



United States Department of the Interior
OFFICE OF THE SOLICITOR
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M-37082

Memorandum

To: Secretary

From: Solicitor

Subject: Request from the Pueblo of San Felipe to Review Interior Board of Land Appeals Opinion Filed August 31, 2017, *Pueblo of San Felipe*, 191 IBLA 53

In 2017, the Interior Board of Land Appeals (IBLA) affirmed the Bureau of Land Management's (BLM) decision to deny the Pueblo of San Felipe's protest challenging a Paleontological Resources Use Permit issued to the New Mexico Museum of Natural History & Science and the University of New Mexico (collectively, Museum).¹ The permit allowed the excavation of 40-million-year-old vertebrae mammalian fossils located in Stearns Quarry within the Ball Ranch/Espinosa Ridge Area of Critical Environmental Concern (ACEC) in New Mexico.² No excavation occurred, and the permit has since expired.

This opinion discusses the potential application of the Native American Graves Protection and Repatriation Act (NAGPRA) to paleontological resources.³ In reaching its 2017 decision, the IBLA considered whether the ancient mammalian fossils were "cultural items and cultural patrimony" affiliated with the Pueblo of San Felipe and thus protected under NAGPRA.⁴ Despite the Pueblo's insistence that these fossils were cultural items, the IBLA concluded they had provided insufficient evidence and declined to apply NAGPRA.⁵ Recently, San Felipe expressed concerns with various holdings and findings in the IBLA's decision.⁶

After reviewing the IBLA decision, I am issuing this M-Opinion to clarify two issues in the IBLA decision, especially in light of changes to NAGPRA regulations and consultation policies since 2017. First, paleontological resources can be cultural items under NAGPRA, and the case law should not be read to create a presumption otherwise. Second, deference is owed to Native

¹ *Pueblo of San Felipe*, 191 IBLA 53 (2017).

² The December 2024 Record of Decision for the Rio Puerco Resource Management Plan revision changes the name of this ACEC to Shu'tu'ba/Espinosa Ridge (at the request of the Tribe). This area is the subject of a protest resolution agreement that applies to future permitting decisions in the area.

³ 25 U.S.C. §§ 3001 *et seq.*

⁴ 191 IBLA at 59 (quoting the Pueblo of San Felipe's description of the fossils).

⁵ *Id.* at 68-72.

⁶ See Letter from the Pueblo of San Felipe to Secretary Deb Haaland (June 19, 2024).

American traditional knowledge when identifying cultural items, as the most recent update to the NAGPRA regulations expressly requires.⁷

I. Background

On August 31, 2017, the IBLA issued a decision affirming the BLM’s decision to deny San Felipe’s protest challenging the issuance of a Paleontological Resources Use Permit to the Museum.⁸ First, the IBLA held that San Felipe did not show that the BLM failed to engage in government-to-government consultation in accordance with Executive Order 131175, BLM Department of the Interior policy, and the National Historic Preservation Act.⁹ Next, the IBLA held the Paleontological Resources Preservation Act (PRPA), which requires the BLM to “manage and protect paleontological resources . . . using scientific principles and expertise[,]”¹⁰ and not NAGPRA, applied to the fossils that were subject to the permit.¹¹ San Felipe had asserted that the fossils themselves were cultural items and cultural patrimony under NAGPRA, but the IBLA found San Felipe did not sufficiently support this assertion.¹² The IBLA next found that the BLM complied with the National Environmental Policy Act (NEPA).¹³ The IBLA held that San Felipe mischaracterized the contents of the environmental assessment with respect to cultural resources.¹⁴ Notably, the IBLA stressed that in examining the sufficiency of the BLM’s NEPA analysis, particularly the findings of its experts in its cultural analysis, the BLM is entitled to rely on the opinion of its experts and found that San Felipe failed to show error in the BLM expert’s opinion.¹⁵ San Felipe highlighted in their letter to the Secretary this discussion in the IBLA’s decision regarding BLM’s lawful reliance on its experts.¹⁶ Finally, the IBLA dismissed several arguments San Felipe did not raise previously before the BLM.¹⁷

On December 13, 2023, the Department of the Interior (Department) issued a final rule revising the NAGPRA regulations, located at 43 C.F.R. Part 10. The regulations “clarify and improve upon systematic processes”¹⁸ for returning Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony to lineal descendants, Indian Tribes, and Native Hawaiian Organizations (NHOs). One of the most prominent updates is that the new regulations make express the requirement to defer to the Native American traditional knowledge of lineal descendants, Indian Tribes, and NHOs.

In its letter to the Secretary regarding the IBLA decision, San Felipe noted disappointment in the IBLA’s discussion and conclusions regarding BLM’s consultation with San Felipe and the

⁷ This opinion uses the term “Native American traditional knowledge” for consistency with the NAGPRA regulations. Other departmental policies refer to “Indigenous Knowledge” or may use other similar terms.

