

## International Cultural Property

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### Introduction

This year saw two important U.S. decisions concerning cultural property law: *Republic of Austria v. Altmann*, dealing with the question of the extent of immunity from suit in U.S. courts to be granted to foreign sovereigns; and *Bonnichsen v. United States*, interpreting one of the key provisions of the Native American Graves Protection and Repatriation Act. There continued to be legal developments in reaction to the war in Iraq and its effect on cultural heritage, while the Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Warfare came into effect.

### I. *Republic of Austria v. Altmann*

Probably the most significant United States court decision that affects international cultural property was the Supreme Court's decision in *Republic of Austria v. Altmann*.<sup>2</sup> In this case, the plaintiff, Maria Altmann, is seeking to recover possession of six Gustav Klimt paintings, which had originally belonged to her uncle, Ferdinand Bloch-Bauer. Two of the paintings depict Ferdinand's wife, Adele, and all six, which belong to the Austrian Secessionist movement of the early 20<sup>th</sup> century and now have a value of \$150 million, hang in the Austrian Gallery in Vienna. Adele died in 1925, but Ferdinand fled the Anschluss in 1938 to Switzerland

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<sup>2</sup>*Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004). The facts of the case are taken from the Supreme Court as well as lower court decisions: 124 S. Ct. at 2244-45; 142 F. Supp. 2d 1187 (C.D. Cal. 2001), and 317 F.3d 954 (9<sup>th</sup> Cir. 2002). 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 THE INT'L LAW. 565, 567-69 (2003).

and died soon after the war. Ferdinand's property was "Aryanized" at the beginning of the war, and a Nazi lawyer, Dr. Erich Führer, took possession of the paintings at issue in the case and engaged in various transactions, including selling some of them to the Gallery. In 1946, Austria passed a law invalidating 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, but the Gallery claimed that Adele had bequeathed the paintings to the Gallery, which 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 purporting to "acknowledge and accept Ferdinand's declaration that in the event of his death he wished to follow [Adele's] wishes to donate" the paintings to the Gallery. 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 art works to Austrian museums in exchange for permission to export other possessions to reclaim their art works. 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 art works 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, subsequently voluntarily dismissed her claim. She then filed suit in district court in the Central District of California seeking, among other relief, recovery of the paintings, damages, imposition of a constructive trust and restitution based on unjust enrichment.

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.<sup>3</sup> Both the District Court and the Ninth Circuit held, although for different reasons, that Austria was not immune from suit. 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 United States 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".<sup>4</sup> The decision whether United States courts would exercise jurisdiction over foreign sovereigns was left to the political branches of the U.S. government, particularly the Executive, 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 Department would in the future apply the "restrictive theory" of foreign sovereign immunity.<sup>5</sup> 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 in which foreign nations would pressure the State Department to request immunity, regardless of the nature of the actions that were subject to suit and, when the foreign nation did not request immunity from the State Department, courts were left to guess whether immunity should be granted based on earlier State Department decisions.

To remedy this confusion, in 1976 Congress passed the FSIA, which codified the restrictive theory of immunity. The FSIA grants general immunity to foreign sovereigns, establishes federal court jurisdiction over civil actions against foreign sovereigns and contains,

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<sup>3</sup>28 U.S.C. §§ 1602-11.

<sup>4</sup> 124 S. Ct. at 2248.

<sup>5</sup> *Id.*

among others, provisions for venue and removal of such actions.<sup>6</sup> However, the FSIA also creates several exceptions to this general grant of immunity. If a case falls within one of these exceptions, then the foreign sovereign does not enjoy immunity. Finally, the preamble states that the FSIA will “henceforth” determine claims of foreign sovereign immunity. One of the key exceptions to immunity 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.<sup>7</sup>

The central issue was whether the FSIA applies to Austria’s conduct in 1948 (and earlier), although the FSIA was not enacted until 1976. Austria argued that under the formulation of foreign sovereign immunity that U.S. courts applied in the 1940’s, Austria, as a nation friendly to the United States, was entitled to immunity from suit in U.S. courts. On the other hand, if the FSIA applied to this conduct, then the facts of the case might well fall within the “expropriation exception” to immunity. The Supreme Court therefore needed to determine the applicable scope of the FSIA 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.<sup>8</sup> 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 next considered whether the FSIA affects substantive or procedural rights. Prior Supreme Court precedent had established that if substantive rights were at issue, then there would be a presumption against retroactivity.<sup>9</sup> On the other hand, the Court concluded that the FSIA defied

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<sup>6</sup> *Id.* at 2249.

