2005

Kennewick Man, Kinship, and the "Dying Race": The Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act

Allison M. Dussias
New England School of Law, adussias@nesl.edu

Follow this and additional works at: http://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: http://digitalcommons.unl.edu/nlr/vol84/iss1/3

This Article is brought to you for free and open access by the Law College at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Kennewick Man, Kinship, and the "Dying Race": The Ninth Circuit's Assimilationist Assault on the Native American Graves Protection and Repatriation Act

TABLE OF CONTENTS

I. Introduction ........................................... 56

II. Documenting the Dying Race: Imperial Anthropology Encounters Native Americans .......................... 61

III. Let My People Go: The Native American Graves Protection and Repatriation Act and its Application to the Ancient One ................................................................. 74

A. Understanding NAGPRA and its Key Goals ........ 74

B. Parsing the Statute—The Who, What, When, and Where of NAGPRA .................................. 77

1. Definitions and Coverage ............................ 77

2. Ownership and Control Priorities ............... 79

3. Post-NAGPRA Discoveries and Repatriation of Pre-NAGPRA Collections .......................... 84

C. The Discovery of the Ancient One and the DOI's NAGPRA Decision .................................. 87

1. The DOI's Native American Determination .... 88

2. The Cultural Affiliation Analysis .................. 94

a. Archaeological Data Report .................... 97

b. Traditional Historical and Ethnographic Information Report ........................................... 99

c. Linguistic Information Report .................... 102

d. Bio-Archaeological Information Report ........ 104

3. The DOI's Cultural Affiliation Conclusion .... 105

© Copyright held by the NEBRASKA LAW REVIEW.

* Professor of Law, New England School of Law. A.B. 1984, Georgetown University; J.D. 1987, University of Michigan. The author is grateful to Govind P. Sreenivasan for his thoughts on this Article and for his patience through many discussions of it.
IV. They Blinded Me with Science: Bonnichsen v. United States ........................................... 107
   A. The Empire Strikes Back: Imperial Anthropology Lays Claim to the Ancient One ............. 107
      1. The Plaintiffs' Claim—Science Battling Religion ........................................ 110
      2. The Tribal Claim—We Are Still Here .......... 116
   B. The Court of Appeals Opinion in Bonnichsen v. United States .................................... 126
      1. Setting the Stage ........................................ 130
      2. What's in a Name? .................................... 131
      3. Redefining "Native American" ..................... 133
      4. Rejecting Disinterested Experts' Opinions ...... 138
      5. Denying Cultural Affiliation ....................... 143
      6. The Panel's Conclusion .............................. 149
   C. The Aftermath and Impact of the Bonnichsen Decision ........................................ 150

V. Conclusion .............................................. 156

VI. Postscript ............................................. 161

These tough men had to rely so much on this quiet, gentle woman who could translate, who could find medicinal herbs, who could look for landmarks. . . . Americans today could probably use such a level-head guide. . . . We exist in uncertain times, times of change, times of danger. . . . Maybe our Native American culture will be needed again to help lost Americans survive when the television lights dim and the oil runs out. That is the Indian strength—we know how to survive.

- Randy'L He-dow Teton, Shoshone Bannock

I. INTRODUCTION

On October 20, 1805, Meriwether Lewis and William Clark took a break from their travels along the rapids of the Columbia River to satisfy their curiosity about the burial practices of the local people with whom they had been trading and socializing.2 Entering a sixty-foot-
long "Indian Vault" constructed of planks of wood and pieces of canoes, they found large numbers of piled bones, a circular arrangement of skulls on mats, and more recently deposited bodies wrapped in leather robes. The remains were accompanied by fishing nets, baskets, skins, horses' skeletons, and other funerary objects.3

Lewis and Clark's investigation of this burial site was but one instance of the many un-consented Euro-American entries into Native American graves that were to occur in the lands over which the United States claimed authority by virtue of the Louisiana Purchase. While Lewis and Clark apparently took nothing with them from the burial chamber that they had encountered, those who came after them usually lacked such scruples. Indeed, to the American anthropologists and other similarly minded social scientists whose profession was taking shape as the nineteenth century progressed, grave robbing was precisely the reason for the burial explorations in which they engaged. They were committed to "proving" the inferiority of Native Americans to Euro-Americans through physical comparisons, which required examination of Native American skeletal remains. They were convinced that the indigenous inhabitants of the continent, burdened by their innate inferiority compared to European-derived American civilization, could not long survive, and therefore were a "dying race." This belief precipitated a flurry of activity aimed at documenting Native Americans' presence through anthropology, ethnology, and similar fields while some of them still remained. Eventually, it was believed study of Native Americans would be within the purview of only those who studied extinct cultures.

That they were a doomed people would not have crossed the minds of the members of the Nez Perce Tribe who had welcomed Lewis and Clark and their "Corps of Discovery" to Nez Perce territory in the Fall of 1805. If the Nez Perces had speculated about anyone's chances of survival at that point, it would probably have been the survival odds of Lewis, Clark, and their party that occupied their thoughts. First of all, the Nez Perces would have known that the Corps of Discovery had had very little success in hunting in recent weeks, and that the fish, roots, and berries that they were able to purchase from the Nez Perces

3. See LEWIS AND CLARK, supra note 2, at 257–58.
saved the Corps from starvation.\(^4\) Also, the Corps had been forced to linger on Nez Perce land because many of its members were critically ill from dysentery and too weak to ride a horse or walk;\(^5\) they could hardly have inspired awe as the emissaries of a superior civilization. Indeed, at this point the very survival of the Corps and their mission rested in the hands of the Nez Perces. They could easily have overpowered the weakened party and seized the Corps's weapons, which at that time amounted to the biggest arsenal west of the Mississippi River. They did not. Nez Perce oral history reveals that when members of the tribe first encountered ill members of the Corps, they did consider killing them for their weapons. The party was spared through the intervention of Watkuweis ("Returned from a Far Country"), who had lived with white traders in Canada for several years following her capture by Blackfeet Tribe members.\(^6\) The Corps eventually recovered sufficiently to travel, guided along part of the way by Nez Perces, who at times even piloted the Corps's boats through rapids.\(^7\) Continuing along the Snake and Columbia River system, the party encountered Yakimas, Wanapams, and Walla Wallas, hospitable relatives of their Nez Perce guides.\(^8\) The amicable reception they received did not, however, deter Lewis and Clark from finding a moment to satisfy their curiosity about "the method those nativs [sic] practiced in depos[ite]ng [sic] the dead"\(^9\) by visiting the burial chamber on October 20.

A handful of days before their visit to the burial chamber, Lewis and Clark and their party would have passed near the site of another burial, one which was to lie undisturbed for the next one hundred and ninety-one years. On July 28, 1996, the human remains of the man dubbed "Kennewick Man" by the popular press were found by chance scattered a few meters offshore in Lake Wallula, a lake formed behind a dam on the Columbia River, near Kennewick, Washington. The discovery area is under the management authority of the Army Corps of Engineers, which determined that the remains were Native American and, pursuant to the Native American Graves Protection and Repatriation Act, returned them to the Confederated Tribes of the Colville Reservation (a tribe in Washington) for reburial.

\(^4\) See id. at 240–43; Ambrose, supra note 2, at 289, 294, 296.
\(^5\) See Lewis and Clark, supra note 2, at 241–43; Ambrose, supra note 2, at 294–96. Their illness, apparently brought on by an abrupt change in diet from eating only meat to consuming only roots, berries, and dried fish, caused "acute diarrhea and vomiting." Lewis and Clark, supra note 2, at 241; Ambrose, supra note 2, at 294.
\(^6\) See Ambrose, supra note 2, at 295.
\(^7\) See Lewis and Clark, supra note 2, at 249.
\(^8\) See Ambrose, supra note 2, at 298. These tribes spoke Shahaptian languages, like the Nez Perces the expedition had already encountered, and the expedition's Nez Perce guides could speak to them and vouch for the party. See id. at 298.
\(^9\) Lewis and Clark, supra note 2, at 257 (alteration in the original).
ation Act ("NAGPRA"),\textsuperscript{10} were required to be transferred to a group of area tribes, who had acknowledged the "Ancient One"\textsuperscript{11} as an ancestor. The tribal coalition included the Nez Perce Tribe, on which the Corps of Discovery had depended for survival almost two hundred years before. The tribes sought to repair the damage done by erosion along the river by returning the Ancient One to the place where members of his community had buried him thousands of years before.

This reburial might have been a routine matter under NAGPRA were it not for two factors. Portions of the remains were radiocarbon dated to be over 8,000 years old, and a misleadingly photographed and heavily publicized artistic reconstruction of the skull "did not look Native American" to at least some non-Native American readers of TIME magazine and similar popular publications. These factors sparked widespread interest in the remains, and also suggested to interested anthropologists that there might be a way to pry the remains out from under NAGPRA's protection. Those who demanded access argued that Kennewick Man, the name preferred by those who opposed the government's NAGPRA ownership determination, should not be recognized as Native American, and was therefore within NAGPRA's coverage. Rather than being recognized as an ancestor of contemporary tribal members, Kennewick Man was depicted as a genetic "dead end"—an early "American" who had left no biological descendants to rightfully lay claim to him and thus frustrate academics' demands for access. In other words, Kennewick Man was presented as an embodiment of the "dying race" theory of nineteenth century anthropologists; he had just been more obliging than the tribes studied by the anthropologists, who had continued to survive despite the predictions of their imminent extinction. In the late twentieth century, the contemporary members of tribes whose continued survival had proved the anthropologists wrong were threatening to disrupt access to the kind of "resource" that anthropologists had long claimed as their own. And the tool that the tribes had at their disposal was NAGPRA, which had


\textsuperscript{11} See Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004); Bonnichsen v. United States, 217 F. Supp. 2d 1116 (D. Or. 2002); Bonnichsen v. United States, 969 F. Supp. 628 (D. Or. 1997); Bonnichsen v. United States, 969 F. Supp. 614 (D. Or. 1997). These cases represent the \textit{Bonnichsen} litigation. This article refers to the individual whose remains are at issue in the \textit{Bonnichsen} litigation as the Ancient One, in keeping with the respect for the tribal perspective that is reflected in NAGPRA. The physical remains themselves are also referred to as the "Kennewick remains," in recognition of the proximity of the burial site to Kennewick, Washington. The past and present members of the tribes residing in the area known today as the United States are referred to in this article as "Native Americans," in keeping with the use of that term in the title of the statute under consideration herein.
already been responsible for the repatriation of other Native American remains from museum collections.

The result was the Bonnichsen litigation, which pitted a group of anthropologists, who claimed what they termed a "right" to have access to and to re-analyze the Kennewick remains, against the federal government and the tribal coalition. Following the review of results of dozens of scientific tests and hundreds of pages of documents prepared by qualified experts, the Department of the Interior ("DOI") concluded that NAGPRA considered such remains to be Native American and required their return to the tribal coalition. The disappointed anthropologists continued to demand access through litigation. The Oregon district court and Ninth Circuit Court of Appeals ultimately sided with the plaintiffs, concluding that not only were the tribal claimants not entitled to control of the remains, but that the remains were not even Native American, and were therefore not protected by NAGPRA. This result was achieved by grafting a new requirement onto the statutory "Native American" definition, contrary to the text of the statute, the history behind its enactment, and underlying congressional intent.

This Article examines the Bonnichsen case and the Ninth Circuit's controversial and fundamentally flawed rewriting of NAGPRA, in light of the history of Native Americans' encounters with anthropologists and of the goals that NAGPRA was intended to achieve. The focus is on what the Bonnichsen decision reveals about the court's understanding of and attitudes toward Native Americans and Native American claims on the one hand, and anthropologists' claims on the other, and on how this understanding echoes the nineteenth century depiction of Native Americans as a dying race without valid claims to the human remains that seemed, as a matter of common decency and basic human rights, to belong to them. This understanding is also tied to the court's views on whose knowledge and what kinds of knowledge are worthy of judicial respect. In addition, the Bonnichsen opinion echoes nineteenth century assimilation advocates' efforts to suppress Native Americans' "backward" notions of kinship and to replace them with a focus on the nuclear family, bound together by close biological ties, as the unit on which a civilized society is built. The court's underlying perspective and its decision suggest the same kind of failure to understand and respect Native American perspectives and rights that has long plagued relations between tribes and the dominant society in general, and between tribes and anthropologists in particular.

Part II discusses the history of anthropologists' activities involving Native Americans and the remains of their deceased kin, revealing the longstanding practices that NAGPRA was enacted to redress. This historical background provides the context in which NAGPRA must be understood and interpreted, and in light of which decisions under the
statute should be made. Moreover, while contemporary anthropologists may claim that this history should be forgotten because it reflects attitudes that they believe their profession has repudiated, for tribal members who continue to be subjected to anthropologists' claims to the remains of their ancestors, this past is still very much a part of the present. Part III examines NAGPRA itself and the key determinations that need to be made when the statute is applied to human remains. Part III also discusses the DOI's application of the statute to the Kennewick remains. Part IV examines the views of the plaintiffs and the defendants in the Bonnichsen case and critiques the Ninth Circuit's 2004 decision in favor of the plaintiffs. A careful analysis of the court's language reveals much about the underlying attitudes and sympathies that shaped the outcome. This analysis also demonstrates how the court's approach to the case and the case's outcome both reflect continuing rejection and subordination of the Native American perspective that Congress, in enacting NAGPRA, established as being entitled to respect, and thus perpetuate the assimilationist attitude that for so long characterized government policy toward Native Americans. The Conclusion offers some final thoughts on the Bonnichsen decision and the future treatment of Native American remains, and on the continuing survival of the "dying race," against seemingly great odds.

II. DOCUMENTING THE DYING RACE: IMPERIAL ANTHROPOLOGY ENCOUNTERS NATIVE AMERICANS

The fundamental thesis of the anthropologist is that people are objects for observation, people are then considered objects for experimentation, for manipulation, and eventual extinction. The anthropologist thus furnishes the justification for treating Indian people like so many chessmen available for anyone to play with. 12

NAGPRA was enacted in 1990, after a lengthy quest by Native Americans to obtain legal protection against grave desecration and the theft of objects of religious and cultural significance, and to recover possession of human remains and objects that had been improperly taken in the past. Senator Daniel Inouye, one of the statute's sponsors, highlighted how much was at stake in obtaining the passage of NAGPRA by identifying the statute as human rights and civil rights legislation, and Senator John McCain described it as establishing "a process that provides the dignity and respect that our Nation's first citizens deserve." 13 Indeed, NAGPRA may be understood as a

---

final legal recognition of the very humanity of Native Americans. In other words, NAGPRA embodies a recognition that the remains of Native Americans are human remains, and that they are therefore equally entitled to the respectful treatment that the law already afforded to the remains of Euro-Americans. Native American human remains—or at least those excavated on federal and tribal lands or already housed in the collections of federally funded institutions—were no longer to be treated as mere objects to be made freely available to satisfy the curiosity of academics or the public at large.

At the time that NAGPRA was enacted, all fifty states, as well as the District of Columbia, had statutes that regulated cemeteries and sought to protect graves from vandalism and desecration.14 Grave robbers and those who mutilated the dead could be subjected to criminal penalties. Most states guaranteed that all persons, including the indigent, prisoners, and unidentified persons, were entitled to a decent burial, and disinterment of the dead was permissible only in very limited circumstances.15 In short, existing state law reflected a deep respect for the remains of deceased human beings, and a conviction that human remains should be properly buried and thereafter left undisturbed.

These legal protections had not, however, prevented the remains of many thousands of deceased Native Americans—perhaps as many as two million16—from being wrenched from their resting places and taken away by government agencies, museums, educational institutions, and operators of tourist attractions. The remains were obtained by a wide variety of people—soldiers, other government employees, private collectors, museum collectors, and academics—acting from a variety of motivations, including profit-seeking, entertainment, and scientific curiosity.17 To these collectors, the remains of deceased Na-


15. See Trope & Echo-Hawk, supra note 14, at 39.

16. See id. (noting that estimates of the deceased Native Americans whose remains had been taken ranged from 100,000 to 2,000,000). Native American burial sites continue to suffer from inadequate legal protection and thus the risk of remains being taken from their graves continues to be a serious concern. See generally Amato, supra note 14. According to one source, "[t]he sale of artifacts plundered from Native American burial sites . . . has been estimated as a billion dollar per year business." See id. at 2 n.2.

17. See Trope & Echo-Hawk, supra note 14, at 40.
ative Americans were not worthy of the respect given to the remains of deceased Euro-Americans. This attitude allowed the collectors to treat the remains in a way that undoubtedly would have appalled them if it had been applied to the remains of their own family and friends. This point is made forcefully at the beginning of Tony Hillerman’s 1989 mystery novel Talking God, in which a Smithsonian Institution conservator receives a box filled with the recently unearthed bones of her grandparents, which had been sent to her to protest the museum’s failure to repatriate Native American remains.\(^{18}\)

This cavalier attitude toward Native American remains arrived with the earliest settlers. In an incident that is left out of the standard grade school depiction of Pilgrim–Native American relations leading up to the first Thanksgiving celebration, the first Pilgrim exploring party returned to the Mayflower with not only corn taken from Native American storage pits, but also with some of “the prettiest things” that they had uncovered, along with a corpse, in a Native American grave.\(^{19}\)

Native American burials also excited the curiosity of prominent Americans like Thomas Jefferson. Jefferson thoroughly excavated a Native American burial mound near Monticello, Virginia,\(^{20}\) uncovering tiers of burials, “separated by layers of gravel and stone,”\(^{21}\) in which rested the remains of about 1,000 men, women, and children.\(^{22}\) He concluded that the burials had been made by the ancestors of present day Native Americans.\(^{23}\) He knew that a group of tribal members had visited the burial mound only about thirty years before his excavation, but their interest in these graves did not prompt him to seek permission from possible descendants of those buried there before beginning his excavations.\(^{24}\) The participation of someone of Jefferson’s stature in Native American grave desecration gave an imprimatur of respectability to the practice.\(^{25}\) Jefferson’s excavation of the Virginia grave provides an early example of the involvement of federal government officials in the desecration of Native American burial sites and of the willingness of prominent Americans who gener-


\(^{19}\) See Trope & Echo-Hawk, supra note 14, at 40 (quoting Dwight B. Heath, Mourt’s Relation: A Journal of the Pilgrims at Plymouth 27–28 (1986) (“We brought sundry of the prettiest things away with us, and covered up the corpse again.”)).

\(^{20}\) James Riding In, Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians, 24 Ariz. St. L.J. 11, 15 (1992). This article’s title inspired the title of Part II of this Article.


\(^{22}\) See Riding In, supra note 20, at 16.

\(^{23}\) See Adovasio & Page, supra note 21, at 15.

\(^{24}\) See Riding In, supra note 20, at 16.

\(^{25}\) See id. at 17.
ally have been regarded as enlightened thinkers to set aside their usual sensibilities where Native American remains are concerned. Moreover, Jefferson's actions were at odds with his stated beliefs about Native Americans: "I believe," he wrote in 1785, "the Indian to be in body and mind equal to the whiteman."26 Although he professed a belief in Native American equality, he did not see the need for equal treatment where burials were concerned. In keeping with his interest in Native Americans, when Jefferson sent Lewis and Clark on their expedition to explore the land covered by the Louisiana Purchase, he instructed them to take note of the traditions and customs of the natives they encountered, an instruction that Lewis' medical adviser, Dr. Benjamin Rush, elaborated on in a detailed questionnaire covering (among other matters) tribal burial practices.27 Perhaps, then, Lewis and Clark were just following instructions when they entered a Native American burial chamber in the Pacific Northwest in October of 1805.28

More extensive and systematic collection of Native American remains geared up in the nineteenth century, spurred by the popularization of craniology, the study of brain size and skull shape, by Samuel G. Morton. Morton, a physician who was a seminal figure in the development of American physical anthropology, collected large numbers of Native American skulls, to support his argument that measurements of the skulls of Native Americans proved that they were racially inferior.29 Morton believed that cranial measurements could be used for race classification and for measuring mental capability and a race's level of development.30 This belief was related to the

---

26. See AMBROSE, supra note 2, at 55.
28. See supra notes 1–2 and accompanying text. Lewis and Clark thus launched the role of the government in claiming dominion over Indian remains in service of the imperialist ambitions of the emerging fields of archaeology and anthropology, in addition to "open[ing] the road to the domination of Indian tribes and to bringing them and their lands into the American empire." Robert J. Miller, Agents of Empire: Another Look at the Lewis and Clark Expedition, 64 OR. ST. B. BULL. 35 (Feb.–Mar. 2004).
29. See ROBERT E. BIEDER, SCIENCE ENCOUNTERS THE INDIAN, 1820–1880, at 63–64 (1986). Physical anthropology, according to the American Association of Physical Anthropologists, is "a biological science that deals with the adaptations, variability, and evolution of human beings and their living and fossil relatives. Because it studies human biology in the context of human culture and behavior, physical anthropology is also a social science." American Association of Physical Anthropologists (Dec. 6, 2004), available at http://www.physanth.org. Physical anthropology is also referred to as biological anthropology.
30. See BIEDER, supra note 29, at 64, 70.
theory of polygenesis, or "multiple creations," which held that since
the creation of the world there had existed certain varieties of
humans—in effect, separate species—with certain inalienable traits
(including skull forms), that rendered them superior or inferior to
other types of mankind.31

Morton was able to enlist the support of physicians in the western
United States, both those in civilian and in military practice, by hav-
ing them send to him Native American crania, and as a result of the
enthusiastic support that he received Morton was able to build the
largest collection of crania in the United States.32 Morton and his
allies were aware of but indifferent to Native American opposition to the
robbing of their graves, an attitude made abundantly clear in a letter
from a field collector to Morton:

It is rather a perilous business to procure Indians' skulls in this country—

——_The natives are so jealous of you that they watch you very closely
while you are wandering near their mausoleums & instant & sanguinary ven-
geance would fall upon the luckless ————_ who would presume to in-
terfere with the sacred relics . . . . There is an epidemic raging among
them which carries them off so fast that the cemeteries will soon lack watchers—

——_I don't rejoice in the prospects of death of the poor creatures cer-
tainly, but then you know it will be very convenient for my purposes.33

Morton concluded, after manipulating the data gathered from his
examinations of plundered skulls,34 that Native American crania were
smaller in volume than those of other groups.35 Because he believed
incorrectly that cranial volume directly indicated intelligence,36 he
opined that Native Americans were less intelligent than members of
groups with larger cranial volumes.37 Moreover, he argued that Na-
tive Americans' alleged mental capacity showed them to be at a "low
state of development" that condemned them to "savagery,"38 made
them unable to become part of the civilization with which they had

31. See Brian W. Dippie, The Vanishing American: White Attitudes and U.S. In-
dian Policy 82 (1982). For additional discussion of polygenesis and the com-
peting theory, monogenesis, see Bieder, supra note 29, at 89–91, 99–100.
32. See Bieder, supra note 29, at 64. In addition to army doctors, regular soldiers in
the West and participants in western military expeditions also desecrated graves
and sent Native American crania to interested individuals, including Morton.
See Riding In, supra note 20, at 19.
33. Letter from John Townsend to Samuel G. Morton (Sept. 20, 1835), in Bieder,
supra note 29, at 66.
34. See Bieder, supra note 29, at 69 n.28 (citing Stephen J. Gould, Morton's Ranking
of Races by Cranial Capacity: Unconscious Manipulation of Data May be a Sci-
fific Norm, Science, May 5, 1978, at 503–09) (discussing Stephen J. Gould's ex-
planation of how Morton manipulated his data to reach his conclusion).
35. See id. at 69.
36. See id. at 73 (noting that this view was erroneous).
37. See id. at 69–70.
38. See id. at 70.
been in contact for over two hundred years, and doomed them to ultimate extinction. Morton believed that God had "retarded [the] dark races" and accordingly given the white race a superior position, not only in the United States but around the world:

Was it not for this same mental superiority, these happy climes which we now inhabit would yet be possessed by the wild and untutored Indian, and that soil which now rejoices the hearts of millions of freemen, would be yet overrun by lawless tribes of contending Barbarians. Thus it is that the white race has been able to plant and sustain its colonies in every region of the habitable earth.

Morton's work was widely viewed as giving scientific validity to white claims of racial superiority, and government policymakers saw Morton's findings as supporting the relocation of the tribes and the taking of the land of this dying race. Relocating Native Americans to lands west of the Mississippi got them out of the way of settlement while Euro-Americans waited for "nature to take its course." Like the Puritans who had viewed the diminution in the New England native population as a sign of God's favoring of their endeavors, nine-

---

39. See id. at 70, 73. These sentiments were made clear in a speech that Morton made before the Boston Society of Natural History in which he offered the following analysis of Native Americans:

Their minds seize with avidity on simple truths, while they reject whatever requires investigation or analysis. Their proximity for more than two centuries to European communities, has scarcely effected an appreciable change in the manner of life; and as to their social condition, they are probably in most respects the same as at the primitive epoch of their existence.

Id. at 85 (quoting Samuel G. Morton, An Inquiry into the Distinctive Characteristics of the Aboriginal Race of America 13–14 (1842)).

40. See Bieder, supra note 29, at 85–86. Morton scoffed at those who "influenced more, perhaps by feeling more than reflection, are unwilling to admit these differences among the several races of men" and who refused to accept Indians' "inaptitude" for civilization. See id. at 86 (quoting Samuel G. Morton, Brief Remarks on the Diversity of the Human Species, and on Some Kindred Subjects 6 (1842) [hereinafter Morton, Brief Remarks]); id. at 76 (quoting Samuel G. Morton, Crania Americana: or a Comparative View of the Skulls of Various Aboriginal Nations of North and South America, 38 Am. J. Sci. & Arts 341–75 (1840)) ("However much the benevolent mind may regret the inaptitude of the Indian for civilization, the affirmative of this question seems to be established beyond a doubt. His moral and physical nature are alike adapted to his position among the races of men, and it is as reasonable to expect the one to be changed as the other. The structure of his mind appears to be different from that of the white man, nor can the two harmonise in their social relations except on the most limited scale.").

41. Id. at 86 (quoting Morton, Brief Remarks, supra note 40, at 21–22).

42. See id. at 80; Trope & Echo-Hawk, supra note 14, at 40.

43. See Bieder, supra note 29, at 99.

teenth century Americans could take comfort in Morton’s findings by reading them as evidence that the expected extinction of the Native American population was part of a divine plan rather than a result of their own actions.\textsuperscript{45} In this instance, science (or at least what passed as science at the time) and religion went hand in hand to support the seizure of tribal lands, including lands on which tribes’ deceased ancestors had been at rest for generations.

In addition to promoting policies aimed at taking possession of tribal lands in the East and relocating tribes to lands west of the Mississippi on the basis of views supported by Morton’s work, the federal government also sought to promote the work of Morton and his colleagues by making the collecting of Native American crania part of government policy. In 1868, the Surgeon General of the Army issued an order that directed army personnel, who had already been collecting skulls on a less formal basis for Morton and others since the early 1800’s,\textsuperscript{46} to obtain Native American skulls and other body parts for the Army Medical Museum\textsuperscript{47} for the purpose of aiding “the progress of anthropological science by obtaining measurements of a large number of skulls of the aboriginal races of North America.”\textsuperscript{48} The response to the order was so enthusiastic that over 4,000 heads were collected pursuant to the order in the following decades.\textsuperscript{49} These skulls eventually became part of the Smithsonian Institution’s collection of about 18,500 bodies.\textsuperscript{50} While some skulls were taken from fresh graves, burial scaffolds, and burial grounds, in other cases, skulls were taken by decapitating Native Americans who had never been buried, such as those who were killed on battlefields or in massacres or who died in POW camps or army hospitals.\textsuperscript{51}

Anthropologists and ethnologists were not the only academics who were interested in collecting Native American crania; researchers

\textsuperscript{45} See Bieder, supra note 29, at 98. In contrast to Morton’s theory, some Christians espoused monogenesis, believing that all human beings were created together as part of the same species, and argued that it was therefore possible to “save” Indians from extinction through “education and Christianity.” See, e.g., id. at 91.

\textsuperscript{46} See supra note 32 and accompanying text.

\textsuperscript{47} See Trope & Echo-Hawk, supra note 14, at 40.

\textsuperscript{48} Riding In, supra note 20, at 19 (quoting Memorandum from C.H. Crane, Assistant Surgeon General, United States Army, to Medical Officers (Sept. 1, 1868)).

\textsuperscript{49} See Trope & Echo-Hawk, supra note 14, at 40.

\textsuperscript{50} See Riding In, supra note 20, at 23; see also 80 U.S.C. § 80(q)(6)–(7) (2000) (congressional finding, in the National Museum of the American Indian Act, that approximately 4,000 Native American remains were gathered from battlefields and burial sites pursuant to the order of the Surgeon General of the Army and eventually transferred from the Army Medical Museum to the Smithsonian Institution, and that the Smithsonian had acquired approximately 14,000 additional remains through archaeological excavations and individual and museum donations).