⁸ 191 IBLA 53.

⁹ *Id.* at 64-67.

¹⁰ 16 U.S.C. §§ 470aaa-1(a), 470 aaa(5).

¹¹ 191 IBLA at 68-72.

¹² *Id.* at 70-72.

¹³ *Id.* at 73-78.

¹⁴ *Id.* at 75.

¹⁵ *Id.* at 76-78.

¹⁶ Letter from the Pueblo of San Felipe to Secretary Deb Haaland (June 19, 2024).

¹⁷ 191 IBLA at 77-79.

¹⁸ Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 86,452, 86,452 (Dec. 13, 2023).

BLM’s treatment of San Felipe’s cultural beliefs and traditions in determining whether cultural items existed within the ACEC. Specifically, San Felipe challenged BLM’s ability to rely on the professional opinion of its experts when they are not experts in San Felipe cultural issues.¹⁹ San Felipe explained “[a]bsent a clear showing that a tribe’s cultural traditions, beliefs, and practices were adequately considered in a determination of use of a site claimed by that tribe as sacred or culturally significant, which is not found in the IBLA decision, a permit for use of a site that is adverse to such a tribe should be denied.”²⁰

II. Discussion

I conclude that San Felipe’s points about their cultural items are well taken and am addressing those concerns in this Opinion. As set forth below, two aspects of the IBLA’s decision require clarification and correction to ensure that the Department and its bureaus have clear legal guidance on how to apply NAGPRA to paleontological resources that are culturally significant to Tribes. First, the decision could be read—incorrectly—to create a presumption that paleontological resources are not protected by NAGPRA as cultural items. Paleontological resources can be considered cultural items depending on the cultural context. Second, the 2023 updates to the NAGPRA regulations require deference to the Native American traditional knowledge of lineal descendants, Indian Tribes, and NHOs. This ensures meaningful consideration of Native American traditional knowledge when making NAGPRA determinations.

A. NAGPRA’s Application to Paleontological Resources

The PRPA excludes from the definition of “paleontological resources” any cultural item protected in NAGPRA.²¹ Section 2 of NAGPRA, in turn, defines “cultural items” as including associated funerary objects, unassociated funerary objects, sacred objects, and cultural patrimony.²² Thus, the threshold question for the IBLA was whether the paleontological resource in question was considered a cultural item—specifically a sacred object or object of cultural patrimony—under NAGPRA. The IBLA erred in its analysis of this question.

NAGPRA defines “sacred objects” as “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents.”²³

NAGPRA defines “cultural patrimony” as an object:

having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual . . . and such object shall have been considered

¹⁹ Letter from the Pueblo of San Felipe to Secretary Deb Haaland (Jun 19, 2024).

²⁰ *Id.*

²¹ 16 U.S.C. § 470aaa. The Department issued PRPA regulations in 2022, located at 43 C.F.R. Part 27. *See* Paleontological Resources Preservation, 87 Fed. Reg. 47,296 (Aug. 2, 2022).

²² 25 U.S.C. § 3001(3).

²³ *Id.* § 3001(3)(C).

inalienable by such Native American group at the time the object was separated from such group.²⁴

The IBLA concluded the fossils are not sacred objects because “there [was] no evidence in the record that the fossils were devoted to a traditional Native American religious ceremony or ritual.”²⁵

Further, the IBLA determined that the fossils are not objects of cultural patrimony because they were deposited forty million years ago and thus “could not have been separated from a group of humans before they were deposited in the earth.”²⁶ The time of deposition in the Earth, however, is not dispositive of whether the fossils are objects of cultural patrimony because the moment of deposition is not necessarily the moment of separation from the Native American group. Fossils can be objects of cultural patrimony under NAGPRA if those fossils—even millions of years after being deposited in the Earth—become objects of cultural importance to a Native American group, whether through spiritual beliefs or other means. Under NAGPRA, separation must occur after the object develops its cultural relationship to the Tribe within the meaning of NAGPRA, not necessarily the time the fossils were deposited in the ground. If paleontological resources were to be excavated, and thus separated, they could be subject to return under NAGPRA as objects of cultural patrimony, depending on consultation and the determination of the decision-making bureau.

The IBLA also reasoned that the fossils were not objects of cultural patrimony because they were not created or used by humans and there was a lack of evidence humans had seen the fossils before.²⁷ Nothing in NAGPRA requires the object be created or used by humans. Rather, the test is whether the object “[has] ongoing, historical, traditional, or cultural importance central to [a] Native American group” like the Pueblo. Therefore, paleontological resources may be considered objects of cultural patrimony, depending on the cultural context, consultation, and determination of the decision-making bureau.

