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The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study?

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COMMENTS

THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT: THE DEATH KNELL FOR SCIENTIFIC STUDY?

Renee M. Kosslak*

Table of Contents

I. Introduction	130
II. Origins of The Native Graves Protection and Repatriation Act	133
A. How American Indian Remains, Funerary Objects, Sacred Objects and Objects of Cultural Patrimony Ended Up in Federal Hands	133
B. Pre-Repatriation Legislation	134
III. The Native Graves Protection and Repatriation Act	136
A. Scope	137
1. Who Is Involved	137
a) Indian Tribes	137
b) Museums	138
c) Federal Agencies	138
2. What Is Covered	139
3. The Process of Repatriation	140
B. Implementation	141
IV. Are the Objectives of Repatriation and Scientific Study Mutually Exclusive?	142
A. The Origin of Humans in North American	143
B. Scientific Challenges to NAGPRA	145
1. <i>Na Iwi O Na Kupuna O Mokapu v. Dalton</i>	145
2. <i>Bonnichsen v. United States</i>	147
3. The Effect of the <i>Bonnichsen</i> Decision	148
C. Lessons Learned: Development of a Balancing Test as a Possible Compromise	149
V. Conclusion	151

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I. Introduction

On November 23, 1990, President George Bush signed into law the Native American Graves Protection and Repatriation Act (NAGPRA).¹ This legislation is the result of decades of effort by American Indians to protect the burial sites of their ancestors against grave desecration and to recover the remains of ancestors and sacred cultural objects in the possession or under the control of federal agencies and museums.²

The enactment of NAGPRA is historically significant because it represents a fundamental change in social attitudes toward Native people by museum curators, the scientific community, and Congress.³ NAGPRA's enactment followed more than a century of mistreatment of native peoples' ancestral dead by non-native people.⁴ In enacting NAGPRA, Congress attempted to "strike a balance between the interest in scientific examination of skeletal remains and the recognition that Native Americans, like people from every culture around the world, have a religious and spiritual reverence for the remains of their ancestors."⁵ The recent discovery of a nine-thousand-year-old human skeleton on the Columbia River, the Kennewick Man,⁶ indicates just how difficult it will be to strike a balance among the diametrically opposed interests of American Indians, on the one hand, and museums, scientists, and the public on the other, who believe that analysis of the past provides a key to the future.

The Kennewick Man has fueled a heated controversy between scientists and American Indians. Scientists who study American prehistory⁷ view the discovery of the Kennewick Man as an event of great historical and anthropological significance, and believe that much can be learned from a

1. Pub. L. No. 101-601, 1045 Stat. 3048 (codified at 18 U.S.C. § 1170 (1994) and 25 U.S.C. §§ 3001-3013 (1994)); see Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992).

2. Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 207 (1996).

3. Trope & Echo-Hawk, *supra* note 1, at 36-37.

4. See Senator Daniel K. Inouye, *Repatriation: Forging New Relationships*, 24 ARIZ. ST. L.J. 1, 1 (1992).

5. *Id.* at 2.

6. Douglas Preston, *The Lost Man*, NEW YORKER, June 16, 1997, at 70. The bones of the Kennewick Man were uncovered during recent flooding of the Columbia River near Kennewick, Washington. *Id.* Certain features of the skeleton, such as the worn down crowns of the teeth, indicated that it was a prehistoric Indian. *Id.* Other physical features, and the age of the bones suggested the skeleton was not culturally associated with any existing American Indian group. *Id.* at 71-72.

7. Prehistory refers to events which predate recorded history. DAVID J. MELTZER, *SEARCH FOR THE FIRST AMERICANS* 43 (1993).

detailed study of his remains.⁸ Plans to study the Kennewick Man by archaeologists, however, were blocked by the Umatilla Indians who formally claimed the Kennewick Man's remains under NAGPRA.⁹ The Army Corps of Engineers (Corps) granted the Umatillas' request.¹⁰ The Umatillas announced they were going to rebury the remains of Kennewick Man in a secret place, where they would never again be available for study.¹¹ The Umatillas released a written statement in response to the public outcry over the reburial plans:

Our elders have taught us that once a body goes in the ground, it is meant to stay there until the end of time. . . . We do not believe that our people migrated here from another continent, as the scientists do. . . . Some scientists say that if this individual is not studied further, we, as Indians, will be destroying evidence of our history. We already know our history. It is passed on to us through our elders and through our religious practices.¹²

The Kennewick Man is now at the center of a legal controversy, the resolution of which will determine the course of American archaeology.¹³

The legal controversy over the remains of the Kennewick Man exposes a fundamental weakness in NAGPRA regarding the disposition of ancient human remains where the ancestral link with present-day American Indians may be questionable. NAGPRA provides little guidance for ascertaining which American Indian tribe, if any, should have control or ownership over culturally unidentified remains.¹⁴ Many American Indians believe that the tribe claiming the remains should have the right to prohibit or to allow research according to their customs.¹⁵ However, the language of the Act and the legislative history surrounding it suggest that the intent was not to ban scientific research, but to achieve the following objectives: (1) to repatriate American Indian remains and cultural items that were stored in museum and agency warehouses, or were on display as exhibits; (2) to prohibit, with limited exceptions, the intentional excavation of American Indian graves and

8. Boyce Rensberger, *Putting a New Face on Prehistory*, WASH. POST, Apr. 15, 1997, at A1.

9. Preston, *supra* note 6, at 74. The Umatillas represent a coalition of five tribes and bands from the Columbia River basin. *Id.* The tribes represented by the coalition are: Colville, Nez Perce, Yakama, Umatilla, and Wanapum. *Corps Agrees to Repack Kennewick Man Skeleton*, NEWS TRIB. (Tacoma, Wash.), Oct. 30, 1997, at B3.

10. Preston, *supra* note 6, at 72.

11. *Id.*

12. *Id.*

13. *Bonnichsen v. United States*, 969 F. Supp. 628 (D. Or. 1997). While the various parties await the outcome of the litigation, the Army Corps of Engineers (Corps) has placed the bones in a secured vault at the Pacific Northwest National Laboratory, in Richland, Washington. Preston, *supra* note 6, at 72.

14. See 25 U.S.C. § 3002 (1994).

15. See Trope & Echo-Hawk, *supra* note 1, at 64.

cultural items; and (3) to suppress illegal trafficking in American Indian remains and artifacts.¹⁶ Yet, many feel that, as a result of NAGPRA, less will be learned about prehistoric peoples in the years to come.¹⁷

This comment suggests that it should be possible both to respect the views of American Indians and to further science and public education by allowing the study of culturally unidentified remains, should a link to present-day peoples or nations need to be established.¹⁸ In instances where "ancient remains" are inadvertently discovered on federal lands, a committee should be appointed to determine the needs and the scope of any proposed scientific research and when repatriation and/or reburial should occur. In cases where conflicting views prevent agreement, a balancing test that weighs the scientific merit of the proposed research with American Indian concerns should be applied by the courts.

This comment discusses how the ambiguity of the language in NAGPRA presented the court in *Bonnichsen v. United States*¹⁹ with the difficult task of interpreting congressional intent and balancing the competing interests of archaeologists and American Indians. Part II provides the backdrop for the controversy, by describing how American Indian remains, funerary objects, sacred objects, and objects of cultural patrimony ended up in non-native hands. This section also describes the largely unsuccessful pre-NAGPRA demands for the repatriation of American Indian property by American

16. H.R. REP. NO. 101-877, at 9 (1990), reprinted in 1990 U.S.C.C.A.N. 4367, 4368.

17. Gary D. Stumpf, *A Federal Land Management Perspective on Repatriation*, 24 ARIZ. ST. L.J. 303, 319 (1992). As American Indians gradually gain control over their own cultural heritage, artifacts that were previously available for display will no longer be displayed, sacred items will remain in the possession of the tribe, and, in most instances, only basic osteological information will be gathered prior to reinterment of remains, unless the tribe chooses another course of action. *Id.* at 313-17.

