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CASE DISCUSSION

Bonnichsen v. United States: Time, Place, and the Search for Identity

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INTRODUCTION

On its surface, *Bonnichsen v. United States*[1] is an administrative law case, reviewing a decision by the Secretary of the Interior regarding the appropriate reach of a specific set of legislative and regulatory rules. As such, Judge Gould, writing for a panel of the Ninth Circuit of the United States Court of Appeals (Ninth Circuit) decided that the secretary's office had overstepped its bounds; in short, its interpretation of the rules in question was not reasonable.[2] But underneath the legal categories, *Bonnichsen* is a much more complicated and politically charged case. It is about competing conceptions of history and spirituality. It is about sovereignty (although that word is not uttered once in the decision, aside from reciting a definition of Native Hawaiians) and the clash of cultures. It is less about the standards for decision making and more about who the appropriate decision makers are. It is a case about a man who lived 9,000 years ago and about how today we should understand his cultural identity.

Below the administrative law veneer, *Bonnichsen* is about the identity of *Kennewick Man* or *Ancient One*,[3] a 9,000-year-old, nearly complete skeleton found in the Columbia River Basin almost a decade ago. The primary issue for the secretary, and subsequently the federal courts, was whether the remains fell within the Native American Graves Protection and Repatriation Act of 1990[4] (NAGPRA) that, among many other things, requires that ownership and control of Native American skeletal remains found on federal land be granted to the Indian tribe with the "closest cultural affiliation."[5] The secretary decided that Kennewick Man fell within NAGPRA; the federal courts, at the urging of a collection of scientists headed by Robson Bonnichsen,[6] all "experts in their respective fields," decided that it did not. The following case note explores the *Bonnichsen* decision. The first section covers the basic details of *Bonnichsen*—the essential facts and its lengthy and somewhat contentious legal history. The second section looks more closely at the legislation at the heart of the case, the Native American Graves Protection and Repatriation Act. The final

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section focuses on the use of time and place to determine affiliation and what I consider to be the most serious flaw of the decision—the Court's failure to understand (or at least to openly acknowledge) the case as being about two very different but *equally* ambiguous and culturally determined visions of the past.

As an initial matter, I feel it is important to note that I don't have strong views about what should have been the appropriate outcome of this dispute. The following case note is critical of the decision, but my argument rests less with the outcome and more with the arguments that were utilized to reach the final outcome. I read the case with an open mind, only to find myself unconvinced by the legal reasoning and dissatisfied with the weak justifications provided by the Court.

BONNICHSEN V. UNITED STATES

The Facts

The facts of *Bonnichsen* are by now well known, popularized by a wide array of newspaper write-ups, lengthy expositions in the *New Yorker*, *Time*, and *Newsweek* magazines and a PBS special, not to mention a long list of scholarly articles.[7] In July of 1996, a group of teenagers discovered skeletal remains on federal land in the Columbia River Basin near the small town of Kennewick, Washington. Shortly after and pursuant to the Archaeological Resources Protection Act (ARPA) of 1979, the remains were turned over to an anthropologist, Dr. James Chatters. An initial examination of the facial bone structure led Chatters and others to believe that the skeleton was that of an early European settler, but the discovery of a small stone projectile point embedded in the hip bone of the skeleton suggested that the remains were much older. A radiocarbon analysis estimated the age of the skeleton to be between 8,340- and 9,200-years old.

Shortly thereafter and just before the remains were to be sent to the Smithsonian for further analysis, the Native American tribes from the Columbia River area demanded that they be handed over for reburial pursuant to NAGPRA. The Army Corps of Engineers (Corps) agreed and by mid-September had filed an official *Notice of Intent to Repatriate Human Remains* pursuant to the requirements laid out in NAGPRA. At the same time, the Corps ordered an immediate stop to all scientific study of the remains. A group of scientists, now led by Robson Bonnichsen, director for the Study of First Americans at Oregon State University, requested access to the skeleton for ongoing studies but were refused and finally turned to the courts in October 1996. Thus began the litigation that eventually led to the decision in *Bonnichsen*.[8]

The Litigation

In the first opinion issued regarding the disposition of the Kennewick Man, the United States District Court for the District of Oregon (a Magistrate operating

under the District Court) rejected the Corps' motion for summary judgment, threw out the Corps' initial decision regarding the remains, and remanded the matter back to the Corps. That decision was in June 1997. In March 1998, the Corps entered into an agreement with the Secretary of the Interior assigning responsibility to the secretary for determining whether the remains were Native American under NAGPRA.