\textsuperscript{51} See Trope & Echo-Hawk, supra note 14, at 40–41; Riding In, supra note 20, at 19–20.
from other fields also collected skulls as opportunities arose. For example, Edward Drinker Cope, a prominent nineteenth century American paleontologist, was not above desecrating Native American burials during his dinosaur fossil-hunting expeditions on tribal lands. His description of one incident provides insight into the attitudes of collectors like Cope toward the remains of Native Americans:

[A] day or so ago I gathered a number of skulls and skeletons of Sioux with a bag of tools buried with a chief, and brought them to the boat [on the Missouri River] and boxed them. The uproar it created among the poor white element that run the lesser offices scared the captain so that he ordered them all taken back to the place where I obtained them. He . . . said that I had “immolated the graves of the dead.” . . . [The bones had to go. But I have a little bill of $120 for the bones . . . . It is not a nice job, taking dirty skulls from skeletons not carefully prepared, and it is done at some risk to life. So I am indignant . . . .]52

Cope’s description of this incident highlights not only his vision of Native American graves and remains as ripe for the picking and not entitled to the respectful treatment afforded Euro-American burials, but also the elitist undertones of his attitude. The “poor white element” for whom Cope expressed such contempt apparently recognized the humanity of the recently disinterred remains that he sought to bring on the boat and were appalled by the desecration of their resting place. They were unable to share in the dehumanization and objectification of Native American remains that was part and parcel of the work of Cope and his colleagues.

For many other Americans, however, the collecting of Native American skulls in the name of science legitimized the desecration of tribal burial sites and the mutilation of Native American remains, and led them to envision deceased Native Americans as objects of curiosity to be collected by those whose careers so required.53 This spawned a tradition of grave- looting and collecting of remains and burial offerings by amateurs, often referred to as “pothunters,” which continues to this day.54 In addition to these amateur collection efforts, universi-

---


53. See, e.g., Julie Cart, Feds Fight Back Against Looters; Market Hot for Indian Artifacts, Denver Post, May 25, 2001, at A34. One long-term “pothunter” was Earl K. Shumway, who claimed to have “been digging artifacts from public lands ever since he was a child” and to have “looted sites thousands of times.” He was convicted of violating the Archaeological Resources Protection Act. See Joe Costanzo, Appeals Court Orders Resentencing of Artifact Hunter, Deseret News, May 7, 1997, at B04. For a discussion of the difficulty of monitoring archaeologi-
ties and state historical societies sent out collecting parties of archaeologists to survey and excavate Native American ruins and burial sites, and took away “thousands of human remains [and] innumerable burial objects” to build their collections. The development of university classes and degree programs in archaeology meant that increasing numbers of would-be collectors were sent out for the express purpose of desecrating Native American graves and collecting Native American remains, all in the name of science and without any concern that such a practice was immoral or unethical.

Systematic desecration of Native American graves by archaeologists, anthropologists, and others, oblivious to the objections of Native Americans, continued unabated into the twentieth century. Moreover, as was the case with Samuel Morton, recognized leaders in these fields were particularly active and unapologetic collectors. Franz Boas, considered to be the father of cultural anthropology, complained that stealing bones from graves is unpleasant work, but concluded that he had to be philosophical about it: “[W]hat is the use, someone has to do it.” While visiting British Columbia in the 1880s, Boas professed friendship for the Native Canadians he met and an interest in their oral traditions, while secretly stealing corpses, which he hoped to sell for profit.

Some of the most chilling incidents involving the taking of Native American bodies from burial sites were generated by the activities of the Smithsonian Institution’s own Ales Hrdlicka, as he was building his reputation as the “patriarch” of American physical anthropology. Hrdlicka spent forty years at the Smithsonian, during which time he served as Curator of the Division of Physical Anthropology, founded the American Journal of Physical Anthropology, and amassed the world’s most complete collection of human bones. He collected Na-

55. See Riding In, supra note 20, at 21.
56. Id. at 21–22.
57. See id. at 22 (quoting THE ETHNOGRAPHY OF FRANZ BOAS 88 (Ronald P. Rohner ed., 1969)).
58. See id.
60. See Minnesota State University, Mankato, Ales Hrdlicka, 1869–1943, available at http://www.mnsu.edu/emuseum/information/biography/tghij/hrdlicka_ales.html (last visited Aug. 5, 2005); see also ADOVASIO & PAGE, supra note 21, at 95–97 (discussing Hrdlicka’s background and career).
tive Alaskans’ remains during the 1920s and 1930s, in pursuit of evidence, which he believed could be derived from human crania’s physical characteristics, to support his personal theory as to the arrival of humans in the Americas. He was almost exclusively interested in collecting crania, and was “generally unconcerned with the archaeological history of the places he excavated.” Hrdlicka’s determination to collect remains was so great that in one of his projects alone, the Larsen Bay project on Kodiak Island, he collected the remains of about 1,000 individuals.

Hrdlicka excavated not only old burial sites, but also carried off recently buried bodies, such as those of the victims of a 1918 influenza epidemic, without permission and despite community opposition. While plundering one grave, for example, he noticed “an old woman who appeared to be provoked at something and was talking rather loudly,” and learned that “the old woman claimed the bones to be those of her long departed husband.” This kind of encounter simply prompted Hrdlicka to better conceal his activities, as his description of a 1926 Yukon River excavation demonstrates:

Some of the burials are quite recent. Open three older ones. In two the remains are too fresh yet, but secure a good female skeleton, which I pack in a practically new heavy pail, thrown out probably on the occasion of the last funeral. Then back, farther out, to avoid notice, through swamps and over moss . . . .

His concealment efforts were not always successful, as he noted in recounting another 1926 excavation. He had tried to hide bones that he had just dug up in his boat and to “strike off as far as possible from the shore so none could see what is carried,” but noticed that an “old In-

62. See Killion & Bray, supra note 59, at 3.
63. See id. at 4.
64. Id. at 6. The Larsen Bay remains, which the people of Larsen Bay sought to have repatriated from the Smithsonian’s Department of Anthropology beginning in 1987, “included 756 sets of skeletal remains, comprising an estimated 1,000 individuals, and 95 lots of associated funerary objects.” See id. at 5–6. The remains ranged in age “from one to several thousand years old.” Id. at 5. They were eventually returned to Kodiak Island and reburied, with Russian Orthodox rites, in 1991. Id. at 6. For the struggle for the repatriation of the remains, see generally RECKONING WITH THE DEAD, supra note 59.
65. See Pullar, supra note 61, at 21.
67. Pullar, supra note 61, at 21 (quoting Ales Hrdlicka, The Ancient and Modern Inhabitants of the Yukon, in SMITHSONIAN INSTITUTION, EXPLORATIONS AND FIELDWORK OF THE SMITHSONIAN INSTITUTION IN 1929, at 137, 139 (1930)).
68. Pullar, supra note 61, at 22 (quoting ALES HRDLICKA, ANTHROPOLOGICAL SURVEY IN ALASKA 76 (1930)).
Hrdlicka had no qualms about examining even the remains of individuals whom he had known in life. In 1897, he met and examined six Inuits whom Polar explorer and entrepreneur Robert Peary had just brought from Greenland to New York City, where they were initially housed in the American Museum of Natural History's basement. When four of them died within a two-month period in 1898, Hrdlicka was able to examine the corpse of one of them, a man named Qisuk, and to obtain the deceased man's brain for study. For men like Hrdlicka, “one brief but final breath separate[d] a human curiosity from a scientific specimen,” and whether alive or dead the Inuits did not receive the degree of respect to which Euro-Americans were entitled. Despite a state statute requiring that all dead human bodies “be decently buried within a reasonable period of time after death,” Qisuk's skeleton was exhibited in the museum, as his son Minik, who had accompanied Qisuk to New York City and had been eight years old when his father died, was horrified to learn ten years after his father's death. In short, museum officials refused to treat the body

69. Pullar, supra note 61, at 21-22 (quoting Ales Hrdlicka, Alaska Diary 1926-1931, at 56 (1943)).
71. See id. at 15-20 (describing the six Inuits), 21-23 (describing their arrival in New York City in 1897 and Peary's reasons for bringing them), 29 (noting they were first housed in the basement), 68 (describing Peary's lucrative trading activities). Peary was also comfortable with collecting the bodies of Inuit men, women, and children whom he had met, including ones "he knew by name." See id. at 22, 27, 69.
72. See id. at 91-92. The brain was the subject of an article that Hrdlicka published in 1901, entitled “An Eskimo Brain.” See id. at 92, 246 (citing Ales Hrdlicka, An Eskimo Brain, 3 Am. Anthropologist 454 (1901)).
73. Id. at 91.
74. See id. at 95. When an 11-year-old Inuit girl, who had been brought to New York City by a fur trader, died and the New York Tribune announced that her body would be preserved and donated to the Museum of Natural History “as a specimen of the race,” a letter to the editor “questioned the legitimacy” of this plan in light of the New York statute. See id. at 95 (citing New York Tribune, June 15, 1899, at 10; New York Tribune, June 14, 1899). The response from the scientific community was simply that the child’s body would be “an interesting study” and that they were free to do what they pleased with it. See id. at 95 (citing New York Tribune, June 17, 1899, at 16).
75. See id. at 96. A newspaper account at the time explained that the body would be dissected by students at Bellevue Hospital and then the skeleton would be mounted and preserved in the American Museum of Natural History. See id. at 85.
76. See id. at 83-85 (quoting Minik, the Esquimaux boy, World, Jan. 6, 1907, at 3), 96-97 (describing the conflicting accounts of Minik and his foster father, William Wallace, as to how Minik learned of the fate of Qisuk's body). Minik was shocked not only because of the disrespect that was shown by this display of his father's
of Qisuk, or of any of the other deceased Inuits, as that of a human being, whose fundamental dignity in death would be protected by the statutory burial requirement. If prominent anthropologists treated recently deceased Native Americans with so little dignity, then it is small wonder that it became accepted practice within the profession to treat the skeletal remains of earlier Native Americans, including those dating to antiquity, with little respect.

This, then, is the backdrop against which the Native American Graves Protection and Repatriation Act, commonly referred to as NAGPRA, was proposed and became law. From the earliest contacts between Native Americans and Euro–Americans, the bodies of deceased Native Americans were treated as mere objects to be used to satisfy Euro–American curiosity. In the name of science, they were denied the respectful treatment that the law, as well as basic human decency, required to be afforded to the physical remains of deceased human beings. Moreover, these practices were bound up with the belief that the racial inferiority of Native Americans condemned them to extinction. They were a dying race, anthropologists were convinced, and this view was shared by others, from government officials to would-be settlers. As a result, everything that belonged to Native Americans, from their land to the very bodies of their deceased family members, was available for taking.

NAGPRA was designed to put a stop to the theft of Native American remains and cultural objects on federal and tribal lands that was being carried out in the name of science, and to return remains and objects that had previously been taken to those to whom they rightfully belonged. NAGPRA’s fundamental task was, in effect, to elevate the remains of deceased Native Americans to the level of humanity, that they might no longer be subjected to the kind of treatment that American law generally permitted for only non-human remains. Moreover, NAGPRA represented an acknowledgment that the stories of the Native Americans’ imminent demise had been greatly exagger-

---

77. The bodies of all four of the Inuits were dissected and then added to the collection of the American Museum of Natural History, following maceration of the bones. See id. at 89–90 (describing the disposition of the bodies), 58–59 (describing the maceration process).

body, but also because museum scientists had staged a fake funeral, complete with a body-sized log draped with a cloth and mask, for Minik’s benefit at the time of Qisuk’s death, so Minik believed that Qisuk had been buried. See id. at 86–87. This was done, according to anthropologist Franz Boas, to keep Minik “from discovering that his father’s body had been chopped up and the bones placed in the collection of the institution.” Id. at 88 (quoting Prof. Boas Defends the Fake Funeral, THE EVENING MAIL, Apr. 24, 1909, at 4). Attempts by Minik and his foster father to recover Qisuk’s body were rebuffed by museum officials. See id. at 111–16. In 1993, the remains of Qisuk and the other four Inuits were at last returned to Greenland and buried. See id. at 227–28. Minik himself died in New Hampshire in 1918 and was buried there. See id. at 229.
ated. They were not a dying race. Rather, they had survived, as Native Americans, despite the ravages of war, disease, relocation, and forced assimilation efforts. Moreover, they had survived as tribes, despite efforts to destroy tribalism and tribes' political authority through various government policies, including outright termination. The choice of the term "repatriation" in NAGPRA is itself significant, as it literally refers to a return to a country of birth or citizenship; the same term can be used to refer to the return of living prisoners of war. Under NAGPRA, Native Americans were at last recognized, as individuals and collectively as tribes, as having the legal right to claim the human remains and cultural objects that, as history showed, Euro-American anthropologists and other collectors had so long regarded as their own. This history, which NAGPRA sought to repudiate, must be kept in mind when analyzing the opinion of the Ninth Circuit panel in Bonnichsen.

Finally, it is only in light of this history that contemporary tribes' views of the work, and of the intentions, of anthropologists, archaeologists, and other researchers can be understood. Today's anthropologists and archaeologists may well argue that the history of their professions' highhanded and racist treatment of indigenous peoples and their remains has no relevance today, and should not be held against contemporary practitioners in these fields. It is indeed true that these disciplines have made strides in seeking to gain some understanding of, and in demonstrating some respect for, Native American perspectives and rights with respect to human remains. Nevertheless, the fact remains that Native Americans continue to live with the legacy of this history, as they fight for repatriation of wrongly taken remains and cultural objects. And as they encounter contemporary claims like those of the Bonnichsen plaintiffs, from their perspective it may well appear that some fundamental aspects of the dealings between Native Americans and anthropologists and archaeologists have changed little since the eighteenth century. Members of these same professions still claim to be entitled to access to remains of human beings whom Native Americans regard as their kin, in order to handle and measure them, and still argue that Native Americans' perspectives and claims should be subordinated to their own. In short, Native Americans may not be able to discern that any profound change has occurred to distinguish today's anthropologists and archaeologists from their professional forbears. From the perspective of those who must continue to try to defend ancestral remains against the demands of "science," Lewis and Clark in the early nineteenth century, Morton later in the nineteenth century, Hrdlicka in the twentieth century, and the Bonnichsen plaintiffs of today can be seen as having much more in common than the plaintiffs are ever likely to appreciate and acknowledge.
III. LET MY PEOPLE GO: THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT AND ITS APPLICATION TO THE ANCIENT ONE

The initial viewing of the remains was shocking. The majority of these remains consisted of skulls stained with dried blood . . . . A long moment of silence—broken by sounds of crying—took place prior to the actual preparation of each human remain for burial. . . . [Though not an elder, I] was selected to handle the remains of a young female victim. . . . I hugged and kissed the remains of that young girl prior to placing her in the cedar box . . . . By late afternoon, the last cedar box was sealed. . . . Our people were finally coming home. After 100 years of unrest, they would be given back to the Mother Earth and allowed to complete their journey to the spirit world.78

A. Understanding NAGPRA and its Key Goals

NAGPRA was enacted in 1990 after the consideration of several related bills by both the House of Representatives and the Senate and following the conclusion of a process that involved extensive hearings, in which many pages of testimony were taken from Native Americans, museum officials, and other interested parties in the scientific community.79 Several key goals and characteristics of NAGPRA must be acknowledged in order to understand the statute and how it should be interpreted and implemented. The more judges, agency officials, and others lose sight of what NAGPRA was designed to respond to and to accomplish, the greater the risk of misinterpretations of the text of, and mistakes in implementation of, the statute.

First, NAGPRA represented a repudiation of the objectification of Native American remains and of the practice of treating Native American remains and cultural items as objects that were, in essence, available for plunder. It was also an attempt to repair some of the damage that had resulted from this practice, by requiring the return of remains and cultural items from federal and federally funded institutions to the appropriate Native American individual or tribe. NAGPRA therefore must be understood as remedial legislation, which must be construed broadly in order “to give full effect to its purpose.”80


79. For example, in the May 14, 1990 hearing on two Senate bills, S. 1021 and S. 1980, the Committee on Indian Affairs heard testimony “from several professional associations of archaeologists and anthropologists, representatives of several museums with Native American collections, private art dealers and tribal leaders.” S. Rep. No. 101-473, at 3 (1990).

Secondly, NAGPRA must be understood as the human rights legislation, and civil rights legislation, that those who contributed to its drafting and its supporters intended it to be. It was intended to provide Native Americans with the respectful, dignified treatment for their dead that was given as a matter of course to Euro-Americans, and with legal rights equal to those of Euro-Americans with respect to their dead.81 NAGPRA did not give special treatment to Native Americans, but rather endeavored to give them the equal treatment that had long been denied them.

Thirdly, NAGPRA is undeniably Native American, or, in other words, Indian, legislation. The Act's very title demonstrates this. The inclusion of the statute in Title 25 of the U.S. Code, entitled "Indians," indicates this common understanding. The Act also explicitly states that it "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations." It was enacted to protect Native American graves, and to require the repatriation of Native American human remains and other items, to Native Americans, in recognition of Native American rights. Unlike statutes like the Antiquities Act of 1906 and the Archaeological Resources Protection Act ("ARPA"), which establish procedures to allow access by researchers and are codified in Title 16, the "Conservation" section of

81. The Senate Report explained that the Panel for a National Dialogue on Museum/Native American Relations had found that "the process for determining the appropriate disposition and treatment of Native American human remains . . . should be governed by respect for Native human rights" and stated that "human remains must at all times be accorded dignity and respect." S. Rep. No. 101-473, at 2. Tribal witnesses testified that when they tried to reclaim human remains and other items that had been improperly alienated from their tribes, they met "resistance from museums." Id. at 3. Also, illegal excavation of graves on federal and tribal lands and looting of their contents continued. Id. at 4. Testimony was also given about instances in which Native American human remains and funeral objects were treated differently from how other human remains were treated by museums. Id. at 5. See Sherry Hutt & C. Timothy McKeown, Control of Cultural Property as Human Rights Law, 31 Ariz. St. L.J. 363, 366 (1999) (noting that until the late 1980s, unmarked graves and burials outside established cemeteries "of European religious institutions generally did not receive protection from state burial laws"); Christopher Smith, Attorney General's Office Incensed by 'Racist' Grave-Robbing Ruling; Anasazi Graves No Different, State to Argue, SALT LAKE TRIB., Aug. 31, 1997, at A1 (describing the Utah Attorney General's Office's incredulous reaction to a Utah judge's ruling that Utah's grave-robbing statute did not protect ancient Indian remains); see also Hutt & McKeown, supra, at 372 (explaining that the rights recognized in NAGPRA are consistent with existing rights that were already enjoyed by non-Native Americans and that "[w]hen a law confers no special benefit, but rather equalizes the legal landscape, it is recognized as civil rights legislation"); Rebecca Tsosie, Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values, 31 Ariz. St. L.J. 583, 641-42 (1999) (discussing the "equal protection argument" supporting the enactment of NAGPRA).

NAGPRA focuses on protecting Native American tribes and individuals against the past and present conduct of researchers and other collectors of human remains and cultural items. As Indian legislation, enacted in the context of the trust relationship described below, NAGPRA must be interpreted and applied in light of the canons of construction that the U.S. Supreme Court and lower courts have long utilized in Indian law decisions. Thus, NAGPRA is to be construed liberally in the Indians' favor, any ambiguities are to be resolved for their benefit, and the statute should be interpreted as Indians would understand it. These canons—the liberal construction, ambiguity, and Indian understanding canons—are of long standing and the Supreme Court and lower courts continue to rely upon them.

Fourthly, NAGPRA must be construed in light of the trust relationship between tribes and the federal government, and the federal responsibilities that it entails. It is to the trust relationship that NAGPRA refers when it speaks of the "unique relationship" between tribes and the federal government. In the past, the government has not fully honored this relationship where human remains and cultural objects were concerned. As Part II revealed, the government not only failed to protect tribal rights with respect to remains, funerary objects, and other items, but itself participated in actions that violated those rights, such as takings from tribal lands without consent. Indeed, the government amassed its own considerable collection of the kinds of items that NAGPRA acknowledged should be subject to tribal control. NAGPRA embodied a commitment by the government to recognize its protective responsibilities in this area and to try to undo at

---


84. For a brief discussion of these canons, which were developed in the context of construing Indian treaties, see Getches et al., supra note 44, at 129-31 (quoting Charles F. Wilkinson & John M. Volkman, Judicial Review of Indian Treaty Abrogation: "As Long as the Water Flows or Grass Grows Upon the Earth"—How Long a Time is that?, 63 CAL. L. REV. 601, 608-19 (1975)). The Supreme Court, for example, relied on the three canons in Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 194 n.5, 196, 200 (1999), and the liberal construction canon was applied to NAGPRA by a federal district court in Yankton Sioux Tribe v. United States Army Corps of Engineers, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000). See Flood, supra note 80, at 60, 73-74 (discussing the use of the canons in construing NAGPRA).

least some of the damage that had resulted from its past failure to carry them out.

Finally, it must be understood that the DOI was given the key administrative role with respect to the implementation of NAGPRA, as indicated by the statutory instruction to "promulgate regulations."\textsuperscript{86} This preeminent role for the DOI seems altogether fitting, given the key role that the DOI plays in Indian affairs and policy within the federal government. The Bureau of Indian Affairs is housed within the DOI, and the DOI thus has the most active role in carrying out the trust responsibility among the executive branch departments. Moreover, much of the federal land covered by NAGPRA on which Native American remains might be found is subject to the authority of the DOI and its sub-agencies, such as the National Park Service and the Bureau of Land Management. The DOI's special role in this area was recognized in the decision of the Army Corps of Engineers to transfer decision making authority as to the Kennewick remains to the DOI.\textsuperscript{87}

B. Parsing the Statute—The Who, What, When, and Where of NAGPRA

The Bonnichsen litigation has focused not only on the actions required, and actions prohibited, by NAGPRA, but also on the more fundamental question of whether the Act applies at all. Answering this question requires careful focus on the definitions included in NAGPRA. NAGPRA establishes ownership priorities and excavation permission requirements for "Native American cultural items" that are excavated or discovered on "Federal or tribal lands" after November 16, 1990.\textsuperscript{88} Thus, in order to be protected by these NAGPRA provisions, items discovered after the statute's effectiveness date must: (1) be found on land that is subject to the statute; (2) fall within the definition of "cultural items"; and (3) be "Native American."

1. Definitions and Coverage

NAGPRA protects covered items that are found on "Federal lands," defined to include any land (other than tribal land) that is controlled or owned by the United States,\textsuperscript{89} and tribal land,\textsuperscript{90} which includes all

\textsuperscript{86} 25 U.S.C. § 3011.
\textsuperscript{87} See infra note 147 and accompanying text.
\textsuperscript{88} 25 U.S.C. § 3002(a).
\textsuperscript{89} Id. § 3001(5). The NAGPRA regulations state that lands under federal control refers to "those lands not owned by the United States but in which the United States has a legal interest sufficient to permit it to apply these regulations without abrogating the otherwise existing legal rights of a person." 43 C.F.R. § 10.2(f)(1) (2004).
\textsuperscript{90} 25 U.S.C. § 3002(a) (referring to ownership or control of Native American cultural items that are excavated or discovered on federal or tribal lands).
lands within Indian reservation boundaries. The Ancient One's remains were discovered in an area that was under the management authority of the Army Corps of Engineers, and therefore were found on land subject to NAGPRA.

The term "cultural items" refers to human remains, along with funerary objects, sacred objects, and cultural patrimony. "Funerary objects" are objects that are believed to have been placed with human remains as part of a death rite or ceremony. "Sacred objects" are ceremonial objects that "are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents." NAGPRA thus requires that there be a link between sacred objects and contemporary Native Americans in order for them to be covered by the statute, while not stating that a similar link must be established for human remains or funerary objects. The House Report indicated that Congress was aware that certain ceremonies may not have been performed for some

91. Id. § 3001(15)(A). The term "tribal land" also includes "all dependent Indian communities . . . [and] any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3." Id. § 3001(15)(B)–(C); see also 18 U.S.C. § 1151 (2000) (including dependent Indian communities in the definition of "Indian country"). For a discussion of the means that are available to provide at least some protection for human remains and cultural resources that are found on privately owned land, see generally Constance M. Callahan, Warp and Weft: Weaving a Blanket of Protection for Cultural Resources Found on Private Property, 23 ENVTL. L. 1323 (1993).

92. See Bonnichsen v. United States, 969 F. Supp. 614, 618 n.2 (D. Or. 1997). NAGPRA provides that when a person "knows, or has reason to know" that he or she has discovered Native American human remains on federal lands, the discoverer must notify in writing the head of the department, agency, or other instrumentality with "primary management authority" with respect to the lands in question. 25 U.S.C. § 3002(d)(1).

93. 25 U.S.C. § 3001(3). The statute offers definitions for two kinds of funerary objects (namely, associated and unassociated funerary objects, which are distinguished on the basis of whether or not the remains with which the objects were placed are in the possession of a federal agency or museum), sacred objects, and cultural patrimony. See id. The statute itself does not define the term "human remains," presumably because it was considered to be largely self-explanatory, but the NAGPRA regulations do provide a definition: "Human remains means the physical remains of the body of a person of Native American ancestry." 43 C.F.R. § 10.2(d)(1). The regulation excepts from the definition "remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets" and provides that "human remains incorporated into a funerary object, sacred object, or object of cultural patrimony . . . must be considered as part of that item" for the purpose of making a "cultural affiliation" determination. 43 C.F.R. § 10.2(d)(1).

94. 25 U.S.C. § 3001(3)(A)–(B). Funerary objects are termed "associated funerary objects" if the human remains with which they were placed are held by a federal agency or museum. See id. § 3001(3)(A).

95. Id. § 3001(3)(C).
time because of government coercion, social upheaval, or unconsented loss of sacred objects, but this gap in ceremonial performance and usage was not to be a basis for refusing to return sacred objects to present day religious practitioners. Finally, "cultural patrimony" embraces objects with an "ongoing historical, traditional, or cultural importance to the Native American group or culture itself," which therefore "cannot be alienated by any individual."  

The Ancient One's remains unquestionably belong to a human being and they thus fit within the statutory definition of cultural items. The more contentious issue, as discussed below, turned out to be whether the remains would be considered "Native American" for purposes of NAGPRA—in other words, whether they were related to "a tribe, people, or culture that is indigenous to the United States." The term "indigenous" is not defined in either the statute or the regulations, and is not discussed in the House and Senate reports. As discussed below, on the basis of radiocarbon dating of bone samples (indicating a clearly pre-Columbian date), other information about, and analyses of, the remains, and sedimentary, lithic, and geomorphologic analyses, the DOI concluded that the Kennewick remains were "'Native American,' as defined by NAGPRA." This conclusion has been supported by the Society for American Archaeology ("SAA"), the leading professional society of archaeologists focusing on archaeology in the Americas. The courts in the *Bonnichsen* case, however, decided otherwise.

2. Ownership and Control Priorities  

In situations in which human remains (and other cultural items) are determined to be Native American and are excavated or discovered on federal lands, they are subject to the ownership and control priorities of section 3002 of NAGPRA. The first ownership priority

---

98. See infra subsection IV.B.3.  
102. See infra subsection IV.B.3.  
103. NAGPRA seems to intend the term "control," in the phrase "ownership and control," to refer to rights in human remains, while using both the terms "control"
belongs to "the lineal descendants of the Native American" whose remains are at issue. If lineal descendants cannot be identified, then the next priority for ownership is given to the Indian tribe on whose tribal land the remains were found, followed by the Indian tribe that has the closest cultural affiliation with the remains. NAGPRA defines "Indian tribe" to include only groups, including Alaska Native villages, that have been federally recognized. Finally, if the remains' cultural affiliation cannot be determined and the remains were discovered on federal land that is part of a tribe's aboriginal land, then ownership is in that tribe, unless it can be shown by a preponderance of the evidence that another tribe has a stronger cultural relationship with the remains and as a result is entitled to priority. The statute makes it clear that tribal views on whether or not to accept return of a covered item are to control by acknowledging that a tribal government could expressly relinquish ownership of human remains and other cultural items.

In applying the first priority, where ownership is given to the deceased Native American's lineal descendants, the NAGPRA regulations define "lineal descendant" as "an individual tracing his or her ancestry directly and without interruption by means of the traditional and "ownership" (as well as the related term "title") to refer to other cultural items. See 25 U.S.C. § 3002(e) ("control over any Native American human remains, or title to or control over any funerary object, or sacred object"). This approach is in accord with the common law principle that human remains are not subject to full scale ownership, but rather the next of kin of the deceased has a "quasi-property' interest" in the remains, which gives the "next of kin the right to determine the treatment and disposition of the remains." Tsosie, supra note 81, at 634 (quoting Travelers Ins. Co. v. Welch, 82 F.2d 799, 801 (5th Cir. 1936); Pettigrew v. Pettigrew, 56 A. 878, 880 (Pa. 1904)). For ease of reference, the term "ownership" alone is used in the following discussion.

105. Id. § 3002(a)(2)(A)–(B). "Indian tribe" is defined as "any tribe, band, nation, or other organized group or community of Indians . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Id. § 3001(7). These provisions also refer to Native Hawaiian organizations and recognize them as being entitled to the same priorities as tribes under section 3002. See id. § 3002(a)(2).
106. Id. § 3001(7) (any tribe "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians").
107. Id. § 3002(a)(2)(C). The aboriginal land priority refers to "Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe." Id.
108. See id. § 3002(e) ("Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object."). Similarly, ownership by a tribe on the basis of the cultural affiliation or aboriginal land priorities is dependent upon a tribe having stated a claim for the item at issue, after receiving notice. See id. § 3002(a)(2)(B)–(C).
kinship system of the appropriate Indian tribe . . . or by the common law system of descent to a known Native American individual whose remains . . . are being claimed.109 The "earlier person" whose remains are at issue must "be identified as an individual whose descendents can be traced."110 The present day claimant's lineal descent "must be established by a preponderance of the evidence."111 In the case of the Kennewick remains, the DOI determined that "given the very ancient date" of the remains there were no present day lineal descendants, without elaborating.112 Thus, even though the regulations dealing with this priority allow for traditional kinship systems to be utilized in establishing descendancy, this seeming openness to Native American understandings of kinship, which might include a more inclusive understanding of descendancy, did not affect the disposition of the Kennewick remains. The tribal claimants' attorneys—perhaps daunted by the requirement that ancestry be traced "directly and without interruption"—apparently focused on the cultural affiliation and aboriginal lands priorities as the basis for the tribes' legal claim, while also referring to the Ancient One as the tribes' ancestor.

