UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-15710

NAVAJO NATION,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, SALLY JEWELL, in her official capacity as SECRETARY OF THE DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, JONATHAN B. JARVIS, in his official capacity as DIRECTOR OF THE NATIONAL PARK SERVICE, and TOM O. CLARK, in his official capacity as PARK SUPERINTENDENT, CANYON DE CHELLY NATIONAL MONUMENT
Defendants-Appellees

REPLY BRIEF OF PLAINTIFF-APPELLANT NAVAJO NATION

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A Supplemental Addendum ("Supp. App.") is appended to the end of this Brief to include new authorities not previously cited in either the Nation's or the Government's Briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Navajo Nation ("Nation") brought the claims in this case to recover 303 sets of human remains and associated artifacts, removed from the Nation by the National Park Service ("NPS") without the Nation's consent. The Nation intends to reinter the remains in their original resting place in Canyon de Chelly, on the Navajo Nation.

In its complaint, the Nation alleged violations of the Treaty signed at Canyon de Chelly in 1849 and ratified in 1850, 9 Stat. 974 (the "1850 Treaty"), the Treaty signed and ratified in 1868, 15 Stat. 667 (the "1868 Treaty"), 16 U.S.C. §§ 445-445b (the Canyon de Chelly "Monument Act"); the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. §§ 470aa-mm; the Native American Graves Protection and Repatriation Act "NAGPRA"), 25 U.S.C. § 3001 *et seq.*; and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, and breach of the Government's trust duties. The Nation showed that the Navajo Nation did not consent and would never have consented to an abrogation of its Treaty rights to Canyon de Chelly, and urged that if the Monument Act or any other law were construed to abrogate those rights,

it would be unconstitutional.

As the Nation explained in its opening brief, the 1868 Treaty confirms the Nation's property rights in Canyon de Chelly which was specifically bargained for. That Treaty reserved to the Nation the equivalent of full title in fee to the resources and the fundamental and uncontroverted right to exclude others. As the Nation also explained, the Monument Act preserved the Nation's treaty rights to Canyon de Chelly and did not abrogate them.

The Government's failure to confront the Nation's arguments under the Monument Act is most telling. The Government fails to address NPS's own history of the Monument showing that Canyon de Chelly was "sacred ground" to the Navajo, and the repeated promises of the federal government that nothing in the Act would affect the Nation's treaty rights. The Government has no explanation for the statement from NPS's own Director at the time the Act was adopted, that nothing in the Act affected the Nation's "ownership and control" of Canyon de Chelly. Instead, the Government offers only unsubstantiated, self-serving conjecture of what Congress must have intended, in contravention of basic tenets of statutory construction. The Monument Act established duties of care and preservation of the Nation's resources, not their confiscation, which, combined with NPS's administration and occupancy of the Monument, establishes enforceable trust duties.

Moreover, ARPA and its regulations confirm that archaeological resources from Canyon de Chelly are the property of the Nation and cannot be taken or given to others without the Nation's consent. This is true even for resources that have been collected from the Nation's lands with a federally issued permit under ARPA or the Antiquities Act. Because the resources are the Nation's property, NPS has a mandatory obligation to return them on demand, under ARPA and the common law.

NAGPRA is consistent with ARPA and the two statutes should be construed *in pari materia*. Section 3 of NAGPRA is the only provision that addresses ownership or control of NAGPRA cultural items found in tribal lands. It applies from NAGPRA's enactment on November 16, 1990, forward. In Section 3, Congress provided that the rights of landowner tribes to NAGPRA cultural items from their tribal lands are superior to the rights of others, including potentially culturally affiliated tribes. The Government's failure to explain this provision cannot be rescued by simply stating that there are "two distinct schemes" in NAGPRA for ownership of resources from tribal lands. NPS Br. 14. Rather, consistent with the ownership provisions in Section 3 of NAGPRA, Sections 5-7 require an agency or federally funded museum to have a legal interest in pre-1990 cultural items in its physical custody before Sections 5-7 are applicable. Here, NPS does not have the necessary legal interest in the Canyon de Chelly property to establish "possession"

or "control" of the remains and objects, as required for NPS to apply Sections 5-7 of NAGPRA in the first instance. The Government's attempt to redefine "possession" and "control" to mean mere physical custody contravenes its own regulations and should be rejected.