After extensive study, the secretary's experts concluded that the remains were "unlike those of any known present-day population, American Indian or otherwise." [9] But they also stated that this did not rule out the possibility of a biological/ancestral connection to modern American Indians. Based on this information, oral histories, the age of the remains, and the geographic location of their discovery, the secretary announced on January 13, 2000, that the remains were Native American as defined by NAGPRA. Subsequently, the secretary also determined that they were culturally affiliated with the present-day Indian tribes and awarded the Kennewick Man remains to a coalition of tribal claimants.[10]

The scientists filed an amended complaint challenging the secretary's decision and seeking further study of the remains. The District Court again ruled in their favor, finding that the "secretary did not articulate a cogent rationale that supports his finding of cultural affiliation." [11] In particular, Judge Jelderks objected to the secretary's reliance on a geographic connection and the oral traditions of the tribal claimants. Whereas the oral traditions provided by the tribal claimants were considered an important source of evidence by the secretary, in particular stories often corresponding to known geological events, and the general absence of migration stories, Judge Jelderks decided they did not hold up against the *arbitrary and capricious* standard—the applicable standard in reviewing an agency decision. In short, the secretary had no rational basis for his decision. The secretary and the tribal claimants appealed.

The Decision

Judge Gould began with two standing issues. The first of these issues was quickly dealt with and is not worth mentioning here, but the second is worth a brief accounting. The tribal claimants had argued that the plaintiffs did not have standing because they "do not seek to invoke interests within the 'zone of interest' that NAGPRA protects." [12] In other words, NAGPRA was passed to protect the interests of Native Americans, and so the plaintiffs and their claims fall outside NAGPRA. Furthermore, the plaintiffs were seeking to prevent rather than compel repatriation under NAGPRA, a cause of action that the tribal claimants argued was not contemplated. Drawing on the broad language in NAGPRA's enforcement and jurisdiction provision, Judge Gould rejected the limited jurisdiction arguments, finding that the words, "any action" brought by "any person alleging a violation" were sufficient to encompass the plaintiffs and their cause of action.

The remainder of the decision is devoted to a review of the secretary's decision. As stated at the outset, the review is governed by standards established under the Administrative Procedures Act (APA), which permit a Court to set aside an agency decision if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[13] The focus of the Court's analysis was the secretary's decision that the Kennewick Man remains are Native American as defined under NAGPRA. The secretary's decision can be divided into three areas of analysis: the scientific information, oral histories, and legislative intent.

The scientific evidence regarding the origins and cultural affiliations of the Kennewick Man was consistently ambiguous. Dr. Kenneth Ames, one of the secretary's experts, stated that, "the empirical gaps in the record preclude establishing cultural continuities or discontinuities particularly before about 5000 B.C." In other words, there are no clear lines that can be drawn between Kennewick Man and any current populations. When coupled with oral histories "highly suggestive of long-term establishment of the present-day tribes"[14] and lacking in any migration stories, the secretary seemed comfortable resolving this ambiguity in favor of the tribal claimants.

All of this, according to the secretary, is consistent with NAGPRA, given that NAGPRA does not explicitly require proof of a connection with a current tribal group. The definition provided by NAGPRA—human remains are Native American if they are "of, or relating to, a tribe, people, or culture that is indigenous to the United States" (U.S.C. § 3001(9))—can, according to the secretary, be interpreted as specifying current or past "tribes, peoples, and cultures." The secretary found support for this interpretation in the fact that NAGPRA sets out a two-step inquiry for the return of remains. First, one must determine whether remains are Native American, and only then does one move to a more specific cultural-affiliation analysis. If the definition of Native American requires proof of a connection with a specific present-day group, the cultural-affiliation analysis, according to the secretary, becomes redundant. If the language of the definition leaves any remaining ambiguity, the secretary cites the "Indian canon of construction" requiring "doubtful expressions" in legislation enacted for the benefit of Native Americans to be interpreted in their favor.[15]

In short, in the absence of any definitive information ruling out the possibility of Native American connections, the secretary decided to err in favor of the tribal claimants, using oral histories and geography (the location is the traditional land of the tribal claimants) to tip the balance. Given the uncertainties, a contrary decision might have been reasonable, but the secretary's decision in favor of the tribal claimants appears, given the circumstances, to have been equally reasonable. The matter could have gone either way.

