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United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Memorandum

To: Secretary

From: Solicitor
/s/ John D. Leshy

Subject: NAGPRA and the Disposition of the Kennewick Human Remains

Section 3 of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3002, sets forth the procedures to follow for the disposition of Native American human remains that are, like the Kennewick human remains, excavated or removed from Federal or tribal lands after November 16, 1990. Subsection 3002(a)(2)(B) provides that, if lineal descendants are not identified and if the remains are not recovered from tribal lands, control of the remains shall be with the Indian tribe or Native Hawaiian organization "which has the closest cultural affiliation with such remains . . . and which, upon notice, states a claim for such remains . . ." Subsection 3002(a)(2)(C) provides that if the cultural affiliation of the remains "cannot be reasonably ascertained" and the remains were discovered on Federal land which "is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe," the ownership or control of the remains shall be in the Indian tribe that aboriginally occupied the area in which they were discovered and that states a claim for their custody.

The Federal land where the Kennewick human remains were discovered was the subject of several cases brought before the Indian Claims Commission (ICC) in the 1950s and 1960s by the Confederated Tribes of the Umatilla Reservation (Attachment A), which were comprised of the Umatilla, Cayuse, and Walla Walla Indian bands. One of these cases sought additional compensation for the lands ceded to the United States by the Umatilla in the Treaty of June 9, 1855, which included the Kennewick remains recovery site (Attachment A). In the course of this litigation, the ICC issued findings of fact and opinions which established that the recovery site of the Kennewick remains is the joint aboriginal land of the three Umatilla tribes, the Wayampam bands, the Nez Perce tribe, the Snake Indians, and other Indians. *Confederated Tribes of the Umatilla Reservation v. United States*, 14 Ind. Cl. Comm 14, 102-03 (1964).

These cases were eventually settled, and the settlement culminated in a final judgment. See 16 Ind. Cl. Comm. 484, 510 (1966). The compromise settlement did not delineate the aboriginal territory of the Umatilla, Cayuse, and Walla Walla tribes. Because the ICC determined that the area of land where the Kennewick remains were later recovered was not subject to the exclusive use of any particular tribe, it

was not identified as land exclusively held by the Umatilla, Cayuse, or Walla Walla Indian bands on the "Indian Land Areas Judicially Established 1978 Map" (1978 Map) (Ind. Cl. Comm. Final Report, H. Doc. 96-383, pocket part (1980), Map Area No. 95, 96, and 97). This map portrays the results of cases brought before the ICC in which an American Indian tribe proved its original tribal occupancy of a tract of land within the United States.

In the 1998 Federal Defendant's Fourth Quarterly Status Report and supporting documentation filed in the pending litigation involving the Kennewick remains (*Bonnichsen et al. v. United States*), we reported that the discovery site of the Kennewick remains did not fall within an area of Federal land that had been recognized by a final judgment of the ICC as the aboriginal land of any Indian tribe. We relied on the 1978 Map in making this Report.

We have since further reviewed the entire ICC record addressing the issue of aboriginal land status at the Kennewick human remains' discovery site (Attachment A), which was the subject of ICC findings of fact and opinions prior to a compromise settlement. We have also considered how similar ICC findings of fact and opinions have been considered in implementing Section 3 across the country (Attachment B). Based on this review, I believe our earlier report to the Court somewhat oversimplified the situation, as explained below.

NAGPRA's purpose, according to the House Committee Report on the Act, is "to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian, and Native Hawaiian lands." H.R. Rep. 101-877 (1990) p. 8. NAGPRA's section 12 specifically recognizes the unique legal relationship between the United States and Indian tribes. Therefore, the statute ought to be construed as Indian legislation, and any ambiguities in it resolved liberally in favor of Indian interests. See, e.g., *County of Yakima v. Yakama Indian Nation*, 520 U.S. 251, 269 (1992); *Yankton Sioux Tribe v. U.S. Army Corps of Engineers*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000).

