No. 02-35994

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBSON BONNICHSEN, ET AL.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellants,

and

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, ET AL.

Defendants-Intervenors.

On Appeal from the U.S. District Court for the District of Oregon, District Court No. 96-1481JE (D. Or.)

BRIEF OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS AND THE MORNING STAR INSTITUTE AS AMICI CURIAE SUPPORTING DEFENDANTS-INTERVENORS AND SEEKING VACATION OF THE DISTRICT COURT DECISION

WALTER ECHO-HAWK
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JACK F. TROPE
Association on American Indian Affairs
966 Hungerford Drive, Suite 12-B
Rockville, MD 20850
(240) 314-7155

No. 02-35994

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBSON BONNICHSEN, ET AL.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellants,

and

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Defendants-Intervenors.

On Appeal from the U.S. District Court for the District of Oregon, District Court No. 96-1481JE (D. Or.)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae parties the Association on American Indian Affairs and the Morning Star Institute make the following disclosures:

1. The parties are not a subsidiary or affiliate of a publicly owned corporation.

2. No corporation owns 10% or more of any of the parties' stock.

Walter Echo-Hawk jt

Respectfully Submitted,

Walter Echo-Hawk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Jack F. Trope, Executive Director
Association on American Indian Affairs
966 Hungerford Drive, Suite 12-B
Rockville, MD 20850
(240) 314-7155

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

STATEMENT OF INTEREST.....1

ARGUMENT

THE DISTRICT COURT DECISION WAS INCONSISTENT WITH THE LEGAL STANDARDS OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA) AND SHOULD BE VACATED.....2

I. The Intent of NAGPRA is the protection of Native Native American Human Rights 2

II. NAGPRA applies to this case and supersedes the requirements of the Archeological Resources Protection Act (ARPA) 11

A. The definition of Native American covers all indigenous remains.....11

B. Application of NAGPRA precludes the Court from mandating a remedy that would permit the plaintiffs to study the human remains.....14

1. The ARPA regulations utilized by the Court are not applicable.....14

2. The cause of action provision in NAGPRA does not give the District Court the authority to order that the plaintiffs be given access to the human remains for scientific study.....19

3. Plaintiffs have no standing to raise a NAGPRA Claim.....20

III. The trial court misinterpreted NAGPRA in several other critical respects.....23

A. Extensive consultation with Indian tribes is a proper interpretation of the law, not evidence of bias.....23

B. Joint claims for repatriation are legitimate.....27

C. A finding that Cultural Affiliation exists does not require scientific certainly 28

D. In making a claim based upon aboriginal occupancy, an Indian Claims Commission finding should suffice.....30

CONCLUSION.....32

CERTIFICATE OF COMPLIANCE.....33

CERTIFICATE OF SERVICE.....34

TABLE OF AUTHORITIES

Cases

Baca v. King
92 F.3d 1031 (10th Cir. 1996).....21

Bonnichsen v. United States
969 F.Supp.628 (D.Or. 1997).....22

Bonnichsen v. United States
217 F. Supp.2d 1116 (D. Or. 2002).....11, 14, 22, 27

Bryan v. Itasca County
426 U.S. 373 (1976).....9

Chevron U.S.A., Inc. v. National Resource Defense Counsel, Inc.
467 U.S. 837 (1984).....10

Green v. Dumke
480 F.2d 624 (9th Cir. 1973).....9

Idrogo v. United States Army
18 F.Supp.2d 25 (D.D.C. 1998).....22

Lara v. Secretary of Interior
820 F.2d 1535 (9th Cir. 1987).....29, 30

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992).....20, 22

Pueblo of San Ildefonso v. Ridlon
103 F.3d 936 (10th Cir. 1996).....10

Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy
898 F.2d 1410 (9th Cir. 1990).....8