The Court's objection to the secretary's decision begins with his interpretation of NAGPRA. Whereas the secretary read expansively the definition of Native American remains to cover remains associated with indigenous peoples, whether past or present, Judge Gould interpreted the phrase "*that is* indigenous to the United

States" to limit the definition to remains associated with a "*presently existing* tribe."[16] Judge Gould writes that this meaning of the definition is so clear, so unambiguous, that the absence of the present tense *that is* in the definition of Native American found in the regulations under NAGPRA is not given any weight.[17] The clarity in the definition is, according to Judge Gould, so apparent that it was not necessary to fall back on the Indian canon of construction partially relied upon by the secretary. In fact, the definition is so unambiguous that no argument raised by the secretary or the tribal claimants was capable of raising even a hint of doubt—human remains fall under NAGPRA only if it can be proven that they are associated with a presently existing tribe.

The Court finds support for this interpretation in the judge's understanding of the purpose and intent of the human remains provisions under NAGPRA. According to Judge Gould, NAGPRA was passed with the intent of respecting "the burial traditions of modern-day American Indians. . . . NAGPRA was intended to benefit modern American Indians by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors' graves and the study or display of their ancestors' remains."[18] For the Court, NAGPRA is focused on the interests of modern Native Americans and those identifiably associated with them.

On top of the plain meaning and intent arguments, Judge Gould layers one more idea, that, for lack of a better label, I will call his commonsense argument. He argues that the logical conclusion of the secretary's argument is that any pre-Columbian remains found within the United States would have to be classified as Native American. This, he argues, clearly was not the intention of Congress and would indeed be a patently absurd result: "the government's unrestricted interpretation based solely on geography, calling any ancient remains found in the United States Native American if they predate the arrival of Europeans has no principle of limitation beyond geography. This does not appear to be what Congress had in mind. . . ."[19]

So Judge Gould, writing for the Court, saw things very differently from the secretary and the tribal claimants. In his judgment, NAGPRA demands a more definitive connection, a "significant relationship" between human remains and "presently existing" Native Americans. Human remains with uncertain or ambiguous origins automatically fall outside the definitions set out in NAGPRA. In short, the Court's position wasn't just that the plaintiffs had a stronger argument; they had the *only* reasonable argument.

Once NAGPRA was removed from the analysis, the case was remanded so that the District Court could determine an appropriate plan of scientific study under ARPA. At present, there is still no approved plan of study, although it appears that the scientists are close to having this settled.[20] The tribal claimants continue to argue that they should have a voice in the process.[21] This is, of course, a much broader issue than just the Kennewick Man. Federal agencies and federally funded institutions falling under the jurisdiction of NAGPRA have large numbers of "culturally unidentifiable" remains, and Native American communities are uncertain

and suspicious about what will happen to them in the wake of the Kennewick Man decision. They have voiced strong opposition to a new set of regulations for the "disposition of culturally unidentifiable human remains." [22]

THE MEANING OF NAGPRA

The Kennewick Man decision is a double blow to Native Americans. First, the Court made it clear that the interests being served by NAGPRA are not just those of Native Americans, but rather include anyone or any institution that chooses to argue a case under NAGPRA's provisions. Second, the Court made it much harder for Native Americans to claim ancient remains by requiring scientific evidence (oral history does not appear to be sufficiently accurate—Judge Gould labeled it "unreliable" [23]) of a connection to a presently existing Native American group. Both aspects marginalize Native American claims and perspectives; the first by limiting their voice within NAGPRA and the second by narrowing the application of NAGPRA altogether.

Native American communities are worried about the Kennewick Man decision and were eager in the remaining days of the 108th Congress to support a proposed amendment to NAGPRA, a simple two-word addition to the definition of Native American so that it would refer to "a tribe, people or culture that is *or was* indigenous to the United States." [24] The bill, S.2843, did not make it through Congress before the end of the last session, and its sponsor Senator Ben Nighthorse Campbell (R-Colorado), chair of the Senate Indian Affairs Committee, has since retired. To my knowledge, no one has reintroduced the bill.

