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INTRODUCTION

In 1996, the Fallon Paiute-Shoshone tribe[1] (Fallon Paiute) sought the return of a nearly 10,000-year-old set of human remains known as the Spirit Cave Man from the Bureau of Land Management (BLM).[2] The BLM is a federal agency that controlled the land upon which the remains were discovered in 1940.[3] The tribe argued that the Spirit Cave Man was a cultural ancestor, and that federal law entitled them to the return, or in other words, the repatriation, of his remains.[4]

The BLM, which was responsible for determining whether the Spirit Cave Man was an ancestor of the Fallon Paiute, found that no cultural affiliation existed between the remains and the claimant tribe.[5] It found, nonetheless, that the Spirit Cave Man was Native American in origin.[6] Under then-current federal law, the BLM's determination allowed it to retain control of the Spirit Cave Man indefinitely.[7] At that point, without new evidence of cultural affiliation with the remains, the agency was under no obligation to repatriate the Spirit Cave Man.[8]

The law governing the disposition of the Spirit Cave Man remains, and all Native American remains, is the Native American Graves Protec-

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1. The use of the word "tribe" in this Note, except where explicitly stated to the contrary, refers to Federally-recognized Native American tribes.

2. Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207, 1210 (D. Nev. 2006).

3. *Id.*

4. *Id.* at 1209–10.

5. *Id.* at 1211.

6. *Id.*

7. *Id.* at 1218.

8. *Id.*

tion and Repatriation Act (NAGPRA).[9] NAGPRA is federal law aimed at protecting Native American gravesites and human remains from desecration.[10] It also provides a way for Native American tribes to recover ancestral remains from federally-funded museums, agencies, and institutions.[11] The statute, however, does not provide a way for tribes to recover remains from institutions that, like the Spirit Cave Man, are identified as Native American but culturally unidentifiable with any presently existing, federally-recognized tribe.[12]

To fill that gap in the law, the Department of the Interior (DOI) issued final regulations regarding the disposition of culturally unidentifiable Native American remains (CUNARs) on March 15, 2010 (March 2010 regulations).[13] While NAGPRA itself requires that Native American tribes prove cultural affiliation to succeed in a claim for remains previously housed in federally-funded institutions, these regulations allow tribes to claim CUNARs based on a geographic connection to the area where the remains were discovered.[14] The regulations, moreover, mandate the repatriation of CUNARs in all cases where a claimant requests their return.[15]

This mandate has divided public opinion. Some commentators see the regulations as an illegitimate exercise of administrative power, arguing that CUNARs are beyond the authority of the Secretary of the Interior (The Secretary) to regulate.[16] Others, in contrast, see the regulations as a legitimate, and much needed, expansion of NAGPRA's repatriation goals.[17]

This Note examines the legitimacy of the March 2010 regulations. Part I describes the common law and statutory protections for graves and human remains, as well as the inability of Native Americans to avail themselves of these protections. Part II then focuses on the history, purpose, and structure of NAGPRA as an answer to inadequate state and federal law protections for Native American graves and human remains. It also explains the standard of cultural affiliation that institutions use to determine

9. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (2006).

10. *Id.*

11. *Id.* §§ 3003, 3005.

12. *See Fallon Paiute-Shoshone*, 455 F. Supp. 2d at 1218.

13. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12378, 12378 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10.11).

14. *Id.* at 12403–04.

15. *See id.* at 12382, 12403.

16. *See, e.g.*, Letter from John W. McCarter, Jr., President and CEO, Field Museum of Natural History, to Dr. Sherry Hutt, Manager, Nat'l NAGPRA Program 1–3 (May 13, 2010), www.regulations.gov (enter Keyword or ID: DOI-2007-0032-0177.1).

17. *See, e.g.*, Letter from NAGPRA Review Comm. 1, 5 (May 14, 2010), www.regulations.gov (enter Keyword or ID: DOI-2007-0032-0215.1).

whether they will repatriate human remains to Native American tribes and discusses the Kennewick Man[18] dispute, which revolved around another set of ancient human remains. Next, Part III revisits the Spirit Cave Man remains, which are subject to the March 2010 regulations, in detail. Finally, Part IV evaluates the legitimacy of the March 2010 regulations.

I. NATIVE AMERICANS AND AMERICAN LEGAL ATTITUDES TOWARD GRAVES AND HUMAN REMAINS

A. The Issue of Legal Standing and Civil Remedies for Desecration of Graves and Bodies

In the United States, the availability of civil remedies for the desecration of a grave or corpse depends upon whether the litigant has legal standing to bring the claim.[19] Although American judges in the Eighteenth Century imported the English notion that no one could acquire property rights in corpses, this black letter rule proved unworkable.[20] The rule divested plaintiffs of any legal remedy, even in extreme cases where the body of a loved one had been mutilated or maimed.[21] In response, American courts began to recognize a species of quasi property rights that gave the next of kin a possessory interest in a corpse for the purposes of carrying out a burial.[22] These rights also provided the next of kin with the necessary legal standing to sue for the desecration of a corpse or grave.[23]

Today, the availability of civil remedies for the desecration of a corpse or grave largely[24] depends upon whether a potential plaintiff can satisfy the

18. The Kennewick Man is an approximately 9,000-year-old set of skeletal remains. Its discovery in Washington State in the 1990s sparked a conflict between the federal government, local tribes, and scientists who wished to study the remains. Bonnichsen v. United States, 367 F.3d 864, 868–69 (9th Cir. 2004), *amending*, 357 F.3d 962 (9th Cir. 2004). Numerous authors have written about the discovery of and subsequent legal battle over the Kennewick Man. *See generally, e.g.*, DAVID HURST THOMAS, SKULL WARS: KENNEWICK MAN, ARCHAEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY (2000).

19. Danny R. Veilleux, Annotation, *Liability for Desecration of Graves and Tombstones*, 77 A.L.R.4th 108 §§ 2–3, 5 (1989); R. F. Martin, Annotation, *Removal and Reinterment of Remains*, 21 A.L.R.2d 472 § 6 (1952).

20. Martin, *supra* note 19.

21. *See* Larson v. Chase, 50 N.W. 238, 239–40 (Minn. 1891) (recognizing that the wife of the deceased had a property interest in her husband's corpse that allowed her to sue for emotional damages over the unauthorized mutilation and dissection of the corpse).

22. *See id.* at 238–39; Martin, *supra* note 19.

23. *See* Veilleux, *supra* note 19; Martin, *supra* note 19.

24. One cause of action for the desecration of graves and corpses that does not necessarily depend upon ties of kinship is based upon contract law. It allows individuals who purchase burial plots from a cemetery to sue for desecration of the gravesite based upon a breach of contract. Veilleux, *supra* note 19, § 6. This theory of recovery, however, is irrelevant to the present discussion as most of the issues regarding Native American burial sites do not revolve around traditional cemetery arrangements.

legal definition of "next of kin."[25] The common law retains this concept where statutory law has not spoken on the issue, and where it has spoken, statutory law embraces the "next of kin" concept.[26] Although "next of kin" has varied meanings, depending on the state, it generally refers to individuals who possess a marriage or blood relation to the interred corpse at issue.[27] Therefore, if an individual cannot demonstrate either of these relationships, she cannot seek civil remedies for the desecration of either the grave or the corpse.[28]

As a result, Native American claimants have often been unable to use these remedies to protect their gravesites and human remains.[29] Anglo-American notions of family and kinship do not always translate easily to Native American social practices.[30] In *United States v. Unknown Heirs*, a federal district court faced the choice of legitimizing one of two plural wives of a dead Comanche chief for the purpose of directing internment of the Chief's body.[31] Choosing the Chief's legitimate wife would have provided legal standing to one set of family members over another.[32] Rather than make this choice, and declare illegitimate some of the Chief's children, the court itself determined a place of interment.[33] It chose Fort Sill in Oklahoma, the spot where, decades earlier, the tribe had surrendered tribal rule to the United States government.[34]

Additionally, legal standing issues arise when Native Americans lacking any blood or marriage connection to the deceased seek civil remedies for grave desecration.[35] In the *Medicine Bird* case, the Tennessee Department of Transportation dug up three ancient Native American graves while

25. *See id.* §§ 2–3, 5.

26. *See, e.g.*, Johnson v. Ky.-Va. Stone Co., 149 S.W.2d 496, 498 (Ky. 1941) (holding that "next of kin" referred to those individuals who would inherit from the deceased via the statute of descent); Dennis v. Keillor, 306 N.W.2d 324, 325–26 (Mich. Ct. App. 1981) (holding that the son of the deceased had standing to bring a lawsuit for the desecration of his parents' grave); Wainwright v. N.Y.C. Health and Hosps. Corp., 877 N.Y.S.2d 201, 201 (N.Y. App. Div. 2009) (holding that relatives of the deceased may bring an action for the mishandling of a corpse); Veilleux, *supra* note 19; Martin, *supra* note 19.

