American Indian Law Review

Volume 28 | Number 1

1-1-2003

Has Oregon Tightened the Perceived Loopholes of the Native American Graves Protection and Repatriation Act?--Bonnichsen v. United States

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NOTES

HAS OREGON TIGHTENED THE PERCEIVED LOOPHOLES OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT? — *BONNICHSEN V. UNITED STATES*

*Michelle Sibley**

I. Introduction

In our nation's past, the trade in Native American artifacts was a profitable business.[1] This lucrative trade often led to egregious abuses of American Indian remains and burial sites.[2] In 1990, Congress enacted the Native American Graves Protection and Repatriation Act[3] (NAGPRA or the Act) with a twofold purpose: to return to Native American tribes all remains and artifacts being housed in museums or any remains or artifacts found on public lands and to ensure that Native American burial sites would be protected in the future.[4]

NAGPRA requires all Native American remains and artifacts in the possession of federal agencies and museums be cataloged and that all tribes culturally affiliated with the artifacts or remains be notified.[5] After the tribes have been notified, the artifacts or remains must be returned to any lineal descendant or culturally affiliated tribe who makes a claim to them.[6] Any Native American remains or artifacts found on federal or tribal lands after the date the Act was promulgated are owned and/or controlled by the lineal descendants, the tribe who owns the land where the remains or artifacts were

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1. 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, 39-45 (1992).

2. Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 440 (2002).

3. 25 U.S.C. §§ 3001-3013 (2000).

4. Wendy Crowther, *Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA*, 20 J. LAND RESOURCES & ENVTL. L. 269,269 (2000).

5. *See* Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3003 (2000).

6. *See id.* § 3005.

found, or whichever tribe has the closest cultural affiliation to the remains or artifacts.[7]

This note traces the application of NAGPRA to a set of remains found in Benton County, Washington, the so-called Kennewick Man. The note will follow the case of the Kennewick Man from first discovery to repatriation of his remains to a coalition of Pacific Northwest Indian tribes. The note will then review the subsequent litigation filed by a group of scientists who wished to study the remains, including the August 30, 2002, decision by a United States Magistrate Judge that held that the plaintiff scientists would be allowed to study the remains of Kennewick Man.

Part II of the note details the facts which led to the filing of *Bonnichsen v. United States*[8] and looks at the history of the proceedings. Part III explores the issues and claims addressed by the parties in *Bonnichsen III*[9] and analyzes how a United States Magistrate Judge applied NAGPRA to the legal dispute surrounding the Kennewick Man. Part IV concludes the note.

II. Statement of the Case

A. Facts

In July 1996, two college students found a skull on the banks of the Columbia River near Kennewick, in Benton County, Washington.[10] The land on which the skull was found was federal land under the control of the U.S. Army Corps of Engineers[11] (the Corps). The two students notified the sheriff's office in Benton County, and the sheriff's office called in the Kennewick police.[12] During an investigation by the Kennewick police, several more bones were found, so the county coroner was brought into the investigation.[13] The coroner then contacted a local anthropologist, Dr. James Chatters (Dr. Chatters), to help with the investigation.[14]

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7. *See id.*

8. 969 F. Supp. 614 (D. Or. 1997). For the duration of this note, this case will be referred to as *Bonnichsen I.*

9. Bonnichsen v. United States, 217 F. Supp. 2d 1116 (D. Or. 2002). For the duration of this note, this case will be referred to as *Bonnichsen III.*

10. John Stang, *Skull Found on Shore of Columbia*, TRI-CITY HERALD (Kennewick, Pasco & Richland, Wash.), July 29, 1996.

11. Crowther, *supra* note 4, at 276.

12. *Id.*

13. *Id.*

14. *Id.*

When Dr. Chatters visited the site, he found a nearly complete skeleton.[15] Based upon an initial examination of the remains, Dr. Chatters determined that the remains were from "an early white pioneer,"[16] who was in his forties or fifties when he died.[17] However, the "preliminary examinations raised more questions than they answered about the ethnic background of" the skeleton, so one of the bones was then subjected to radiocarbon testing.[18] Based on this testing, the age of the skeleton was determined to be "between 9200 and 9600 years old."[19] The remains became known as Kennewick Man, since they were found near Kennewick, Washington.[20]