There are many issues that arise from this case, but I would like to narrow my comments to two issues. The first is whether this marginalization of Native American perspectives is in keeping with the original understanding or intent of NAGPRA. The second is whether time and geography (or place) are relevant considerations in determining cultural affiliation.

NAGPRA as Human Rights Legislation

NAGPRA was quite clearly conceived as human rights legislation.[25] It was designed to rectify the violations of the "civil rights of America's first citizens." Congress pursued this human rights initiative legislatively by encouraging a dialogue between federally funded institutions, specifically museums, and Native American tribes. As stated by Senator Inouye, "[f]or museums and institutions which have consistently ignored the requests of Native Americans, this legislation will give Native Americans greater ability to negotiate." [26] As human rights legislation, NAGPRA covers much more than just human remains, it covers a range of things typically understood as being associated with cultural rights, all falling under the label *cultural items*: human remains, associated and unassociated funerary objects,

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sacred objects, and cultural patrimony. Each category has a separate process for identification and repatriation.

The scope of NAGPRA is truly significant, and this in and of itself made it historic legislation. But what is most unique and impressive about NAGPRA is that it expressly chose to privilege the views of Native Americans. For example, what falls within the category of cultural patrimony is left up to the "Native American group or culture"—it is what the group in question claims is of "ongoing historical, traditional, or cultural importance" and what it considers to be "inalienable." (U.S.C. § 3001(3)(D)) This definition depends on Indian, not common law, property institutions[27] as well as Indian claims of cultural significance. It seems utterly uncontroversial to allow Native American tribes to define what is significant to them in their own terms, but prior to NAGPRA, Native Americans did not have any federally recognized right to control representations of their identities as expressed in their material culture, and claims with respect to their cultural heritage were routinely ignored.[28] It is this aspect of NAGPRA, more so than the scope of its application, that marks it as significant human rights legislation.

The same shift is evident in the provisions dealing with human remains. An Indian tribe can demand the return of human remains if it can prove that they are culturally affiliated. In an effort to prove cultural affiliation, claimants can rely on "geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral traditional, historical, or other relevant information or expert opinion." (U.S.C. § 3005(a)(4)). As with the provisions relating to cultural patrimony, these provisions clearly recognize the value of Indian perspectives and the importance of such perspectives in resolving disputes over human remains.[29] Whereas Judge Gould found the oral histories of the tribal claimants to be inherently unreliable, NAGPRA expressly specified that such testimony should be given the same evidentiary value as traditional scientific or historical evidence.

Congress even recognized the possibility of a Kennewick Man situation arising and specified that a failure of the scientific record to fully support tribal claims should not necessarily defeat the claims in question.

> [I]t may be extremely difficult, in many instances, for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, 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.[30]

While this statement does not on its own merit decide the disposition of the Kennewick Man, it does indicate that scientific and historic information, or the lack thereof, should not defeat tribal claims. At the very least, reliance by the secretary upon oral history as part of the "overall evaluation of the totality of the circumstances" should rise to the level of reasonable, given the express intentions of Congress.

In short, one of the most important aspects of NAGPRA, one that is a necessary component of its status as human rights legislation, is that it gives Native Americans the freedom to construct their own claims. It gives them a voice in matters that pertain to the well being of their cultures rather than leaving questions about cultural identity in the hands of others. It creates new space for collective and cultural agency, and as such, it is as much about sovereignty as it is about the disposition of cultural heritage and human remains. It is this aspect of NAGPRA that the Court in *Bonnichsen* failed to recognize. This failure was not in the fact that the tribal claimants lost but in the failure of the Court to show any respect for the alternative perspective of the tribal claimants as voiced through their oral histories.