27. *See* 25A C.J.S. *Dead Bodies* § 23 (2009).

28. *See id.*; Veilleux, *supra* note 19; Martin, *supra* note 19.

29. Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native American Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437, 447–48 (1986) (discussing the difficulties Native Americans face in acquiring civil and criminal protection for their gravesites).

30. Steve Russell, *Sacred Ground: Unmarked Graves Protection in Texas Law*, 4 TEX. F. ON C.L. & C.R. 3, 12 (1998).

31. United States v. Unknown Heirs, 152 F. Supp 452, 453–55 (W.D. Okla. 1957).

32. *See id.* at 455.

33. *Id.* at 456.

34. *Id.* at 455–56.

35. Tennessee *ex rel.* Comm'r of Transp. v. Med. Bird Black Bear White Eagle, 63 S.W.3d 734, 742 (Tenn. Ct. App. 2001).

widening a traffic intersection.[36] It then filed suit to relocate the graves and terminate the use of the land as a cemetery under state law.[37] The trial court initially allowed fifteen Native American defendants to oppose relocation of the graves.[38] On appeal, the court found that none of the Native American defendants had sufficient standing under Tennessee law to participate in the lawsuit.[39] The relevant statute gave standing to individuals who had a property interest in the land where the gravesite was located or were blood relatives of the deceased.[40] None of the Native American defendants satisfied these statutory requirements.[41] As a result, they were unable to participate in the suit to prevent relocation of the graves.[42]

B. The Efficacy of Criminal Grave Protections for Native American Graves

Native Americans have also faced challenges when turning to the criminal law to protect their graves and human remains. Traditionally, American law has protected the sanctity of graves.[43] Every state has enacted laws to protect graves from vandalism and looting,[44] and, generally, no one may exhume a body except under compelling circumstances.[45] However, courts have not regularly enforced criminal anti-desecration laws when applied to Native American burial sites.[46]

For example, in *Newman v. State*, a University of Miami student was convicted under a statute designed to prevent the looting and desecration of tombs and graves for removing the skull of a Seminole Indian from an unmarked grave.[47] The District Court of Appeal of Florida overturned the judgment on the ground that there was insufficient evidence of the required malicious intent.[48] The court cited Newman's good character and his forth-

36. *Id.* at 743.
37. *Id.*
38. *Id.* at 744.
39. *Id.* at 757.
40. *Id.* at 756.
41. *Id.* at 757.
42. *See id.*
43. Veilleux, *supra* note 19, § 2(a).
44. *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, 38–39 (1992).
45. Veilleux, *supra* note 19, § 2(a) (noting that while legal rules governing the burial and exhumation of corpses differ from state to state, they all share a common disinclination to move a body from its resting place).
46. *See* Echo-Hawk, *supra* note 29, at 448.
47. Newman v. State, 174 So. 2d 479, 480–81 (Fla. Dist. Ct. App. 1965).
48. *Id.* at 484.

right admission to taking the skull.[49] Additionally, the court emphasized the apparent desolation of the burial site in the wilderness and indicated that a reasonable person would conclude that the site was not a burial ground.[50] Nonetheless, commentators suggest that if Newman had taken the skull from a conventional cemetery, then the court would have treated his theft as involving malicious intent *per se*.[51]

Moreover, case law also reflects disparity between legal notions about the nature of dead bodies and Native American cultural beliefs. In *State v. Glass*, an Ohio appellate court reversed the grave robbing conviction of a real estate developer.[52] The court reversed the conviction because the remains that she removed from her project site were 125 years old and no longer recognizable bodies.[53] According to the court, "[a]fter undergoing an undefined degree of decomposition," the skeleton decomposes to a point where "it ceases to be a dead body in the eyes of the law."[54] This analysis implies that, in the eyes of the law, once remains reach a certain age, they lose a measure of the sacrosanct nature that requires society to enact grave protections for them.[55] Broadly speaking, Native Americans do not possess the same attitude toward skeletal remains.[56] Rather, "[n]ative people maintain close religious connections with ancient dead," and see the continued repose of the dead as integral to maintaining the identity and prosperity of the tribe.[57]

C. *The Applicability of Cemetery Laws to Native American Issues*

Additionally, laws designed to establish and maintain cemeteries have not provided a vehicle for addressing Native American concerns.[58] In *Wana the Bear v. Community Construction, Inc.*, a housing developer uncovered a burial ground of the Miwok tribe and excavated over 200 human

49. *Id.* at 482.

50. *Id.* at 483.

51. Echo-Hawk, *supra* note 29, at 447; *see Newman*, 174 So. 2d at 483.

52. State v. Glass, 273 N.E.2d 893, 894, 898 (Ohio Ct. App. 1971).

53. *See id.* at 898.

54. *Id.*

55. For example, federal law takes the stance that remains that are over 100 years old and of scientific interest are considered archaeological resources. 43 C.F.R. § 7.3(a) (2009).

56. *See, e.g.*, James Riding In, Cal Seciwa, Suzan Shown Harjo & Walter Echo-Hawk, *Protecting Native American Human Remains, Burial Grounds, and Sacred Places: Panel Discussion*, 19 WICAZO SA REV. 169, 173 (2004) ("When we entered those places within the Smithsonian where the human remains were kept, we saw row after row of shelves that reached almost to the ceiling. Just walking into those areas gave me such an oppressive feeling. It was a feeling right here [*points to chest*].").

57. Trope & Echo-Hawk, *supra* note 44, at 46.

58. Wana the Bear v. Comm. Constr., Inc., 180 Cal. Rptr. 423, 424, 426 (Cal. Ct. App. 1982).

remains.[59] In 1980, a descendant of the Miwok tribe sought to enjoin future construction on the site based upon an 1872 statute that prohibited disinterment of bodies without force of law.[60] A California state court determined that, in this case, the statute did not protect the burial grounds from development.[61]

The court could not apply the 1872 statute retroactively.[62] Only burial grounds in use after enactment of the statute were eligible to receive protected status as cemeteries.[63] In 1872, the Miwoks no longer used the site for burials, and no other groups conducted burials on the site thereafter.[64] Thus, the 1872 statute did not apply to the Miwok burial grounds.[65]

The court found no way to account for the fact that the Miwok tribe left the area because they were forced out between 1850 and 1870.[66] Although the court noted that outside forces prevented the Miwok from using the burial site after 1870, the court did not attempt to fashion a remedy based on this fact.[67] Consequently, the gravesite went unprotected.[68]

As the above cases indicate, Native Americans have faced challenges when seeking a legal remedy for the desecration of a grave or body using state law. *Unknown Heirs* and *Medicine Bird* show that the legal concept of next of kin is somewhat incompatible with Native American social practices. Because Native American claimants often have no blood or marriage ties to the deceased, they cannot employ existing civil remedies to combat grave desecration. Additionally, as the *Newman* case shows, courts do not always apply criminal law prohibitions on the desecration of graves to protect Native American burial sites. Moreover, the *Glass* case tells us that criminal law prohibitions on grave robbing will not protect ancient Native American remains. Lastly, state laws that govern the creation and maintenance of cemeteries have also provided little aid to Native Americans seeking protection for their gravesites. *Wana the Bear* shows that these laws are ill-suited to crafting remedies when dealing with issues such as the forced migration of a Native American tribe away from its burial grounds.

59. *Id.* at 424.
60. *Id.* at 425.
61. *Id.* at 426–27.
62. *Id.* at 424–25.
63. *Id.* at 425.
64. *Id.* at 426.
65. *Id.* at 426–27.
66. *See id.* at 426.
67. *See id.*
68. *See id.* at 426–27.

D. *Federal Law and Policy Regarding Native American Graves and Human Remains*

Native Americans, furthermore, have not fared better under federal law and policy regarding gravesites and human remain. Early federal policy regarding Native American remains was exploitive. In 1867, the Army Surgeon General ordered field surgeons to collect any available remains of Native Americans and have them sent to the Surgeon General for scientific study and display in an Army museum.[69] Field surgeons collected at least four thousand Native American remains under this policy.[70]

Moreover, early federal legislation treated Native Americans remains as cultural resources. The Antiquities Act of 1906 does not provide any rights to Native Americans to human remains or cultural objects.[71] Instead, it presumes control over all Native American burial sites and vests ownership of all excavated remains and cultural items in the United States.[72] The Act broadly covers all "objects of historic or scientific interest" discovered on federal land and provides for their excavation to benefit the public.[73] It makes no mention of seeking Native American approval, control, or consultation for the excavation of gravesites found there.[74]

The Archaeological Resources Protection Act of 1979 (ARPA), which replaced the Antiquities Act, also treats Native American remains as resources to be disposed of by the United States.[75] Although it states that objects found "on public lands and Indian lands" are an "irreplaceable part of the Nation's heritage," the Act is not intended as a remedial measure for Native Americans, nor does it treat human remains as categorically different from any other cultural artifact.[76] Rather, its purpose is to "[protect] archaeological resources and sites which are on public lands and Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals."[77] ARPA provides Native Americans with the authority to grant or refuse a permit to excavate on their tribal lands and to govern the disposition of artifacts and other cultural items found on those

69. National Museum of the American Indian Act § 2, 20 U.S.C. § 80q (2006).

70. *Id.*

71. *See* Antiquities Act of 1906 §§ 1–6, 16 U.S.C. §§ 431–433 (2006).

