

COMMENT

BETTER LATE THAN NEVER? THE EFFECT OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT'S 2010 REGULATIONS

INTRODUCTION

In 1998, a thirty-year drama came to an end when anthropologists at the University of Nebraska agreed to return the skeletal remains of 1702 Native Americans to a coalition of fifteen modern tribes.¹ For the tribes involved, this repatriation represented the end of a long struggle to assert their right to possession of human skeletal remains with which they shared a common heritage.² Even though anthropological studies had concluded that the remains were not affiliated with any particular tribe, the Sioux and other tribes expressed their belief that the remains were part of their tribal history and should be returned to the spirit world in order “to nourish the soil, bring food to people.”³

However, for scientists in the University of Nebraska Anthropology Department, the repatriation of these remains represented the loss of valuable scientific resources that had the capacity to shed light on human evolution and existence. Additionally, the experience had proved to be a lesson in the importance of complying with federal legislation governing Native American skeletal remains. Following allegations that its researchers had attempted to cover up violations of the Native American Grave Protection and Repatriation Act (“NAGPRA”), the University of Nebraska Anthropology Department was subject to a federal criminal investigation and public demands for

1. Joe Duggan, *Native Repatriations Nearly Complete in Nebraska*, LINCOLN J. STAR (Oct. 9, 2010), http://journalstar.com/news/state-and-regional/article_1f4da392-d41b-11df-82d6-001cc4c002e0.html; Diedtra Henderson, *Human Bones: What to Do With Them?*, SEATTLE TIMES, Oct. 11, 1998, <http://community.seattletimes.nwsources.com/archive/?date=19981011&slug=2777071>; *Indians Focus on Future After University Agrees to Hand Over Remains*, LEWISTOWN SUN J., Sept. 3, 1998, at B8; Jon Marcus, *Indian Tribes Given Bones for Reburial*, TIMES HIGHER EDUC., Sept. 25, 1998, <http://www.timeshighereducation.co.uk/story.asp?storyCode=109183§ioncode=26>.

2. See Marcus, *supra* note 1. Following the repatriation, all of the remains were reburied at the Ponca Cemetery in Niobrara, Nebraska. See Duggan, *supra* note 1.

3. Marcus, *supra* note 1 (quoting a member of the Sioux tribe).

administrative action.⁴

In the twenty years since NAGPRA was enacted, similar disputes between scientists and Native American tribes seeking possession of culturally unaffiliated skeletal remains have been equally contentious. Passed by Congress in 1990, NAGPRA provides sweeping protection for Native American skeletal remains and cultural artifacts that are found on federal land or held by federal agencies and museums.⁵ To be in compliance with NAGPRA, federal agencies and museums are required to undertake an effort to return Native American skeletal remains to a culturally affiliated tribe.⁶ This repatriation process was initially lauded as a landslide victory for Native American tribes in the struggle for indigenous rights.⁷ Despite the initial support of a coalition of scientific organizations,⁸ NAGPRA quickly became a pariah in the anthropological community as scientifically valuable human remains were returned to tribes for reburial.⁹ This tension continued to amplify as tribes and scientists wrestled with how to determine whether a cultural affiliation existed between contested skeletal remains and a Native American tribe.¹⁰

Even though NAGPRA provides comprehensive protection of indigenous remains, problems with the statute's implementation and efficacy became apparent after its passage.¹¹ Native American activists continued to insist that the government was not doing enough to meet the responsibilities imposed by NAGPRA.¹² In July

4. See Duggan, *supra* note 1.

5. See 25 U.S.C. §§ 3001–3013 (2006).

6. *Id.* § 3003(a).

7. See, e.g., 136 CONG. REC. 35,678 (1990) (statement of Sen. Daniel Inouye) (“[T]he bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights.”).

8. The organizations that urged Congress to pass repatriation legislation in 1990 included the American Association of Museums, the Society for American Archaeology, the American Anthropological Association, the American Association of Physical Anthropologists, the Archaeological Institute of America, the Society for Historical Archaeology, and the Society of Professional Archaeologists. See Timothy McKeown & Sherry Hutt, *In the Smaller Scope of Conscience: The Native American Graves Protection and Repatriation Act Twelve Years After*, 21 UCLA J. ENVTL. L. & POL'Y 153, 154 (2002–2003).

9. See G.A. Clark, *NAGPRA and the Demon-Haunted World*, SOC'Y FOR AM. ARCHAEOLOGY BULL. (Nov. 1996), <https://www.saa.org/Portals/0/SAA/publications/SAAbulletin/14-5/SAA4.html> (“NAGPRA is an unmitigated disaster for archaeologists, bioarchaeologists, and other physical anthropologists concerned with the study of human skeletal remains.”).

10. See Brad Knickerbocker, *An Ancient Man's Bones of Contention*, CHRISTIAN SCI. MONITOR, Oct. 21, 1999, at 1.

11. KATHLEEN S. FINE-DARE, GRAVE INJUSTICE: THE AMERICAN INDIAN REPATRIATION MOVEMENT AND NAGPRA 143–63 (2002).

12. See, e.g., *Native American Graves Protection and Repatriation Act: Oversight Hearing Before the H. Comm. on Natural Res.*, 111th Cong. 17–18 (2009) (statement of D. Bambi Kraus, President, National Association of Tribal

2010, these concerns were vindicated when the Government Accountability Office (“GAO”) issued a comprehensive report on the status of Native American skeletal remains in the United States.¹³ Drawing on investigations into the cultural property collections of eight government agencies,¹⁴ the GAO concluded that the executive branch had generally failed to meet its duty to implement the repatriation provisions of NAGPRA.¹⁵

While the GAO’s assessment was a particularly harsh critique of the federal government’s performance under NAGPRA, the report did not consider new regulatory developments that have the capacity to clarify problematic areas of the repatriation process. Four months before the GAO’s report was released, the Department of the Interior (“DOI”) implemented new regulations to clarify NAGPRA’s procedures in situations involving culturally unidentifiable human remains.¹⁶ These regulations seek to return skeletons to tribes even when a cultural affiliation cannot be established by a preponderance of the evidence—thus theoretically allowing for the return of more skeletal remains than under the previous regulatory framework. While these new regulations have the potential to streamline repatriation proceedings, scientific organizations have already criticized the regulations and have threatened to seek review in federal court.¹⁷

Because of the length of time between the passage of NAGPRA and the promulgation of the 2010 regulations, the federal courts acted in the interim to establish a framework for the analysis of human remains under NAGPRA. Since these courts indicated that

Historic Preservation Officers) (stating that NAGPRA still faced many “challenges and barriers to success,” including the fact that “two out of three Native Americans, over 123,000 Native Americans are now listed as culturally unidentifiable and they remain languishing on museum shelves”); Letter from Robert García, Exec. Dir. and Counsel, The City Project, et al. to Ken Salazar, Sec’y, U.S. Dept. of the Interior, et al. (July 27, 2011), <http://www.cityprojectca.org/blog/wp-content/uploads/2011/07/TCP-letter-Salazar-re-106-NAGPRA-20110727.pdf> (asking the Secretary of the Interior to institute civil penalty proceedings against Los Angeles County for its failure to repatriate human remains pursuant to the requirements outlined in NAGPRA).

13. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-768, NATIVE AMERICAN GRAVE PROTECTION AND REPATRIATION ACT: AFTER ALMOST 20 YEARS, KEY FEDERAL AGENCIES STILL HAVE NOT FULLY COMPLIED WITH THE ACT (2010), available at <http://www.gao.gov/new.items/d10768.pdf>.

14. The GAO investigated agencies in the Department of the Interior—the Bureau of Indian Affairs, the Bureau of Land Management, the Bureau of Reclamation, the U.S. Fish and Wildlife Service, and the U.S. Army Corps of Engineers—as well as the Department of Agriculture’s U.S. Forest Service and the Tennessee Valley Authority. *Id.* at 3.

15. *See id.* at 53–55.

16. 43 C.F.R. § 10.11 (2010); *see* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 74.

17. *See* Rob Capriccioso, *Scientists Ponder NAGPRA Lawsuit*, INDIAN COUNTRY TODAY, Apr. 14, 2010, <http://indiancountrytodaymedianetwork.com/2010/04/scientists-ponder-nagpra-lawsuit/>.

some of their analysis would depend on the final promulgation of regulations for culturally unaffiliated remains, this Comment will address the effect of the 2010 regulations on this judicially created framework. First, the developments leading to the initial enactment of NAGPRA will be addressed. Second, the statutory provisions for repatriation provided in the organic legislation will be analyzed. This Comment will also highlight the previous regulatory guidance on cultural affiliation as well as the case law that led to the creation of an overall NAGPRA framework in the absence of regulation. Further, this Comment will assess the development of the 2010 regulations and the new layer of analysis they require. Finally, the twenty years of statutory guidance, regulations, and case law under NAGPRA will be synthesized to establish a final NAGPRA analytical framework. This Comment concludes that the greatest benefit of the 2010 regulations will be that they have the effect of requiring agencies and museums to revisit their initial cultural affiliation determinations using the comprehensive NAGPRA analytical framework. This result—though not leading to repatriation for all human skeletal remains—will force agency and museum compliance, thus correcting some of the institutional failures noted by GAO’s 2010 report.