The second ownership priority belongs to the tribe on whose tribal land the remains were discovered. NAGPRA defines "tribal land" to include land within reservation boundaries.113 In other words, it does not encompass all aboriginal land of a tribe, but rather its current reservation land, which may overlap with its aboriginal land or be located elsewhere. Because the Kennewick remains were not found on land that fits within this definition, but rather on federal land,114 no tribe was entitled to claim the remains on the basis of this second priority.115

NAGPRA's third priority is granted to the tribe with the "closest cultural affiliation" with the remains. NAGPRA defines cultural affil-

110. Id. § 10.14(b).
111. Id. § 10.14(f).
112. DOI Final Determination, supra note 100. A non-tribal claimant of Polynesian ancestry, Joseph Siofele, did make such a claim but his motion to intervene in the case was dismissed. See Siofele v. United States, 87 Fed. Appx. 654 (9th Cir. 2003); see also generally Notice of Motion and Motion of Joseph P. Siofele, AKA Paramount Chieftain Faumuina, to Intervene as Plaintiff as a Matter of Right, Siofele v. United States, 87 Fed. Appx. 654 (9th Cir. 2003) (No. 96-1481-JE), at http://www.saa.org/Repatriation/siofelemotion.pdf (last visited Aug. 5, 2005). An ancestry-based claim was also filed but later abandoned by a group called the Asatru Folk Assembly, which stated that it represented Asatru, "one of the major indigenous, pre-Christian, European religions." Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1122 n.10 (D. Or. 2002).
115. See DOI Final Determination, supra note 100, at 3 ("[A] claim brought for the custody of the Kennewick human remains based upon its excavation or removal from tribal lands . . . cannot be validated.").
iation as "a relationship of shared group identity which can be reasonably traced historically between a present day Indian tribe ... and an identifiable earlier group." The statutory language does not require that the contemporary tribe and the earlier group be identical in all respects; presumably there must be some degree of cultural similarity. By referring to the "closest cultural affiliation," the statute indicates that Congress contemplated that there might be more than one present day tribe sharing some degree of group identity with the earlier group, and concluded that priority should be given to whichever tribe had the closest cultural affiliation. Although the section establishing ownership priorities for newly discovered remains and other items does not discuss the process of determining cultural affiliation, the NAGPRA provision dealing with repatriation of items from existing collections, section 3005, indicates that a cultural affiliation determination is to be "based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." The statute does not present these sources of information in a hierarchical fashion as it did with the ownership and control priorities, which suggests that Congress saw them as having equal relevance and significance. The standard to be used in the cultural affiliation determination is a preponderance of the evidence, and therefore "scientific certainty"—a concept that does not seem to fit with social science fields like anthropology and archaeology anyway—is not required. A cultural affiliation finding is to be "based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being

117. Id. § 3005(a)(4). This provision deals specifically with the process by which a tribe can seek repatriation of human remains in the possession of a federal agency or museum where the "cultural affiliation" has not been established in a NAGPRA-required inventory or where the remains have not been included in an inventory. See id. The implementing regulations outline in greater detail the requirements for establishing a cultural affiliation between a present day tribe and an earlier group to which the individual whose remains were found belonged: (1) "Existence of an identifiable present-day Indian tribe"; (2) "Evidence of the existence of an identifiable earlier group," which may be supported by evidence of the earlier group's "identity and cultural characteristics," "distinct patterns of material culture manufacture and distribution methods," and "existence . . . as a biologically distinct population"; and (3) "Evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe . . . and the earlier group," which evidence establishes "that a present-day Indian tribe . . . has been identified from prehistoric or historic times to the present as descending from the earlier group." 43 C.F.R. § 10.14(c) (2004).
118. See 25 U.S.C. § 3005(a)(4); see also 43 C.F.R. § 10.2(e) ("Cultural affiliation is established when the preponderance of the evidence . . . reasonably leads to such a conclusion.").
claimed and should not be precluded solely because of some gaps in the record." 120 Again, scientific certainty is not required, and the decision maker is expected to evaluate the various kinds of available evidence and reach a reasonable conclusion, based on a preponderance of the evidence standard of proof. 121

In the case of the Ancient One, the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Indian Nation, the Nez Perce Tribe, and the Wanapum Band submitted a joint claim for the remains. 122 As discussed below, 123 the DOI ultimately concluded that these claimants had a valid claim to the remains on the basis of the cultural affiliation priority. 124

Finally, the fourth priority is based on aboriginal occupancy of the federal land on which the remains were discovered. The priority is tied to actions by the Indian Claims Commission or the Court of Claims that recognize certain areas as aboriginal lands of particular tribes. 125 In the case of the Kennewick remains, an Indian Claims Commission opinion and findings of fact had concluded that several tribes (including the Nez Perce Tribe and tribes from the Umatilla Reservation) had occupied the area where the remains were discovered, 126 although the district court ultimately decided to discount this finding for procedural reasons. 127

The drafters of NAGPRA contemplated that there could be some Native American remains that were not claimed under the section 3002 ownership priorities, such as remains for which a cultural affilia-

120. Id. § 10.14(d).
121. See id. § 10.14(f).
122. See DOI Final Determination, supra note 100, at 2–3 (listing the tribal joint claimants). The Confederated Tribes of the Colville Reservation include descendants of twelve aboriginal tribes, “commonly known by English and French names . . . the Colville, the Nespelem, the San Poil, the Lake, the Palus, the Wenatchi (Wenatchee), the Chelan, the Entiat, the Methow, the southern Okanogan, the Moses Columbia and the Nez Perce of Chief Joseph's Band.” See Confederated Tribes of the Colville Reservation, Facts & Information, at http://www.colville tribes.com/facts.htm (last visited Aug. 5, 2005). The Confederated Tribes of the Umatilla Reservation include the Cayuse, the Umatilla, and the Walla Walla Tribes. See Confederated Tribes of the Umatilla Indian Reservation, at http://www.umatilla.nsn.us (last visited Aug. 5, 2005). The Nez Perce (“pierced nose” in French), properly known as the Nimiipuu, were called the Chopunnish by Lewis and Clark. This name may be derived from “tsouopnit,” the Sahaptian word for piercing, although it is not clear whether the Nimiipuu's ancestors did in fact pierce their noses. See Mark Spence, Soyaapo and the Remaking of Lewis and Clark, 105 OR. HIST. Q., Fall 2004, at 482.
123. See infra subsection III.C.2.
124. See DOI Final Determination, supra note 100, at 5.
126. See DOI Final Determination, supra note 100, at 5.
127. See infra note 342.
tion had not been established to the satisfaction of the officials who were applying the priority provisions. NAGPRA provided that these apparently culturally unaffiliated remains, or otherwise unclaimed remains, are to be disposed of in accordance with regulations to be promulgated by the Secretary of the Interior in consultation with the Review Committee established by NAGPRA (on which Native American representation is required), along with tribes, museum representatives, and the scientific community. The Secretary has yet to promulgate these regulations, although the NAGPRA Review Committee has issued recommendations about them.

In summary, NAGPRA establishes four ownership priorities for human remains—lineal descendants, the tribe on whose land the remains were found, the tribe with the closest cultural affiliation, and the tribe on whose aboriginal land the remains were found (unless another tribe establishes a stronger cultural relationship). In addition, NAGPRA establishes the leading role of the Secretary of the Interior and the NAGPRA Review Committee in setting the guidelines for the disposition of unclaimed remains and other items that are protected by NAGPRA.

3. Post-NAGPRA Discoveries and Repatriation of Pre-NAGPRA Collections

NAGPRA also specifies what action is to be taken in connection with the application of the ownership priorities in two scenarios—intentional excavation and inadvertent discovery on federal or tribal lands. Intentional removal or excavation for "purposes of discovery, study, or removal" is permitted only if four criteria are met: (1) an ARPA permit that is consistent with NAGPRA has been obtained; (2) the appropriate tribe has been consulted or has given consent (in the case of activity on tribal lands); (3) it is agreed that the ownership of the remains will be determined in keeping with section 3002; and (4)

128. See 25 U.S.C. § 3002(b). The NAGPRA Review Committee, composed of seven members appointed by the Secretary from lists of nominees submitted by Native American groups and museum and scientific organizations, was established by the statute to monitor, and make recommendations with respect to, the implementation of the statute. See id. § 3006. Three members are appointed from among nominations "submitted by Indian tribes, Hawaiian organizations, and traditional Native American religions leaders with at least 2 of such persons being traditional Indian religious leaders;" three are appointed from nominations by "national museum organizations and scientific organizations;" and the final member is appointed from a list developed by and consented to by the other six members. Id. § 3006(b)(1).

129. See 43 C.F.R. § 10.7 (2004) ("Disposition of unclaimed human remains, funerary objects, sacred objects, or objects of cultural patrimony.").

proof of the required consultation or consent is shown. If an inadvertent discovery on federal or tribal lands occurs, the person making the discovery must give written notice to the relevant agency head (and to the appropriate tribe if the discovery occurs on tribal land), cease activity in the area, and make a “reasonable effort” to protect the discovered items. This provision is designed to ensure that Native Americans are informed of discoveries and are given an opportunity to intervene in development activity on either federal or tribal land when necessary to protect cultural items and to determine the proper disposition of the discovered items, while also placing a burden on the discoverer of the items to protect them prior to involvement by the appropriate tribe.

There is a significant difference with respect to scientific study between the section 3002 provisions for newly discovered items and the provisions governing cultural items that were already in the hands of federal agencies and museums when the statute was enacted. Under sections 3003 and 3004 of NAGPRA, federal agencies and federally funded state and local government agencies were required to compile inventories of any Native American cultural items in their possession, indicating geographical and cultural affiliation, where possible, of human remains. Tribes found to be culturally affiliated with human remains in a collection were to be notified within six months of inventory completion. Where human remains' cultural affiliation


132. 25 U.S.C. § 3002(d)(1). After the making of the required written notification and upon certification by the appropriate recipient that the notification has been received, the activity may be resumed thirty days after the certification. Id.


134. 25 U.S.C. § 3003(a). The inventories and identifications were to be completed within five years after November 16, 1990, and were to be “completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders.” Id. § 3003(b). Each agency was also to prepare a summary, including cultural affiliation “where readily ascertainable,” of the other cultural items in its holdings. Id. § 3004(a). The inventories were to be completed within three years of November 16, 1990 and were to be “followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders.” Id. § 3004(b).

135. Id. § 3003(d). Section 3004, addressing other kinds of cultural items, did not have a comparable notification provision, but tribes and Native Hawaiian organi-
were established by an inventory, they were to be returned "expeditiously," upon the request of "a known lineal descendant" or the appropriate tribe or organization. However, a limitation was placed on the timing of the repatriation. An agency or museum could temporarily refuse to repatriate requested items if they were "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States." This kind of accommodation for scientists was not, however, included in the provisions dealing with remains and other items discovered after the statute took effect. Rather, the focus is on Native American ownership, and determining which individual or tribe has the strongest claim to the item in question.

Finally, NAGPRA indicated Congress's strong support for the return of Native American cultural items to Native American groups and individuals by including a savings provision that focused on the repatriation authority of federal agencies and museums. In addi-
tion, the concern for the protection of Native American rights that inspired the enactment of NAGPRA was further demonstrated by a section providing that nothing in NAGPRA should be construed to limit any procedural or substantive right held by individuals, tribes, or Native Hawaiian organizations.\textsuperscript{139}

C. The Discovery of the Ancient One and the DOI's NAGPRA Decision

The Ancient One's remains were found by chance, by spectators of a hydroplane race, in an area under the management of the Army Corps of Engineers in Washington State's Lake Wallula, which is a part of the Columbia River that has pooled behind a dam. The remains, which proved to be largely complete, were found scattered in the river, close to the river terrace that contains Kennewick, Washington's Columbia Park.\textsuperscript{140} The remains were removed pursuant to a permit issued to archaeologist James Chatters under ARPA, without notification to the tribal claimants.\textsuperscript{141} Examination of the remains suggested that they had some physical characteristics that differed from both modern Native Americans and European settlers and that there was a stone projectile point, apparently of a type that was in use in the area long before European settlement, embedded in a pelvic bone.\textsuperscript{142} Initial radiocarbon dating, based on testing of a portion of a metacarpal bone, suggested that the remains were between 8,340 and

\textsuperscript{authority to "enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by" NAGPRA. Id. § 3009(1)(B).

\textsuperscript{139} Id. § 3009(1), (2).

\textsuperscript{140} See Francis P. McManamon, The Initial Scientific Examination, Description, and Analysis of the Kennewick Man Human Remains 2, at http://www.cr.nps.gov/aad/kennewick/mcmanamon.htm (last visited Aug. 5, 2005). Apparently boating traffic and water level variations caused by the dam resulted in the collapse of the terrace margin in which the remains were resting into the river edge, and water action then scattered the remains over a wide area about 10 feet from the shore. See id. The remains were thus recovered in a disturbed state and context, although they proved to be about ninety percent intact. See Bonnichsen v. United States, 367 F.3d 864, 869 n.6 (9th Cir. 2004). According to a newspaper account, two individuals who made the discovery were in the area to see the "Budweiser Columbia Cup Unlimited Hydroplane Races," and initially hid the skull in some weeds, out of fear that drawing attention to what they believed to be the remains of a crime victim would result in an immediate investigation that would hinder their ability to view the races. See Danyelle Robinson, Ancient Remains Relative to Many, INDIAN COUNTRY TODAY, Jan. 20-Jan. 27, 1997, at A1.

\textsuperscript{141} Bonnichsen, 367 F.3d at 869 n.6; see also James C. Chatters, The Recovery and Analysis of an Early Holocene Human Skeleton from Kennewick, Washington, 65 AM. ANTIQUITY 291 (2000). The issuance of the permit to Dr. Chatters was itself questionable. See Tsosie, supra note 81, at 606.

\textsuperscript{142} Bonnichsen, 367 F.3d at 869.
9,200 years old. When the local tribes that ultimately took part in the Bonnichsen litigation learned of the discovery of the Ancient One's remains, they sought custody of the remains for reburial, a request that was at odds with the demand of a number of anthropologists for access to the remains for personal study purposes. After the Corps agreed with the claimant tribes that NAGPRA required the Corps to turn the remains over to the tribes, and was not convinced by the plaintiffs that they were entitled to the opportunity to study the remains, the plaintiffs filed suit. The magistrate judge hearing the case vacated the Corps's decision, but denied the plaintiffs' motion to study the remains, and remanded the case for further proceedings. The Corps and the DOI entered into an agreement under which the DOI was given the responsibility of determining whether the remains were Native American and, if so, what NAGPRA required with respect to their disposition. The DOI thus assumed the leading role in the determination of the status of the remains and their proper disposition under NAGPRA.

1. The DOI's Native American Determination

In January 2000, Francis McManamon, Chief Archaeologist for the National Park Service and Chief Consulting Archaeologist for the DOI, announced the determination that the Kennewick remains were considered "Native American" under NAGPRA. The determination was based on a nondestructive analysis of the remains, which suggested an ancient, pre-Columbian date, and radiocarbon dating of samples extracted from the remains. Dr. McManamon explained that "information derived using the methods and techniques of archeology, geomorphology, physical anthropology, sedimentology, and other scientific disciplines support this determination."
Although the Bonnichsen plaintiffs have claimed that the Ancient One's remains are needed for scientific study and that the tribal claimants are preventing such study, the fact of the matter is that the remains have already been subjected to extensive scientific study, some of which even involved physical destruction of portions of the remains. Moreover, most of the tests and analyses that were performed were recommended by the plaintiffs, and were, in many instances, performed by individuals whom the plaintiffs recommended. The conclusions from this study, which are described below, were included in descriptive and analytic reports, totaling several hundred pages, that were submitted by a team of physical anthropologists, archaeologists, curators, and conservators. These reports have been made available to the public at the National Park Service website. A brief overview of the work done by these experts is necessary in order to fully appreciate both the diligence with which the DOI approached its responsibility for determining whether the Kennewick remains were Native American and the extensiveness of the expert study and analysis of the Kennewick remains that had already taken place by the time the district court and court of appeals heard the plaintiffs' claim that scientific study of the remains had been prevented by the tribes' claims and the DOI's decisions.

The initial, nondestructive examination by experts at the invitation of the DOI consisted of examinations of the remains themselves, of the sediments adhering to them, and of the lithic, or stone, artifact that was found embedded in one of the pelvic bones. The osteological assessment of the remains included physically examining and measuring them in detail and then comparing their measurements and characteristics to databases containing information on recent, historic, and ancient Native American skeletal characteristics. The skull was reconstructed from fragmented facial bones and was measured and photographed, and then a three-dimensional computerized

150. See McManamon, supra note 140, at 5. This examination was conducted by Dr. Joseph F. Powell of the University of New Mexico and Dr. Jerome C. Rose of the University of Arkansas. See id. at 1 (stating the academic affiliations of Drs. Powell and Rose), 3 (stating that Drs. Powell and Rose conducted the examination).

151. Drs. Powell and Rose conducted a physical examination of the remains and reviewed the inventory that had been taken of them; measured the bones and teeth and compared the measurements to existing databases of recent, historic, and ancient Native American skeletal characteristics; and observed and recorded other, non-metric dental and skeletal characteristics of the remains and compared them to existing data on the characteristics, such as evidence of inflammation or trauma, toxins, dental wear and caries, and other indicators of the health and way of life of an individual, of ancient Native American skeletal populations. See id. at 5.
model was created. The examination indicated that the remains belonged to a single, male individual, about 5' 9" tall, who died at about forty-five to fifty years of age. He was well-muscled and regularly used his arms in rigorous physical activity, and appeared to have not suffered any disability from several injuries that he had experienced. The skeleton's virtual completeness and excellent condition suggested that it had been deliberately buried in a grave while the body was intact, rather than having decomposed on the surface.

Drs. Joseph F. Powell and Jerome C. Rose, who examined the remains, sought to determine whether they belonged to a "Native American," which they took to refer to "a modern or recent human population indigenous to the Americas," by first using multivariate analyses to generate probabilities of the remains' membership in certain groups and then subjectively comparing the remains' characteristics to patterns of discrete morphological variation among current forensic samples in the United States. Most of the available skeletal reference samples were recent in origin, and they included only a small number of Palaeoindian and Archaic period skeletal series to

153. See id. at 9.
154. See id. at 4.
155. See id. at 5-6, 15.
156. See id. at 5-7, 15. He had suffered several injuries, including bone fractures and a wound from the projectile point that remained embedded in his pelvis, many years before his death, but they had all healed well. The projectile point would have entered from the rear and considerable force would have been needed for it to penetrate the bone as deeply as it had gone, but it was impossible to tell whether this was the result of an accident or some kind of conflict. See id. at 7, 15.
157. See id. at 8, 15. The completeness of the remains (due to the lack of loss of small bones that can be carried off by scavengers if left exposed), the lack of carnivore damage, and the evidence of rodent gnawing were typical of the pattern seen in intentional burials, both prehistoric and modern. See id. The body's apparently deliberate burial was consistent with the vast majority of human remains of the early Holocene period that have been found in the Americas. See id. at 9.
158. Id. at 9.
159. See id. This was done to explore the remains' "biological affinity." Id.
160. See id. They developed two sets of hypotheses related to whether or not the Kennewick remains belonged to an individual drawn from a population of recent or of Archaic Native Americans. The first set of hypotheses were the following: "Kennewick represents an individual drawn from a population of recent (late Holocene) Native Americans. . . . Kennewick does not represent an individual drawn from a population of recent Native Americans." Id. The second set of hypotheses were the following: "Kennewick represents an individual drawn from a population of Archaic (middle Holocene) Native Americans. . . . Kennewick does not represent an individual drawn from a population of Archaic Native Americans." Id. at 10.
which the Kennewick remains could be compared.\textsuperscript{161} Drs. Powell and Rose noted that if the Kennewick remains were those of a member of a founding population whose descendants had evolved in the Americas over the past 9,000 years, later American populations might well be dissimilar to the Kennewick remains.\textsuperscript{162} In other words, they acknowledged that the Ancient One could be the biological ancestor of recent Native Americans despite morphological dissimilarities.

The analysis indicated that, like other early skeletons found in the Americas, the Kennewick remains had a number of morphological features that are not present in recent human populations, including Native American populations. The craniometric analyses indicated that the Kennewick remains had a low probability of membership in any of the available recent craniometric reference samples, which Drs. Powell and Rose noted was unsurprising given the approximately 8,000 year gap between the remains and the reference samples that were used.\textsuperscript{163} They concluded that the Kennewick remains were not drawn from a population of recent Native Americans,\textsuperscript{164} and also were "clearly not" those of a Caucasoid, meaning a member of the populations of modern day Europe, the Near East, and India.\textsuperscript{165} On the other hand, there was evidence that the Kennewick cranial remains were similar to Archaic populations from the eastern woodlands and

\textsuperscript{161} See id. at 10. They believed, though, that the comparisons could still provide useful information on morphological similarity and dissimilarity between groups in the Americas between 9,000 and 5,000 B.P. See id. "B.P." indicates the number of years before the present, with the year A.D. 1950 being "the present," according to radiocarbon dating convention. See ADOVASIO & PAGE, supra note 21, at 113. Dates are given as +/- B.P., meaning a certain date plus or minus a smaller number of years. See id.

\textsuperscript{162} See Powell & Rose, supra note 152, at 10. These dissimilarities could have resulted from "the cumulative effects of genetic drift, mutation, and natural selection." Id.

\textsuperscript{163} See id. at 15. The most similar samples were those from the south Pacific, from Polynesia, and from the Ainu people of Japan, a finding which was consistent with patterns observed in some other studies of early human crania found in the Americas. See id. The analyses involved comparison of the remains to the modern reference samples in terms of dozens of craniometric dimensions. See id. at 10. Drs. Powell and Rose used fifty-two variables for the first analysis, and lower numbers of variables for other analyses. See id. at 10–13.

\textsuperscript{164} See id. at 15. This conclusion was based on the available craniometric data and an analysis of cranial and dental discrete traits. Id. at 15–16. They could not, however, draw this conclusion from their analysis of anthroposcopic traits and odontometric data. See id. at 16; see also id. (describing the odontometric, cranial and dental discrete trait, and anthroposcopic, analyses).

\textsuperscript{165} See id. at 16. In nineteenth century anthropological literature, the Ainu of Japan were described as Caucasoids, but Drs. Powell and Rose agreed with the more recent approach of viewing the Ainu as having derived from peoples who had their closest biological affinity with south Asians rather than with western Eurasians. See id.
the northern Great Basin regions. In short, the Powell and Rose analysis indicated that the Kennewick remains were not very similar to any modern human populations included in the limited available reference samples, which included only nineteen North and South American populations from among a total of 183 populations used for craniometric comparison, but were similar to some Archaic Native American populations. In other words, the available data suggested that the remains were more similar to other ancient remains than to modern ones, hardly a surprising conclusion, given the great change that facial features within a population can undergo over several millennia.

The nondestructive analysis of the Kennewick remains also included examination of the sediments adhering to them as a means of possibly linking the remains to dated soil layers in the river terrace in which, it was believed, the remains had been buried. The skeletal sediments were found to be similar to a portion of the soil profile that was dated to between 7,000 and 9,000 years ago, leading to an estimate that the remains dated to between 6700–9000 years B.P. (before the present). Thus the sedimentary analysis, like the osteological assessment, indicated that the Ancient One lived, died, and was buried in the distant past, long before the European settlement of the Americas.

Finally, an analysis of the object embedded in one of the Ancient One's pelvic bones indicated that it resembled a Cascade Point, a

166. See id.
167. Id. at 11. This limited representation of Native American populations made it difficult for them to fully assess the possible biological affinity between the Ancient One and recent Native Americans using their methodology.
168. Drs. Powell and Rose stated that only a sequence of remains, dated to various points over the past 9,000 years, could provide direct evidence of biological continuity between the Kennewick remains and modern tribes. See id. at 16.
169. See ADOVASIO & PAGE, supra note 21, at 245.
170. See McManamon, supra note 140, at 5. Dr. Gary Huckleberry of Washington State University and Dr. Julie K. Stein of the University of Washington performed this examination. See Gary Huckleberry & Julie Stein, Analysis of the Sediments Associated with Human Remains Found at Columbia Park, Kennewick, WA 1 (Oct. 1999), at http://www.cr.nps.gov/aad/kennewick/huck_stein.htm; see also McManamon, supra note 140, at 1 (listing the academic affiliations of Drs. Huckleberry and Stein).
171. See McManamon, supra note 140, at 6.
172. See Huckleberry & Stein, supra note 170, at 16.
173. Dr. John L. Fagan, the president of Archaeological Investigations, Inc. of Portland, Oregon, performed this analysis. See John L. Fagan, Analysis of Lithic Artifact Embedded in the Columbia Park Remains (Oct. 1999), at http://www.cr.nps.gov/aad/kennewick/fagan.htm; see also McManamon, supra note 140, at 1 (listing the business affiliation of Dr. Fagan). Because the object was still embedded in the remains, Dr. Fagan had to use CT scans to document and analyze it. See id. at 5; see also Fagan, supra, at 2 (describing the use of CT scans in the analysis). It appeared to have been made from basalt and shaped by percu-
type of stone projectile point that was in common use in the Pacific Northwest prior to 7,000 years ago. The point appeared to be the tip or armament of a spear, which could be used for thrusting or throwing, or of a dart, which would have been propelled by an atlatl. This finding gave an idea of the kind of technology that was available to the Ancient One and his community and clearly suggested a pre-Columbian date for the remains.

In summary, the nondestructive analysis of the Kennewick remains—analysis of the remains themselves, sediment adhering to them, and the stone point embedded in them—indicated that they dated from a time that far preceded European settlement in the Americas. The analysis also indicated that the Ancient One had lived an active, physically demanding life, and was buried (presumably by members of his community) when he died, and gave an idea of at least one kind of technology that was in use in his community. This work established the kind of detailed scientific documentation of the remains that both ARPA and NAGPRA required. Limitations in their respective fields' techniques and methodologies, and in their application, however, forced each group of investigators to conclude that their own results, standing alone, were insufficient to serve as the basis for a determination by the DOI that the Kennewick remains were Native American. This uncertainty led to a decision to extract bone samples from the remains for the purposes of radiocarbon testing. This testing was done despite the opposition of the tribal claimants, who objected to the partial destruction of the remains that resulted from sample extraction.

The radiocarbon dates obtained for the skeletal material samples ranged from close to 6000 years B.P. to over 8400 B.P., dates
which were consistent with the early dates suggested by the nondestructive analysis. In addition, two of the laboratories provided an additional detail about the Ancient One's way of life by noting that their analysis indicated that the Ancient One, much like the tribes of the area centuries into the future, had a marine diet. On the basis of the examination and analysis of the remains, soil, and lithic point, bolstered by the radiocarbon dating, the DOI determined that the Kennewick remains were "Native American," and that NAGPRA therefore governed their disposition.

2. The Cultural Affiliation Analysis

In order to determine the proper disposition of the Ancient One's remains under NAGPRA, the DOI gathered and evaluated a wide range of information, consulted (as NAGPRA requires) with representatives of the claimant tribes, read reports submitted by the tribal claimants, and evaluated the data and observations submitted by experts enlisted by the DOI. These experts performed almost all of the studies that the plaintiffs had recommended.

---

181. The right first metatarsal, the source of the material that was assigned this C14 date by two laboratories, is one of the load-bearing bones of the foot. One of the two laboratories reported a date of 8410 +/- 40 B.P. See Carbon 14 Memorandum, supra note 148, at 2. The other laboratory reported a date of 8130 +/- 40 B.P. See id. There was some concern that the skeleton, or parts of it, might have been contaminated at some point in the past by exogenous, or intrusive, carbon which could have distorted the carbon dates for the samples. See id. at 3. If this had occurred, however, the effect would have been to make the dates for the samples more recent than their true dates, and this may explain the more recent date, which was obtained for the tibial crest samples. See id. In certain circumstances, bone can be contaminated by older carbon, but this kind of contamination was unlikely to have occurred in the Kennewick case because of the characteristics of the area in which the remains had been located. See id.


184. See id. at 1.


186. See id.

In analyzing the possibility of a claim being validated on the basis of NAGPRA's cultural affiliation priority, the DOI reviewed "geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, and other relevant information and expert opinion evidence," deeming all of the lines of evidence equally important and according all of them equivalent weight. This equal weighting approach comported with the text of the statute, which does not assign priorities to the kinds of evidence that are to be considered. Interior Secretary Bruce Babbitt noted, in his letter notifying the Department of the Army of the DOI's determination as to the proper disposition of the remains, that when implementing NAGPRA, the DOI is to make the determination that, based on the evidence, would best carry out NAGPRA's purpose.

Because the tribal claimants were pursuing a claim jointly, the DOI had to determine preliminarily whether cultural affiliation with a single tribe was required by NAGPRA, or whether affiliation could be determined for a group of tribes claiming jointly. In creating a preference in NAGPRA for the tribe with the "closest cultural affiliation," Congress recognized that more than one tribe could be culturally affiliated with human remains. The DOI concluded that NAGPRA did permit a finding of cultural affiliation with multiple tribes that submitted a joint claim, and that the fact that one of the claimant tribes (in this case, the Wanapum Band) was not federally recognized did not foreclose a joint claim disposition where the other claimants were federally recognized. In addition to being consistent with what the text of NAGPRA suggested about this issue, this conclusion made sense in light of the respect for tribal views that NAGPRA reflects. In short, if a group of recognized tribes is willing to welcome a

Letter). The plaintiffs recommended seventeen kinds of studies. As of the time of the disposition letter, the results of the DNA analysis were pending. The kinds of requested studies that were not conducted were the following: antibody studies; section analysis—dental; bone histology; and phytolith recovery (due to a lack of calculus on the teeth). In addition, further study of the discovery site had been recommended by the plaintiffs and DOI experts.