72. *See id.*; Echo-Hawk, *supra* note 29, at 448–49.

73. 16 U.S.C. § 432; *see* Echo-Hawk, *supra* note 29, at 448–49.

74. *See* 16 U.S.C. § 432; Echo-Hawk, *supra* note 29, at 448–49.

75. *See* Archaeological Resources Protection Act of 1979 §§ 2–14, 16 U.S.C. § 470aa–mm (2006); Echo-Hawk, *supra* note 29, at 449.

76. 16 U.S.C. § 470aa(a)(1).

77. *Id.*

lands, but it does not provide the means for tribes to claim cultural artifacts or human remains found on federal land.[78] Moreover, ARPA provides no measures for repatriation, makes Native American opinion purely advisory on non-tribal lands, and categorizes Native American remains of sufficient antiquity as "archaeological resources."[79]

The first federal legislation to recognize Native American remains as human remains is the National Museum of the American Indian Act (NMAIA), enacted in 1989.[80] This law created the National Museum of the American Indian as part of the Smithsonian Institution and transferred the Heye Museum of New York's collection of Native American artifacts to the Smithsonian.[81] Rather than being subsumed within a larger idea of archaeological or cultural resources, the NMAIA specifically talks in terms of human remains,[82] and the Congressional findings in the preamble disclose a candid history of the mistreatment of Native American remains, including the existence of at least 14,000 remains in the Smithsonian's holdings.[83]

In recognition of these facts, the NMAIA provides some remedial avenues for Native Americans asking the Smithsonian to return the remains of their ancestors. First, the statute provides that the Smithsonian inventory its holdings in cooperation with Native American tribes, giving them a complete picture of all the Native American remains in its possession.[84] Second, the NMAIA provides that, upon request, the Smithsonian must repatriate any remains and artifacts identified with a federally recognized tribe.[85] Third, the statute creates a committee to oversee the inventory and repatriation process, composed partially of Native American representatives.[86] This provision allows Native Americans some ability to ensure the Smithsonian's compliance with the law.

The NMAIA, nevertheless, is not broadly remedial. The purpose of the Act is stated as being to "advance the study of Native Americans," to "collect, preserve, and exhibit Native American objects" and to provide for "Native American research and study" programs, rather than to correct past

78. *Id.* §§ 470cc(g)(2), 470dd(2).

79. *Id.* §§ 470aa, 470bb(1), 470cc(c).

80. *See* National Museum of the American Indian Act § 2, 20 U.S.C. § 80q (2006) (referring to human remains not as archaeological resources but as part of Native American heritage).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* § 80q-9(a).

85. *Id.* § 80q-9(c).

86. *Id.* § 80q-10.

wrongs.[87] The NMAIA, moreover, only applies to the Smithsonian, leaving other institutional collections of Native American remains unaffected.[88]

Indeed, the vast majority of Native American remains housed in institutional collections are outside the scope of the NMAIA. Federally-funded institutions, excluding the Smithsonian, housed about 163,000 Native American remains before NAGPRA's passage in 1990.[89] Since that time, institutions have repatriated approximately 38,671 of those remains.[90] The 124,329 human remains still housed in museum collections, all culturally unidentifiable, await repatriation under the March 2010 regulations.[91]

II. THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

A. The Purpose and Scope of NAGPRA

Congress enacted NAGPRA on November 16, 1990, to remedy inadequacies in state law dealing with the protection of Native American remains and cultural objects, expand the scope of repatriation started by the NMAIA, and right past wrongs against Native Americans.[92] Congress intended NAGPRA to "protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on federal, Indian and Native Hawaiian lands."[93] Commentators have referred to it as human rights legislation,[94] and Representative Morris Udall of Arizona, who introduced the bill to the House of Representatives, characterized it as being about "respecting the rights of the dead."[95] He also called it "the biggest thing we may have ever done" in the "scope of conscience."[96]

87. *Id.* § 80q-1.

88. *See id.* § 80q-9.

89. *See* NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL NAGPRA PROGRAM FY09 FINAL REPORT 10 (2009), http://www.nps.gov/nagpra/DOCUMENTS/FY09FinalReport.pdf (documenting the 38,671 notices of inventory completion published in the Federal Register since 1990); Letter from NAGPRA Review Committee, *supra* note 17, at 1 (noting that nearly 125,000 culturally unidentifiable Native American remains have yet to be repatriated).

90. *See* NAT'L PARK SERV., *supra* note 89.

91. *See* Letter from NAGPRA Review Committee, *supra* note 17, at 1.

92. *See* S. REP. NO. 101-473, at 1–2 (1990).

93. H.R. REP. NO. 101-877, at 8 (1990).

94. *See, e.g.*, Sarah Harding, Bonnichsen v. United States*: Time, Place, and the Search for Identity*, 12 INT'L. J. CULT. PROP. 249, 254 (2005).

95. 136 CONG. REC. E3484-01 (daily ed. Oct. 27, 1990) (remarks by Rep. Morris K. Udall).

96. *Id.*

NAGPRA governs the disposition of Native American remains in three sets of circumstances.[97] First, it governs remains discovered incidentally or pursuant to an archaeological dig on either federal lands or tribal lands after NAGPRA's enactment.[98] Second, NAGPRA requires federal institutions and institutions that receive federal money to inventory their collections of Native American remains and repatriate culturally affiliated remains upon request of interested tribes.[99] Third, NAGPRA criminalizes the knowing sale or purchase of Native American remains and cultural objects by anyone who lacks the right of possession to those remains and objects as defined by NAGPRA.[100]

NAGPRA accomplishes its goals by balancing Native American claims for repatriation against scientific interests. However, this balance strongly favors the interests of Native American claimants. For example, in the case of Native American remains found on federal or tribal land after NAGPRA's enactment, the interests of a lineal descendant take precedence over all others.[101] Where no descendant is available, the statute favors a number of tribal interests, including those of the tribe that owns the land upon which the remains were found, as well as the tribe with the strongest cultural affiliation to the remains.[102] NAGPRA only gives explicit recognition to the interests of museums and researchers when remains and objects go unclaimed by any tribe.[103] At that point, members of the scientific community may propose what to do with the remains.[104]

Yet, NAGPRA does not allow scientists to make that decision unilaterally. Rather, they are required to discuss the fate of the remains with interested Native American groups, as well as the NAGPRA Review Committee, a seven member advisory panel created by NAGPRA to resolve ownership disputes informally and advise the Secretary of the Interior in drafting regulations to implement the statute.[105]

Additionally, NAGPRA strongly favors the interests of Native American tribes seeking the repatriation of human remains housed in institutional collections. First, without proof of consent by the "official governing body" of a Native American tribe or the next of kin, museums may never acquire

97. Native American Graves Protection and Repatriation Act § 4, 18 U.S.C. § 1170 (2006); Native American Graves Protection and Repatriation Act §§ 3, 5, 25 U.S.C. §§ 3002, 3003 (2006).

98. 25 U.S.C. § 3002.

99. *Id.* § 3003, 3005.

100. 18 U.S.C. § 1170.

101. 25 U.S.C. § 3002(a)(1).

102. *Id.* § 3002(a)(2).

103. *Id.* § 3002(b).

104. *Id.*

105. *Id.*

a right of possession[106] over Native American remains.[107] Second, the process of identifying the cultural affiliation of remains does not allow institutions to conduct new scientific studies on Native American remains and cultural objects.[108] Rather, NAGPRA requires institutions to make cultural affiliation determinations "to the extent possible based on information possessed by such museum or Federal agency."[109] Nor can vague claims of scientific importance overpower the wishes of tribes rightfully claiming remains and objects; only a specific, ongoing scientific study "of major benefit to the United States" will stall the repatriation process long enough to allow completion of the study.[110] Third, short of an ongoing scientific study, an institution must grant the repatriation request of tribes that show cultural affiliation to human remains; the matter is not discretionary.[111]

When looked at collectively, these provisions show that NAGPRA prioritizes Native American concerns about Native American remains over scientific considerations.[112] For remains found on federal or tribal land after the enactment of the statute, NAGPRA favors a variety of tribal interests, giving scientists the opportunity to claim the remains only if no tribe wishes to claim them at all.[113] Moreover, for remains currently housed in institutional collections, NAGPRA mandates that institutions must return all culturally affiliated remains to a claimant tribe, giving scientists only a limited opportunity to retain the remains for an ongoing scientific study.[114]

B. The Cultural Affiliation Standard Established by NAGPRA

Cultural affiliation is the repatriation standard for human remains housed[115] in institutional collections.[116] If an institution can determine or a

106. A right of possession is defined as "possession obtained with the voluntary consent of an individual or group that had authority of alienation." *Id.* § 3001(13).