It is worth noting that this interpretation of NAGPRA (its focus on increasing the profile of Native American perspectives) has also been praised by some individuals and groups in the museum and scientific communities. These groups are of the view that NAGPRA encourages a productive partnership with Native American communities, quelling the hostility that has marked their relationship in the past. Giving Native Americans a stronger voice in the process is, according to this view, better for everyone. A recent statement by the World Archaeological Congress (WAC) in support of Senator Campbell's proposed amendment to NAGPRA is a good example of this attitude. After recognizing that the proposed amendment is "consistent with the spirit of the original NAGPRA legislation and is simple good sense," Dr. Claire Smith, President of the WAC went on to state:

> What really concerns me is the reaction to this amendment from some of the scientists involved in the Kennewick Man case. That kind of hostility to the legitimate concerns of Native peoples causes mistrust and is very damaging to our discipline. In contrast, international experience shows that research on human remains increases when indigenous peoples and archaeologists work together cooperatively.[31]

The Relevance of Oral Tradition

It is important to recognize that the Court's comments extended to oral tradition in general, not the specific stories relied upon in the Kennewick Man case. Judge Gould stated, "because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins, we do not think that the oral traditions . . . were adequate to show the required significant relationship."[32] This is a commonly held opinion of oral tradition,[33] but it may be overstated. John Borrows writes:

> The similarities between oral and written history are legion. A significant portion of the documentary record started its life as oral history. This means that each format can encounter similar challenges in verification and authentication. . . Each format may also be subject to substantial revision, permutation and change. . . The diversity of interpretation about these events is not necessarily a result of the way in which they were trans-

> mitted, but instead reflects the fact that there are different interpreters of history who have different interests in reproduction.[34]

The point of this is not to show how Native American perspectives voiced through oral traditions live up to the standards of conventional written historical analysis but rather to point out that "all historical observation and interpretation, oral and written, is colored by differential life experience and training."[35] In its embrace of oral tradition and Native American perspectives, NAGPRA was a move toward recognizing the equal status of such perspectives. The same process is evident in other jurisdictions, most notably in Canada, where in *Delgamuukw v. British Columbia*, the Supreme Court stated that oral histories should be accepted on an "equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."[36] It is this process, this acceptance of Native perspectives that made NAGPRA so promising and that has been so seriously undermined by the *Bonnichsen* decision.

In his book *Who Owns Native Culture?* Michael Brown writes convincingly about the need to find mechanisms to resolve cultural disputes that rely on open discussion and negotiation, rather than rights and property concepts. In fact, he criticizes the tribal claimants and Indian activists in the Kennewick Man case for their statements rejecting the relevance of any other histories. I agree with Brown when he states that "[t]he reality of pluralist democracy is that groups living together must be free to talk about one another's history and culture," but this is a two-way street.[37] NAGPRA tried to ensure that histories, in particular oral histories, from Indian perspectives would be shared and listened to. The reality is that the American legal system is not interested in listening—the oral histories of Native Americans are "stories that legal ears [cannot] hear."[38] The Court in *Bonnichsen* rejected NAGPRA's attempt to change this, preferring instead to continue the privileged status of the written and documented histories of others.

NAGPRA as Federal Indian Legislation

Finally, the other aspect of NAGPRA that the Court in *Bonnichsen* fails to acknowledge is that it is federal Indian legislation. It falls within that part of the U.S. Code, Title 25, that deals with the multifaceted trust relationship between the federal government and Indian tribes. This trust relationship has "given rise to the principle that enactments dealing with Indian affairs are to be liberally construed for the benefit of Indian people and tribes."[39] As previously noted, the Court recognized the existence of such a principle but found it to be inapplicable, because the Court had already decided that NAGPRA itself was inapplicable. In other words, Judge Gould ruled out an application of the principle when it seemed most relevant—at the stage of determining whether NAGPRA applied. The conflicting definitions of Native American found in the legislation and in the regulations, not to mention the different ways in which the legislative definition could be interpreted, presented an appropriate opportunity to apply the interpretive principles

advanced by the secretary. But in deciding that NAGPRA's definition was unambiguous, despite the conflicts just mentioned, the Court effectively foreclosed any possibility of viewing the matter as one relating to Indian affairs.