Because no Act of Congress gave NPS "possession" or "control" of the remains and artifacts required to proceed under NAGPRA, its final decision to proceed with inventorying and disposing of the Nation's property under those inapplicable procedures is final agency action under the Administrative Procedures Act. By refusing to return the Nation's resources on its demand, the Government is independently violating ARPA, NAGPRA, the Monument Act, and its trust duties. The Government's immunity for those claims is also waived by 5 U.S.C. § 702.

ARGUMENT

I. THE TREATY OF 1868 RESERVED THE NATION'S PROPERTY RIGHTS TO CANYON DE CHELLY AND THE MONUMENT ACT DID NOT ABROGATE THOSE RIGHTS.

The Treaty of 1868 is an independent source of the Nation's property interests in this case. Pursuant to the Treaty, the Nation has the right to prevent federal agencies from taking or disposing of the Nation's property. The Monument Act did not abrogate any rights reserved by the Nation in the Treaty. To the extent the federal government is authorized pursuant to the Monument Act to administer the

Nation's archaeological resources from Canyon de Chelly, it can only do so as trustee and guardian, and cannot confiscate the Nation's property or give it to others. *See Shoshone Tribe of Indians*, 304 U.S. at 115-116; 16 U.S.C. § 445a.

The 1868 Treaty specifically includes Canyon de Chelly as wholly within the reservation, and "set apart for the use and occupation of the Navajo Tribe of Indians . . . ." 1868 Treaty Art. II, Add. 5. This language recognizes that the Nation has the equivalent of "full title in fee" to Canyon de Chelly and the lands and resources therein. *See Shoshone Tribe of Indians*, 304 U.S. at 116. The Treaty did not except from the reservation the prehistoric sites in Canyon de Chelly, "sacred ground" to the Navajo people. David Brugge, *et al., Administrative History: Canyon de Chelly National Monument Arizona* (National Park Service 1976) (Library of Congress Control No. 76600883) ("Monument History") 7, Add. 70. As even the Government acknowledges, the Treaty does not "make[] any specific reference to burials within the reservation or to objects of antiquity." NPS Br. 7. These were all therefore reserved to the Navajo Tribe as part of its exclusive property. *See United States v. Winans*, 198 U.S. 371, 381 (1905) (where tribe cedes a right through a treaty or agreement, courts must be mindful that the instrument is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted"). Navajo jurisdiction over its Reservation in Arizona stretches "from the top of the sky

to the center of the Earth," and those lands are held in an express trust established by Congress. *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 463 (9th Cir. 1996); *see* 25 U.S.C. § 640d-9(a). Indeed, Canyon de Chelly was specifically bargained for and was included by name in the description of reservation lands in the Treaty of 1868, as "it was the very heart of [Navajo] country . . . ." Treaty Between the United States of America and the Navajo Tribe of Indians/With a Record of the Discussions that Led to Its Signing (KC Publications 1968) (Library of Congress Control No. 68-29989), Add. 63.

The Monument Act was passed only after the consent of the Navajo Tribal Council was given. *See* 16 U.S.C. § 445. That consent was conditioned on the Government's promise that "title would not be taken in any way from the Indians or their treaty rights interfered with." Monument History 8, Add. 71. The Act accordingly did not in any way abrogate the Nation's treaty rights or property rights to the resources in Canyon de Chelly. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (ambiguous provisions in federal statutes and agreements are interpreted in favor of tribes, and doubtful expressions of legislative intent must be resolved in their favor); *see generally* Richard B. Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365, 379-80 (1989). The Government's conjecture that Congress could not have thought "that 'lands and minerals' included the remains

of ancestral Puebloans," NPS Br. 47, ignores these basic tenets of statutory construction and treaty abrogation. The Treaty of 1868, *not* the Monument Act, is the source of the Nation's property rights, and there is utterly no support for the position that the Tribal Council believed that NPS's trusteeship, as described to it in the negotiations leading to the Monument Act, would include abrogating treaty rights, digging up 303 sets of human remains from Canyon de Chelly, and hauling them off to Tucson for study or storage, such actions being abhorrent to Navajo cultural practices. *See* Compl. 5-7, NNRE 34-36. To abrogate a treaty commitment to the Navajo Nation, Congress must make its intent to do so clear, *see United States v. Dion*, 476 U.S. 734, 738-739 (1986), and it certainly did not do so in the Monument Act. The Monument Act (and NAGPRA) should have been construed *not* to have abrogated any treaty rights and to avoid serious questions of their constitutionality, *see Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993), and the District Court's ruling otherwise is reversible error.

