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IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

No. 12-1953

CHACO NATION OF THE CHACO INDIAN RESERVATION,
DEPAULIA,
Plaintiff-Appellant,

v.

EDWARD WILLIAMSON,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of DePaulia.
No. 12 X 123 – **Patricia A. Jehle**, *Judge.*

ARGUED August 11, 2012 — DECIDED November 14, 2012

Before CLARK, SIMON, and LEMONCELLI, Circuit Judges.

CLARK, *Circuit Judge.*

The Chaco Nation of the Chaco Indian Reservation (Chaco Nation), located in DePaulia, appeals the judgment of the United States District Court for the Northern District of DePaulia. The district court held, first, that the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001 *et seq.*, does not vest in the Chaco Nation control of the disposition of the approximately 14,000-year-old human remains of a deceased individual. Second, the district court held that the vesting of the approximately 500- to 700-year-old funerary objects associated with the human remains of a Native American individual, which were removed from land owned in fee simple by Dr. Edward "Ed" Williamson (Williamson) and situated within the exterior boundaries of the Chaco Indian Reservation, would constitute a taking of property under the Fifth Amendment. For the reasons that follow, we reverse the judgment of the District Court and remand for findings consistent with this holding.

I.

The facts in this case are not in dispute.[1] The Chaco Nation is an Indian entity recognized and eligible to receive services from the United States Bureau of Indian Affairs. As such, the Chaco Nation is acknowledged to have the immunities and privileges available to other federally recognized Indian tribes by virtue of their government-to-government relationship with the United States, as well as the responsibilities, powers, limitations, and obligations of such tribes. The Chaco Nation is an "Indian tribe" for the purposes of NAGPRA. 25 U.S.C. § 3001(7).

Historically, the people of the Chaco Nation lived more than 1,100 miles from the present-day Chaco Indian Reservation. By 1854, the Chaco Nation had entered into a number of treaties with the United States, through which they ceded millions of acres of land to the Federal government. Under the Treaty of 1854, all members of the Chaco Nation were required to remove to a reservation in DePaulia Territory.

Following the General Allotment Act of 1887, also known as the Dawes Act, Congress systematically allotted lands on most Indian reservations, and the Chaco Indian Reservation was no exception. In addition to diminishing the tribal land estate, the reservation was opened to settlement by non-Indians. As a result, today the land within the exterior boundaries of the Chaco Indian Reservation is a "checkerboard" pattern comprised of individual Indian allotments held in trust by the United States; the DePaulia National Forest, owned and administered by the United States as part of the National Forest System; fee land owned by non-Indians, and the communal lands of the Chaco Nation held in trust by the United States. Under NAGPRA, all these lands within the exterior boundaries of the Chaco Indian Reservation are deemed to be "tribal land." 25 U.S.C. § 3001(15)(A).

Appellee Williamson is a retired professor of ethnobiology at DePaulia University and a member of the National Academy of

1. Our rendition of the facts is adapted from the district court's published opinion in this case. *See Chaco Nation v. Williamson*, 311 F. Supp. 3d 1983 (N.D. Dep. 2011). No party on appeal disputes the district court's findings of fact, which are supported by the administrative record.

Sciences. He is also the non-Indian owner of land in fee simple within the exterior boundaries of the Chaco Indian Reservation. The land in question is Harper Springs Ranch, 80 acres of prime grazing land that have been in the Williamson family since 1900. Harper Springs Ranch is bounded on the east by the Abiquiu River, which is fed by the Abiquiu Reservoir to the north.

In August 2008, severe rains caused the Abiquiu River to slip its banks and erode an area that included Williamson's land. During a lull in the rain, Williamson went outside to survey the damage caused by the flooding and found that, at two sites on opposite sides of his eastern property line (Site I and Site II), the flooding had created 20-foot vertical escarpments. At Site I, Williamson discovered what he believed to be a human skull in eroded sediment, as well as additional bones nearby that appeared to belong to the skeleton. The skeleton was later determined to be 95% complete. At Site II, Williamson discovered another complete set of human remains by a bank of sediment that had washed down in the flood. Associated with the human remains at Site II were two fully intact vessels painted both inside and out. As the threat of heavy rain and attendant flooding was imminent, Williamson removed the *ex-situ* human remains and objects and transported them to his house in order to protect them.

After the rains abated, Williamson notified the President of the Chaco Nation about the human remains and objects that he had discovered at Sites I and II and the action he had taken to protect them. He also notified the local police, who transferred the remains to the district medical examiner for analysis.[2] The medical examiner performed an autopsy and determined that neither skeleton was of recent origin. Unable to come to a definite conclusion as to the skeletons' ages, and believing Williamson to have discovered two separate unmarked burials,[3] the medical

2. Under the DePaulia Code, "[w]hen an unmarked burial is discovered other than during an archaeological excavation authorized by the State or an educational institution . . . the district medical examiner shall be notified." DEPAULIA STAT. § 872.05 (4)).