188. The DOI concluded that a claim could not be validated based either on lineal descent or on excavation or removal from tribal lands, the first two ownership priorities under NAGPRA. See Disposition Determination Letter, supra note 185, at 2–3. Secretary Babbitt explained in his letter that "given the very ancient date for the Kennewick Man remains ... we found that no present day lineal descendants ... exist." Id. at 2. Also, the tribal lands priority was not relevant because the remains were found on federal lands, rather than on a reservation or other tribal lands. Id. at 3.

189. Id. at 3.

190. See supra note 117 and accompanying text.

191. See Disposition Determination Letter, supra note 185, at 3.

192. See id.

193. See id.

194. See id. at 3 n.1.
non-recognized tribe as a joint claimant, deference to this decision seems appropriate. Moreover, the Kennewick joint claim in particular seems appropriate because of the traditional joint use of the area by the tribal claimants and because of the vagaries of the federal tribal acknowledgment process, which would have presented a formidable obstacle to the recognition of the Wanapum Band if the tribe had decided to seek it.

In order to analyze the cultural affiliation issue, the DOI assembled a panel of experts and asked each to explore, within the context of his field, how an earlier group with which the Kennewick remains were associated could be identified and to consider the possible cultural affiliation of the remains and the group they represented with the present-day tribes, as of the time of the visit of Lewis and Clark to the area.\textsuperscript{195} The Corps of Discovery's sojourn with the Nez Perce and other tribes thus played an unanticipated role as a time marker in the cultural affiliation analysis. Four reports—focusing on archaeological data, historical and ethnographic information, linguistic information, and bio-archaeological information—resulted from this process. Reading the summaries of the reports included below gives a sense of the challenge that faced the courts in reviewing the documentation that prompted the DOI's decision—documentation of a kind with which federal judges are unlikely to have any familiarity. Indeed, review of the reports and of the rest of the record in the case, which totaled over 20,000 pages, proved to be such a daunting task that the district court felt compelled to provide an explanation to the parties of the resulting "unusual delay" that occurred before the case was decided.\textsuperscript{196} Moreover, this review reveals the difficulties faced by the experts who prepared the reports, and the consequent limitations of their conclusions, and of the inherent limitations and doubts of the experts' fields themselves. In short, the reports suggest that the concept of "scientific cer-

\textsuperscript{195} See Francis P. McManamon et al., Background and Scope for the Cultural Affiliation Reports 1–2 (Sept. 2000), at http://www.cr.nps.gov/aad/kennewick/cultaffintro.htm. They were asked to identify evidence both of continuity and discontinuity between tribes that inhabited the area in the early nineteenth century, when the Lewis and Clark expedition visited the area, and the ancient group, represented by the remains, which probably resided in that area 9,500 years ago, as well as to describe gaps in the record due to insufficient information. \textit{Id.} at 2. Because the historical record showed that since at least 1805, the ancestors of the interested present-day tribes had resided in the area, it was not necessary to examine and set out in detail the links between these tribes and the groups, bands, and tribes reported to be there at the beginning of the nineteenth century. Thus the studies focused on the period between 9,500 years ago and the early nineteenth century, when written historically documented accounts of the area began. See \textit{id}.

tainty," which the plaintiffs would prefer to have applied to the cultural affiliation determination, simply has no place in the field of archaeology and other branches of anthropology.

a. Archaeological Data Report

The preparation of the archaeological data report, which focused on determining what social and economic interpretations, based on material culture, site components, and regional settlement patterns revealed by archaeological data, could be made, was hampered by empirical gaps in the archaeological record itself that made it difficult to establish either cultural continuities or discontinuities. Only a small sample of radiocarbon dates, broken up by as yet unexplained gaps, exists for the period to which the Kennewick remains were dated, a period during which local population levels were apparently very low. The available evidence suggested that a number of features of the period's material culture did not appear to carry forward into later periods, but this was probably due to cultural change rather than to cultural replacement, as the archaeological record contained no evidence of a migration into the area. Also, several important aspects of the topography of the area—features that must have certain unavoidable effects on the formation of the way of life of the people of an area—had not changed since the Ancient One's day, and the economies of the area had continued to be hunter-gatherer economies over the previous 9,500 years.


198. See Archaeological Data: Conclusions, supra note 197, at 1. Gaps in the record might be due to the small size of the sample or be due to some other factor. See id.

199. See id. at 1–2 (continuities and discontinuities); see also id. at 2 (lack of evidence of migration). At the same time, there were some continuities in tools, but these did not necessarily indicate cultural continuity, because they may be simply analogous similarities. In other words, if two groups of people used similar tools, the similarity may not be due to the fact that they shared a common cultural ancestry, but rather to the fact that these two groups just happened to develop the same kind. See Archaeological Data: Issues, supra note 197, at 2–3 (discussing the difference between historical, or homologous, and functional, or analogous, causes of similarities).

Preparation of the report was also hampered by the haste with which it had to be prepared, because of district court deadlines. An additional problem was created by the nature of the archaeological work that had been done on the Columbia Plateau, which was piecemeal and had not produced the kind of data that would have been useful. Moreover, differences of opinion among archaeologists who had worked on the region—differences which the report's author deemed normal in a profession that requires a "positive skepticism about the knowledge claims of one's peers and one's self"—as to appropriate theoretical standpoints, basic assumptions, and cultural chronologies, and even as to the best way to understand the concepts of continuity and discontinuity, further complicated the task. As a result of these obstacles, the author of the report was unable, on the basis of the evidence then available to him, either to link the Kennewick remains to peoples in the area circa 1800 A.D., or to disprove the existence of such a link. He emphasized that his conclusions did not mean that there was not cultural continuity between the early nineteenth century people of the area and earlier groups, but simply that the gaps in the record precluded establishing either continuities or discontinuities.

201. Dr. Ames noted at the outset of his report that the DOI's scope of work for his investigation had acknowledged the time constraints imposed upon his study of the archaeological data and noted that much of the necessary evidence might be in materials with limited circulation or even be unpublished. See Kenneth M. Ames, Review of the Archaeological Data 2 (Sept. 2000), at http://www.cr.nps.gov/aad/kennewick/ames.htm [hereinafter Archaeological Data: Introduction]. The relevant materials were difficult to obtain, because much of the archaeological literature on the Columbia Plateau was unpublished, was published only in limited distribution reports, or was available only "in venues which are obscure, or difficult even to find out about." See Kenneth M. Ames, Review of the Archaeological Data: The Southern (Columbia) Plateau: Background 2 (Sept. 2000), at http://www.cr.nps.gov/aad/kennewick/ames2.htm [hereinafter Archaeological Data: Columbia Plateau].

202. See Archaeological Data: Columbia Plateau, supra note 201, at 2.

203. See id. at 3.

204. See id.; Archaeological Data: Issues, supra note 197, at 11. Given the fact that the area has a known archaeological record extending over approximately 13,500 calendar years, there are plenty of opportunities for professional disagreement. See Archaeological Data: Columbia Plateau, supra note 201, at 3.

205. See Archaeological Data: Conclusions, supra note 197, at 2. He explained that additional fieldwork and a more extensive review of the published literature and of museum collections than time constraints allowed him might have uncovered additional evidence. Id.
b. Traditional Historical and Ethnographic Information Report

The historical and ethnographic report examined the extent to which the ethnographic record on the region might be related to the region's earlier peoples.206 The author examined both published and archival materials,207 and also reviewed oral traditions in order to create a historical context for the period prior to 1805 (when written records first existed). This approach reflects the current theoretical understanding of ethnohistorians that oral traditions are not inferior to written records and that histories recorded in oral traditions are not any less valid than histories recorded in writing.208

Researchers consider the cultures of the southern Plateau region, at the confluence of the Columbia and Snake Rivers, to be "a set of interconnected and culturally similar groups,"209 that, prior to European contact, developed a rich body of oral traditions.210 These traditions, which are more than merely stories, legends, or fables,211 have functioned as histories for the indigenous peoples of the region, and link the people's existence to the beginning of the appearance of human beings in the area and relate their continued existence on the Plateau to that distant past.212 Unlike the traditions of most indigenous peoples of North America, these traditions contain no origin myths that explain the placement of the Plateau peoples by creation or by migration to the region.213 The way of life described in this

206. See McManamon et al., supra note 195, at 2. Dr. Daniel Boxberger of Western Washington University prepared this report. Id.
207. He reviewed published ethnographic materials, archaeological reports, published versions of oral traditions, and local histories, as well as archival materials, covering such matters as traditional histories of the region; kinship; artifact types; dwellings; residence, community, and settlement patterns; economic and subsistence patterns; and trade and social networks. See Daniel L. Boxberger, Review of Traditional Historical and Ethnographic Information 1–2 (Sept. 2000), at http://www.cr.nps.gov/aad/kennewick/boxberger.htm.
208. See id. at 2. A different type of analytical approach may, however, be used for them. See id. For another description of an analytical framework that can be used to examine oral traditions, see generally Roger C. Echo-Hawk, Ancient History in the New World: Integrating Oral Traditions and the Archaeological Record in Deep Time, 65 AM. ANTIQUITY 267 (2000).
209. See Boxberger, supra note 207, at 4.
210. See id. at 6.
211. See id. at 16.
212. See id. at 6.
213. See id. “Instead, the Plateau became populated by people who were already there.” Id. The tribes' history tells that Coyote traveled up the Columbia River and its tributaries and transformed the landscape to create a place for people. He interacted with the myth people, who were identified as animals but acted like humans, and whose “way of life set the pattern for the people whom Coyote caused to be scattered across the Plateau by slaying the Monster and distributing its parts which became the people.” Id.; see also id. at 17–18 (discussing the absence of a creation event and the Coyote and the Monster narrative).
traditional history is similar to that described in written ethnographic accounts of the region, and thus serves as supplementary historical documentation for the written sources.\footnote{214. See id. at 6.}

As the report explained, this history makes clear the ancient and enduring ties between the modern day peoples in the area and the land itself, and links the origin of the people to the area's geological features.\footnote{215. See id. at 18 (describing how the peoples of the area are believed to have their origin in the body of the Monster, the heart of which remains in stone form in Idaho’s Kamiah Valley). The history includes narratives that refer to specific local geological features. See id. at 20–23 (giving examples of narratives that refer to specific geological features).} The knowledge of ancient events exhibited in some of the narratives indicates a striking time depth.\footnote{216. See id. at 23.} One narrative, for example, refers to a time when the Columbia River flowed through the Grand Coulee rather than in its present channel, thus linking the story to an event that occurred over 10,000 years ago, when, geologists believe, the Columbia did flow through the Grand Coulee.\footnote{217. See id. at 20. Another narrative suggests the geologic period during which glaciers, the retreat of which caused massive flooding, created large lakes. Id.}

Ethnographic research indicates that the peoples of the area determined kinship through both the male and female lines and developed extensive kinship ties. Extended families grouped together to form small villages, usually located along rivers, in which the families lived in longhouses.\footnote{218. See id. at 7, 9. During the food-gathering season, people would move to gathering locations and reside in tipis. See id.} Semi-subterranean pithouses— circular structures which were apparently the main prehistoric dwellings—located next to the longhouses were used for storage and other purposes,\footnote{219. See id.} and thus linked the past to the present in the daily lives of their users. Because of extensive intermarriage, villages would often include residents from a number of different tribes.\footnote{220. See id. at 9.}

A network of relations among the region's people, extending beyond the villages, was formed for co-utilization of resources and access, through a mechanism of intermarriage, mutual co-utilization of resources, and intergroup cooperation.\footnote{221. Id.} Intergroup activities, such as fishing for salmon, plant gathering, and trading, were carried on at many sites throughout the region,\footnote{222. Id.; see also id. at 10 (describing subsistence and trading patterns).} and there was "considerable evidence" that these intergroup activity patterns had existed for 10,000 years.\footnote{223. Id. at 10.}
The report also briefly surveyed the three main periods of the prehistory of the region and identified a number of continuities between prehistoric and historic times. Evidence from the period 11,500 B.P. to 5000–4400 B.C. indicated the existence of a mixed economy, based on consumption of animals, plants, and fish (which the Ancient One seems to have regularly consumed), that was similar to the economy of historic times. Striking similarities between this early period and the historic period existed with respect to subsistence activities, technology, dwellings, and trade.

By the time Lewis and Clark visited the area, items such as brass, copper, and coins had reached the region via intertribal trade routes and via Plateau peoples' direct access outside the region. The greatest impacts from non-native contact came from European diseases and from the introduction of the horse, but these phenomena facilitated and accelerated the activities that already characterized the region rather than fundamentally changing them. The beginning of non-native influence triggered a process of change and adaptation, as it had in the prehistoric period, but the region's distinctly Plateau cultural tradition survived.

The report concluded that the area where the Kennewick remains were found was part of the traditional use area of the claimant tribes, who are the "heirs of succession" to the area. The protohistoric, historic, and ethnographic evidence suggested a cultural continuity in the region extending into the prehistoric period; the cultural change that did occur was transitional and evolutionary, rather than indicating a cultural transformation that could have occurred from in-migration (a kind of event for which the archaeological report had also found no evidence). The native history of the region placed the tribes in the

---

224. *Id.* at 10–11.
225. *See supra* note 182 and accompanying text (noting that the Ancient One seems to have had a marine diet).
227. *See id.* ("Projectile points, net weights, milling stones, tipi-like dwellings, and evidence of trade from the sea coast as long ago as 9000 B.C. impress one as strikingly similar to the cultural traditions described in the ethnographic database.").
228. *See id.* at 12.
229. *See id.* Some scholars believe that the Plateau region was struck by a hemispheric-wide smallpox pandemic that they believe emanated from the 1519 Caribbean smallpox epidemic, and then was not struck again until the historically recorded epidemics of the late 1700s. *See id.* Others believe that no epidemic affected the region until after Europeans first reached the coast in 1774. *See id.*
230. *See id.* at 13. Horses were acquired by at least 1730 A.D. *See id.* at 12.
231. *See id.* at 13.
232. *See id.* at 12.
233. *See id.* at 24.
234. *See id.*
235. *See supra* note 200 and accompanying text.
region from the beginning of time and related to events of the distant past, which are "highly suggestive of long-term establishment of the present-day tribes." In short, the evidence suggested very long-term cultural connections between the tribal claimants and the peoples, like the Ancient One's group, who had formerly inhabited the region in which the remains were found.

c. Linguistic Information Report

The linguistic information report focused on the use of historic linguistic methods to try to determine the linguistic affiliation of the group to which the Ancient One belonged. Widely accepted historical linguistic methods make it "theoretically possible to establish 'cultural affiliation' across the 9,000 years" separating contemporary Native American groups from the earlier group to which the Ancient One belonged. Because language is a part of culture, as well as the chief means for transmitting it, if the linguistic evidence suggests continuities in the "cultural core"—"[t]he constellation of features which are most closely related to subsistence activities and economic arrangements"—then this indicates cultural affiliation between the claimant tribes and the Ancient One's group.

The linguistic evidence suggested that the language that linguists believe to be ancestral to Nez Perce and Sahaptin (languages in use at the time of first Euro-American contact), called proto-Sahaptian, was most likely spoken near the Ancient One's burial site at least 2,000 years ago, and that proto-Sahaptian (or its immediate predecessor) was spoken throughout the Plateau region about 4,000 years ago. Proto-Penutian, the ancestral language of the Penutian phylum of languages, to which proto-Sahaptian belonged, might, in turn, "have been spoken 8,000 or more years ago," making it "more than likely" that the Ancient One spoke a proto-Penutian dialect. The continuity of oc-

---

236. Boxberger, supra note 207, at 25.
237. See Eugene S. Hunn, Review of Linguistic Information 8, at http://www.cr.nps.gov/aad/kennewick/hunn.htm (last visited Aug. 5, 2005). The term "group" is used to mean a local residential group or a group sharing the same language. See id. at 4 (explaining how "group" is defined). This report was prepared by Dr. Eugene Hunn of the University of Washington.
238. Id. at 1 (quoting JULIAN STEWARD, THEORY OF CULTURAL CHANGE 37 (1955)); see also id. at 8 ("[I]f a contemporary group can be shown 1) to be linguistically affiliated with an earlier group and 2) to occupy the ancestral habitat of that earlier group by similar technical means, these factors would support an inference of shared group identity between the earlier group and the modern group.").
239. See id. at 2; see also id. at 12 (discussing the close kinship of Sahaptin and Nez Perce, which are likely to have diverged not more than 2,000 years ago).
240. Id. at 3. The Penutian language phylum is estimated to be older than Indo-European, which is thought to be about 7,000 years old. See id. The prefix "proto" refers to a proto-language, defined as "a hypothetical language which through time has diversified to form the known contemporary descendant lan-
ocupation in the area by descendant speakers would then suggest that it is most likely that the Ancient One is culturally affiliated more closely with historic Sahaptin-speaking people in the region than with any other Native American group.\textsuperscript{241}

An analysis of the cultural correlates of language made it seem even more likely that the Ancient One was part of a culture that was fundamentally like that practiced in historic times by the peoples of the Southern Plateau.\textsuperscript{242} Throughout the millennia stretching back to the Ancient One’s time, the region’s peoples had sustained themselves by harvesting a group of resources that included salmon, shellfish, a variety of roots and berries, and game.\textsuperscript{243} The Sahaptin vocabulary shows close links between language and specific features of the local environment,\textsuperscript{244} the key features of which have changed little during the last 12,000 years,\textsuperscript{245} and the ethnobiological vocabulary of contemporary Sahaptin does not suggest that the Sahaptin-speaking peoples ever resided in a location other than their historic homeland.\textsuperscript{246}

Finally, the report examined the legend of Laliik, a summit that is a dominant feature of the central Columbian basin and which has no name in English.\textsuperscript{247} In Sahaptin, Laliik means “standing above the water,” a name that refers to a great ancient flood that surrounded the summit and that may in fact refer to the great floods, called the Bretz floods, that occurred in the area between 13,000 and 18,000 years ago.\textsuperscript{248} If this is indeed the case, then the legend links the area’s contemporary Sahaptin-speaking residents to a group that witnessed the Bretz floods, and indicates that the Sahaptin language includes a “cultural memory” of events that occurred long before even the Ancient One lived.\textsuperscript{249} The Laliik legend thus offers an additional potential lin-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{241} See \textit{id.} at 3.
\item \textsuperscript{242} See \textit{id.} at 14.
\item \textsuperscript{243} See \textit{id.}
\item \textsuperscript{244} See \textit{id.; see also id.} at 6–8 (examining the animal terms, plant terms, and place names in the contemporary Sahaptin vocabulary as evidence that Sahaptin speakers were intimately familiar with the environmental features of the region, the key environmental features of which have changed little in the last 12,000 years).
\item \textsuperscript{245} See \textit{id.} at 6.
\item \textsuperscript{246} See \textit{id.} at 17.
\item \textsuperscript{247} See \textit{id.} at 15.
\item \textsuperscript{248} See \textit{id.} at 15.
\item \textsuperscript{249} See \textit{id.} at 16–17.
\end{itemize}
\end{footnotesize}
inguistic link between the contemporary residents of the region and its ancient inhabitants.

d. Bio-Archaeological Information Report

The bio-archaeological information report focused on mortuary patterns and bio-archaeological studies of the Pacific Northwest.250 The report's author compiled a chronological outline of key archaeological sites that include burials and osteological data,251 followed by reviews of the literature on mortuary patterns,252 of biological anthropology studies,253 and of osteological studies.254 The report also described researchers' ongoing bioarchaeological work, focused on DNA analysis255 and on developing more extensive osteological studies,256 which are relevant for analyzing the biological and cultural affiliation of early human remains.257 The report did not, however, draw any conclusions about the Ancient One's cultural affiliation, but instead was limited to describing the existing literature while also indicating what current research might ultimately prove helpful.

In summary, the archaeological data report was unable to reach a conclusion as to either cultural continuities or discontinuities between the Ancient One's group and area Native American groups because of gaps in the archaeological record itself, fundamental disagreements among archaeologists who worked in the area, and time restrictions that necessitated ignoring some of the existing data. There was, however, no evidence of migration into the area as a source of discontinuity, and key aspects of the topography and the region's economies had remained in place between the Ancient One's time and the Lewis and Clark visit. The evidence revealed by the historical and ethnographic report suggested very long-term connections between the traditional culture of the tribal claimants and the people who had inhabited the area in the past. Finally, the linguistic report's evidence also suggested cultural continuities between the area's indigenous peoples in historic times and the ancient inhabitants of the area.

250. See Steven Hackenberger, Cultural Affiliation Study of the Kennewick Human Remains: Review of Bio-Archaeological Information 1, at http://www.cr.nps.gov/aad/kennewick/hackenberger.htm (last visited Aug. 5, 2005). This report was prepared by Dr. Steven Hackenberger of Central Washington University. He and his associates sought to identify continuities, discontinuities, and gaps in the data in these areas for the period from 9500 B.P. to the early nineteenth century. See id.

251. See id. at 4.

252. See id. at 9–11.

253. See id. at 11–15.

254. See id. at 15–20.

255. See id. at 20.

256. See id. at 21–23.

257. See id. at 22.
3. The DOI's Cultural Affiliation Conclusion

After considering the purpose of NAGPRA, NAGPRA's emphasis on returning Native American remains to tribes, and the guidance provided by the NAGPRA regulations, the DOI concluded that the evidence established a reasonable link between the Kennewick remains and the tribal claimants.258 As summarized in a detailed report,259 the DOI relied upon the geographic and oral tradition evidence, but took a very cautious approach to some other evidence and treated it as being too limited to allow the drawing of conclusions as to the cultural affiliation between the group to which the Ancient One belonged and the tribal claimants.260 Working backwards in time, the DOI found that cultural and historical evidence firmly established the link between the claimant tribes and the Plateau cultural pattern that existed in the region 2,000–3,000 years ago,261 but additional evidence was then needed to bridge the gap extending back to the period between 8,500 and 9,500 years ago, when the Ancient One and his group lived there.262 The oral tradition evidence suggested a continuity between the Ancient One's group and the claimant tribes.263 Although some cultural discontinuities were suggested by some of the evidence, such as differences in population size, the perceived discontinuities were due, at least in part, to the current lack of more complete evidence about the period 8,500–9,500 years ago.264 Secretary of the Interior Babbitt stressed that "none of the cultural discontinuities suggested by the evidence are inconsistent with a cultural group con-

258. See Disposition Determination Letter, supra note 185, at 4; see also id. at 5 (stating the DOI's conclusion that there was sufficient evidence of cultural continuity to show by a preponderance of the evidence that the Ancient One's group was culturally affiliated with the claimant tribes).

259. The report accompanied the letter that conveyed the DOI's determination. See Enclosure 3, in Disposition Determination Letter, supra note 185.

260. See Disposition Determination Letter, supra note 185, at 4. The evidence of burial patterns, linguistic evidence, and morphological data were deemed too limited. See id. The evidence of burial patterns for the period from 8,500 to 9,500 years ago was very limited, and significant time gaps existed for other periods. See id. The linguistic analysis also was unable, the DOI believed, to provide reliable evidence for the Ancient One's period. See id. Finally, the morphological data was inconclusive. While there were some differences in morphological characteristics between members of the claimant tribes and the Ancient One, it was unclear whether these differences indicated a cultural discontinuity between the two groups or just indicated that the Ancient One's group subsequently intermixed with other groups in the region, leaving descendants with different morphological characteristics. See id.

261. See id.

262. See id.

263. For example, the claimant tribes possess similar traditional histories as to the region's landscape and these histories make no reference to a migration in or out of the region. See id.

264. See id. at 5.
NAGPRA threshold for establishing cultural affiliation had been met. In addition, as Secretary Babbitt explained, because NAGPRA is Indian legislation, as indicated by the text of the statute and its legislative history, the DOI was required to construe any ambiguities in the statutory language liberally in favor of tribal interests.266

The DOI further determined that disposition to the tribal claimants on the basis of aboriginal occupation was also appropriate.267 The area was the subject of several Indian Claims Commission cases, brought by the Confederated Tribes of the Umatilla Reservation, in which the Commission had determined that several tribes, including the Umatilla tribes (the Umatilla, Walla Walla, and Cayuse), the Nez Perce, and the Wayampam Band had used and occupied the area as joint aboriginal land.268

Because the DOI concluded that the proper disposition of the Ancient One’s remains was to the tribal claimants on the basis of cultural affiliation and aboriginal occupation, any study of the remains by the public, without the permission of the tribes as the legal custodians of the remains, was precluded by NAGPRA.269 Interior Secretary Babbitt communicated the DOI’s determination to the Department of the Army on September 21, 2000.270

265. Id.
266. See id.
267. See id. at 5. The reasoning supporting the DOI determination was included in an attachment to the letter. See Enclosure 4, in Disposition Determination Letter, supra note 185.
268. See Disposition Determination Letter, supra note 185, at 5. The cases had resulted in a compromise settlement so the aboriginal territory had not needed to be fully delineated. See Enclosure 4, supra note 267, at 1. Although the statute’s aboriginal land provision referred to a “final judgment” of the ICC, the Secretary thought that disposition under this provision should not be precluded “when the ICC final judgment embodied a voluntary settlement agreement that did not specifically delineate aboriginal territory, yet where findings of fact were previously published by the ICC that recognized the land in question as being subject to use by several tribes.” Id. at 3. This flexible approach was appropriate because NAGPRA is Indian legislation and therefore the ambiguity canon of construction applies. See id. at 2. In 1964, the ICC determined that the area in which the Kennewick remains were later found was within an area that had not been exclusively used by a single tribe, but that at the time an 1855 treaty was ratified (in 1859), the discovery area was within the Walla Walla Tribe’s original title area. See Enclosure 4, Attachment A, at 4, in Disposition Determination Letter, supra note 185.
269. See Enclosure 4, Attachment A, supra note 268, at 6.
270. See Disposition Determination Letter, supra note 185, at 1.
IV. THEY BLINDED ME WITH SCIENCE: BONNICHSEN v. UNITED STATES

[L]ike any other group of priests and politicians . . . scientists lie and fudge about their conclusions as much as the most distrusted professions in our society—lawyers and car dealers.271

A. The Empire Strikes Back: Imperial Anthropology Lays Claim to the Ancient One

From the standpoint of the plaintiffs, the Kennewick dispute was frustratingly familiar. Like their ancestors of the nineteenth and twentieth centuries, the tribes were laying claim to human remains and thus trying to interfere with the attempts of anthropologists to get access to resources that they claimed for themselves and their profession. Once again, they were standing in the way of “progress,” as they had in past centuries by objecting to graverobbing by those who sought to “prove” Indian inferiority and ripeness for extinction in the new world of a superior civilization.272 In addition, the tribes’ laying claim to the Ancient One as an ancestor, without scientific evidence of biological ties to him, demonstrated their stubborn adherence to the far-reaching kinship ties and to the religiously influenced understanding of history and time that the nineteenth century founders of anthropology had labeled primitive, and that government officials had long tried to suppress through the assimilation process. That the tribes had survived, and that their understanding of kinship, history, and time survived as well, testified to the miscalculations of both the anthropologists and the bureaucrats.

Moreover, from the plaintiff anthropologists’ perspective, the stakes were now even higher than they had been before. Other sets of human remains were already being “lost to science” from existing collections as a result of NAGPRA. Also, human remains, especially virtually complete sets of remains, that have been radiocarbon dated to be as old as the Ancient One’s remains are in particularly short supply, because so few have been discovered and claimed as archaeological resources.273 Interest in the Kennewick remains was even further


272. See generally supra Part II.

273. The remains known to anthropologists and archaeologists as “Spirit Cave Man” and “Buhl Woman” are other examples of remains believed to be of similar antiquity. The Buhl Woman remains, which were discovered in 1989 and radiocarbon dated to be over 10,000 years old, were reburied on the Fort Hall Indian Reservation, after the Shoshone–Bannock Tribal Council was notified of the find in accordance with Idaho’s Graves Protection Act. See Karen Bossick, Bones Found in Magic Valley in 1989 Were Those of a Girl Who Lived at Least 11,600 Years Ago,
heightened by the fact that they came to light during a period in which fierce battles were being fought within the plaintiffs' profession over competing theories as to the original peopling of the Americas. 274 Ca-

IDAHO STATESMAN, Aug. 12, 2003, at 3, available at 2003 WL 60747875; Samantha Silva, A Famous Skeleton Returns to the Earth, HIGH COUNTRY NEWS, vol. 25, no. 4 (Mar. 8, 1993), available at http://www.hcn.org/servlets/hcn.URLRemapper/1993/mar08/dir/lead.html. The skeleton was analyzed by an Arkansas Archaeological Survey team, in consultation with the Shoshone-Bannock Tribes, before its 1991 reburial, and was determined to have cranial morphology that was similar to that of both American Indian and East Asian populations. Andrew L. Slayman, News Briefs: Buhl Woman, ARCHAEOLOGY, vol. 51, no. 6 (Nov./Dec. 1998), available at http://www.archaeology.org/9811/newsbriefs/buhl.html. See also infra note 302 (noting differences of opinion among investigators with respect to analysis of the remains). “Spirit Cave Man” was excavated from Spirit Cave, Nevada and was found by the NAGPRA Review Committee to have a relationship of shared group identity with the Fallon Paiute-Shoshone Tribe, and was therefore required to be repatriated to the tribe. See Native American Graves Protection and Repatriation Review Committee Findings and Recommendations Regarding Human Remains and Associated Funerary Objects from Spirit Cave in Nevada, 67 Fed. Reg. 17,463 (April 10, 2002). The remains were dated to be over 9,400 years old. Diedtra Henderson, New Branch of the Human Family Tree? Kennewick Man, Other Skeletons May Represent a New Human Branch, SEATTLE TIMES, Dec. 23, 1997, at A10, available at 1997 WLNR 1445033.