The Government asserts that the Anglo-American common law regarding ownership of dead bodies provides the "backdrop" to the issues in this case, and that the remains are either not property at all, or to the extent they are considered property or quasi-property, they can belong only to the "next of kin or culturally affiliated

tribes." NPS Br. 27-31. However, property interests protected by the due process clause of the United States Constitution are created and defined by existing law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In this case, the laws creating and defining the Nation's property rights at Canyon de Chelly are the 1850 and1868 Treaties, the Monument Act, ARPA, NAGPRA and federal common law, not Blackstone's Commentaries, penned when the Church had primary responsibility for such matters and premised on ecclesiastical law. *Cf.* NPS Br. 27. Moreover, no matter what "legal label" is put on rights in a dead body, "these rights . . . closely correspond with the 'bundle of rights' by which property has been traditionally defined," *Whaley v. County of Tuscola*, 58 F.3d 1111, 1117 (6th Cir.), *cert. denied*, 516 U.S. 995 (1995), and which include "the right to possess, use and dispose of it," as well as "the power to exclude others . . . traditionally one of the most treasured strands in an owner's bundle of property rights," *Newman v. Sathyavaglswaran*, 287 F.3d 786, 795-796 (9th Cir.) (internal citations, ellipses and quotation marks omitted), *cert. denied*, 537 U.S. 1029 (2002); *see Brotherton v. Cleveland,* 923 F.2d 477, 481 (6th Cir. 1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). The Nation's right to exclude nonmembers under the 1868 Treaty is well established. *See*, *e.g.*, *Williams v. Lee*, 358 U.S. 217 (1959).

Particularly unavailing is the Government's conflation of "cultural affiliation"

with lineal descendants or "next of kin." NPS Br. 28 - 31. In the case of prehistoric remains, as here, actual descendants are unknown. If the common-law rule were that a purportedly "culturally affiliated" group held a property interest in prehistoric human remains absent next of kin, then Congress would not have needed to pass NAGPRA in order to transfer federal ownership of human remains to culturally affiliated tribes, because such tribes would already own the remains. Moreover, if the Government's rule were correct, in promulgating Section 3 of NAGPRA, Congress would have recognized ownership or control of human remains in a culturally affiliated tribe as *superior* to the tribal landowner, not as *inferior* to the tribal landowner, which is what Congress did. *See* 25 U.S.C. § 3002(a). In any event, the old English common law rule derives from the laws of the ecclesiastical courts, based on the idea that the dead have a right to a "dignified disposition." *Newman*, 287 F.3d at 791. The remains at issue here need to be returned to their original resting place in Canyon de Chelly, a dignity that *only* the Navajo Nation, as the tribal landowner, can provide.

II. ARPA AND ITS REGULATIONS CONFIRM THAT ARCHAEOLOGICAL RESOURCES FROM CANYON DE CHELLY BELONG TO THE NATION.

ARPA and its regulations confirm that archaeological resources from Canyon de Chelly, which include NAGPRA cultural items by definition,[1] belong to the Nation. ARPA states:

> The Secretary of the Interior may promulgate regulations providing for–
>
> (1) the exchange, where appropriate, between suitable universities, museums, or other scientific or educational institutions, of archaeological resources removed from public lands and Indian lands pursuant to this Chapter, and
>
> (2) the ultimate disposition of such resources and other resources removed pursuant to the [Archeaological and Historic Preservation Act of 1974] or the [Antiquity Act of 1906].
>
> *Any exchange or ultimate disposition under such regulation of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands*. Following promulgation of regulations under this section, nothwithstanding any other provision of law, such regulations shall govern the disposition of archaeological resources removed from public lands and Indian lands pursuant to this Act.

16 U.S.C. § 470dd (ARPA Section 5) (emphasis added); *see also id* § 470cc(g)

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[1]NAGPRA "cultural items" include human remains, associated and unassociated funerary objects, sacred objects and cultural patrimony. *See* 25 U.S.C. § 3001(3). These categories are all subsumed under the general category of "archaeological resources" under ARPA, provided they are at least 100 years old, as here. *See* 16 U.S.C. § 470bb(1); 43 C.F.R. § 7.3(a)(2), (3).