I. THE DEVELOPMENT OF NAGPRA

Scientific interest in Native American skeletal remains has existed since the eighteenth century when Thomas Jefferson began excavating an Indian burial ground on the banks of the Rivanna River.¹⁸ However, the approach Jefferson and his scientific contemporaries took divorced the identity of the human remains they uncovered from the Native populations then occupying the American landscape.¹⁹ Early scientists embraced the notion that human skeletal remains and cultural artifacts uncovered during excavations belonged to a unique “ancient” Indian culture that was in no way associated with living tribes.²⁰ This belief perpetuated the “myth of the mound builders,” which argued that Native American burial mounds were not the work of earlier native populations, but were instead constructed by the Vikings, lost tribes of Israel, or refugees from Atlantis.²¹

18. Karl Lehmann-Hartleben, *Thomas Jefferson, Archaeologist*, 47 *AM. J. ARCHAEOLOGY* 161, 162 (1943).

19. PATTY GERSTENBLITH, *ART, CULTURAL HERITAGE, AND THE LAW* 840 (2d ed. 2008).

20. *Id.* (noting that many early scientists believed that ancient American remains were attributable to a culture far superior to any living Native American group).

21. See Angela Miller, “*The Soil of an Unknown America*”: *New World Lost Empires and the Debate over Cultural Origins*, *AM. ART*, Summer/Fall 1994, at 9, 9–10, 14. The persistence of this myth represents another way in which early archaeology was used to reinforce Native American inferiority and repression.

The “myth of the mound builders” persisted as an interest in American archaeology during the eighteenth and nineteenth centuries and led to increasing excavation of Indian burial mounds throughout the United States. During this period, archaeologists became increasingly focused on obtaining human skeletal remains.²² This preoccupation with Native American skeletons allowed budding American museums to build impressive skeletal collections, and it also provided scientists with adequate remains to use in various osteological studies. Unfortunately, these studies were motivated in part by the nation’s desire to justify the historical subjugation of the Native American tribes and other minorities.²³ The father of this school of thought was Samuel Morton, an American physician who used measurements from the skulls of Native Americans to “scientifically prove” that Native Americans were intellectually inferior to persons of Caucasian descent.²⁴ Motivated in large part by Morton’s work, the U.S. military began conducting craniometric studies on Native American skulls taken from battlefields and graves to prove similar hypotheses.²⁵

Interest in Native American skeletal remains and associated funerary artifacts persisted into the twentieth century, during which time academics became increasingly concerned with the destruction of artifacts and burial sites by looters.²⁶ Federal legislation was the weapon of choice for dealing with this problem, and, in 1906, Congress passed the Antiquities Act to authorize criminal punishment when individuals were found impermissibly excavating a prehistoric or historic ruin on government land.²⁷ In 1979, the Archaeological Resources Protection Act was enacted to provide additional protection to Native American remains by criminalizing the purchase or sale of archaeological resources found on public and Indian land.²⁸ However, while these statutes did provide protection to Native American cultural resources, they failed

Id. at 9–10.

22. GERSTENBLITH, *supra* note 19.

23. See James Riding In, *Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians*, 24 ARIZ. ST. L.J. 11, 18 (1992).

24. Specifically, Morton concluded that American Indians were “averse to cultivation, and slow in acquiring knowledge; restless, revengeful, and fond of war.” SAMUEL GEORGE MORTON, *CRANIA AMERICANA* 6 (Philadelphia, J. Dobson 1839). From this background, it is no surprise that Native Americans remain suspicious of cranial and skeletal studies that are conducted by modern physical anthropologists and archaeologists.

25. Riding In, *supra* note 23, at 19.

26. GERSTENBLITH, *supra* note 19.

27. The Antiquities Act is codified at 16 U.S.C. §§ 431–433 (2006). Unfortunately, this legislation had limited efficacy as it is narrow in scope and there is disagreement as to whether it is unconstitutionally vague. See ROBERT C. LIND ET AL., *ART AND MUSEUM LAW* 547 (2002).

28. The criminal provisions are codified at 16 U.S.C. § 470ee(c)–(d).

to consider the interests of living Native American tribes and continued to treat prehistoric Native American cultures as entirely distinct from modern tribal communities.²⁹

In the late twentieth century, a grassroots Native American movement began to correct inequalities between the treatment of excavated Native American remains and European remains.³⁰ For over two hundred years, European skeletons were reburied if they were uncovered during archaeological excavations while Native American remains were removed for display in museums or use in scientific study.³¹ Additionally, Native American remains were often subjected to scientific study that was used to justify subjugation and repression of modern Native American tribes.³² To raise awareness and mount a campaign for protective legislation, Native Americans began uniting through organizations such as American Indians Against Desecration and the Native Americans Rights Fund.³³ Activists demanded Congressional action to protect Native American burials, as state legislation tended to exempt scientific study of graves from prosecution.³⁴ Furthermore, many Native Americans claimed that the interment of skeletal remains in museums violated their freedom of religion as tribal beliefs dictated that the spirits of the dead could not rest until properly buried.³⁵

The movement for comprehensive repatriation legislation was also driven by the sheer number of Native American remains being housed by the U.S. government. Public reports revealed that 42.5% of the 34,000 human remains held by the Smithsonian Institution were Native American.³⁶ In response to these statistics, the Senate Select Committee on Indian Affairs began work on repatriation legislation in 1987.³⁷ Congress achieved a breakthrough when it passed the National Museum of the American Indian Act

29. GERSTENBLITH, *supra* note 19.

30. See Riding In, *supra* note 23, at 25 (noting that the Indian burial movement sought to rebury remains held by the U.S. government and museums, repeal discriminatory burial laws, and make certain that Native Americans are entitled to the same fundamental rights as the rest of society).

31. GERSTENBLITH, *supra* note 19, at 841. For example, a 1970s archaeological excavation in Iowa led to the reburial of twenty-six European skeletons, while two unearthened Native American skeletons were sent to a local museum. Jerome C. Rose et al., *NAGPRA is Forever: Osteology and the Repatriation of Skeletons*, 25 ANN. REV. ANTHROPOLOGY 81, 81 (1996).

32. See, e.g., Miller, *supra* note 21, at 9–10, 14; Riding In, *supra* note 23, at 17–18.

33. See Rose et al., *supra* note 31.

34. GERSTENBLITH, *supra* note 19, at 841.

35. See *id.*; Riding In, *supra* note 23, at 13.

36. Rose et al., *supra* note 31, at 89; see also Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 54 (1992) (stating that a catalyst for NAGPRA was the discovery of the thousands of remains at the Smithsonian).

37. See Rose et al., *supra* note 31, at 89.

("NMAIA"), which created a new museum to house the Smithsonian's Native American collection and provided repatriation procedures for the Native American skeletal remains held by the Smithsonian Institution.³⁸ Under the NMAIA, tribes are able to request repatriation of skeletal remains and artifacts so long as the tribe can establish a cultural affiliation between the remains and the modern tribe by a preponderance of the evidence.³⁹ The NMAIA was applauded as "an important first step" in enacting workable repatriation legislation and its passage signaled to other federal agencies and museums that a similar bill would likely be enacted to address disposition of skeletal remains held outside the Smithsonian.⁴⁰ In fact, the NMAIA would come to serve as "important precedent" during the enactment of NAGPRA only a year later.⁴¹

II. NAGPRA'S REPATRIATION PROVISIONS

After two decades of intensive lobbying for repatriation legislation,⁴² Native American activists achieved victory in 1990. On November 16, 1990, President Bush signed into law the Native American Graves Protection and Repatriation Act to ensure an adequate repatriation process for Native American skeletal remains held by federal agencies and federally funded museums.⁴³ From the legislation's inception to its final passage, Congress actively worked to ensure that NAGPRA would accommodate the interests of both Native American tribes and the scientific community.⁴⁴

NAGPRA was introduced in the House on July 10, 1990 by Arizona Representative Morris Udall and from the beginning was supported by a host of tribal and scientific organizations.⁴⁵ During

38. See 20 U.S.C. §§ 80q-1 to -15 (2006); see also Rose et al., *supra* note 31, at 89; June Camille Bush Raines, Comment, *One is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis*, 17 AM. INDIAN L. REV. 639, 651 (1992).

39. 20 U.S.C. § 80q-9(c); see also Raines, *supra* note 38, at 652.

40. 135 CONG. REC. 22,912 (1989) (statement of Sen. John McCain).