The Court's refusal to recognize this aspect of NAGPRA is further evinced by its expansive notion of NAGPRA's "zone of interests." NAGPRA is not, according to Judge Gould's opinion, limited to protecting the interests of Native Americans: "The Tribal Claimants urge that Congress enacted NAGPRA only with the interests of American Indians in mind, so only American Indians or Indian tribes can file suit alleging violations of NAGPRA. We reject this argument."[40] The Court's interpretation of the expansive language in NAGPRA seems technically correct: "any action brought by any person" is broad language. Having said that, it is also hard to escape the fact that NAGPRA was passed with Native American interests in mind. All of the legislative history indicates that this was the clear intention of the legislation.[41] Reconciling the broad language with the clear intention of the legislation is not easy, but the Court seemed uninterested in doing so, preferring instead to ignore the clear intent. The somewhat strange reversal of fortunes brought about by the Court's interpretation of jurisdiction and standing is made all the more perverse by the fact that the standing of the coalition of tribal claimants was called into question, whereas the scientists were described in glowing and respectful terms.[42] These are not easy issues with clear-cut answers, but it is disappointing that the Court did not think it relevant to consider the broader purposes and intent of NAGPRA as federal Indian law in trying to resolve them.

When one adds up these various elements of the Court's decision—its rejection of oral histories, its refusal to apply Indian canons of construction, its questioning of the status of the tribal claimants, its assertion that NAGPRA's provisions go beyond protecting American Indian interests—it is apparent that the Court has a conception of NAGPRA that eviscerates NAGPRA's fundamental intent as human rights legislation, designed to recognize and legitimate Native American perspectives on matters that are of fundamental importance to them. The human rights intent of NAGPRA does not mean tribal claims should not be scrutinized—NAGPRA did not establish absolute rights for Native Americans over all disputed objects and remains. But it did recognize the value of their collective voices and the harm that has been done to Native American communities from centuries of ignoring them. The secretary understood this, and so he engaged in a serious analysis weighing all the evidence, including that presented by the tribal claimants, and then resolved a set of ambiguous facts in their favor—an approach that hardly seems unreasonable given the explicit language and intent of NAGPRA.

TIME AND PLACE

It is clear from a glance at the extensive list of studies used to analyze the nature and identity of the Kennewick Man remains that the secretary did not make his

decision simply based on the age of the remains and the location of their discovery. The thoroughness of the secretary's investigation is impressive.[43] But would there be something absurd or unreasonable should he have relied simply on the age and geographical location of the remains? Is it so absurd to give the remains to a Native American tribe based almost exclusively on the place of discovery (traditional tribal lands), the age of remains (pre-Columbian), and backed by stories that provide some context for entitlement?

In an outright contest between competing groups, each arguing that they have the closest cultural attachment, the tribal claimants have as strong a claim as any to the remains. So the secretary's decision is absurd only if we view the scientists' claim as culturally neutral, somehow rising above competing cultural claims. This is indeed how the Court viewed the competing claims. The tribal claimants were claiming the remains for themselves based on their unique cultural perspective; the scientists were claiming the remains based on objective arguments in the interest of the pursuit of knowledge and to the benefit of all mankind. When understood in this way, it is no small wonder that the scientists won. In a legal contest between the hard claims of science and the soft claims of culture, culture will invariably lose.

This understanding of science is, of course, not without its critics. As Rebecca Tsosie wrote, "[d]espite allegations to the contrary, the discipline of science, like that of history, is not neutral."[44] But even if we accept this understanding of science, the science-vs.-culture construct is not readily applicable to this case. Our current scientific knowledge of the time when Kennewick Man was alive is, as everyone seems to accept, very sketchy. There is no competing scientifically acceptable or verifiable story—there is just the *expectation* that science might tell us something different. There is simply a *cultural belief* in the power and persuasiveness of science to sort things out. When viewed in this light—as a contest between two competing cultural conceptions of history and the past, one that puts trust in science, the other in tradition—is it so absurd to simply rely on time and place to resolve disputes?

Time and place are concepts that are forever being used to terminate aboriginal claims. Nowhere is this more evident than in the recent articulation of Native Title from the Australian High Court. In the case of *Yorta Yorta v. Victoria*, the Australian High Court limited the definition of tradition in the Native Titles Act to only those traditions that can be traced back to precolonialism. Native Title does not exist unless the current claims are founded on traditions or rules that *reach back to a time* before colonization.[45] There must be continuity between past and current practices to support Native Title. Here the passage of time (and arguably the place, given the central location of the land in question) worked against the aboriginal claims. A similar approach has been articulated in Canadian cases—the definition of aboriginal rights is limited to practices that were "integral to the distinctive culture" of the aboriginal community prior to European contact. In the United States, *Johnson v. M'Intosh* established that rights to traditional lands were readily terminated *after* conquest.[46]

The marker on the timeline dividing pre- and post-European settlement has been used to effectively terminate most Native claims. Aboriginal identity has been defined by the courts as a historical artifact, something that existed in the past, in the time before European contact. Aboriginal peoples could take some solace in the fact that whereas the strength of their claims are perceived to have weakened with the passage of time, claims clearly traceable to precolonial times were more likely to succeed—a presumption built into NAGPRA. *Bonnichsen* undermines this one temporal advantage. The precolonial period on the timeline is no longer presumed to be the exclusive domain of Native American culture, despite the absence of any persuasive alternative story about the existence of other unrelated cultures.