(ARPA permit on Indian lands requires tribal landowner consent and its terms may be conditioned by tribe; tribal landowner does not need federal permit to excavate its own archaeological resources).

ARPA Uniform Regulations were promulgated by the Secretary of the Interior and other federal officials. The Uniform Regulations provide that "[a]rchaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources." 43 C.F.R. § 7.13(b). Canyon de Chelly is "Indian lands," not "public lands." *See* 43 C.F.R. §§ 7.3(e) ("Indian lands" includes trust lands), 7.3(d) ("Indian lands" held by the federal government in restricted fee specifically *excepted* from "public lands"); *see also* 1868 Treaty, Art. II, Add. 5; 16 U.S.C. § 445a; Monument History, Add. 79 ("[A]s far as ownership and control by the Indians are concerned [it] was not changed by the establishment of the monument."); *compare* NPS Br. 13.

The Government claims it has no duty to to return the remains and objects to the Nation under ARPA, because regulations have supposedly never been promulgated by the Secretary of the Interior under 16 U.S.C. § 470dd. The Government asserts:

> In ARPA, Congress provided that Interior "may" promulgate regulations providing for the "ultimate disposition" of these objects of antiquity, and of archaeological resources excavated or removed from

> public lands and Indian lands in the future under authority of ARPA. *No such regulations were promulgated, and no dispositions were made, before NAGPRA's enactment*.

NPS Br. 40 (emphasis added); *see also id.* at 11 n.6 ("The Department of the Interior has not to date promulgated the regulations authorized under [16 U.S.C. § 470dd].")

The Government's representation here repeats what it represented below:

> 16 U.S.C. § 470dd creates no nondiscretionary duties applicable here. Instead, the section states that "[t]he Secretary of the Interior may promulgate regulations providing for . . . the ultimate disposition" of archaeological resources and "[a]ny exchange or ultimate disposition under such regulation of archaeological resources excavated or removed from Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands." 16 U.S.C. § 470dd . . .. *But no regulations have been promulgated under this section that address the "exchange or ultimate disposition" of such resources*.

Dist. Ct. Reply Br. 2, NNFRE 5 (original emphases deleted; final emphasis added); *see also id.* n. 1 (claiming that the Department of the Interior is currently developing such regulations at 36 C.F.R Part 79). The District Court took the Government at its word:

> [T]he portion of ARPA relied on by the plaintiff, 16 U.S.C. § 470dd, does not create an immediate nondiscretionary repatriation duty on the part of the NPS. . . . The Secretary of the Interior has promulgated limited regulations under ARPA dealing with the custody of archaeological resources. *See* 43 C.F.R. § 7.13. While these regulations provide in part that "[a]rchaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources," § 7.13(b), they more

> specifically provide that the Secretary may promulgate regulations providing "for the ultimate disposition of archaeological resources, and for standards by which archaeological resources shall be preserved and maintained, when such resources have been excavated or removed from public lands and Indian lands." § 7.13(c). . . . Since 16 U.S.C. § 470dd, the portion of ARPA relied on by the plaintiff, does not specifically provide a nondiscretionary repatriation duty on the part of the defendants *in the absence of any controlling regulation*, the Court concludes that there has not been any withheld agency action that is reviewable under the APA at this time.

Order (Feb. 12, 2013) (emphasis added), 9-10, NNRE 12-13.

When the Government made this assertion to the District Court, such ARPA regulations had already been promulgated by NPS at 36 C.F.R. Part 79 for federal collections of archaeological resources. The Secretary promulgated these regulations under 16 U.S.C. § 470dd to govern "the: (1) Exchange . . . of archaeological resources recovered from public and Indian lands under [ARPA]; and (2) Ultimate disposition of archaeological resources recovered under [ARPA], the Antiquities Act, or the Reservoir Salvage Act." 36 C.F.R. § 79.2(b); 55 Fed. Reg. 37,616, 37,630 (Sept. 12, 1990), Supp. Add. 6. They provide that, pursuant to ARPA, "any exchange or ultimate disposition of resources excavated or removed from Indian lands *shall* be subject to the consent of the Indian or Indian tribe that owns or has jurisdiction over such lands." 36 C.F.R. § 79.2(b) (emphasis added); 55 Fed. Reg. at 37,630; *see also* 36 C.F.R. § 79.8(e) (any contract transferring physical custody of

archaeological resources from Indian lands for placement in a repository requires consent of Indian landowner and tribe having jurisdiction).