274. For a thorough overview of current developments and competing theories on the peopling of the Americas from the viewpoint of anthropologists and archaeologists, see THE FIRST AMERICANS: THE PLEISTOCENE COLONIZATION OF THE NEW WORLD (Nina G. Jablonski ed. 2002). In 1999, plaintiff Robson Bonnichsen's Center for the Study of the First Americans hosted a conference, called “Clovis and Beyond,” for the purpose of discussing research on the settlement of the Americas. The conference was attended by over 1400 people, an indication of the extent of interest in this issue. See Don Allan Hall and George Wisner, Clovis and Beyond Draws Over 1,400, MAMMOTH TRUMPET, Jan. 2000, at 1, available at http://www.centerfirstamericans.com/mt.html?a=2. For an additional view of competing theories on the peopling of the Americas, which gives a sense of the acrimonious nature of the debate, see David G. Anderson & J. Christopher Gillam, Paleoindian Colonization of the Americas: Implications from an Examination of Physiography, Demography, and Artifact Distribution, 65 AM. ANTIQUITY 43 (2000) (discussing possible movement corridors used by initial settlers in the colonization of the Americas and exploring the implications of these routes, when coupled with demographic and archaeological evidence, for the spread and diversification of the initial settlers); John H. Moore & Michael E. Moseley, How Many Frogs Does it Take to Leap Around the Americas? Comments on Anderson and Gillam, 66 AM. ANTIQUITY 526 (2001) (discussing the allegedly dubious nature of some of Anderson and Gillam’s assumptions); David G. Anderson & J. Christopher Gillam, Paleoindian Interaction and Mating Networks: Reply to Moore and Moseley, 66 AM. ANTIQUITY 530 (2001) (responding to Moore and Moseley's criticisms). For yet another view, focused on human craniofacial data, see C. Loring Brace et al., Old World Sources of the First New World Human Inhabitants: A Comparative Craniofacial View, 98 PROC. NAT’L ACAD. SCI. 10,017 (2001) (discussing the evidence from craniofacial data supporting the hypothesis that a first population of settlers, with both European and Asian roots, entered the Western Hemisphere between 15,000 and 12,000 years ago, and that a second population,
ers can be built—or not—on the basis of access to the remains and sites that are believed to date back to earliest American human habitation. For those nearing the end of their careers, access to discoveries like that of the Kennewick remains represents an opportunity to “go out with a bang.” Indeed, one of the arguments made in the Bonnichsen case was that several of the plaintiffs were advanced in years, so haste was needed so that they could have access to the remains before they retired or died. Even if all, or the vast majority, of the tests and analyses that the plaintiffs sought to perform on the remains had already been carried out, in many cases by experts suggested by the plaintiffs themselves, this was not considered an adequate substitute for being able to satisfy their own scientific curiosity by touching and examining, and perhaps even partially destroying for the purposes of further testing, the bones personally.

From the claimant tribes’ perspective as well, this encounter had an all too familiar ring. Once again, they found themselves fighting for what they believed to be their own against the demands of outsiders claiming greater entitlement. In the early nineteenth century, in Johnson v. M’Intosh,275 Indian tribes’ “backwardness”—their alleged failure to farm and enclose the land and to thus make it their own in the landscape-altering way that Euro-Americans considered legally significant—had been used to justify their loss of land to the scions of a “more advanced” civilization. This attitude was bolstered by the expectation that Indians would obligingly “recede into the forest,” as the Supreme Court put it in Johnson, because they were believed to be unable to live in the vicinity of manufacturers and agriculturists, and thus would free up land for settlement.276 The less benign version of this expectation was the “dying race” hypothesis of nineteenth century anthropologists,277 which envisioned the tribes as doomed to extinction, rather than as simply being doomed to being pushed farther west as settlers’ seemingly ever-increasing greed for land advanced the line of settlement. The anthropologists’ demands were focused not on the tribes’ real property—although having tribes removed from their

275. 21 U.S. 543 (1823).
276. Id. at 590–91 (“[A]s the white population advanced, that of the Indians necessarily receded; the country in the immediate neighborhood of agriculturists became unfit for them; the game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out . . . .). This view was based on an erroneous understanding of Native American agricultural practices and lifestyles in general. See generally Allison M. Dussias, Squaw Drudges, Farm Wives, and the Dann Sisters’ Last Stand: American Indian Women’s Resistance to Domestication and the Denial of Their Property Rights, 77 N.C. L. Rev. 637, 648–53, 656–70 (1999) (discussing tribal agricultural practices).
277. See supra notes 38–40 and accompanying text.
land had certainly been convenient—but rather on their personal property—funerary objects, sacred objects, and other items, as well as on the very bones of their deceased family members. NAGPRA seemed to have largely put an end to graverobbing, at least on tribal and federal lands, but in the case of the Kennewick remains the tribes found themselves fighting the same battle all over again. Once more, they were faced with anthropologists’ claims of entitlement. Once more, their understandings of kinship, ancestry, and history were treated as uncivilized and unscientific, and therefore not entitled to respect from the dominant society and its judicial system. For the tribes, as for the anthropologists, the stakes were high; what was claimed was not land or goods, but rather the body of a man whom they understood to be their kinsman.

1. The Plaintiffs’ Claim—Science Battling Religion

A sense of outrage at Indian tribes trying to stand, once again, in the way of anthropologists’ access to a human body that interested them was not alone sufficient for the plaintiffs to proceed with a legal claim. The plaintiffs had to cast in legal terms their demands for access and claims of entitlement to human remains that could not, in any sense, be said to belong to them personally.

The plaintiffs presented themselves to the courts as “renowned scientists” whose ability to carry on their profession had been adversely affected by the defendants’ decisions. Presumably money was at stake, as well—funding, the life blood of research (along with eager graduate students), could be expected to flow to those with ac-

278. Plaintiffs’ Amended Complaint at 3, Bonnichsen v. United States, 217 F. Supp. 2d 1116 (D. Or. 2002) (No. 96-1481-JE), available at http://www.friendsofpast.org/kennewick-man/court/communications/amended-complaint.html [hereinafter Amended Complaint]. Plaintiff Robson Bonnichsen was the Director of the Center for the Study of the First Americans, which was housed at Oregon State University when the litigation began. The other plaintiffs were as follows: C. Loring Brace, Curator of Biological Anthropology at the University of Michigan Museum of Anthropology; anthropology professors George W. Gill, C. Vance Haynes, Jr., Richard L. Jantz, and D. Gentry Steele; Douglas W. Owsley, division head for physical anthropology at the National Museum of Natural History at the Smithsonian Institution; and Dennis J. Stanford, Director of the Paleo Indian Program at the Smithsonian Institution. See Bonnichsen v. United States, 367 F.3d 864, 868 n.1 (9th Cir. 2004). The website of the Anthropology Department at Texas A & M University, where the Center for the Study of the First Americans is now located, describes anthropology and its sub-fields as follows: “Anthropology is the study of humankind over the entire world and throughout time. Anthropologists study existing cultures and human behavior (cultural anthropology), traditions (folklore), prehistoric cultures and lifeways (archaeology), the biological makeup and evolution of humans (physical anthropology), and the origin and nature of language (linguistics).” TAMU, Department of Anthropology, at http://anthropology.tamu.edu (last visited Aug. 5, 2005).
cess to such an important discovery as the Kennewick remains.\textsuperscript{279} The plaintiffs claimed, on behalf of scholars and students in general, a "right" to study the remains, and argued that their First Amendment rights to freedom of speech and to access to information and their Fifth Amendment right to due process had been violated by the defendants' interpretation of NAGPRA.\textsuperscript{280} The plaintiffs were thus claiming rights, as private citizens, to have access to property found in a federally managed area that belonged to the U.S. Government (unless it belonged to tribal claimants under NAGPRA). A similar claim relating to access to government property, though brought by Native Americans, was rejected by the Supreme Court in \textit{Lyng v. Northwest Indian Cemetery Protective Association},\textsuperscript{281} in which the Court considered three tribes' argument that their free exercise rights were threatened by government plans to build a logging road through sacred areas in a national forest. In \textit{Lyng}, after admitting that the proposed action would virtually destroy the plaintiffs' ability to practice their religion, the Court recast their constitutional claim into property law terminology, and then bristled at the thought of the plaintiffs trying to dictate to the government what it could do with its own property.\textsuperscript{282} The federal courts in the \textit{Bonnichsen} case, however, approached the anthropologists' rights of access claim with quite a different attitude and gave them a much more sympathetic reception.\textsuperscript{283}

The \textit{Bonnichsen} plaintiffs purported to make their claims not only on behalf of themselves, as individuals with careers at stake, but also on behalf of the American nation (although only their own access was

\textsuperscript{279} Anthropologists' and archaeologists' personal and professional interests are threatened whenever reburial of human remains in which they are interested is proposed. \textit{See} Larry J. Zimmerman, \textit{Anthropology and Responses to the Reburial Issue, in Indians and Anthropologists: Vine Deloria Jr., and the Critique of Anthropology} 92, 101 (Thomas Biolsi & Larry Zimmerman eds., 1997) ("As the reburial controversy 'heated up,' many physical anthropologists simply reacted to Indian demands in an understandably defensive way. After all, many had invested years of their lives in the study of human skeletal remains. With some justification, they felt that an important database was being threatened and, perhaps, their livelihood as well."). It stands to reason that for a plaintiff like Robson Bonnichsen, who, until his death in December 2004, was the Director of the Center for the Study of the First Americans, which he moved from Oregon State University to Texas A & M University in July 2002, funding needs must be of particular concern, in light of the need to fund the Center's many programs. \textit{See generally} Center for the Study of the First Americans, \textit{at} http://csfa.tamu.edu (last visited Aug. 5, 2005). Bonnichsen is playing a role in Center funding even after his death, as the Center has set up a memorial fund to receive donations in his memory. \textit{See} Center for the Study of the First Americans, Dr. Robson Bonnichsen, \textit{at} http://www.centerfirstamericans.com/memorial_fund.htm (last visited Aug. 5, 2005).

\textsuperscript{280} \textit{Amended Complaint, supra} note 278, at 10–11.

\textsuperscript{281} 485 U.S. 439 (1988).

\textsuperscript{282} \textit{Id.} at 453.

\textsuperscript{283} \textit{See infra} section IV.B.
of immediate concern to them). They claimed that the remains of the Ancient One constituted a “national treasure,” which, if “properly studied” (in other words, studied by the plaintiffs themselves) could “provide information important to an understanding of the peopling of the Americas and human evolution in general.” Study of the remains would be of “major benefit” to the nation, and could, apparently singlehandedly, lead to a better understanding of the earliest human populations of what the plaintiffs eurocentrically referred to as the “New World.” The plaintiffs claimed that building such a “better understanding” was an issue of “great importance” to all people of the Americas, including Native Americans. This claim ignored the perspective of the tribal claimants, who were confident that they already knew everything significant that could be known about the history of their people in the region, and who did not feel a need for the kind of understanding that might arise from the plaintiffs’ method of studying the remains. As Professor Tsosie has explained, this kind of “common heritage” claim made by the plaintiffs, which is aimed at securing coveted objects for scientific study, amounts to nothing more than an imperialistic appeal for everyone to “accept the supreme value of scientific knowledge over all other cultural, political and social values.” In addition, the claim echoed the attitude toward Native American rights and resources that for so long had characterized judicial decision-making and government policy-making—the rights are expendable, and their resources can be taken away by non-Native Americans, when the “national interest” so demands. The claim also brings to mind past allegations that Native American demands and ancient claims were standing in the way of progress, and that their obstructionism had to come to an end, for their own good as well as the good of the nation.

The claim that the remains of the Ancient One are tied to all Americans represents an about-face from the attitudes of nineteenth century anthropologists. In the past, the claimed difference between Native Americans and (white) Americans was what mattered—Native Americans were the doomed, backward “other,” and as people who would ultimately leave no survivors, their property and ultimately their very bodies were up for grabs. Anthropologists distanced themselves from the humanity of Native Americans and thus became comfortable with robbing their graves or enjoying the spoils of others’ graverobbing. Now, however, the better legal strategy for the plaintiffs was to claim a kind of national kinship with the Ancient One, in keeping with which his remains could be presented as belonging to all

284. Amended Complaint, supra note 278, at 5.
285. Id. at 6–7.
286. Id.
287. Tsosie, supra note 81, at 632.
Americans, while the particular ties between the Ancient One and contemporary Native Americans were denied. This strategy also had assimilationist overtones. By claiming him as one of their own, the plaintiffs were implicitly seeking to erase the distinctiveness of the Ancient One and his community, and of his descendants, as compared to contemporary Euro-Americans.288

The plaintiffs also argued that if they were not afforded the access to the Ancient One's remains that they demanded, then this would "preclude his descendants, if any such descendants exist today, of knowledge about their ancestry."289 Again, this ignores the perspective of the tribal claimants; they already claimed the Ancient One as his descendants and already knew all that they needed to know about him. Respect for their ancestor required that he be returned to the rest from which he had been disturbed, rather than being subjected to further objectification and destruction. The plaintiffs, however, apparently understood the term "descendants" to refer to direct biological descendants of the Ancient One, and would not acknowledge the claimant tribes' status as descendants of the Ancient One, in the absence of scientifically based evidence of direct genetic ties.

The plaintiffs presented themselves as the defenders of "science" against religion, and thus sought to obscure the real conflict—between human rights and anthropologists' demands—that NAGPRA was designed to address. In other words, they claimed, as scientists, to be engaged in "a unified enterprise defined by a set of shared attributes that uniquely determine what it is for [their] discipline to be scientific, that set real science apart from other (lesser) epistemic enterprises, and that trump any non-scientific interests or knowledge claims that might challenge the epistemic authority of science."290 Much like

288. Professor Ragsdale has observed that:

Science has long been a battleground for those with other vested interests. Behind the first breeze of a scientific conclusion of basic similarity between native culture and mainstream America might come the renewed storms of assimilation and termination. The tribes, once described by Felix Cohen as miners' canaries in the shifting gases of American politics, are bracing for the onslaught.


289. Amended Complaint, supra note 278, at 7.

290. Alison Wylie, Questions of Evidence, Legitimacy, and the (Dis)unity of Science, 65 AM. ANTIQUITY, 227, 229 (2000) (defining science as seen by science advocates who insist that such a thing as "science" exists). Critics, on the other hand, have raised "skeptical questions about expansive claims of authority made on behalf of science" and have challenged "the presumption that the sciences are uniquely non-parochial in scope and warrant, that they share a body of investigative practices capable of establishing knowledge that decisively transcends the contexts of its pro-
their professional forbears, they believed that they were being stymied by Indians’ religiously influenced sensibilities about their dead. They accused the defendants of harboring a “desire to suppress legitimate scientific inquiry” and of depriving them of access to, and information about, the remains “for reasons based on religious beliefs and doctrines,” which was alleged to violate the Establishment Clause.

In light of the government’s past policies of systematically suppressing Native American religions and of unabashedly financing missionary activities aimed at “Christianizing” tribes, and the Supreme Court’s rejection of Native American religious freedom claims in the Lyng and Smith cases, the idea that the government was deliberately extending a constitutionally impermissible preference to a Native American religion and thus “establishing” it as something akin to a national religion may well have had a ring of irony to it from the perspective of the tribal claimants. The plaintiffs in effect sought to discount the tribes’ claim as being based on their religious faith, and to subordinate it to the anthropologists’ claim, which was based instead on their own faith in their “science.” Moreover, if science is the antithesis of religion, and the anthropologists were asking the courts and government officials to privilege science over religion, it could be observed that they, too, were, in effect, seeking what might be viewed as an Establishment Clause violation—government preference for, and endorsement of, non-religion over religion.

In reaction, the defenders of science reaffirm the divide between science and nonscience, and insist on the unique integrity and authority of science as a corporate whole. Alison Wylie has observed that the antagonistic exchanges over NAGPRA are linked to “the fear of what archaeologists stand to lose if scientific ideals are undermined in any way.”

Id. at 228. Alison Wylie has observed that the antagonistic exchanges over NAGPRA are linked to “the fear of what archaeologists stand to lose if scientific ideals are undermined in any way.” Id.

Amended Complaint, supra note 278, at 9-10.

Id. at 10–11, 13. The plaintiffs did not pursue this claim in their final district court appearance so it was not addressed by the Ninth Circuit.


Some Supreme Court Justices have interpreted the Establishment Clause as requiring neutrality between religion and non-religion, and therefore the government cannot favor either. See, e.g., County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 644 (1989) (Brennan, J., dissenting). It might also be argued that the plaintiffs’ faith in science is itself a kind of religion and that favoring this “faith” would violate the Establishment Clause. See Frank S. Ravitch, Law and Religion, A Reader: Cases, Concepts, and Theory 524 (2004) (noting that a belief in science and proof by the scientific method might qualify as “religion” under the approach to defining religion that has been developed by the Supreme Court).
It should also be noted that the plaintiffs' demands, put forth in the name of science under attack from religion, obscured the fact that despite the objections of the tribal claimants, the remains had already been subjected to extensive scientific examination, most of it corresponding to the kind of analysis that the plaintiffs had claimed was required. The plaintiffs' claim could not be that scientific examination had not taken place because of the tribal claimants' religious scruples, as this would have been blatantly false. Their only objections could be that not all of the analyses that qualified experts had already performed had been carried out exactly as the plaintiffs would have done them, and that the analyses had not been done by the plaintiffs themselves. In short, it cannot be denied that "science" had already had access to the remains, and had even managed to deliberately destroy part of them for its own purposes, regardless of objections that might be attributed to "religion."

Finally, the plaintiffs' argument that their claims, as anthropologists, were being brought on behalf of science reflects an incomplete characterization of their profession and field of study. While practitioners in the fields of anthropology (particularly physical, or biological, anthropology) and its sub-discipline archaeology have become more scientifically oriented in recent years, the fact remains that they are still typically categorized as social (or "soft") sciences, in contrast with the "hard" sciences, such as chemistry and physics. In plaintiff Robson Bonnichsen's home institution, Texas A & M University, for example, anthropology and archaeology are housed in the College of Liberal Arts with such fields as political science, English, and history, while the sciences are housed in the College of Science. In the hard sciences, unlike the soft sciences, researchers can develop a hypothesis, frame an experiment to test the hypothesis, and prove or disprove the hypothesis; another researcher can perform the same ex-

295. See, e.g., Adovasio & Page, supra note 21, at 148 (discussing the "New Archaeology" and its focus on developing a more scientific approach); see also Wylie, supra note 290, at 228 (referring to the New Archaeology's "scientizing ambitions").

296. See College of Liberal Arts at Texas A & M University, at http://clla.tamu.edu/REALP.pl?term=degrees (last visited Aug. 5, 2005); College of Science at Texas A & M University, at http://www.science.tamu.edu (last visited Aug. 5, 2005). Christopher Chippindale, of the Cambridge University Museum of Archaeology & Anthropology, has observed that "[i]n a structured ordering of sciences, classical mechanics—dealing with predictable and limited physical systems—comes at one end, while archaeology is at the other." Christopher Chippindale, Capta and Data: On the True Nature of Archaeological Information, 65 Am. Antiquity 605, 606 (2000). He has also noted that in archaeology the data—"those statements we are given that encapsulate the real-world problem at issue"—"are not independent of the conclusions, for different viewpoints and interests direct what kind of conclusion (if any) is pursued and guide the researcher toward those kinds of data pertinent not just to the problem at issue, but toward the preferred view that is taken of it." Id. at 605.
experiment under the same conditions and should obtain the same re-297 As archaeologist J.M. Adovasio has written, there are still doubts as to “whether the field of archaeology can ever be pursued as a science,”298 as opposed to being a field in which at least some practitioners “develop a theory and then set out to find the data to support it”299 or have theories inspired by “dreams” and then “persuade themselves that the evidence is supportive.”300 Moreover, even the sub-field of physical anthropology, with its use of precise measurements and statistical analyses, is not as objective and “scientific” as it may at first appear. Anthropologists have themselves noted, for example, that some of the variables that are considered in craniometric analyses “tend to exhibit a high degree of intra- and inter-observer error,”301 and even if anthropologists agree upon the specific measurements of particular remains, they may still disagree about the precise methods, protocols, and reference samples that should be used to analyze them, and on what conclusions can be drawn from them.302 The plaintiffs ignored these realities. Instead, by presenting their field of study as science, which must be privileged over religion and any other “nonscientific” interests or foundations for knowledge, the plaintiffs claimed a status for anthropology that is itself debatable, and that is belied by the categorization of anthropology and archaeology by academic institutions, in the hope that their misrepresentation would convince the courts of the legitimacy of their claim.

2. The Tribal Claim—We Are Still Here

The defense by the U.S. Government of the DOI’s NAGPRA determination was based on the requirements of NAGPRA and its related regulations, and on the appropriateness of the way in which government officials acted in carrying out their statutory responsibilities. The tribal claimants also rested their claim on the proper interpretation and carrying out of NAGPRA’s provisions by the DOI. In addition, they also claimed the remains of the Ancient One on grounds that reflected their own perspective on such fundamental matters as the nature of kinship and community, the sources of historical knowledge, and the nature of time itself, as the discussion below reveals.

297. See Adovasio & Page, supra note 21, at 111; see also id. at 182 (discussing the concept of replicability in the hard sciences and its absence in archaeology).
298. Id. at xvi.
299. Id. at 200.
300. Id.; see also Tsosie, supra note 81, at 618–19 (discussing whether archaeology can be regarded as a science).
301. Powell & Rose, supra note 152, at 13.
First of all, the tribal claim to the remains reflected a belief that the physical remains of all human beings, regardless of race, are deserving of respectful treatment. For buried remains that have been disinterred, this would include reburial, so that the remains could be returned to the state of rest from which they had been disturbed. As tribal leader Armand Minthorn explained, “Our elders have taught us that once a body goes into the ground, it is meant to stay there until the end of time,” so if the Ancient One’s remains were returned to the claimant tribes, they would “re-bury him and put him back to rest.”

The tribal claimants’ concern for the fate of disinterred human remains is not limited to Indian remains. The tribes believe that they have “an inherent responsibility to care for those who are no longer with us... [and] to protect all human burials, regardless of race. We are taught to treat them all with the same respect.”

Respect for human burials is not a sentiment that is at odds with the sensibilities of most Americans. Presumably even the plaintiffs would agree that at least the remains of all recently deceased individuals, even Native Americans, should be treated with dignity, and should not presumptively be available as the objects of scientific inquiry. Legal entitlement to this kind of respectful treatment was, of course, a long time in coming for the indigenous inhabitants of the Americas, and remains incomplete. Regarded in the past by many Euro-Americans either as less than fully human or as existing at a lower level of human development and civilization, Native Americans were not afforded equal treatment under the law during life or after death. Indeed, this attitude was not completely laid to rest with the end of the nineteenth century, as the need for a statute like NAGPRA made clear. Despite anthropologists’ fears over NAGPRA’s effects on the availability of the resources that they see as indispensable to their careers, NAGPRA has not brought a complete halt to the robbing of Native American graves within the United States or ensured the return of all Native American remains to Native American individuals or tribes. As Armand Minthorn has noted, Native American remains continue to be held by museums and other institutions, “waiting for the day when they can return to the earth, and waiting for the day that scientists and others pay them the respect they are due.”

Native American remains continue to be held by private collectors as well. In 1997, in the very state in which the remains of the Ancient

303. Armand Minthorn, Human Remains Should be Reburied (Sept. 1996), available at http://www.ummatilla.nsn.us/kman1.html. The focus in this discussion is on the attitudes of the claimant tribes toward human remains and toward the remains of the Ancient One in particular. For discussion of how tribes differ in terms of their attitudes toward death, the deceased, and repatriation, as well as some commonalities, see Tsosie, supra note 81, at 633, 635–40.

304. Minthorn, supra note 303, at 2.

305. Id.
One were found, the remains of at least ten Native Americans were found dumped in the Snoqualmie River, as if the bones, and the once living people whom they represented, were simply garbage to be disposed of when the person who had collected them deemed it expedient to do so.\textsuperscript{306} A morbid and disrespectful fascination with Native American remains seemingly penetrates American society at many levels. The Skull and Bones Society, an organization unofficially tied to Yale University whose members include both President George W. Bush and Senator John F. Kerry, is believed by some to hold the skull of the Apache leader Geronimo, which was reportedly obtained through graverobbing by President Bush’s grandfather.\textsuperscript{307} This allegation has persisted long enough and received sufficient attention to prompt a NAGPRA Review Committee member to request an investigation.\textsuperscript{308} It is illuminating and sobering to realize that even Americans with high political status—and high political hopes—feel no need to respond to these allegations. Perhaps they believe that for most American voters, who may have seen the remains and grave goods of indigenous peoples in museums, the kind of treatment that Native American remains receive is unimportant.

The basis for the difference of opinion between the plaintiffs and the tribal claimants as to the kind of treatment to which the Ancient One’s remains are entitled warrants careful analysis, given that respectful treatment of the dead is a commonly shared American value. One explanation for their differing views might be that the plaintiffs had something to gain, in terms of potential career advancement and maybe even research support, from not having the remains reburied, and their beliefs as to what treatment was appropriate were based on this calculation. Armand Minthorn has described the anthropologists who want to study the Ancient One’s remains as believing “that he

\textsuperscript{306} Scott Sunde, Clues Found in Mystery of Bones; A Collection May have Been Dumped in River, \textit{Seattle Post-Intelligencer}, Aug. 23, 1997, at B1, \textit{available at} 1997 WLNR 1899732. The bones were believed to be about two hundred years old; radiocarbon dating and DNA analysis were not done, at the request of the tribe on whose historical lands they were found, because such analysis would have necessitated breaking or grinding portions of the bones. \textit{See id.} The bones were believed to have been part of a collection because some of them had been treated with shellac or varnish, some were found in a burlap sack, and the absence of algae growing on the bones indicated that they had been in the river for only a short time. \textit{See id.}

\textsuperscript{307} Sherry Hutt, If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans, 24 N. ILL. U. L. REV. 527, 538 n.75, 560 n.211 (2004). Some believe that Prescott Bush, along with five other army captains, partially exhumed Geronimo’s remains in 1918 from their resting place in the Apache cemetery at Fort Sill, Oklahoma. \textit{Id.} at 538 n.75.

should be further desecrated for the sake of science, and for their own personal gain.”

Setting this possible self-interested motivation aside, though, the plaintiffs' views as to what treatment is appropriate for the Kennewick remains—namely, their conviction that the remains should be subjected to further study by themselves, and possibly to additional testing-related destruction—suggest a sense of separation from the human being whose remains are at issue. For at least some of the plaintiffs' anthropological forebears, the sense of separation that allowed them to treat Native American remains as objects for anthropological inquiry seemingly stemmed from racial prejudice. Anthropologist Ales Hrdlicka, for example, dug up freshly buried corpses at the Larsen Bay native community, despite the anguish that he knew this caused to the deceased individuals' surviving family members, whom he treated with utter contempt. It is difficult to imagine that he would have thought it appropriate to treat the remains of recently deceased white Americans in the same way, even if the law had so allowed. The perceived racial divide thus may have allowed him to see himself as separate from the remains he collected, and enabled him to be comfortable with treating them as he did.

Although the persistence of Native American graverobbing and bone collecting indicates that some Americans continue to tolerate treatment for Native American remains that presumably they would not countenance for other human remains, there has been no express indication that the plaintiffs share the blatantly racist sentiments of Ales Hrdlicka. Nonetheless, they also are comfortable with handling, and with partially destroying, the disinterred human remains at the center of the dispute in the Bonnichsen litigation. Their comments suggest that it is the temporal divide, rather than a racial divide, that they see as existing between themselves and the Ancient One that enables them to treat his bones as objects for study rather than as a disinterred human corpse. For the plaintiffs, the fact that the Ancient One died so long ago provides them with a basis to distance themselves from him as a fellow human being, and to think of him instead as merely an object of scientific curiosity. In their eyes, because the Ancient One lived in the distant past, he “belongs” to no one as kin, but rather to everyone as a fascinating object from the past.

To the tribal claimants, however, a temporal distance between the present day and the Ancient One's time has not lessened their sense of bearing a responsibility to treat his remains with the same respect and dignity with which the bodies of more recently deceased individuals are treated. Although the tribal claimants have not publicly ex-

---

309. Minthorn, supra note 303, at 1.
310. See supra notes 65–69 and accompanying text.
pressed any explicit views about the significance of the temporal divide between themselves and the Ancient One, their refusal to make the temporal divide—a divide that anthropologists tell them is vast—determinative of their obligations is consistent with the traditional sense of time commonly attributed to the indigenous peoples of the United States. The traditional indigenous world view conceives of time not in the linear and "progress"-oriented way of Western thought, in which time is clearly divided into past, present, and future, but in a cyclical and reciprocal manner. This cyclical understanding of time is reflected in what is transmitted through oral tradition:

Events or processes transmitted through oral traditions tend not to be recounted in terms of time past or time future in the linear sense. Indeed most Native American languages do not have past and future tenses; they reflect rather a perennial reality of the now. The rich mythic accounts of creation, for example, do not tell of chronological time past, but of processes that are eternally happening. The same processes are recurring now and are to recur in other future cycles.

