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International Cultural Property

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I. Introduction

There were two important U.S. cultural property law decisions this year: *Republic of Austria v. Altmann*, dealing with the question of foreign sovereign immunity from suit in U.S. courts, and *Bonnichsen v. United States*, interpreting one of the key provisions of the Native American Graves Protection and Repatriation Act (NAGPRA). Legal developments continued in reaction to the war in Iraq and its effect on cultural heritage. Finally, the Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict came into effect.

II. *Republic of Austria v. Altmann*

Probably the most significant U.S. court decision that affects international cultural property is the Supreme Court's decision in *Republic of Austria v. Altmann*.[1] In this case, the plaintiff, Maria Altmann, was seeking to recover possession of six Gustav Klimt paintings that had originally belonged to her uncle, Ferdinand Bloch-Bauer. Two of the paintings depict Ferdinand's wife, Adele. All six, from the Austrian Secessionist movement of the early twentieth century, now have a value of $150 million and belong to the Austrian Gallery (Gallery) in Vienna. Adele died in 1925, but Ferdinand fled during the Anschluss in 1938 to Switzerland and died soon after World War II. Ferdinand's property was "Aryanized" at the beginning of the war. A Nazi lawyer, Dr. Erich Führer, took possession of the paintings

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1. Republic of Austria v. Altmann, 541 U.S. 677 (2004). The facts of the case are taken from the Supreme Court as well as the lower court decisions—Altmann v. Republic of Austria, 317 F.3d 954 (9th Cir. 2002) and Altmann v. Republic of Austria, 142 F. Supp. 2d 1187 (C.D. Cal. 2001). The facts, as alleged in the complaint, were assumed by the courts as true for purposes of Austria's motion to dismiss the complaint. For discussion of the facts and the lower court decisions, *see* Daniel W. Eck & Patty Gerstenblith, *International Cultural Property*, 37 INT'L LAW. 565, 567-69 (2003).

at issue in the case and engaged in various transactions, including selling some of them to the Gallery. In 1946, Austria passed a law that invalidated all transactions carried out as part of Nazi ideology, but also prohibited export of cultural objects without permission of the Austrian Federal Monument Agency. Ferdinand's heirs hired a lawyer in Vienna to recover his property. The lawyer wrote to the Gallery in 1948 demanding return of the Klimt paintings. The Gallery claimed, however, that Adele had bequeathed the paintings to the Gallery but the Gallery then permitted Ferdinand to retain possession of them for the remainder of his life. The lawyer obtained permission to export some of Ferdinand's other works of art and executed an agreement "acknowledg[ing] and accept[ing] Ferdinand's declaration that in the event of his death he wished to follow the wishes of his deceased wife to donate" the paintings to the Gallery.[2] Ferdinand's heirs did not consent to either of these actions. The lawyer also assisted the Gallery in locating some of the other Klimt paintings and obtaining them for the Gallery.

In 1998, a journalist discovered that neither Adele nor Ferdinand had donated the paintings to the Gallery. Austria also enacted another restitution law intended to allow individuals, who had been forced to donate artworks to Austrian museums in exchange for permission to export other possessions, to reclaim their artworks. Altmann, who until this time had thought the Klimt paintings had been freely donated, immediately sought to recover the paintings. She was successful in recovering other artworks that the family had been forced to donate in 1948, but the committee that reviewed her request refused to return the six Klimt paintings. Altmann then filed suit in Austria, but because she was required under Austrian law to pay $350,000 to the court in order to proceed with her suit, she voluntarily dismissed her claim. She then filed suit in federal district court in California, seeking recovery of the paintings, damages, imposition of a constructive trust, restitution based on unjust enrichment, and other relief.

Austria moved to dismiss the complaint based on numerous defenses, including immunity from suit under the Foreign Sovereign Immunities Act (FSIA), which grants foreign states immunity from the jurisdiction of federal and state courts but also creates numerous exceptions to such immunity.[3] Both the district court and the Ninth Circuit held that Austria was not immune from suit, although for different reasons. The Supreme Court granted Austria's petition for *certiorari* to review only the issue of applicability of the FSIA to pre-enactment conduct.