107. *Id.*

108. *Id.* § 3003(b)(2).

109. *Id.* § 3003(a).

110. *Id.* § 3005(b) (allowing ninety days for the completion of an ongoing scientific study of "major benefit" to the United States).

111. *Id.*

112. *See id.* §§ 3002, 3003, 3005.

113. *Id.* §§ 3002(a)(1)–(2).

114. *Id.* §§ 3005(b)–(c).

115. As opposed to § 3002(a)(2)(C), for example, which applies to CUNARs discovered on tribal land or land determined to be aboriginal by the Indian Claims Commission or the United States Court of Claims. *Id.* § 3002(a)(2)(C). Section 3002(a)(2)(C) employs a geographic standard, repatriating remains to tribes with connections to the locations where the remains were discovered. *Id.*

116. *Id.* § 3003(d). This standard may also apply to culturally unidentifiable remains discovered after NAGPRA's enactment on federal land that was the aboriginal land of a Native American tribe as

Native American tribe can prove cultural affiliation, then the institution must repatriate the remains to the appropriate tribe. Cultural affiliation means that "there is a relationship of shared group identity[117] which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."[118] One determines cultural affiliation by a "preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."[119]

Cultural affiliation, however, need not be proved with scientific certainty.[120] Rather, NAGPRA requires a "reasonable" connection based on a preponderance of the evidence.[121] In passing NAGPRA, Congress recognized that "it may be extremely difficult, unfair or even impossible in many instances for claimants to show an absolute continuity from present day Indian tribes to older, prehistoric remains without some reasonable gaps in the historic or prehistoric record."[122] Therefore, claims "should not be precluded solely because of gaps in the record" preventing the establishment of scientific certainty.[123]

In the case of CUNARs, the statute itself provides little guidance. NAGPRA does not address what should happen to remains when no determination of cultural affiliation is possible.[124] The statute, instead, charges the NAGPRA Review Committee with recommending a process for the disposition of CUNARs housed in institutional collections, leaving the question open-ended.[125]

C. *The Kennewick Man and Native American Identity*

The dispute over the Kennewick Man remains illustrates the types of challenges faced by tribes, museums, and courts when applying a legal standard, such as NAGPRA's standard of cultural affiliation, to the realities

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determined by final judgment of the Indian Claims Commission or the United States Court of Claims. *Id.* § 3002(a)(2)(C).

117. The term "shared group identity" remains undefined by NAGPRA or its implementing regulations making the concept of cultural affiliation inherently vague. *Id.* § 3001(2).

118. *Id.*

119. *Id.* § 3005(a)(4).

120. 43 C.F.R. § 10.14(f) (2009).

121. 25 U.S.C. § 3003(d)(2)(C); *see* 43 C.F.R. § 10.14(d).

122. S. REP. NO 101-473, at 9 (1990).

123. *Id.*

124. *See* Fallon Paiute-Shoshone v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207, 1218 (D. Nev. 2006).

125. 25 U.S.C. § 3006(c)(5).

of ethnic and cultural identity. In this case, the United States Court of Appeals for the Ninth Circuit interpreted the definition of "Native American" under NAGPRA to formulate a legal test for determining whether remains are Native American under the statute.[126] According to the court, human remains are Native American in origin if they possess a cultural or genetic relationship to a presently existing tribe, people, or culture.[127] In terms of proof, this relationship must go "beyond features common to all humanity."[128]

When the Ninth Circuit applied this test to the Kennewick Man remains, it arguably analyzed the relationship between the remains and the claimant tribes in a way that led the court to determine whether the remains were culturally affiliated to the claimant tribes, not whether the remains were Native American in general, as it aimed to do.[129] Moreover, the court based its analysis upon questionable assumptions about Native American identity.[130] These apparent missteps illustrate the difficulty of applying a legally-formulated test of cultural and ethnic identity to human remains.

The Kennewick Man is an approximately 9,000-year-old set of skeletal remains found on federal land in Washington State in 1996.[131] The remains are the most complete set dating from this time period in North America.[132] Scientists have called it an extremely important find to the study of human origins in the Americas.[133]

The Kennewick Man quickly became the center of controversy between scientists and Native claimants. Not long after the remains were discovered, a confederation of tribes in the area requested repatriation of the remains under NAGPRA.[134] A group of scientists subsequently brought suit in federal court to enjoin the DOI from repatriating the remains. The scientist plaintiffs argued that the Kennewick Man was not Native American under NAGPRA, making the repatriation request invalid.[135] In 2002, the district court ruled in favor of the scientists, holding that the agency had

126. Bonnichsen v. United States, 367 F.3d 864, 877 (9th Cir. 2004), *amending*, 357 F.3d 962 (9th Cir. 2004).

127. *Id.* at 876.

128. *Id.* at 877.

129. *But see id.* at 880.

130. The text accompanying notes 148–160 discusses this issue in detail..

131. *Bonnichsen*, 367 F.3d at 868–69.

132. *Id.* at 869–70 n.6.

133. *Id.* at 869.

134. *Id.* at 870.

135. *Id.* at 870–71.

relied on insufficient evidence in determining the Kennewick Man to be Native American.[136]

Two years later, in *Bonnichsen v. United States*, the Ninth Circuit affirmed the district court's determination.[137] Crucial to the *Bonnichsen* court's decision was its interpretation of the definition of "Native American" in NAGPRA. The statute provides that Native American "means of, or relating to, a tribe, people, or culture that is indigenous to the United States."[138] Based on the use of the present tense in the definition, the court inferred that Congress meant NAGPRA to apply only to cultural objects and human remains bearing some cultural connection to a currently existing tribe.[139] This analysis foreclosed the possibility that the Kennewick Man could be Native American based on a connection to a tribe that previously but no longer existed in North America.[140]

To evaluate whether the DOI had met its evidentiary burden for determining the Kennewick Man to be Native American, the *Bonnichsen* court articulated the aforementioned legal test.[141] NAGPRA itself provides no legal procedure for determining whether remains are Native American.[142]

The court's test closely mirrors NAGPRA's cultural affiliation standard. Just as the *Bonnichsen* test looks for evidence of a genetic or cultural connection between human remains and claimant tribes to establish Native American identity, NAGPRA requires evidence of cultural affiliation based upon "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."[143]

Using this test, the *Bonnichsen* court rejected the DOI's determination that the Kennewick Man was Native American. The DOI determined the Kennewick Man to be Native American using the oral history of the tribes, which claimed habitation of the area for at least 10,000 years.[144] The court held that oral history[145] alone was not substantial evidence[146] of a cultural

136. Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1137–39 (D. Or. 2002), *aff'd*, 367 F.3d 864 (9th Cir. 2004).

137. *Bonnichsen*, 367 F.3d at 865, 882.

138. 25 U.S.C. § 3001(9) (2006).

139. *Bonnichsen*, 367 F.3d at 875.

140. *See id.* at 875–76.

141. *Id.* at 880.

142. *Id.* at 877–79.

143. 25 U.S.C. at § 3005(a)(4); *see Bonnichsen*, 367 F.3d at 876–77.

144. *Bonnichsen*, 367 F.3d at 881–82.

145. Scientific experts for the government stated that they could neither confirm nor disconfirm the possibility that the Kennewick Man was both Native American and culturally affiliated to the tribes of the Columbia Plateau, due to the limited amount known about the inhabitants of North America nearly

or genetic connection between modern day tribes in the area and the Kennewick Man.[147]

Nonetheless, the *Bonnichsen* court's legal conclusion is itself questionable. The *Bonnichsen* test asks whether a cultural or genetic relationship exists between a set of human remains and "a presently existing tribe."[148] A court, therefore, should require a comprehensive comparison of the remains against all presently existing Native American tribes when determining if such a relationship exists. If a court compares the remains to the claimant tribes alone, then it has merely determined whether the remains are culturally affiliated with those specific groups, rather than determining whether the remains are Native American generally. Thus, the Ninth Circuit determined that the Kennewick Man lacks cultural affiliation with any of the claimant tribes, not whether the remains are Native American in origin.[149] The court stated that "[n]o cognizable link exists between Kennewick Man and modern Columbia Plateau Indians."[150] It did not discuss how the remains might relate genetically or culturally to the broader community of Native Americans outside of the Columbia Plateau.[151] In short, the Ninth Circuit merely tested for cultural affiliation to the claimant tribes, instead of determining whether the Kennewick Man was Native American in origin. Consequently, the court may have wrongly determined that the Kennewick Man fell outside of the scope of NAGPRA.