3. Based on an examination of the remains and objects and Sites I and II, the examining anthropologist concluded, and Williamson concedes, that the human remains and objects derive from two different burials, and that the burial in Site II is that of an American Indian.

examiner called upon the expertise of Dr. Christie Toth, an anthropologist attached to the local university. Dr. Toth concluded from the physical characteristics that the remains from Site II were American Indian and identified the associated jars as Fancy Type IIIc1b Ware belonging to the Early Riverine Horizon of the Late DePaulian Culture (A.D. 1300–1500).[4]

Dr. Toth's initial examination of the remains from Site I, which she determined to have been an adult male aged 40–50 years, suggested that the remains were those of a European settler. However, subsequent radiocarbon dating tests performed by Dr. Toth's laboratory in September 2008 revealed that the skeleton was approximately 14,000 years old. In addition, x-rays and CT scans showed a stone projectile resembling a "long-stemmed point" lodged in the skeleton's upper hip bone. Such stone points predate the arrival of Europeans in the region by thousands of years. The skeleton from Site I, which has become known colloquially by some as "Harper Man" and by others as "The Elder,"[5] attracted attention because some of its physical features—such as the shape of the face and skull—differed from those of modern American Indians, and because it is the oldest human skeleton and the best preserved skeleton older than 8,000 years discovered to date in the Americas.[6]

In January 2009, the Chaco Nation contacted Williamson in order to arrange for transfer of the human remains and associated funerary objects to the tribe under NAGPRA. Williamson agreed to transfer the Native American human remains from the burial in Site II to the Chaco Nation, but refused to transfer the remains of Harper Man and the associated funerary objects from the burial at Site II to the tribe. In a letter to the President of the Chaco Nation, Williamson voiced his concern that he believed the expressed

4. This type of pottery is very rare and features "kill holes," which indicate that the vessels were made specifically for use during burial feasts and thereafter buried with the individuals. During recent auctions, such pieces have sold for upwards of $8,000 each. Williamson concedes that the pots are funerary objects and are "cultural items" under NAGPRA.

5. Because the District Court in the proceeding below referred to the remains as "Harper Man," we follow the same convention.

6. Except for the bone sent for radiocarbon dating, the human remains and objects were returned to Williamson, together with the anthropologist's report.

intent of the tribe to immediately re-bury the remains in a secret location on tribal lands would forever deprive researchers of access to a unique, possibly irreplaceable specimen of human history. Williamson also indicated that, because of the significance of the skeleton to the migration patterns of the earliest Americans and his fear that Harper Man would be reburied and not accessible for study, he wished to ensure access to the remains by the American School of Research on the First Inhabitants of the Americas, a non-profit educational institution, for further research and study. He also stated that he intended to make a long-term loan of the two ceramic jars to his alma mater, the University of DePaulia.

In response, the Chaco Nation brought an action in the U.S. District Court for the Northern District of DePaulia under section 15 of NAGPRA, 25 U.S.C. § 3013, alleging that Williamson had violated section 3 of NAGPRA, 25 U.S.C. § 3002, by retaining the human remains and associated funerary objects in question. The Chaco Nation asked the district court to issue an order to enforce the ownership or control provisions of section 3(a)(2)(a) of NAGPRA, 25 U.S.C. § 3002 (a)(2)(A), and compel Williamson to transfer the remains of Harper Man and the associated funerary objects from the Site II burial to the tribe.[7] There being no issue of material fact, on cross-motions for summary judgment, the district court denied the Chaco Nation's request on both counts, and the tribe brings the instant appeal.

First, the tribe argues that the district court erroneously concluded that human remains must bear some relationship to a *presently existing* tribe, people, or culture in holding that the 14,000-year-old human remains are not "Native American" as defined in NAGPRA and therefore are not subject to the ownership provisions of NAGPRA. Second, the tribe challenges the district court's conclusion that vesting in the Chaco Nation control of the associated funerary objects removed from Site II on

7. The Chaco Nation concedes that the tribe is not culturally affiliated with either the human remains or the associated funerary objects in question, and Williamson concedes that he is not related to the individual in the Site II burial. In addition, the State of DePaulia has not asserted any jurisdictional authority over these remains or objects.

Williamson's land would result in a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution and that, as a consequence, the requirements of section 3 of NAGPRA, 25 U.S.C. § 3002, and its implementing regulations do not apply to Williamson's land with respect to the associated funerary objects. Having jurisdiction under 28 U.S.C. § 1291, we reverse the judgment of the district court, and remand the case for further proceedings consistent with our opinion.

II.

The Native American Graves Protection and Repatriation Act (NAGPRA) was enacted "to provide for the protection of Native American graves, and for other purposes." *See* Pub. L. No. 101-601, 104 Stat. 3048 (codified as amended at 25 U.S.C. § 3001 *et seq.*) In providing that protection, the federal government acted in an area of law where, until the 20th century, only the states had affirmatively exercised authority.