The Supreme Court first reviewed the history of foreign sovereign immunity in U.S. courts. Beginning with Chief Justice Marshall's opinion in *Schooner Exchange v. McFaddon* in 1812, the Court noted that, although foreign sovereigns had no constitutional right to immunity, such immunity was often granted as "a matter of grace and comity."[4] The decision whether U.S. courts would exercise jurisdiction over foreign sovereigns was left to the political branches of the U.S. government, particularly the executive branch, which adopted a policy of requesting immunity in all actions against friendly sovereigns. This situation changed, however, in 1952 when Jack B. Tate, the acting Legal Advisor to the U.S. Department of State, explained in a letter to the Justice Department that the State

2. *Altmann*, 541 U.S. at 683.
3. 28 U.S.C. §§ 1602 *et seq.* (2005).
4. *Altmann*, 541 U.S. at 689.

Department would in the future apply the "restrictive theory" of foreign sovereign immunity.[5]

According to the restrictive theory, foreign sovereigns enjoy immunity for sovereign or public acts but not for private acts. The Tate letter led to two decades of increasing inconsistency as foreign nations pressured the State Department to request immunity, regardless of the nature of the actions that were subject to suit. When the foreign nation did not request immunity from the State Department, courts were left to guess whether they should grant immunity based on earlier State Department decisions.

To remedy this confusion, Congress passed the FSIA in 1976, which codified the restrictive theory of immunity. The preamble states that the FSIA will "henceforth" determine claims of foreign sovereign immunity.[6] The FSIA grants general immunity to foreign sovereigns, establishes federal court jurisdiction over civil actions against foreign sovereigns, and contains provisions for venue and removal of such actions.[7] The FSIA also creates several exceptions to this general grant of immunity. One of the key exclusions is the expropriation exception. The FSIA reads in part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . (3) in which rights in property taken in violation of international law are in issue and that property . . . is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.[8]

The central issue in *Altmann* was whether the FSIA applied to Austria's conduct in 1948 and earlier, even though the FSIA was not enacted until 1976. Austria argued that under the formulation of foreign sovereign immunity which U.S. courts applied in the 1940s, Austria, as a nation friendly to the United States, was entitled to immunity from suit in U.S. courts. If, however, the FSIA applied to this conduct, the facts of the case might well fall within the expropriation exception to immunity. The Supreme Court, therefore, needed to determine whether the FSIA applied to conduct that occurred before the FSIA was enacted and even before the adoption of the restrictive theory of immunity in 1952.

The Court began its analysis by examining whether Congress intended the FSIA to apply retroactively.[9] The Court concluded that, despite the reference in the FSIA's preamble, Congress did not clearly express a view concerning retroactive application. The Court, therefore, considered whether the FSIA affects substantive or procedural rights. Prior Supreme Court precedent had established that if substantive rights were at issue, there would be a presumption against retroactivity.[10] On the other hand, the Court concluded that the FSIA defied characterization as affecting either procedural or substantive rights. The Court, however, described the underlying purpose of the anti-retroactivity presumption as "avoid[ing] unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct."[11] Because the grant of sovereign immunity was always the result of

5. *Id.* at 690.
6. 28 U.S.C. § 1602.
7. *Altmann*, 541 U.S. at 691.
8. 28 U.S.C. § 1605(a)(3).
9. *Altmann*, 541 U.S. at 692.
10. Landgraf v. USI Film Prods., 511 U.S. 244, 272 (1994).
11. *Altmann*, 541 U.S. at 696.