41. Trope & Echo-Hawk, *supra* note 36, at 57.

42. See Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 202 (1996).

43. Pub. L. No. 101-601, 108 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-3013 (2006)); see Trope & Echo-Hawk, *supra* note, 36, at 58-59; Renee M. Kosslak, *The Native American Graves Protection and Repatriation Act: The Death Knell for Scientific Study?*, 24 AM. INDIAN L. REV. 129, 130 (2000).

44. GERSTENBLITH, *supra* note 19, at 849; Daniel K. Inouye, *Repatriation: Forging New Relationships*, 24 ARIZ. ST. L.J. 1, 2 (1992). Congress also hoped that the bill would promote "a continuing dialogue between museums and Indian tribes." S. REP. NO. 101-473, at 6 (1990).

45. C. Timothy McKeown, *Considering Repatriation Legislation as an Option: The National Museum of the American Indian Act (NMAIA) & the Native American Graves Protection and Repatriation Act (NAGPRA)*, in UTIMUT: PAST HERITAGE, FUTURE PARTNERSHIPS 134, 136-37, 146 (Mille

congressional hearings, legislators framed the bill as human rights legislation because it sought to end the disparate treatment of Native American remains as compared to those of other groups and ensured Native Americans' right to protect their dead.⁴⁶ In addition to this human-rights element, Congress saw the bill and its broad protection of Native American interests as an exercise of its trust responsibility to the Native American tribes.⁴⁷ The statute was probably most significant, however, because it represented the first piece of American legislation to recognize modern Native American tribes as living descendants of past cultures.⁴⁸ To celebrate the relationship between prehistoric, historic, and modern Native Americans, NAGPRA both prohibits trafficking in Native American human remains and cultural artifacts⁴⁹ and provides repatriation procedures for remains and funerary artifacts that are controlled by the U.S. government.⁵⁰

NAGPRA provides two avenues for Native Americans to obtain possession of human skeletal remains controlled by the government. First, culturally affiliated tribes and lineal descendants may seek repatriation of remains and cultural objects that are held by federal agencies or museums.⁵¹ Second, NAGPRA establishes a repatriation process for any skeletal remains or artifacts that are excavated on federally owned land after the enactment of the legislation.⁵² To help ensure compliance with these repatriation provisions, Congress established a Review Committee to oversee and monitor the return of remains and artifacts.⁵³ The Review Committee has the power to issue a nonbinding recommendation regarding the proper

Gabriel & Jens Dahl eds., 2008).

46. See 136 CONG. REC. 35,677 (1990) (statement of Sen. John McCain) ("I believe this legislation establishes a process that provides the dignity and respect that our Nation's first citizens deserve."); *id.* at 35,678 (statement of Sen. Daniel Inouye) ("[T]he bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights."); *id.* at 35,679 (statement of Sen. Daniel Moynihan) ("[T]his is hugely important legislation. The treatment of native Americans has been one of our Nation's greatest failures."); McKeown, *supra* note 45, at 137.

47. Under the judicially created trust responsibility, enactments that deal with the affairs of Native American tribes are to be liberally construed for the benefit of the Native American people. See Trope & Echo-Hawk, *supra* note 36, at 60 (noting that this is an equivalent standard to that applied in remedial civil rights litigation).

48. GERSTENBLITH, *supra* note 19, at 849; McKeown, *supra* note 45, at 136.

49. Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, § 4(a), 104 Stat. 3048, 3052 (1990) (codified at 18 U.S.C. § 1170 (2006)).

50. These provisions are codified at 25 U.S.C. §§ 3001–3013 (2006). See GERSTENBLITH, *supra* note 19, at 849.

51. 25 U.S.C. § 3005(a)(1); GERSTENBLITH, *supra* note 19, at 849.

52. 25 U.S.C. § 3002(a); GERSTENBLITH, *supra* note 19, at 849–50.

53. See 25 U.S.C. § 3006. The Secretary of the Interior is charged with appointing the seven committee members, who are appointed from a slate of individuals nominated by Native American tribes, museum organizations, and scientific organizations. *Id.*

disposition of specific remains or artifacts, thus providing an alternative to federal litigation.⁵⁴ Overall, oversight by the Review Committee and the procedural protections provided by the repatriation procedures seek to “effectively balance[] the interest of Native Americans in the rightful and respectful return of their ancestors with the interest of our Nation’s museums in maintaining our rich cultural heritage.”⁵⁵

A. *Repatriation of Remains Held in Federal Agency and Museum Collections*

NAGPRA requires federal agencies and federally funded museums to compile an initial inventory of Native American funerary objects and skeletal remains held in their collections.⁵⁶ During this initial inventory, agencies and museums are to determine, to the extent possible, the cultural or geographic affiliation for each item and must note any known lineal descendants.⁵⁷ If there are known lineal descendants⁵⁸ of the deceased, they will be notified and receive priority in repatriation proceedings.⁵⁹ However, if there are no known lineal descendants but a cultural affiliation with a modern tribe is determined or reasonably believed to exist, the agency or museum must notify the affected tribes or Native Hawaiian organization.⁶⁰ If either a lineal descendant or culturally affiliated tribe subsequently requests that an artifact or skeleton be returned, the agency or museum is required to expeditiously return the item at issue.⁶¹

Where a determination of cultural affiliation has not been made by the museum or agency, Native American tribes are authorized to request the repatriation of remains or artifacts if they can establish a prima facie case of cultural affiliation under a preponderance of

54. *Id.*

55. 136 CONG. REC. 35,677 (1990) (statement of Sen. John McCain).

56. 25 U.S.C. § 3003(a); *see also* Francis P. McManamon & Larry V. Nordby, *Implementing the Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 217, 220 (1992).

57. 25 U.S.C. § 3003(a).

58. Lineal descendants must establish a direct line of descent, without interruption, according to the traditional kinship system of the Native American tribe or the common law system of descent. McKeown, *supra* note 45, at 143.

59. 25 U.S.C. § 3005(a)(1).

60. *Id.* § 3003(d)(1). Under NAGPRA, an “Indian tribe” is defined as a “tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” *Id.* § 3001(7). A “Native Hawaiian organization” is any organization which “serves and represents the interests of Native Hawaiians . . . has as a primary and stated purpose the provision of services to Native Hawaiians, and . . . has expertise in Native Hawaiian affairs.” *Id.* § 3001(11).

61. *Id.* § 3005(a)(1).

the evidence standard.⁶² Once the prima facie case is established, the burden shifts to the agency or museum to establish that it has the superior right to possession.⁶³ If the agency or museum cannot establish a superior right to possession, the entity may then attempt to show that the artifact or skeleton is invaluable to its scientific work.⁶⁴ NAGPRA provides flexibility in the repatriation process by allowing repatriation to be suspended for ninety days when the remains requested are indispensable for the completion of a scientific study that would be of major benefit to the United States.⁶⁵ Furthermore, a government agency or museum will also retain stewardship of cultural objects and remains when multiple tribes have asserted competing claims, thus potentially extending the time for scientific research to be conducted.⁶⁶

B. Repatriation of Newly Discovered Remains

In addition to providing for retroactive repatriation of remains and artifacts from museum and agency collections, NAGPRA requires that any Native American human remains found on federal land after November 16, 1990 be delivered to the appropriate Native American tribe.⁶⁷ The Act provides a hierarchy of interests to determine to which tribe particular remains will be repatriated. If a Native American skeleton is found on federal land, repatriation will proceed in the following priority order:

- (1) Skeletal remains will first go to any identified lineal descendants of the Native American.⁶⁸
- (2) If a lineal descendant cannot be identified, skeletal remains will be repatriated to:
 - i. the Native American tribe on whose land the objects or

62. *Id.* § 3005(a)(4). Section 3005 thus establishes a two-tiered hierarchy for repatriation of remains currently held in museum and agency collections: remains go first to any known lineal descendants, and then to the tribe with the closest cultural affiliation to the remains. *See* McKeown, *supra* note 45, at 142.

63. 25 U.S.C. § 3005(c).

64. *Id.* § 3005(b).

65. *Id.* This section does not preclude any additional agreement between the Native American tribe and researchers regarding further study of the remains. *See id.* § 3009(1)(B). A number of Native American tribes have forged successful agreements with archaeologists in the study of human remains and artifacts, including the Bannock-Shoshone, the Catawba, the Chugach, the Dakota, the Kodiak Area Native Association, the Makah, the Blackfoot, and the Cree. *See* T.J. Ferguson, *Native Americans and the Practice of Archaeology*, 25 ANN. REV. ANTHROPOLOGY 63, 69 (1996). The provisions of NAGPRA seek to encourage this type of cooperation, and the statute does not contain any provisions that hinder Native American collaboration with scientists. *See id.* at 74 (“[I]n the post-NAGPRA era archaeologists will pay a severe price for not doing a better job of sharing their work with Native Americans.”).

66. 25 U.S.C. § 3005(e).

67. *Id.* § 3002(a).

68. *Id.* § 3002(a)(1).