B. History of Proceedings

1. U.S. Army Corps of Engineers — Original Decision to Repatriate

Based upon the calculated age of the skeleton,[21] and since the federal land had been sold to the United States by the Walla Walla, Cayuse, and Umatilla Indian Tribes in 1855,[22] the Corps notified several local tribes of the discovery of the remains.[23] After the tribes received notification, five tribes joined together as a coalition (the Coalition) to claim the discovered remains as an ancestor to the local Native Americans.[24] The Coalition consisted of the following tribes: the Confederated Tribes of the Colville Reservation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, the Wanapum, and the Confederated Tribes and Bands of the Yakama Indian Nation.[25] Following NAGPRA, the Coalition sent a claim for

15. *Id.*
16. *Id.* at 277.
17. *Id.* at 276.
18. *Bonnichsen I*, 969 F. Supp. at 617.
19. Crowther, *supra* note 4, at 277.
20. John W. Ragsdale, Jr., *Some Philosophical, Political and Legal Implications of American Archeological and Anthropological Theory*, 70 UMKC L. REV. 1, 46 (2001).
21. Crowther, *supra* note 4, at 277.
22. Treaty Between the United States and the Walla Walla, Cayuse, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, June 9, 1855 (ratified Mar. 8, 1859), *reprinted in* 2 INDIAN AFFAIRS: LAWS & TREATIES 694-98 (Charles J. Kappler ed., 1904) (as cited by Maura A. Flood, *"Kennewick Man" or "Ancient One"? — A Matter of Interpretation*, 63 MONT. L REV. 39, 43-44 (2002)).
23. Maura A. Flood, *"Kennewick Man" or "Ancient One"? — A Matter of Interpretation*, 63 MONT. L REV. 39, 44 (2002).
24. Crowther, *supra* note 4, at 277.
25. Flood, *supra* note 23, at 44.

the remains to the Corps.[26] If they received custody of the remains, the Coalition planned to "rebury them immediately in a secret location in accordance with the tribes' religious customs."[27] The Coalition also requested that all scientific study of the remains cease.[28]

Then, around September 17, 1996, the Corps published a notice in a local newspaper.[29] The publication was entitled "Notice of Intent to Repatriate Human Remains"[30] and included the following:

> (1) the notice of repatriation was being issued pursuant to the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3005(a) ("NAGPRA"), (2) the Corps had determined that the remains were of Native American ancestry, (3) the Corps had determined that the remains had been inadvertently discovered on federal land recognized as the aboriginal land of an Indian tribe, (4) the Corps had determined that there is a relationship of shared group identity which can be reasonably traced between the human remains and five Columbia River basin tribes and bands, (5) that the Corps intended to repatriate the remains to those tribes, (6) that notice had been given to certain Indian tribes, (7) that '[r]epresentatives of any other Native American Tribe which believes itself to be culturally affiliated with these human remains should contact the Corps of Engineers prior to October 23, 1996,' and (8) that repatriation may begin after this date if no additional claimants come forward.[31]

After the notice was published, the Corps began receiving letters from scientists who objected to the repatriation in the interest of scientific study and who wanted the Corps to reconsider repatriating the remains to the Coalition.[32] Since the Corps did not timely respond to the scientists' letters of concern and the date of repatriation was fast approaching, the group of scientists (the scientist plaintiffs or the plaintiffs) filed suit to temporarily stop the repatriation.[33]

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26. Crowther, *supra* note 4, at 277.
27. *Id.*
28. *Id.*
29. *Bonnichsen I*, 969 F. Supp. at 618.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*

A second set of plaintiffs, the Asatru Folk Assembly (the Asatru plaintiffs), also filed suit against the defendants.[34] The Asatru plaintiffs opposed the repatriation to the Coalition on the grounds that the Kennewick Man was not an ancestor of the Coalition, but of the Asatru plaintiffs.[35] Since the cases of the two sets of plaintiffs were nearly identical, the court wrote only one opinion.[36] However, this note will discuss only the arguments and decisions that concern the scientist plaintiffs.