The states have general powers to enact statutes for the health, safety, and general welfare of their citizens, including statutes governing human burials. The federal government has the power to enact statutes governing human burials located on lands of the United States and lands of Indian tribes or individuals which are either held in trust by the United States or are subject to a restriction against alienation imposed by the United States. In addition, it is settled law that, as derived from the Indian Commerce Clause, Art. I, Sec. 8, cl. 3, the Constitution expressly grants to the federal government exclusive (or "plenary") authority over Indian affairs, including the authority to enact statutes for the benefit of Indians, such as those protecting Native American graves. However, Congress cannot exercise one of its powers in such a way as to effect an uncompensated taking of private property, as such an action would contravene the Takings Clause of the Fifth Amendment of the Constitution.[8] Consequently, "[a]ctions authorized or required under . . . [the NAGPRA]

8. The Fifth Amendment to the Constitution states, "nor shall private property be taken for public use, without just compensation."

regulations will not apply to tribal lands to the extent that any action would result in a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution." 43 C.F.R. § 10.2(f)(2)(iv) (2011). With these considerations in mind, we turn to the two issues before us—(1) the meaning of the term "Native American" as defined under NAGPRA, and (2) whether NAGPRA's vesting control in the "tribal land" tribe of "associated funerary objects" removed from fee simple land situated within the exterior boundaries of an Indian reservation would result in a taking of property without compensation within the meaning of the Fifth Amendment.

A. The Meaning of the Term "Native American" under NAGPRA

NAGPRA establishes rights of ownership or control in Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony that are discovered or excavated on Federal or tribal lands after November 16, 1990. 25 U.S.C. § 3001(a). Before any inquiry as to the priority of right of ownership or control of human remains is reached, we must determine whether the human remains are Native American within the meaning of NAGPRA. If they are not, then they fall outside the scope of NAGPRA. If they are, then the requirements of NAGPRA attach, and an inquiry into the allocation of ownership or control is conducted. *See Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004).[9] NAGPRA defines "Native American" as "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). The phrase "is indigenous" is not defined in NAGPRA or its implementing regulations.

9. Under section 3 of NAGPRA, priority of control of the disposition of Native American human remains and associated funerary objects discovered on Federal or tribal lands after November 16, 1990, vests in the lineal descendants of the deceased Native American. 25 U.S.C. § 3002(a)(1). When no lineal descendant can be ascertained, priority of control vests in the Indian tribe on whose tribal land the human remains and funerary objects were discovered. 25 U.S.C. § 3002(a)(2)(A).

The district court, following the reasoning of the United States Court of Appeals for the Ninth Circuit in *Bonnichsen*, agreed with Williamson that the remains of Harper Man must relate to a presently existing tribe to fall within the scope of NAGPRA. In *Bonnichsen*, the Ninth Circuit confronted the same definitional issue. There, anthropologist plaintiffs sought to prevent the U.S. Army Corps of Engineers from transferring 9,000-year-old human remains removed from Corps land to Indian tribes. *Bonnichsen*, 367 F.3d at 868–69. The *Bonnichsen* court presumed that the use of the present tense in the phrase "is indigenous" would ordinarily and naturally refer to "the present time." Therefore, the court concluded that Congress's use of the present tense in its definition of "Native American" signified its intent to require a relationship to a *presently existing* Indian tribe and found that the evidence did not show such a relationship. *Id.* at 875, 877–78.

We review *de novo* the district court's interpretation of NAGPRA's definition of "Native American." *See, e.g., United States v. Montoya*, 827 F.2d 143, 146 (7th Cir. 1987) ("Statutory interpretation is something a district court undertakes as a matter of law . . . . We review legal determinations made by a district court *de novo*"). In the absence of statutory or regulatory guidance as to the meaning of the phrase "is indigenous" in the definition of Native American," we look to the principles of statutory construction to inform our interpretation of this phrase.

Congress's use of the present tense is a significant indication of congressional intent with respect to the interpretation of statutory provisions. *See Bonnichsen*, 367 F.3d at 875 n.15; *see also Carr v. United States*, 130 S. Ct. 2229, 2236 (2010) ("Consistent with normal usage, we have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach"). Nevertheless, "the definition of words in isolation is not necessarily controlling in statutory construction." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis. Importantly, verb tense, too, must be considered within the context of the statute. *Carr,* 130 S. Ct. at 2237. As "[t]he present tense is commonly used to refer to past, present, and future all at the same time," *Coalition for Clean Air v.*

Southern Cal. Edison Co., 971 F.2d 219, 225 (9th Cir. 1992), the use of the present tense in the definition of "Native American," in and of itself, does not necessarily foreclose the meaning of that term as propounded by the Chaco Nation.