Although the recounting of tribal history may begin with phrases such as "in the long ago," this phrase "does not refer to a historical period of a linear time past, but usually refers to a qualitative condition of earlier existence which, through the telling of the myth, may be mysteriously reintegrated and realized in the immediacy of the timeless now." This perspective understands "all worlds—natural and supernatural, ancestral and contemporary—and their inhabitants as simultaneous, coequal, and balanced." By the same token, individuals who lived in the past may not be seen as "dead and gone" in the way that Euro-American anthropologists perceive them; rather, they may be seen as spiritually, even if not physically, alive. Commenting on the remains of the woman known to anthropologists as "Buhl Woman" and radiocarbon dated to over 10,000 years old, which were re-buried on the Fort Hall Reservation, Sho-

312. Id. at 49–50; see also id. at 84–85 ("The recitation of a myth defining creation, for example, is not experienced in terms of an event of linear time past, but rather of a happening of eternal reality, true and real now and forever, a time on the 'knife edge between the past and the future.'"), 86 ("[C]reation . . . occurs not just once out of nothingness in linear time past, but is an event ever occurring and recurring in cyclical fashion, just as the observable cycle of days or seasons speak of death and rebirth. . . . [This understanding of creation] shifts the orientation away from creation understood as a single event of time past, to the reality of those immediately experienced processes of creation ever happening and observable through all the multiple forms and forces of creation.").
313. Id. at 98.
shone–Bannock anthropologist Diana Yupe stated that she is "‘the Mother of us all. . . . To us, she is our ancestor, and hers is not just a decomposed body; she is alive.’”315

Within the context of a world view that has been influenced by such an understanding of time and the past, the period during which the Ancient One lived does not seem as distant and utterly divorced from the present as it does to anthropologists. As Walter Echo-Hawk has put it, “We don’t accept any artificial cutoff date set by scientists to separate us from our ancestors. . . . What Europeans want to do with their dead is their business. . . . We have different values.”316 This perspective can foster a sense of responsibility to those living at different times, all of whom can be seen as equal parts of an organic, continuing community, extending from the seemingly distant past into the present, and beyond into the future. The Western linear sense of time and process, by contrast, assumes that what came earlier is inferior to what came more recently—"the more and the new are mysteriously and automatically identified with the better.”317 It was under the influence of this understanding of time and “progress” that past anthropologists and others viewed Native Americans as ranking low on a hierarchy of civilization and as “innately inferior in their humanity and lifeways to people of modern civilization.”318 And this perspective allows today's anthropologists to see the remains of the Ancient One as objects from a distant, primitive past, which have lost their status as human. They therefore treat these remains as not being entitled to the deferential treatment owed to the remains of recently deceased human beings.

The view of the past shared by archaeologists and physical anthropologists like the plaintiffs also leads them to objectify human remains like those of the Ancient One. Their view can be characterized as a "technical rationality that reduces the past and all else it examines to a simple ‘dead’ exteriority open to all manner of investigation and manipulation.”319 When the plaintiffs treat the past as “gone, extinct, or lost with reburial, [they] send a strong message to Indians that Indians themselves are extinct.” For Indians, acceptance of this view of the past “would actually destroy the present. . . . If the past is

316. Morell, supra note 315 (quoting Walter R. Echo-Hawk).
317. BROWN, supra note 311, at 117; see also id. at 50.
318. Id. at 118.
319. Zimmerman, supra note 279, at 102.
the present, excavated human remains are not devoid of personality and must be respected as a living person should be."\textsuperscript{320} By using any other approach, anthropologists "are actually showing disrespect to the person that is the remains and to contemporary Indians."\textsuperscript{321} The plaintiffs' objectification of human remains and dismissal of the past as being dead and gone thus puts them seriously at odds with the tribal perspective.

It is also clear that the tribal claimants' sense of responsibility to the Ancient One stems not just from a sense that the passage of time has not robbed him of his right, \textit{as a human being}, to be treated as more than a mere object for study. In addition, the tribes feel an obligation to try to see that his remains are treated with dignity because of their recognition of him \textit{as an ancestor}. Their general respect for his remains as human remains is accompanied by a more particularized respect for the remains as their ancestor's remains. From the tribal claimants' perspective, the Ancient One is an individual who was undoubtedly part of a community that lived on their lands thousands of years ago, long before the arrival of Euro-American settlers. As Armand Minthorn explained, his tribe "has ties to this individual because he was uncovered in our traditional homeland – a homeland where we still retain fishing, hunting, gathering, and other rights under our 1855 Treaty with the US Government."\textsuperscript{322} The archaeological evidence that the Ancient One lived over 9,000 years ago does not lessen their sense of connectedness to him as an ancestor, but rather strengthens it. The claimant tribes' people have been part of this land, as they know from their oral histories, "since the beginning of time," and so the discovery of very ancient human bones in their traditional homeland is wholly compatible with their beliefs.\textsuperscript{323}

The tribes' claim to the Ancient One also indicates their understanding of kinship and community ties. They do not consider genetic or other biologically based evidence necessary to prove the Ancient One's kinship with them. This reflects a more inclusive sense of kinship than that of the plaintiffs, for whom the lack of any scientifically proven biological link between the remains and contemporary tribal members is determinative. NAGPRA's provisions enshrine at least partial respect for the tribal perspective on kinship. The ownership provisions give first priority to "lineal descendants"—a term that is undefined in the statute but which suggests the kind of direct link between the individual whose remains are at issue and living individuals that would satisfy mainstream genealogists. Failing the existence of such descendants, however, NAGPRA looks more broadly for

\textsuperscript{320} \textit{Id.} at 103.
\textsuperscript{321} \textit{Id.}
\textsuperscript{322} Minthorn, \textit{supra} note 303, at 1.
\textsuperscript{323} \textit{Id.} at 2.
relationships with the deceased individual and, in effect, assigns tribes the status of next of kin.\textsuperscript{324} Among these more broadly recognized relations, the top priority is given to the tribe on whose tribal land the remains were found, followed by the tribe with the closest cultural affiliation with the remains, and then the tribe on whose aboriginal land the remains were found.\textsuperscript{325} Cultural affiliation is based on shared group identity (i.e., a culturally based connection) between a present day tribe and an earlier group,\textsuperscript{326} rather than on evidence of genetic connections between the older group and the contemporary tribe.

The plaintiffs' understanding of biological connections as the basis for significant human relationships is reminiscent of nineteenth century government policymakers' hostile attitude toward Native Americans' more inclusive understanding of kinship and community. One aspect of the assimilation program implemented by federal Indian policy makers was the restructuring of the Native American family. The elaborate kinship networks and extended family structures of the tribes targeted for assimilation, and the communal family life that accompanied them, were to be replaced by nuclear families, each to be headed by a property-owning man who was to be responsible for the support of his wife and minor children.\textsuperscript{327} Any sense of responsibility and allegiance to other members of the community, such as fellow clan members, was to be obliterated in favor of a focus on the nuclear family, its members joined together by what the government deemed to be close biological ties. As U.S. Board of Indian Commissioners member Merrill E. Gates put it in 1885, "The family is God's unit of society. . . . There is no civilization deserving of the name where the family is not the unit of civil government."\textsuperscript{328} "The family has always been . . . the best school for the development of character."\textsuperscript{329} A sense of relationship with the tribal community was to be "outgrown," because it undermines the "manful effort which political economy teaches us proceeds from the desire for wealth. . . . [T]he tribal system paralyzes at once the desire for property and the family life that ennobles that desire."\textsuperscript{330} Native American notions of relationship and belonging also accommodated a more extensive and more flexible sense of inter-

\begin{itemize}
\item \textsuperscript{324} 25 U.S.C. § 3002(a)(2) (2000).
\item \textsuperscript{325} Id. § 3002(a)(2).
\item \textsuperscript{326} Id. § 3001(2).
\item \textsuperscript{327} See Linda J. Lacey, \textit{The White Man's Law and the American Indian Family in the Assimilation Era}, 40 ARK. L. REV. 327, 331, 342 (1986).
\item \textsuperscript{329} Id. at 55.
\item \textsuperscript{330} Id. at 51.
\end{itemize}
generational ties, with extended family members playing important roles in child-rearing and adoption being more widely accepted than in Euro-American society.

Despite the best efforts of nineteenth century assimilation proponents, in contemporary tribal communities, extended family ties, and foster care and adoptive relationships, continue to flourish. This conception of significant kinship connections not being limited to those sharing what outsiders would consider close biological ties, taken together with a traditional understanding of time as not creating a great temporal divide between the present and the distant past, is consistent with the tribal claims of affiliation with the Ancient One. In short, for the tribal claimants, the Ancient One is one of their relations, and his apparent age and lack of a proven genetic link to them are immaterial. As far as any possible differences in appearance between themselves and the Ancient One are concerned, they, too, are of no consequence to the tribal claimants, in marked contrast to the great significance that the plaintiffs attach to physical appearance. Any such differences are unsurprising to the tribes, Armand Minthorn has explained, because they believe that humans and other animals change over time, in response to their environment, and tribal elders have said “that Indian people did not always look the way we look today.”331 Indeed, even other anthropologists have indicated that apparent physical differences between the Ancient One and contemporary Native Americans are unsurprising given the passage of time,332 and that the differences do not disprove the claim that the Ancient One was a Native American.

In summary, from the tribal claimants' perspective, kinship is not just based on close biological connections. Ties with, and responsibilities to, members of the community are not limited to members of the nuclear family and other “blood relatives” alive today. To the plaintiffs, on the other hand, family ties seemingly do not exist (with the exception, presumably, of marriage) in the absence of a biologically based relationship, and community and kinship ties with and responsibilities to past generations are seen as greatly circumscribed.

Although tribal leaders, like Armand Minthorn, have spoken in terms of their religious and cultural beliefs, it is important to note that the tribes do not, as Donald Sampson, former Chairman of the Board of Trustees of the Umatillas, has pointed out, wholly reject science. Rather, they argue for a more thoughtful, sensitive, and balanced approach than they believe the plaintiffs have exhibited. Sampson explained: “[W]e have anthropologists and other scientists on staff, and we use science every day to help in protecting our people

331. Minthorn, supra note 303, at 2.
332. See, e.g., Adovasio & Page, supra note 21, at 245.
and the land. However, we do reject the notion that science is the answer to everything and therefore it should take precedence over the religious rights and beliefs of American citizens.\textsuperscript{333} Tribal leaders and others have questioned the way in which the scientists have led the public to believe that considerable data could be generated simply by studying one skeleton, and have published, in popular publications such as \textit{The New Yorker} magazine, descriptions of the Ancient One and his lifeways that were depicted as scientific knowledge when they were based on what can only be accurately referred to as speculation.\textsuperscript{334} In the same vein, archaeologist J.M. Adovasio has explained that it is "unwise" to make too much of a single set of remains from the early period to which the Kennewick remains were dated, given that "[n]ot only are there great diversity and complexity in the human anatomy—the differences often shading imperceptibly from one type to another—but there are also individuals who simply don't fit the type even though they are members of it."\textsuperscript{335} Also, Adovasio has criticized some archaeologists for going "off the mark with their exuberant Europeanoid claims"\textsuperscript{336} and has described the reconstructed head of the Ancient One that appeared in national magazines, and led to a lingering preconception that he was European, as an illusion.\textsuperscript{337} The head, which was reconstructed using a method that is itself subject to considerable doubt,\textsuperscript{338} looked Caucasian only from the angle in the heavily publicized photograph and looked altogether different if seen head on,\textsuperscript{339} leading Adovasio to conclude that magazine editors had selected this unique view "[s]o that uncounted numbers of Americans could persist in the absurd belief that it was a white guy, not an Indian, who got to the Americas first."\textsuperscript{340} The plaintiffs have not indicated any concern for clearing up the misconceptions that their own activities and those of their professional colleagues have fostered, and


\textsuperscript{334} Sampson, \textit{supra} note 333, at 2. \textit{The New Yorker} article claimed that scientists knew a great deal about the Ancient One's diet, physical appearance, group, lifestyle, shelter, and clothing. \textit{Id.} at 1.

\textsuperscript{335} ADovASio & PAGE, \textit{supra} note 21, at 254.

\textsuperscript{336} \textit{Id.} at 253.

\textsuperscript{337} \textit{See id.} at 243.

\textsuperscript{338} A statistical method that adds clay in certain thicknesses to the model of a skull, which police forensics experts use to reconstruct the general appearance of an individual's face from his or her skull, was used to construct the head. \textit{See id.} at 244. This provided, at best, "a plausible but generalized statistical projection of a face no one alive had ever seen." \textit{Id.}

\textsuperscript{339} \textit{See id.} at 243-44.

\textsuperscript{340} \textit{Id.} at 245.
seem unwilling to indicate any respect for the tribal claimants' perspective.

B. The Court of Appeals Opinion in Bonnichsen v. United States

From the tribes' and U.S. Government's perspective, there was simply no legal basis for the plaintiffs to seek judicial interference with the DOI's decision as to what NAGPRA required with respect to the Kennewick remains. At the district court level, however, the government and the tribal claimants were unable to persuade the magistrate judge hearing the case, Magistrate Judge Jelderks, with their arguments against the plaintiffs' standing and other arguments for dismissal of the case and summary judgment against the plaintiffs. Instead, Magistrate Judge Jelderks ultimately sided with the plaintiffs and, in a 2002 opinion, set aside the DOI's disposition decision, enjoined transfer of the Ancient One's remains to the tribal claimants,
and required that the plaintiffs be allowed to study the remains, in spite of his acknowledgment of the overlap between the plaintiffs' proposed studies and those that had already been performed.342

The tribal claimants had originally participated in the Bonnichsen litigation solely as amici curiae; they were not defendants in the case and it had appeared to them that the federal defendants had adequately represented their interests.343 Following Judge Jelderks' 2002 decision, however, the tribal claimants344 sought to intervene in the case for purposes of appeal to the Ninth Circuit. They were concerned about the federal defendants' slowness in seeking an appeal to defend the DOI's interpretation of the term "Native American" and the DOI's cultural affiliation determination, and believed that the federal defendants no longer adequately represented the tribal claimants' interest in obtaining possession of the remains and upholding the DOI's interpretation of NAGPRA.345 Judge Jelderks granted their

342. Bonnichsen, 217 F. Supp. 2d at 1119, 1167. Magistrate Judge Jelderks held that the DOI did not have sufficient evidence to conclude that the Ancient One's remains were "Native American" within the meaning of NAGPRA or to establish cultural affiliation by a preponderance of the evidence. Id. at 1139, 1156. He rejected the DOI's conclusion that the "aboriginal lands" ownership priority provided an additional legitimate basis for a disposition decision. Id. at 1161. He rejected the plaintiffs' argument that the DOI's consideration of oral traditions, which were intertwined with religious beliefs, violated the Establishment Clause. Id. at 1152. He declined to address the plaintiffs' claim that the refusal to allow them to study the remains and the discovery site violated their First Amendment rights, on the grounds that courts avoid considering constitutional questions unless it is necessary to do so. Id. at 1161-62.


344. The motion to intervene was filed by the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Colville Reservation, and the Yakama Nation. See id. at 7-8. Thus the Wanapum Band, a non-federally recognized tribe that was not eligible to file its own claim under NAGPRA, did not participate. Magistrate Judge Jelderks held that the DOI had erred in treating the tribal coalition, of which the Wanapum Band had been a member, as a proper claimant under NAGPRA. Bonnichsen, 217 F. Supp. 2d at 1143. The Ninth Circuit did not review the holdings on cultural affiliation, the status of the coalition as a claimant, or the aboriginal occupation priority. See Bonnichsen, 367 F.3d at 872 n.11.

345. Tribal Memorandum to Intervene, supra note 343, at 2, 6. The memorandum explained the reasons for their concern as follows:

The federal defendants have allowed the deadline for seeking to amend the judgment to pass without requesting relief. Nor is it clear that the federal defendants will file and actively pursue an appeal of the district court decision. Even if they do, it is uncertain whether the federal defendants are capable and willing to raise the same issues on appeal as the Joint Tribal Claimants. Considering the numerous legal issues at
motion,\textsuperscript{346} over the objection of the plaintiffs,\textsuperscript{347} and the tribal claimants filed an appeal to the Ninth Circuit.\textsuperscript{348} The tribal claimants' concerns about the federal defendants' commitment to defending the DOI's determinations proved well founded, as the federal defendants did not file a notice of appeal until the day before the appeal deadline.\textsuperscript{349} Moreover, the government decided to defend only the DOI's Native American determination, and not the cultural affiliation determination or aboriginal lands conclusion, on appeal.\textsuperscript{350} The government decided to change its stance on the tribal claimants' entitlement to the remains to the position that the remains should be treated as remains without a qualified claimant, and that such treatment would

\textit{stake in this action, the interests of the Applicants and the federal defendants are no longer congruous.}

\textit{Id.} at 6 (footnote omitted).


350. The federal defendants sought appellate review only on two issues: whether the DOI's determination that the Ancient One is Native American within the meaning of NAGPRA was "arbitrary, capricious, an abuse of discretion, or contrary to law" and whether Magistrate Judge Jelderks erroneously interpreted the term "Native American" as requiring a demonstrated cultural relationship between the remains in question and a presently existing tribe. Federal Appellants' Opening Brief, supra note 349, at 3. The government's opening brief explained that the federal defendants were not appealing the part of the district court order that set aside the DOI determination that the tribal claimants were entitled to custody of the remains under NAGPRA. \textit{Id.} at 52. The government's position was that if the Ninth Circuit reversed the district court holding on the "Native American" issue and upheld the DOI's determination that the Ancient One was Native American, then the matter should be remanded to the DOI so that the remains could be disposed of as unclaimed remains. \textit{Id.} at 52–53.
not necessarily preclude scientific study.\textsuperscript{351} Thus, the federal government left the tribal claimants to go it alone in their appeal of the district court's rejection of the DOI's cultural affiliation determination.

In their appeal to the Ninth Circuit Court of Appeals, the tribal defendants renewed the standing argument before the three-judge panel hearing the appeal, arguing that the plaintiffs lacked standing to challenge the DOI's decisions because, among other reasons, they were not seeking to invoke interests within the "zone of interests" protected by NAGPRA.\textsuperscript{352} NAGPRA was, after all, enacted as human rights legislation aimed at protecting the interests of tribes and their members against repetition of the centuries of past misconduct by the professional forbears of the plaintiffs. The court of appeals, however, interpreted the wording of the NAGPRA enforcement provision\textsuperscript{353} as amounting to a congressional negation of the zone of interests test\textsuperscript{354} and held that the federal courts' jurisdiction was therefore not limited to cases brought by tribes or Native Americans.\textsuperscript{355} Moreover, the court minimized the protective nature of NAGPRA and distorted its focus by stating that the statute "was not intended merely to benefit American Indians, but rather to strike a balance between the needs of scientists, educators, and historians on the one hand, and American Indians on the other."\textsuperscript{356} This passage downplayed the legitimacy of Native American claims under NAGPRA by implicitly characterizing Native Americans as the recipients of gratuitous statutory benefits, which must be balanced against the demands of scientists and others who seek access for study—demands that the court elevated in importance by characterizing them as "needs." By rejecting the tribes' argument that the court did not have jurisdiction to decide the case,\textsuperscript{357} the court in essence agreed to hear a case brought by the very kind of people against whom NAGPRA was designed to provide tribes with protection.\textsuperscript{358}


\textsuperscript{352} Bonnichsen v. United States, 367 F.3d 864, 871-74 (9th Cir. 2004).

\textsuperscript{353} See 25 U.S.C. § 3013 (2000) ("The United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter.").

\textsuperscript{354} See Bonnichsen, 367 F.3d at 873.

\textsuperscript{355} Id. at 874.

\textsuperscript{356} Id. at 874 n.14 (emphasis added).

\textsuperscript{357} Id. at 874.

\textsuperscript{358} The court of appeals also decided that the plaintiffs had satisfied the redressable injury prong of the constitutional standing requirements because if there were a decision favorable to the plaintiffs on the NAGPRA issue, it was likely that the plaintiffs' injury—the loss of the opportunity to study the remains—would be redressed. Id. at 873.
The appeals court's willingness to hear the plaintiffs' claim despite the goals of NAGPRA was unsurprising, given the perspective that the court brought to the case—a perspective that echoes centuries of Euro-American attitudes and government policy toward the indigenous peoples of the Americas—as revealed by the first paragraph of the court's opinion. A critical examination of the precise language of the opinion reveals much about the underlying attitudes and sympathies that shaped the court's decision and that guaranteed an uphill battle for the tribal claimants. The court's approach and ultimate decision also underscore the threat to NAGPRA that is posed by courts' acceptance of warped interpretations of the statute and criticisms of DOI decision making that are brought to the court by anthropologists, eager to regain some of the ground that they believed they had lost to the tribes under NAGPRA.

1. Setting the Stage

The court set the stage for its decision with a revealing opening paragraph:

This is a case about the ancient human remains of a man who hunted and lived, or at least journeyed, in the Columbia Plateau an estimated 8340 to 9200 years ago, a time predating all recorded history from any place in the world, a time before the oldest cities of our world had been founded, a time so ancient that the pristine and untouched land and the primitive cultures that may have lived on it are not deeply understood by even the most well-informed men and women of our age.359

The court's language suggested that it equated recorded history with written history. This approach ignored the fact that for the tribes of the area, the recorded history of the region—the history that has been preserved in a form that has survived transmission from generation to generation—dates back to the very creation of the area, and thus encompasses the period of the Ancient One's life. For the tribes, history preserved by oral transmission is recorded history, and is no less legitimate than history as recorded in written form. Contemporary ethnohistorians have also recognized that the documentary record on which they rely in their work should include oral tradition, along with folklore, place names, enduring customs, and other forms of evidence.360

359. Id. at 868.
360. See James Axtell, Ethnohistory: An Historian's Viewpoint, in The European and the Indian: Essays in the Ethnohistory of Colonial North America 3, 8 (1981). Ethnohistory is "the use of historical and ethnological methods and materials to gain knowledge of the nature and causes of change in a culture defined by ethnological concepts and categories." Id. at 5. A briefer definition of ethnohistory is "the use of historical data to conduct anthropological research." Daniel L. Boxberger, Introduction, in Native North Americans: An Ethnohistorical Approach vii, ix (Daniel L. Boxberger ed., 1990); see also supra note 208 and accompanying text.
Next, the court's opening paragraph juxtaposed cities, recognized by Western thought as the embodiment of civilization and human progress, with the "pristine and untouched land," which was inhabited by "primitive cultures." This dichotomy brings to mind past government policies aimed at "civilizing" the "primitive" Indian tribes,\textsuperscript{361} as well as the Supreme Court's decision in \textit{Johnson v. M'Intosh}\textsuperscript{362}, in which the tribes' allegedly unsettled and violent lifestyle, in contrast to the Euro-American agriculturists around them, was presented as a justification for depriving them of full title to their land. The juxtaposition of cities with undeveloped land inhabited by primitive cultures also suggests anthropology's long-held, traditional view of Native Americans as primitive peoples who ranked low in the hierarchy of civilization, and were doomed to extinction.\textsuperscript{363}

Finally, by claiming that the land and people of the Ancient One's time are not well understood by even the "well-informed," the passage implicitly discounted the claimant tribes' understanding of their people's chronologically distant past. It seems that to the court, only properly credentialed archaeologists and anthropologists could be considered to possess the kind of knowledge that would render them well-informed.

2. What's in a Name?

Having set the stage for the analysis with this revealing opening paragraph, the court proceeded to describe the Ancient One as "one of the most important American anthropological and archaeological discoveries of the late twentieth century."\textsuperscript{364} The court separated the Ancient One from the rest of humanity by objectifying him as a "discovery," rather than treating him as a human being whose remains had been disturbed from their resting place. The court thus started with the premise, shared by the plaintiffs, that the Kennewick remains are not to be regarded as deserving of the respectful treatment that U.S. law usually affords to the physical remains of deceased human beings. Moreover, the court claimed the Ancient One as being "American"—while it later went on to refuse to recognize him as "Native American"—and indicated that the meaning of the discovery to social scientists was what was significant. Again, for the tribes, the discovery had a different significance; it meant that the final resting place of a human being had been disturbed, and that respect for human dignity demanded that the victim of this disinterment be returned to his previous state of repose.

\textsuperscript{361} See supra notes 327–30 and accompanying text.
\textsuperscript{362} 21 U.S. (8 Wheat.) 543, 589–92 (1823).
\textsuperscript{363} See supra notes 38–41 and accompanying text.
\textsuperscript{364} Bonnichsen, 367 F.3d at 868.
Next, the court elected to use the plaintiffs', rather than the tribes', name for the focus of the litigation, "Kennewick Man"—a name that was originally given by anthropologist James Chatters and was popularized by members of the press as some of them were publishing stories that erroneously identified the Kennewick remains as being Caucasian, a mistake that some newspaper accounts indeed continue to make. The court identified "Kennewick Man" as the "popular" and "common" name for the skeleton—in other words, the name that is commonly and popularly used by those whose perspective matters, namely non-Native Americans—while grudgingly admitting that "some American Indians" know the find as the "Ancient One."

Again allying itself with the viewpoint of the plaintiffs, the court privileged the name assigned by the anthropologists, and by the mainstream media and its audience, over the name that reflected the tribes' understanding of the nature of the remains. Supplanting Native American names by imposing "American" replacements had been a longstanding component of the federal government's assimilation policy, and thus the court was following in the footsteps of past government policy makers when it exercised the power of naming in this manner.

In addition, the court opted to use the term "American Indian" rather than "Native American" throughout the opinion. The court stated that this preference was adopted because the definition of the term "Native American," as used in NAGPRA, was a disputed issue, but most of the contexts in which the term was used in the opinion did not relate to the contested issue of whether or not the disputed remains were "Native American" under NAGPRA. Consequently, the court's general reluctance to use the term suggests, once again, the court's inherent sympathy for the viewpoints expressed by the plaintiffs.

Finally, the court gave its characterization of the two perspectives present in the litigation. From the perspective of the plaintiff anthropologists, the court explained, "[T]his skeleton is an irreplaceable

---

365. See Flood, supra note 80, at 40.
367. See, e.g., David Wallace Adams, Education for Extinction: American Indians and the Boarding School Experience, 1875–1928 at 108–12 (1995) (discussing the imposition of new first names and surnames on Native American boarding school students as part of the effort to extinguish students' cultural identity); see also Flood, supra note 80, at 40–41 & n.8 (describing the power to name something or someone as a "significant power" and noting that the tribal claimants refer to the remains as Oytpamanatityt, which has been translated into English as "the Ancient One"). The remains have also been referred to as Xwesaat, a name that means "old man" in Ichiskin, one of the Yakama languages, according to Rory Flintknife, a Yakama Indian Nation attorney. See Robinson, supra note 140, at A1.
368. See Bonnichsen, 367 F.3d at 869 n.3.
source of information about early New World populations that warrants careful scientific inquiry to advance knowledge of distant times." This statement embraced the perspective of European explorers and settlers by using the term “New World.” From the tribes’ perspective, there was, and is, nothing “new” about the North American continent, on which they understand their ancestors to have lived since creation. Moreover, from the tribes’ perspective, additional “knowledge of distant times” is unnecessary, as the tribes’ rich unwritten history already tells them all about the past that there is to know. Further scientific inquiry is simply not warranted. As described by the court, the tribes’ perspective is that the skeleton “is that of an ancestor who, according to the tribes’ religious and social traditions, should be buried immediately without further testing.” This description refers to the burying of the remains, while the re-burying of the remains, which had been disturbed from their resting place, would be the more accurate way to describe the tribes’ goal. Also, the court suggested that the tribes’ preference for reburial was peculiar to them by stating that it was based on the “tribes’ religious and social traditions,” rather than on a basic respect for human dignity that is shared by many, both Native American and non-Native American alike. NAGPRA itself represents an endorsement of this perspective, as it was enacted as basic civil and human rights legislation aimed at guaranteeing to Indian tribes the same dignified treatment for their dead that had long been the norm for non-Indian decedents. In short, the tribes and their perspective were presented as being “on the fringe,” while the plaintiffs were presented as dedicated, knowledge-seeking scientists—“experts in their respective fields” who were endeavoring to further understand a time that was inadequately understood by those whose claims of knowledge the court respected.

3. Redefining “Native American”

After addressing, and rejecting, the argument that the plaintiffs lacked standing to pursue their claim, the court proceeded to discuss whether the remains constitute “Native American” remains and thus are subject to NAGPRA. According to NAGPRA, remains are “Native American” if they are “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” The court focused on the word “is” and concluded that the use of this word indicated that NAGPRA requires that the human remains in question “bear some relationship to a presently existing tribe, people, or culture” in order to

369. Id. at 869.
370. Id.
371. Id. at 869 n.1.
372. See supra notes 352–58 and accompanying text.
be subject to NAGPRA. This view is at odds with the text of NAGPRA, which does not require remains to be related to a contemporary tribe in order to be considered Native American, but rather considers such a link to be relevant to the cultural affiliation determination. As a result, the term "present day" appears in NAGPRA's cultural affiliation definition rather than in the Native American definition. In addition, the phrase "bear some relationship" suggests a low threshold for finding the existence of a relationship, but later in the opinion the court indicated that there must be a finding that the remains have a "significant relationship to a presently existing 'tribe, people, or culture'" in order for them to be considered Native American. The court did not explain what it meant by "significant." The court thus grafted a present, significant relationship requirement onto the statutory definition. The court's "Native American" interpretation is noteworthy for how it ignored the usual dichotomy between non-Native Americans, meaning descendants of settlers who came from Europe and other areas outside of the modern day United States after the European "discovery" of the North American continent, and Native Americans, meaning descendants of pre-contact inhabitants of the land of the United States. The court in effect invented a third category: individuals who are descendants of pre-contact inhabitants of the United States but whom the court will not consider "Native American" because the court is not convinced that they have a significant enough relationship (whatever "significant" may mean in this context) with a current tribe. The remains of these individuals were not protected by NAGPRA, which meant to the court that they were "up for grabs" by descendants of post-contact settlers. The court appeared to be claiming for the judiciary the ultimate power to determine whether or not the relationship was sufficiently significant. A determination by the tribes that such a relationship existed certainly seemed to be irrelevant, or at least not determinative. Furthermore, as anthropologist Robert L. Kelly has pointed out in criticizing the court's redrafting of NAGPRA's Native American definition, if Congress had intended to require that remains be culturally affiliated with a tribe in order to be classified as Native American, then under NAGPRA there would be no "culturally unaffiliated" remains—a category of protected remains to which the statute explicitly refers.