- remains were discovered;⁶⁹
- ii. the Native American tribe which has the closest cultural affiliation to the remains,⁷⁰ or,
 - iii. if cultural affiliation cannot be determined and the skeletal remains are found on federal land that is recognized as aboriginal, then the aboriginal tribe will have custody unless another tribe can demonstrate a stronger cultural relationship.⁷¹

Under section 3002, the actual excavation of Native American skeletal remains on federal land is not prohibited. Instead, the legislation provides only for a repatriation process to interested individuals once remains are unearthed.

III. THE PROBLEM OF CULTURAL AFFILIATION

A. *Legislative and Regulatory Guidance on Cultural Affiliation*

For both newly discovered remains and remains held in federal agency or museum collections, the existence of a cultural affiliation has proven to be one of the most contentious issues under NAGPRA.⁷² This problem mainly resulted from Congress's failure to clarify how strong the requisite relationship needs to be between tribes and skeletal remains. Additionally, archaeological, anthropological, and biological evidence used to assess the presence of cultural affiliation is often far from certain and further compounds the problem.⁷³ The definition of the term provided in NAGPRA seems to establish a fairly low threshold of proof. Under section 3001, a "cultural affiliation" means only that there is "a relationship of shared group identity which can be *reasonably traced* historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group."⁷⁴ To determine this relationship, "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion" can be

69. *Id.* § 3002(a)(2)(A); *see also* McKeown, *supra* note 45, at 143 (noting that tribal lands include "all lands within the exterior boundaries of any Indian reservation").

70. 25 U.S.C. § 3002(a)(2)(B).

71. *Id.* § 3002(a)(2)(C); *see also* McKeown, *supra* note 45, at 143 (noting that the original treaties between the United States government and the various Indian tribes should also be taken into consideration to determine aboriginal occupation).

72. Jane E. Buikstra, *Repatriation and Bioarchaeology: Challenges and Opportunities*, in *BIOARCHAEOLOGY: THE CONTEXTUAL ANALYSIS OF HUMAN REMAINS* 399–402 (Jane E. Buikstra & Lane A. Beck eds., 2006).

73. *See generally* FINE-DARE, *supra* note 11, at 147–48 (describing scientific challenges of NAGPRA).

74. 25 U.S.C. § 3001(2) (emphasis added).

offered and considered.⁷⁵ The Senate Report that accompanied NAGPRA further explained that cultural affiliation did not have to be determined with scientific certainty; rather, the determination should be based on the totality of the circumstances.⁷⁶ In offering this guidance, the Senate Report recognized that it would be “extremely difficult” for Native American claimants to present a case of cultural affiliation with absolute certainty as gaps in the historic or prehistoric record are inevitable.⁷⁷ While this seems to establish a relatively insurmountable burden of proof for Native American tribes seeking repatriation of remains and artifacts, some legislators have argued that the original congressional intent was to require a significant relationship between skeletal remains and presently existing Native American tribes before repatriation would become mandatory.⁷⁸

To further clarify the meaning of “cultural affiliation,” NAGPRA charged the DOI with promulgating regulations specifying how cultural affiliation would be established.⁷⁹ In 1995, the agency responded to these statutory instructions by publishing a series of regulations that expanded on NAGPRA’s statutory framework.⁸⁰ Under the promulgated regulations, Native American tribes seeking to show a cultural affiliation with specific human remains must establish all elements of a three-pronged test. Under the first prong, the tribe will have the burden to show that they are an identifiable and federally recognized Indian tribe.⁸¹ Second, the tribe must offer evidence that an identifiable earlier group existed by establishing the cultural and biological characteristics of that group.⁸² Finally, the tribe must offer evidence of the existence of a shared group identity that can be reasonably traced between the modern tribe and the earlier group.⁸³ Under this third prong, Native American tribes must show by a preponderance of the evidence that the modern tribe has been identified through prehistoric or historic times as descending from the earlier group.⁸⁴

75. *Id.* § 3005(a)(4).

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

77. *Id.*

78. *See, e.g.*, Press Release, Congressman Doc Hastings, Hastings Authors Kennewick Man Bill: Bill Clarifies NAGPRA, Protects Against Future Battle of the Bones (Aug. 9, 2006), *available at* <http://www.friendsofpast.org/nagpra/Hastings/060809PR.pdf> (arguing that the congressional intent in passing NAGPRA was to ensure that only recent and identifiable remains be returned to tribes, thus requiring a substantial relationship between unearthed human remains and a modern tribe).

79. 25 U.S.C. § 3011.

80. Native American Graves Protection Act Regulations, 60 Fed. Reg. 62,134, 62,167–68 (Dec. 4, 1995) (codified at 43 C.F.R. § 10.14 (2010)).

81. 43 C.F.R. § 10.14(c)(1) (2010).

82. *Id.* § 10.14(c)(2).

83. *Id.* § 10.14(c)(3).

84. *Id.* § 10.14(d). This standard of proof necessarily means that Native

However, the regulations made clear that some gaps in the historic record would not be fatal to the tribe's case under this last prong of the analysis.⁸⁵

In addition to charging the DOI with the task of clarifying the requirements of the term "cultural affiliation," Congress left the disposition of culturally unidentifiable remains to regulatory law. Recognizing that the cultural identity of skeletons can prove difficult to establish, NAGPRA implicitly allows federal agencies and museums to list artifacts and skeletons as culturally unidentifiable when a link to a modern tribe cannot be established by a preponderance of the evidence.⁸⁶ However, Congress failed to clarify what repatriation procedure would be utilized if remains were listed as culturally unidentifiable,⁸⁷ and instead provided only that the Secretary of the Interior would promulgate regulations outlining appropriate procedures when cultural affiliation could not be determined.⁸⁸

Despite the congressional mandate to act on this issue, the DOI failed to promulgate regulations relating to the disposition of culturally unidentifiable remains for twenty years after NAGPRA was enacted. In the interim, heated disagreements between Native Americans and scientists regarding these unclassified remains were motivated in part by the number of remains that had been relegated to the status of culturally unidentifiable.⁸⁹ In 2007, seventeen years after the enactment of NAGPRA, some estimates claimed that 118,000 Native American skeletal remains were still being retained by federal agencies and museums because they were considered culturally unidentifiable.⁹⁰ These numbers, staggering as they are, serve to represent the problems associated with using uncertain archaeological, biological, and historical data to prove cultural affiliation by a preponderance of the evidence.

B. *The Culturally Unaffiliated in the Absence of Regulation*

1. *The Review Committee*

In the twenty years between the enactment of NAGPRA and the

Americans will not have to prove cultural affiliation with scientific certainty. *See Id.* § 10.14(f).

85. *See Id.* § 10.14(d).

86. *See* Ryan M. Seidemann, *Altered Meanings: The Department of the Interior's Rewriting of the Native American Graves Protection and Repatriation Act to Regulate Culturally Unidentifiable Human Remains*, 28 TEMP. J. SCI. TECH. & ENVTL. L. 1, 7 (2009).

87. *See* 25 U.S.C. § 3002 (2006); Kosslak, *supra* note 43, at 131.

88. *See* 25 U.S.C. § 3011.

89. *See, e.g.*, News Release, Nat'l Ass'n of Tribal Historic Pres. Officers, Study Finds Native Americans Excluded from Repatriation Process; More Work Needed on Improving NAGPRA (Aug. 14, 2008), http://www.nathpo.org/PDF/NAGPRA%20Report/Nagpra_Report_Press_release.pdf.

90. Seidemann, *supra* note 86.

promulgation of the DOI's regulations addressing the disposition of culturally unidentifiable skeletal remains, the Review Committee assisted the federal courts in determining the fate of contested remains. The Review Committee has the power to hear both requests for disposition recommendations and disputes between federal agencies or museums and Native American tribes seeking repatriation.⁹¹ While the Review Committee can issue opinions regarding the disposition of culturally unidentifiable remains in both these instances, these opinions are not binding on federal agencies and museums.⁹² However, in many cases where the parties have mutually requested a disposition recommendation, the Review Committee's recommendations are implemented, especially if the Secretary of the Interior concurs in the recommendation.⁹³ In these scenarios, the Review Committee will most often recommend either repatriation to a federally recognized tribe or additional consultation between scientists and Native American tribes.⁹⁴ However, when adversarial disputes are heard before the Review Committee, the process tends to be more contentious. For example, in 2009, federal agencies and museums only fully implemented a dispute recommendation by the Review Committee in 8.3% of cases.⁹⁵ Since figures like these indicate the relative weakness of a Review Committee decision, federal courts became the avenue used by Native American tribes to clarify the repatriation of culturally unidentifiable remains.