In interpreting statutes, absurd results are to be avoided. *McNeill v. United States*, 131 S. Ct. 2218, 2223 (2011) (quoting *United States v. Wilson*, 503 U.S. 329, 334 (1992)). According to the district court's interpretation, Native American-ness becomes mutable—one day you're in, and the next day you're out. Thus, the human remains of an individual who dies today, if they bear some relationship to an indigenous tribe, people, or culture existing today, are "Native American." However, 14,000 years from today, when the human remains of that same individual are discovered, unless they bear some relationship to an indigenous tribe, people, or culture existing 14,000 years from today, they will not be "Native American." We consider that result to be absurd. Once the human remains of an individual are "Native American," they stay "Native American." The passage of time does not transform them from Native American to non-Native American. Consequently, the human remains of an individual who, at the time of death 14,000 years ago, bore some relationship to a tribe, people, or culture indigenous to the preset-day geographical area of the United States are "Native American" when they are discovered in 2008. In order to avoid interpreting "Native American" in an absurd manner, we find that Congress did not intend the meaning of "is indigenous" given that phrase by the district court in this case and by the Ninth Circuit in *Bonnichsen.*

Further, statutes must be construed so that no word or clause is rendered surplusage or null. *Hohn v. United States*, 524 U.S. 236, 249 (1998). If the words "is indigenous" are interpreted to refer only to a relationship to a presently-existing Indian tribe, then other parts of NAGPRA would be rendered meaningless. Specifically, the term "culturally unidentifiable human remains," 25 U.S.C. § 3006(c)(5), would be rendered a nullity because if only remains with a relationship to a presently-existing tribe would qualify as "Native American," there would be no such thing as "culturally unidentifiable human remains." As we must give meaning to all words of the statute, we find that Congress did not intend to limit the meaning of "is indigenous."

The context and design of NAGPRA convince this Court to construe the use of the present tense as referring to the present *and the past.* Consequently, we hold that the human remains of an individual who, *at the time of death*, is related to a tribe, people, or culture that is indigenous to the present-day geographical area of the United States are "Native American" under NAGPRA, no matter whether the human remains bear a relationship to a present-day Indian tribe or are culturally unidentifiable.

We are further prompted to this conclusion by the Indian canon of construction which directs that, where a statute is passed for the benefit of Indian tribes, the statute is "to be liberally construed, [with] doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 392 (1976) (citation omitted). NAGPRA is a statute that was passed for the benefit of Indians. To interpret NAGPRA as requiring that human remains bear a relationship to a presently existing tribe, people, or culture in order to be considered "Native American" would not favor the right of Indian tribes to control the disposition of an individual who, at the time of death, is related to a tribe, people, or culture that is indigenous to the geographical area of the United States, but who is not related to a present-day Indian tribe. For all the above reasons, we reverse the judgment of the district court with respect to the meaning of "Native American" and remand for further proceedings consistent with our holding.

B. Whether NAGPRA's Vesting of Right of Control of "Associated Funerary Objects" Removed from Fee Simple Land within the Exterior Boundaries of an Indian Reservation Would Result in a Taking of Property without Compensation within the Meaning of the Fifth Amendment of the United States Constitution

Under section 3 of NAGPRA, priority of control of Native American human remains and associated funerary objects discovered on Federal or tribal lands[10] after November 16, 1990, vests in the lineal descendants of the deceased Native American. 25 U.S.C. § 3002(a)(1). When no lineal descendant can be

10. "Tribal land" is defined to include all lands within the exterior boundaries of any Indian reservation. 25 U.S.C. § 3001(15)(A).

ascertained, priority of control vests in the Indian tribe on whose tribal land the human remains and funerary objects were discovered. 25 U.S.C. § 3002(a)(2)(A). As Williamson's land lies within the exterior boundaries of the Chaco Reservation, under the statute, ownership or control of the two ceramic jars associated with the Native American human remains removed from Site II would vest in the Chaco Nation. However, the district court held that vesting in the Chaco Nation ownership or control of the two ceramic jars would result in a taking of property without compensation and, thus, the actions required under NAGPRA and its implementing regulations do not apply to the associated funerary objects.[11]

In deciding this issue, we note that it is a matter of first impression not only for the Twelfth Circuit, but for any United States court. We have already stated that the land in which the Site II Native American skeleton and pottery vessels were interred belongs in fee simple to Mr. Williamson, and that Williamson stipulates that he is not related to the Native American individual in the Site II burial. Although Williamson makes no claims as to control of the disposition of the human remains in the Site II burial, we nonetheless will address the matter of the human remains as part of our analysis regarding the two pottery vessels associated with those remains.

According to the Supreme Court, property interests are not created by the Constitution. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* Whether a substantive interest created by the state rises to the level of a constitutionally protected property

11. Under the regulations interpreting NAGPRA, actions that are authorized or required by NAGPRA do not apply to tribal lands if the action would constitute a taking under the Fifth Amendment. 43 C.F.R. § 10.2(f)(2)(iv) (2011). While the issue here could be phrased as whether the vesting of control of the vessels in the Chaco Nation is authorized by NAGPRA, we focus instead on the underlying question of whether such vesting constitutes a taking under the Fifth Amendment.

interest, however, is a question of federal constitutional law. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Roth*, 408 U.S. at 577; *Perry v. Sindermann*, 408 U.S. 593, 602 (1972)). This determination does not rest on the label attached to a right, but rather on the substance of the right. *See Matthews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Under the common law, if no true owner can be identified, an object discovered embedded in the soil is generally recognized as belonging to the owner of the land in which the object is embedded based on the landowner's constructive possession of the object. *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985) (citing *Bishop v. Ellsworth*, 234 N.E.2d 49 (Ill. App. Ct. 1968); *Allred v. Biegel*, 219 S.W.2d 665 (Mo. 1949); *Flax v. Monticello Realty Co.*, 39 S.E.2d 308 (Va. 1946); *Schley v. Couch*, 284 S.W.2d 333 (Tex. 1955)). Human remains that are discovered embedded in the soil, however, are not considered to constitute property (that is, something that may be subject to ownership).

