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February 2, 2009

Congressional Research Service

Report RL33031

*Native American Graves Protection and Repatriation Act
(NAGPRA): Legal and Legislative Developments*

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August 10, 2005

Abstract. Currently pending legislation, S. 536, the Native American Omnibus Act of 2005, would amend NAGPRA. Section 108 would amend the definition of "Native American," within the context of NAGPRA, so as to include a tribe, people, or a culture, that is or was indigenous to the United States (*italics added*). It would further amend NAGPRA to include the phrase "any geographic area that is now located within the boundaries of" the United States. If enacted, it is not certain what precise impact this amendment may have on the disposition of the Kennewick Man and on the disposition of other ancient human remains which may be discovered in the future. However, if enacted, the amendment may bring such remains into the purview of NAGPRA. The Senate Committee on Indian Affairs held a hearing on S. 536 on July 28, 2005. The statutory provisions of NAGPRA and the related regulations are outlined below. The factual circumstances concerning the discovery and custody of the Kennewick Man are summarized and the litigation and its conclusions are analyzed. Currently pending legislation, and its possible impact on the application of NAGPRA are considered.

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Native American Graves Protection and Repatriation Act (NAGPRA): Legal and Legislative Developments

August 10, 2005

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Native American Graves Protection and Repatriation Act (NAGPRA): Legal and Legislative Developments

Summary

The Native American Graves Protection and Repatriation Act (NAGPRA) was enacted to serve as a means for museums and federal agencies to return certain Native American cultural items (including human remains) to the lineal descendants, culturally affiliated Indian tribes, or Native Hawaiian organizations. NAGPRA makes provision for both intentionally excavated and inadvertently discovered Native American cultural items on federal and tribal lands. Penalties are provided for noncompliance. A Review Committee was established by NAGPRA to monitor the various processes and to assist in dispute resolution involving repatriation issues.

Certain provisions of NAGPRA were judicially scrutinized in a series of cases concerning the disposition of the remains of an ancient man, believed to be about 9,000 years old and known as the Kennewick Man or the Ancient One, which was discovered on federal land under the jurisdiction of the U.S. Army Corps of Engineers (“COE”). The COE considered the applicability of NAGPRA to the situation, and concluded that NAGPRA was applicable. The COE proposed to return the remains to a coalition of Native American groups. This action was challenged by a group of scientists and others who successfully argued that the provisions of NAGPRA were not applicable. The U.S. Court of Appeals for the Ninth Circuit concluded in *Bonnichsen v. U.S.* that the remains were not identifiable with any current day Native American group, and therefore the provisions of NAGPRA did not apply.

An amendment to NAGPRA has been proposed in section 108 of S. 536, the “Native American Omnibus Act of 2005.” If enacted, the amendment would define “Native American” within the context of NAGPRA so as to include a tribe, people, or culture that is or *was* indigenous to any geographic area that is now located within the boundaries of the United States. If enacted, the amendment could have an impact on the ultimate disposition of the remains of the Kennewick Man, as well as the control and custody of any other ancient human remains and related objects which may be discovered.

Interest in NAGPRA is particularly strong during the summer of 2005, as severe weather conditions have caused various rivers in the continental United States—such as the Missouri River—to recede. This has exposed traditional Native American burial grounds which have been subject to increased looting and vandalism.

The Senate Committee on Indian Affairs held oversight hearings on NAGPRA for July 28, 2005. The hearings focused on the proposed amendment contained in S. 536.

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Native American Graves Protection and Repatriation Act [NAGPRA]: Legal and Legislative Developments

Introduction and Summary

The Native American Graves Protection and Repatriation Act (“NAGPRA”) was enacted by Congress in 1990¹ to provide a means for museums and federal agencies to return such Native American cultural items as human remains, funerary objects, sacred objects, or objects of cultural patrimony to the lineal descendants, culturally affiliated Indian tribes, or Native Hawaiian organizations.² NAGPRA also provides for the disposition of unclaimed and culturally unidentifiable Native American cultural items. Provision is made for the inadvertent discovery of Native American cultural items on federal and tribal lands. Penalties are provided for noncompliance with NAGPRA and for the illegal trafficking in cultural goods. The law authorizes federal grants for Indian tribes, Native Hawaiian organizations, and museums to aid with the inventory and return of Native American cultural items. NAGPRA established the Native American Graves Protection and Repatriation Review Committee (“Review Committee”), which is authorized to monitor the various NAGPRA processes and to assist in the resolution of disputes concerning the repatriation of objects or remains. Regulations have been promulgated,³ and the provisions of the law and the regulations have been implemented. Since NAGPRA’s enactment and implementation, many cultural items have been returned to Native American groups and Native Hawaiian organizations.⁴