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

Despite the importance of NAGPRA and its effect on the rights of Native American tribes, there has been shockingly little judicial attention to the meaning of "cultural affiliation" in the statute. The few courts that have considered the issue have attempted to provide further clarification of the term through an interpretation of the statutory language. Only five years after NAGPRA's passage, the District of Hawaii was confronted with determining what type of scientific inquiry could be used to assess the presence of a "cultural affiliation" between a Native Hawaiian organization and human skeletal remains held by a government agency. *Na Iwi O Na Kupuna O Mokapu v. Dalton* involved a Department of Defense inventory of human remains that had been disinterred from the Mokapu Peninsula on the island of Oahu, Hawaii.⁹⁶ Initial work on the collection revealed that the remains of multiple individuals had

91. 25 U.S.C. § 3006(c); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 29.

92. Rose et al., *supra* note 31, at 91.

93. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 31.

94. *Id.*

95. *See id.* at 36.

96. *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1402 (D. Haw. 1995).

become commingled, necessitating the use of anthropological techniques⁹⁷ to determine the age and sex of the bones.⁹⁸ Throughout the process, the museum consulted with the Hui Malama, a Native Hawaiian organization, on the study of the skeletons.⁹⁹ However, after the final report on the inventory was published in the Federal Register, the Hui Malama initiated a lawsuit claiming that the Department of Defense had violated the provisions of NAGPRA by conducting additional scientific research on the Mokapu remains.¹⁰⁰

The U.S. District Court for the District of Hawaii ultimately held that NAGPRA provided scientists with the option of engaging in physical anthropology research to make a more definite cultural affiliation determination.¹⁰¹ The court reasoned that NAGPRA's requirement that an initial inventory be a "simple itemized list"¹⁰² did not preclude the use of scientific techniques in completing an inventory of human remains.¹⁰³ Instead, a scientific assessment of cultural affiliation using modern techniques would ultimately further the overarching goal of NAGPRA—to provide accurate repatriation of human skeletal remains to culturally affiliated tribes.¹⁰⁴ The court also rejected the argument that section 3003(b)(2) only allowed agencies and museums to rely on the available written record when making a cultural affiliation determination.¹⁰⁵ The court found that section 3003(b)(2) prohibited studies unrelated to an initial inventory but allowed scientific study in making an accurate determination of cultural affiliation during

97. *Id.* at 1403. The court's opinion indicates that morphometric and macroscopic assessments were utilized. Morphometric analysis studies involves "visual observations of skull morphology, strengthened by physical measurements of specific distances on the skull, to create two-dimensional and three-dimensional data of morphological variation that can then be evaluated using statistical analyses." Arion T. Mayes, *These Bones are Read: The Science and Politics of Ancient Native America*, 34 AM. INDIAN Q. 131, 143 (2010). In contrast, macroscopic analysis involves a visual examination of traits on the remains that are large enough to be seen without magnification and is useful in the determination of age and sex. Patricia M. Landau & D. Gentry Steele, *Why Anthropologists Study Human Remains*, 20 AM. INDIAN Q. 209, 216 (1996).

98. *Dalton*, 894 F. Supp. at 1403.

99. *Id.*

100. *Id.* at 1403–04.

101. *See id.* at 1414–15.

102. 25 U.S.C. § 3003(e) (2006).

103. *Dalton*, 894 F. Supp. at 1414–15 (noting that Congress included the "simple itemized list" language only to avoid placing an undue burden on federal agencies and museums seeking to complete their initial inventories under NAGPRA).

104. *Id.* at 1415. Under this reasoning, § 3003(e) sets a minimum floor which below agencies and museums cannot fall in meeting their NAGPRA responsibilities, although agencies are allowed to go beyond the minimum and conduct additional identification studies to confirm ethnicity. *Id.*

105. *Id.* at 1416.

an initial inventory.¹⁰⁶ Thus, the court sanctioned the use of anthropological techniques in determining whether a link between modern tribes and skeletal remains existed.¹⁰⁷

3. *Bonnichsen v. United States*

Perhaps the most prominent case addressing the issue of cultural affiliation between Native American tribes and human skeletal remains is *Bonnichsen v. United States*, which dealt with the discovery of a set of human remains known as the “Kennewick Man.”¹⁰⁸ The remains were discovered along the banks of the Columbia River during a hydroplane race on property owned by the Army Corps of Engineers.¹⁰⁹ The remains were initially handled by a local anthropologist, Dr. James Chatters, who concluded that the bones belonged to an early white settler.¹¹⁰ However, when subjected to further scientific examination, it was discovered that the remains were over 9000 years old, making them some of the oldest human remains ever uncovered on the American continent.¹¹¹ These subsequent scientific studies further suggested that the bones did not share any physical similarity to modern Native Americans but instead possessed characteristics that indicated Caucasian ancestry.¹¹²

After the results were published in local papers, the local Native American community began asserting their right to possession of the remains.¹¹³ In part, this response was the result of a twenty-five year-old school of thought with roots in the civil rights movement. During the 1960s, tribes began celebrating their heritage by embracing a creationist view of the past that was based on their rich tradition of oral histories. The premise of this view was the belief that native peoples had existed on the American continent for all of

106. *Id.* at 1417.

107. *Id.*

108. *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

109. Susan B. Bruning, *Complex Legal Legacies: The Native American Graves Protection and Repatriation Act, Scientific Study, and Kennewick Man*, 71 AM. ANTIQUITY 501, 501 (2006).

110. Timothy Egan, *Tribe Stops Study of Bones That Challenge History*, N.Y. TIMES, Sept. 30, 1996, at A12. Dr. Chatters based this conclusion on the features of the excavated skull, including the prominent nose, square-shaped eye sockets, and angular jaw common to Europeans. Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains*, 22 HARV. ENVTL. L. REV. 369, 374 (1998).

111. See Bruning, *supra* note 109; Lannan, *supra* note 110, at 372.

112. See Lannan, *supra* note 110, at 372. On a humorous note, early graphical facial reconstructions based on the bones revealed an individual that some have described as shockingly similar to British actor Patrick Stewart. DAVID HURST THOMAS, THE SKULL WARS: KENNEWICK MAN, ARCHEOLOGY, AND THE BATTLE FOR NATIVE AMERICAN IDENTITY xxi (2000).

113. Lannan, *supra* note 110, at 376.

time,¹¹⁴ an idea that was irreconcilable with the migratory theory of North American colonization that is central to archaeological theory.¹¹⁵ Armed with this creationist belief, and having been shut out of the initial examination process, a coalition of local Native American tribes¹¹⁶ asserted that the “Kennewick Man” was their ancestor and attempted to reclaim the skeleton through the use of the repatriation procedures established in NAGPRA.¹¹⁷ The Army Corps of Engineers initially agreed to repatriation, but a group of eight academics opposed the return of the skeleton on the grounds that a full scientific examination was not yet complete.¹¹⁸ When the tribe’s request was denied, it sued and successfully had the repatriation order remanded to the Corps for further examination of the cultural affiliation between the Kennewick Man and the tribes seeking repatriation.¹¹⁹

Realizing that the situation was reaching a boiling point, the Corps deferred the final decision on cultural affiliation to the Secretary of the Interior, who found that the remains were Native American and culturally affiliated with the tribal coalition.¹²⁰ To again halt the pending repatriation, scientists sought review of the Secretary’s decision in the U.S. District Court for the District of Oregon.¹²¹ The district court sided with the scientists, holding that

114. Ryan M. Seidemann, *Time for A Change? The Kennewick Man Case and Its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W. VA. L. REV. 149, 153 (2003).

115. Modern archaeology ascribes to an immigration theory of North American colonization. Under this theory, Native Americans are the descendants of several waves of Asian immigrants that passed between Siberia and Alaska as early as 30,000 years ago. See Michael D. Lemonick & Andrea Dorfman, *Who Were the First Americans?*, TIME, Mar. 13, 2006, at 44, 47.

116. The tribes involved were the “Confederated Tribes of the Colville Reservation, the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Wanapum Band, and the Confederated Tribes and Bands of the Yakama Indian Nation.” Lannan, *supra* note 110, at 376.

117. See *id.* In hindsight, it has been suggested that more could have been done to avoid the expensive litigation over this skeleton. In cases where archaeologists have conferred with local Native American groups during initial examination of remains, compromises have been achieved that are acceptable to both groups. For example, when archaeologist Terry Fifield uncovered ancient human remains in On Your Knees Cave on Prince of Wales Island, she contacted local Tlingit groups to discuss how the bones should be handled. Her honesty and willingness to work with the tribes resulted in a cooperative relationship in which tribal leaders passed resolutions allowing for a full scientific examination of the remains. See Timothy H. Heaton, *On Your Knees Cave*, UNIV. OF S.D., <http://orgs.usd.edu/esci/alaska/oykc.html> (last visited Sept. 28, 2011). This is in sharp contrast to the initial examination of the Kennewick Man, which did not involve any consultation with local tribes.

118. *Bonnichsen v. United States*, 969 F. Supp. 614, 617–18 (D. Or. 1997). The plaintiffs included two Smithsonian Institution anthropologists and a group of anthropology professors.