18. See *Report of the Panel for a National Dialogue on Museum/Native American Relations* (Feb. 28, 1990), 24 ARIZ. ST. L.J. 487, 499-500 (1992) [hereinafter *Panel*]. The Panel was formed to facilitate communication between tribal leaders and elders, museum professionals, and anthropologists, recognizing that a two-way dialogue was needed to bridge the gap between museum professionals and scientists, on the one hand, and American Indians on the other. See Michael J. Fox, *Repatriation: Mutual Benefits for Everyone*, 24 ARIZ. ST. L.J. 7, 7-8 (1992). Many on the Panel felt that scientific study of "Native" human remains carries an obligation to secure consent, and if the tribes and people strongly believe that these remains should be reburied, their wishes should be respected. *Panel, supra*, at 499-500. The remainder of the Panel believed that "Native" human remains that cannot be linked culturally to contemporary American Indians, and are considered valuable by the scientific community, should be preserved and remain accessible for future research. *Id.* at 500.

19. See *Bonnichsen v. United States*, 969 F. Supp. 628, 651-54 (D. Or. 1997). In *Bonnichsen*, the response by the United States government to American Indian demands to rebury the Kennewick Man's remains in accordance with NAGPRA resulted in a lawsuit brought by scientists desiring to study these remains. *Id.* at 631-32. In resolving the conflicting views represented in this lawsuit, the court will need to weigh the merits of allowing scientific research on the remains versus American Indian views on creation and burial.

Indians. Part III examines the scope of NAGPRA and asks if repatriation is an effective tool for returning stolen cultural items and human remains to American Indians. In Part IV, alternative views on the origin of humans in North America are examined. The section ends by evaluating whether NAGPRA is flexible enough to incorporate these different views. Part V concludes by finding that a minimally intrusive scientific study should be allowed, if required, to establish a cultural or biological link with present-day American Indian tribes, and suggests that NAGPRA represents a first step toward resolving these differing points of view.

II. Origins of the Native Graves Protection and Repatriation Act

Respect for the dead is embedded in the American legal system.

The normal treatment of a corpse, once it is decently buried, is to let it lie. This idea is so deeply woven into legal and cultural fabric that it is commonplace to hear it spoken of as a "right" of the dead and a charge on the quick. [No] system of jurisprudence permits exhumation for less than what are considered weighty, and sometimes compelling reasons.²⁰

These values are protected in all fifty states by criminal statutes that prohibit grave desecration, grave robbing, and mutilation of the dead.²¹ Because these statutes did not encompass unmarked graves, they were not applied to protect American Indian dead during the later part of the 1800s and for most of the 1900s.²²

A. How Native American Remains, Funerary Objects, Sacred Objects and Objects of Cultural Patrimony Ended up in "Federal" Hands

The means by which American Indian remains were obtained by soldiers, government agents, pot hunters, private citizens, museum collecting crews, and scientists is well documented by historians.²³ Early interest in collecting American Indian remains was initiated in the 1840s by Dr. Samuel Morton who collected large numbers of Indian crania to prove through skull measurements that the American Indian was racially inferior and doomed to

20. Trope & Echo-Hawk, *supra* note 1, at 38 (quoting R.F. Martin, Annotation, *Removal and Reinterment of Remains*, 21 A.L.R.2D 472, 475 (1952)).

21. Walter R. Echo-Hawk & Roger C. Echo-Hawk, *Repatriation, Reburial, and Religious Rights*, in HANDBOOK OF AMERICAN INDIAN RELIGIOUS FREEDOM 63, 68 (Christopher Vecsey ed., 1991).

22. Trope & Echo-Hawk, *supra* note 1, at 47. The authors suggest the laws and social policy of the United States evolved to define Indians as "non-renewable archaeological resources" to be treated like dinosaurs or snails, 'federal property' to be used as chattels in the academic marketplace, 'pathological specimens' to be studied by those interested in racial biology, or simple 'trophies or booty' to enrich private collectors." Echo-Hawk & Echo-Hawk, *supra* note 21, at 68.

23. See Trope & Echo-Hawk, *supra* note 1, at 40 (citations omitted).

extinction.²⁴ Morton's findings established the "Vanishing Red Man" theory which was used by the government as scientific justification for relocating Indian tribes and taking tribal lands.²⁵ Later, procurement of Indian remains became official federal policy with the Surgeon General's Order of 1868, which directed army personnel to obtain Indian crania and other body parts for the Army Medical Museum.²⁶ As a result of this order, "over 4000 heads were taken from battlefields, POW camps, hospitals, fresh graves, and burial scaffolds across the country."²⁷

The army was not the only agency involved in the collection of American Indian remains. During this same period, collecting crews from America's museums conducted expeditions to obtain Indian skeletons.²⁸ The passage of the Antiquities Act of 1906 allowed for thousands of Indian dead to be classified as "archaeological resources" and exhumed as "federal property."²⁹ This one-way transfer of Indian property to non-Indian ownership came full circle when Indians — who had not gone extinct — demanded repatriation.³⁰

B. Pre-Repatriation Legislation

The failure of the American legal system to protect Indian burial sites has been attributed in part to the lack of access to courts by American Indians during the time when the courts and state legislators were enacting specific statutes for cemeteries and burials.³¹ Consequently, the common law failed

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 41. Franz Boas, a leading figure in American anthropology, observed in his diary: It is most unpleasant work to steal bones from graves, but what is the use, someone has to do it. . . . Yesterday I wrote to the Museum in Washington asking whether they would consider buying skulls this winter for \$600; if they will, I shall collect assiduously. Without having such a connection I would not do it.

James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ. ST. L.J. 11, 22 (1992) (quoting THE ETHNOGRAPHY OF FRANZ BOAS 88 (Ronald P. Rohned ed., 1969)).

29. Trope & Echo-Hawk, *supra* note 1, at 42-43. "Between 1875 and 1925, trainloads of Native artifacts left Indian hands for American and European museums and mansions. One wealthy collector, George Heye, managed to acquire over one million artifacts; statistically, he collected more than one object from every American Indian who was alive during that time!" Echo-Hawk & Echo-Hawk, *supra* note 21, at 65.

30. Most tribal leaders believe that until the situation is remedied, American Indians will continue to experience the social ills of American society. Steven Platzman, Comment, *Object of Controversy: The Native American Right to Repatriation*, 41 AM. U. L. REV. 517, 521 (1992) (citations omitted); see also Connie Hart Yellowman, "Naevahoo'ohitsemé" — *We Are Going Back Home: The Cheyenne Repatriation of Human Remains — A Woman's Perspective*, 9 ST. THOMAS L. REV. 103 (1996) (describing the impact that removal of American Indian dead had on the Cheyenne of Oklahoma). Leaders of the United Indian Nations in Oklahoma link their peoples' high alcoholism rate, soaring suicide rate, poor health, low educational achievement, and bleak economy to the state of their ancestors' remains. Platzman, *supra* note 30, at 521.