Seminole Nation v. United States
316 U.S. 286 (1942).....8

United States v. Corrow
119 F.3d 796 (10th Cir. 1997).....7

White Mountain Apache Tribe v. Bracker
448 U.S. 136 (1980).....9

Statutes

2 U.S.C. 1534(b).....24

5 U.S.C. 554(a).....26

5 U.S.C. 557(d)(1).....26

16 U.S.C. 228i(c).....8

16 U.S.C. 410ii-4.....8

16 U.S.C. 410pp-6.....8

16 U.S.C. 460uu-47.....8

16 U.S.C. 470a(a)(7).....19

16 U.S.C. 470a(d)(6).....23

16 U.S.C. 470cc.....18

16 U.S.C. 470h-2(a)(2)(F)(iii).....19

16 U.S.C. 543f.....8

16 U.S.C. 668a.....8

16 U.S.C. 1371(b).....8

20 U.S.C. 80q-9.....5

20 U.S.C. 80q-11A.....5

20 U.S.C. 80q-14(4).....5

25 U.S.C. 640d-19.....8

25 U.S.C. 2901 et seq.....8

25 U.S.C. 3001 et seq.....2

25 U.S.C. 3001(2).....29

25 U.S.C. 3001(3)(C).....9, 13

25 U.S.C. 3001(9).....11, 13

25 U.S.C. 3002.....17, 31

25 U.S.C. 3002(a).....18

25 U.S.C. 3002(a)(2)(C).....12, 30

25 U.S.C. 3002(a)(2)(C)(1).....31, 32

25 U.S.C. 3002(b).....12

25 U.S.C. 3002(c)(1).....14

25 U.S.C. 3002(c)(2).....24

25 U.S.C. 3003(b)(1)(A).....24

25 U.S.C. 3003(b)(2).....15, 20

25 U.S.C. 3004(b)(1)(B).....24

25 U.S.C. 3005.....17, 18

25 U.S.C. 3005(a)(4).....29

25 U.S.C. 3005(b).....9, 15, 17, 19

25 U.S.C. 3005(c).....9

25 U.S.C. 3005(d).....24

25 U.S.C. 3005(e).....27

25 U.S.C. 3006(c)(4).....27

25 U.S.C. 3006(c)(5).....12

25 U.S.C. 3009.....16, 17

25 U.S.C. 3013.....19, 20, 22

25 U.S.C.A. 3010.....7

42 U.S.C. 1996.....5

42 U.S.C. 1996a.....8

Public Laws

P.L. 95-341.....5

P.L. 95-498.....8

P.L. 95-499.....8

P.L. 98-408.....8

Regulations

36 C.F.R. Part 79.....14, 15, 16, 19

36 C.F.R. Part 79.2(a).....19

36 C.F.R. 800.2(c)(2)(ii)(A).....23

43 C.F.R. 10.1 (a).....12

43 C.F.R. 10.3(c)(1).....25

43 C.F.R. 10.5(b)(1).....25

43 C.F.R. 10.5(b)(2).....25

43 C.F.R. 10.5(b)(3).....25

43 C.F.R. 10.5(c).....25

43 C.F.R. 10.5(d).....25

43 C.F.R. 10.5(e).....26

43 C.F.R. 10.5(f).....26

43 C.F.R. 10.5(g).....25

43 C.F.R. 10.14(c).....28

43 C.F.R. 10.14(d).....29

43 C.F.R. 10.14(e).....29

43 C.F.R. 10.14(f).....29

Federal Register

55 Fed. Reg. 37630 (1990).....19

55 Fed. Reg. 41639 (1990).....19

60 Fed. Reg. 62134 (1995).....12, 28

Legislative History

135 Cong. Rec. H8448 (daily ed. Nov. 13, 1989).....6

135 Cong. Rec. S12397 (daily ed. Oct. 3, 1989).....6

135 Cong. Rec. S12388 (daily ed. Oct. 3, 1989).....6

136 Cong. Rec. H10989 (daily ed. Oct 22, 1990).....6

136 Cong. Rec. S17173 (daily ed. Oct. 26, 1990).....4, 9

136 Cong. Rec. S17174 (daily ed. Oct 26, 1990).....2, 3, 6

136 Cong. Rec. S17175 (daily ed. Oct 26, 1990).....3

House Committee on Interior and Insular Affairs
Protection of Native American Graves and the Repatriation of
Human Remains and Sacred Objects: Hearing on H.R. 1381,
H.R. 1646, and H.R. 5237, 101st Cong., 2nd Sess., (1990)
("House Hearing 101-62").....4, 30, 31

Senate Select Committee on Indian Affairs
Native American Grave and Burial Protection Act:
Hearing on S. 1021 and S. 1980, 101st Cong., 2nd Sess.,
(1990) (Senate Hearing 101-952).....7, 13

H. Rep. No. 877, 101st Cong., 2d. Sess. (1990).....7, 8, 29, 31

S. Rep. No. 473, 101st Cong., 2d. Sess. (1990).....6, 14, 18, 28, 29

Miscellaneous

Executive Order 13,084 (1998).....23

Federal Agencies Task Force, American Indian Religious Freedom Act Report, (U.S. Department of the Interior, 1979).....5, 16

Trope and Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz., St. L.J. 35 (1992).....5, 12, 15

Vol. 7 Oxford English Dictionary (2nd ed., 1989).....13

STATEMENT OF INTEREST

The Association on American Indian Affairs (AAIA) is an 80 year old non-profit membership organization with members in all 50 states and offices in Maryland and South Dakota. AAIA is governed by an all Native American Board of Directors. Its mission is to promote the welfare of American Indians and Alaskan Natives by supporting efforts to sustain and perpetuate their cultures; to protect their sovereignty, constitutional, legal, and human rights, and natural resources; and to improve their health, education, and economic and community development. The AAIA has a long-standing cultural preservation advocacy program that includes promoting the repatriation of human remains and cultural items and the protection of sacred sites. It was integrally involved in the effort to obtain the enactment of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990 and has worked with tribes since 1990 to repatriate almost 2,000 human remains. It has a vital interest in the proper implementation of NAGPRA.

The Morning Star Institute is a non-profit Indian rights organization devoted to Native Peoples' traditional and cultural advocacy, arts promotion and research. Founded in 1984, the Morning Star Institute is based in Washington, D.C., and governed by a national Board of Directors whose

members are Native American tribal and traditional religious leaders, artists and cultural rights specialists. Morning Star is a leading organization in the areas of Native Peoples' religious freedom, cultural property rights and sacred lands protection, and was key to the successful educational efforts to achieve the 1989 and 1990 repatriation laws, including NAGPRA, and the 1991 repatriation policy of the National Museum of the American Indian. With its long record of service, Morning Star works with Native American tribal and spiritual leaders, as well as cultural institutions nationwide, on policies and practical issues involved in the care, treatment and return of Native American human remains, sacred objects and cultural property.

ARGUMENT

THE DISTRICT COURT DECISION WAS INCONSISTENT WITH THE LEGAL STANDARDS OF THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA) AND SHOULD BE VACATED.

I. The intent of NAGPRA is the protection of Native American human rights.

The Native American Graves Protection and Repatriation Act (NAGPRA) is, first and foremost, human rights legislation. It was designed to address the flagrant violation of the "civil rights of America's first citizens." 136 Cong.Rec. S17174 (daily ed. Oct. 26, 1990) (statement of

Senator Inouye). When NAGPRA was passed by the Senate, Senator Daniel Inouye stated that:

> When the Army Surgeon General ordered the collection of Indian osteological remains during the second half of the 19th Century, his demands were enthusiastically met not only by Army medical personnel, but by collectors who made money from selling Indian skulls to the Army Medical Museum. The desires of Indians to bury their dead were ignored. In fact, correspondence from individuals engaged in robbing graves often speaks of the dangers these collectors faced when Indians caught them digging up burial grounds.
>
> When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.
>
> In light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century. Even today, when supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony, the wishes of native Americans are often ignored by the scientific community. In cases where native Americans have attempted to regain items that were inappropriately alienated from the tribe, they have often met with resistance from museums...
>
> [T]he bill before us is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights... For museums that have dealt honestly and in good faith with native Americans, this legislation will have little effect. For museums and institutions which have consistently ignored the requests of native Americans, this legislation will give native Americans greater ability to negotiate.
>
> [Id. at S17174-17175]