119. *Bonnichsen v. United States*, 969 F. Supp. 628, 645 (D. Or. 1997).

120. *Bonnichsen v. United States*, 367 F.3d 864, 871–72 (9th Cir. 2004).

121. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1119 (D. Or. 2002).

the Secretary's finding of cultural affiliation was not supported by a preponderance of the evidence.¹²² In a subsequent blow to the tribal coalition, the Ninth Circuit affirmed the decision and found that there was not enough evidence of a cultural affiliation to reasonably justify repatriating the remains for reburial.¹²³

The reasoning for the Ninth Circuit's final holding was based on NAGPRA's own definition of what constitutes a "Native American." Under § 3001(9), "Native American" is defined as "of, or relating to, a tribe, people or culture that is indigenous to the United States."¹²⁴ Because the present-tense word "is" was used in the statute, the court reasoned that Congress intended for the remains to bear some relationship to a Native American tribe presently in existence.¹²⁵ The court's analysis thus suggested that a NAGPRA analysis should be completed in two steps: first, it would have to be determined if the remains at issue were in fact Native American; second, if the remains were Native American, then a determination of which modern tribe had the closest cultural affiliation would be required.¹²⁶ This judicial analysis was found to comport with the purpose of Congress, which was to allow for repatriation of human remains to Indian tribes when there was a discernable relationship between the tribe and the remains at issue.¹²⁷

Since the remains at issue in this case could not be linked to any particular modern tribe, the court held that NAGPRA does not give the tribal coalition control "over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture."¹²⁸ The court reached this finding by examining the evidence presented by both the scientists and tribal coalition.¹²⁹ First, the court noted that a physical examination of the bones revealed them to be of South

122. *Id.* at 1156.

123. *Bonnichsen*, 367 F.3d at 882.

124. *Id.* at 878.

125. *Id.* at 878–79.

126. *See id.* at 877 ("The first inquiry requires only a general finding that remains have a significant relationship to a presently existing 'tribe, people, or culture,' a relationship that goes beyond features common to all humanity. The second inquiry requires a more specific finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe.")

127. *Id.* at 876. Representative Charles Bennett directly addressed this issue during House of Representatives hearings on NAGPRA in 1990. He commented that "we should not overlook the fact that there are some of the deceased who don't have modern descendants, and their remains still should be kept with care . . ." *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearings on H.R. 1381, H.R. 1646, and H.R. 5237 Before the H. Comm. on Interior and Insular Affairs*, 101st Cong. 130 (1990). These comments strongly suggest that Congress did not intend for NAGPRA to force the repatriation of ancient remains when there was no relationship to modern tribes.

128. *Bonnichsen*, 367 F.3d at 879.

129. *Id.* at 880–81.

Asian ancestry and had measurements that differed substantially from any modern North American Indian tribe.¹³⁰ Furthermore, the testimony of one of the DOI's archaeological experts revealed that there had been substantial changes in "settlement, housing, diet, trade, subsistence patterns, technology, projectile point styles, raw materials, and mortuary rituals" between the time that Kennewick Man lived and the beginning of the modern Columbia Plateau culture over 2000 years ago.¹³¹ Additionally, archaeological experts testified that the style in which Kennewick man was buried could not be reliably associated with the Columbia Plateau culture.¹³² The only evidence presented that suggested a possible cultural relationship between the Kennewick Man and the tribal coalition was Native American oral histories. However, the Ninth Circuit found that concerns of authenticity and reliability mandated disregarding this evidence—for the court, the roughly 9000-year gap between the modern tribes and Kennewick Man was simply too substantial to bridge with oral tradition.¹³³

Since no "reliable" evidence had been presented to indicate that Kennewick Man had a legitimate genetic or cultural link to a modern tribe, and therefore could not be considered "Native American," the court found that the Secretary of the Interior had acted in an arbitrary and capricious manner in ordering repatriation.¹³⁴ As a result of this holding, the Kennewick Man was returned to the Corps and interred in the Burke Museum at the University of Washington.¹³⁵ Senator John McCain attempted to reverse this result in 2005 by proposing an amendment to NAGPRA which would define "Native American" as an individual that "is or was indigenous to the United States," thus ensuring that ancient remains would be returned to modern tribes.¹³⁶ However, Congress never took action on the bill, and the Kennewick Man continues to be utilized for scientific study.

4. Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management

Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management was the first case to consider NAGPRA's "cultural affiliation" provisions following the highly-publicized *Bonnichsen* decision. At issue in the case were skeletal remains known as the

130. *Id.* at 880.

131. *Id.* at 881.

132. *Id.*

133. *Id.* at 882. *But see* Buikstra, *supra* note 72, at 401 (stating that oral traditions have been successfully used as evidence in repatriation proceedings before the Smithsonian's Native American Repatriation Committee).

134. *Bonnichsen*, 367 F.3d at 879–82.

135. *See* Richard L. Hill, *Tribes Quit Long Fight Over Kennewick Man's Remains*, THE OREGONIAN, July 16, 2004, at A01.

136. S. 536, 109th Cong. § 108 (2005).

“Spirit Cave Man,” which dated to nearly 10,000 years old.¹³⁷ The initial controversy over the Spirit Cave Man arose in 1996 when researchers from the University of California, Davis sent a request for collaborative investigation to the Nevada State Museum.¹³⁸ Included in the request was a proposal to conduct radiocarbon dating on forty-one sets of human skeletal remains that had previously been uncovered on Bureau of Land Management (“BLM”) land in Nevada.¹³⁹ Among the forty-one skeletons at issue was a mummy that had been found in the 1940s in a cave outside of Fallon, Nevada.¹⁴⁰ At that time, the Spirit Cave remains were estimated to be 2000 years old.¹⁴¹ However, radio carbon dating conducted in the 1990s revealed that the Spirit Cave Man had been alive during the mid-Holocene, making him the oldest human uncovered in North America.¹⁴² The significance of this finding did not go unnoticed, and the Spirit Cave Man became the subject of national scientific attention.¹⁴³ Because of the age of the remains, the Nevada State Museum listed them as culturally unaffiliated in its mandatory NAGPRA inventory.¹⁴⁴

Following the University of California, Davis’s request to conduct destructive radiocarbon dating on the bones, the Fallon Paiute-Shoshone tribe sought repatriation of the Spirit Cave Man and demanded a moratorium on further destructive testing.¹⁴⁵ To support its claim of cultural affiliation, the tribe presented evidence based on geographic location, textiles, and oral histories.¹⁴⁶ However, the BLM reasserted its belief that the remains were unaffiliated with any modern tribe.¹⁴⁷ The Fallon Paiute-Shoshone appealed the decision to the NAGPRA Review Committee, which found that the BLM had improperly ignored the evidence presented by the tribe that tended to show a cultural affiliation between the tribe and the Spirit Cave Man.¹⁴⁸ The BLM ignored the

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

138. PAT BARKER ET AL., BUREAU OF LAND MGMT., DETERMINATION OF CULTURAL AFFILIATION OF ANCIENT HUMAN REMAINS FROM SPIRIT CAVE, NEVADA 2 (2000), available at http://www.blm.gov/pgdata/etc/medialib/blm/nv/cultural/spirit_cave_man.Par.57656.File.dat/SC_final_July26.pdf.

139. *Id.* at 2–3.

140. *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1209; BARKER ET AL., *supra* note 138, at 10.

141. *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1210.

142. BARKER ET AL., *supra* note 138, at 12–13, 35; Carey Goldberg, *Oldest Mummy Found’ on Museum Shelf*, N.Y. TIMES, Apr. 27, 1996, at 1.

143. *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1210.

144. BARKER ET AL., *supra* note 138, at 3.

145. *Id.*

146. *Id.*

147. *Id.* at 66 (“[T]he BLM has determined that the remains from Spirit Cave are unaffiliated with any modern individual, tribe, or other group and are therefore culturally unidentified.”).

148. 67 Fed. Reg. 17,463 (Apr. 10, 2002) (announcing findings and

recommendation of the Review Committee on the grounds that the committee was an advisory body only,¹⁴⁹ and the tribe filed suit in U.S. District Court for the District of Nevada.