2. Bonnichsen I[37]

The scientist plaintiffs filed suit in the United States District Court for the District of Oregon, asking for a temporary restraining order which would stop the Corps from repatriating Kennewick Man to the Coalition.[38] The scientist plaintiffs "demanded a detailed scientific study to determine the origins of the man before the Corps decided whether to repatriate the remains."[39] The scientist plaintiffs also asked the court to "enjoin alleged violations of NAGPRA, to declare the agency actions at issue null and void, and for an injunction to prevent defendants from 'depriving plaintiffs from access to [Kennewick] Man.'"[40]

After a hearing on the scientist plaintiffs' requests, the Corps told the court that the agency would notify all plaintiffs at least fourteen days before repatriation.[41] After that hearing, the Corps moved to dismiss the action based on several grounds, including allegations that the scientist plaintiffs' claim was not ripe for judicial review, that the plaintiffs had failed to exhaust administrative remedies, and that the plaintiffs had failed to state a claim.[42]

When alleging that the plaintiffs' claims were not ripe and that the plaintiffs had failed to exhaust all administrative remedies, the Corps reasoned that they had not yet made a final decision, so there could be no judicial review of the decision until the plaintiffs had exhausted all of their administrative remedies and the Corps had made a final decision concerning repatriation of the remains.[43] The court disagreed with the Corps on this

34. *Id.*
35. *Id.*
36. *Id.* at 619.
37. *Id.* at 614.
38. *Id.* at 618.
39. *Id.*
40. *Id.*
41. *Id.* at 619.
42. *Id.*
43. *Id.*

issue.[44] The court focused on the fact that the Corps had published the Notice of Intent and that the Notice of Intent had contained several decisions that appeared to be "final."[45] The court also stated that at the first hearing, the Corps "left little doubt that they had decided the remains were Native American, were subject to NAGPRA, and should be repatriated pursuant to that statute."[46] Based on these findings, the court determined that there was a final action by the Corps and that the action could be reviewed by the court.[47]

In deciding the issue of whether the plaintiffs had failed to exhaust all administrative remedies, the court first looked at the Act to determine what administrative remedies were available for the plaintiffs under the Act.[48] In order for a party to seek judicial review under the Administrative Procedures Act, there must be "both a remedy to exhaust and recourse to that remedy is required by statute or agency rule."[49] Under the Act, the only parties who have standing to request a return of remains or artifacts after the determination that the remains or artifacts are Native American are "a known lineal descendant of the Native American or of the tribe or organization."[50] Based on the wording of the statute, the court reasoned that the plaintiffs would have had no standing to file a claim under the Act.[51] The court stated:

> [T]he requirement that a person file a "claim" for repatriation or disposition makes sense only if that person is seeking repatriation or disposition of the remains. It is meaningless in the context of someone who is *opposing* repatriation or disposition, and not merely claiming a superior right to the remains pursuant to NAGPRA.[52]

The court held that the action could not be barred for failure on the part of the plaintiffs to exhaust all administrative remedies when there were no administrative remedies available to them.[53]

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44. *Id.* at 619-25.
45. *Id.* at 619-20.
46. *Id.* at 620.
47. *Id.* at 622.
48. *Id.* at 623-24.
49. *Id.* at 623 (citing Darby v. Cisneros, 509 U.S. 137 (1993)).
50. 25 U.S.C. § 3005(a)(1) (2000).
51. *Bonnichsen I*, 969 F. Supp. at 623-24.
52. *Id.* at 624.
53. *Id.*

The Corps also asserted that the plaintiffs' claims should be dismissed for failure to state a claim.[54] The court did dismiss the plaintiffs' civil rights claims based on 42 U.S.C. §§ 1981 and 1983, but found that the plaintiffs did have valid claims regarding the assertion that the Corps violated the provisions of NAGPRA and the assertion that NAGPRA was unconstitutional.[55]

3. Bonnichsen II[56]

After the court made its ruling granting in part and denying in part the Corps' motion to dismiss, the Corps made a motion for summary judgment and the scientist plaintiffs made a motion that they be allowed to study the remains of Kennewick Man immediately.[57] In its motion for summary judgment, the Corps once again argued that the scientist plaintiffs lacked standing to maintain the action[58] and that the agency action was not ripe for review because there had been no final agency action.[59]

The Corps argued that the scientist plaintiffs lacked standing to maintain the action for two reasons.[60] The Corps' first standing argument was based on the case of *Lujan v. Defenders of Wildlife*.[61] Citing the United States Supreme Court's decision in *Defenders of Wildlife*, the Corps argued that the scientist plaintiffs could not maintain the action because they had not suffered an injury in fact and that any perceived injury to the scientist plaintiffs could not be redressed by the court.[62] The Corps' second argument was that the scientist plaintiffs did not fall within the zone of interests because they were not part of the group protected by the Act.[63]