31. Trope & Echo-Hawk, *supra* note 1, at 45. Lack of access to courts by American Indians

to take into account indigenous burial practices and mortuary traditions.³² Instead, only marked graves and actively used cemeteries were protected.³³

American Indians have struggled for almost 100 years to regain possession of their religious objects and the remains of their ancestors, and to protect the burial sites of their dead.³⁴ In the mid-1980s, a few tribes successfully obtained the return of their dead by convincing state legislatures to pass repatriation statutes.³⁵ In addition, a handful of academic institutions agreed to return remains after extensive negotiations with their descendants.³⁶ However, many tribes remained dissatisfied with the lack of response from federal agencies and sought federal legislation directing these entities to return Indian remains and burial items to the original tribes upon request.³⁷

was the result of prevailing racial views and the use of the battlefield to settle disputes between Indians and white settlers. *Id.* at 45-46.

32. *Id.*

33. *Id.* at 47. The effect of protecting marked graves meant many unmarked Indian graves were discovered, disturbed, or dug up and the remains never reburied. *Id.* Similarly, many Indian cemeteries were considered "abandoned" because relocated Indian tribes no longer had access to burial sites on the land from which they were removed. *Id.* In Illinois, an entire Indian cemetery containing 234 bodies was uncovered for public display at the Dixon Mounds Museum. *Id.*

34. Platzman, *supra* note 30, at 521, 523 (recounting the Iroquois and Onondaga Nations' battle to legally regain possession of ceremonial wampum belts) (citations omitted); see Trope & Echo-Hawk, *supra* note 1, at 52 (listing states which have recently passed unmarked burial-protection laws). See generally Catherine Bergin Yalung & Laurel I. Wala, *A Survey of State Repatriation and Burial Protection Statutes*, 24 ARIZ. ST. L.J. 419 (1992).

35. Trope & Echo-Hawk, *supra* note 1, at 53. In 1989, Kansas passed legislation implementing a reburial agreement between state officials, the owner of a tourist attraction, and three Indian tribes providing that the dead would be reburied by the descendent tribes. *Id.* at 53 (citations omitted). The tourist attraction consisted of 165 Indians from an Indian burial ground at Salina, Kansas. *Id.*; see also Echo-Hawk & Echo-Hawk, *supra* note 21, at 72-73. Similarly, the Nebraska legislature enacted a repatriation statute allowing for the reinterment of over 400 Pawnee dead from the Nebraska State Historical Society. *Id.*

36. Immediately prior to the enactment of NAGPRA, American Indian remains were returned by Stanford University. Anne C. Roark, *Stanford Agrees to Return Indian Skeletal Remains*, L.A. TIMES, June 22, 1989, at 1. The Stanford agreement took five years to negotiate and resulted in an end to all research on the skeletal remains of approximately 550 Ohlone-Costanoan Indians. *Id.* A Stanford archaeologist commenting on the agreement said "the decision is indicative of 'an awakening among archeologists to the fact that we're dealing with the remains of people who still have living descendants.'" *Id.* The University of Minnesota also entered into an agreement to repatriate American Indian remains. Patrick Sweeney, *Indians Win Battle to Bury Ancestors*, ST. PAUL PIONEER PRESS, July 16, 1989, at 1B.

37. Echo-Hawk & Echo-Hawk, *supra* note 21, at 77. In 1986, Northern Cheyenne leaders discovered that almost 18,500 human remains were warehoused in the Smithsonian. Trope & Echo-Hawk, *supra* note 1, at 54 (quoting Douglas J. Preston, *Skeletons in Our Museums' Closets*, HARPER'S, Feb. 1989, at 68). This discovery provided the catalyst for a concerted national effort by Indian tribes to obtain federal legislation to repatriate human remains and cultural artifacts. *Id.* at 55.

Between 1989 and 1990, a number of bills were introduced in Congress to address the issue of repatriation.³⁸ In the 99th and 100th Congress, bills were introduced to provide for the creation of a Commission to resolve disputes between museums and Native Americans.³⁹ This legislation was opposed by the Smithsonian Institution, the American Association of Museums, and the Society for American Archeology, and therefore was not enacted.⁴⁰ Nonetheless, the National Museum of the American Indian Act was passed in 1989,⁴¹ and a Panel for a National Dialogue on Museum/Native American Relations created.⁴² The National Museum of the American Indian Act and the Panel were instrumental in paving the way for the enactment of a more comprehensive repatriation bill.⁴³ NAGPRA was finally enacted during the second session of the 101st Congress.⁴⁴

III. The Native Graves Protection and Repatriation Act

NAGPRA is a complex law governing the repatriation of human remains, funerary objects, sacred objects, and objects of cultural patrimony. NAGPRA provides for the protection and ownership of materials found on federal and tribal lands.⁴⁵ The act requires museums to provide an inventory and describe their American Indian cultural items determining where possible the "cultural affiliation" with a particular Indian tribe.⁴⁶ NAGPRA also:

- (1) stipulates that illegal trafficking in human remains and cultural items may result in criminal penalties;
- (2) authorizes the Secretary of the Interior ("Secretary") to administer a grants program to assist museums and Indian tribes in complying with NAGPRA;
- (3) requires the Secretary to establish a Review Committee to provide advice and assistance in carrying out key provisions; and
- (4) directs the Secretary to develop regulations in consultation with the Review Committee.⁴⁷

38. Trope & Echo-Hawk, *supra* note 1, at 55.

39. *Id.*

40. *Id.* at 56.

41. Although the Smithsonian Institution opposed NAGPRA, the National Museum of the American Indian Act became law on November 28, 1989. *Id.* (citing 20 U.S.C.A. §§ 89q to 80q-15 (West 1990)). This Act created a National Museum of the American Indian within the Smithsonian Institution and addressed the issue of repatriating human remains and funerary objects in the museum's possession. *Id.*

42. Trope & Echo-Hawk, *supra* note 1, at 57-58. Participants in the panel were museums, scientists, and American Indians. *Id.* The dialogue concerned appropriate treatment of human remains and cultural artifacts. *Id.* at 58.

43. *Id.*

44. *Id.* at 58-59 (citing 25 U.S.C.A. §§ 3001-3013).

45. 25 U.S.C. § 3002 (1994).

46. *Id.* §§ 3003, 3004.

47. Francis P. McManamon & Larry V. Nordby, *Implementing the Native American Graves*

A. Scope

The following provides an examination of the "nuts and bolts" of NAGPRA's major provisions: who is involved, what is covered, and how the repatriation process works.⁴⁸

1. Who Is Involved

NAGPRA's protection extends to federally recognized American Indian tribes, and Native Hawaiian and Alaskan organizations.⁴⁹ Other participants include museums receiving federal funds and federal agencies.⁵⁰ The Secretary of the Interior and the NAGPRA Review Committee provide oversight and direction for the activities required by these groups.⁵¹

a) Indian Tribes

NAGPRA defines an Indian tribe as "any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Village . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."⁵² A Native Hawaiian organization is

any organization which (A) serves and represents the interests of Native Hawaiians, (B) has as a primary and stated purpose the provision of services to Native Hawaiians, and (C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.⁵³

The key issue for NAGPRA is the establishment of lineal descent or cultural affiliation between present-day tribes and organizations and "human remains or other cultural items located in museums, federal collections, or as yet undiscovered on federal or tribal land."⁵⁴ "Cultural affiliation" is defined as a "relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native

Protection and Repatriation Act, 24 ARIZ. ST. L.J. 217, 222 (1992) (citing 18 U.S.C.A. § 1170 (West Supp. 1991 and 25 U.S.C.A. §§ 3006(a), 3006(c)(7), 3008 (West Supp. 1991)). McManamon is the consulting archaeologist for the National Park Service, Department of the Interior.