NAGPRA was perhaps most visible following the discovery of human skeletal remains that are generally believed to be about 9,000 years old and have come to be

¹ Pub. L. 101-601, Nov. 16, 1990, 104 Stat. 3048. Codified at 25 U.S.C. § 3001 to § 3013.

² NAGPRA applies to human remains, funerary objects, sacred objects, or objects of cultural patrimony which are indigenous to Alaska, Hawaii, and the continental United States, but not to territories of the United States. (43 C.F.R. § 10.1(b)(2)).

³ 43 C.F.R. § 10.1 to § 10.17.

⁴ While an exact figure of the number of cultural items repatriated is not readily available, the National Park Service maintains records on its website. The website indicates that the remains of 30,261 individuals, 581,679 associated funerary objects, and 92,298 unassociated funerary objects have been repatriated to the appropriate persons or organizations. See [<http://www.cr.nps.gov/nagpra/FAQ/INDEX.HTM>].

known as the Kennewick Man or the Ancient One.⁵ In 1996 the remains were unexpectedly discovered on federal land administered by the U.S. Army Corps of Engineers (“COE”). The COE considered the application of the provisions of NAGPRA to the Kennewick Man and concluded that NAGPRA was applicable. Pursuant to NAGPRA, the COE proposed to return the remains to a coalition of Native American groups. This action was challenged by a group of scientists and others, who successfully argued that the provisions of NAGPRA were not applicable to the facts in the case. Following extensive litigation, the U.S. Court of Appeals for the Ninth Circuit concluded that the remains were not identifiable with any current day Native American group, and hence the provisions of NAGPRA were not applicable.⁶ The remains are currently undergoing scientific testing.

Currently pending legislation, S. 536, the Native American Omnibus Act of 2005,⁷ would amend NAGPRA. Section 108 would amend the definition of “Native American,” within the context of NAGPRA, so as to include a tribe, people, or a culture, that is or *was* indigenous to the United States (*italics added*). It would further amend NAGPRA to include the phrase “any geographic area that is now located within the boundaries of” the United States. If enacted, it is not certain what precise impact this amendment may have on the disposition of the Kennewick Man and on the disposition of other ancient human remains which may be discovered in the future. However, if enacted, the amendment may bring such remains into the purview of NAGPRA.⁸ The Senate Committee on Indian Affairs held a hearing on S. 536 on July 28, 2005.

The statutory provisions of NAGPRA and the related regulations are outlined below. The factual circumstances concerning the discovery and custody of the Kennewick Man are summarized and the litigation and its conclusions are analyzed. Currently pending legislation, and its possible impact on the application of NAGPRA are considered.

NAGPRA⁹

The search for, excavation, and removal of the contents of Native American graves for profit or curiosity has long been a common practice. It is believed that these activities were at their peak during the late nineteenth century and the early twentieth century. Ultimately, thousands of Native American human remains and funerary objects came to be housed in museums and educational institutions around the United States. For many years, various Indian tribes have tried to have these remains and the funerary objects of their ancestors returned to them. These efforts

⁵ For the purposes of this report, the ancient human remains will be referred to as the Kennewick Man. This is the designation used by the federal courts in the related litigation. Native American groups refer to the human remains as the Ancient One.

⁶ *Bonnichsen v. U.S.*, 367 F.3d 864 (9th Cir. 2004).

⁷ 109th Cong., 1st Sess. (2005).

⁸ As discussed below, the circumstances of the Kennewick Man case are unique.

⁹ The National Park Service maintains an extensive website concerning NAGPRA, the Review Committee, and related issues. [<http://www.cr.nps.gov/nagpra>].

have often caused heated debates on the rights of the Native American people versus the importance to museums of retaining their collections and the scientific value of the items.¹⁰

NAGPRA has two main objectives. The first objective concerns prospective excavation or removal of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony from federal or tribal lands. NAGPRA requires that any person who wishes to excavate such items may do so only after receiving a permit issued under the Archeological Resources Protection Act (ARPA).¹¹ If such remains are found on federal lands and it is known which tribe is related to them, that tribe is afforded the chance to reclaim the remains or objects.