Further, the IBLA’s opinion was issued against a now outdated regulatory backdrop concerning the deference owed to Native American traditional knowledge, and consultation duties. NAGPRA requires consultation with lineal descendants, Indian Tribes, or NHOs when making a NAGPRA determination of whether an item is a sacred object or has “ongoing historical, traditional, or cultural importance” so as to identify that item as an object of cultural patrimony.²⁸ The updated NAGPRA regulations emphasize to a greater degree the role of consultation because “[c]onsultation, which is required throughout the Act prior to any determination, is how an Indian Tribe or NHO shares the information needed to identify a cultural item.”²⁹ This consultation is meant to result in more informed decision-making because “[t]he definitions of . .

²⁴ *Id.* § 3001(3)(D).

²⁵ 191 IBLA at 71.

²⁶ *Id.*

²⁷ *Id.*

²⁸ 43 C.F.R. § 10.1(a)(2).

²⁹ Native American Graves Protection and Repatriation Act Systematic Processes for Disposition or Repatriation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony, 88 Fed. Reg. 86,452, 86,470 (Dec. 13, 2023).

. sacred objects, and objects of cultural patrimony [cultural items] all rely on information that may only be available to or shared by lineal descendants, Indian Tribes, or NHOs.”³⁰

The updated NAGPRA regulations define, “cultural items” as “a funerary object, sacred object, or object of cultural patrimony *according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization.*”³¹

The regulations define, in relevant part, “sacred object” as “a specific ceremonial object needed by a traditional religious leader for present-day adherents to practice traditional Native American religion, *according to the Native American traditional knowledge of a lineal descendant, Indian Tribe, or Native Hawaiian organization.*”³²

The new regulations also updated the definition of “object of cultural patrimony,” now defined, in relevant part, as “an object that has ongoing historical, traditional, or cultural importance central to a Native American group, including any constituent sub-group (such as a band, clan, lineage, ceremonial society, or other subdivision), *according to the Native American traditional knowledge of an Indian Tribe or Native Hawaiian organization.*”³³

While it is ultimately the agency or bureau that is “responsible for making determinations under the Act and [the NAGPRA] regulations . . . [t]he addition of ‘according to Native American traditional knowledge’ [to] th[ese] definition[s] is to ensure meaningful consideration of this information during consultation” with lineal descendants, Indian Tribes, and NHOs when determining whether an item is a cultural item.³⁴ The regulations define “Native American traditional knowledge” as:

knowledge, philosophies, beliefs, traditions, skills, and practices that are developed, embedded, and often safeguarded by or confidential to individual Native Americans, Indian Tribes, or the Native Hawaiian Community. Native American traditional knowledge contextualizes relationships between and among people, the places they inhabit, and the broader world around them, covering a wide variety of information, including, but not limited to, cultural, ecological, linguistic, religious, scientific, societal, spiritual, and technical knowledge. Native American traditional knowledge may be, but is not required to be, developed, sustained, and passed through time, often forming part of a cultural or spiritual identity. Native American traditional knowledge is expert opinion.³⁵

In addition, the NAGPRA regulations now expressly “require deference to the Native American traditional knowledge of lineal descendants, Indian Tribes, and Native Hawaiian organizations.”³⁶ This deference “is intended to require that a museum or Federal agency

³⁰ *Id.* at 86, 477 (discussing Congressional intent).

³¹ 43 C.F.R. § 10.2 (emphasis added).

³² *Id.* (emphasis added).

³³ *Id.* (emphasis added).

³⁴ 88 Fed. Reg. at 86,470 (replying to a comment about the definition of “cultural item,” which includes objects of cultural patrimony).

³⁵ 43 C.F.R. § 10.2.

³⁶ 88 Fed. Reg. at 86, 504.

recognize that lineal descendants, Indian Tribes, and NHOs are the primary experts on their cultural heritage.”³⁷ While the regulations do not define “deference,” the “term is intended to ensure meaningful consideration of Native American traditional knowledge” throughout the NAGPRA process and “should be understood to have a standard, dictionary definition”³⁸

Affording deference to Native American traditional knowledge does not shift the decision-making responsibility away from a museum or federal agency under NAGPRA or its regulations such that the decisionmaker defers to the determination a lineal descendant, Indian Tribe, or NHO makes based on traditional knowledge.³⁹ It does require, however, that the decisionmaker make a determination on whether an item is a cultural item only after consulting with lineal descendants, Indian Tribes, and NHOs, and meaningfully considering the Native American traditional knowledge provided during that consultation process.⁴⁰ That deference includes the Department and its bureaus deferring to a lineal descendant, Indian Tribe, or NHO on the substance and validity of its Native American traditional knowledge when making its final determination on whether an item, like a paleontological resource, is a cultural item.⁴¹