48. For in depth discussions of NAGPRA's provisions, see Trope & Echo-Hawk, *supra* note 1, at 58-75; McManamon & Nordby, *supra* note 47, at 222-52; Suagee, *supra* note 2, at 200-09.

49. 25 U.S.C. § 3001(6)-(7) (1994).

50. McManamon & Nordby, *supra* note 47, at 222.

51. 25 U.S.C. § 3006 (1994).

52. *Id.* § 3001(7).

53. *Id.* § 3001(10).

54. McManamon & Nordby, *supra* note 47, at 223.

Hawaiian organization and an identifiable earlier group.⁵⁵ Groups of American Indians of diverse backgrounds who voluntarily associate for some purpose are not viewed as proper claimants under NAGPRA.⁵⁶

NAGPRA also does not define "lineal descent" or explain how to determine "shared group identity." Although this omission may be significant in light of the controversy generated over the Kennewick Man, NAGPRA does provide a means for prioritizing among competing claims for human remains and cultural items which lack a known cultural affiliation.⁵⁷

b) Museums

A museum is defined as "any institution or State or local government agency (including any institution of higher learning) that receives federal funds and has possession of, or control over, American Indian cultural items. Such term does not include the Smithsonian Institution or any other Federal Agency."⁵⁸

NAGPRA requires each museum to ensure that inventories or written summaries are completed for all cultural items within their collections.⁵⁹ Affected Indian tribes or Native Hawaiian organizations must be notified upon completion of the inventory or written summary.⁶⁰ The notice needs to include information which (1) identifies the remains or cultural items and the circumstances surrounding acquisition; (2) lists the human remains or cultural items whose tribal origins are clearly identifiable; and (3) lists those remains and cultural items that are not clearly identifiable, but, given the totality of the circumstances surrounding acquisition, are believed to be affiliated with an Indian tribe or Native Hawaiian organization.⁶¹

c) Federal Agencies

Any federal agency that manages land or is responsible for archaeological collections taken from their land or generated by their activities must comply with NAGPRA.⁶² Federal agencies are responsible for: (1) producing inventories and written summaries of cultural items either in their collections or controlled by them;⁶³ and (2) consulting with Indian tribes or Native Hawaiian organizations when planned archaeological excavations may

55. 25 U.S.C. § 3001(2) (1994).

56. McManamon & Nordby, *supra* note 47, at 223 (citing 25 U.S.C.A. § 3001(2)).

57. 25 U.S.C. § 3002(a)(2) (1994).

58. *Id.* § 3001(8). For a discussion of the Smithsonian's responsibilities, see *supra* text accompanying note 41.

59. 25 U.S.C. § 3003(a) (1994).

60. *Id.* § 3003(d).

61. *Id.* § 3003(d)(2).

62. See McManamon & Nordby, *supra* note 47, at 227 (citations omitted).

63. 25 U.S.C. § 3004 (1994).

encounter cultural items or when cultural items are discovered inadvertently on federal or tribal lands.⁶⁴

2. *What Is Covered*

Under NAGPRA, "cultural items" means human remains and: (1) associated funerary objects; (2) unassociated funerary objects; (3) sacred objects; and (4) objects of cultural patrimony.⁶⁵ Because NAGPRA does not define human remains, all American Indian human remains, whether they come from a burial site or not, are covered by NAGPRA.⁶⁶ "Associated funerary objects" are objects reasonably believed to have been placed with human remains as part of the death rite or ceremony.⁶⁷ "Unassociated funerary objects" are objects that were placed with an individual at the time of death or later, but the individual's remains are no longer in the possession or control of the museum or federal agency.⁶⁸

"Sacred objects" are defined as "specific ceremonial objects which are needed by traditional American Indian religious leaders for the practice of traditional American Indian religions"⁶⁹ An object qualifies as "sacred" if it is needed to practice or renew traditional religions.⁷⁰ Objects of "cultural patrimony" are defined as having "ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which therefore, cannot be alienated, appropriated, or conveyed by any individual."⁷¹ To meet this definition, the objects must be of such importance to the tribe that they are owned communally.⁷²

Of the many objects in archaeological or ethnographic collections, relatively few are covered by NAGPRA because they lack a burial, funerary, religious, or cultural patrimonial context.⁷³ This means that the primary effect of NAGPRA is repatriation of human remains.⁷⁴

64. *Id.* § 3002(c)(2).

65. *Id.* § 3001(3).

66. *Id.* § 3001(1); *see also* McManamon & Nordby, *supra* note 47, at 231-32.

67. 25 U.S.C. § 3001(3)(A) (1994). This definition includes objects that are stored together or for which adequate records exist permitting a reassociation. McManamon & Nordby, *supra* note 47, at 232.

68. 25 U.S.C. § 3001(3)(B) (1994). To regain possession of unassociated funerary objects, a tribe must demonstrate by a preponderance of the evidence that the objects are "related to specific individuals or families," or were "removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe." *Id.*

69. *Id.* § 3001(3)(C).

70. McManamon & Nordby, *supra* note 47, at 233 (citations omitted).

71. 25 U.S.C. § 3001(3)(D) (1994).

72. McManamon & Nordby, *supra* note 47, at 234. Such objects would include the Zuni War Gods, or the Wampum belts of the Iroquois. *Id.*

73. *Id.*

74. *See* Part III.B of this comment for a discussion of cultural items repatriated since the

3. *The Process of Repatriation*

The recommended steps for repatriation of remains or items in collections are: (1) consultation; (2) written summary and inventory procedures; (3) notification; (4) repatriation; and (5) disposition.⁷⁵ In addition,

museums and agencies are not required to repatriate unassociated funerary objects, sacred objects, and objects of cultural patrimony, unless the claimant can demonstrate *all* of the following:

- (a) the objects conform to the definition of an unassociated funerary object, sacred object, or object of cultural patrimony;
- (b) cultural affiliation exists for these kinds of items;
- (c) sacred objects and objects of cultural patrimony were in the claimant's ownership or control;
- (d) evidence presented by the claimant exists which, if standing alone before the introduction of evidence to the contrary, would support a finding that the . . . agency or museum did not have the right of possession to such object.⁷⁶

These steps work well for human remains or cultural items in which a link to a lineal descendant or culturally affiliated tribe is well documented and which are currently under the control or in the possession of a museum or federal agency.⁷⁷

The most troubling aspect of NAGPRA for tribes, scientists, and federal agencies is the failure of NAGPRA to address how the passage of time affects the establishment of cultural affiliation.⁷⁸ For example, NAGPRA does not specify the types of studies that should be done on human remains or cultural items tens-of-thousands of years old to establish biological links to present day Native peoples.⁷⁹ Similarly, NAGPRA assumes that properly affiliated claimants exist for human remains or cultural items discovered on federal or tribal lands from thousands of years ago.⁸⁰ Yet, different tribes may have occupied the same geographical area at different times in the historic or prehistoric past, or there may be no affiliated descendants because they no longer exist.⁸¹

enactment of NAGPRA.

75. McManamon & Nordby, *supra* note 47, at 239-45.

76. *Id.* at 243 (citations omitted).

77. *Id.* at 239.

78. *Id.* at 225.

79. *Id.*

80. 25 U.S.C. § 3002 (1994).