<sup>7</sup> 28 U.S.C. § 1605(a)(3).

<sup>8</sup> 124 S. Ct. at 2250.

<sup>9</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

characterization as affecting either procedural or substantive rights. However, the Court described the underlying purpose of the antiretroactivity presumption as “avoid[ing] unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct.”<sup>10</sup> Because the grant of sovereign immunity was always the result of political realities, foreign sovereigns could not be said to have based their conduct on an expectation of receiving immunity in U.S. courts. The Supreme Court therefore concluded that it should defer to the most recent statement on this issue, that is the FSIA, and that it should not presume that Congress’ statement should not apply “merely because it postdates the conduct in question.”<sup>11</sup> The Court bolstered its conclusion by referring to the statement in the FSIA’s preamble that “[c]laims of foreign states to immunity should henceforth be decided . . . in conformity with the principles” of the FSIA.<sup>12</sup> While not a clear directive, this statement nonetheless indicates Congress’ intent that the FSIA 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 in determining the immunity issue. Furthermore, the United States 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.<sup>13</sup>

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 Supreme Court’s interpretation of

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<sup>10</sup> 124 S. Ct. at 2252.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 2252-53.

<sup>13</sup> *Id.* at 2255-56 and n. 22.

the FSIA clearly indicates that foreign sovereign immunity will not bar other claims for recovery of cultural objects, if facts fitting the FSIA's expropriation exception or another of the FSIA's exceptions are present. However, the State Department's option to file a statement of interest asking courts to decline to exercise jurisdiction and the unresolved issue of whether such a request should be granted deference still leaves several unanswered questions concerning the nature of foreign sovereign immunity.

## II. Iraq-Related Developments

The Second Gulf War has had a significant impact on the cultural heritage of Iraq. In 2004, that impact became clearer. The losses from the archaeological collection at the Iraq Museum are now reported to about 15,000 objects; some 4000 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.<sup>14</sup> Numerous archaeological sites, particularly those in the south of the Sumerian civilization (4<sup>th</sup> to 3<sup>rd</sup> millennia B.C.), have been extensively looted.<sup>15</sup> In addition, considerable damage was done to the site of Babylon apparently through construction of a military base on the site.<sup>16</sup>

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 his agreement to plead guilty.<sup>17</sup> Braude was charged with three counts for smuggling and making false

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<sup>14</sup> Presentation of Dr. Donny George, Director of the Iraq Museum, Iraq State Board of Antiquities and History, Annual Meeting of the Archaeological Institute of America, January 8, 2005.

<sup>15</sup> Presentation of Burhan Shakir, Director of Excavations, Iraq State Board of Antiquities and History, Annual Meeting of the Archaeological Institute of America, January 8, 2005. Those sites most extensively looted include Fara, Isin, and Umm al-Aqarib.

<sup>16</sup> Presentation of John Russell, Former Deputy Senior Advisor to the Iraqi Ministry of Culture, Annual Meeting of the Archaeological Institute of America, January 8, 2005; John E. Curtis, Report on Meeting at Babylon, 11<sup>th</sup> – 13<sup>th</sup> December 2004, available on-line at: [http://www.thebritishmuseum.ac.uk/newsroom/current2005/Babylon\\_Report04.doc](http://www.thebritishmuseum.ac.uk/newsroom/current2005/Babylon_Report04.doc).

<sup>17</sup> These facts are taken from a News Release from the U.S. Immigration and Customs Enforcement of January 18, 2005, available at:

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.), which 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. The three seals were returned to his Excellency Samir Sumaidaie, the Ambassador of Iraq to the United Nations, on January 18, 2005.