The record of the Committee hearings and floor debate on NAGPRA are replete with reference to the fact that the goal of Congress was to rectify a centuries-old intrusion upon the human rights of Native peoples. See, e.g., Statements of Senator John McCain (The intent of Congress was to "establish a process that provides the dignity and respect that our Nation's first citizens deserve.") 136 Cong. Rec. S17173 (daily ed. Oct. 26, 1990) (statement of Sen. McCain); Representative Charles Bennett ("[A]s a nation, we have failed to adequately protect these fundamental rights of Native Americans...Protection of Native American burial grounds...is a matter of civil rights for the Indians and for protecting the rights of religious freedom.") House Committee on Interior and Insular Affairs, Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects: Hearing on H.R. 1381, H.R. 1646, and H.R. 5237, 101st Cong., 2nd Sess., 1990 (hereinafter "House Hearing 101-62") at 46-47; Representative Ben Nighthorse Campbell ("[F]or too long the treatment of deceased American Indians found in unmarked graves has been really in sharp contrast with those of non-Indian people found in marked graves.") Id. at 45.

Other parts of the legislative history also emphasize the "human rights" genesis of NAGPRA. There were a number of antecedents and

progenitors of NAGPRA. In 1978, Congress enacted the American Indian Religious Act, P.L. 95-341, codified in part at 42 U.S.C. 1996. Section 2 of that Act directed Federal agencies to prepare a report to Congress summarizing and evaluating their policies to determine whether the religious freedom rights of Native Americans were adequately protected. That report specifically addressed repatriation issues, viz.

> The prevalent view in the society of applicable disciplines is that Native American human remains are public property and artifacts for study, display and cultural investment. It is understandable that this view is in conflict with and repugnant to those Native people whose ancestors and near relatives are considered the property at issue. Most Native American religious beliefs dictate that burial sites once completed are not to be disturbed or displaced, except by natural occurrence.
>
> [Federal Agencies Task Force, American Indian Religious Freedom Act Report, (U.S. Department of the Interior, 1979) (hereinafter "AIRFA Report") at 64 cited in Trope and Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, 24 Ariz.St.L.J. 35, 49-50 (1992).]

The most immediate catalysts for the enactment of NAGPRA were the repatriation provisions of the National Museum of the American Indian Act (NMAI Act), 20 U.S.C. 80q-9, 80q-11A and 80q-14(4), enacted in 1989 and the Report of the Panel for a National Dialogue on Museum/Native American Relations ("Heard Report") which took place at about the same

time – both of which placed a major emphasis upon "human rights". 135 Cong. Rec. S12397 (daily ed. Oct. 3, 1989) (statement of Sen. McCain); 136 Cong. Rec. S17173-17174 (daily ed. Oct. 26, 1990) (statements of Sens. McCain and Inouye); 136 Cong. Rec. H10989 (daily ed. Oct. 22, 1990) (statement of Rep. Rhodes); S. Rep. No. 473, 101st Cong., 2d. Sess. at 6 (1990) (hereinafter Senate Report 101-473). When the NMAI Act was passed, it was explained that its repatriation provisions were aimed at rectifying "some of the injustices done to Indian people over the years" and providing the promise that "one day their ancestors will finally be given the resting place that they so deserve." 135 Cong. Rec. S12388 (daily ed. Oct. 3, 1989) (statement of Senator Inouye); 135 Cong. Rec. H8448 (daily ed. Nov. 13, 1989) (statement of Rep. Rahall). The Senate Committee on Indian Affairs summarized its understanding of the Heard Report as follows: "The Panel found that the process for determining the appropriate disposition and treatment of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony should be governed by respect for Native human rights. The Panel report states that human remains must at all times be accorded dignity and respect." Senate Report 101-473, supra, at 2.

Much of the testimony before Congress emphasized that the need for the legislation arose from a sordid history of treating Native American

human remains and cultural items merely as resources to be exploited. See, e.g., Senate Select Committee on Indian Affairs, Native American Grave and Burial Protection Act: Hearing on S. 1021 and S. 1980, 101st Cong., 2nd Sess., 1990 (hereinafter Senate Hearing 101-952) at 50-53, 74-79 (statements of Walter Echo-Hawk, Jerry Flute and Suzan Harjo). Indeed, Congress had before it a lengthy report by Professor Robert Bieder that catalogued this sordid history. Id. at 278-362. Even representatives of the museum and scientific communities recognized that the need for NAGPRA arose from a need to provide a remedy to address the ramifications of this history. See, e.g., Senate Hearing 101-952, supra, at 38, 53-56, 65-66 (statements of Paul Bender, Trustee, Heard Museum, Norbert Hill, Executive Director, American Indian Science and Engineering Society, and Philip Thompson, Director, Museum of Northern Arizona). See also United States v. Corrow, 119 F.3d 796, 800 (10th Cir. 1997) (recognizing that NAGPRA is "human rights legislation").

Congress expressly indicated in the statute that it viewed NAGPRA as part of its trust responsibility to Indian tribes and people, specifically stating that it "reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations." 25 U.S.C.A. § 3010. See also H. Rep. No. 877, 101st Cong., 2d. Sess. (1990) at 25 (hereinafter House

Report 101-877) ("Section 12 recognizes the special relationship between the Federal government and Indian tribes and Native Hawaiian organizations.") This principle has given rise to a "distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people...which is humane and self-imposed" and involves "moral obligations of the highest responsibility..." Seminole Nation v. United States, 316 U.S. 286, 296-297 (1942). This trust relationship applies to all Federal agencies and to federal action outside Indian reservations. See, e.g., Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 898 F.2d 1410, 1420 (9th Cir. 1990). Because of its trust responsibility and treaty obligations, the Federal government has assumed the specific responsibility for protecting and fostering the well-being of Indian people, including the continuation of their societies, cultures and communities.[1] The trust doctrine has given rise to the principle that enactments dealing with Indian affairs are to be liberally construed for the benefit of Indian people

[1] In addition to the laws stated in the body of the brief, legislation in the area of Indian religion and culture includes the Native American Languages Act, 25 U.S.C. 2901 et seq., statutes addressing ownership or access to sacred sites, 25 U.S.C. 640d-19, 16 U.S.C. 228i(c), 16 U.S.C. 410ii-4, 16 U.S.C. 543f, 16 U.S.C. 460uu-47, 16 U.S.C. 410pp-6, P.L. 98-408, P.L. 95-498, P.L. 95-499, statutes addressing the religious and cultural use of animals, 16 U.S.C. 668a and 16 U.S.C. 1371(b), and a statute protecting Native American religious use of peyote, 42 U.S.C. 1996a.

and tribes, Bryan v. Itasca County, 426 U.S. 373 (1976) – a canon of construction similar to that applicable to remedial civil rights legislation. See, e.g., Green v. Dumke, 480 F2d 624, 628, n.7 (9th Cir. 1973).