When the IBLA issued its decision, it relied on the old regulations that, unlike the updated regulations, did not highlight to the same degree the role of Native American traditional knowledge as expert opinion and the requirement of deferring to Native American traditional knowledge in all NAGPRA decision-making steps. As the preamble to the final rule explains in discussing the definition of “cultural item,” “[d]eference to Native American traditional knowledge is necessary to ensure the rights of lineal descendants, Indian Tribes, and NHOs the Act recognizes.”⁴² Thus, consistent with the statute and its updated implementing regulations, the Department and its bureaus must ensure meaningful consultation and afford proper deference to and consideration of Native American traditional knowledge, as expert opinion, when determining whether paleontological resources are cultural items under NAGPRA.

B. Applicability of *Bonnichsen v. United States*

The IBLA’s reliance on *Bonnichsen v. United States*, referred to as “the Kennewick Man” case,⁴³ when evaluating whether paleontological resources could be considered cultural items misconstrued the applicability of the precedent. In *Bonnichsen*, the Ninth Circuit considered whether ancient human remains were “Native American” as defined in NAGPRA. The Department concluded they were Native American under NAGPRA and should be transferred to local Tribes asserting an affiliation with the remains. Scientists sought custody to study the remains. The Ninth Circuit applied a “substantial evidence” analysis to determine whether the

³⁷ *Id.* at 86,467.

³⁸ *Id.*

³⁹ *Id.* (stating that the updates to the regulations “have not added a requirement for deference to the determinations of lineal descendants, Indian Tribes, or NHOs as it would be inconsistent with the Act”).

⁴⁰ *Id.* at 86,481, 86,504 (“Museums and Federal agencies are responsible for making determinations under the Act and these regulations, but must do so after consulting with lineal descendants, Indian Tribes, and NHOs.”).

⁴¹ A museum or agency may also receive evidence that may support or conflict with the Native American traditional knowledge and must also consider this evidence.

⁴² 88 Fed. Reg. at 86, 470.

⁴³ 367 F.3d 864 (9th Cir. 2004). The human remains at issue in the case were found near Kennewick, WA, and thus are sometimes referred to as the “Kennewick Man.” *Id.* at 868-69. Tribes in the area refer to him as the “ancient one.”

administrative record could sufficiently establish a connection between the Kennewick Man and a presently existing Tribe, including discounting the Tribes' oral histories.⁴⁴ Finding the Tribes unable to meet this standard, the court held that because the "remains are *so* old and the information about his era is *so* limited, the record does not permit" a conclusion that the Kennewick Man was Native American for the purposes of NAGPRA.⁴⁵


Bonnichsen is inapposite to these circumstances because it examined the narrow legal question of whether human remains that were thousands of years old were "Native American" within the meaning of NAGPRA, not whether items could be identified as cultural items, the question before the IBLA in *Pueblo of San Felipe*.

Not only was the legal question different, but so too was the factual backdrop. While *Bonnichsen* dealt with ancient human remains, the IBLA case concerned paleontological resources. For these ancient human remains in *Bonnichsen* to fall under NAGPRA, the Kennewick Man had to have a significant relationship with a presently existing Tribe. However, the Ninth Circuit reached its conclusion partially because of the age of the remains, determining it was "almost impossible" that they were connected to a presently existing Tribe, with geographic location of the find alone being insufficient to establish a significant relationship to that presently existing Tribe.⁴⁶ The circumstances of San Felipe's case are much different than the issue in *Bonnichsen*. San Felipe was not trying to establish an ancestral, special or significant relationship to human remains to show the remains are "Native American" under NAGPRA. Rather, they asserted that the fossils are cultural items and have an ongoing historical, traditional, or cultural importance central to them as a presently existing Tribe such that the fossils are Native American objects of cultural patrimony.⁴⁷

Because of these stark differences, the IBLA should not have relied on *Bonnichsen* to support its finding that the fossils were not cultural items. As discussed in detail above, updated NAGPRA regulations require the Department and its bureaus to meaningfully consider and defer to Native American traditional knowledge of lineal descendants, Indian Tribes, and NHOs provided during consultation. Under today's regulatory framework, the BLM and IBLA would have to give appropriate weight to San Felipe's traditional knowledge as expert opinion on the cultural identification of the paleontological resources as cultural items.

III. Conclusion

Although each case is necessarily fact-specific, paleontological resources can be considered cultural items under NAGPRA. In making a determination, the Department should engage in meaningful consultation and ensure proper deference is given to Native American traditional knowledge, consistent with NAGPRA and the updated implementing regulations.


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⁴⁴ *Id.* at 879-82.

⁴⁵ *Id.* at 882 (emphasis in original).

⁴⁶ *Id.* at 879.

⁴⁷ 191 IBLA at 60.