81. McManamon & Nordby, *supra* note 47, at 225.

B. Implementation

Since NAGPRA, American Indians have regained numerous items of cultural importance and human remains from federally funded museums. For example, the Denver Art Museum repatriated its first object in 1995, the Elk Tongue Beaver bundle, to members of Canada's Blackfeet nation.⁸² The museum has some 17,000 North American Indian-related objects, and has sent letters summarizing its collection to 700 federally recognized tribes.⁸³ A second repatriation request has recently been received.⁸⁴

The Colorado History Museum has possession of 600 human remains in its collection of 17,000 American Indian artifacts.⁸⁵ The remains have not been on display since the 1970s and are stored in a controlled-access museum storage room.⁸⁶ To date the museum has contacted 145 tribes and has received a request for the return of one individual's remains.⁸⁷

Somewhat more reluctantly, a small town museum in Barre, Massachusetts is working to turn over its entire collection of Indian artifacts following a repatriation request under NAGPRA by descendants of the survivors of Wounded Knee.⁸⁸ Since receiving the request, the museum closed to the public for fear of offending any Sioux concerned over the display of their ancestors' remains and belongings.⁸⁹

The hope that the positive effects of NAGPRA would extend beyond federally funded entities to the private sector has been only partially fulfilled.⁹⁰ For example, the remains of two Oglala Sioux were voluntarily returned from Britain after more than 100 years.⁹¹ In contrast, Navajo and

82. Steven Rosen, *A Sacred Trust*, DENVER POST, May 30, 1995, at D8. The museum purchased the object in 1949 from a collector who had allegedly bought it from an Indian owner. *Id.*

83. *Id.*

84. *Id.* This request also is from the Blackfeet and involves another bundle which the museum purchased from the same collector in 1940.

85. *Id.*

86. *Id.* Most of the Colorado History Museum's collection of remains were obtained from private collectors. *Id.* According to one museum head, "museums sometimes acquired their human remains with good intentions — to take them off the market." *Id.*

87. *Id.*

88. *Museum Set to Lose Indian Treasure*, N.Y. TIMES, Feb. 19, 1993, at A12. The museum's collection includes more than 100 items stripped from the bodies of Oglala Lakota Sioux Indians killed in the massacre at Wounded Knee in 1890. *Id.* The museum received the collection through a donation from a town resident who is thought to have purchased the items from a "contractor in charge of clearing the killing field where hundreds of Indians' bodies were tossed into mass graves." *Id.* For a description of the Wounded Knee massacre, see DEE BROWN, *BURY MY HEART AT WOUNDED KNEE*, 439-45 (1970).

89. *Id.* The current curator was unaware of the significance of the items and had previously thought of them as "artwork." *Id.*

90. Rosen, *supra* note 82, at D8 (quoting Roger Echo-Hawk).

91. *Sioux Chief's Remains are Finally Home*, PEORIA J. STAR, Sept. 29, 1997, at A2.

Hopi religious leaders were unsuccessful in preventing the sale of sacred masks from a private collection during an auction at Sotheby's.⁹² However, their protest spurred Elizabeth Sackler, president of the Arthur M. Sackler Foundation, to buy the masks and return them to the Indians.⁹³ Overall, cooperation between federal agencies, scientists and tribal leaders to return remains and items wrongfully taken from American Indians appears to be producing a positive result in the community as a whole.

IV. Are the Objectives of Repatriation and Scientific Study Mutually Exclusive?

Western cultures learn from earliest childhood that understanding the past is the key to the future.⁹⁴ Conversely, American Indians believe that any form of archaeological study at any burial site constitutes desecration.⁹⁵ Perhaps Chief Seattle put it most eloquently:

To us the ashes of our ancestors are sacred and their resting place is hallowed ground. You [white Americans] wander far from the graves of your ancestors and seemingly without regret. . . .

Your dead cease to love you and the land of their nativity as soon as they pass the portals of the tomb and wander way beyond the stars. They are soon forgotten and never return. Our dead never forget the beautiful world that gave them being. They still love its verdant valleys, its murmuring rivers, its magnificent mountains, sequestered vales and verdant lined lakes and bays, and ever yearn in tender, fond affection over the lonely hearted living, and often return from the Happy Hunting Ground to visit, guide, and console and comfort them.⁹⁶

The above passage illustrates the basic conflict that exists between American Indians and non-Indian people, including archaeologists. It is clear that archaeologists, museum officials and American Indians differ widely in their points of view on issues relating to the excavation of archaeological sites, disposition of human remains, and ownership of cultural artifacts.⁹⁷

92. *Tribes Try to Stop Relic Sale*, WASH. POST, May 18, 1991, at G7. The masks were valued at \$22,000 to \$33,000. *Id.*

93. Rita Reif, *Antiques: With Indian Art the Exhibit Could Be in Court*, N.Y. TIMES, June 2, 1991, at 37; see also Linda Lehrer, *Returning a Gift*, CHI. TRIB., July 23, 1991, at 4.

94. "What's past is prologue." WILLIAM SHAKESPEARE, *THE TEMPEST*, quoted in OXFORD DICTIONARY OF QUOTATIONS 485 (3d ed. 1979).

95. Gene A. Marsh, *Walking the Spirit Trail: Repatriation and Protection of Native American Remains and Sacred Cultural Items*, 24 ARIZ. ST. L.J. 79, 92 (1992) (citations omitted).

96. Riding In, *supra* note 28, at 11 (citation omitted).

97. See Deborah Schoch, *Loss of Prehistoric Burial Site "a Shame," Experts Say*, L.A. TIMES, Nov. 5, 1997, at B1 (discussing the significance of the find and its subsequent destruction); Deborah Schoch, *Facts of Orange County Prehistory May Be Buried Forever*, L.A.

A. The Origin of Humans in North America

Understanding and respect for non-Western traditions is difficult for Euro-americans.⁹⁸ "The non-Western, tribal equivalent of science is the oral tradition, teachings that have been passed down from one generation to the next over uncounted centuries."⁹⁹ These teachings comprise a "loosely held collection of anecdotal material," that explain "the nature of the physical world as people have experienced it and the important events of their historical journey."¹⁰⁰

The beliefs of tribal elders are not shaken if their version of creation differs from that held by a neighboring tribe because American Indians believe each tribe has its own special relationship with the spiritual forces that govern the universe.¹⁰¹ For example, the origin stories of many tribes, passed down through generations, suggest that their people were here "at the beginning" and, hence, evidence to the contrary is not persuasive.¹⁰² In contrast, archaeologists believe that all inhabitants of North America are immigrants.¹⁰³ Because archaeologists consider tribal people as lineal descendants of the first Americans, the Paleoindians, present day American Indians become exceedingly valuable as sources for clues to that origin.¹⁰⁴

Many archaeologists believe the first Americans colonized this continent during the Pleistocene or Ice Age.¹⁰⁵ Radiocarbon dating of prehistoric sites fixes the date of the earliest settlement, the Clovis occupation, between 11,000 and 11,500 years ago.¹⁰⁶ These dates coincide with the breakup of the northern ice sheets that are believed to have blocked the passage from Alaska,

TIMES, Nov. 2, 1997, at A1 (covering the differing opinions of American Indians and scientists regarding the loss of information associated with the destruction of the site).

98. VINE DELORIA, *RED EARTH, WHITE LIES* 33 (1997).

99. *Id.* at 36.

100. *Id.*

101. *Id.*

102. *Id.* at 69, 81-84, 232. See generally EDMUND NEQUATEWA, *TRUTH OF A HOPI* 1-15 (7th ed. 1993); PAUL G. ZOBROD, *DINE BAHANE* 33-78 (2d ed. 1989).

103. MELTZER, *supra* note 7, at 11-15. Accepting the archaeologists' point of view, Africa, where *Homo sapiens* first originated, is the only nation inhabited by indigenous people. See Ann Gibbons, *Y Chromosome Shows That Adam Was an African*, 278 *SCIENCE* 804 (1997).