political realities, it could not be said that foreign sovereigns based their conduct on an expectation of receiving immunity in U.S. courts. The Supreme Court, therefore, concluded that it should defer to the FSIA, Congress' most recent statement on this issue, and that it should not presume that the FSIA should not apply "merely because it postdates the conduct in question."[12] The Court bolstered its conclusion by referring to the FSIA's preamble which states that "[c]laims of foreign states to immunity should henceforth be decided . . . in conformity with the principles" of the FSIA.[13] While not a clear directive, this statement nonetheless indicates Congress' intent that the FSIA should apply to claims brought after 1976, regardless of when the underlying conduct occurred. This conclusion also furthers Congress' purpose in enacting the FSIA by bringing greater consistency to cases brought now and by eliminating detailed historical inquiries for immunity determinations. Furthermore, the U.S. government can still file a statement of interest requesting courts to decline jurisdiction in cases implicating foreign sovereign immunity. In the *Altmann* case, however, the government had previously indicated that it would not file such a statement.[14]

Because the two lower courts had previously decided the other procedural issues in the case in the plaintiff's favor, the Supreme Court's decision clears the way for the *Altmann* claim to proceed to trial. The Supreme Court did note that the Act of State Doctrine is still available to Austria as a substantive defense on the merits of the case. The Court's interpretation of the FSIA clearly indicates that foreign sovereign immunity will not bar other claims for recovery of cultural objects if the facts satisfy one of the FSIA's exceptions, including the expropriation exception. Several questions remain unanswered, including whether deference would be given by the courts to a request to decline to examine jurisdiction.

III. Iraq-Related Developments

The Second Gulf War has had a significant impact on the cultural heritage of Iraq. In 2004, that impact became more evident. The losses from the archaeological collection at the Iraq Museum are now reported at about 15,000 objects. Some 4,000 objects have either been returned within Iraq or been recovered in foreign countries, including the United States, Jordan, Syria, Iran, Kuwait, Saudi Arabia, and Turkey.[15] Numerous archaeological sites, particularly those of the Sumerian civilization (4th to 3rd millennia B.C.), have been extensively looted.[16] In addition, considerable damage was done to the site of Babylon through construction of a military base on the site.[17]

The prosecution of Joseph Braude, the American author of *The New Iraq: Rebuilding the Country for its People, the Middle East, and the World*, ended in August 2004 with a guilty

12. *Id.*

13. *Id.*

14. *Id.* at 702.

15. Dr. Donny George, Director of the Iraq Museum, Iraq State Board of Antiquities and History, Address at the Annual Meeting of the Archaeological Institute of America (Jan. 8, 2005) (on file with author).

16. Burhan Shakir, Director of Excavations, Iraq State Board of Antiquities and History, Address at the Annual Meeting of the Archaeological Institute of America (Jan. 8, 2005) (on file with author). The sites most extensively looted include Fara, Isin, and Umm al-Aqarib.

17. John Russell, Former Deputy Senior Advisor to the Iraqi Ministry of Culture, Address at the Annual Meeting of the Archaeological Institute of America (Jan. 8, 2005) (on file with author); John E. Curtis, Report on Meeting at Babylon (Dec. 11-13, 2004), *available at* http://www.thebritishmuseum.ac.uk/iraqcrisis/reports/Babylon%20Report04.pdf.

plea.[18] Braude was charged with three counts for smuggling and making false statements in violation of 18 U.S.C. § 545. When he entered the United States on June 11, 2003, Braude was found to be carrying three cylinder seals of the Akkadian period (ca. 2340-2180 B.C.) that were taken from the collection of the Iraq Museum in Baghdad. The seals still carried the partially preserved registration numbers used by the Iraq Museum's cataloging system. When questioned, Braude initially denied having traveled to Iraq, but he later admitted that he had been to Iraq where he had purchased the seals. Braude ultimately pled guilty and was sentenced to six months of house arrest and two years of probation.[19] The three seals were returned to his Excellency Samir Sumaidaie, the ambassador of Iraq to the United Nations, on January 18, 2005.[20]