Protection of the sanctity of human remains being of paramount importance, under the common law, no general property interest exists in human remains. Instead, the next-of-kin of a deceased individual are recognized as having a "quasi-property right" to control the burial or other lawful disposition of the decedent's remains. *See, e.g.*, *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458, 460–61 (W. Va. App. 1985); *Long v. Chicago, R.I. & P. RY. Co.*, 15 Okla. 512 (1905); *Foley v. Phelps*, 37 N.Y.S. 471 (1896); *Seals v. H & F, Inc.*, 301 S.W.3d 237 (Tenn. 2010). Federal courts have protected this right under the Due Process Clause of the Fourteenth Amendment against actions by state governments.[12] *Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002); *Whaley v. County of Tuscola,* 58 F.3d 1111 (6th Cir. 1995); *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991). The right to control the disposition of human remains also has been

12. The Fourteenth Amendment prohibits States from "depri[ving] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This same prohibition applies to the Federal government under the Due Process Clause of the Fifth Amendment. U.S. Const. amend. V.

extended to Indian tribes that are culturally affiliated with the human remains of the deceased individual. *See Charrier v. Bell*, 496 So. 2d 601 (La. Ct. App. 1986). However, courts have found that, with regard to the body or body parts of a decedent, no one, not even the next-of-kin, may maintain an action for conversion, *i.e.*, an action for the wrongful taking of property. *See Shults v. United States*, 995 F. Supp. 1270 (D. Kan. 1998); *Bauer v. N. Fulton Med. Ctr.*, 527 S.E.2d 240 (Ga. App. Ct. 1999); *Bourgoin v. Stanley Med. Research Inst.*, No. CV-05-34, 2005 WL 3882080 at *2 (Me. Super. Ct. Nov. 23, 2005); *Boorman v. Nev. Mem. Cremation Soc'y, Inc.*, 236 P.3d 4 (Nev. 2010); *see also Colavito v. New York Organ Donor Network, Inc.*, 860 N.E.2d 713 (N.Y. 2006).

When the existing rules or understandings that stem from independent, state law sources are applied to the facts of the matter before this court, Williamson clearly does not have any protected right or interest in the Native American human remains of the individual in the burial at Site II. But does he have a property interest in the two vessels that is protected under the Takings Clause of the Fifth Amendment of the United States Constitution? Are rights or interests in human remains in a burial severable from rights or interests in the funerary objects associated with the human remains in that burial? No, because the rights or interests in both are identical in scope. Just as the "quasi-property right" or "property interest" to control the burial or other lawful disposition of a decedent are only in the next-of-kin, the right to control what goes into the burial along with the decedent's body, as well as what comes out of that burial, is in those same parties. Thus, whenever funerary objects are removed from a grave, they belong to the person who furnished the grave or to the decedent's known descendants or next-of-kin. *See, e.g.*, *Charrier*, 496 So. 2d at 601; *State ex. Rel. Comm'r of Transp. v. Eagle,* 63 S.W.3d 734 (Tenn. Ct. App. 2001).

The placement of objects in a grave or burial is not an act of abandonment, which might make the object subject to a property interest in the finder. As the court in *Charrier* observed, under the common law, "[t]he relinquishment of possession [of grave goods in a burial] normally serves some spiritual, moral, or religious purpose of the descendant/owner, but is not intended as a means of

relinquishing ownership to a stranger." *Charrier*, 496 So. 2d at 605. To apply the principles of abandonment to objects associated in a burial with human remains "would render a grave subject to despoliation either immediately after interment or definitely after removal of the descendants of the deceased from the neighborhood of the cemetery." *Id.*

In addition, some state statutes governing the disposition of Native American human remains expressly treat funerary objects associated with a burial in the same manner as they do the human remains themselves. For example, Tennessee law provides that "[a]ny Native American human remains or *any Native American burial objects* discovered in the course of an excavation, exhumation or accidentally . . . shall be properly reburied following scientific analysis . . . in accordance with procedures formulated by the advisory council which are appropriate to Native American traditions." Tenn. Code Ann. § 11–6–119 (2012) (emphasis added). Furthermore, we can find no existing rules or understandings that stem from state law sources to show that a right or interest in the finder to the funerary objects interred with a decedent is a constitutionally protected "property interest" under the Takings Clause, and we decline to create such an interest today.