The court based its analysis on the assumption that a fixed racial component of Native American identity exists. [152] Throughout its opinion, the *Bonnichsen* court referenced the discrepancy between the Kennewick

10,000 years ago. *Id.* at 880–81. In fact, researchers cannot presently provide a clear answer as to when humanity first peopled North America. In the past, researchers have proposed dates as far back as 30,000 years. Stefan Lovgren, *Americas Settled 15,000 Years Ago, Study Says*, NAT'L GEOGRAPHIC (Mar. 13, 2008), http://news.nationalgeographic.com/news/pf/62066933.html. Like the oral history that the *Bonnichsen* court rejected in evaluating The Secretary's determination, scientific theory regarding early North American habitation is in flux. *See Bonnichsen*, 367 F.3d at 881.

146. Specifically, the court asked whether the DOI had relied upon substantial evidence in determining the Kennewick Man to be Native American. *Id.* at 880. If an agency does not rely upon substantial evidence in making a decision, the Administrative Procedure Act empowers courts to overturn the decision. Administrative Procedure Act § 10, 5 U.S.C. § 706(2)(E) (2006). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bonnichsen*, 367 F.3d at 880 n.19.

147. *Id.* at 882.

148. *Id.* at 879.

149. *But see id.* at 880.

150. *Id.*

151. *See id.* at 880–81.

152. The court emphasized that the Kennewick Man's cranial structure is significantly different from contemporary Native American at three different points: in relating the discovery of the Kennewick Man, in recounting the scientific analysis of the Kennewick Man, and in analyzing whether the DOI had determined the Kennewick Man to be Native American based on substantial evidence. *See id.* at 870, 871, 880.

Man's cranial structure and the cranial structure of modern Native Americans.[153] The court interpreted this discrepancy to suggest that no genetic connection existed between the Kennewick Man and the claimant tribes, even absent actual genetic evidence.[154]

Yet, the discrepancy between the cranial structure of the Kennewick Man and the claimant tribes does not prove the absence of a genetic connection between them.[155] It is not clear that researchers, experts in the field, would give significant weight to differing cranial structure.[156] Scientists who worked on the Spirit Cave Man, a set of remains comparable in age to the Kennewick Man, have asserted that it is unlikely that any individual alive 10,000 years ago would bear a strong physiological resemblance to what we would recognize as the ethnic groups of today.[157] That is to say, no group's 10,000-year-old ancestors are likely to look like their descendants, and cranial dissimilarity proves nothing.[158] Native American tribes today are often composed of individuals with mixed ethnic backgrounds.[159] As a result, differences might exist between the cranial structures and genetic characters of ancient Native Americans and modern groups, even where a genetic connection is present.[160]

These criticisms highlight the difficulty of applying a legal standard to ethnic and cultural identity. First, useful evidence, such as a genetic sample, is often not available to prove or disprove a connection between human remains and a claimant tribe. Second, what it means to be a part of a cultural or ethnic group is open to debate. For example, expert scientists in the Kennewick Man dispute asserted that the tribes of the Columbia Plateau did not exist 9,000 years ago.[161] In contrast, the tribes themselves asserted that they had existed in the area since the beginning of time itself.[162] Should one claim be better than the other based on the existence or absence of scientific fact to prove it? Or should we evaluate these claims differently, valuing the assertions of a Native American tribe about its own identity over the scientific community's assertions about it? Although we are free to

153. *See id.* at 869, 871, 880.

154. *See id.*

155. *See* Heather J. H. Edgar, Edward A. Jolie, Joseph F. Powell & Joe E. Watkins, *Contextual Issues in Paleoindian Repatriation: Spirit Cave Man as a Case Study*, 7 J. SOC. ARCHAEOLOGY 101, 106–07 (2007).

156. *Id.*

157. *Id.*

158. *Id.*

159. *See* Kimberly Tallbear, *DNA, Blood, and Racializing the Tribe*, 18 WICAZO SA REV. 81, 83, 89, 95, 98 (2003).

160. *See* Edgar, *supra* note 155, at 106–07.

161. *See Bonnichsen*, 367 F.3d at 881.

162. *See Bonnichsen*, 217 F. Supp. 2d at 1121.

choose what we value most, scientific fact or cultural belief, neither choice will lead to an objective understanding of what it means to be "Native American."[163] In fact, an entirely objective understanding of Native American cultural and ethnic identity is impossible; its meaning depends upon who seeks to define it.[164] Defining ethnic identity in a way that is both sufficiently descriptive of its subject and equitable to all parties involved presents a significant challenge for lawmakers and judges.

What is clear is that the *Bonnichsen* decision remains unaffected by the March 2010 Regulations regarding culturally unidentifiable remains. First, the regulations apply to remains already housed in institutional collections, not remains discovered after the enactment of NAGPRA, such as the Kennewick Man.[165]

Second, even if an institution had previously housed the Kennewick Man in its collection, the March 2010 Regulations would not apply to his remains; the regulations only apply to remains previously determined to be Native American.[166] Because the Kennewick Man was determined not to be Native American, the March 2010 Regulations would have no effect on the ownership of his remains. This is true of any culturally unidentifiable remains that are not determined to be Native American in origin.[167]

The *Bonnichsen* decision may, nonetheless, have an effect on other remains that do fall within the scope of the March 2010 regulations. The regulations require transfer of control over CUNARs to claimant tribes based on the following priority: first, to the claimant tribe "from whose tribal land, at the time of the excavation or removal, the human remains were removed;" and second, to the claimant tribe "recognized as aboriginal to the area from which the human remains were removed."[168] Given this mandate to transfer control over all claimed CUNARs, opponents of repatriation may look to the *Bonnichsen* analysis as a means to re-categorize remains with scientific value from "Native American" to "Non-Native

163. *See* Mashpee Tribe v. New Seabury Corp., 592 F.2d. 575, 579–80 (1st. Cir 1979), *cert. denied*, 444 U.S. 866 (1979) (noting that, according to the jury at the district court level, the Mashpee tribe had voluntarily abandoned their tribal identity in the 1870s when the town of Mashpee became incorporated by the state of Massachusetts); JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 303 (1988) (arguing that the Mashpee did not necessarily assimilate in the Eighteenth or Nineteenth Centuries but, as a matter of survival, found ways to incorporate and adapt to the larger culture around them without giving up their sense of independent identity).

164. *See* CLIFFORD, *supra* note 163, at 303.

165. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12378, 12403 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10.11).

166. *Id.*

167. *See id.*

168. *Id.* at 12404.

American," thus circumventing the repatriation mandate of the March 2010 Regulations.

III. THE SPIRIT CAVE MAN CONTROVERSY

In contrast to the anthropological conundrums presented above, the Spirit Cave Man dispute raises questions about what constitutes appropriate administrative action during the process for determining cultural affiliation. In determining the Spirit Cave Man's cultural status, the BLM provided no explanation as to why the Fallon Paiute tribe's evidence of cultural affiliation was insufficient to prove a connection between them and the remains.[169] In addition, as a United States district court suggested in reviewing the BLM's determination, the agency impeded the Fallon Paiute in presenting their complete case for cultural affiliation and violated NAGPRA's moratorium on scientific study of Native American remains in institutional collections.[170] In short, the BLM exercised its administrative power over the cultural affiliation determination of the Spirit Cave Man at the expense of the Fallon Paiute.

In 1994, researchers at the Nevada State Museum rediscovered the remains of the Spirit Cave Man, where they had languished in obscurity for over fifty years. Originally, archaeologists discovered the remains in 1940 in Spirit Cave, on land owned then, and now, by the BLM.[171] Subsequently, researchers dated the remains at nearly 10,000 years old.[172] News of this dating sparked considerable scientific and national interest in Spirit Cave Man.[173]

In 1997, the Fallon Paiute requested repatriation of the remains.[174] In 1996, the Nevada State Museum had determined that the remains lacked cultural affiliation with any tribe, including the Fallon Paiute.[175] The BLM, however, never formalized this determination, and the question of affiliation officially remained unresolved.[176] In the interim, researchers continued to study the remains.[177] In 1998, the tribe appealed to the NAGPRA Re-

169. *See* Fallon Paiute-Shoshone v. U.S. Bureau of Land Mgmt., 455 F. Supp. 2d 1207, 1224–25 (D. Nev. 2006).