As both the tribe and the BLM had stipulated that the Spirit Cave Man was Native American,¹⁵⁰ the court was forced to consider the issue of cultural affiliation under *Bonnichsen*'s second prong of inquiry. In making this determination, the court introduced a roadmap that was to be followed when remains at issue were "culturally unaffiliated." First, the government agency was required to complete a study of the remains that took into account scientific, cultural, and traditional evidence.¹⁵¹ If the remains are subsequently determined to be culturally unaffiliated, Native American tribes are given an opportunity to provide additional scientific, cultural, and traditional evidence in an attempt to demonstrate by a preponderance of the evidence that the remains are affiliated with their particular tribe.¹⁵² The government agency should then weigh all the presented evidence to determine if the tribe has established the necessary cultural affiliation.¹⁵³ If, after assessing all the evidence, the government agency still determines that the remains are unaffiliated, the remains are to remain in the possession of the government.¹⁵⁴

With regards to the Spirit Cave Man, the court found that there was no issue with the Bureau of Land Management's substantive determination that the remains lacked the necessary cultural affiliation for repatriation.¹⁵⁵ However, the court vacated the Bureau's decision on the grounds that the government had neither undertaken a reasoned weighing of the evidence nor explained why the tribe's evidence was not sufficient to establish a cultural affiliation.¹⁵⁶ On remand, the BLM would need to "uphold or reverse its determination of non-affiliation based on a reasoned and coherent discussion of the evidence and BLM's reasons for believing or disbelieving it."¹⁵⁷ Furthermore, the court recognized that, in the future, the disposition of culturally unidentifiable human remains would depend on the Secretary of the Interior's adoption of regulations under 43 C.F.R. § 10.11, which had yet to be promulgated at that time.¹⁵⁸

recommendations of the Review Committee); see *Fallon Paiute-Shoshone Tribe*, 455 F. Supp. 2d at 1212.

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

150. *Id.* at 1216.

151. *Id.* at 1218.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 1225.

156. *Id.* at 1224.

157. *Id.* at 1225.

158. *Id.* at 1214, 1218, 1226 n.2 (noting that the parties to this action had agreed that the implementation of the DOI regulations governing disposition of

IV. THE 2010 REGULATIONS AND THEIR EFFECT ON THE CURRENT NAGPRA FRAMEWORK

A. *The Development of 43 C.F.R. § 10.11(c)*

In 2007, the Department of the Interior finally initiated action to clarify NAGPRA's repatriation process by publishing a proposed rule that established a procedure for the disposition of culturally unidentifiable remains.¹⁵⁹ The proposed rule generated over one hundred comments from Native American tribes, museums, and scientific organizations seeking to weigh in on the regulation's specific provisions.¹⁶⁰ The overall tone of the comments generally revealed support for the DOI's long-awaited disposition procedures. However, some comments did raise concerns that resulted in extensive modifications to the regulations before they became final on March 15, 2010.¹⁶¹

In the policy statement to the draft regulations proposed in 2007, the DOI voiced its commitment to returning culturally unidentifiable remains to Native American groups.¹⁶² In order to accomplish this goal, the Department created a hierarchy of interests to be used to assess which Native American tribe will have a superior claim to culturally unidentifiable remains.¹⁶³ Under the draft of section 10.11(c), if a federal agency or museum cannot prove that it has a superior right of possession to culturally unidentifiable remains, the agency or museum must offer to transfer control to Native American tribes in the following priority order:

- (1) A museum or Federal agency that is unable to prove that it has right of possession . . . to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:
 - (i) The Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed;

culturally unidentifiable remains would have governed the outcome of this case).

159. Disposition of Culturally Unidentifiable Human Remains, 72 Fed. Reg. 58,582 (proposed Oct. 16, 2007).

160. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 74. For the comments, see *Docket Summary Folder: NAGPRA Regulations: Docket No. DOI-2007-0032*, DOI, <http://www.regulations.gov/#!docketDetail;D=DOI-2007-0032> (last visited Sept. 28, 2011).

161. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13, at 74.

162. *Id.*

163. Disposition of Culturally Unidentifiable Human Remains, 72 Fed. Reg. at 58,583.

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- (ii) The Indian tribe or tribes that are recognized as aboriginally occupying the area from which the human remains were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order; or
- (iii) The Indian tribe and Native Hawaiian organization with:
 - (A) A cultural relationship to the region from which the human remains were removed, or
 - (B) For human remains lacking geographic affiliation, a cultural relationship to the region in which the museum or Federal agency with control over the human remains is located.
- (iv) If it can be shown by a preponderance of the evidence that another Indian tribe or Native Hawaiian organization has a stronger cultural relationship with the human remains than an entity specified in paragraph [(ii)] or [(iii)] of this section, the Indian tribe or Native Hawaiian organization that has the strongest demonstrated cultural relationship, if upon notice, the Indian tribe or Native Hawaiian organization claims the human remains.

- ...
- (3) If none of the Indian tribes or Native Hawaiian organizations identified in paragraph (c)(1) of this section agrees to accept control, a museum or Federal agency may, upon receiving a recommendation from the Secretary or authorized representative:
 - (i) Transfer control of culturally unidentifiable human remains to a non-federally recognized Indian group, or
 - (ii) Reinter culturally unidentifiable human remains according to State or other law.¹⁶⁴

As public comments were submitted on the hierarchical scheme of the proposed rule, it became apparent that the provisions allowing for repatriation of human remains based on geographic affiliation would be the most controversial. Objection to this provision was based on the fact that archaeological research has shown that Native American groups were highly mobile and often nomadic. Thus, there was no scientific basis for the DOI to assume

164. 72 Fed. Reg. at 58,589.

that remains excavated in a particular locale must be culturally or genetically linked to the Native American tribe that is currently occupying the area.¹⁶⁵ The Society for American Archaeology (“SAA”) argued in opposition to this section of the regulation, stating that “[a] cultural relationship to a region, without additional demonstrable contextual connections to particular human remains, is too tenuous to provide any reasonable structure for assessing potential claimants.”¹⁶⁶ This conclusion was based on the SAA’s observations that tribes had often been forced to relocate far from regions where their ancestor’s remains were located, and the current location of any tribe could not provide justification for assuming a connection with geographically affiliated remains.¹⁶⁷

The relationship between skeletal remains and Native American groups becomes even more tenuous when based on the location in which the museum or agency currently housing the remains is located.¹⁶⁸ Because museums strive to assemble geographically diverse collections and documentation of a skeleton’s origin might be incomplete or nonexistent, there is simply no reasonable basis to find a cultural affiliation between remains and Native tribes in the areas surrounding a museum or agency.¹⁶⁹ Additionally, these geographically based provisions would not even comport with the goal of NAGPRA itself, which was to provide repatriation of human remains to Native American tribes that shared a meaningful relationship with the skeleton at issue.¹⁷⁰ In drafting its final rule, the DOI took notice of comments like these and chose to remove the geographic affiliation basis for a cultural relationship, explaining that “[t]he diversity of opinion regarding the meaning of ‘cultural relationship’” convinced the agency that the geographic affiliation provisions were inappropriate.¹⁷¹ Similar concerns prompted the removal of the provisions that allowed for evidence of a stronger cultural link to overcome geographic affiliation.¹⁷²

165. See Seidemann, *supra* note 86, at 22.

166. Letter from Dean R. Snow, President, Soc’y for Am. Archaeology to Sherry Hunt, Manager, Nat’l NAGPRA Program 11 (Jan. 14, 2008), http://www.saa.org/Portals/0/SAA/repatriation/SAA_CUHR_comments_2008_01_14.pdf.

167. *Id.* at 16.

168. *Id.* at 12 (“The location of a museum or repository might have absolutely nothing to do with cultural affiliation of the remains they curate.”).

169. *Id.*

170. *Id.* at 11 (“[This provision] demonstrates disrespect for NAGPRA’s carefully structured process for allowing parties with genuine cultural connections to human remains to engage with institutions in the process of determining ultimate disposition options.”).

171. Native American Graves Protection and Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed. Reg. 12,378, 12,389 (Mar. 15, 2010) (codified at 43 C.F.R. pt. 10).

172. *Id.* at 12,400.

In sum, the regulations that emerged from the DOI in final form on March 15, 2010 listed only two groups to which culturally unidentifiable remains must be repatriated: (1) the Native American tribes from whose tribal lands the remains were removed, and (2) the Native American tribe recognized as aboriginal to the land from which the remains were removed.¹⁷³ This scaled-back final version of the regulation should have represented a victory for scientific organizations seeking to retain possession over culturally unidentifiable skeletal remains. However, many scientists remained worried that the promulgation of these regulations would seriously undermine research involving ancient human remains by requiring repatriation when no discernable cultural relationship existed.¹⁷⁴

B. A Synthesis of the Judicially Created NAGPRA Framework

Given the length of time between the enactment of NAGPRA and the promulgation of the 2010 regulations, agencies and museums had come to rely on the protection provided by the federal courts to ancient human remains and otherwise culturally unaffiliated skeletons. In its comments to the 2007 proposed regulations, the Field Museum of Natural History noted its concern that the new regulations seemed to “directly contradict the result in the Kennewick Man case in that culturally unidentifiable human remains would be returned to the requesting tribes under the proposed regulations.”¹⁷⁵ However, despite the concern of the Field Museum and other scientific organizations, it is unlikely that the 2010 regulations will lead to any significant change in the way in which an analysis of cultural affiliation is conducted under currently existing federal case law.