Finding that the scope of the right or interest in controlling the disposition of human remains in a burial and the scope of the right or interest in controlling the disposition of objects placed in that burial to be identical, we conclude that a burial or grave is a unified *res*.[13] Some support for our finding can be found in a

13. We note that such a consideration is not unprecedented. For example, an analogy can be found in maritime/admiralty law, wherein shipwrecks as a whole—often consisting of both property and human remains—are generally treated as a legally unified *res*, which has the effect of preventing the severing of part of that property from the remainder. *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 499–500 (1998). This principle is applied even in situations in which parts of the *res* can be legally distinguished from other parts, as when a portion of a shipwreck consists of insured property and a portion consists of property that is uninsured. *See id.*; *see also Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011) (treating all property found on a sunken vessel belonging to a foreign sovereign as sovereign property).

federal statute. In the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. § 470bb(1), Congress stated that a grave which is at least 100 years old shall be considered an archaeological resource. Under ARPA, a grave means any portion or a piece of a grave. 16 U.S.C. § 470bb(1). Therefore, a grave that contains both human remains and funerary objects is *an* archaeological resource and not several disaggregated archaeological resources.

As Williamson clearly does not have any protected right or interest in the Native American human remains of the individual in the burial at Site II, he likewise does not have any constitutionally protected right or interest in the funerary objects associated with the burial, i.e., the two pottery vessels. Consequently, we hold that NAGPRA's vesting of right of control of the associated funerary objects removed from Williamson's land in the Chaco Nation would not result in a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution. Accordingly, we reverse the district court's judgment and remand for further proceedings consistent with our holding.

LEMONCELLI, *Circuit Judge, dissenting.*

I dissent. I believe that the district court applied the proper standard in determining that Harper Man is *not* Native American, as that phrase is defined in section 2(9) of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C § 3001(9). I also would find that the two vessels discovered by Williamson at Site II are private property belonging to Williamson; that vesting ownership or control of the vessels in the Chaco Nation would result in a taking of property without just compensation within the meaning of the Taking Clause of the Fifth Amendment; and that such an action falls outside the jurisdiction of NAGPRA. Thus, I would affirm the district court's grant of summary judgment.

A. The Remains of Harper Man Are "Native American" Only If They Bear Some Relationship to a Presently Existing, Indigenous Tribe, People, or Culture

The district court found that, based on a lack of evidence in the record to show that Harper Man bears some relationship to a presently existing, indigenous tribe, people, or culture, the remains of Harper Man are not Native American within the meaning of NAGPRA and NAGPRA does not apply to them. The majority now reverses that determination. I cannot agree.

In interpreting a statute, we start with the plain language of the provisions to be interpreted. *Alston v. Country Wide Financial Corp.*, 585 F.3d 753, 759 (3d Cir. 2009). Where no ambiguity in the language exists, it is not necessary to go further. *Toibb v. Radloff*, 501 U.S. 157, 162 (1991). It is axiomatic that, in construing a statute, courts generally give words not defined in the statute their ordinary and natural meaning. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994).

While NAGPRA defines the term "Native American," 25 U.S.C. § 3001(9), it does not define the phrase "that is indigenous" within that term. However, the text of the relevant statutory clause is written in the present ("of, or relating to, a tribe, people, or culture *that is indigenous*"). Congress's use of the present tense is significant when interpreting Congress's intentions. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 59 (1987). In the context of NAGPRA, I presume that Congress gave the phrase "is indigenous" its ordinary or natural meaning and that, by using the present tense, Congress referred to presently existing indigenous tribes, people, or cultures. Consequently, I would agree with the district court in this case and the Ninth Circuit in *Bonnichsen v. United States*, 367 F.3d 864, 878 (9th Cir. 2004), that human remains must bear some relationship to a *presently existing* indigenous tribe, people, or culture in order to be "Native American" under NAGPRA, that this requirement is unambiguous, and that, consequently, it is not necessary to go further in interpreting the plain language of the statute.

The majority finds that the interpretation of "Native American" propounded by the district court would produce an absurd result because the mere passage of time can transform Native American

human remains into non-Native American human remains. I disagree. The exact issue before this Court is not whether the human remains of Harper Man are Native American. Rather, at issue is the standard for determining whether human remains are Native American *for purposes of NAGPRA.*

Distinguishing between those human remains that bear some relationship to a presently existing indigenous tribe, people, or culture and those that do not doesn't produce an absurd result because such a distinction accords with NAGPRA's purposes. "As regards newly discovered human remains, NAGPRA was enacted with two main goals: to respect the burial traditions of modern-day American Indians and to protect the human dignity of the body after death." *Bonnichsen*, 367 F.3d at 876. Congress's purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them. *Id.* Moreover, the exhumation and study of ancient human remains that are unrelated to modern American Indians was not a target of Congress's aim, nor was it precluded by NAGPRA. *Id.*

The majority also finds that the district court's interpretation of "Native American" renders the term "culturally unidentifiable human remains," 25 U.S.C.

§ 3006(c)(5), a nullity because only remains with a relationship to a presently existing indigenous tribe would qualify as "Native American," so there could be no such thing as "culturally unidentifiable human remains." Again, I disagree.