These regulations apply not only to federally owned collections but also where "a non-Federal collection is being cared for and maintained (administered) by a Federal agency on behalf of the non-Federal owner." 52 Fed. Reg. 32,740 (Aug. 28, 1987), Supp. Add. 5 (draft rule); *compare* Monument Act, 16 U.S.C. §445b ("The National Park Service, under the direction of the Secretary of the Interior, is charged with the *administration* of the area of said national monument, so far as it applies to the *care, maintenance, preservation and restoration* of the prehistoric ruins . . . ") (emphases added). The federal government does not own the Canyon de Chelly remains and objects, which it merely administers, because "[m]aterial remains . . . that are excavated or removed from a prehistoric or historic resource generally are the property of the landowner." 36 C.F.R. § 79.3(a)(1). "Material remains" include "[h]uman remains." *Id.* §79.4(a)(1)(vi).

Ownership of archaeological resources was discussed by NPS in promulgating both the final rule, *see* 55 Fed. Reg. at 37,618 ("[P]roperty rights concerning archeological resources on public and Indian lands are specified in . . . [§ 7.13] of ARPA's uniform regulations . . . ."); *compare* 43 C.F.R. § 7.13 ("Archaeological resources excavated or removed from Indian lands remain the property of the Indian

or Indian tribe having rights of ownership over such resources."), and the draft rule:

> The majority of federally funded or authorized archeological studies are conducted in connection with a Federal undertaking on public (Federal) lands . . . The material remains and associated records (referred to herein as archeological collections) generated by those studies generally belong to the United States Government.
>
> . . .
>
> Other federally funded or authorized archeological studies are conducted in connection with a Federal undertaking on Indian lands, State or local lands, or privately owned lands . . . The archeological collections generated by those studies *generally belong to the individual Indian or Indian tribe*, State or local agency, or person or institution that owns or has jurisdiction over said lands.
>
> . . .
>
> *Unless otherwise negotiated with non-Federal owners*, archeological collections recovered from non-Federal lands generally *are returned to the landowner* following necessary analyses.

52 Fed. Reg. 32,740 (emphases added), Supp. Add. 5. The regulations specifically provide that, as an exception to placement in a repository, "non-federally-owned remains are retained and disposed of *by the owner*," 36 C.F.R. § 79.6(b)(3) (emphasis added), and repositories "shall . . . not transfer, *repatriate* or discard a federally *administered* collection (or any part thereof) without the written permission of the Federal Agency Official *and the owner*." 36 C.F.R. § 79.8(o) (emphases added). There is a mechanism by which a federal agency can obtain title of resources in its physical custody from a non-federal owner, including an Indian tribe, such as through a gift deed. *See* 55 Fed. Reg. at 37,617, 37,637. However, the Nation has

never deeded the Canyon de Chelly resources to NPS, as would be required for NPS to own, and not just administer, the collection.

Finally, the NAGPRA regulations themselves specifically refer to ARPA, 16 U.S.C. § 470dd(2), as additional authority for their promulgation, and such regulations must therefore conform to that statute. *See Rodriguez v. Smith*, 541 F.3d 1180, 1189 (9th Cir. 2008) (regulations conflicting with clear language of statute invalid). The Government claims that the reference to Section 5 of ARPA is only for the NAGPRA regulatory provisions related to culturally unidentifiable remains (43 C.F.R. § 10.11), because the reference was added at the same time the regulation addressing such remains was promulgated. *See* NPS Br. 44. However, the March 15, 2010 rule also addressed "applicability of the regulations, definitions, [and] inventories of human remains and related funerary objects . . . ." 75 Fed. Reg. at 12,378 (March 15, 2010), Supp. Add. 8. Indeed, although the Government removed the reference to 16 U.S.C. § 470dd in a *draft* NAGPRA rule it promulgated in 2012, *see* 77 Fed. Reg. 23,196, 23,200 (April 18, 2012), Supp. Add. 9, it reinstated that reference to ARPA in the final rule after receiving numerous comments stating that the draft rule was erroneously revising the authority for the regulations, *see* 78 Fed. Reg. 27,078, (May 9, 2013), Supp. Add. 10. The Government's current account also

completely contradicts its earlier representation to the District Court, that the initial *inclusion* of 16 U.S.C. § 470dd(2) as authority for the NAGPRA regulations was a "scrivenor's error." *See* NNFRE 2.