374. Bonnichsen, 367 F.3d at 875.
375. Id. at 878.
376. Robert F. Kelly, Kennewick Man is Native American, 5 SAA ARCHAEOLOGICAL REC. 33, 34 (Nov. 2004). Professor Kelly further noted that as NAGPRA's inventory requirements have been put into operation, only about 25% of approximately 117,000 inventoried remains have been found to be culturally affiliated to tribes. Id. at 34. For further criticism of the court's reasoning as to the Native American definition, see id. at 34–35.
The court claimed that its narrowing of NAGPRA’s coverage was consistent with what it identified as NAGPRA’s first goal: respecting “the burial traditions of modern-day American Indians by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors’ graves and the study or display of their ancestors’ remains.” As the court explained, this goal would not be served “by requiring the transfer to modern American Indians of human remains that bear no relationship to them.” The court ignored the point that there may be a difference of opinion, even among anthropologists, as to whether or not there is a relationship between particular remains in dispute and contemporary Native Americans. Clearly such a dispute existed in this very case. The tribal claimants believed that there was a relationship between the Ancient One, whom they considered an ancestor, and themselves, and NAGPRA was intended to take into account Native Americans’ views on this kind of issue. The DOI had reached the same conclusion on the question of the Ancient One’s Native American status, as had the SAA. The DOI further concluded that the tribes’ cultural affiliation with the Ancient One had been established in accordance with NAGPRA. The key question was whose views on whether or not such a relationship exists are to be respected. The court concluded that only its views, as shaped by those of the plaintiffs, mattered. According to this approach, human remains cannot be considered Native American under NAGPRA unless the reviewing court is satisfied that a “significant” relationship (again, a term that the Bonnichsen court does not define) exists between the remains and contemporary tribes.

The court identified protecting the dignity of human bodies after death, by ensuring respectful treatment of Native American graves, as the second main goal of NAGPRA. The court said that this goal was served by requiring the return to Native Americans of human remains that bear some “significant relationship” to them. Once again, the problem with the court’s analysis was that it failed to acknowledge that contemporary Native Americans, on the one hand, and judges and many other members of the dominant society, on the other hand, may have different views as to who “counts” as an ancestor and therefore whether a significant relationship exists. In order for NAGPRA to provide Native Americans with adequate protection with respect to deceased individuals with whom they claim kinship, just as protection has long been provided for the remains of those who are regarded as relatives by members of the dominant society, contem-

377. Bonnichsen, 367 F.3d at 876.
378. Id. (emphasis added).
379. See infra notes 409–18 and accompanying text.
380. Bonnichsen, 367 F.3d at 876.
381. Id. at 877.
porary Native American perspectives on kinship and ancestry must be given more respect than the court appeared willing to give them.

Moreover, the court’s unwillingness to recognize the tribal perspective on kinship represented continuing acceptance of the assimilationist attitudes of nineteenth century policy makers toward Native American conceptions of family and kinship, which were rejected as over-inclusive and uncivilized in compared with those of the dominant society. The analysis also brings to mind the contemporary federal tribal acknowledgment process, in which petitions for acknowledgment have been found to lack the kind of information, including extensive genealogical data, that federal officials considered essential for establishing “true” ancestral and kinship connections.

The court rejected the argument, made by the government, that limiting the term “Native American” to cover remains that the court believed have a significant relationship with present day Native Americans collapsed NAGPRA’s first inquiry (whether remains are Native American) into NAGPRA’s second inquiry (which Native Americans or tribe are affiliated with the remains). The court stated that the first inquiry requires only a “general finding” that the remains have a “significant relationship” with a contemporary “tribe, people, or culture.” The court did not explain what it meant by a “general finding” in this context, but it is difficult to envision how a finding of a “significant” relationship could be made without focusing on the strength of the link between the remains and a contemporary Native American or Native Americans, which is the issue on which the second NAGPRA inquiry is focused. In rejecting the DOI’s argument on this point, the court refused to afford the Secretary the usual Chevron-based deference to the Secretary’s determination of the meaning of the term “Native American.” The court claimed that NAGPRA unambiguously required that remains bear a relationship to a presently existing tribe, people, or culture, and therefore, the Secretary’s interpretation was not entitled to deference. The court also used its characterization of the definition as unambiguous as an excuse for not applying the Indian law canon of construction under which doubtful expressions in statutes are to be construed in tribes’ favor.

The court admitted that “NAGPRA does not specify precisely what kind of a relationship or precisely how strong a relationship ancient human remains must bear to modern Indian groups to qualify as Na-

382. See supra notes 327–30 and accompanying text.
384. The Secretary of the Interior had made this argument in criticism of the district court’s decision. See Bonnichsen, 367 F.3d at 877.
385. See id. at 877–78.
386. See id. at 877 n.18.
These omissions are unsurprising, however, given that the requirement of a "significant relationship" with contemporary Native Americans is simply not part of the text of the statutory definition, but rather was just grafted onto the definition by the court. The court did not acknowledge this fact, but rather claimed that the legislative history "provides some guidance on what type of relationship may suffice" and quoted two passages from the House Report on NAGPRA that referred to Native American demands about the return of their ancestors. The court stated that "[h]uman remains that are 8340 to 9200 years old and that bear only incidental genetic resemblance to modern-day American Indians . . . cannot be said to be . . . 'ancestors' within Congress's meaning." It is unclear, however, exactly what conclusions can be drawn about the meaning that Congress attached to the term "ancestors" when the statements quoted by the court described Indians' concerns. The court continued: "Congress enacted NAGPRA to give American Indians control over the remains of their genetic and cultural forbears, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture." Once again, the court made a statement that failed to acknowledge that the people whose rights and cultural understandings were intended to be protected by NAGPRA might have a different sense of who their forbears are than the court, and that, under NAGPRA, their sense of kinship is deemed deserving of respect. Moreover, it is difficult to see how Congress could have focused on the "genetic forbearers" of contemporary Native Americans in the same way that the court appeared to believe was appropriate, given that the DNA techniques for assessing ancestry that are available today, even with their continuing limitations, were not available when NAGPRA was enacted.

Finally, it is worth noting that at the time that museums began to experience the full effects of NAGPRA, anthropologists were report-

387. Id. at 879.
388. Id.
389. Id.
390. Id.
edly "upset that the law provides Native Americans with very broad ancestral claims—even on items that scientists say predate the origins of the tribes themselves," and that it could be used as a basis for claiming prehistoric remains on the basis of tribal tradition. In other words, at least some anthropologists expected early on that NAGPRA would extend to and protect tribal claims to items that anthropologists would not consider to be tied to the claimant tribe. Any shock professed at NAGPRA's application to the Ancient One's remains needs to be considered with this past understanding in mind.

4. Rejecting Disinterested Experts' Opinions

Having grafted onto the statutory definition of "Native American" the requirement of a "significant relationship" between a set of human remains and a contemporary tribe, the court proceeded to review the determination of the Secretary of the Interior that the remains of the Ancient One were Native American. The court concluded that the administrative record did not contain substantial evidence that the remains were Native American (as the court interpreted the term) and that no reasonable person could conclude that the remains were Native American. In effect, the court dismissed as irrational not only the views of the claimant tribes, but also those of the DOI and the SAA, which had agreed with the DOI's Native American determination.

The court did not find in the record evidence of a connection by a genetic or cultural relationship that was "special or significant" (again, these were terms that were left undefined) between the remains and a current tribe—the kind of connection that the court said was required to establish that the remains were Native American. The court found that there was "no cognizable link" between the remains and contemporary tribes of the Columbia Plateau, citing the differences between the cranial measurements and facial features of the reconstructed skull and those of contemporary Native Americans. The court stated that the Ancient One's cranial measurements and features "most closely resemble those of Polynesians and southern Asians," and that they "differ significantly from those of any modern Indian group living in North America." The court did not add that the experts' report on the craniometric analyses had in fact concluded that the remains could be excluded from all recent human groups, which indicated that differences between the Ancient One's morphol-

393. See id.
394. Bonnichsen, 367 F.3d at 880 & n.20.
395. See infra notes 409–18 and accompanying text.
396. Bonnichsen, 367 F.3d at 880.
397. See Powell & Rose, supra note 152, at 20.
ogy and contemporary Native Americans’ morphology were not necessarily attributable to a lack of a biological connection between the Ancient One and the tribal claimants, but may have been due to changes that took place in the population over the course of several millennia. Moreover, the report had found morphological similarities to other ancient populations of the Americas, namely North American Archaic populations from the northern Great Basin region, as well as those from the eastern woodlands. The Ancient One’s morphology thus had not been found to be as different from all past North American populations as the court’s selective citing of the report’s findings indicated. The court focused on what it and the plaintiffs, rather than the tribes, considered to be a sufficient relationship between the remains and contemporary tribes, and this sense of relationship was based on genetics, as evidenced by morphology—itself a problematic linkage. And the court’s statements as to the conclusions reached by those who did the relevant analyses were incomplete and misleading.

It is worth emphasizing that, as discussed above, the limitations in the analyses that had been done to determine whether or not the remains were Native American had been pointed out by those who did them. The measurements of the reconstructed skull had been compared to only a limited number of Native American skulls. The spoils of past plundering of Native American remains did not provide as complete a sample as would have been required to draw conclusions in which more confidence could have been placed. Moreover, a number of the variables that are considered in the craniometric analyses “tend to exhibit a high degree of intra- and inter-observer error,” casting into doubt the value of such analyses in general. And of course, it is unsurprising that there are significant morphological differences between the remains and contemporary Native Americans, given the chronological distance between the Ancient One’s time and today.

398. See, e.g., Adovasio & Page, supra note 21, at 254 (“[T]he skull is exceptionally malleable in evolutionary terms and capable of changing greatly over generations, much less thousands of years. For example, native skeletons from some two or three millennia after Kennewick Man show resemblances to today’s native populations.”).

399. See Powell & Rose, supra note 152, at 20.

400. See, e.g., Kelly, supra note 376, at 35 (noting that the use of cranial variation to determine ancestor-descendant relationships “is not settled scientifically”).

401. See, e.g., supra notes 197–98, 201 and accompanying text (discussing the limitations inherent in the archaeological data analysis and report).

402. See Powell & Rose, supra note 152, at 13. Because of this problem, these variables were removed for one of the analyses, which meant that fewer dimensions could be used for the analyses. See id.

403. See id. at 12 (“If the Kennewick remains represent a member of a founding population whose descendants evolved in situ over the past 9,000 years, North and South American populations who appear later in time may be dissimilar to the...”)
It is also important to note the existence of a debate among anthropologists themselves over the scientific validity of the kinds of cranial analyses that anthropologists have performed to assess the link between ancient human remains and contemporary peoples. For example, in a 2003 article in *American Antiquity*, anthropologists Alan Swedlund and Duane Anderson discussed the problems and limitations inherent in the morphometric techniques that Douglas Owsley and Richard Jantz, both plaintiffs in the *Bonnichsen* litigation, have used in assessing biological affinities between ancient cranial specimens from the Americas and contemporary humans. They noted the importance of being aware of "sampling errors raised by the availability of remains and by those originally involved in assembling the databases." Id. at 162. Sample populations may suffer from the flaws of not being random with respect to sex and age and of being selected for inclusion on the basis of the subjective judgment of those who were selecting the samples. See id. at 163.

404. See Alan Swedlund & Duane Anderson, *Gordon Creek Woman Meets Spirit Cave Man: A Response to Comment by Owsley and Jantz*, 68 AM. ANTIQUITY 161 (2003). Swedlund and Anderson focused specifically on the use of these methods in analyzing the so-called “Gordon Creek Woman,” but their critique extended to the analysis of other paleo-Indian remains.

405. They noted the importance of being aware of "sampling errors raised by the availability of remains and by those originally involved in assembling the databases." Id. at 162. Sample populations may suffer from the flaws of not being random with respect to sex and age and of being selected for inclusion on the basis of the subjective judgment of those who were selecting the samples. See id. at 163.

406. Swedlund and Anderson explained that Owsley and Jantz's technique involved comparing a specimen to crania database samples with regard to a number of cranial measurements; placing the specimen in some degree of probability of relationship to the comparison samples on the basis of the morphological, or physical measurement, distance between the specimen and the comparison samples; and then plotting this out into a multi-dimensional, spatial representation. Owsley and Jantz assume that the specimen being studied should plot closest to the population samples with which it is most closely associated geographically, and if it instead plots closest to a population found at a greater geographical distance, then it is morphologically/genetically closer to that population sample. See id. at 163. This is problematic because "a specimen that might date approximately 8,000 years older than its closest reference sample is not only separated by geographic distance but also by considerable temporal distance . . . in which gene flow, drift, mutation, and natural selection have had an opportunity to operate between the specimen and the referents." Id. These same factors were mentioned in the report on the osteological assessment of the Ancient One. See Powell & Rose, *supra* note 152, at 12. Swedlund and Anderson noted that in light of these considerations it was not surprising to them that some ancient American cranial specimens plotted more closely to the samples from other continents. See Swedlund & Anderson, *supra* note 404, at 163.
environmental forces;\textsuperscript{407} and the specific statistical inferences that Owsley and Jantz make as to the relatedness of ancient specimens and more recent samples.\textsuperscript{408} In short, while the court, like the plaintiffs, attached considerable importance to the cranial measurements of the Ancient One, the appropriate analysis of such measurements and their significance for determining biological identity and affiliation are a subject of debate within the field of anthropology itself. The court was unlikely to have an awareness and understanding of this debate, and, apparently unwittingly, just happened to choose the position that corresponded with the views of the plaintiffs.

Finally, it is instructive to analyze the divergence between the court’s view on the “Native American” determination and the views of the SAA, the leading professional organization of archaeologists focused on the archaeology of the Americas.\textsuperscript{409} The SAA, which has publicly stated that it “believes strongly” that the Kennewick remains are Native American,\textsuperscript{410} was involved in the development and drafting of NAGPRA and has monitored and participated in its implementation.\textsuperscript{411} Although the SAA disagreed with the DOI’s cultural affiliation determination for the Kennewick remains,\textsuperscript{412} it publicly endorsed both the DOI’s position on the interpretation of “Native American” under NAGPRA and the DOI’s specific conclusion that the Ancient One’s remains are Native American, believing that the interpretation is fully consistent with congressional intent and the conclusion is supported by the evidence.\textsuperscript{413} The SAA explained its agreement with the DOI on this issue in a brief submitted to Magis-

\textsuperscript{407} See Swedlund & Anderson, supra note 404, at 163. They noted that “[l]ifestyle, nutrition, and diet, and mechanical forces on the face related to diet and food processing[,] can account for significant amounts of temporal variation in craniofacial morphology. These trends help to explain why central tendencies can shift across time and space without any genetic change or replacement occurring.”\textit{Id.} at 164.

\textsuperscript{408} They explained that Owsley and Jantz’s “method for assigning affinity is by using the ‘typicality probability’ as defined” in a commonly cited article by S.R. Wilson, but without regard to certain safeguards and caveats observed by Wilson herself.\textit{Id.} at 164. In addition, Owsley and Jantz had apparently not analyzed the reference population samples that they used to evaluate the variation among the samples themselves. A proper evaluation would determine “whether between-group variation was sufficient for reliable prediction of group membership” and would indicate “the possibility of misclassification for each group.”\textit{Id.} at 165.

\textsuperscript{409} SAA Brief, supra note 101, at 1.


\textsuperscript{411} The SAA has worked with the NAGPRA Review Committee and the DOI on NAGPRA issues and has testified at Senate committee hearings on NAGPRA implementation. See \textit{id.} at 2.

\textsuperscript{412} SAA Brief, supra note 101, at 9.

\textsuperscript{413} Society for American Archaeology Position Paper, The Secretary of the Interior’s September 21, 2000 Determination of Cultural Affiliation for Kennewick Man,
trate Judge Jelderks. The SAA viewed the DOI's Native American interpretation as being consistent with the plain language of NAGPRA, in which the "Native American" definition turns on the meaning of the word "indigenous." Dictionary definitions demonstrate that the word "commonly refers to the original or early inhabitants of a region, particularly as distinct from later European colonists," and the DOI's interpretations of "Native American" and "indigenous" were consistent with the standard meaning of these terms. Moreover, other alternative readings of the term "Native American" and the word "indigenous," the SAA believed, were problematic. For example, if "indigenous" were read to "give primacy to its connotations of "first or earliest," then if followed to an extreme, a paradox would result. It would exclude later descendants, including present-day tribes, which is clearly not what Congress intended. The SAA explained:

Most scholars today believe that the initial, prehistoric peopling of North America was a long and complex process. Contemporary Native Americans are the descendants of people who arrived in many waves from multiple places of origin. Thus a definition of a "Native American" that would include only the "first or earliest" peoples to inhabit the United States would be inconsistent with the common understanding of "Native American." Similarly, according to the SAA, it would not make sense to interpret the term "Native American" to "require proof of a relationship with present day Native peoples," as the plaintiffs had argued (and managed to persuade Judge Jelderks and the Ninth Circuit panel). This interpretation would be contrary to NAGPRA's plain language, "which requires the remains or artifacts to have a relationship to 'a tribe, people or culture indigenous to the United States,' not a relationship to 'present day Native peoples.'" In addition, this interpretation would be contrary to the common-sense understanding of "Native American" as it could exclude the many groups that are historically


414. See SAA Brief, supra note 101, at 6. As the SAA noted, the DOI's determination of the meaning of the terms "indigenous" and "Native American" turned "in part on whether the remains or items in question are related to tribes, peoples or cultures that predated the historically documented arrival of European explorers." Id. Christopher Columbus's voyages "provide a widely known and appropriate benchmark for the 'historically documented arrival of European explorers' that quickly followed," even if Columbus himself never set foot in the United States. Id. Also, using the 1492 date as a benchmark would not, as the plaintiffs had claimed, open up the possibility of artifacts and remains that are not commonly understood to be "Native American," such as Vikings or Japanese fishermen, being covered by NAGPRA. They would not fit the "Native American" definition because the word "indigenous" refers to "a long-term, rather than temporary presence," and also includes the concept of being born in the region. Id. at 7. Thus, African, Asian, or European remains that reflect a temporary presence would not be considered Native American. Id.

415. Id. at 8.

416. Id.
documented and prehistorically known that would be commonly thought of as "Native American" but which scientists do not believe, based on evidence found to date, have any present-day descendants. Finally, the SAA concluded that it was "eminently reasonable" to conclude that the Ancient One was indigenous and therefore Native American, because the remains were pre-Columbian, they were found well within U.S. borders, and there was no reason to believe that he was born outside U.S. borders or was not a permanent resident within those borders.

The SAA made these arguments in an amicus curiae brief submitted to Magistrate Judge Jelderks. When the litigation proceeded to the court of appeals level, however, the SAA, perhaps acting out of a now more keenly felt concern that the career interests of at least some of its 6,600 members were at stake, submitted a brief that did not mention the SAA's agreement with the DOI's Native American determination, but instead focused only on the SAA's disagreement with the DOI's cultural affiliation determination. There is no reason to believe, however, that, given its basic approach to the case, the Ninth Circuit panel would have been any more receptive to or respectful of the views of this important professional organization on the Native American definition than Magistrate Judge Jelderks had been.

5. Denying Cultural Affiliation

The court continued its explanation of its finding on the Native American issue with a discussion of cultural similarities between the Ancient One and modern day tribes. In this portion of the opinion, the court relied on statements extracted from the cultural affiliation report, prepared for the second inquiry under NAGPRA, as opposed to the findings in the report that actually had investigated whether or not the remains were Native American. Because the DOI had considered determining the Native American status and the cultural affiliation of the remains to be truly separate inquiries, as NAGPRA indicated, the report on Native American status had not considered cultural affiliation and was therefore not sufficient for the court's purposes. The opinion summarized points made in the archaeological data report about the difficulty of establishing either cultural continuities or discontinuities between the present and the distant past, particularly before 5000 B.C. While the court emphasized the limited evidence as to cultural similarities and continuities, the report's author had taken pains to note that the available evidence was equally

417. See id.
418. See id. at 9.
inadequate for demonstrating discontinuity. He stated, “These conclusions emphatically do not mean that to my mind there was not cultural continuity between the peoples of the Columbia Plateau in 1800 and earlier peoples on the Plateau.”\(^{420}\) In short, the court used the evidentiary limitations as a basis for concluding that there was a lack of similarity and continuity between the Ancient One and contemporary Native Americans, rather than treating the lack of evidence of discontinuity as an indication that continuity in fact may have existed, which is what the expert who prepared the report had indicated. It is almost as if the court had presupposed discontinuity. Moreover, the court did not note that the report was limited to a focus on continuities and discontinuities in the archaeological record, and did not cover historical continuities and discontinuities, meaning the “presence or absence of cultural links between ancestral and descendant groups.”\(^{421}\) The report was also limited by the fact that it had to be prepared hurriedly; additional evidence bearing on continuity might have been obtained by an extensive review of other existing evidence, as well as additional fieldwork, the report had noted.\(^{422}\)

Repeated reading of the experts’ reports, and of the court’s description of its selective reliance on them, generates a strong impression of great uncertainty surrounding the Ancient One’s identity and life, and his affiliation with contemporary tribes, in the minds of anthropologists, along with great uncertainty and disagreement within the profession as to the identity, origins, and lifestyles of ancient North Americans. As the authors of the Osteological Assessment report, using the idiom of their profession, had noted, for example, “Much of the interpretation of the biological affinity of Kennewick results depends on subjective opinions and assumptions about the rate of morphological change possible during the past 10,000 years, the underlying genetics of the traits examined, and the demographic history of early and late Holocene humans in the New World.”\(^{423}\) The tribes, on the other hand, express no such uncertainty. To them, the Ancient One is unquestionably their kinsman, and they bear a responsibility to obtain respectful treatment for his physical remains. Similarly, when Lewis and Clark visited the area where the Ancient One’s remains were unearthed and discovered, the completion of their task was threatened time and again by their ignorance. Their guide, Sacagawea, and the tribes whom they met along the way, by contrast, were imbued with valuable knowledge of the land and its resources. Lewis and Clark recognized the value of, and consciously depended on, the knowledge of the Native Americans whom they encountered. The

\(^{420}\) Archaeological Data: Conclusions, supra note 197, at 2.
\(^{421}\) Id. at 1.
\(^{422}\) See id. at 2.
\(^{423}\) Powell & Rose, supra note 152, at 12.
Bonnichsen court, however, treated the admitted ignorance of one group of academics as the basis for handing the Ancient One over to another group of academics; the tribes' knowledge of the Ancient One and his identity seemingly had no value. This lack of respect for the tribes' perspective is wholly at odds with Congress's reasons for the enactment of NAGPRA, and reinforces the impression that the attitudes that necessitated the enactment of NAGPRA have not been laid to rest.

The court of appeals also cited statements by the Secretary of the Interior about the lack of evidence of continuity with respect to settlement patterns, burial practices, and language. As with the archaeological evidence, gaps in knowledge based on a lack of professionally respected empirical data had created a perceived lack of continuity at various points between the Ancient One's time and the present, and this ignorance was used to bolster the plaintiffs' claim and to undercut the tribes' claim to the remains.

While hastening to point to suggestions of discontinuity in some of the DOI experts' reports, the court gave short shrift to the oral history evidence cited by the Secretary of the Interior in making the cultural affiliation determination, which was based on the traditional historical and ethnographic information report prepared as part of the cultural affiliation report. The court decided that the oral history accounts of the area were "just not specific enough or reliable enough or relevant enough to show a significant relationship of the Tribal Claimants with Kennewick Man." The oral history evidence was not adequate to show the "required significant relationship" between the remains and the tribes, the court concluded, because "oral accounts have been inevitably changed in context of transmission, because the traditions include myths that cannot be considered as if factual histories, because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins." The court's conclusion seemed to have been based in large part on a fundamental scepticism about and rejection of all oral tradition evidence, which was contrary to Congress's intentions as ex-

424. Bonnichsen v. United States, 367 F.3d 864, 881 (9th Cir. 2004). Settlement patterns were addressed in Dr. Ames's archaeological study. See supra notes 196-205 and accompanying text.

425. Bonnichsen, 367 F.3d at 881. Burial practices were addressed in Dr. Hackenberger's bio-archaeological study. See supra notes 250-57 and accompanying text.

426. Bonnichsen, 367 F.3d at 881. Language distribution and development were addressed in Dr. Hunn's linguistic study. See supra notes 237-49 and accompanying text.

427. Bonnichsen, 367 F.3d at 881.

428. Id. at 881-82.
pressed in NAGPRA. Congress not only did not discount oral history evidence, but even included it in a list of relevant types of evidence to be considered without indicating that it was to be given lesser weight than other forms of evidence. In other words, Congress did not subscribe to what anthropologist Peter Whiteley has called "the Western cult of the written word," which is characterized by "entrenched—though largely unexamined—ideas about the supposed instability and unreliability of oral narratives." The fixation on written texts and denial of validity to oral texts has led many archaeologists of the Americas to reject the evidence presented by tribal oral histories, in marked contrast to the practice of classical archaeologists. This attitude has also led them to take literally and unquestioningly Spanish colonial and exploratory records while rejecting tribal oral texts as historical sources. Whiteley does not advocate unquestioned acceptance by archaeologists of all elements of oral accounts of the past, but instead believes that they should be evaluated according to certain standards of truth evaluation, such as multiplicity and reproducibility.

While the court discounted the opinion of the ethnographic expert who had contributed his work to the preparation of the cultural affiliation report, it acknowledged that "considerable help" was provided in the court's evaluation of the oral history evidence by the "explanations of the uses and limits on oral narratives as explained and documented with scholarly authority" by Professors Andrei Simic and Harry Glynn Custred, Jr. The amicus brief submitted by these two anthropology professors, which the court found so helpful, suffered from the same limited perspective as the court. Like the court, the professors found the information drawn from the tribes' traditions to be not credible, while expressing respect for the opinions of non-Native American anthropologists and literary critics. Relying on the oral narratives discussed in the ethnographic report, the professors wrote, would "ignore all that has been learned about the nature of such stories"—in other words, all that these anthropologists and other individuals who are outside the tribal communities believe about the nature of these

430. See id. at 408 (noting that it would be unthinkable for classical archaeologists to interpret an ancient Greek or Trojan site without looking to "subsequent contemporary [written] textual references and other archived information about Greek or Trojan cultural history").
431. See id. at 406, 408.
432. See id. at 411-12.
433. Bonnichsen, 367 F.3d at 882 n.23.
434. Motion for Leave to File Brief of Amicus Curiae, in Support of the Plaintiff-Appellees, by Dr. Andrei Simic and Dr. Harry Glynn Custred, Jr., at 3, Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004) (No. 02-35996) [hereinafter Simic-Custred Brief].
stories. Only such individuals are deemed capable of performing the kind of "critical analysis" of the traditions that these anthropologists believe is needed to determine, to their satisfaction, the "authenticity and accuracy" of the traditions.435 To these anthropologists, the oral traditions discussed in the ethnographic report are "clearly myths," and therefore are to be discounted and not to be treated as "factual histories."436 They contrasted "history" with oral traditions, described as stories. These stories, they wrote, "are always told for a purpose which may change from time to time depending on the intent of the story-teller,"437 and their "selective and interpretive aspect" cannot be ignored.438 They failed to acknowledge that similar statements have been used to describe written history. The continuing existence of disputes between more traditional American historians and those whom they—and some Supreme Court Justices—criticize as "revisionist historians," for example, undermines the monolithic view of "factual history" presented by these anthropologists.439

Professors Simic and Custred faulted the tribes for failing to "test their oral tradition evidence to determine whether it is authentic, credible and accurate."440 For the tribes, the kind of "testing" that the professors had in mind might well have seemed pointless and unnecessary. The tribes might also have pointed out that written history must also be subjected to the kind of testing that the professors described, to assess its potential bias, purposes, selectivity, and interpretation of evidence. As anthropologist Peter Whiteley has noted, for example, "written records, such as diaries, journals, even official reports, are certainly no less interpretively problematic [than oral records], as historians currently recognize."441

While expressing great skepticism about the reliability of tribal oral narratives, the professors presented as well-established, uncomplicated fact one of the several theories of human migration to the Americas: "Since all humans originated in the Old World"—they used the same kind of Eurocentric nomenclature that the court adopted442—"the Tribal Claimants' ancestors must have migrated into the region at some point in the past. For the Salishan speaking tribes, this happened within the last four or five thousand years."443 They did not acknowledge the controversy among anthropologists of

435. See id. at 3.
436. See id. at 6.
437. Id.
438. Id. at 7.
440. Simic-Custred Brief, supra note 434, at 8.
441. Whiteley, supra note 429, at 408.
442. See supra notes 365–66 and accompanying text.
443. Simic-Custred Brief, supra note 434, at 22.
various stripes that continues to surround the issue of the first settlement of the Americas, in terms of the identity of the first settlers, their place of origin, how they got here, whether and when they were followed by subsequent migrations, and what conclusions can be drawn about these continuing questions from anatomical, archaeological, linguistic, and genetic evidence. And again, the professors' skeptical attitude toward oral history was not shared by Congress as it enacted NAGPRA.