In late 2004, Congress passed, and President Bush signed into law, the Emergency Protection for Iraqi Cultural Antiquities Act.[21] This statute allows the President to exercise his authority, under the Convention on Cultural Property Implementation Act (CPIA),[22] to impose import restrictions on cultural objects illegally removed from Iraq after August 1990 (the time of the initial trade sanctions against Iraq). The statute removes the requirement that Iraq submit a request for import restrictions to the United States and that the request be reviewed by the Cultural Property Advisory Committee. Furthermore, it provides a different definition of the cultural materials, whose import into the United States will be restricted, as follows:

> the term "archaeological or ethnological material of Iraq" means cultural property of Iraq and other items of archaeological, historical, cultural, rare scientific, or religious importance illegally removed from the Iraq National Museum, the National Library of Iraq, and other locations in Iraq, since the adoption of United Nations Security Council Resolution 661 of 1990.[23]

This legislation adopts the definition of cultural materials used in the United Nations Security Council Resolution 1483, paragraph 7 that calls on United Nations members to prevent trade in Iraq's illegally-exported cultural materials.[24] The legislation, therefore, is at least a partial fulfillment of the United States' obligations under the Security Council Resolution.

IV. International Conventions

A. Second Protocol to the 1954 Hague Convention

The 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (Hague Convention)[25] is the primary international legal instrument that

18. News Release, U.S. Immigration and Customs Enforcement, Cultural Antiquity Returned to Iraqi Government After ICE Investigation (Jan. 18, 2005), *available at* http://www.ice.gov/graphics/news/newsreleases/articles/iraqiartifact_011805.htm.

19. *Id.*

20. *Id.*

21. 150 Cong. Rec. H9627-01, H9677-78 (2004).

22. 19 U.S.C. §§ 2601 *et seq.* (2005).

23. 150 Cong. Rec. H9627-01, H9678 (2004).

24. SCOR Res. 1483, U.N. SCOR, 4761st mtg., para. 7, U.N. Doc. S/RES/1483 (2003).

25. Convention on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240, *available at* http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html [hereinafter Hague Convention].

regulates the conduct of war and occupation for the preservation of cultural sites, monuments, and objects. The Second Protocol[26] was written in 1999 to update the Hague Convention, particularly in light of the experiences of the Balkan Wars. It went into effect on March 9, 2004, and at the end of 2004 had twenty-six States Parties.[27]

The Hague Convention in article 4, paragraph 2, waives the obligation to respect cultural property "in cases where military necessity imperatively requires such a waiver."[28] The Second Protocol clarifies and narrows the circumstances in which such waiver would apply to a situation in which the "cultural property has, by its function, been made into a military objective" and "there is no feasible alternative available to obtain a similar military advantage."[29] The waiver provisions apply to excuse the use of cultural property for purposes that are likely to expose the cultural property to harm, only when there is no other option that will give a similar military advantage.[30] Article 7 requires the taking of precautions to ascertain whether a military objective includes cultural property. Specifically, article 7 calls for avoiding and minimizing incidental damage to cultural property and refraining from undertaking an attack that will cause harm to cultural property that is disproportionately excessive in comparison to the expected military advantage.[31]

The Second Protocol provides for the granting of enhanced protection to cultural property that meets the following three criteria:

a. it is cultural heritage of the greatest importance for humanity;
b. it is protected by adequate domestic legal and administrative measures recognizing its exceptional cultural and historic value and ensuring the highest level of protection;
c. it is not used for military purposes or to shield military sites and a declaration has been made by the Party which has control over the cultural property, confirming that it will not be so used.[32]

Cultural property meeting these requirements must be placed on a list for management by a committee established by the Second Protocol in order to be entitled to "enhanced protection."[33] Any cultural property under enhanced protection is entitled to absolute immunity from attack, except under narrow circumstances delineated in article 13.