If the tribe does not wish to take possession of the remains or objects, the Secretary of the Interior will determine their disposition after consultation with Native American, scientific, and museum groups. NAGPRA also deals with instances concerning the incidental discovery of such items on federal lands by persons engaged in such other activities as construction, logging, or other pursuits. When items are found, the activity must temporarily cease and a reasonable effort is required to be made to protect the discovered items. The federal land manager in charge of the location must be notified in writing and notification must also be given to the appropriate tribe or Native Hawaiian organization, if known or readily ascertainable. NAGPRA provides penalties for selling, or otherwise profiting from, any Native American human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony currently held or controlled by federal agencies or museums, regardless of their origins..

The second objective of NAGPRA concerns the collections of Native American human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony held or controlled by federal agencies and museums.¹² NAGPRA required that within five years of its enactment (with discretionary extensions possible), all federal agencies and museums that receive federal funds, which have possession of, or control over, any Native American human remains or associated funerary object, were to compile an inventory of such remains or objects and, with the use of available information, attempt to identify the remains/objects as to geographical and cultural affiliation. Following the completion of the inventory, the appropriate tribe or Native Hawaiian organization was to be contacted. If the tribe or Native Hawaiian organization related to the remains or objects and the tribe or organization wanted the return of the items, the items were to be returned.

A written summary of unassociated funerary objects (those objects known to be funerary objects but not connected to a specific body), sacred objects, and objects of cultural patrimony which are controlled by a federal agency or museum was also to be completed, in this case, within three years of enactment. The summary is to

¹⁰ H.Rept. No. 101-877 at 10 (1990).

¹¹ Pub. L. 96-95, §4, Oct. 31, 1979, 93 Stat. 721. Codified at 16 U.S.C. § 470cc.

¹² NAGPRA does not deal with cultural objects in private collections. Repatriation by the Smithsonian Institution is governed by the National Museum of the American Indian Act of 1989 (20 U.S.C. § 80q).

describe the collection, the number of objects in it, and how, when, and from where the collection was received. After the summary, the appropriate Indian tribe or Native Hawaiian organization was to be contacted and the two sides were to meet to discuss the future disposition of the items.

The various museums and federal agencies compiled the requisite inventories and written summaries. Through the utilization of these inventories and the summaries, the museums and the Native American and Native Hawaiian groups have been able to meet and to discuss the appropriate disposition of human remains and various cultural objects. Through the implementation of this consultative process, many objects—including human remains—have been returned to the appropriate Native American and Hawaiian groups.¹³ The consultative and repatriation process remains ongoing.

NAGPRA allows for the repatriation of culturally affiliated items in addition to any other agreement for the disposition or caretaking which may be agreed to by the interested parties.

Section-by-Section Summary of NAGPRA.¹⁴

*Section 3001*¹⁵ provides several key definitions, including the definitions for such terms as “burial site,” “cultural affiliation,” “Federal agency,” “museum,” and other related terms. One of the definitions which has come under significant scrutiny is the definition of “Native American”:

(9) “Native American” means of, or relating to, a tribe, people, or culture that is indigenous to the United States.¹⁶

Section 3002 provides for the ownership of various Native American human remains and objects. Native American human remains and objects excavated or discovered on federal or tribal lands after November 16, 1990 are to be repatriated in the following priority sequence: 1) lineal descendants; 2) Indian tribe or Native Hawaiian organization on whose land such objects are discovered; 3) the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains; and 4) if the cultural affiliation of the objects can not be determined, then the tribe recognized as aboriginally occupying the geographic area may place a claim, or if a different tribe has a stronger cultural relationship to the objects, then that tribe

¹³ See note 4.

¹⁴ 25 U.S.C. §§ 3001 et seq.

¹⁵ Additional definitions for such terms as “museum,” “Federal agency official,” and other terms are set out in regulations. (43 C.F.R. § 10.2).