It is true, as has often been said, that the bill as enacted reflected a compromise forged by representatives of the museum, scientific, and Indian communities. 136 Cong. Rec. S17173 (daily ed. Oct 26, 1990) (statement of Sen. McCain). There are a number of provisions designed to address concerns of museums and the scientific community, such as provisions dealing with scientific study of cultural items, 25 U.S.C. 3005(b), the standard of repatriation applicable to unassociated funerary objects, sacred objects or objects of cultural patrimony, 25 U.S.C. 3005(c) and carefully crafted definition of such terms as "sacred object", 25 U.S.C. 3001(3)(C). However, the accommodations made to scientific and museum interests do not in any way detract from a conclusion that the central purpose of NAGPRA – in fact, in the end, the only reason that it even exists – was to rectify centuries of discrimination against Native Americans. As such, the canons of statutory construction applicable to Indian legislation apply here and warrant the interpretation of any ambiguities in favor of Indian people. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-144 (1980).

In addition, it is a benchmark standard of statutory construction that "deference is given to an agency's interpretation of the statute that it administers." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). This rule has been applied to the Department of Interior's interpretation of NAGPRA. Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936, 940 (10th Cir. 1996). This principle must also be applied in reviewing the decision below. As will be shown, in many important respects, the agency's interpretation of NAGPRA very closely followed the legislative history and should have been accepted by the Court below. The dismissal of the agency by Magistrate Judge Jelderks as somehow biased, which appears to have influenced the court's evaluation of the agency's interpretive activities, reflects a substantial misunderstanding of the law specifically and principles of the federal trust relationship in general (see below for further discussion).

The misinterpretation of NAGPRA by the Court below in several meaningful respects not only affected the result in this case but, if left standing, would greatly limit, impede and alter the implementation of NAGPRA. Thus, it is important for this Court to correct these misinterpretations in its opinion.

II. NAGPRA applies to this case and supersedes the requirements of the Archeological Resources Protection Act (ARPA).

A. The definition of Native American in NAGPRA covers all indigenous remains.

As a threshold matter, the Magistrate Judge ruled that NAGPRA does not apply to this case because the remains in question are not "Native American" within the meaning of the Act. He interpreted "Native American" (and thus the Act's scope) as only including those remains and cultural items with a cultural relationship with a currently existing Indian tribe. His decision was based, in part, upon the fact that the definition in 25 U.S.C. 3001(9) refers to a tribe, people, and culture "that is" indigenous to the United States, but perhaps even more so upon his inability to believe that Congress could have intended to include all prehistoric grave sites within NAGPRA's scope, referring to such a result as "odd or absurd". Bonnichsen v. United States, 217 F.Supp.2d 1116, 1134-1139 (D. Or. 2002). Such a conclusion is reflective of a judge unable to set aside his personal "belief system" in evaluating Congressional intent and reveals much about the judge's approach to the interpretation of NAGPRA.[2]

---

[2] The inability of the Magistrate Judge to appreciate that Congress could (and did) have the intent of including prehistoric remains within the scope of the Act is but the latest in a long history of ethnocentric court decisions in

The Magistrate Judge's interpretation of "Native American" was erroneous. Some of the most significant flaws in the Magistrate Judge's reasoning were as follows:

- The Magistrate Judge failed to provide deference to the regulations implementing NAGPRA, adopted pursuant to notice and comment prior to this litigation, which removed the words "that is" from the definition of "Native American" to address whatever ambiguity might exist in the statutory definition. 43 C.F.R. 10.1(a). As correctly explained in the commentary to the regulations, "'Native American' is used...only to refer to particular [cultural items]...and not to any living individual or group of individuals." 60 Fed.Reg. 62134, 62137 (1995).
- The Magistrate Judge failed to understand that his definition -- which essentially would require a showing of cultural affiliation as a threshold requirement for the Act's application -- would render numerous sections of the Act superfluous, including 25 U.S.C. 3002(a)(2)(C) (claims based upon aboriginal occupation), 25 U.S.C. 3002(b) (unclaimed remains) and 25 U.S.C. 3006(c)(5) (unaffiliated remains).

---

the area of Native American human remains. See Trope and Echo-hawk, supra, 24 Ariz.St.L.J. at 46-47.

- The Magistrate Judge ignored that the word "indigenous" commonly refers to the "aboriginal peoples" of a given geographic area. See Volume 7 of the Oxford English Dictionary (2nd Ed. 1989).
- The Magistrate Judge ignored legislative history showing that Congress had considered and rejected definitions of "Native American" that would have been in accord with the Judge's interpretation. Compare section 2(1) of S. 1980, 101st Cong., 1st Sess. (1989) which defined "Native American" as "any individual who is an Indian, an Alaska Native, or a Native Hawaiian", Senate Hearing 101-952, supra, at 14, with 25 U.S.C. 3001(9) which defines "Native American" in reference to indigenous tribes, peoples and cultures.
- The Magistrate Judge improperly utilized language in the definition of sacred object referring to "present day adherents", 25 U.S.C. 3001(3)(C), to support his conclusion that NAGPRA only applies to cultural items related to present day tribes and cultures, not recognizing that this language was inserted in the definition as compromise language to address certain concerns of museums and established a stricter standard of repatriation for sacred objects that is an exception to the rule in the rest of the statute that there are no

temporal limitations to the application of the Act, , see Senate Report 101-473, supra, at 7.