When analyzing the Corps' first argument, the court compared the facts of *Defenders of Wildlife* to the facts of the *Bonnichsen II* action.[64] In *Defenders of Wildlife*, the plaintiffs were members of the general public who challenged an agency action that they felt would lead to the possible destruction of certain

54. *Id.* at 626.
55. *Id.* at 627-28.
56. Bonnichsen v. United States, 969 F. Supp. 628 (D. Or. 1997). For the duration of this note, this case will be referred to as *Bonnichsen II*.
57. *Id.* at 632.
58. *Id.*
59. *Id.* at 637.
60. *Id.* at 632.
61. 504 U.S. 555 (1992).
62. *Bonnichsen II*, 969 F. Supp. at 635.
63. *Id.* at 636.
64. *Id.* at 633.

endangered species.[65] The Supreme Court held that the plaintiffs in *Defenders of Wildlife* lacked standing to maintain an action because they had only a "mere general grievance or interest that is shared by the world at large."[66] The *Bonnichsen II* court easily distinguished the facts of *Defenders of Wildlife* from the *Bonnichsen II* facts. The court stated that:

> Unlike the affiants in *Defenders of Wildlife*, the *Bonnichsen [II]* plaintiffs have presented concrete plans, including a detailed description of the tests that each plaintiff proposes to conduct. . . . Plaintiffs have identified a particular set of remains that they desire to study, they have presented a concrete plan for conducting those studies, and they are ready, willing, and able to commence those tests immediately.[67]

After reviewing the marked differences in the facts of the two cases, the court held that the scientist plaintiffs had suffered an injury-in-fact sufficient to confer standing.[68]

The Corps' further argued that based on *Defenders of Wildlife* even if the scientist plaintiffs had suffered some type of injury, there was no way for that injury to be redressed by a decision favorable to the scientist plaintiffs by the *Bonnichsen II* court.[69] The Corps argued "that the injury will not be redressed by a favorable ruling in this case, since plaintiffs will not have an absolute right to study the remains."[70] The court did not agree with the Corps' characterization of this issue.[71] The court reasoned that, if there was a decision favorable to the scientist plaintiffs, there was a "likely" chance that they would be allowed to study the remains and their injury would be redressed.[72]

The Corps' second standing argument was that the scientist plaintiffs "[did] not fall within the 'zone of interest' sought to be protected or regulated by NAGPRA."[73] To fall within a statute's "zone of interest", a plaintiff must establish that it is among the group of whose interests the provision was

65. *Id.*
66. *Id.* at 634.
67. *Id.*
68. *Id.* at 635-36.
69. *Id.* at 635.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 636.

intended to protect.[74] The Corps argued that the only parties who fall within NAGPRA's "zone of interest" are parties seeking to have awarded to them the rights to human remains or cultural objects covered by the Act.[75] However, the court found nothing in the Act that would preclude a party from contesting an agency action that denied the party the rights to human remains.[76] The court, therefore, held that the scientist plaintiffs' claims were not precluded by the "zone of interest" rule.[77]

The Corps also argued that the scientist plaintiffs' claim should be dismissed because the Corps' decision to repatriate the remains was not a final agency action, so the decision was not ripe for review.[78] After the court entered its opinion in *Bonnichsen I*, the Corps rescinded its original notice of intent by publishing a "Notice Rescinding Notice of Intent to Transfer Custody of Human Remains in the Custody of the U.S. Army Corps Engineers, Walla Walla District" on March 23, 1997.[79] Based on this notice, the Corps argued that they had rescinded the original decision to immediately repatriate the remains to the Coalition.[80] Thus, it was obvious that there had been no final agency action.[81] However, the scientist plaintiffs argued that the notice was a "sham" that the Corps published so they could argue the issue of ripeness.[82]

The court questioned the Corps' classification of the argument as a question of ripeness.[83] Instead, the court reasoned, the issue was "whether as a result of the March 23rd notice, this case is now moot."[84] The court, however, looked at the Corps' conduct as a whole when deciding this issue, not just the notice published March 23.[85] After publishing the notice to rescind, the Corps filed two memoranda with the court.[86] The first, filed on April 23, 1997, stated:

> Because Kennewick Man is either of or related to the indigenous peoples [of America], the remains fit within the definition of Native American as provided for by NAGPRA . . . Because under the

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 637.
79. *Id.*
80. *Id.*
81. *Id.* at 638.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

> plaintiffs' own scenario, the remains fit within NAGPRA's definition of Native American, the only conclusion is that they are subject to NAGPRA.[87]

The Corps filed another memorandum on April 25 stating its opposition to the scientist plaintiffs' motion to be allowed to study the remains.[88] This memorandum stated:

> Because there is no provision for scientific studies under the disposition provisions of NAGPRA, there is no right to conduct scientific studies where those provisions apply. Because those provisions apply to the present case, there is no right to study here.[89]

The court noted that the position of the notice to rescind was directly contradicted by the statements in the memoranda filed with the court.[90] The Corps could not ask the court to believe that there had been no final agency action based on the face of the notice to rescind, and then file documents with the court stating that the remains were definitely subject to NAGPRA.[91] The scientist plaintiffs also introduced evidence of several other instances of conduct by the Corps that directly contradicted the Corps' position that no final agency action had taken place.[92]

The court reviewed the standards it must follow when determining whether an action has become moot.[93] After reviewing these standards and applying them to the circumstances of the case before it, the court determined that the Corps had not met its burden of proving that the action had become moot.[94] Therefore, the court held that the action was not moot and should not be dismissed as such.[95]

Upon denying the Corps' motion for summary judgment, the court ordered the Corps to vacate all of its previous decisions concerning Kennewick Man and remanded the matter to the Corps for further investigation.[96] The court instructed the Corps to ensure that, on remand, it apply the proper legal

87. *Id.* (quoting April 23rd Memorandum to the Court from Defendants at page 5.)
88. *Id.*
89. *Id.* (quoting April 25th Memorandum to the Court from Defendants at page 23.)
90. *Id.*
91. *Id.*
92. *Id.* at 639.
93. *Id.* at 639-40.
94. *Id.* at 641.
95. *Id.*
96. *Id.* at 645.

standards when arriving at a new decision, and that the new decision be clearly supported.[97] The court also declared that the Corps should consider the scientist plaintiffs' request to study the remains when arriving at a new decision.[98]

The court went on to discuss the scientist plaintiffs' motion to be allowed to study the remains and the scientist plaintiffs' First Amendment and Equal Protection claims.[99] The court denied the motion to study the remains, but stated that the scientist plaintiffs could renew their motion after the Corps had reached a decision on remand.[100] However, the court declined to rule on the scientist plaintiffs' other claims, stating that the plaintiffs could pursue these claims on remand and suggesting that the Corps should consider these claims when arriving at a new decision.[101]

The court submitted a non-exclusive list of issues for the Corps to consider on remand.[102] The court also ordered the parties to submit reports to the court quarterly to keep the court informed of the process on remand.[103] The Corps was ordered to maintain the remains "in a manner that preserves their potential scientific value."[104] The court stayed the action pending a decision on remand and retained jurisdiction over the matter.[105]

4. U.S. Army Corps of Engineers — Second Decision to Repatriate

Following the court's remand to the agency, several events occurred. There was a great deal of controversy regarding the Corps' treatment of the remains.[106] Based on the Corps' obvious lack of ability to properly care for the remains, the court ordered that the remains be moved to a facility more equipped to deal with them.[107] In December 1997, "a team composed of representatives of the Tribal Claimants, the Corps and other federal agencies, and a team from Washington State University" completed a restricted study of the discovery site.[108] However,

97. *Id.*
98. *Id.* at 645-46.
99. *Id.* at 645.
100. *Id.*
101. *Id.* at 645-51.
102. *Id.* at 651-54.
103. *Id.* at 645.
104. *Id.*
105. *Id.* at 654.
106. *Bonnichsen III*, 217 F. Supp. 2d at 1124.
107. *Id.*
108. *Id.*

no further study of the discovery site was ever authorized or completed by the Corps.[109]

In March 1998, the Corps entered into an agreement with the Department of the Interior.[110] The agreement basically assigned to the Department of the Interior the responsibility for dealing with Kennewick Man, placing the Department of the Interior in the "role of lead agency" for the purposes of deciding the issues in the case.[111]