¹⁶ *Id.* § 3001(9).

may place a claim.¹⁷ Provision is made for the disposal of unclaimed Native American human remains and objects.¹⁸

The section provides for the intentional excavation¹⁹ and removal of Native American human remains and objects under certain circumstances. Such activity is permitted only under the provisions of the Archaeological Resources Protection Act (ARPA), after consultation and consent of the related Indian tribe or Native Hawaiian organization, and in accordance with other conditions.

A person inadvertently discovering²⁰ Native American remains and objects on tribal land or federal land after November 16, 1990 must notify in writing the Department or agency head of the oversight agency in the federal government, and the appropriate tribe or Native Hawaiian organization with respect to tribal lands. If the discovery occurs in the course of an activity such as construction, mining, or logging, the person is required to cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice. The activity may resume thirty days after certification by the appropriate federal, tribal, or Native Hawaiian official that the notification has been received, the activity may resume thirty days after such certification.²¹

Nothing in this section would 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.

Section 3003 sets out requirements for an inventory²² of human remains and associated funerary objects.²³ Each federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects must compile an inventory of such objects and attempt to identify the geographical and cultural affiliation of each item. Such inventories shall be completed in consultation with tribal government and Native Hawaiian organization officials and religious leaders. Such inventory was required to have been completed not later than November 16, 1995. Native American and Native Hawaiian groups may request additional information from the museum or

¹⁷ Federal regulations have been promulgated concerning the custody of human remains, funerary objects, and related objects. (43 C.F.R. § 10.6).

¹⁸ See 43 C.F.R. § 10.8.

¹⁹ Relevant regulations for intentional archaeological excavations are at 43 C.F.R. § 10.3.

²⁰ Relevant regulations for inadvertent discoveries are at 43 C.F.R. § 10.4.

²¹ Regulations have been promulgated concerning consultation between federal agency officials and lineal descendants and other interested parties as part of the intentional excavation or the inadvertent discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony. (43 C.F.R. § 10.5).

²² A sample notice of inventory completion is provided in Appendix B, 43 C.F.R. § 10.

²³ Extensive regulations have been promulgated to implement the inventory requirements. (43 C.F.R. § 10.9).

agency concerning the inventory items. Museums may apply to the Secretary of the Interior (“Secretary”) for an extension of time to complete the inventory, if the museum has demonstrated a good faith effort.

If the cultural affiliation of any particular Native American human remains or associated funerary objects²⁴ is determined, the federal agency or museum concerned, shall notify the affected Indian tribes or Native Hawaiian organization not later than six months after the completion of the inventory. A copy of such notice is to be sent to the Secretary for publication in the Federal Register.

Section 3004 requires that each federal agency or museum that has possession or control over holdings of sacred objects, funerary objects not associated with remains, or objects of cultural patrimony shall provide a written summary²⁵ of such objects based upon available information held by such agency or museum.²⁶ The summary is to describe the scope of the collection, the kinds of objects included, geographical locations, acquisition information, and cultural affiliation. Such summary was to have been completed not later than November 16, 1993. Upon request, Indian tribes and Native Hawaiian organizations shall have access to records, catalogues, relevant studies, or other data for determining geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects.

Section 3005 concerns the repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums.²⁷ If the cultural affiliation of Native American human remains and associated funerary objects with a particular Native American Indian tribe or Native Hawaiian organization is established, then the federal agency or museum, upon request from a known lineal descendant of the Native American, tribe, or organization, shall return such remains and associated funerary objects. If the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown concerning unassociated funerary objects, sacred objects or objects of cultural patrimony, then the federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization, shall expeditiously return the objects. Where the cultural affiliation of Native American human remains and funerary objects has not been established, such Native American human remains and funerary objects shall be returned when the requesting Indian

²⁴ Both associated and unassociated funerary objects are cultural items that are reasonably believed to have been placed with individual human remains either at the time of death, or later as part of the death rite or ceremony of a culture. Under the provisions of NAGPRA, funerary objects are considered to be “unassociated” if the human remains with which the objects were placed are not in the possession or control of a museum or federal agency. Funerary objects are considered to be “associated” if the human remains with which the objects were placed are in the possession of a museum or federal agency. See 25 U.S.C. § 3001(3).

²⁵ A sample “summary” is provided in Appendix A, 43 C.F.R. § 10.

²⁶ Regulations have been promulgated regarding the contents, completion, and other aspects of the summaries of human remains, funerary objects, and other related items in museums and federal collections. (43 C.F.R. § 10.8).