Asking *whether* human remains are Native American requires only a general finding that remains have a "relationship to a presently existing indigenous 'tribe, people, or culture,' a relationship that goes beyond features common to all humanity." *Bonnichsen*, 367 F.3d at 877. As the magistrate judge in *Bonnichsen* stated, "It is clear from the full text of NAGPRA that the cultural relationship required to meet the definition of 'Native American' is less than that required to meet the definition of 'cultural affiliation.'" *Bonnichsen v. U. S. Dep't of the Army*, 217 F. Supp. 2d 1116, 1138 (D. Or. 2002). This is because the requirements for establishing "Native American" status under NAGPRA

> may be satisfied not only by showing a relationship to existing tribes or people, but also by showing a relationship to *a present-day 'culture'* that is indigenous to the United States. The culture that is indigenous to the 48 contiguous states is the American Indian culture, which was here long before the arrival of modern Europeans and continues today. *Id.* (emphasis added).

Asking *which* Indian tribe bears the closest relationship to Native American human remains, on the other hand, requires a more specific finding that the remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe. *Bonnichsen*, 367 F.3d at 877. The district court's interpretation of "Native American" preserves these two distinct inquiries and, thus, does not render the term "culturally unidentifiable human remains" a nullity.

The majority invokes the Indian canon of construction to support their interpretation of "Native American." I believe they misapply the canon in the instant case. Case law demonstrates that the Indian canon of construction is only applied where there is an ambiguity in the statute. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). The Indian canon of construction cannot be used to contradict an unambiguous statute. *Cherokee Nation of Okla. v. United States*, 73 Fed. Cl. 467, 478 (Fed. Cl. 2006). Moreover, the canon of construction regarding the resolution of ambiguities in favor of Indians does not permit reliance on ambiguities that do not exist. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986). As the majority has not found the term "Native American" to be ambiguous, it cannot rely on the Indian canon of construction to support its interpretation of that term.

Although I recognize that the interpretation of "Native American" propounded by the district court in this case and by the Ninth Circuit in *Bonnichsen* might be potentially painful to some, the court is not free to rewrite the statute that Congress enacted. *Dodd v. United States*, 545 U.S. 353, 359 (2005). "When a statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6

(2000)). As the disposition required by the text here is not absurd, it is for Congress, not this Court, to amend the statute if it believes the term "Native American" to be unduly restrictive. *See Dodd*, 545 U.S. at 359–60.

B. Vesting Ownership or Control in the Chaco Nation of the Associated Funerary Objects Would Result in a Taking of Private Property without Compensation

Reversing the district court's grant of summary judgment to Williamson, the majority holds that Williamson has no protected property right or interest in the two vessels found at Site II, and that physically taking the funerary objects from Williamson and transferring them to the Chaco Nation would not result in a taking of private property without compensation within the meaning of the Fifth Amendment. I disagree. I believe that, with respect to the associated funerary objects in question, the actions required under Section 3 of NAGPRA and the regulations promulgated thereto do not apply to the land Williamson owns in fee simple.

I agree with the majority that, in exercising exclusive (or "plenary") authority to enact statutes for the benefit of Indians, such as NAGPRA, Congress cannot exercise that power in such a way as to effect an uncompensated taking of private property. The legislative history of NAGPRA, though, does not explicitly indicate whether Congress believed that the vesting of the right of control of associated funerary objects removed from fee simple land within the exterior boundaries of an Indian reservation would result in a taking of property without compensation within the meaning of the Fifth Amendment of the U.S. Constitution.[14] I am

14. Interestingly, at least two courts have found that private land *entirely* falls outside the scope of section 3 of NAGPRA. *See Kawaiisu Tribe of Tejon v. Salazar*, No. 1:09–cv–01977, 2011 WL 489561 at *7 (E.D. Cal. Feb. 7, 2011); *Van Zandt v. Fish & Wildlife Serv.*, 524 F. Supp. 2d 239, 247, n.7 (W.D.N.Y. 2007) ("NAGPRA only protects Indian artifacts found on Federal or Indian tribal grounds not private property."). The issue of whether fee simple lands within the exterior boundaries of a reservation are "tribal land" is not before this Court. Rather, our review is limited to the application of Section 3 of NAGPRA and its implementing regulations to Williamson's fee-owned land with respect to the associated funerary objects in question.

convinced, though, that the Secretary of the Interior, who is responsible for promulgating regulations to carry out NAGPRA, 25 U.S.C. § 3011, has interpreted the law as not applying to fee simple land located within the exterior boundaries of a reservation with respect to associated funerary objects that, as is the case here, are not culturally affiliated with the "tribal land" tribe.

In 2010, the Secretary promulgated a final rule, codified at 43 C.F.R. § 10.11, concerning the disposition of culturally unidentifiable Native American human remains in holdings or collections of museums or Federal agencies. 75 Fed. Reg. 12,378 (Mar. 15, 2010). Under that rule, the disposition of Native American human remains determined to be "culturally unidentifiable" is to Indian tribes and Native Hawaiian organizations based on their past geographical affiliation to the remains, *i.e.*, the remains were removed either from land that, at the time of removal, was the tribal land of an Indian tribe or Native Hawaiian organization, or from land that was aboriginally occupied by an Indian tribe or tribes. *See* 43 C.F.R. § 10.11(c).