In April 1998, the discovery site was buried by the Corps.[112] The original plan to bury the discovery site was proposed in 1996, but was stayed during the first phase of the litigation.[113] After the court's remand, the Corps buried the site despite public protest and legislation that had been introduced to stop the Corps from going forth with the burial unless it had permission from the court.[114] The Corps has refused to allow further study of the discovery site.[115]

In January 2000, the Department of the Interior (the Department) revealed that it had determined that the remains were Native American for the purposes of NAGPRA.[116] The Department's experts based its determination on "the age of the remains, and their discovery within the United States."[117] Then, on September 25, 2000, the Department revealed that it would repatriate the remains to the Coalition and denied the scientist plaintiffs any opportunity to study the remains.[118] The plaintiff scientists proceeded to file an Amended Complaint that challenged the second decision to repatriate.[119]

III. Bonnichsen III[120]

The scientist plaintiffs made several claims in their Amended Complaint. The first claim that the court addressed sought judicial review, pursuant to the Administrative Procedure Act (APA) of the Corps' second decision to repatriate the remains.[121] The court reviewed the standards that must be met in order for

109. *Id.*
110. *Id.* at 1126.
111. *Id.*
112. *Id.* at 1124.
113. *Id.* at 1125.
114. *Id.* at 1125-26.
115. *Id.* at 1126.
116. *Id.* at 1130.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 1116.
121. *Id.* at 1131.

a party to obtain judicial review under the APA.[122] The court stated that "since the time the Corps took possession of the remains of the Kennewick Man, Defendants have not acted as the fair and neutral decision makers required by the APA."[123] Based on this observation, the court decided that it would be of no use to remand the case to the agencies for further decision making and that it would be in the best interest of all of the parties if the issues were decided.[124]

The second claim addressed by the court was the allegation by the scientist plaintiffs that the defendants, when arriving at their decision to repatriate, had violated NAGPRA.[125] NAGPRA defines Native American as "of, or relating to, a tribe, people, or culture that is indigenous to the United States."[126] The court noted that the definition used by the defendants when determining the cultural affiliation of the remains was "'Native American' refers to any remains or other cultural items that existed in the area now covered by the United States before 1492."[127] The court reasoned, based on the definition used by the defendants, that any remains found within the borders of the present-day United States that are deemed to be older than 510 years would be considered "Native American" when applying NAGPRA, regardless of whether the remains can be tied to any modern "tribe, people or culture."[128] After reviewing the language of NAGPRA, the court declared there was no evidence that Congress intended for the definition of Native American to be as broad as the Department had interpreted.[129]

The court went on to note that the Department's decision concerning the Native American status of Kennewick Man could only be overturned by the court if "the administrative record contains insufficient evidence to support the conclusion that the remains are related to a present-day tribe, people, or culture that is indigenous to the United States as required by the statute."[130] In order to support a determination that remains are Native American, a party must show that one of two different relationships is present:

> The first is the general relationship to a present-day tribe, people, or culture that establishes that a person or item is "Native American."

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122. *Id.* at 1131-32.
123. *Id.* at 1134.
124. *Id.*
125. *Id.* at 1131.
126. 25 U.S.C. § 3001(9) (2000).
127. *Bonnichsen III*, 217 F. Supp. 2d at 1135.
128. *Id.*
129. *Id.* at 1137.
130. *Id.*

> The second, more narrowly defined specific relationship establishes that a person or item defined as "Native American" is also "culturally affiliated" with a particular present-day tribe.[131]

Based on this requirement, the Department was required to build a record that included evidence that Kennewick Man was tied in some way to an existing tribe.[132] The court completed a careful review of the Department's record that supported its decision and found no evidence that Kennewick Man tied to any particular existing tribe.[133] According to the court, "Kennewick Man's culture is unknown and apparently unknowable."[134] After this careful review of the Department's administrative record, the court held that there was no evidence that support the Department's determination that Kennewick Man was Native American for the purposes of NAGPRA. [135] Therefore, the Act did not apply to Kennewick Man.[136]

Because the court decided that NAGPRA did not apply to Kennewick Man based on the lack of a general relationship with any existing tribe, it was unnecessary for the court to discuss any of the scientist plaintiffs' other claims.[137] However, in the interest of "creating a complete record for possible appellate review" the court went on to discuss several of the scientist plaintiffs' other claims.[138] The court provided a detailed discussion of the second relationship — the "cultural affiliation" relationship — discussed above.[139]