In any event, regulations have been promulgated implementing 16 U.S.C. § 470dd(2) and their mandatory language is binding on NPS. *See* 16 U.S.C. § 470dd(2); 36 C.F.R. § 79.2(b); 43 C.F.R. § 7.13(b); 43 C.F.R. Part 10. Accordingly, NPS can neither indefinitely retain nor dispose of archaeological resources from the Nation's reservation lands, including NAGPRA cultural items, without the Nation's consent. The District Court's contrary ruling, based on the erroneous view that requisite regulations had not been promulgated under 16 U.S.C. § 470dd, is reversible error.

III. NAGPRA CONFIRMS THAT CULTURAL ITEMS FROM TRIBAL LANDS ARE OWNED OR CONTROLLED BY THE TRIBAL LANDOWNER.

A. Only Section 3 of NAGPRA Addresses Ownership or Control of Cultural Items from Tribal Lands and Confirms the Rule in ARPA.

NAGPRA Section 3 is the only provision in NAGPRA that addresses ownership or control of NAGPRA cultural items specifically from tribal lands. It provides clearly that the rights of a landowner tribe are superior to the rights of any

potentially culturally affiliated tribe or the federal government.[2] *See* 25 U.S.C. § 3002(a)(2); *see also* 43 C.F.R. § 10.6(a) (regulation implementing NAGPRA Section 3). Congress affirmed this rule from November 16, 1990 forward even though a possibly more culturally affiliated tribe could find itself unable to reinter its assumed ancestors "according to [its] own cultural practices," NPS Br. 3, unless, of course, the landowner tribe consents, *see* 25 U.S.C. § 3002(a).[3]

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[2]The Government strongly implies that the Navajo people are not culturally affiliated with the human remains from Canyon de Chelly, NPS Br. 3, 5, 6, 19, based on facts *not* in the record and, importantly, *not* at issue in this appeal. The Government calls the remains "ancestral Puebloan," *see*, *e.g.*, NPS Br. 3, 8, 19, 47, apparently predetermining cultural affiliation solely with so-called "modern Puebloan groups," before any consideration of the evidence that NAGPRA requires to be used in making a cultural-affiliation determination, *see* 25 U.S.C. § 3005(a)(4); 43 C.F.R. § 10.2(e)(1), and which would otherwise include Navajo creation stories and Navajo oral tradition linking extant Navajo clans with prehistoric cultures and peoples of the Southwest, including the prehistoric sites in Canyon de Chelly. Notably, the Colorado College culturally affiliated13 individuals, 11 from a single cliff dwelling, taken from Canyon De Chelly, "not Federal lands at the time of collection," with *21* separate tribes stretching geographically from north central Arizona to Texas, but *not* with the Navajo Nation, the tribal landowner. *See*, *e.g.*, 74 Fed. Reg. 48,779, 48,779 - 80 (Sept. 24, 2009) (Aplee.Add. 76-77). The Government characterizes these remains as the "ancestors" and "next of kin" of all 21 tribes, *see*, *e.g.*, NPS Br. 5, 19 n. 17, even though these 21 tribes represent four *unrelated* language families, *see* Pueblo Indian Languages, available at http://www.native-languages.org/pueblo.htm.

[3]The Nation is unaware of a single tribe that has "cultural practices" for reburial of human remains that have been dug up from their final resting place and carted away by federal officials or archaeologists to be probed, placed on display in museums, or stacked away in museum basements. Nonetheless, tribes do take part in reburying such remains, and the Nation has allowed other tribes to participate in such reinterment on Navajo lands.

B. For NAGPRA Cultural Items Excavated after 1990, Congress Transferred Federal Title to Culturally Affiliated Tribes, But Only if Those Items Were Found on *Federal* Lands.

In NAGPRA, Congress *did* transfer title of NAGPRA cultural items removed after 1990, from the federal government to the closest culturally affiliated Indian tribe, if that tribe claims them, but only if those items are found on *federal* lands. 25 U.S.C. § 3002(a)(2)(B). Congress could do so, without limiting any "substantive right" of a landowner tribe, *see* 25 U.S.C. § 3009(4), because "[a]rchaeological resources which are excavated or removed from public lands . . . remain the property of the United States," 16 U.S.C. § 470cc(b)(3); *see also* 43 C.F.R. § 7.13(a).