²⁷ Regulations have been promulgated dealing with repatriation. (43 C.F.R. § 10.10).

tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, or other evidence. Similar criteria are to be used for the return of sacred objects and objects of cultural patrimony.²⁸

If the lineal descendant, Indian tribe or Native Hawaiian organization requests the return of cultural affiliated Native American cultural items, the federal agency or museum shall return such items, unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than ninety days after the date on which the scientific study is completed.

If there are multiple requests for repatriation of any cultural item, and after complying with the requirements of this chapter, the federal agency or museum cannot determine which person is the most appropriate claimant, the agency or museum may retain the item until the requesting parties agree upon its disposition or the dispute²⁹ is otherwise resolved pursuant to the statute or by a court.³⁰

Section 3006 establishes a Review Committee³¹ to monitor and review the implementation of the inventory and identification process and repatriation activities. Criteria are established for the committee. Among the Committee's duties are monitoring the inventory and identification process so as to guarantee a fair, objective consideration and assessment of the available relevant information and evidence; facilitating the resolution of disputes among Indian tribes and others regarding the return of items; and other related activities. The committee is required to make an annual report to Congress regarding the progress and barriers encountered in the implementation of the provisions the legislation. The Committee may be terminated when the Secretary determines, in a report submitted to Congress, that its work has been completed.³²

Section 3007 provides for penalties.³³ A museum that does not comply with the requirements of NAGPRA may be assessed a civil penalty by the Secretary. Each violation is to be considered a separate offense. The amount of the penalty is to be determined upon the basis of several factors, including the archaeological, historical, or commercial value of the item involved; the damages suffered by the aggrieved party; and the number of violations. If a museum fails to pay the assessment of a

²⁸ Regulations provide for limitations and remedies concerning the return of cultural objects, human remains, and relative objects to native peoples. (43 C.F.R. § 10.15).

²⁹ Regulations have been promulgated concerning dispute resolution. (43 C.F.R. § 10.17).

³⁰ Regulations have been promulgated concerning the determination of lineal descent and cultural affiliation. (43 C.F.R. § 10.14).

³¹ Regulations have been promulgated concerning the Review Committee. (43 C.F.R. § 10.17).

³² The Review Committee is operating at the present time. See [http://www.cr.nps.gov/nagpra]. Its next meeting is scheduled to be held in November 2005 in Albuquerque, NM.

³³ Regulations have been promulgated at 43 C.F.R. § 10.12.

civil penalty and has not appealed the penalty, the Attorney General may institute a civil action to collect the penalty. Subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

Section 3008 provides that the Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the repatriation of Native American cultural items. The Secretary is also authorized to make grants to museums to assist in the inventory and identification processes required by the statute.

Section 3009 concerns savings provisions and provides that nothing in the statute is to limit the authority of any museum or federal agency to return cultural items and to enter into agreements over the disposition of, or control over, cultural items.

Section 3010 states that this statute reflects the unique relationship between the federal government and Indian tribes and Native Hawaiian organizations. The law should not be construed to establish a precedent with respect to any other individual, organization, or foreign government.

Section 3011 provides that the Secretary must promulgate regulations before November 16, 1990.

Section 3012 provides for the authorization of appropriations.

Section 3013 provides that the United States district courts will have jurisdiction over any action alleging a violation of the statute and the courts shall have the authority to issue such orders as may be necessary to enforce the statute.

The Kennewick Man

Factual and Administrative Background.

The Kennewick Man is the name generally given to the remains of a prehistoric man found near Kennewick, Washington, on July 28, 1996.³⁴ Two teenagers accidentally discovered the skull while swimming below the surface in Lake Wallula, a section of the Columbia River pooled behind the McNary Dam. Law enforcement authorities were notified and took charge of the remains.³⁵ At the time of the discovery of the remains, their age and ethnic origin were uncertain. The land upon which Kennewick Man was found was under the jurisdiction of the U.S. Army Corps of Engineers (“COE”).³⁶

³⁴ For the local news of the discovery, see [<http://www.kennewick-man.com/kman/news/story/2888895p-2924726c.html>].

³⁵ See [http://en.wikipedia.org/wiki/Kennewick_man].

³⁶ See website for the National Park Service Archeology and Ethnology Program: [<http://www.cr.nps.gov/aad/kennewick/index.htm>].