Congress passed and President Bush signed into law the Emergency Protection for Iraqi Cultural Antiquities Act.<sup>18</sup> This statute allows the President to exercise his authority under the Convention on Cultural Property Implementation Act (CPIA)<sup>19</sup> 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.<sup>20</sup>

This legislation adopts the definition of cultural materials used in the United Nations Security

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[http://www.ice.gov/graphics/news/newsreleases/articles/iraqiartifact\\_011805.htm](http://www.ice.gov/graphics/news/newsreleases/articles/iraqiartifact_011805.htm).

<sup>18</sup>Miscellaneous Trade and Technical Corrections Act of 2004, H.R. 1047, S. 691, 150 Cong. Rec. H 9627, §§ 3001-3003

<sup>19</sup>19 U.S.C. §§ 2601-13.

<sup>20</sup>H.R. 1047, *supra* note 18, §3002(b).

Council Resolution 1483, paragraph 7, which calls on United Nations members to prevent trade in illegally-exported cultural materials of Iraq. The legislation therefore is at least a partial fulfillment of the United States' obligations under the Security Council Resolution.

### **III. 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<sup>21</sup> is the primary international legal instrument that regulates the conduct of war and occupation for the preservation of cultural sites, monuments and objects. The Second Protocol<sup>22</sup> was written in 1999 to update the 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.

The main Convention in Article 4, paragraph 2, waives the obligation to respect cultural property “in cases where military necessity imperatively requires such a waiver.” 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.”<sup>23</sup> Furthermore, 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.<sup>24</sup> Article 7 requires the taking of precautions to ascertain whether a military objective includes cultural property; avoidance and minimization of incidental damage to

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<sup>21</sup> 249 U.N.T.S. 240 (1956). The full text may be found at: [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>22</sup> The full text of the Second Protocol may be found at: [http://portal.unesco.org/en/ev.php-URL\\_ID=15207&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>23</sup> *Id.* Article 6 (1)(a) and (b).

<sup>24</sup> *Id.* Article 6 (1)(c).

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.<sup>25</sup>

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 recognising 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.<sup>26</sup>

Cultural property that meets these criteria must be placed on a list managed by a committee established by the Second Protocol and is then entitled to enhanced protection. 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 excavation except “where this is strictly required to safeguard, record or preserve cultural property.”<sup>27</sup> The Second Protocol also clarifies the criminal responsibility of individuals who violate its provisions and requires nations that are party to the Protocol to establish criminal offenses under their domestic law.<sup>28</sup> Finally, it clarifies that the Protocol applies to armed conflicts that are not of an international character, although it does not apply to “situations of internal disturbances and tensions.”<sup>29</sup>

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<sup>25</sup>*Id.* Article 7 (a), (b) and (c).

<sup>26</sup> *Id.* Article 10.

<sup>27</sup>*Id.* Article 9 (a) and (b).

<sup>28</sup>*Id.* Articles 15-21.

<sup>29</sup>*Id.* Article 22.

## 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<sup>30</sup> in 2002 and 2003, only three new nations joined the Convention this year: Paraguay, Iceland and the Seychelles. This brings the total of States Parties to 106. However, additional market nations, particularly Germany and Belgium, are considering ratification.

## IV. Cultural Property Implementation Act Developments

The Convention on Cultural Property Implementation Act (CPIA)<sup>31</sup> is the United States' domestic legislation implementing its ratification of the 1970 UNESCO Convention. Pursuant to Article 9 of the 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 ethnologic 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.<sup>32</sup> This past year two new requests were received: one from Colombia asking for import restrictions on both archaeological materials and ethnologic materials of the Colonial era,<sup>33</sup> and one from China, requesting import restrictions for archaeological materials of the Paleolithic through Qing Dynasty periods.<sup>34</sup> Because these bilateral agreements last for a maximum of five years, nations must request a renewal of the agreement if they wish the agreement to be extended. This past year El Salvador submitted a

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<sup>30</sup> 823 U.N.T.S. 231, 10 I.L.M. 289 (1971).

<sup>31</sup> 19 U.S.C. §§ 2601-13.

