. The panel erroneously applied the "preponderance of the evidence" standard to the "Native American" determination. Slip Op. at 1604 n.20. A "preponderance of the evidence" is only required under sections 3002(a)(2)(C)(2) and 3005(a)(4). The panel should have reviewed the evidence supporting the "Native American" determination under the more lenient "substantial evidence" standard of the Administrative Procedures Act. Substantial evidence is "more than a mere scintilla but less than a preponderance." Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995) (emphasis added).

[8] H.R. 1381, 101st Cong. § 5 (1989); H.R. 1646, 101st Cong. § 3(1) (1989) (defining "Native American" as a "member of an Indian tribe"); S. 1021, 101st Cong. § 3(1) (1989); S. 1980, 101st Cong. § 3(1) (1989); H.R. 5237 § 2(11) (1990).