For all of these reasons, this Court should find that the term "Native American" covers all human remains and cultural items relating to cultures indigenous to the United States, regardless of whether they relate to current day Indian tribes. That being the case, NAGPRA applies to the remains at issue here.

B. Application of NAGPRA precludes the Court from mandating a remedy that would permit the plaintiffs to study the human remains.

1. The ARPA regulations utilized by the Court are not applicable.

The District Court ordered that plaintiffs be permitted access to the human remains at issue based upon the provisions of 36 C.F.R. Part 79, which, in part, implement the Archeological Resources Protection Act. 217 F.Supp.2d at 1166-1167. Once the conclusion that NAGPRA applies is made, however, the use of these regulations is simply not warranted.

NAGPRA provides that those who excavate sites covered by the Act must obtain an ARPA permit. 25 U.S.C. 3002(c)(1). However, any ARPA permits issued to excavate sites and materials covered by NAGPRA must "be consistent" with NAGPRA. Id. In short, NAGPRA requirements supersede inconsistent ARPA provisions.

For several reasons, the regulations at 36 C.F.R. Part 79 are inconsistent with the purposes of NAGPRA. The use of ARPA in NAGPRA for permitting purposes was an administrative convenience -- it obviated the need to create a new permit system. There is no evidence, however, that Congress's intent was to incorporate ARPA's ownership and access requirements which reflected a wholly different approach to the treatment of human remains -- namely they are viewed as "archeological resources" in ARPA rather than "human remains". See Trope and Echo-Hawk, supra, 24 Ariz.St.L.J. at 42-43.

An analysis of the legislative intent underlying NAGPRA supports this conclusion. Unlike ARPA, there is no evidence in NAGPRA that Congress intended to create or recognize an independent right in any person to gain access to NAGPRA-covered items for scientific study. Indeed, the only provisions in NAGPRA dealing with scientific study are: (1) 25 U.S.C. 3005(b), a narrow provision dealing with ongoing studies of cultural items in the possession of a museum or agency at the time a request for repatriation is made where the items are indispensable to the completion of the study and the outcome of the study would be of major benefit to the United States; and (2) 25 U.S.C. 3003(b)(2), which specifically clarifies that the requirement in the Act that agencies and museums compile inventories identifying the

cultural affiliation of human remains and associated funerary objects "shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects..."). Neither of these provisions authorizes routine access to human remains and cultural items similar to that provided by 36 C.F.R. Part 79, nor do they suggest that this was contemplated as a matter of right by Congress when it enacted NAGPRA.

In addition, not only is NAGPRA a statute that establishes certain standards that, when met, require repatriation, but it is also a statute that specifically does not "limit the authority of any Federal agency...to...return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals...[nor] "delay action on repatriation requests that are pending..." 25 U.S.C. 3009. Indeed, the right of Federal agencies to repatriate has long been recognized prior to the enactment of NAGPRA. [3] An agency may choose to repatriate an item that falls under NAGPRA, regardless of whether it is culturally affiliated, except for two

[3] For example, in the 1979 AIRFA report, it was stated that "[t]he museums of the Departments of the Army, Navy and Air Force are presently reviewing their holding for any object that may be of religious significance to Native American traditional practitioners. Should any such objects be identified, the appropriate Native religious leaders will be notified and invited to discuss its return, long-term loan and/or care and handling." (emphasis added) AIRFA Report, supra, at 78.

very limited circumstances: (1) where there is or would be a valid legal claim by an Indian tribe, Native Hawaiian or lineal descendant under sections 3 or 6 the Act (25 U.S.C. 3002 and 25 U.S.C. 3005); or (2) where it is specifically proscribed. The only section of NAGPRA that might create a cognizable right in some person other an Indian tribe, Native Hawaiian organization or lineal descendant is 25 U.S.C. 3005(b) which deals with specific scientific studies of materials within the possession of a Federal agency or museum that are already ongoing at the time of the repatriation request, where the materials are indispensable for completion of the study, and the study would be of major benefit to the United States. That section does not apply to the circumstances of this case because 25 U.S.C. 3005(b) does not apply to human remains and cultural items subject to the imbedded materials section, 25 U.S.C. 3002. Moreover, this is not a situation where there was an ongoing scientific study taking place at the time the request for repatriation was under consideration.

In short, NAGPRA is a floor for repatriation establishing minimum requirements for mandatory repatriation, not a ceiling on the voluntary repatriation of cultural property within the ownership, possession and control of the federal government. See 25 U.S.C. 3009. If parties such as the plaintiffs are given the right to challenge agency dispositions of such

property in court and demand scientific access, this would undermine this important legislative framework.[4]

As indicated by the government in its brief, there have been several instances where repatriations of unaffiliated remains (not required by NAGPRA) have been ratified by the NAGPRA Review Committee. Aplt. Gov. Br. at 11, footnote 8. This confirms that repatriation of human remains covered by NAGPRA routinely takes place even where the explicit standards of 25 U.S.C. 3002(a) and 3005 have not been met.[5]

The inconsistency of the regulations at 36 C.F.R. Part 79 with NAGPRA is not surprising as they were adopted prior to the enactment of

---

[4] It is worth noting that ARPA allows agencies to issue such permits for excavation, but does not require agencies to issue permits; the authority in ARPA is permissive only. 16 U.S.C. 470cc. Thus, there is no absolute right to study or possess archeological materials imbedded in federal lands even under ARPA. Indeed, it is our understanding that the plaintiffs in the case were not in possession of an ARPA permit.

[5] Such an approach is consistent with the legislative history. Congress believed that NAGPRA would "encourage a continuing dialogue between museums and Indian tribes and Native Hawaiian organizations and...promote greater understanding between the groups", Senate Report 101-473, supra, at 6, presumably dialogues that would sometimes result in agreements on repatriation even where the available information is insufficient to make a formal finding of cultural affiliation. It would have been the antithesis of this goal to allow private plaintiffs without a specific legal interest to use NAGPRA as a sword to prevent repatriations in those cases where an agreement on repatriation has been reached.