104. MELTZER, *supra* note 7, at 129-49, 162-66. The first Americans were named Paleoindians in recognition of their great antiquity. *Id.*

105. *Id.* at 12, 27-28. At the time of the last Ice Age, some 18,000 years ago, much of the earth's water was frozen, and sea levels dropped considerably, exposing a land bridge, "Beringia," between the Old World and the New. *Id.* at 13.

106. *Id.* at 15. Traces of a group believed to be the first Americans were found at a pond near Clovis, New Mexico. *Id.* at 13. More recent immigrants include the Anasazi, with settlements dating from about 700 B.C. WILLIAM M. FERGUSON & ARTHUR H. ROHN, *ANASAZI RUINS OF THE SOUTHWEST IN COLOR* 1 (1988).

thus supporting the theory that an ice-free corridor extended from Alaska into the rest of the New World.¹⁰⁷

In spite of the available information, exactly when the first Americans arrived remains highly controversial.¹⁰⁸ Other areas of controversy concern the origin of the first Americans, the routes they traveled, and whether the initial settlement of this continent involved a single group or multiple waves of immigration.¹⁰⁹

The Kennewick Man could provide a crucial link in our understanding of the geographic origin of the first Americans.¹¹⁰ Depending on a particular viewpoint, the first Americans could have come either from Europe or from Asia.¹¹¹ Currently, the predominant view is that the first Americans were descendants of Northeast Asian populations.¹¹² Analysis of the Kennewick Man may change this view.¹¹³

At least three migratory waves of distinct groups are thought to have traversed the Bering Land Bridge, giving rise to the three main language patterns found in the New World.¹¹⁴ The Amerinds arrived first and are the largest group, embracing over 900 indigenous languages of the New World spoken from Hudson Bay to Tierra del Fuego.¹¹⁵ Next came the Eskimo-Aleuts, followed much later by the Na-Dene.¹¹⁶

Scientific interest in the first Americans or modern day American Indians is unlikely to abate.¹¹⁷ However, for archaeologists interested in studying the past, the key will be to find a way to answer their many questions while at the same time respecting American Indian beliefs regarding the proper treatment of their ancestors.¹¹⁸

107. MELTZER, *supra* note 7, at 15.

108. *Id.*

109. *Id.*

110. Preston, *supra* note 6, at 74.

111. Rensberger, *supra* note 8, at A1. *But see* MELTZER, *supra* note 7, at 159.

112. MELTZER, *supra* note 7, at 159. Evidence to support this view is based on dental patterns, shared mitochondrial DNA markers, and certain elements of the languages of their modern descendants. *Id.*

113. Preston, *supra* note 6, at 74.

114. MELTZER, *supra* note 7, at 88. It is also possible that migrations occurred and were not successful. *Id.* at 103. For example, archaeologists know that the Norse made it to northern Newfoundland 1000 years ago and were driven off by native "Skrælings." *Id.*

115. *Id.* at 86-87.

116. *Id.* at 88. Today "the 38 Na-Dene or Athabaskan languages are spoken by three widely separated groups: Northern Athabaskans who inhabit subarctic Alaska and Canada, the Pacific Coast Athabaskan who live in the major river valleys of British Columbia, Oregon, and northern California, and the Apachean who live in the southwestern United States." *Id.* at 86.

117. *Id.* at 162-66. In recent years, some archaeologists have used the number and distribution of American Indian languages as a way to map the route of entry for the first Americans. *Id.* at 165. Others study the genetic diversity of modern American Indians to determine if their genes accurately represent the gene pool of America's founding populations. *Id.* at 166.

118. For example, tribal representatives of the Umatillas "consider DNA testing to be

B. Scientific Challenges to NAGPRA

Since the enactment of NAGPRA, few claims for repatriation have resulted in judicial resolution. Of these, one involved a formal repatriation claim.¹¹⁹ The other two claims addressed the extent to which NAGPRA permits scientific research.¹²⁰

1. *Na Iwi O Na Kupuna O Mokapu v. Dalton*

John Dalton, in his capacity as Secretary of the Department of the Navy, awarded a contract to the Bishop Museum to prepare an inventory of the human remains disinterred from the Mokapu Peninsula, Hawaii (hereinafter "the Mokapu remains" or "the Na Iwi") in compliance with NAGPRA section 3003.¹²¹ The general objective of the inventory was to provide an accurate list of the human remains and funerary objects.¹²² Because the "Mokapu" collection was in "some disarray," it became necessary to employ standard physical anthropology techniques to determine the minimum number of individuals represented by the remains.¹²³

Pursuant to section 3003(b)(1)(A) of NAGPRA, consultations were held with Hui Malama to discuss the difficulties the museum had identifying the remains.¹²⁴ During these consultations, the museum advised Hui Malama that it intended to use current anthropological methods to determine the age, sex, and the number of individuals represented by the remains.¹²⁵ The Bishop Museum finalized the inventory in January 1994, and notified individuals according to section 3003(d)(3) of NAGPRA.¹²⁶ Hui Malama brought suit

desecration, with serious spiritual consequences." Courtenay Thompson & Richard L. Hill, *Testing Possible for Kennewick Man*, PORTLAND OREGONIAN, Oct. 2, 1997, at D7.

119. Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936 (10th Cir. 1996). The court of appeals found that the district court had incorrectly decided the case based on the section 3002 ownership clause. *Id.* at 939 (citing 25 U.S.C. §§ 3004-3005). Because the Pueblo sued under section 3005, claiming a right of repatriation of pottery in the possession of a federally-funded museum, the court of appeals vacated the lower court's judgment and remanded for further proceedings consistent with its opinion. *Id.* at 939-40.

120. *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397 (D. Haw. 1995); *Bonnichsen v. United States*, 969 F. Supp. 628 (D. Or. 1997).

121. *Na Iwi*, 894 F. Supp. at 1402. This was the first Department of Defense project falling under NAGPRA section 3003. *Id.*

122. *Id.*

123. *Id.* at 1403. Lack of a systematic curatorial program created confusion regarding the number of individuals represented by the remains at the commencement of the inventory. *Id.*

124. *Id.* The Hui Malama is a Native Hawaiian organization that is acting as the alleged guardian of the Mokapu remains. *Id.* at 1406.

125. *Id.* at 1402-03. Morphometric and macroscopic methods were used to make these determinations.

126. *Id.* at 1403. Individuals notified included potential claimants, persons involved in the litigation, Navy personnel, the Review Committee and National Park Service Consulting Archaeologist, and requestors under the Freedom of Information Act, 5 U.S.C. § 552 (1994).

in June 1994 alleging that the federal defendant (Dalton) had failed to return expeditiously the Mokapu remains in violation of NAGPRA sections 3005 and 3010, and that Dalton had conducted additional scientific research on the remains in violation of NAGPRA sections 3003 and 3010.¹²⁷

In considering whether the research conducted was a violation under NAGPRA, the court first addressed what was required under section 3003(e).¹²⁸ The court found that section 3003(e) "contains no language which proscribes the kind of examination conducted by the Federal agency during the course of compiling an original inventory."¹²⁹ The court held that "examinations done for the purpose of accurately identifying cultural affiliation are permissible because they further the overall purpose of NAGPRA."¹³⁰ The court supported its interpretation by relying on legislative history which emphasized the importance of ensuring access to available information of Indian remains because of the "need to learn for the future from the past."¹³¹ Furthermore, American Indian witnesses at congressional hearings considering the enactment of NAGPRA did not object to scientific studies of remains in collections as long as they had a specific purpose and definite time period.¹³² Therefore, the court concluded that the federal defendant had conducted the Mokapu inventory "according to a good faith, reasonable reading of the statute."¹³³