170. *See id.*; MAKAH INDIAN TRIBE & THE NAT'L ASS'N OF TRIBAL HISTORIC PRES. OFFICERS, FEDERAL AGENCY IMPLEMENTATION OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT G-50 (2008).

171. *See Fallon Paiute-Shoshone*, 455 F. Supp. 2d at 1210.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

view Committee to resolve the dispute.[178] But because the BLM had yet to make an official determination of cultural affiliation, the Committee declined to involve itself.[179]

In 1999, the tribe presented scientific evidence of cultural affiliation with the Spirit Cave Man to the BLM.[180] By that point, the BLM, as well as the state museum that housed Spirit Cave Man, agreed with the tribe that the Spirit Cave Man was Native American in origin.[181] The agency, nonetheless, stated that it would need more time to make a final determination in light of the tribe's evidence. [182]

Finally, in August 2000, four years after the Fallon Paiute requested repatriation, the BLM officially determined the remains to be culturally unidentifiable but Native American.[183] The BLM would not repatriate the Spirit Cave Man.[184] The tribe again took the matter before the NAGPRA Review Committee, which stated that it believed the BLM had failed to take into account all of the tribe's evidence, and that the Spirit Cave Man was culturally affiliated with the Fallon Paiute.[185] This apparent victory did not ultimately benefit the Fallon Paiute; the advisory opinion was not binding on the BLM.[186]

Ignoring the committee opinion, the BLM affirmed its determination of the Spirit Cave Man, and the tribe filed suit four years later.[187] The Federal District Court of Nevada, in reviewing the issue under the Administrative Procedure Act (APA),[188] found the BLM's determination to be arbitrary and capricious, based on the fact that the agency ignored the NAGPRA Review Committee's findings[189] and on the fact that it had refused to explain why the tribe's evidence was insufficient.[190]

178. *Id.* at 1211.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1212.

186. *See* 43 C.F.R. § 10.16(b) (2009).

187. *Fallon Paiute-Shoshone*, 455 F. Supp. 2d at 1212.

188. The Administrative Procedure Act (APA) is a comprehensive federal law governing federal agencies. The APA provides standards for agencies to follow when promulgating and finalizing regulations. It also determines when agency action is ripe for judicial review and provides legal standards for courts to apply in those circumstances. TOM C. CLARK, ATT'Y GEN., U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 9 (1947).

189. Although the Committee's final decisions are not binding upon anyone, the court reasoned that the BLM was legally obligated to at least reconsider the evidence before it in light of the Committee findings. *Fallon Paiute-Shoshone*, 455 F. Supp. 2d at 1224.

190. *Id.* at 1223–24.

In its opinion, the court suggested that the BLM had purposefully obstructed the determination process. The court noted that the BLM provided "no overarching determination . . . which explains the reasons for its actions and determinations."[191] And the court further chided the BLM by reminding it that it "[is not] free to ignore other competing views by failing to recognize their existence and refusing to describe the reasons why they were not accepted."[192]

Nonetheless, this decision did not represent a complete victory for the Fallon Paiute. The tribe had alleged that the BLM violated NAGPRA by forcing the tribe to present its evidence within forty-five days of the Spirit Cave Man determination.[193] In contrast, the BLM studied the remains for several years before making its final determination.[194] The court refused to touch this issue, noting that agencies have considerable power to determine their own internal procedures.[195] Rather, the court based its decision entirely upon the APA and the BLM's refusal to acknowledge the NAGPRA Review Committee's findings.[196] The question of whether the BLM had improperly exercised its authority under NAGPRA went unanswered.[197]

A related question regarding the BLM's authority to conduct scientific study on the remains went unaddressed by all the parties involved, including the Fallon Paiute. According to the statute, institutions must attempt to determine cultural affiliation "to the extent possible based on information possessed by [the] museum or Federal agency."[198] NAGPRA states, furthermore, that the inventory and determination process is not an authorization to conduct further scientific study on the remains.[199] Notes from a December 1994 staff meeting indicate that the BLM encouraged its researchers to violate this moratorium by studying the remains extensively, before any tribes claimed the Spirit Cave Man for repatriation.[200] These notes also indicate that the BLM planned to tie study of the remains into an unrelated, ongoing research program to stall the NAGPRA process.[201] The

191. *Id.* at 1223.
192. *Id.* at 1224.
193. *Id.* at 1220.
194. *Id.* at 1210–12.
195. *Id.* at 1220.
196. *See id.* at 1223–24.
197. *See id.*
198. 25 U.S.C. § 3003(a) (2006).
199. *Id.* § 3003(b)(2).
200. MAKAH INDIAN TRIBE & THE NAT'L ASS'N OF TRIBAL HISTORIC PRES. OFFICERS , *supra* note 170, at G-50.
201. *Id.*

Fallon Paiute, however, did not allege these violations of NAGPRA at trial.[202]

Years later, the Fallon Paiute may yet succeed in their claim for the Spirit Cave Man. In contrast to the Kennewick Man, the Spirit Cave Man does fall under the category of remains regulated by the March 2010 Regulations: the Spirit Cave Man is Native American, but culturally unidentifiable, and was previously housed in an institutional collection.[203]

If the Fallon Paiute tribe renews its request for the repatriation of the remains, it will likely base its request upon an aboriginal connection to the area where researchers discovered the Spirit Cave Man. The March 2010 Regulations define aboriginal land as that recognized by judgment of the Indian Claims Commission, the U.S. Court of Claims, act of Congress, treaty, or Executive Order.[204] The Indian Claims Commission has previously determined that the area in which Spirit Cave is situated is aboriginal land of the Fallon Paiute.[205] The tribe, therefore, may claim the Spirit Cave Man under the regulations as an "Indian tribe . . . that [is] recognized as aboriginal to the area from which the human remains were removed."[206] Thus, assuming that the regulations are legitimate, the Fallon Paiute will likely succeed in their claim.

Indeed, the March 2010 Regulations will allow many federally recognized tribes to succeed in claims for CUNARs that they had failed in previously. Before the March 2010 Regulations came into effect, claimant tribes could not succeed in their claim to CUNARs without presenting new evidence proving cultural affiliation to the claimed remains.[207] This process could repeat several times over the course of several years—the Fallon Paiute's claim to the Spirit Cave Man is a good example. The March 2010 Regulations put an end to that process. Under the regulations, institutions now look to where the remains were discovered and compare that data to evidence of tribal or aboriginal occupation of the discovery site at the time when the remains were discovered.[208] This shift from a cultural affiliation

202. *See generally Fallon Paiute-Shoshone*, 455 F. Supp. 2d at 1216–23.

203. *See* Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12378, 12403 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10.11).

204. *Id.*

205. PAT BARKER, CYNTHIA ELLIS & STEPHANIE DAMADIO, DETERMINATION OF CULTURAL AFFILIATION OF HUMAN REMAINS FROM SPIRIT CAVE, NEVADA 46 (2000).

206. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. at 12404.

207. *See* 25 U.S.C. § 3005(a)(4) (2006).

208. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. at 12389, 12404.

to geographic affiliation standard will likely make it easier for tribes to demonstrate a valid connection to a claimed set of remains.

IV. LEGITIMACY OF THE REGULATIONS REGARDING CULTURALLY UNIDENTIFIABLE REMAINS

As noted earlier, the March 2010 Regulations mandate the repatriation of CUNARS to claimant tribes based on their geographic connection to the region in which the remains were discovered. The regulations govern all culturally unidentifiable human remains previously housed in an institution and previously determined to be Native American.[209] Within ninety days of receiving a repatriation request, and before any transfer of custody is made, the regulations require institutions to consult with claimant tribes upon whose tribal or aboriginal land the remains were discovered.[210] If, after consulting with all of the tribes, no cultural affiliation is determined, and the institution cannot prove a right of possession,[211] then the institution must offer to transfer control of the remains, first, to the tribe upon whose tribal land the remains were discovered, and second, to the tribe upon whose aboriginal land the remains were discovered.[212] This duty is non-discretionary.[213]

If valid, the regulations will result in the repatriation of a number of the 125,000 CUNARs currently housed in institutional collections.[214] Proponents of the regulations see them as the next step in fully implementing NAGPRA.[215] Opponents, fearing their effect on archaeology, anthropology, and other related disciplines, claim that they are beyond The Secretary's power to regulate.[216]

209. *See id.*

210. *Id.*

211. Right of possession is defined as "possession obtained with the voluntary consent of an individual or group that had authority of alienation." 43 C.F.R. § 10.10(a)(2) (2009). As others have pointed out, it is highly unlikely that any institution would be able to prove that it obtained voluntary consent from an authoritative individual or group to obtain culturally unidentifiable remains. Letter from Dennis O'Rourke, Patricia M. Lambert, Clark S. Larsen & Fred H. Smith, Am. Ass'n of Physical Anthropologists, to Dr. Sherry Hutt, Manager, Nat'l NAGPRA Program 4 (May. 10, 2010), www.regulations.gov (enter Keyword or ID: DOI-2007-0032-0164.1).

212. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. at 12404.

213. *Id.*

214. *See* Letter from NAGPRA Review Comm., *supra* note 17, at 1.

215. *See, e.g., id.* at 1–6.

216. *See* Letter from John W. McCarter, Jr., *supra* note 16, at 1–3.

A. General Rulemaking Authority

Motivated in part by scientific interest in CUNARs such as the Spirit Cave Man, critics of the March 2010 regulations have questioned their legitimacy. They argue that because NAGPRA does not explicitly authorize The Secretary to regulate CUNARs in institutional holdings, he lacks the administrative authority to promulgate regulations regarding these remains.[217]

Contrary to critical assertions, The Secretary likely has the general rulemaking authority necessary to promulgate these regulations. Whether Congress delegated rulemaking authority to an agency is a matter of statutory interpretation.[218] If the meaning of the statute is apparent from a plain reading of the text, then that interpretation must control, unless it leads to an absurd result.[219] Section 3011 of the statute states that "[t]he Secretary shall promulgate regulations to carry out this chapter within 12 months of November 16, 1990."[220] A plain reading of this text indicates that Congress explicitly granted general rulemaking authority to The Secretary. Section 3006(c)(7) of the statute supports this interpretation indirectly, as it states that the NAGPRA Review Committee shall "consult[] with the Secretary in the development of regulations to carry out" NAGPRA.[221]

This interpretation does not run afoul of recent Supreme Court case law, which instructs not to imply broad congressional delegations of agency authority from delegations of authority on specific issues.[222] The Secretary's regulation of CUNARs is unlike that of the Attorney General's attempted regulation of the medical profession in *Gonzales v. Oregon*.[223] There, the Court affirmed a Ninth Circuit decision to strike down an interpretive rule promulgated by the Attorney General of the United States under the Controlled Substances Act (CSA).[224] The Attorney General had attempted to criminalize the practice of prescribing controlled substances to assist the suicide of terminally ill patients in Oregon, even though Oregon law permitted this practice.[225] In determining whether the Attorney General had authority to do this, the Court looked to the regulatory power granted

217. *Id.*

218. Gonzales v. Oregon, 546 U.S. 243, 258–59 (2006).

219. *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006); *Gonzales*, 546 U.S. at 258–59.

220. 25 U.S.C. § 3011 (2006).

221. *Id.* § 3006(c)(7).

222. *Gonzales*, 546 U.S. at 257–58.

223. *See id.* at 253–54.

224. *Id.* at 249, 255, 275.

225. *Id.* at 253–54.

to him under the CSA.[226] The CSA allowed the Attorney General to promulgate regulations necessary to carry out his duties in adding new drugs to the schedule of controlled substances, and registering and deregistering physicians who are authorized to prescribe controlled substances to patients.[227]

The government argued that the Attorney General's power to deregister physicians for acts inconsistent with the public interest gave him the power to criminalize certain medical practices.[228] The Court, however, rejected that argument.[229] It reasoned that the CSA's highly-structured delegation of authority for the purpose of registering and deregistering physicians did not grant the Attorney General an implicit and greater power to criminalize certain medical practices.[230]

Here, The Secretary has not strayed from his grant of regulatory authority. Sections 3011 and 3006(c)(7) indicate that Congress intended to give The Secretary broad rulemaking authority.[231] Moreover, although Congress provided some specification for how to regulate certain issues in sections 3002(b), 3006(g), and 3007(b), NAGPRA does not contain a highly specific procedure for promulgating regulations for any issue, unlike the CSA.[232] This unconstrained mandate to promulgate regulations indicates that The Secretary has general rulemaking authority under NAGPRA.

B. Deference to The Secretary's Interpretation

1. Congressional Intent

After establishing general rulemaking authority, the test created in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* governs the legitimacy of an agency interpretation of an ambiguous statute that it administers.[233] The Secretary's regulation of CUNARs is valid, therefore, if Congress has not directly spoken to the breadth of his authority over these remains,[234] and if his interpretation of the statute is reasonable.[235] Determining whether Congress has spoken directly to an issue involves

226. *Id.* at 258–62.
227. *Id.*
228. *Id.* at 262–63.
229. *Id.*
230. *Id.* at 260–61.
231. *See* 25 U.S.C. §§ 3006(c)(7), 3011 (2006).
232. *See id.* §§ 3002(b), 3006(g), 3007(b).
233. United States v. Mead, 533 U.S. 218, 229 (2001); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
234. *See Chevron,* 467 U.S. at 842–43, 845.
235. *Id.* at 843.

analysis of the text of the statute itself, examination of other statutes dealing with the same issue, and common sense about "the manner in which Congress is likely to delegate a policy decision . . . to an administrative agency."[236]

Turning to the first prong of the test, the text of the statute indicates that Congress has not spoken directly on the issue of The Secretary's power to regulate CUNARs housed in institutions.[237] Congress speaks most closely to this issue in 25 U.S.C. § 3006(c)(5), which charges the NAGPRA Review Committee with "compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains."[238] This delegation of authority does not mean that Congress intended to prevent The Secretary from regulating CUNARs. Nothing in the text of the statute prohibits The Secretary from acting on the recommendations of the Review Committee regarding these remains. NAGPRA, instead, instructs the NAGPRA Review Committee to collaborate with The Secretary in promulgating regulations.[239] Therefore, the presence of this language suggests that Congress intended The Secretary to regulate CUNARs.

Examination of other statutes dealing with Native American remains indicates that Congress has previously invested The Secretary with the kind of authority necessary to regulate CUNARs. As one commentator noted, in ARPA, Congress gave The Secretary power to regulate the "ultimate disposition" of archaeological resources,[240] defined as "any material remains of past human life or activities which are of archaeological interest," including human remains.[241] Additionally, in the past, Congress has invested The Secretary, through the Bureau of Indian Affairs, with the authority to manage many aspects of Native American life, from the creation and maintenance of tribal government, to the management of natural resources on Native American reservations.[242] These delegations of power suggest that

236. Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

237. *See* 25 U.S.C. § 3006 (2006).

238. *Id.* § 3006(c)(5).

239. *Id.* § 3006(c)(7).

240. Archaeological Resources Protection Act of 9179, 16 U.S.C. §§ 470dd(1)–(2) (2006); *see* Letter from Marc D. Slonim, Brian W. Chestnut & Rebecca N. Johnson, Ziontz, Chestnut, Varnell, Berley & Slonim, to Dr. Sherry Hutt, Manager, Nat'l NAGPRA Program 26-27 (Jan. 14, 2008), http://www.regulations.gov (enter Keyword or ID: DOI-2007-0032-0066.1).

241. 16 U.S.C. § 470bb(1).

242. *See, e.g.*, 25 U.S.C. § 2 (2006) ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations."); Indian Self-Determination and Education Assistance Act of 1975, *id.* § 458aa ("The Secretary of the Inte-

if Congress has spoken to The Secretary's authority to regulate CUNARs under NAGPRA, it has affirmed his authority over them.[243]

Common sense also suggests that, if Congress has spoken, it has affirmed The Secretary's regulatory power over CUNARs. NAGPRA is legislation intended to facilitate the repatriation of Native American remains to Native Americans.[244] As other commentators have pointed out, Congress would not prevent The Secretary from regulating the kinds of remains that it enacted NAGPRA to protect.[245]

Lastly, The Secretary's assertion of jurisdiction over CUNARs is appropriate even in light of the Supreme Court's decision in *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*[246] There, the Supreme Court expressed doubt as to whether an agency interpretation of its jurisdictional limits deserved *Chevron* deference.[247] The FDA had attempted to regulate tobacco products under the Food, Drug, and Cosmetic Act (FDCA), claiming that they were a health risk.[248] In rejecting the FDA's interpretation of its jurisdictional limits, the Court noted that Congress had spoken on the issue of tobacco products.[249] Congress had already passed entirely separate regulatory schemes for tobacco products, such as the Federal Cigarette Labeling and Advertising Act, and also dealt with the issue of cigarettes and health under such statutes as the Comprehensive Smoking Education Act; the Public Health Cigarette Smoking Act; and the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act.[250] In addition, the legislative history of the Federal Cigarette Labeling and Advertising Act and the FDCA indicated that Congress had contemplated giving the FDA jurisdiction over tobacco products under that statute but rejected the proposal.[251] As a result, the Court concluded, FDA jurisdiction over tobacco products would be contrary to Congress's plainly manifested view of the issue.[252]

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rior . . . shall establish and carry out a program . . . to be known as Tribal Self-Governance . . . ."); Indian Mineral Development Act of 1982, *id.* § 2102(a) (2006) ("Any Indian tribe, subject to the approval of the Secretary [of the Interior] . . . may enter into any joint venture . . . providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium . . . .").