NAGPRA[6] and do not in any way reflect the changes to substantive federal law made by NAGPRA. In fact, although 36 C.F.R. Part 79 was promulgated pursuant to authority granted by the National Historic Preservation Act (NHPA), 16 U.S.C. 470a(a)(7), 36 C.F.R. 79.2(a), those regulations have not even been amended to reflect 1992 amendments to the NHPA that referenced the need for federal agencies to comply with NAGPRA requirements. 16 U.S.C. 470h-2(a)(2)(F)(iii). For all of these reasons, it is inappropriate to apply these regulations in this matter once the conclusion has been reached that the human remains at issue fall within NAGPRA's ambit.

2. The cause of action provision in NAGPRA does not give the District Court the authority to order that the plaintiffs be given access to the human remains for scientific study.

25 U.S.C. 3013 empowers the District Court "to issue such orders as may be necessary to enforce the provisions of this Act." There are no provisions of this Act, aside from 25 U.S.C. 3005(b) which as explained above is not applicable here, that authorize scientific study of human remains and cultural items subject to NAGPRA. In fact, as noted, in the case of inventories Congress specifically made clear its intent not to

---

[6] The regulations were adopted in September and October 1990, 55 Fed. Reg. 37630 (1990), 55 Fed Reg. 41639 (1990). NAGPRA became law on November 16, 1990.

authorize new scientific studies even in an instance where agencies and museums were being instructed to determine the cultural affiliation of the remains and objects in their possession. 25 U.S.C. 3003(b)(2). The import of these two sections is that the Act does not contemplate an enforceable right by private parties to access to human remains for study. This leads to the conclusion that a Court order mandating access to NAGPRA human remains for the purposes of scientific study would not be an order "enforcing the provisions of this Act" and thus 25 U.S.C. 3013 does not provide the District Court with the authority to issue such an order.

3. Plaintiffs have no standing to raise a NAGPRA claim.

Article III of the Constitution requires a plaintiff to show that: (1) he or she has personally suffered an injury in fact; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, not merely speculative, that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

"Injury in fact" means "an invasion of a legally protected interest which is (a) concrete and particularized...and (b) 'actual or imminent, not conjectural or hypothetical' [citations omitted and emphasis added]." Id. As already shown, once NAGPRA has been found to apply, plaintiffs have no

legally protected interest in the human remains. Thus, plaintiffs fail to satisfy this element of standing.

Moreover, given that the ARPA regulations are inapposite, the plaintiffs' injuries are not redressable within the meaning of Article III standing. The plaintiffs have no more than a hope that *if* the case is remanded to the agency, the agency *might* decide not to repatriate the remains and the agency *might* approve the scientific study of the remains by the plaintiffs. Even if the cultural affiliation and aboriginal land determinations were overturned, the agency would not be compelled to allow the plaintiffs to study the remains.

An analogy might be drawn to Court cases relating to leasing of federal lands. For example, in Baca v. King, 92 F.3d 1031 (10th Cir. 1996), Mr. Baca challenged a decision by the Bureau of Land Management ("BLM") to exchange certain lands with a Mr. King that Mr. Baca wanted to continue leasing. Like the plaintiffs, Mr. Baca sought to void the administrative action and enjoin the agency. However, the Tenth Circuit said "[n]o court has the power to order the BLM or the Department of Interior to grant Mr. Baca another grazing lease," Id. at 1037. Therefore, Mr. Baca's claim was not redressable and he was without Article III standing to pursue his complaint, id.

The breadth of the cause of action language in 25 U.S.C. 3013 does not change this conclusion. Lujan v. Defenders of Wildlife, supra, involved a similar provision in the Endangered Species Act. The Court ruled that such language did not obviate the need to meet the above standing requirements as they are constitutional in nature. Id. at 578. Accord Idrogo v. United States Army, 18 F.Supp.2d 25, 27-28 (D.D.C. 1998) (In the only other reported case dealing with standing under NAGPRA, the Court held that the broad language of 25 U.S.C. 3013 could not confer standing on individuals that have not suffered any "injury in fact".)

Accordingly, as plaintiffs have no legally protected interest that can be redressed by a Court ruling, they have no standing to raise any claims under NAGPRA.[7]

---

[7] Amici are aware that the standing issue was addressed in an earlier decision of the Magistrate Judge. Bonnichsen v. United States, 969 F.Supp.628, 632-637 (D.Or. 1997). At that time, the Court was evaluating standing based upon multiple legal theories, and did not separately analyze standing in regard to each of the legal bases for the claims that were asserted. Since amici believe that the most substantial substantive issues that have been raised by the claims in this case are governed by NAGPRA, we believe that this Court should revisit the standing issue specifically in regard to NAGPRA. We would note that the Court below did not address the "legally protected interest" concept in its opinion on standing and that its treatment of redressability was rather cursory.

III. The trial court misinterpreted NAGPRA in several other critical respects.

A. Extensive consultation with Indian tribes is a proper interpretation of the law, not evidence of bias.

As indicated, NAGPRA is based upon the special trust relationship between Indian tribes and the Federal Government. See Section I. of this brief.

There are a phalanx of statutes and Executive Orders that mandate that the federal government consult with Indian tribes in discharging its trust obligations. For example, the National Historic Preservation Act (NHPA) requires that federal agencies must "consult with any Indian tribe...that attaches religious and cultural significance to properties...eligible for inclusion in the National Register" in regard to undertakings affecting such properties. 16 U.S.C. 470a(d)(6). The regulations provide specifically that tribes must be treated as consulting parties throughout the many phases of the section 106 NHPA review process. 36 C.F.R. 800.2(c)(2)(ii)(A). Executive Order 13,084 (1998) requires federal agencies to engage in regular and meaningful consultation and collaboration with Indian tribal governments in the development of regulatory practices on Federal matters that significantly or uniquely affect their communities. See also the Federal

Advisory Committee Act, 2 U.S.C. 1534(b) (consultations with tribal governments excluded from FACA restrictions).