The great confidence that the Ninth Circuit panel placed in the brief submitted by these two professors might lead to an assumption that they must be eminent anthropologists who had proven themselves well qualified to comment on the oral history and linguistic history of the tribes of the Pacific Northwest. However, this was not the case. Professor Custred has written articles focused on Andean ethnography, language use in Transylvania, and South American language boundaries, while Professor Simic has focused most of his research on East European ethnic studies. Thus, their areas of expertise raise questions about their ability to offer an informed opinion on oral history evidence related to the indigenous peoples of the Plateau region. Nonetheless, the court accepted the "evidence" about oral history submitted by Professors Custred and Simic and thus accepted their implicit claim that their profession's knowledge "is not just different from indigenous knowledge, [but] . . . is fundamentally better" and has the power to "define what is truth." In addition, it is interesting to note that Professor Custred's participation in this case is just one example of his advocacy activities in publicly prominent issues that touch upon race. He has devoted time to such projects as promoting Proposition 209, of which he was a co-author. Passed by California voters in 1996, Proposition 209 was designed to eliminate race- and gender-based affirmative action in public contracting, education, and


445. Professor Simic submitted to the district court an affidavit addressing oral tradition and cultural affiliation, in which he admitted that his professional research had focused principally on East European ethnic studies, but explained that he believed that he was nonetheless qualified to comment on Native American folklore and oral traditions because he was "familiar" with them. Affidavit of Andrei Simic, Mar. 2000, available at http://www.friendsofpast.org/kennewick-man/court/affidavits/oral-tradition-5.html. Professor Simic received his Ph.D. in social anthropology and is a professor at the University of California at Los Angeles. See Anthropology at USC, Andre Simic, at http://www.usc.edu/dept/elab/anth/FacultyPages/simic.html (last visited Aug. 5, 2005).

446. See Whiteley, supra note 429, at 408. Although Whiteley was discussing archaeologists in particular, his comments also accurately characterize the attitude of anthropologists like Professors Custred and Simic.
The perspective indicated by Professor Custred's public advocacy work seems to have colored his attitude toward NAGPRA and tribal claims as well, as the following comments on the Ancient One suggest:

Indian activists weren't amused [about further testing] . . . , for the present system of incentives and rewards in which they operate depends on constant assertion of Indian victimhood and white guilt. Such assertions would not be helped if it turned out the Indians weren't the first Americans after all; that Europeans may have been here before them; or that Indians, like the Europeans that followed, may have come to America as colonizers to find a racially different aboriginal population, which they eventually replaced. For them it is better that as little as possible be known about Kennewick Man, or about any other ancient skeletal material for that matter. These are not the kind of sentiments expressed in the amicus brief, leaving unanswered the question of whether an awareness of Professor Custred's general attitude toward NAGPRA and his broader concerns about Native American status would have made any difference to the Ninth Circuit panel.

The tribal claimants' ability to defend the DOI's cultural affiliation decision making against attack by the plaintiffs and by Professors Simic and Custred undoubtedly was hampered by the stance taken by their United States co-defendant at this stage of the litigation. As noted above, after defending the DOI's cultural affiliation determination at the lower court level, the government declined to do so before the court of appeals. The tribal claimants were thus left to defend by themselves this key determination by the Secretary of the Interior. Defending DOI decisions in litigation is not a role that tribes and their attorneys regularly take on, but the tribal claimants were left no choice in the Bonnichsen litigation.

6. The Panel's Conclusion

In concluding its analysis, the court of appeals panel acknowledged that the administrative record might permit a reasonable conclusion that the tribes' ancestors had lived in the area "for a very long time," but maintained that the record did not permit a conclusion that the Ancient One shared "special or significant genetic or cultural features with presently existing tribes" such that his remains could be considered "Native American" within the court's revised definition of the

---

448. Ron Selden, Bones of Contention, MISSOULA INDEPENDENT, Mar. 22, 2001, available at http://www.missoulanews.com/Archives/News.asp?no+1592. Concerns about the scholarliness with which Professor Custred approached his work might also be raised by his and his co-author's failure to even spell Magistrate Judge Jelderks' name correctly in their brief. See Simic-Custred Brief, supra note 434 (addressed to "Judge Jeldricks").
term. As a result, NAGPRA did not apply, and the plaintiffs could proceed under ARPA, to carry out the same kinds of studies that had already been done by the experts who contributed to the Native American determination analysis and the cultural affiliation report.

Having been abandoned by the United States at the appeals level, and having lost the case before a Ninth Circuit panel, the tribal claimants had to consider their next move. After the Ninth Circuit denied their request for a rehearing en banc, they considered whether to appeal the panel's decision to the Supreme Court. The tribes ultimately decided not to seek a writ of certiorari, as did the U.S. Justice Department (an unsurprising decision, given the government's marked lack of enthusiasm for pursuing the appeal to the Ninth Circuit). The tribal claimants were unwilling to take the risk that the Supreme Court would uphold the Ninth Circuit's judicial amendment to NAGPRA's "Native American" definition and thus extend its potential impact beyond the Ninth Circuit.

C. The Aftermath and Impact of the Bonnichsen Decision

Following the announcement of the Ninth Circuit decision, the plaintiffs worked on preparing a study plan for the remains, as the appeals court had instructed them to do. James Chatters, the archaeologist who had obtained an ARPA permit covering the remains when they were first discovered and whose initial indication that the remains were Caucasoid did much to foster the widespread public misperception of their nature, expressed excitement at the chance to examine them again. He stated that the Ancient One's remains would

449. Bonnichsen v. United States, 367 F.3d 864, 882 (9th Cir. 2004).
450. See Bonnichsen, 367 F.3d at 882 n.24.
454. See King, supra note 452. Tribal attorney Rob Roy Smith also noted that appeals to the Supreme Court are expensive and there is no guarantee that the Court will agree to hear the case. Id. Umatilla spokeswoman Deb Crosswell also noted that the Umatillas had considered how the current membership of the Court would affect the chances of an appeal. Frazier, supra note 451, at B4.
455. Chatters eventually distanced himself, at least in the anthropological literature, from the impression that he created. He claimed, "Once the skeleton's age was known, however, I referred to the remains as 'Caucasoid-like'.... I did not state,
be stored for further scientific study, rather than re-buried, and would be part of a federally maintained collection, in the company of “the rest of the national treasures where he belongs.”

The plaintiffs’ excitement over their success in persuading the Ninth Circuit panel to re-write NAGPRA’s “Native American” definition and overturn the DOI’s disposition determination has undoubtedly been tempered by their finding themselves faced with the federal government’s determination to conscientiously carry out the terms of ARPA. Alan Schneider, an attorney for the plaintiffs, has accused the government of using ARPA to hinder the plaintiffs’ plan of study for the remains, which are housed in the Burke Museum in Seattle. The Army Corps of Engineers has explained that the plaintiffs’ plan was “subject to reasonable terms and conditions” and that the Corps was trying to work out the details with the plaintiffs. The tribal claimants have sought to be granted full party status by the court, along with the government and the plaintiffs, in the process of negotiating a study plan for the remains. In a motion to intervene filed on September 9, 2004, the tribal claimants relied on the American Indian Religious Freedom Act, their status as sovereign nations, ARPA, and the National Historic Preservation Act. The tribes have argued that there is a lower burden of proof for demonstrating a religious and cultural interest in the remains that would give them standing to participate in the development of the study plan, as opposed to when the Native American status of the remains was being determined. They are concerned about the additional damage to the remains that may be caused by repeated handling by multiple anthropologists and are seeking to have the remains returned to them for burial when the plaintiffs’ studies are completed. In December 2004, Magistrate Judge Jelderks ruled that the tribes would not be allowed to participate in the study plan negotiations, a decision which the tribes have appealed. The tribes’ attorney has indicated that the tribes remain hopeful that they will be able to play a role in the study plan discussions and will eventually have the Ancient One’s remains returned to

nor did I intend to imply, once the skeleton’s age became known, that he was a member of some European group.” Chatters, supra note 141, at 306.

456. King, supra note 452.
460. See id.
them. Until the dispute over the study plan and its development is resolved, the threat of additional litigation over the remains of the Ancient One will continue to exist and the ultimate fate of his remains will remain uncertain.

The ire of the plaintiffs and their attorneys is also being directed at a proposed technical correction to the text of NAGPRA to indicate more explicitly that the remains do not need to be shown to be tied to a contemporary tribe to be considered Native American. The proposed two-word correction to the Native American definition, which has been approved by the Senate Indian Affairs Committee, responds to the Ninth Circuit's interpretation of the phrase "is indigenous" as requiring such a contemporary link in order for the disposition of the remains to be determined under NAGPRA. The correction inserts the words "or was," such that "Native American" would be expressly defined to mean "of, or relating to, a tribe, people, or culture that is or was indigenous to the United States." This clarification was suggested in testimony before the Committee by Professor Paul Bender, who was involved in the development of NAGPRA and has commented on how startling the Ninth Circuit's decision was to those who played a role in that process. Professor Bender has noted that the Ninth


462. See supra note 374 and accompanying text.

463. See S. 536, Native American Omnibus Act of 2005, 109th Cong. § 108 (2005) (emphasis added); see also NAGPRA Change Up for Senate Consideration Again, at http://www.indianz.com/News/2005/006919.asp (last visited Aug. 5, 2005) (noting that the correction was included in a technical corrections bill introduced by Senator McCain and that it was also included in a previous bill). The Senate Indian Affairs Committee reported favorably on the bill in a May 12, 2005 report. See S. REP. NO. 109-67 (2005). An additional change to the definition inserts the words "any geographic area that is now located within the boundaries of" after the word "indigenous" and before the words "United States." S. 536, § 108. Senator McCain was involved in the original passage of NAGPRA. See supra note 13 and accompanying text.

Circuit's interpretation of the statute, in addition to being "a serious error of statutory construction," frustrated NAGPRA's "important human rights objective of including Indian governments and groups in decisions about whether materials are Indian-related and about the treatment and disposition of such materials"—an important objective in light of the history of institutions' refusal to share information with tribes or allow their participation in decision making with respect to human remains. While the proposed technical correction would not affect the Ancient One's remains and has been approved, in substance, by the SAA, opponents of the proposal have voiced concerns about its effect on the disposition of other remains. The ultimate fate of the proposed legislation in the Senate is unclear, and no companion legislation is currently pending in the House of Representatives.

Meanwhile, in the aftermath of the Bonnichsen decision, newspapers have continued to falsely report that the Ancient One had been determined to have some "Caucasian features" and to present this as evidence of ancient non-Asian migration. Even a newspaper as prominent as the Los Angeles Times reported, in a story on the Ninth Circuit decision, that the Kennewick remains were "found to have some Caucasian features, suggesting groups other than Asians may have migrated to the continents thousands of years ago." Newspapers have also continued to report the Kennewick discovery as a threat to Native American identity and tribal legal status. The Los Angeles Times, for example, reported that tribes' "identity as the continents' 'original' inhabitants seemed jeopardized." At least some readers, ignorant of the fact that tribal legal rights are based on treaties and pre-constitutional sovereignty and property rights rather than on racial classifications and "first occupancy," view such stories as a justification for questioning the legal rights that American law recognizes as inhering in tribes and their members.

465. See Bender Testimony, supra note 464, at 7.
466. Id. at 5.
467. See id. at 9.
468. The SAA released a position statement on the prior bill that included the technical correction, stating that the substance of the proposed change "affirms the Society's position that the definition of 'Native American' was intended to include tribes, peoples, and cultures that were once indigenous to the United States as well as those presently recognized as indigenous." SAA Statement on Proposed NAGPRA Amendment, available at http://www.saa.org/repatriation/nagpra_amendment.html (last visited Aug. 5, 2005). The Society objected, however, to the process by which the proposal was put forward, which it believed had not included sufficient consultation with the Society or other groups who have a stake in NAGPRA issues. See id.
469. Bone of Contention, supra note 457, at A12.
470. See id.
If prominent newspapers still cannot (or will not) get the facts straight, then it is unsurprising that members of the public at large make similar mistakes. Furthermore, just as some anthropologists' heralding of the Bonnichsen decision may indicate their broader opposition to NAGPRA as a statute that is contrary to their interests, so some members of the public's comments on the Kennewick remains have indicated a broader hostility to Native Americans. For example, one individual reacted to the news on the Yahoo! home page of the discovery of an apparently very old site of human habitation in Maryland with the following confused and error-filled post: "This is more proof that the white man was in America before the 'native' americans descended upon America from Asia. Also note the red haired, caucasian feature skeleton found in Oregon that the tribes fought to re-bury before it could be studied and the truth could get out." \(^{471}\) The damage done to the public perception of the case by the media's false reports cannot be easily undone.

There have already been initial indications of the potential for the decision in Bonnichsen to have an impact beyond the disposition of the Ancient One's remains. The decision has been cited as additional ammunition against the application of NAGPRA to remains that have already been disinterred and to those located at sites that are currently being excavated. The Fallon Paiute–Shoshone Tribe, for example, is involved in a continuing dispute over a mummified human skeleton dated to be over 10,000 years old that was discovered in Spirit Cave in Nevada, near its reservation. Although the NAGPRA Review Committee concluded that cultural affiliation had been established between the remains and the Tribe and recommended that the remains be repatriated to the Tribe, \(^{472}\) in 2004 the Bureau of Land Management ignored the Committee's recommendation and upheld an earlier finding against affiliation by the Bureau's Nevada office. \(^{473}\)

Also, in what an article in a local newspaper termed "a possible repeat of the Kennewick Man controversy," mummified human remains have

---

471. "Proof Whites Discovered America First," posted by "soldier_for_christ_2004_ad" on Yahoo News message board on Aug. 17, 2004 (reacting to story "Maryland Dig May Reach Back 16,000 Years").


473. See Spirit Cave Man Update, June 2004, at http://dmla.clan.lib.nv.us/docs/museums/cc/update.htm. For the original Nevada BLM determination that the remains could not be shown to be culturally affiliated with the Tribe and were culturally unidentified, see Pat Barker et al., Determination of Cultural Affiliation of Ancient Human Remains from Spirit Cave, Nevada, July 26, 2000, available at http://www.nv.blm.gov/cultural/spirit_cave_man/SCsummary.pdf. The remains are in the possession of the Nevada State Museum but are not on display, because of state law prohibitions. See Spirit Cave Man Update, supra.
been found in Range Creek Canyon in the Book Cliffs area of Utah.\textsuperscript{474} The site is on a mix of federal, state, and private land, but most of the site was recently acquired from a rancher by Utah's Division of Wildlife Resources.\textsuperscript{475} Archaeologists and their students have been excavating the site for several years, without notification to the state Division of Indian Affairs or any tribal officials, and have reportedly discovered about 225 locations containing artifacts, three or four of which also contain human remains.\textsuperscript{476} Although the site has been dated to 4,500 years ago, archaeologists believe that further analysis could show that it was occupied 7,000 or more years ago.\textsuperscript{477} Tribal leaders, such as Northwest Shoshone Tribe cultural resources manager Patty Timbimboo-Madsen, have noted that ceremonies need to be performed when remains are found because of the disturbance of the dead that has occurred\textsuperscript{478} and that the remains should eventually be repatriated to the appropriate tribe.\textsuperscript{479} While the rancher, whose efforts to keep the site secret preserved it from looters, has stated that remains that are found "should be left where the Indians buried them in the first place,"\textsuperscript{480} a newspaper editorial recently warned of the need to make the site "legally secure against unproven claims" under NAGPRA, arguing that claims like those in the Kennewick Man case, in which "tribes nearly prevented scientific study of the bones," were likely in the Range Creek Canyon situation.\textsuperscript{481}


\textsuperscript{475} Elizabeth Neff & Greg Lavine, Indian Remains Spark a Debate, \textit{Salt Lake Trib.}, July 2, 2004, at A1. Rancher Waldo Wilcox bought the land in 1951 and kept the archaeological site, which is spread over thousands of acres, secret in order to protect it. He sold it to the Trust for Public Land in 2001, which in turn sold it to the Bureau of Land Management, which sold it to Utah in 2004. Since the location of the site became public, some artifacts have already been stolen. See Kirk Johnson, Long Secret, Ancient Ruins are Revealed in Utah, \textit{N.Y. Times}, July 1, 2004, at A1.

\textsuperscript{476} See Neff & Lavine, supra note 475, at A1. Some remains have, however, emerged on the surface through erosion. See id. For a description of Utah state law on Native American remains, including a requirement of notification and provisions allowing tribal claims for remains found on state land, see id.

\textsuperscript{477} See Foy, supra note 474, at B01.

\textsuperscript{478} See id. Melvin Brewster, the Skull Valley Band of Goshutes' historic preservation director, has made similar statements. See, e.g., id. ("They need to bring in the traditional spiritual leaders. . . . It looks like all this noncompliance went on.").

\textsuperscript{479} The Paiute Indian Tribe's Tribal Chairwoman, Lora Tom, has stated that "any bodies should be repatriated out of respect. . . . Once we are at a point where any remains are discovered, I think that someone from the surrounding tribes should be there." Neff & Lavine, supra note 475, at A1.


\textsuperscript{481} Protect Ruins, Verify Claims; Secure Site Against Threats, \textit{Rocky Mountain News}, July 11, 2004, at 7E.
In addition to encouraging anthropologists who have chafed under NAGPRA to resist compliance with its requirements, the Ninth Circuit's decision to side with the plaintiffs in the *Bonnichsen* litigation against the DOI and the tribal claimants may make it more difficult for tribes and anthropologists to reach agreements for the study of remains, perhaps on a short-term basis, in situations in which the interested tribes are not averse to at least some analysis by anthropologists. In the case of remains found at Buhl Quarry in Idaho that were dated to be over 10,000 years old, Shoshone–Bannock elders gave permission for measurement and study of the remains and for radiocarbon testing, which ended up delaying reburial of the remains and associated funerary objects for over two years.\(^4\) J.M. Adovasio has also written about his experience of the positive relationships that can be developed between Native Americans and archaeologists\(^4\) who are willing "to move from the ethics of conquest to the ethics of collaboration."\(^4\) Particularly in cases where it is relatively easy to establish ties between human remains and contemporary tribes that even the Ninth Circuit panel would accept under its re-writing of NAGPRA, tribal cooperation can give anthropologists an opportunity to study remains that they would not otherwise have. It is not difficult to envision, though, that in the aftermath of cases like *Bonnichsen*, in which the plaintiff anthropologists and their supporters displayed negative and even contemptuous attitudes toward tribal perspectives and claims, requests for tribal permission to examine remains may be greeted with a less enthusiastic response than they might have received in the past. As a result, anthropologists and archaeologists themselves may ultimately come to conclude that the *Bonnichsen* decision was not quite the victory that at least some of them first believed it to be.

V. CONCLUSION

*Between the arrival of Lewis and Clark and today, Indians have fallen off the map. . . . Lewis and Clark passed through the homeland of a real, living, breathing society. But we've become just an exotic backdrop to someone else's story.*

– Roberta Conner, Director, Tmatskliit Cultural Institute, Umatilla Indian Reservation\(^4\)

---

482. *See Roger Downey, Riddle of the Bones: Politics, Science, Race, and the Story of Kennewick Man* 121–27 (2000) (describing the discovery of the remains, their study, and their repatriation); *see also* Green et al., *supra* note 302, at 437. Thomas Green and his co-authors noted that they "greatly appreciate[d] the cooperation and tolerance of the Shoshone–Bannock tribes of Fort Hall, Idaho." *Id.* at 452.

483. *See Adovasio & Page, supra* note 21, at 252.


Although the tribal claimants have so far been unable to save a man whom they regard as their ancestor from being treated as the representative of a dying race—a sort of archaeological "Last of the Mohicans"—they continue to themselves prove wrong the nineteenth century predictions of Native Americans' imminent extinction. Members of the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Indian Nation, the Nez Perce Tribe, and the Wanapum Band continue to live their lives in the area that has supported their people for millennia, and to value the ties of kinship and community that bind them together as tribes. Like the Ancient One himself, whose identity as a Native American has been denied by the federal judiciary, the Wanapum Band continues to lack federal recognition of its existence as a tribe. If the Band were to submit to the review process established for tribes seeking federal acknowledgment, its members would be likely to encounter the same focus on biological connections as the basis for ancestry that they and the other tribal claimants did with the Ancient One. Like the tribal coalition claiming descent from the Ancient One in Bonnichsen, the Band would, in effect, have to extract from the government an admission of failure to either exterminate or assimilate it. If the government were to acknowledge the existence of the Wanapum Band as a tribe, it thus would be acknowledging that it had failed to destroy the Band as a political and cultural entity and to absorb its members fully into the dominant society.

The tribal claimants clearly do not stand alone as survivors of the nineteenth century assimilation process and as proof of the falsity of the dying race theory. Moreover, the higher population growth rates of Native Americans as compared to white Americans provide additional evidence that Native Americans continue to prove nineteenth century anthropologists wrong. Between the 2000 Census and 2003, the Indian and Alaska Native population grew 4.6% and the Native Hawaiian population grew 7.1%, while the number of non-Hispanic whites increased only 0.9%.486 Moreover, the Native American population tends to be younger than the white population487 and to have a higher birth rate. In South Dakota, for example, the 2001 Native American birth rate was twice that of white residents of the state, as


487. In July 2003, for example, the median ages of American Indians and Alaska Natives and of Native Hawaiians and other Pacific Islanders were 28.9 and 28.5, respectively; the median age of non-Hispanic whites was 39.6. See id. at tbl. 2.
the white birth rate in the state continued its twenty year decline. These figures may be threatening to non-Native Americans, who recognize that where tribal sovereignty is concerned, there may be strength in numbers. Alaska Senator Ted Stevens, for example, has implied that the higher birth rate of Alaska Natives compared to other Alaskans is one of his reasons for resisting the sovereignty of Alaska Native villages. Inadequate health care, along with other factors, however, have continued to present challenges to the health and longevity of members of Native American communities. Thus, while Native Americans today may not suffer catastrophically from the diseases brought by Europeans, like influenza and small pox, that decimated their communities in the past, the failure of the government to provide the health care in consideration of which tribes ceded territory continues to take a toll on their communities.

The recent opening of the National Museum of the American Indian stands as a testament to the survival of the indigenous peoples of the Americas. The long-awaited opening of the Museum marks a public rejection of the dying race theory of the nineteenth century, despite the Ninth Circuit's rendering of a decision that is consistent with the theory, and gives those Native Americans who are involved in its development the opportunity to present their understanding of their past, present, and future. Stephen Cook, the head curator of the

489. See Jerry Reynolds, Silent on Housing Rider, Alaska Senator Denies Slur Against American Indians, INDIAN COUNTRY TODAY, Oct. 22, 2003, available at 2003 WL 72623162. Stevens had been reported, apparently incorrectly, to have used the term “breeding” when he discussed the Alaska Native birth rate. See id.
490. See, e.g., Ortman, supra note 488 (noting that the median age at death for Native Americans was 57, compared to 80 for whites); Health Statistics; Motherhood in South Dakota on the Rise, WOMEN'S HEALTH WEEKLY, Feb. 5, 2004, at 63 (noting that the infant mortality rate in South Dakota in 2002 was 14.4% for Native American infants and 4.7% for white infants, and that Native American infants died before age one at three times the rate of white infants); Eric Newhouse, Indian Kids Dying—Too Many, Too Young, GREAT FALLS TRIB., Feb. 7, 2003, at 7A (noting that the death rate in Montana for Native American infants was 88% higher that for white infants, and that death rates for Native American children aged 1–19 were 58% higher); Brent Walth, Tribes Turn Tide Against Infant Mortality, Series: A Place Where Children Die, THE OREGONIAN, Dec. 8, 2003, at A07 (noting that infant mortality continues to take a heavy toll in Native American communities in the United States but that strides have been made in dealing with high infant mortality rates on the Warm Springs Reservation in Oregon).
491. See, e.g., Peter Harriman, Indian Health Worries Shared, ARGUS LEADER, Aug. 25, 2003, at 1 (noting Oglala Sioux Tribe Council member Dennis King's comment that health care was owed under treaties and that a U.S. Civil Rights Commission report on Indian Health Service funding had concluded that it was so “fiscally constricted” that it could not provide basic health services to its user population, let alone address the specific health needs of Native American communities).
Mashantucket Pequot Museum and Research Center, has commented that “Indians more than anyone else are really aware of the past, because of the damage it’s done. . . . The Vanishing Indian is gone. . . . It doesn’t exist. It never did. . . . Not only have we not lost our past, we are not going to lose the future.” The Museum does not have an anthropology department, because this discipline is not intended to play a role in defining who Native Americans are or to be the final arbiter of what will be included; rather, the Museum looks to tribal communities themselves “as authorities about who they are.”

In his remarks on the opening of the Museum, President Bush spoke of celebrating “the legacy of the first people to call this land home” and of remembering “Sacagawea’s presence with Lewis and Clark.” Linking the past and present of the tribes with their future, he commented:

The National Museum of the American Indian . . . affirms that you and your tribal governments are strong and vital today and provides a place to celebrate your present achievements and your deepest hopes for the future. . . . Long before others came to the land called America, the story of this land was yours alone. . . . The . . . Museum . . . affirms that this young country is home to an ancient, noble, and enduring native culture . . . and as we celebrate this new museum and we look to the future, we can say that the sun is rising on Indian country.

The Museum stands as a gathering place of once-condemned but still living cultures, a far cry from the museum of skeletal remains and artifacts of extinct peoples that past anthropologists anticipated would soon be all that remained to document the existence of the continent’s pre-Columbian inhabitants.

While the new Museum welcomes visitors in Washington, D.C., to experience a glimpse of the past, present, and future of the indigenous peoples of the United States, a different encounter, which is also both time-laden and timeless, is being played out in the territory of the Ancient One. The path of the Lewis and Clark expedition is being trav-


495. Id. at 2106.
versed by a group that wishes to commemorate their journey on the hundredth anniversary of its launch from St. Louis, an effort that is supported by a presidential proclamation designating 2003–2006 as the "Lewis and Clark Bicentennial." The individuals who have assumed the roles of members of the Corps of Discovery have come to find that not all Native Americans are as welcoming to their visits as were most of the tribes whom the original Corps encountered, and depended on for survival. Although some tribes, including the Nez Perce Tribe, have had representatives involved in the planning of the re-enactment via a "Circle of Tribal Advisors," in order to try to ensure that their perspective on this commemoration is not ignored, other Native American groups and individuals have organized protests along the route. To these protestors, the re-enactors are "re-enacting the death" of their people.

Viewed against the sweep of history, however, whether contemporary Native Americans are welcoming to the re-enactors or hostile to their presence seems less significant than the fact that they are here to react to the reenactment at all. Whether the visit of the Corps of Discovery is viewed as simply the beginning of regularized contact between Native Americans and Euro-Americans, or as the prelude to conquest, or even to genocide, the fact remains that Native Americans have survived to have an opinion about the visit of the original Corps and that of its modern-day imitators. Moreover, despite concerted efforts to suppress their cultures and assimilate them into Euro-American society, they have survived as individuals and as tribes. They continue to disprove the predictions of nineteenth century anthropologists and government officials that they are a race doomed either to physical extinction or to cultural extinguishment. While the Bonnichsen decision represents a new form of acceptance of the dying race theory, and a rejection of the tribal claimants' culturally influenced perspective on history and kinship, those who wish to preserve the integrity of NAGPRA must hope that it is an aberration, and that future decisions by federal courts and action by Congress will correct the mistake made by the Ninth Circuit in its misinterpretation of NAGPRA.

VI. POSTSCRIPT

As this Article was going to press, several of the Bonnichsen plaintiffs, along with a number of other anthropologists, were given the opportunity to handle the remains of the Ancient One. Examination of the remains began on July 6, 2005 and lasted ten days. A Smithsonian Institution anthropologist prepared a new reconstruction of the skull that looks very different from the one that provoked speculation about the Ancient One's origins and that has features similar to those of other Paleo-Indian remains. The tribal claimants have continued their appeal of the district court’s rejection of a tribal role in formulating study plans for the remains, in the hope of having some say in the remains’ ultimate disposition.

As the tribes struggle on in their efforts to obtain respectful treatment for the remains of the man whom they understand to be their kinsman, the government continues to distance itself from the tribes and from the DOI’s own NAGPRA determination. The Bush administration has publicly announced support for the Ninth Circuit panel’s decision in the Bonnichsen litigation and opposition to the proposed statutory clarification of NAGPRA that is pending in the Senate. Where the Ancient One is concerned, the government has thus regressed to the role that it played in the nineteenth century, acting as the servant of “science” at the expense of Native Americans’ human rights.

499. See Timothy Egan, A Skeleton Moves From the Courts to the Laboratory, N.Y. Times, July 19, 2005 at F4. Preliminary results of the new studies are expected to be released in October of 2005. See id.
500. Id.
501. See Anna King, Kennewick Man to be Studied in Seattle, TRI-CITY HERALD, June 20, 2005, available at http://www.tri-cityherald.com/tch/local/v-printer/stroy/6626748p-6512469c.html (noting a tribal official’s statement that the tribes had filed an appeal with the Ninth Circuit and that they expected that plaintiffs’ study would continue despite their appeal).