243. *See* Letter from Marc D. Slonim, Brian W. Chestnut & Rebecca N. Johnson, Ziontz, *supra* note 240, at 26–27.

244. *See, e.g.*, 136 CONG. REC. E3484-01 (daily ed. Oct. 27, 1990) (remarks by Rep. Morris K. Udall).

245. Letter from Ziontz, Chestnut, Varnell, Berley and Slonim, *supra* note 240, at 27.

246. 529 U.S. 120, 160 (2000).

247. *Id.*

248. *Id.* at 126–30.

249. *Id.* at 132–33.

250. *Id.* at 144–55.

251. *Id.* at 147–48.

252. *Id.* at 160–61.

Here, however, Congress has not spoken directly on the issue of The Secretary's authority over CUNARs housed in institutions. NAGPRA specifically provides that the NAGPRA Review Committee shall make recommendations for the disposition of these remains but nothing prevents The Secretary from acting upon these recommendations.[253] The 2010 regulations, therefore, do not contradict any express Congressional intent, unlike the regulations at issue in *Williamson*.[254]

2. Reasonableness of The Secretary's Interpretation

After determining that Congress has not spoken on the issue, the next question is whether The Secretary reasonably interpreted the statute to grant him authority to regulate CUNARs in institutional holdings.[255] Generally, an interpretation of the statute that is consistent with the plain meaning of its text and with its underlying purpose deserves *Chevron* deference.[256]

The Secretary's interpretation of his jurisdiction under NAGPRA is consistent with the plain meaning of the statute and its underlying purpose. The text of the statute itself suggests that The Secretary has authority over these remains. As noted by one commentator, section 3002(b) invests The Secretary with the authority to promulgate regulations over unclaimed cultural items discovered on federal or tribal land after NAGPRA's enactment.[257] This is important because the statutorily defined term "cultural items" includes all human remains, even culturally unidentifiable ones. In this context, NAGPRA explicitly gives The Secretary authority over CUNARs. Interpreting NAGPRA to give The Secretary authority over CUNARs in institutional holdings does not contradict section 3002(b) or any other section of NAGPRA.[258]

253. *See* 25 U.S.C. § 3006(c)(5) (2006).

254. *See Williamson*, 529 U.S. at 160.

255. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

256. *See* Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 88–89 (2002); Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407, 417 (1992).

257. Robert Van Horn, *The Native American Graves Protection and Repatriation Act at the Margins: Does NAGPRA Govern the Disposition of Ancient, Culturally Unidentified Human Remains?*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 227, 250 (2008).

258. Congressional mandates to promulgate regulations regarding specific issues in sections 3002(b), 3006(g), and 3007(b) of NAGPRA do not indicate that The Secretary's interpretation of the statute is improper. Indeed, the very framework of *Chevron* anticipates that Congress may grant an agency general rulemaking authority, while explicitly delegating control over certain issues, and implicitly delegating control over others. *See* United States v. Mead, 533 U.S. 218, 229 (2001).

C. *The Reasonableness of the Geographic Standard*

Critics of the March 2010 Regulations also argue that, even if The Secretary has authority to promulgate the regulations, the regulations are nonetheless invalid. Specifically, they argue that the geographic standard of affiliation introduced by the regulations is inconsistent with NAGPRA's statutory scheme, and that the regulations violate the statute's balance of interests between scientific study and repatriation.[259]

Nonetheless, the geographic standard of affiliation employed by the March 2010 Regulations is likely consistent with NAGPRA. The regulations require institutions to transfer control over CUNARs to claimant tribes, first, to the claimant tribe "from whose tribal land, at the time of the excavation or removal, the human remains were removed" and, second, to the claimant tribe "recognized as aboriginal to the area from which the human remains were removed."[260] This language mirrors that in section 3002(a)(2)(C) of NAGPRA, which provides that Native American remains discovered or excavated on tribal land or aboriginal land after enactment of NAGPRA may be repatriated to the tribe upon whose land the remains were discovered.[261] NAGPRA does not require proof of cultural affiliation in that situation.[262] Rather, NAGPRA permits an inference of cultural affiliation between remains of this kind and a claimant tribe based upon their geographic connection.[263] Consequently, the March 2010 regulations are consistent with NAGPRA: in fact, the regulatory language is nearly identical to the language of section 3002(a)(2)(C).

Moreover, the regulations do not upset the balance of interests in NAGPRA between scientific study and repatriation and are therefore not contrary to the intent of the statute. NAGPRA strongly favors Native American interests over Native American remains.[264] When discovered on tribal, aboriginal, or federal land after NAGPRA's enactment, NAGPRA mandates repatriation to claimants.[265] And where cultural affiliation to human remains is determinable, the regulations mandate repatriation of them except where an ongoing study of national importance exists.[266]

259. Letter from Soc'y for Am. Archaeology, to Dep't of the Interior 3 (Jan. 14, 2008), http://www.regulations.gov (enter Keyword or ID: DOI-2007-0032-0039.2).

260. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12378, 12404 (Mar. 15, 2010) (to be codified at 43 C.F.R. pt. 10.11).

261. 25 U.S.C. § 3002(a)(2)(C) (2006).

262. *See id.*

263. *See id.*

264. *See id.* §§ 3002(a)–(b), 3003(a), 3005(b).

265. *Id.* § 3002(a).

266. *Id.* §§ 3005(a)–(b).

Therefore, although these regulations will, as opponents point out, likely remove a large number of human remains from institutional collections and prevent study of them, this result is not necessarily contrary to the purpose of the Act or its balance of interests.[267] Congress enacted NAGPRA to right past wrongs against Native Americans and protect Native American burial sites from desecration.[268] The regulations further that purpose by expanding the repatriation of Native American remains to Native Americans.

This reading of the statute is supported by section 3003(b)(2) of NAGPRA, which states, in part, that "this chapter shall not be construed to be an authorization for, the initiation of new scientific studies of [Native American remains in institutional collections] and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects."[269] The above language suggests that Congress did not intend for researchers to conduct extensive study on CUNARs in institutional collections. The March 2010 regulations, therefore, do not upset the alleged balance of interests between scientific study and repatriation regarding these remains—NAGPRA does not countenance scientific study of them.

CONCLUSION

The March 2010 regulations regarding CUNARs are likely a legitimate exercise of agency authority under NAGPRA. Congress granted The Secretary general rulemaking authority to promulgate regulations and the March 2010 regulations are reasonable under the *Chevron* test.

NAGPRA is human rights legislation aimed at redressing past wrongs committed against Native Americans and the remains of their ancestors.[270] For many years, common law and statutory law, both state and federal, were ineffective in protecting Native American graves and human remains from desecration.[271] Rather, the scientific community was allowed to treat Native Americans remains as resources to study in the pursuit of knowledge.[272] Congress enacted NAGPRA to change that by providing Native

267. *Contra* Letter from John W. McCarter, Jr., *supra* note 16, at 7–8.

268. *See* S. REP. NO. 101-473, at 1–2 (1990).

269. 25 U.S.C. § 3003(b)(2).

270. *See, e.g.*, 136 CONG. REC. E3484-01 (daily ed. Oct. 27, 1990) (remarks by Rep. Morris K. Udall).

271. *See, e.g.*, Wana the Bear v. Comm. Constr., Inc., 180 Cal. Rptr. 423, 426–27 (Cal. Ct. App. 1982).

272. *See* Trope & Echo-Hawk, *supra* note 44, at 40.

Americans with the legal right to request repatriation of ancestral remains from the holdings of agencies and institutions.[273]

Scientific research and public education are valid goals whose legitimacy is not in question. NAGPRA appropriately exempts Native American remains from repatriation when a scientific study of national importance is ongoing with the remains.[274]

Nonetheless, a commitment to NAGPRA entails a commitment to giving up control[275] over Native American remains.[276] The regulation and repatriation of CUNARs is in keeping with the spirit of the law.

273. *See* 136 CONG. REC. E3484-01.

274. 25 U.S.C. § 3005(b).

275. There are a number of examples of scientific researchers working with Native American communities to achieve both the goals of scientific study and the interests of Native American communities in treating their ancestors with respect. For example, a dispute between the Fallon Paiute-Shoshone of Nevada and a state museum resulted in the repatriation of human remains to the tribe. The tribe interred the remains on their reservation. However, they interred the remains in a specially designed crypt that, on occasion, could be opened. This design gave researchers the continued opportunity to study the remains. S. REP. NO. 101-473, at 5 (1990).

276. *See* 136 CONG. REC. E3484-01.