Not surprisingly, then, NAGPRA permits, indeed mandates, considerable ongoing consultation with Indian tribes and people. 25 U.S.C. 3002(c)(2) (before excavation, consultation with tribes required); 25 U.S.C. 3003(b)(1)(A) (inventories of human remains and associated funerary objects to be completed in consultation with tribal governments and traditional religious leaders); 25 U.S.C. 3004(b)(1)(B) (same for summaries of other types of cultural items); 25 U.S.C. 3005(d) (museums and federal agencies must share information that they possess regarding an object that may be the subject of repatriation to assist in making a claim). This last section is especially significant since it is an indication that Congress intended museums and federal agencies to work with potential claimants in their efforts to make repatriation claims.

Along the same lines, the regulations spell out an elaborate notice and consultation required in the case of excavations on Federal lands. Before approval or permits are issued, written notice must be sent proposing a time and a place for meetings and consultation. This notice must be sent to:

- Any known lineal descendants;

- Indian tribes and Native Hawaiian organizations that are likely to be culturally affiliated with the items at the site;
- Any Indian tribe which originally occupied the area where the activity is taking place; and
- Any Indian tribe or Native Hawaiian organization that may have a cultural relationship with the items imbedded in the ground.

[43 C.F.R. 10.3(c)(1), 10.5(b)(1) and (2)]

Written notification should be followed by telephone contact if there is no response within 15 days of the notice. 43 C.F.R. 10.3(c)(1).

At the consultation, the Federal officials must provide information stating that additional documentation on cultural affiliation is available if requested. 43 C.F.R. 10.5(c). They must also seek to identify traditional religious leaders, obtain recommendations on how the consultation process should be conducted, and identify the kinds of objects that may be considered unassociated funerary objects, sacred objects and cultural patrimony. 43 C.F.R. 10.5(b)(3), (d) and (g).

Following consultation, Federal agencies are required to develop written action plans including information regarding how tribes will be consulted at the time of excavation, the information to be used to determine ultimate custody of the items and how items will be transferred in

accordance with that determination. 43 C.F.R. 10.5(e). The regulations also encourage the development of comprehensive agreements between Indian tribes, Native Hawaiian organizations and Federal agencies which would "address all Federal agency land management activities that could result in the intentional excavation or inadvertent discovery" of NAGPRA items, and establish processes for consultation and determination of custody, treatment and disposition of such items. 43 C.F.R. 10.5(f).

In short, the NAGPRA process was not designed to be adversarial. Rather, the NAGPRA process was designed to be cooperative with an agency having an obligation to work closely with potential tribal claimants. For that reason, the provisions of the Administrative Procedures Act (APA) that deal with adjudicative processes, 5 U.S.C. 554(a) and 5 U.S.C. 557(d)(1), have no relevance to the NAGPRA process. It was appropriate for the government to consult extensively with the tribes in this matter and there was no similar statutory or other obligation to consult with the plaintiffs. Such "one-sided" consultation is not evidence of bias or improper ex parte contact; instead, it simply means that the government was complying with Congressional intent and its overall trust responsibility.

B. Joint claims for repatriation are legitimate.

Magistrate Judge Jelderks held that joint claims are permissible under NAGPRA only in very limited circumstances and that the tribes in this case could not file a joint claim. 217 F.Supp.2d at 1141-1143. Again, this interpretation would greatly change how NAGPRA has been implemented since its inception. As the tribes pointed out in their brief, almost 49% of all repatriations have been to joint claimants. (Aplt. Tribes Br. at 55-56).

A number of provisions in NAGPRA and the legislative history support the legitimacy of this approach. 25 U.S.C. 3005(e) states that when there are competing claims for any cultural item, a Federal agency or museum may retain such item "until the requesting parties agree upon its disposition..." Moreover, one of the NAGPRA Review Committee's responsibilities under the statute is to facilitate the resolution of disputes that may arise under the Act. 25 U.S.C. 3006(c)(4). As explained by the Senate Indian Committee, "The Committee contemplates that the Review Committee could serve as a useful mediator in resolving a dispute between Indian tribes regarding the ownership, control, or right of possession of human remains or objects. In addition, the Committee intends this section to allow for the negotiation of agreements between Indian tribes that provide for mutually acceptable dispositions for human remains or objects over

which there are competing claims of the right of possession." Senate Report 101-473, supra, at 10. Certainly, it was foreseeable by Congress that one possible outcome of this sort of mediation would be a joint tribal claim. Indeed, the commentary to the regulations clearly addressed this question as follows: "[a]nother commentator recommended changing all references to Indian tribe in this section to 'Indian tribe or tribes' to reflect the fact that Indian tribes may bring joint claims for certain items. The drafters consider the current language to support the possibility of joint claims." 60 Fed. Reg. 62,134, at 62,155.

The two principles of interpretation laid out in section I. of this brief – that this is remedial Indian legislation that should be construed liberally and that the agency interpretation is entitled to deference – further support a finding that joint claims such as were presented in this case are appropriate.

C. A finding that cultural affiliation exists does not require scientific certainty.

The Department of the Interior regulations have accurately captured the legislative intent of the Congress. As they state, cultural affiliation must be "reasonably traced". 43 C.F.R. 10.14(c). "A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely

because of some gaps in the record." 43 C.F.R 10.14(d). "Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, and historical" evidence is all relevant. 43 C.F.R. 10.14(e). "Claimants do not have to establish cultural affiliation with scientific certainty." 43 C.F.R. 10.14(f). All of these regulations are derived directly from the statute and legislative history. 25 U.S.C. 3005(a)(4); House Report 101-877, supra, at 14; Senate Report 101-473, supra, at 8. The House Committee explained that the cultural affiliation requirement "is intended to ensure that the claimant has a reasonable connection with the materials." (emphasis added) House Report 101-877, supra, at 14. Of note, the final definition of "cultural affiliation" was less strict that an earlier version of that definition which had called for "a continuity" of group identity to be "reasonably established". Compare section 3(9) of S. 1980, 101st Cong. 2d. Sess. (1990) as reported by the Senate Committee on Indian Affairs, described in Senate Report 101-473, supra, at 9, with 25 U.S.C. 3001(2).

In evaluating the Magistrate Judge's decision to reverse the Department's finding in this case on cultural affiliation, this Court must apply the appropriate legal standard and (unlike the Magistrate Judge below) pay the requisite deference to the factual findings of the agency. See Lara v.