In order to prove that cultural affiliation exists between remains and a tribe, a party must have evidence of "a relationship of shared group identity which can reasonably be traced . . . between a present day Indian tribe . . . and an identifiable earlier group."[140] The court reviewed the record and found that the Department:

> (a) did not adequately determine "an identifiable earlier group" to which the Kennewick Man allegedly belonged, or even establish that he belonged to a particular group, (b) did not adequately address the requirement of a "shared group identity," (c) did not articulate a

131. *Id.* at 1137-38.
132. *Id.* at 1138.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 1138-39.
137. *Id.* at 1139.
138. *Id.*
139. *Id.* at 1139-56.
140. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001(2) (2000).

> reasoned basis for the decision in light of the record, and (d) reached a conclusion that is not supported by the reasonable conclusions of the Secretary's experts or the record as a whole.[141]

As such, the court stated that the Department had not presented evidence in its record sufficient to prove a cultural affiliation between Kennewick Man and the Coalition.[142] As such, the Department's determination that Kennewick Man should be repatriated to the Coalition had to be set aside.[143]

After briefly discussing the scientist plaintiffs' other claims, the court discussed what remedy would be given to the scientist plaintiffs' based on the court's finding that Kennewick Man was not subject to NAGPRA.[144] The usual remedy for a judicial review of an agency decision is remand to the agency for further investigation and action.[145] However, the court noted that because this case had been so unusual, there was no reason to rely on the usual remedy.[146] The court stated that, based on the entire record of proceedings, it was apparent that "the agency was consistently biased, acted with obvious disregard for even the appearance of neutrality, and predetermined the outcome of critical decisions, including the ultimate disposition of the remains."[147] Another factor the court looked at when determining that remand was not a proper remedy was the fact that the court had already remanded the action to the agency once to no avail.[148] For those reasons, the court vacated the Department's decision and ordered that the scientists plaintiffs be allowed to study Kennewick Man.[149]

IV. Recent Developments in the Kennewick Man Case

After U.S. Magistrate John Jelderks entered his ruling on August 30, 2002, Nez Perce, Umatilla, Colville and Yakama tribes asked for and received Jelderks' permission to file an appeal of the case, because the Coalition believed that the United States did not properly represent the interest of the tribes.[150] The

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141. Bonnichsen v. United States, 217 F. Supp. 2d 1116 (D. Or. 2002).
142. *Id.* at 1143.
143. *Id.* at 1156.
144. *Id.* at 1164-67.
145. *Id.* at 1164.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. Richard L. Hill, *U.S. Plans to Appeal Kennewick Man Ruling*, OREGONIAN (Portland), Oct. 30, 2002, at B4.

tribes and the United States both timely filed appeals.[151] The appeals will be heard by the Ninth U.S. Circuit Court of Appeals.[152]

The tribes had also asked Jelderks to delay allowing the plaintiff scientists to study Kennewick Man until the appellate court had made a ruling.[153] In January 2003, Jelderks denied the tribes' request to delay the study.[154] The tribe has appealed that decision, also.[155] Kennewick Man is currently being preserved at the Burke Museum in Seattle, studies by the plaintiff scientists cannot commence until all of the study details have been approved.[156]

V. Conclusion

The case of Kennewick Man uncovered several loopholes that can be encountered when applying NAGPRA to remains and cultural objects found within the boundaries of the United States. If parties are allowed to use a definition similar to the one proposed by the Department of Interior in its decision to repatriate Kennewick Man, any remains found in the United States that are older than 510 years old are subject to NAGPRA and must be repatriated to any tribe that requests repatriation. If this were allowed, it would be difficult for much meaningful archeological or scientific study of ancient cultural objects and remains to take place.

For now, the United States District Court for the District of Oregon has attempted to tighten these perceived loopholes by requiring that an agency must prove that cultural objects and remains have a cultural relationship with an existing tribe. It has taken six years for Kennewick Man to make it this far through the courts, but his legal journey will most likely not be over for several years.

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151. *Id.*

152. Richard L. Hill, *Four Tribes Seek to Stall Kennewick Man Study*, OREGONIAN (Portland), Jan. 22, 2003, at B5.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*