<sup>32</sup>The Federal Register Notice detailing the agreement may be found at: <http://exchanges.state.gov/culprop/hn04fr01.txt>

<sup>33</sup>The request from Colombia is summarized at: <http://exchanges.state.gov/culprop/co04sum.html>.

<sup>34</sup>The request from China is summarized at: <http://exchanges.state.gov/culprop/cn04sum.html>.

request for the second extension of its agreement. The Cultural Property Advisory Committee has considered the requests from Colombia and El Salvador, but no decision has yet been announced. The request from China will be considered early in 2005.

## **V. Museum Codes and Guidelines for Acquisitions**

In June 2004, the Association of Art Museum Directors issued a Report of the AAMD Task Force on the Acquisition of Archaeological Materials and Ancient Art.<sup>35</sup> 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. 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 U.S. 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 as well before acquiring a work. The Guidelines 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.'" The Guidelines also direct 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."<sup>36</sup> Finally, the Guidelines provide that member museums should not acquire any archaeological materials that were removed after November 1970.

The Guidelines also recognize that there may be times when the museum cannot obtain

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<sup>35</sup>The Report and Guidelines can be found at:  
[http://aamd.org/papers/documents/June10FinalTaskForceReport\\_001.pdf](http://aamd.org/papers/documents/June10FinalTaskForceReport_001.pdf)

<sup>36</sup> *Id.* Guidelines, Section D.

adequate provenance information to determine whether the acquisition would comply with applicable law and the Guidelines themselves. The Guidelines then provide:

In 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 probably 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.<sup>37</sup>

The last provision of the Guidelines deals with the situation in which a museum learns after acquisition 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.

The International Council of Museums adopted a new Code of Ethics for Museums in November 2004,<sup>38</sup> although 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:

Every effort must be made before acquisition to ensure that any object or

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<sup>37</sup> *Id.* Guidelines, Section E.

<sup>38</sup> The Code may be found at: <http://icom.museum/ethics.html>.

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.

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

#### **VI. *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.”<sup>39</sup> 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 United States Army Corps of Engineers. Initial study of the remains pursuant to a permit issued under the Archaeological Resources Protection Act<sup>40</sup> 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 the Native American Graves Protection and Repatriation Act.<sup>41</sup> A group of scientists, however, sought to study the skeleton and after the Corps rejected their request, they filed suit claiming that the U.S.

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<sup>39</sup> The facts as stated here are taken from the Ninth Circuit decision, 357 F.3d 962 (9<sup>th</sup> Cir. 2004).

<sup>40</sup> 16 U.S.C. §§ 470aa-470mm.

<sup>41</sup> 25 U.S.C. §§ 3001-13. 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, is in the lineal descendants of the Native American; or, if lineal descendants cannot be ascertained, then in the Indian tribe on whose tribal lands the remains were discovered; in the Indian tribe with “the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains”; or, if cultural affiliation cannot reasonably be determined, then 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).

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<sup>42</sup> and the Ninth Circuit affirmed.<sup>43</sup>

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, in part because it was likely that a favorable decision would redress their injury.<sup>44</sup> 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- or over-enforcement of the statute.<sup>45</sup> Therefore, the Tribal Claimants' reading of the statute was 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 human remains as "Native American" if they are "of, or relating to, a tribe, people, or culture that is indigenous to the United States."<sup>46</sup> 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

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<sup>42</sup>217 F. Supp. 2d 1116 (D. Or. 2002).

<sup>43</sup>357 F.3d 962.

<sup>44</sup>*Id.* at 970-71.

<sup>45</sup>*Id.* at 971-72.

<sup>46</sup>25 U.S.C. § 3001(9).

American”<sup>47</sup> and rejected as unreasonable the Department of the Interior’s regulations interpreting the statutory definition.<sup>48</sup>

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.<sup>49</sup> The only evidence offered by the government was the 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 could be considered to satisfy the definition of “Native American.”<sup>50</sup> 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.

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<sup>47</sup> 357 F.3d at 973.

<sup>48</sup> *Id.* at 974-75.

<sup>49</sup> *Id.* at 977.

<sup>50</sup> *Id.* at 979.