The Kennewick Man became the focus of debates and extensive litigation about the relationship between Native American cultural and religious rights and science and archaeology. Almost immediately, a controversy developed concerning who was responsible for determining what would be done with the remains. Claims were placed by Indian tribes, local officials, and some members of the scientific community. The COE ultimately took possession of the remains, but its actions to resolve the situation in accordance with NAGPRA were challenged in federal court.

The remains were initially given to forensic anthropologists for study and dating. They concluded that Kennewick Man lived approximately 9,000 years ago. Meanwhile, Indian tribes from the region of the Columbia River opposed the study of the remains on religious grounds and demanded that the remains be turned over to them for immediate burial. Their claim was based on NAGPRA. The COE agreed with the tribal claimants and seized the remains before further testing could be completed. In 1998, the COE and the Secretary of the Interior entered into an agreement whereby the Secretary was given the responsibility to decide whether the remains were “Native American” under NAGPRA, and to determine their appropriate disposition.

Extensive study had indicated that the remains were unlike those of any known present day population, American Indian, or otherwise. Still, based upon the age of the remains and the fact that the remains were found within the United States, the Secretary determined that the Kennewick Man’s remains were “Native American” within the meaning of NAGPRA. Later, the Secretary further concluded that the Kennewick remains were culturally affiliated with present day Indian tribes. For this reason, the Secretary awarded Kennewick Man’s remains to a coalition of tribal claimants.³⁷ Pursuant to this decision and in compliance with NAGPRA, the COE published a “Notice of Intent to Repatriate Human Remains” in a local newspaper. Various scientists objected to the repatriation decision and requested that scientists be allowed to study the remains further. The COE did not agree to allow additional study, and the scientists began the litigation.³⁸

Judicial Review—*Bonnichsen v. U.S.*

The plaintiffs—a group of scientists and others--challenged the Secretary’s decisions in District Court. During the course of this litigation, the scientist-plaintiffs viewed the skeleton as an “irreplaceable source of information about early New World populations that warrants careful scientific inquiry to advance knowledge of distant times.”³⁹ By contrast, the position of the Native American tribes was that the skeleton is “that of an ancestor, who according to the tribes’ religious and social traditions, should be buried immediately without further testing.”⁴⁰

³⁷ The factual background is summarized from the court’s opinion in *Bonnichsen v. U.S.*, 367 F.3d 864 (9th Cir. 2004).

³⁸ *Id.*

³⁹ 357 F.3d at 869.

⁴⁰ *Id.*

The district court ruled in plaintiffs' favor and vacated the Secretary's decision on the ground that the Secretary improperly concluded that NAGPRA applied.⁴¹ The district court also held that since NAGPRA did not apply, the plaintiffs should have the opportunity to study Kennewick Man's remains under ARPA. The defendants and the tribal claimants appealed, and the Court of Appeals stayed the district court's order granting the scientists opportunity to study of the remains pending the decision of the Court of Appeals.

In *Bonnichsen v. U.S.*⁴² the U.S. Court of Appeals for the Ninth Circuit affirmed the decision of the district court,⁴³ determining that the scientists had standing to bring this action; that for NAGPRA to apply the human remains must bear some relationship to a presently existing tribe, people or culture to be considered "Native American" within the meaning of NAGPRA; and the evidence did not support the Department of Interior's decision that the remains were Native American within this meaning.⁴⁴

Standing

Following a detailed factual summary of the events leading up to the litigation and a summary of the decisions of the district court, the court turned to the issue of jurisdiction. The tribal claimants argued that the court lacked jurisdiction because the plaintiff's alleged injuries are not redressable by court action and that the plaintiffs lack standing to bring claims alleging violations of NAGPRA because they did not seek to invoke interests within the "zone of interest" protected by NAGPRA. Examining the issue of standing, the court concluded that if NAGPRA does not apply, then the Archaeological Resources Protection Act (ARPA)⁴⁵ would apply, and ARPA would give the plaintiffs the opportunity to study the Kennewick Man's remains. The court concluded that the plaintiffs' injury would be redressed by a favorable decision on the NAGPRA issue, and hence the plaintiffs have constitutional standing.⁴⁶

In finding for the plaintiffs, the court rejected the argument of the tribal coalition. The tribal coalition had argued that the plaintiff scientists lacked standing

⁴¹ *Bonnichsen v. United States*, 217 F.Supp. 2d at 1138-39.