Article 9 of the Second Protocol strengthens the provisions for protection of cultural property during occupation by prohibiting the illegal export or transfer of ownership of cultural property. Furthermore, it forbids the carrying out of archaeological excavations except "where this is strictly required to safeguard, record or preserve cultural property."[34] The Second Protocol also clarifies the criminal responsibility of individuals who violate its

26. The Second Protocol to the Hague Convention for the Protection of CulturalProperty in the Event of Armed Conflict, Mar. 26, 1999, 38 I.L.M. 769 (1999), *available at* http://unesdoc.unesco.org/images/0013/001306/130696eo.pdf [hereinafter Second Protocol].

27. *See* United Nations Educational, Scientific and Cultural Organization *at* http://erc.unesco.org/cp/convention.asp?KO=15207&language=E.

28. Hague Convention, *supra* note 25, art. 4, para. 2.

29. Second Protocol, *supra* note 26, art. 6(1)(a)-(b).

30. *Id.* art. 6(1)(c).

31. *Id.* art. 7(a)-(c).

32. *Id.* art. 10.

33. *Id.* art. 11.

34. *Id.* art. 9(a)-(b).

provisions and requires nations that are party to the Second Protocol to establish criminal offenses under their domestic law.[35] Finally, it clarifies that the Second Protocol applies to armed conflicts that are not of an international character, although it does not apply to "situations of internal disturbances and tensions."[36]

B. 1970 UNESCO Convention

After a flurry of new ratifications by market nations of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention)[37] in 2002 and 2003, only three nations joined the UNESCO Convention this year: Paraguay, Iceland, and the Seychelles.[38] This brings the total of States Parties to 106.[39] Additional market nations, such as Germany and Belgium, are considering ratification.

V. CPIA Developments

The CPIA[40] is the U.S. domestic legislation implementing ratification of the 1970 UNESCO Convention. Pursuant to article 9 of the UNESCO Convention and the CPIA, other nations that are party to the UNESCO Convention can ask the United States to impose import restrictions preventing the import of illegally exported materials that belong to designated categories of archaeological and ethnological materials. The United States and Honduras entered into a bilateral agreement on March 12, 2004, that will prevent the import, into the United States, of illegally exported archaeological objects of ceramic, metal, stone, and other materials.[41] This past year, two new requests were received—one from Colombia asking for import restrictions on both archaeological materials and ethnological materials of the Colonial era[42] and one from China requesting import restrictions for archaeological materials of the Paleolithic through Qing Dynasty periods.[43] Because these bilateral agreements last for a maximum of five years, nations must request a renewal of the agreement if they wish it to extend longer. This past year El Salvador submitted a request for the second extension of its agreement. The Cultural Property Advisory Committee has considered the requests from Colombia and El Salvador, but has not announced a decision. The request from China will be considered early in 2005.

35. *Id.* art. 15-21.

36. *Id.* art. 22.

37. Convention on the Means of Prohibiting and Preventing the Illegal Import, Export and Transfer of Ownership of Cultural Property, Apr. 24, 1972, 823 U.N.T.S. 231 (1971) *at* http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html.

38. See http://erc.unesco.org/cp/convention.asp?KO=13039&language=E.

39. *Id.*

40. 19 U.S.C. §§ 2601 *et seq.* (2005).

41. Import Restrictions Imposed on Archeological Material Originating in Honduras, 69 Fed. Reg. 12267 (Mar. 16, 2004) (to be codified at 19 C.F.R. pt. 12).

42. U.S. Dep't. of State, *Request for Cultural Property Protection from the Government of the Republic of Colombia, available at* http://exchanges.state.gov/culprop/co04sum.html (last modified June 16, 2004).

43. U.S. Dep't. of State, *Request of the People's Republic of China to the Government of the United States of America Under Article 9 of the 1970 UNESCO Convention, available at* http://exchanges.state.gov/culprop/cn04sum.html (last modified Dec. 17, 2004).