When considered in their entirety, the holdings in *Dalton*, *Bonnichsen*, and *Fallon Paiute-Shoshone Tribe* establish the following framework for the analysis of culturally unidentifiable remains. An agency or museum must first determine whether the remains at issue are in fact “Native American” and therefore subject to the provisions of NAGPRA. In making this assessment, the agency or museum will look for a reasonable relationship between the remains and modern Native Americans that includes features beyond those “common to all humanity.”¹⁷⁶ In finding this relationship, scientific and cultural evidence may be taken into account, and it is likely that DNA analysis will be considered

173. See 43 C.F.R. § 10.11(c) (2010).

174. See Capriccioso, *supra* note 17.

175. Letter from Joe Brennan, Gen. Counsel, Field Museum of Natural History, to Sherry Hunt, Manager, Nat'l NAGPRA Program (Jan. 10, 2008) (internal citation omitted), <http://www.regulations.gov/#!documentDetail;D=DOI-2007-0032-0017>.

176. *Bonnichsen v. United States*, 367 F.3d 864, 877 (9th Cir. 2004).

important. If the skeleton is not found to be Native American under this evaluation, then the repatriation provisions of NAGPRA will not apply.

If, however, remains are found to be Native American within the meaning of NAGPRA, the agency or museum must then continue its analysis of the remains. The agency or museum will need to conduct an assessment of the skeleton to determine its cultural affiliation. The evidence necessary to establish cultural affiliation at this stage of the analysis must be more specific than the evidence necessary to support the general finding that the remains are Native American. In making this initial assessment of cultural affiliation, the agency or museum is free to use scientific evidence and physical anthropology techniques as confirmed in *Dalton*. If the agency or museum cannot establish that a cultural affiliation exists under a preponderance of the evidence standard, the remains can be listed as culturally unidentifiable.

A Native American tribe is free to challenge the agency's initial conclusion by offering scientific and cultural evidence of a cultural affiliation between the tribe and the skeletal remains. The agency or museum will then need to weigh all competing evidence to determine whether the proffered relationship does exist. If a cultural relationship is still not believed to exist, the remains will be listed as culturally unaffiliated.

C. The Effect of the 2010 Regulations on the Current NAGPRA Framework

The 2010 regulations do nothing to challenge the judicially created framework for analyzing human remains under NAGPRA. Instead, the regulations come into effect when a final agency decision determines that the remains are culturally unaffiliated. Prior to 2010, agencies and museums could retain possession of remains after this final decision was entered. However, the new regulations mandate that remains listed as culturally unaffiliated pass through one more level of analysis. Under this last prong, the agency or museum will have to determine whether the culturally unaffiliated remains were excavated on either Native American tribal lands or land recognized by the Indian Claims Commission or the U.S. Court of Claims as the aboriginal lands of a Native American tribe. If the remains were excavated on one of these categories of land, then repatriation to the tribe associated with that land is appropriate. If the remains were not excavated on one of these categories of land, the agency or museum will retain possession of the remains for scientific study.

Under the new stage of analysis codified in the 2010 regulations, it is true that more culturally unidentifiable skeletal remains will be returned to Native American tribes than prior to the adoption of these regulations. It is unlikely, however, that scientists

will lose all scientifically valuable remains to Native American tribes. First, adoption of the 2010 regulations does nothing to change the disposition of cases like *Bonnichsen* because some human remains will not be identifiable as Native American, and therefore will not be subject to any of the repatriation provisions in NAGPRA. This result is particularly likely to occur where ancient human remains are involved. Because remains over five-thousand years old have genetic and cultural backgrounds entirely distinct from modern Native American groups, these remains will not bear a reasonable relationship to modern Native Americans and cannot be considered “Native American” under the standard announced by the *Bonnichsen* court.

However, the 2010 regulations are likely to make a difference in the disposition of cases like *Fallon Paiute-Shoshone Tribe*. If the agency or museum stipulates that certain remains are indeed Native American, the remains are subjected to a cultural affiliation analysis. If the remains are ultimately determined to be “culturally unaffiliated,” the skeletons may still be returned depending on where they were excavated. For example, the Spirit Cave mummy at issue in *Fallon Paiute-Shoshone Tribe* could ultimately have been returned to the requesting tribe if Spirit Cave was located on tribal land or federally recognized aboriginal land. In fact, some archaeologists have argued that the remains should be returned because government documents list the location in which the remains were originally uncovered as “traditional tribal lands.”¹⁷⁷ Because approximately fifty-five million acres of land¹⁷⁸ are recognized as Native American tribal land in the United States, any culturally unaffiliated remains that were uncovered on these tribal lands will be affected by the 2010 regulations and returned to Native tribes. Even if the remains were not excavated on tribal land, such aboriginal lands “cover most every inch of our country”¹⁷⁹ and may serve as the next basis for repatriating skeletons to modern tribes.

For Native American tribes, perhaps the most valuable effect of the 2010 regulations will be the renewed look given to culturally unaffiliated remains. Since the enactment of NAGPRA in 1990, Native American tribes have consistently argued that agencies and museums have failed to undertake a proper analysis of cultural affiliation.¹⁸⁰ Additionally, tribes claim that federal agencies and

177. See *Anthropologists Back Native American Claims*, UNM TODAY (Feb. 14, 2007), <http://www.unm.edu/~market/cgi-bin/archives/001718.html>.

178. U.S. FOREST SERVICE, FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS D-1 (1997), available at <http://www.fs.fed.us/people/tribal/tribexd.pdf>.

179. “*Tweaking the NAGPRA Rules*”: *Native American Calling Interview with Sherry Hutt on April 7, 2010*, FRIENDS OF AMERICA’S PAST, <http://friendsofpast.org/nagpra/2010NAGPRA/Hutt4710.pdf>.

180. Capriccioso, *supra* note 17.

museums have not shared information with them in order to make an accurate finding of cultural affiliation possible.¹⁸¹ While it was not the primary motive of the 2010 regulations to address these concerns, Dr. Sherry Hutt, the manager of the National NAGPRA program, has stated that she believes the new regulations will force agencies and museums to revisit their cultural property collections and notify interested Native American tribes of the remains that are currently being held in their repositories.¹⁸²

Because of the failure of agencies and museums to follow the analytical framework provided by NAGPRA and its case law, some studies have indicated that eighty percent of the culturally unaffiliated skeletal remains held by federal agencies and museums are actually culturally affiliated with a modern tribe.¹⁸³ To address this discrepancy, the 2010 regulations add a new layer of analysis to the cultural affiliation problem, thus forcing agencies to reexamine their collections to determine if one of the geographic affiliation provisions will apply. In making these determinations, the agency or museum will be forced to walk through the statutory and judicial framework for assessing a cultural affiliation, thus bringing the entity into compliance with the proper NAGPRA analysis. As tribes have been discouraged with the failure of agencies and museums to meet the basic requirements of NAGPRA,¹⁸⁴ the reexamination prompted by the 2010 regulations' new prong of analysis might be the most valuable contribution of the new regulations. Therefore, even though the 2010 regulations will not *change* the analytical framework under NAGPRA, they will, *de facto*, *initiate* compliance with the framework, hopefully correcting some of the longstanding problems with NAGPRA compliance.

CONCLUSION

From twenty years of case law, regulatory guidance, and statutory mandates under NAGPRA, a clear analytical framework has emerged for culturally unaffiliated remains that balances the needs of both scientists and Native Americans. By not requiring repatriation when remains are not considered "Native American," the framework protects ancient remains for use in scientific study. If, however, remains are considered Native American, the case law applying NAGPRA and its 2010 regulations require a thorough balancing of evidence in making a cultural affiliation determination, followed by geographically based repatriation when a cultural affiliation cannot be scientifically concluded. Because the geographic affiliation provisions allow Native American tribes to reclaim remains even when cultural affiliation cannot be

181. *Id.*

182. "Tweaking the NAGPRA Rules", *supra* note 179.

183. *Id.*

184. *Id.*

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conclusively determined, tribes are able to rebury remains that they still consider part of their heritage and cultural background, even if this relationship is not entirely recognized in the modern scientific community.

The most helpful application of the 2010 regulations, however, may be in a realm in which they do not directly apply. Because the GAO has determined that federal agencies are generally failing to meet their statutory duties under NAGPRA, Native Americans have become rightfully disillusioned with the NAGPRA process. These feelings may be, in part, the result of the piecemeal way in which a NAGPRA framework was built. Because the initial legislation did not provide sufficient guidance on how to assess cultural affiliation, many tribes, museums, and federal agencies were left wondering how remains would be analyzed under NAGPRA's repatriation process. But after twenty years of trial and error, a balancing framework has finally emerged from the federal courts that will help agencies and museums understand their NAGPRA responsibilities. By forcing agencies and museums to revisit initial assessments of cultural affiliation, entities will be forced to conduct an examination under the NAGPRA framework and consult with tribes on the evidence used. Many hope that this increased involvement with and discussion on previously unaffiliated remains will smooth some of the tensions between Native Americans and the scientific community, thus leading to a more workable relationship in cases where mutual agreement cannot be reached.

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