Alternatively, Hui Malama argued that section 3003(b)(2) restricted scientific study.¹³⁴ Under 3003(b)(2) the federal agency is required to supply additional available documentation as requested.¹³⁵ However, the need for

127. *Na Iwi*, 894 F. Supp. at 1403-04 (citing 25 U.S.C. §§ 3003, 3010). In alleging that the federal defendant had failed to return expeditiously the Mokapu remains, Hui Malama believed it was the only group requesting repatriation of the remains. *Id.* at 1405. Subsequently, the organization learned that fourteen other groups also claimed the remains. *Id.* This finding led Hui Malama to concede it no longer sought adjudication of its repatriation claims, rendering this issue moot. *Id.* Hui Malama also asserted that section 3010 establishes a fiduciary relationship between the government and Hui Malama. *Id.* at 1410. The court found Hui Malama's interpretation of section 3010 impermissible and interpreted "Section 3010 as a disclaimer intended to ward off tangential repatriation claims from groups other than Native Americans or Native Hawaiians." *Id.* The court found no violation of NAGPRA section 3010, and consequently, limited discussion of the second claim to section 3003. *Id.*

128. *Id.* at 1414.

129. *Id.* at 1415.

130. *Id.*

131. *Id.* (citing H.R. REP. NO. 101-877, at 13 (1990)).

132. *Id.* (citing S. REP. NO. 101-473, at 4-5 (1990)). Under NAGPRA, repatriation of remains and cultural items can be delayed if research "essential to the national interest" is being conducted on such materials. McManamon & Nordby, *supra* note 47, at 244. Unfortunately, NAGPRA does not define the types of research essential to the national interest. 25 U.S.C. § 3005(b) (1994). Nor has the Secretary of the Interior defined what research would be of benefit to the United States. See 43 C.F.R. § 10.10(e)(1) (1996).

133. *Na Iwi*, 894 F. Supp. at 1416.

134. *Id.*

135. *Id.* "The term 'documentation' means a summary of existing . . . records, including

additional documentation should not be construed as authorizing new scientific studies after the initial inventory is complete.¹³⁶ The court concluded that section 3003(b)(2) reflected Congress' intent to correct the past trend of protracted studies on Native remains without concern for timely repatriation.¹³⁷ The court believed, however, that "Congress would not require accurate inventories under NAGPRA and then deny museums and federal agencies the necessary tools to comply effectively with that specific requirement."¹³⁸ Thus, according to the district court's interpretation of NAGPRA, scientific study is permissible to identify accurately remains and cultural items in the possession or under the control of federal agencies.

2. *Bonnichsen v. United States*

Unlike *Na Iwi*, *Bonnichsen* considers whether NAGPRA permits scientific studies to identify accurately the cultural affiliation of human remains inadvertently discovered on federal lands.¹³⁹ The *Bonnichsen* plaintiffs are scientists who seek to study human remains believed to be over 9000 years old, the so-called Kennewick Man.¹⁴⁰ *Bonnichsen* challenged the Corps decision that these remains are subject to NAGPRA and should be transferred to the Umatillas for reburial.¹⁴¹ The Umatillas have requested that the Corps respect their traditional beliefs and allow the remains to be reburied as soon as possible.¹⁴²

The *Bonnichsen* court remanded the case for reconsideration by the Corps because the court was left with the "distinct impression" that the Corps had made a "hasty decision before they had all the facts, or even knew what facts were needed."¹⁴³ For example, the Corps relied on facts that were later proven erroneous that the site at which the remains were found was recognized as the "aboriginal land of an Indian tribe."¹⁴⁴

inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American remains and associated funerary objects . . ." *Id.* (quoting 25 U.S.C.A. § 3003(b)(2)).

136. *Id.* at 1417.

137. *Id.*

138. *Id.*

139. *Bonnichsen v. United States*, 969 F. Supp. 628, 632 n.2 (D. Or. 1997).

140. *Id.* at 631; *see supra* note 6 and accompanying text.

141. *Bonnichsen*, 969 F. Supp. at 631.

142. *Id.* at 632. The traditional beliefs of the Umatillas preclude the destructive study of human remains. *Id.* Destructive study would include DNA analysis. *See* JAMES D. WATSON ET AL., *RECOMBINANT DNA* 583-602 (2d ed. 1992).

143. *Bonnichsen*, 969 F. Supp. at 641.

144. *Id.* The Corps decision in this instance was based on 25 U.S.C. § 3002. Because Congress failed to define what it meant by "aboriginal," the court is faced with choosing between two competing views of the origin of humanity in North America. 25 U.S.C. § 3001 (1994); *see also supra* Part IV.A. The ordinary meaning of the word "aboriginal" as defined in the dictionary

In remanding the case, the *Bonnichsen* court was primarily concerned with the action taken by the agency and whether NAGPRA applied to the remains in the first place.¹⁴⁵ In addressing "agency action," the court found the issue was more than just a decision to repatriate remains.¹⁴⁶ It also included the decision to seize those remains and forbid any study of them.¹⁴⁷

With respect to the second concern, the court questioned whether "the agency gave adequate consideration to the question of whether NAGPRA applies to these remains, or the significance for this case, if NAGPRA does or does not apply."¹⁴⁸ The court pointed to the agency's recognition of the problem and the uncertainty as to how to resolve it.¹⁴⁹ The court also found that the "Corps was not alone in its uncertainty regarding the treatment of 'culturally unidentifiable human remains.'"¹⁵⁰ In addition, the court felt that this was a case where the agency should not consider itself solely responsible for reaching a decision, because Congress had established a special review committee, along with the Secretary of the Interior, to oversee the implementation of NAGPRA.¹⁵¹ Ultimately, the court conceded that an appropriate resolution might require congressional action to clarify the law regarding "culturally unidentifiable ancient remains."¹⁵²

3. *The Effect of the Bonnichsen Decision*

In its decision, the *Bonnichsen* court pointed out several issues that the Corps should consider on remand.¹⁵³ First and foremost was whether NAGPRA covered culturally unidentifiable remains inadvertently discovered on federal lands.¹⁵⁴ In reaching a decision on this issue, the Corps will need to interpret the meaning of "Native American" and "indigenous."¹⁵⁵ If the

is "existing in a place from the beginning; first; indigenous." WEBSTER'S NEW WORLD DICTIONARY 4 (college ed. 1955). Given the present state of scientific knowledge regarding the origin of humans in America, no present day peoples can claim to be indigenous unless "the beginning" is defined by a date that could perhaps best be determined phylogenetically if sufficient scientific research were allowed. See *supra* Part IV.A. Thus, it becomes necessary to define what is meant by "aboriginal" for purposes of NAGPRA. *Bonnichsen*, 969 F. Supp. at 651 n.24.

145. *Bonnichsen*, 969 F. Supp. at 641.

146. *Id.*

147. *Id.*

148. *Id.* at 654.

149. *Id.* at 641-42. The Corps recognized that the disposition of "very ancient remains" inadvertently found on federal land presented a serious issue, on which the regulations were silent. *Id.*; see 43 C.F.R. § 10.4 (1996).

150. *Bonnichsen*, 969 F. Supp. at 642. "During congressional hearings on NAGPRA, several witnesses testified that the problem posed by remains that cannot be culturally affiliated with any modern tribe was 'the one big unanswered question' . . ." *Id.* at 642 n.11.

151. *Id.* at 643.

152. *Id.* at 654.

153. *Id.* at 651-54.

154. *Id.* at 651.