VI. Museum Codes and Guidelines for Acquisitions

In June 2004, the Association of Art Museum Directors (AAMD) issued a Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art.[44] Guidelines that accompanied the report address several facets of acquisitions. First, the guidelines call on member museums to undertake thorough research concerning any works that they are planning to acquire, including the work's background, ownership history and origins, and to obtain written documentation, including import and export documents, for each acquisition. Additionally, the guidelines state than an image and provenance information for each acquisition should be published promptly.

In terms of legal considerations, the guidelines direct that museums should comply with all local, state, and federal laws (or the laws of the country in which the museum is located). The guidelines advise that museums should be familiar with the laws of other countries before acquiring a work. They also call for specific adherence to article 7(b) of the 1970 UNESCO Convention by directing that museums should not acquire any work "known to have been 'stolen from a museum, or a religious, or secular public monument or similar institution.'"[45] The guidelines also state that "member museums should not acquire any archaeological material or work of ancient art known to have been part of an official archaeological excavation and removed in contravention of the laws of the country of origin."[46] Finally, the guidelines provide that member museums should not acquire any archaeological materials that "were removed after November 1970."[47]

The guidelines also recognize that there may be times when the museum cannot obtain adequate provenance information to determine whether the acquisition would comply with applicable law and the guidelines themselves. The guidelines then provide that

> [i]n such cases, museums must use their professional judgment in determining whether to proceed with the acquisition . . . recognizing that the work of art, the culture it represents, scholarship, and the public may be served best through the acquisition of the work of art by a public institution dedicated to the conservation, exhibition, study, and interpretation of works of art. This may be the case, for example, if: the work of art is in danger of destruction or deterioration; or the acquisition would make the work of art publicly accessible, providing a singular and material contribution to knowledge, as well as facilitating the reconstruction of its provenance thereby allowing possible claimants to come forward. In considering such acquisitions, member museums should also take into account any other factors that bear on the appropriateness of the acquisition, notably: whether the work of art has been outside its probable country or countries of origin for a sufficiently long time that its acquisition would not provide a direct, material incentive to looting or illegal excavation; while each member museum should determine its own policy as to length of time and appropriate documentation, a period of 10 years is recommended; and the exhibition and publication history, if any, of the work of art.[48]

44. Association of Art Museum Directors, *Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art* (June 10, 2004), *available at* http://aamd.org/papers/documents/June10FinalTaskForceReport_001.pdf.

45. *Id.* at para. D.

46. *Id.*

47. *Id.*

48. *Id.* at para. E.

The last provision of the guidelines deals with the situation in which, after acquisition, a museum learns of information that establishes another party's claim to the work of art. In such a case, "the museum should seek an equitable resolution" and should consider possibilities such as transfer or sale of the work to the claimant, payment, loan or exchange, or retention of the work.[49]

The International Council of Museums adopted a new Code of Ethics for Museums (Code) in November 2004.[50] This Code is largely based on its earlier code as it was amended in 2001. While the Code is too lengthy to be considered in detail here, two provisions concerning the legal acquisition of museum collections are worth noting. In addition to requiring that the museum be assured of obtaining valid legal title to all acquisitions, the Code provides in section 2.3 that

> [e]very effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained in or exported from, its country of origin or any intermediate country in which it might have been owned legally (including the museum's own country). Due diligence in this regard should establish the full history of the item from discovery or production.[51]

Section 2.11 of the Code also permits museums to act "as an authorized repository for unprovenanced, illicitly collected or recovered specimens and objects from the territory over which it has lawful responsibility."[52]

VII. *Bonnichsen v. United States*

The Ninth Circuit brought to an end this year the protracted litigation surrounding the disposition of an approximately 9000-year-old skeleton known as "Kennewick man."[53] The skeleton was accidentally discovered in 1996 near the Columbia River in the state of Washington. The land where the skeleton was discovered is federal land, managed by the U.S. Army Corps of Engineers. An initial study of the remains, pursuant to a permit issued under the Archaeological Resources Protection Act (ARPA),[54] revealed the early date of the bones and a lack of similarity in its physical features to modern Native Americans. The Army Corps published a notice of its intent to repatriate the remains to a group of four Native American tribes located in the area, as required for newly-discovered Native American remains under NAGPRA.[55] A group of scientists, however, sought to study the skeleton

49. *Id.* at para. F.