CONCLUSION

The secretary and the Department of the Interior did not take lightly their responsibility to determine whether the Kennewick Man fell within or outside NAGPRA. The official Kennewick Man website for the National Park Service states, "Whether one agrees or disagrees with the various decisions and positions as this case works its way through the federal court system, the thoroughness and objectivity of the government scientific investigations, the expertise of the investigating scientists, and the value of the information obtained should not be ignored."[47] Ironically, a comparison of the scientific study actually done by the Department of the Interior with the study proposed by the plaintiffs in the case reveals remarkable similarity. There is very little being proposed by the scientists that has not already been done by the Department of the Interior.[48] With this in mind, it is hard to see how the secretary's interpretation of NAGPRA and of the scientific information did not at least rise to the level of reasonableness.

I began this comment by confessing ambivalence with regard to the ultimate outcome of this case. My dissatisfaction with the decision in *Bonnichsen* rests more with the reasoning and less with the outcome. To be fair to the Court, there was no way to overturn the decision of the secretary without finding it patently unreasonable. It was not within the judge's discretion to declare the position of the secretary and the tribal claimants reasonable but then side with the scientists on the basis that they had the better or more reasonable claim. Under the APA, judge Gould was restricted to upholding the secretary's decision or finding it "arbitrary and capricious"—there was nothing in between. But with this in mind, perhaps some deference was in order.

ENDNOTES

1. Bonnichsen et al. v. United States, 357 F.3d 962–979 (9th Cir. 2004); *amended in 367* F.3d 864 (9th Cir. 2004); *on appeal from* Bonnichsen et al. v. United States, 217 F. Supp. 2d 1116 (D.Or. 2002). Earlier decision Bonnichsen v. United States, 969 F. Supp. 614 (D.Or. 1997).

2. Bonnichsen et al. v. United States, 357 F.3d, 979 ("the record does not permit the secretary to conclude *reasonably* that Kennewick Man shares special features with presently existing indigenous tribes, people, or cultures.")

3. This is the name preferred by the tribal claimants. For ease of reference, I will use the more popularly known title, Kennewick Man.

4. 25 U.S.C. §§ 3001–3013 (1994).

5. 25 U.S.C. § 3002(a)

6. It should be noted that Robson Bonnichsen died on December 24, 2004.

7. See also Ackerman, "The Meaning of 'Cultural Affiliation,' " 359; Tsosie, "Privileging Claims to the Past," 583; Seidemann, "Time for a Change?" 149.

8. Tsosie, "Privileging Claims to the Past."

9. Bonnichsen et al. v. United States, 357 F.3d, 969.

10. The Tribal Claimants are the Confederated Tribes and Bands of the Yakima Indian Nation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes of the Colville Reservation. (Bonnichsen et al. v. United States, 357 F.3d, 966, fn. 2)

11. Bonnichsen et al. v. United States, 217 F. Supp. 2d, 1155. Judge Jelderks also commented extensively on the procedural irregularities on the part of the secretary and the Department of the Interior, but did not decide the case on these grounds: "I need not decide whether this unfairness in itself is sufficient to set aside the secretary's decision. As discussed later, the secretary's decision must be set aside on substantive grounds. . ." (1134).

12. Bonnichsen et al. v. United States, 357 F.3d, 972.

13. 5 U.S.C. § 706(2)(A).