⁴² 367 F.3d 864 (9th Cir. 2004).

⁴³ The district court has issued three published opinions in this case. See *Bonnichsen v. United States*, 969 F.Supp. 614 (D.Or. 1997)(denying the defendants' motion to dismiss based on failure to state a claim and ripeness grounds); *Bonnichsen v. United States*, 969 F.Supp. 628 (D.Or. 1997)(denying defendants' motion for summary judgment and vacating the government's disposition of the Kennewick Man's remains); and *Bonnichsen v. United States*, 217 F.Supp.2d 1116 (D.Or. 2002)(again vacating the government's disposition of the Kennewick Man's remains).

⁴⁴ In a procedural matter, the original opinion of the Court of Appeals at 357 F.3d 962 (9th Cir. 2004) was subsequently amended by a footnote (footnote 20). The amended opinion is at 367 F.3d 864 (9th Cir. 2004).

⁴⁵ See note 11.

⁴⁶ *Id.* at 872-73.

to bring claims alleging violations of NAGPRA. The tribal claimants argued that Congress enacted NAGPRA with the interests of American Indians in mind, and only American Indians or tribes could file suit alleging violations of NAGPRA. The court scrutinized § 3013 of NAGPRA and determined that it did not limit jurisdiction to suits brought by American Indians or Indian tribes.⁴⁷

Concept of “Native American” within the Context of NAGPRA

The court then reviewed the Secretary’s decision to transfer the Kennewick Man to the tribal coalition. The court examined NAGPRA and conducted a two-part analysis. The first question is whether the human remains are Native American within the statute’s meaning. If the remains are not Native American, then NAGPRA does not apply. If the remains are Native American, then NAGPRA applies, triggering the second question of determining which persons or tribes are most closely affiliated with the remains.⁴⁸

The court focused on the definition of “Native American” at 25 U.S.C. § 3001(9) and noted that the relevant statutory clause is written in the present tense and that the statute unambiguously requires that human remains bear some relationship to a presently existing tribe, people, or culture for them to be considered Native American. The court concluded that Congress enacted NAGPRA to give American Indians control over the remains of their genetic and cultural forebears, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture.⁴⁹

Review of the Secretary’s Decision that the Kennewick Man’s remains are Native American

The court reviewed the Department of the Interior’s records to determine whether there is substantial evidence that supports the agency decision that the Kennewick Man is “Native American” within the context of the NAGPRA definition. After reviewing the record, the court concluded that the record did not contain substantial evidence that the Kennewick Man’s remains were Native American within the context of the NAGPRA meaning.

After reviewing all of the records, the court concluded that because the Kennewick Man’s remains are so old and that the information about this era is limited, the record did not permit the secretary to reasonably conclude that the Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures. The court therefore concluded that the Kennewick Man’s remains are not Native American remains within the context of NAGPRA, and that NAGPRA does not apply to them.⁵⁰

⁴⁷ *Id.* at 873-74.

⁴⁸ *Id.* at 875.

⁴⁹ *Id.* at 879.

⁵⁰ *Id.* at 882.

Consequently, the court ordered that studies of the Kennewick Man's remains by the plaintiff scientists could proceed under ARPA.⁵¹

Aftermath of the Decision.

Following the decision in *Bonnichsen*, studies continue on the remains of the Kennewick Man. Nevertheless, the scientific community is still concerned about the future application of NAGPRA to ancient human remains, as well as about proposed amendments to NAGPRA.

The Umatilla tribe of Native Americans had been a leader of the tribal defendants in the case. The position of the Native Americans is that they wish to have “the remains reburied as required by traditional tribal law...”⁵² Although the Native Americans were unhappy with the determinations of the Ninth Circuit, discussed above, they decided not to appeal the case to the U.S. Supreme Court. This decision was based upon the availability of financial resources, the uncertainty of whether the Court would hear the case, and the risk of an unfavorable decision.⁵³ The position of the tribe, expressed on their website, appears to be that NAGPRA needs to be strengthened so that it fulfills Congress' intent, which was to protect tribal burials and to return sacred items to the tribes.⁵⁴