Regarding the funerary objects associated with such human remains, the Secretary provided that "mandatory disposition for this category of items raises right of possession *and takings issues* that are not clearly resolved in the statute or the legislative history, [and] the common law regarding associated funerary objects that are not culturally identifiable is not well established." *Id.* at 12,398 (emphasis added). Therefore, the Secretary did not consider it appropriate to make the provision to transfer such associated funerary objects mandatory. In essence, the Secretary believed first, that, at minimum, certain associated funerary objects are property for which a taking challenge may be maintained and, second, that vesting ownership in a non-culturally affiliated Indian tribe of associated funerary objects which are in the possession of another party, based solely on the tribe's past geographical affiliation to the land from which the associated funerary objects were removed, would raise takings issues.

I agree with the Secretary's interpretation of the law and would hold that, likewise, vesting ownership of the two associated funerary objects in the non-culturally affiliated Chaco Nation, based solely on the Chaco Nation's past geographical affiliation to the land from which the associated funerary objects were removed,

would result in a taking of property and, thus, that under the terms of the regulation promulgated by the Secretary of the Interior, 43 C.F.R. § 10.2(f)(2)(iv), the actions authorized or required under section 3 of NAGPRA and its implementing regulations do not apply to Williamson's land with respect to the two pottery vessels.

The majority's reliance on a unified *res* theory to avoid a taking of property without compensation is faulty. The rights or interests in the human remains and in the funerary objects in a burial are not identical in scope. Our common law tradition in the United States derives from the English common law. Under English common law, "a person who removed the corpse from the grave was guilty of a larceny of the *things buried with the corpse* but not [the corpse]." Hugh Y. Bernard, *The Law of Death and Disposal of the Dead* 16 (1979) (emphasis added). Thus, at common law, objects buried in a grave have been considered to be property. While states and even the federal government may enact laws requiring that a dead body and the objects placed with that body in a grave be considered a unified *res*, in the absence of such a law, we need look to the common law for guidance on determining the ownership of the associated funerary objects removed from Williamson's land.[15]

Under our common law tradition, as derived from the English common law, absent a true owner, property embedded in the soil, which (based on the analysis above) includes objects buried in a grave, belongs to the owner of the *locus in quo*. *In re Search and Seizure of Shivers*, 890 F. Supp. 613, 615 (E.D. Tex. 1995); *Chance v. Certain Artifacts Found & Salvaged from the Nashville*,

15. The majority's use of the Archaeological Resources Protection Act ("ARPA") to support a unified *res* theory would appear to me to be self-defeating. A grave that contains both human remains and funerary objects might be *an* archaeological resource under ARPA (16 U.S.C. § 470bb(1)), but only where the human remains and funerary objects are all at least 100 years of age. A headstone less than 100 years old placed atop a 100-year old or older grave is, for purposes of ARPA, disaggregated from the grave. Similarly, if 100-year old or older human remains previously exhumed are reinterred in a coffin or other container that is less than 100 years old, for purposes of ARPA the coffin is disaggregated from the grave. Thus, ARPA's definition of "archaeological resources" provides no support for a grave being a unified *res* under the law.

606 F. Supp. 801, 805 (S.D. Ga. 1984) ("[w]hen personalty is found embedded in land however, title to that personalty vests with the owner of the land"(citations omitted)). Or, to put it another way, "when the owner of the land where the property is found (whether on or embedded in the soil) has constructive possession of the property such that the property is not "lost," it belongs to the owner of the land." *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel,* 578 F.2d 1511, 1514 (11th Cir. 1985). In the instant case, the Chaco Nation is not the true owner of the two ceramic vessels embedded in Williamson's land, and there is no statute requiring that a dead body and the objects placed with that body in a grave be considered a unified *res*. Therefore, I would hold that, as between Williamson and the Chaco Nation, Williamson's right in this property is superior to that of the Chaco Nation, and that vesting ownership of this property in the Chaco Nation would result in a taking of Williamson's property.[16]

Where no lineal descendant can be ascertained for associated funerary objects removed from the Chaco Nation's reservation lands, Congress has confirmed the right of the Chaco Nation in these cultural items as the beneficial owner of the land. Were Congress to transfer the Chaco Nation's right in these cultural items removed from the Chaco Indian Reservation to Williamson, the result would be a taking of property without compensation within the meaning of the Fifth Amendment. In the same manner, I would confirm the right of Williamson in the cultural items in question as the owner of the land in fee simple from which they were removed and would conclude that transferring Williamson's right in the two vessels to the Chaco Nation would result in a taking of property without compensation within the meaning of the Fifth Amendment. For all the above reasons I dissent and would affirm the district court's grant of summary judgment.

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16. The majority mistakenly relies on *Charrier v. Bell*, 496 So. 2d 601 (La. Ct. App. 1986), for the proposition that the placement of objects in a grave will never make the objects subject to a property interest in the finder or landowner. In *Charrier*, a thief removed Native American objects from the land without the approval or permission of the landowner. The appellate court merely held that, as between the thief and the descendant tribe (or, in NAGPRA's terms, the "culturally affiliated" tribe), "grave goods" belong to the descendant tribe.