50. International Council of Museums, *ICOM Code of Ethics for Museums* (2004), *available at* http://icom.museum/code2004_eng.pdf.

51. *Id.* at 2.3.

52. *Id.* at 2.11.

53. The facts as stated here are taken from the Ninth Circuit decision. Bonnichsen v. United States, 357 F.3d 962 (9th Cir. 2004).

54. 16 U.S.C. §§ 470aa *et seq.* (2005).

55. 25 U.S.C. §§ 3001 *et seq.* (2005). NAGPRA provides that ownership or control of Native American human remains and associated funerary objects found on federal or tribal lands after November 16, 1990, are in the lineal descendants of the Native American. If the lineal descendants cannot be ascertained, then ownership or control of the remains is vested in the Indian tribe on whose tribal lands the remains were discovered or in the Indian tribe with "the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains." If cultural affiliation cannot reasonably be determined, then ownership or control is vested in an Indian tribe that is recognized by a final judgment of the United States Court of Federal Claims as the aboriginal occupier of the land where the objects were discovered. 25 U.S.C. § 3002(a).

and after the Army Corps rejected their request, they filed suit claiming that the U.S. government was improperly applying the statute. After several years of study, the Department of the Interior concluded that the skeleton was Native American and that based primarily on oral history, it was culturally affiliated with the tribal claimants. The district court, however, rejected these conclusions[56] and the Ninth Circuit affirmed.[57]

The Ninth Circuit first considered whether the plaintiff-scientists had standing to challenge the government's determinations. The court concluded that they did have standing partly because it was likely that a favorable decision would redress their injury.[58] Particularly, because the plaintiffs already held an ARPA permit to study the remains, only the government's decision to repatriate the remains under NAGPRA prevented the plaintiffs from studying them. Furthermore, the court held that the plaintiffs' claim fell within the statute's zone of interests because the statute confers jurisdiction on any person alleging a violation of the statute. Such a violation could result from either under-enforcement or over-enforcement of the statute.[59] Therefore, the tribal claimants' reading of the statute, as being intended only to protect the Native American interest in repatriation of human remains, did not accord with NAGPRA's statement of jurisdiction.

In turning to the question of whether the disposition of the skeleton was subject to NAGPRA, the court analyzed whether the remains were Native American for purposes of the statute's application. The court looked at NAGPRA's definition of Native American human remains, which requires that they are "of, or relating to, a tribe, people, or culture that is indigenous to the United States."[60] The court read this to mean that NAGPRA requires that human remains "bear some relationship to a presently existing tribe, people, or culture to be considered Native American"[61] and rejected as unreasonable the Department of the Interior's regulations interpreting the statutory definition.[62]

The court then concluded that the remains are not Native American because it believed that the record demonstrated no cultural or genetic link or other relationship between the skeleton and any presently-existing Native American tribe.[63] The only evidence offered by the government was oral history indicating that the tribes that inhabit the Columbia River plateau had lived there for a long time. The court found this evidence to be insufficient to establish the type of cultural continuity required by NAGPRA before the skeletal remains would be considered to satisfy the definition of Native American.[64] Because the remains are not subject to NAGPRA, the Ninth Circuit held that the plaintiff-scientists should be permitted to proceed with their studies. This decision seems to set chronological parameters around the applicability of NAGPRA, giving control over the more recent past to the Native American tribes and consigning the more distant past to the realm of science.

56. Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1167 (D. Or. 2002).
57. *Bonnichsen*, 357 F.3d at 980.
58. *Id.* at 970-71.
59. *Id.* at 971-72.
60. 25 U.S.C. § 3001(9).
61. *Bonnichsen*, 357 F.3d at 973.
62. *Id.* at 974-75.
63. *Id.* at 977.
64. *Id.* at 979.