In fact, Congress has considered legislation to modify the definition of “Native American” within the context of NAGPRA. Legislation was introduced in the 108th Congress to amend NAGPRA. Section 14 of S. 2843,⁵⁵ the proposed Native American Technical Corrections Act of 2004, would have amended the definition of the term “Native American” at 25 U.S.C. § 3001(9), so as to add the crucial word “was.” The section would have read: “‘Native American’ means of, or relating to, a tribe, people of culture that is **or was** indigenous to the United States.” If enacted, this change would have expanded the coverage of NAGPRA to potentially include the remains of peoples and cultures which no longer have current descendants, tribal connections, or cultural similarities. The bill was introduced by Senator Campbell on September 23, 2004.⁵⁶

⁵¹ *Id.*

⁵² See the website for the Confederated Tribes of the Umatilla Indian Reservation at [<http://www.umatilla.nsn.ancient.html>].

⁵³ See [<http://www.umatilla.nsn.us/kman14.html>].

⁵⁴ *Id.*

⁵⁵ 108th Cong., 2d Sess. (2004)

⁵⁶ The bill was referred to the Committee on Indian Affairs and reported out on November 10, 2004 (S.Rept. 108-406).

Pending Legislation – S. 536⁵⁷

S. 536, the Native American Omnibus Act of 2005 was introduced by Senator McCain on March 7, 2005. The purpose of the legislation is to make technical corrections to laws relating to Native American and for other purposes.

Section 108 provides an amendment to the definition of “Native American” within the context of NAGPRA. Two changes are proposed to be made in 23 U.S.C. § 3001(9). If enacted, the amended definition would read:

(9) “Native American” means of, or relating to, a tribe, people, or culture that is *or was* indigenous to *any geographic area that is now located within the boundaries of* the United States. [amendment language emphasized].

In the accompanying report language,⁵⁸ it is stated that this change is intended “to clarify that in the context of repatriations, the term ‘Native American’ refers to a member of a tribe, a people, or a culture that is or was indigenous to the United States.”

Enactment of this amendment may significantly broaden the scope of NAGPRA. As discussed above, the *Bonnichsen* court held that for NAGPRA in its present form to be applicable, there needed to be a connection between the cultural object and a current day people or culture. The amendment would remove such a distinction and would have the possibility of including any indigenous person within the context of NAGPRA, whether or not there is a connection to a current tribal group or culture.

While it cannot be predicted what effect this amendment, if enacted, may have on the ultimate disposition of the remains of the Kennewick Man, it is conceivable that if the amendment to NAGPRA is enacted, there may be further judicial consideration of the applicability of NAGPRA to the Kennewick Man’s remains and whether they would fall within the purview of the amended definition of “Native American.”

The Senate Indian Affairs Committee held an oversight hearing on NAGPRA on July 28, 2005.⁵⁹ The hearing focused on the amendment contained in Section 108 of S. 536. In his testimony before the Committee, an Interior Department official, Paul Hoffman, stated that the Department agrees with the decision in the *Bonnichsen* case.⁶⁰ He stated that the Department opposes the amendment to NAGPRA and prefers to let the courts resolve issues of controversy as they did in *Bonnichsen*. This is apparently the first time that the Department has publicly stated that it agrees with

⁵⁷ 109th Cong., 1st Sess. (2005).

⁵⁸ S. Rep. No. 109-67 (2005).

⁵⁹ Hearing Before the Senate Committee on Indian Affairs on Native American Graves Protection and Repatriation Act.

⁶⁰ *Id.* Testimony of Paul Hoffman, Deputy Secretary for Fish and Wildlife and Parks, U.S. Department of Interior, Washington, DC.

the *Bonnichsen* decision and a less expansive application of NAGPRA.⁶¹ His position was supported by the testimony of Paula Barran, the attorney who represented the plaintiff scientists in *Bonnichsen*.

Other witnesses at the hearing included professors and representatives of Native American and Hawaiian groups.⁶² Generally speaking, these witnesses supported the amendment to NAGPRA and supported a more expansive and inclusive application of NAGPRA.

⁶¹ See, “Bush Administration Opposes NAGPRA Amendment,” at [<http://www.indianz.com/NEWS/2005/009562.asp>].

⁶² Testimony of Paul Bender, Walter R. Echo-Hawk, Sr., Patricia Lambert, and Van Horn Diamond.