Secretary of Interior, 820 F.2d 1535, 1538 (9th Cir. 1987) (Court should provide great deference to an agency's interpretation of its own regulations).

D. In making a claim based upon aboriginal occupancy, an Indian Claims Commission finding should suffice.

By definition, 25 U.S.C. 3002(a)(2)(c) was intended to allow repatriations to tribes who could not meet the cultural affiliation standards for particular human remains when they are discovered on tribal aboriginal lands. Of note, there is no similar provision in the sections of the bill dealing with existing agency and museum collections mandating repatriation where cultural affiliation is not present. This divergence is striking. It suggests and reflects that Congress wanted to err on the side of repatriation in the case of those remains not already disturbed. Given Congress' outrage about the history of the desecration of Indian graves, see, e.g., House Hearing 101-62, supra, at 46-47 (statement of Rep. Charles Bennett), this makes sense.

Earlier versions of NAGPRA contained a provision allowing for tribal claims based upon aboriginal land occupancy where cultural affiliation could not be established. Aboriginal lands were not defined, the assumption being that aboriginal occupancy would be established through any relevant evidence. See Section 3(a)(2)(C) of H.R. 5237, 101st Cong. 2d. Sess. (1990), House Hearing 101-62, supra, at 19. Because the scientific

community had concerns about open-ended aboriginal lands provisions, however, see, e.g., House Hearing 101-62, supra, at 137, the final bill linked the land claim provision to determinations of the Indian Claims Commission, presumably to provide more certainty as to which aboriginal lands would be subject to the ownership provision in 25 U.S.C. 3002 by making reference to the decisions of a "neutral" third party.

There is nothing in the legislative history that specifically addresses those circumstances where a land description is not actually included in the judgment. However, the House Report explains that the provision is meant to establish ownership or control in "the tribe or Native Hawaiian organization which is recognized by the Indian Claims Commission as having aboriginally occupied the area." House Report 101-877, supra, at 21. Canons of Indian statutory construction (and the limited legislative history just cited) would suggest that where there are claims commission findings in a case – in some document other than the judgment itself – that this technicality should not serve to defeat the claim. The Interior Department in its decision found that, "disposition under § 3002(a)(2)(C)(1) may not be precluded when an ICC final judgment did not specifically delineate aboriginal territory due to a voluntary settlement agreement. If the ICC's findings of fact and opinions entered prior to the compromise settlement

clearly identified an area as being the joint or exclusive aboriginal territory of a tribe, this evidence is sufficient to establish aboriginal territory for purposes of section 3002(a)(2)(C)(1)." This would seem to be a reasonable interpretation of this remedial statute and should have been left undisturbed.

CONCLUSION

For all of the reasons stated above, the decision below was erroneous as a matter of law and should be vacated.

DATED this 25th day of March, 2003.

Respectfully submitted,

ASSOCIATION ON AMERICAN INDIAN AFFAIRS
MORNING STAR INSTITUTE

By: Walter Echo-Hawk jt

WALTER ECHO-HAWK
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JACK F. TROPE, Executive Director
Association on American Indian Affairs
966 Hungerford Drive, Suite 12B
Rockville, MD 20850
(240) 314-7155

Counsel for the Association on American Indian Affairs and the Morning Star Institute

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief is in compliance with Fed. R. App. P. 29(d), 32(a)(5), and 32(a)(7) since it is written in a proportionally spaced typeface of 14 points and contains 6,437 words.

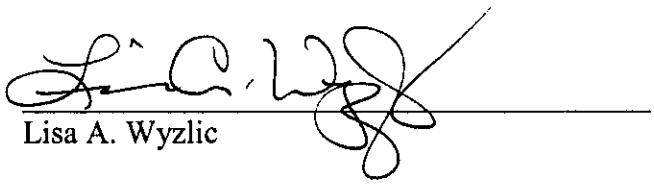
Jack F. Trope

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served by U.S. priority mail the foregoing Brief of the amici curiae Association on American Indian Affairs and Morning Star Institute this 25th day of March, 2003, to the following:

Paula Barran BARRAN & LIEBMAN 601 SW Second Ave., Suite 2300 Portland, OR 97204-3159	Dan Hester Fredericks Pelzyger Hester & White LLC 1075 South Boulder Rd., Ste. 305 Louisville, CO 80027
David J. Cummings Nez Perce Office of Legal Counsel P.O. Box 305 Lapwai, ID 83540-0305	Michael J. Fanelli Covington & Burling 1201 Pennsylvania Ave., NW Washington, DC 20004-2401
Naomi Stacy Confederated Tribes of the Umatilla Indian Reservation P.O. Box 638 Pendleton, OR 97801	Melissa T. Campobasso Office of Reservation Attorney Colville Confederated Tribes P.O. Box 150 Nespelem, WA 99155-0150
Thomas A. Zeilman Yakama Nation Office of Legal Counsel Fort Road, P.O. Box 151 Toppenish, WA 98948	Tim Weaver Cockrill & Weaver, PS 316 N. Third St., P.O. Box 487 Yakima, WA 98907
Mr. Joseph P. Siofele 12691 Sunnymeadows Drive Moreno Valley, CA 92553	Alan Schneider 1437 SW Columbia St., Ste. 200 Portland, OR 97201
Yvonne T. Knight Walter Echo-Hawk Native American Rights Fund 1506 Broadway Boulder, CO 80302-6296	Carl V. Ullman Klamath Tribes Box 957 Chiloquin, OR 97624-0957

Thomas Schlosser Rob Roy Smith Confederated Tribes of the Colville Reservation MSHJM 801 2nd Ave., Suite 115 Seattle, WA 98104	David F. Shuey Ellen J. Durkee Attorneys, Environment & Natural Resources Division Department of Justice P.O. Box 23795 L'Enfant Plaza Station Washington, DC 20026
Michael W. Mosman United States Attorney Timothy W. Simmons Assistant United States Attorney Portland, OR 97204-2902	Audie Huber Confederated Tribes of the Umatilla Indian Reservation P.O. Box 638 Pendleton, OR 97801



Lisa A. Wyzlic