NAGPRA's text refers to a "final judgment" of the ICC that "recognize[s]" the land where human remains or other cultural items are recovered "as the aboriginal land of some Indian tribe." In the case of the Kennewick remains, there is no such final judgment. On the other hand, there are ICC findings of fact to the effect that several claimant Indian tribes aboriginally used and occupied the area where the Kennewick remains were found. Although the settlement of the claim did not affirm these findings, it poses no barrier to their use in determining the aboriginal land of some Indian tribe(s) under NAGPRA, 25 U.S.C. § 3002(a)(2)(C).

The preamble to DOI's regulations implementing NAGPRA seems to acknowledge that final judgments of the ICC may not fully reflect a specific delineation of aboriginal land claims. It states that while the regulation's drafters considered ICC final judgments "a valuable tool for identifying area[s] occupied aboriginally by a present-day Indian tribe[, o]ther sources of information regarding aboriginal occupation should also be consulted." 60 Fed. Reg. 62140 (1995) (emphasis added).

Looking more broadly at the ICC practice, of all the ICC decisions that judicially established Indian lands, some 53 cases, or 30% of the petitions, were resolved through compromise settlements. Additionally, a review of the total number of ICC decisions indicated that approximately 27 cases (some of which ended in final judgments, and others in compromise settlements) established separate Indian land areas with more than one tribal landowner. See United States Indian Claims Commission Final Report, H.Doc. 96-383 (1983), pp. 131-37. (Attachment B). That is, use of an area of land by multiple tribes did not preclude the ICC from

determining that the area was the aboriginal land of an Indian tribe or tribes. In one example, the Delaware (1/5 owners), Wyandot (1/5 owners), Potawatomi (1/5 owners), Ottawa (1/5 owners), and Chippewa (1/5 owners) were found by the ICC to be the shared aboriginal land-holders of a single region (See 1978 Map, Ind. Cl. Comm. Final Report, H. Doc. 96-383, pocket part (1980), Map Area No.2; 30 ICC 8 (1973); affd 207 Ct. Cl. 958 (1975)). Because the ICC occasionally made shared aboriginal land-holder determinations, it might have done so for the discovery site of the Kennewick remains in the cases that the Umatilla brought before the ICC, had the Umatilla filed a joint claim with the other tribes (which it did not).

In these circumstances, I believe that NAGPRA's reference to "final judgments" of the ICC ought to be looked at somewhat flexibly. Specifically, I believe that disposition of Native American human remains and other cultural items under 25 U.S.C. § 3002 (a)(2)(C)(1) ought not to be precluded when the ICC final judgment embodied a voluntary settlement agreement that did not specifically delineate aboriginal territory, yet where findings of fact were previously published by the ICC that recognized the land in question as being subject to use by several tribes.

Because, as noted above, the ICC's findings of fact and opinions identify the recovery site of the Kennewick remains as the joint aboriginal land of numerous Indian groups, including at least two of the claimant tribes, I believe that these tribes collectively may successfully claim the Kennewick remains, if disposition is not appropriate under 25 U.S.C. §3002 (a)(1), (a)(2)(A) and (a)(2)(B).

Furthermore, in determining whether the Kennewick remains are culturally affiliated with any present-day tribes making claims for the remains, I believe the ICC's findings of fact are highly relevant to that determination. That is, the statute's design is that if cultural affiliation cannot "reasonably be ascertained," the remains go to the tribe(s) recognized by an ICC final judgment as aboriginally occupying the area where the remains were discovered. That is so regardless of whether the available evidence shows any connection whatsoever between the remains and the tribe in question; in other words, the tribe whose aboriginal land is recognized in the final judgment may successfully claim the remains, no further questions asked so long as no other Indian tribe can show a stronger cultural relationship with the remains (see 25 U.S.C. § 3002(a)(2)(C)(2)). That being the case, where, as here, the ICC has made findings of fact that the area was used by the present-day tribes making the claim for the remains, it seems to me appropriate to take that fact into account in making the cultural affiliation determination. The ICC determination may not be regarded as conclusive of cultural affiliation, because other kinds of evidence must be weighed as well in the balance, but it deserves considerable respect, not only because it is a formal judicial determination of a geographic connection between the recovery site and present-day tribes, but also because of NAGPRA's fundamental purpose and architecture.

Attachments

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