14. Bonnichsen et al. v. United States, 357 F.3d, 979.

15. Bonnichsen et al. v. United States, 357 F.3d, 974–5, and fn.18.

16. Bonnichsen et al. v. United States, 357 F.3d, 972.

17. Bonnichsen et al. v. United States, 357 F.3d, 976.

18. Bonnichsen et al. v. United States, 357 F.3d, 974.

19. Bonnichsen et al. v. United States, 357 F.3d, 975 fn.17.

20. King, "Kennewick Man Study Outlined," *Tri-City Herald*, February 17, 2005.

21. King, "Tribes Appeal Bone Ruling," *Tri-City Herald*, February 16, 2005.

22. See also 43 CFR 10.11, Disposition of Culturally Unidentifiable Human Remains. "This section of the regulations will establish a process for the disposition of culturally unidentifiable human remains that are in museum and Federal agency collections. Key issues to be addressed include determining who may make a claim for culturally unidentifiable human remains, under what circumstances transfer may take place, and reporting requirements. A draft of this regulation is currently under review within the Department of the Interior." ⟨http://www.cr.nps.gov/nagpra/MANDATES/Reserved_Sections.htm⟩ For extensive discussion of the proposed regulations along with their text see ⟨http://www.nathpo.org/News/NAGPRA/NPS-Remains.html⟩

23. Bonnichsen et al. v. United States, 357 F.3d, 979.

24. Gugliotta. "Bill Would Redefine Indian Tribe; Kennewick Man's Fate in the Balance," *Washington Post*, November 17, 2004. For a full version of Senate Bill 2843, ⟨http://thomas.loc.gov/cgi-bin/query/z?c108:S.2843⟩

25. Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act," 59–60; Harjo, "Native Peoples' Cultural and Human Rights."

26. Senator Inouye, statement in 136 Cong. Rec. S17174–17175 (October 26, 1990).

27. Although federal institutions are entitled to assert common law or constitutional property defenses, as set out in the definition of "right of possession." § 3001(13).

28. See also Harding, "Justifying the Repatriation of Native American Cultural Property;" Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act." One notable exception to this was the successful repatriation of Zuni War Gods.

29. See also Tsosie, "Privileging Claims to the Past."

30. H. R. Rep. No 877, 101st Cong., 2d Sess. 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367–4392.
31. "World Archaeological Congress Supports NAGPRA Amendment," October 20, 2004, ⟨http://ehlt.flinders.edu.au/wac/site/news_pres.php⟩
32. Bonnichsen et al. v. United States, 357 F.3d, 979.
33. See also Borrows, "Listening for a Change," 5–1; Canada, *Report of the Royal Commission on Aboriginal Peoples*.
34. Borrows, "Listening for a Change," 15–17.
35. Borrows, "Listening for a Change," 17.
36. Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010, para. 87. Although *Delgamuukw's* acceptance of oral histories made it a landmark decision in the area of aboriginal rights, the use of such evidence is still very difficult and it is not clear that it has been particularly effective in fully integrating aboriginal perspectives. Some commentators have questioned just how valuable the decision is when the Court made it clear that such Aboriginal perspectives are still subordinate to Canadian legal and constitutional perspectives. See also Borrows, "Listening for a Change," 23–29.
37. Brown, "Who Owns Native Culture?" 224. For an example of the rejection of non-Native histories, Michael Brown quotes Armand Minthorn: "We already know our history. It may not be written down, but we already know our history."
38. Torres and Milun, "Translating Yonnondio by Precedent and Evidence," 649.
39. Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act," 60.
40. Bonnichsen et al. v. United States, 357 F.3d, 971.
41. Trope and Echo-Hawk, "The Native American Graves Protection and Repatriation Act."
42. See also Bonnichsen et al. v. United States, 357 F.3d, 971 fn.11, and 967 fn.1.
43. See also ⟨http://www.cr.nps.gov/aad/kennewick/⟩
44. Tsosie, "Privileging Claims to the Past," 630.
45. Yorta Yorta v. Victoria [2002] HCA 58. See also Tehan, "A Hope Disillusioned, An Opportunity Lost?"
46. In Canada see R. v. Van der Peet, [1996] 2 S.C.R. 507 at 549; in the United States, see Johnson v. M'Intosh 21 U.S. (8 Wheat.) 543 (1823) (All rights and title in lands held by Native Americans, with the exception of the right of occupancy, were extinguished upon the European "discovery" of their lands.).
47. See also ⟨http://www.cr.nps.gov/aad/kennewick/⟩
48. See also ⟨http://www.cr.nps.gov/aad/kennewick/encl_2.htm⟩

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