155. *Id.* The meaning of the term "indigenous" is also subject to the same problems of

Corps accepts conventional scientific theory that present day American Indians are descended from immigrants who came from other continents, the questions become "Who were the original immigrants?" and "When, if ever, does an immigrant population become indigenous?"¹⁵⁶ Likewise, "if North America was settled by more than one wave of ancient migration, which wave gave rise to modern day Native Americans?"¹⁵⁷ Because these questions are clearly beyond the expertise of the Corps, they should be resolved by the Secretary of the Interior acting in conjunction with the NAGPRA Review Committee¹⁵⁸ or by legislation.¹⁵⁹

The other major unresolved issue is the nature of the connection required to establish a link between present-day American Indians and Paleoindians, and in particular, whether NAGPRA requires a biological link.¹⁶⁰ If a biological link is impossible, the challenge will be to determine the type of evidence necessary to establish a cultural affiliation when cultural objects are not found with the remains.¹⁶¹

C. Lessons Learned: Development of a Balancing Test as a Possible Compromise

A balancing test, with maximum tribal participation, may satisfy both American Indians and scientific interests. Although federal regulations provide some guidance in establishing cultural affiliation, these tests appear to be of little use in establishing links to human remains that are tens of thousands of years old.¹⁶²

From a strictly scientific standpoint, the fact that we do not know how or even if ancient human remains such as the Kennewick Man are related to present day Indian peoples seems to merit an intermediate screening process that would provide for scientific studies prior to reburial.¹⁶³ Although the use

interpretation as "aboriginal." See *supra* note 144 and accompanying text.

156. *Bonnichsen*, 969 F. Supp. at 652.

157. *Id.*

158. See 25 U.S.C. § 3006 (1994).

159. United States Representative Hastings from Washington has recently placed a bill before the House which would expand the ability of scientists to study human remains. *Hastings Offers Bill to Resolve Dispute over Kennewick Man*, SEATTLE POST-INTELLIGENCER, Nov. 14, 1997, at C13. The amendment sought by Representative Hastings would allow scientific studies to establish cultural affiliation. In addition, the bill provides for scientific studies on cultural items of known affiliation if the outcome of the study is expected to provide significant new information concerning the history or prehistory of the United States. H.R. 2893, 105th Cong. § 3 (1997).

160. *Bonnichsen*, 969 F. Supp. at 652.

161. *Id.* This problem is currently being faced by the Umatilla Tribe, who have yet to uncover any relevant artifacts at the site where the Kennewick Man was discovered. See Virginia Morell, *Kennewick Man: More Bones to Pick*, 279 SCIENCE 25 (1998).

162. 43 C.F.R. § 10.9 (1999).

163. The *Na Iwi* court supported this contention, but in a different context. *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1417 (D. Haw. 1995).

of radiocarbon dating and DNA analysis may offend most American Indians, the combination of these types of analysis would yield valuable information regarding the origins of the first Americans.¹⁶⁴ Recently, the five tribes involved in the Kennewick Man dispute met to discuss the possibility of the limited testing and study of his remains.¹⁶⁵ Although the tribes are not in favor of destructive testing, the fact that they are meeting to discuss the issue is an important first step toward resolving the dispute in a manner in which all parties may benefit.¹⁶⁶

The Corps, in its memorandum dated September 3, 1996, offered what appeared to be a reasonable solution to the problem of identifying "ancient" human remains.¹⁶⁷ In so doing, the Corps recognized it is unlikely that ancient remains will show a close affinity with any historical ethnic group.¹⁶⁸ On this ground alone, scientific study would be justified simply to determine if the remains are biologically linked to any present-day Indian tribe or group. If they are not, NAGPRA is wholly inapplicable.¹⁶⁹

If the remains are biologically linked, a reasonable approach would be to have the NAGPRA Review Committee form a panel composed of tribal representatives and scientists to develop a set of guidelines for screening this category of remains in a minimally destructive fashion.¹⁷⁰ Once the approved studies are completed, the remains could be repatriated to the appropriate tribe

164. Given the current state of technology, the amount of DNA needed in normal laboratory experiments is less than a microgram. WATSON ET AL., *supra* note 144, at 81. This means that DNA can be extracted from very small pieces of tissue, such as blood cells, sperm cells, and cells in saliva. Karla K. Hotis, Note, *The Admissibility of PCR-Based DNA Evidence*, 37 JURIMETRICS 495, 496 n.8 (1997) (citations omitted). Thus, it is unlikely that anything more than a small bone chip would be required to obtain genetic information from ancient human remains.

165. Thompson & Hill, *supra* note 118.

166. *Id.* The Transwestern Pipeline Project illustrates how the process of negotiation to obtain consent can lead to cooperation among agencies, tribes, archaeologists, and private industry. See Stumpf, *supra* note 17, at 314-19. Transwestern took a pro-active approach to assist federal agencies in complying with NAGPRA and prevent delays during construction. *Id.* at 315. After three months of discussion, an agreement was finalized with tribes whose ancestral burial sites would be affected by construction of the pipeline. *Id.* at 316-17. The agreement stipulated that human remains and funerary objects discovered during construction would be reinterred within 72 hours of discovery. Although only non-destructive, in-field documentation was specified, a provision for alternative methods of treatment was provided, requiring the consent of the affiliated tribe. *Id.* at 317. An alternative to reburial was used by members of the Fallon Paiute-Shoshone Tribe. *Id.* at 313. Approximately 140 individuals and associated funerary objects were reinterred in a concrete crypt to ensure availability of the remains for study in the future if re-access should be justified. *Id.* (citations omitted).

167. *Bonnichsen v. United States*, 969 F. Supp. 628, 642 (D. Or. 1997).

168. *Id.* at 641. Ancient remains would include specimens in the 9000 to 10,000 year age range. *Id.*

169. *Id.* Even assuming that the ancestors of present-day American Indians have always been here, non-Indians could also have been present in the New World at some earlier date. *Id.* at 651; see also MELTZER, *supra* note 7, at 103.

170. *Bonnichsen*, 969 F. Supp. at 651.

or organization provided that a cultural or biological link has been established. If the tests reveal that there are no descendants, or that the remains are not covered by NAGPRA, the remains should be retained by the appropriate federal agency or museum.¹⁷¹ The information obtained from the panel could be the basis for a NAGPRA amendment providing a balancing test which would afford maximum tribal input through consultation and negotiation, and allow the use of the least intrusive means to answer compelling scientific questions concerning the origins of the first Americans.¹⁷² Scientific testing should be allowed in those instances where clear and convincing evidence shows that substantial scientific knowledge will be gained through such study.

V. Conclusion

NAGPRA is a unique statute because it considers, for the first time in federal legislation, the Native American perspective on the proper treatment of their ancestors.¹⁷³ While this is an important first step, future amendments will be necessary to resolve unanswered questions. Specifically, in resolving the question of how to treat "culturally unidentifiable ancient remains" found on federal lands, it will be necessary to allow some scientific study to: (1) establish a biological link to present-day peoples; and (2) satisfy society's desire for knowledge about the past. By encouraging discussion between Native peoples and scientists, it should be possible to allow limited study which can be completed in a discrete time frame and in a culturally sensitive manner.

171. See *supra* text accompanying note 18.

172. *Bonnicksen*, 969 F. Supp. at 651. This is not an unprecedented suggestion since many of the findings and recommendations made by the Panel for a National Dialogue on Museum/Native American Relations were incorporated in NAGPRA. See Trope & Echo-Hawk, *supra* note 1, at 58.

173. Trope & Echo-Hawk, *supra* note 1, at 77.