Congress has the power to dispose of federal property. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 466 (1982). However, it cannot dispose of the property of Indian tribes without paying just compensation. *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116-117 (1938). Thus, ultimate disposition of archaeological resources removed *from tribal lands* is determined by the landowner tribe, not by the federal government. 16 U.S.C. § 470dd; 43 C.F.R. § 7.13(b); 60 Fed. Reg. 5,256, 5,258 (Jan. 26, 1995); 25 U.S.C. § 3002(a); 43 C.F.R. § 10.6(a).

C. NAGPRA and ARPA Must Be Read *In Pari Materia*.

Having no support for its continued retention of the Canyon de Chelly remains

and artifacts in the Constitution, the 1850 and 1868 Treaties, the Antiquities Act, the Monument Act, ARPA, or Section 3 of NAGPRA, the Government must rely solely on the argument that Sections 5-7 of NAGPRA created a new rule, one which necessarily repealed the established ARPA rule by implication. Thus, the Government speculates that Congress provided two contradictory rules in NAGPRA for ownership or control of NAGPRA cultural items taken from tribal lands. First, the Government finds a prospective rule from 1990 forward at Section 3 of NAGPRA that comports with the ARPA rule and affirms ownership in the landowner tribe. NPS Br. 14. Then, it finds a contrary, purportedly retrospective rule, not found in the language of NAGPRA itself, which "amended" (*i.e.*, repealed) the established ARPA rule confirming tribal ownership and control of cultural items taken from tribal lands. *See* NPS Br. 40 (relying on *Cohen's Handbook of Federal Indian Law* § 20.02[2][b] at 1287 (2012 ed.), itself citing no authority).

NAGPRA and ARPA were adopted eleven years apart and cover the same subject matter. NAGPRA specifically requires that intentional excavations of cultural items from Indian lands and public lands be carried out only with permits issued under ARPA and its regulations. 25 U.S.C. § 3002(c)(1). It is a well settled "rule of statutory construction that statutes dealing with the same general subject matter are to be construed in pari materia." *Wilson v. United States*, 250 F.2d 312, 320 (9th Cir.

1958); *see Kickapoo Traditional Tribe of Texas v. Chacon*, 46 F. Supp. 2d 644, 651 (W.D. Tex. 1999) (ARPA and NAGPRA should be construed *in pari materia* and in a manner to give effect to both). Moreover, "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Hui v. Castaneda*, 559 U.S. 799, 810 (2010) (internal citations omitted).

Even if NAGPRA were ambiguous on this point, the Government would not be entitled to *Chevron* deference for any interpretation of NAGPRA that relies on an implied repeal of ARPA. *See Ledezma-Galicia v. Holder*, 636 F.3d 1059, 1075 (9th Cir. 2010) (Where "the presumptions against retroactivity and against implied repeals remove any potential ambiguity that an agency might otherwise resolve, *Chevron* deference has no role to play."); *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F.Supp. 1397, 1417 (D. Hawai'i 1995) ("Where a statute equivocally repeals or avoids the operation of a prior act, the statute is strictly construed to effectuate a consistent operation with the previous legislation."). Section 3 of NAGPRA, the only provision in NAGPRA directly addressing ownership of cultural items from tribal lands, and Section 5 of ARPA state the same rule: notwithstanding any alleged cultural affiliation of an Indian tribe to NAGPRA cultural items taken from *tribal* lands, the tribal landowner's right to determine the disposition of cultural items is superior to the rights of other tribes. *See* 16 U.S.C. § 470dd; 25 U.S.C. § 3002(a).

There is no basis in NAGPRA, its legislative history, or logic for the contention that Congress sought to change this rule using an arbitrary 1990 cut-off date.

Moreover, after the enactment of NAGPRA, the ARPA Uniform Regulations were amended to harmonize them with NAGPRA. *See* 60 Fed. Reg. 5,256, Add. 38. Accordingly, the draft rule adding 43 C.F.R. §§ 7.3(a)(6) and 7.13(e) established procedures *only* for disposition of human remains and associated material remains that had been removed from *public lands*. *See* 56 Fed. Reg. 46,259, 46,261-62 (Sept. 11, 1991), Supp. Add. 7. The final rule provided a simple direction for federal land managers to follow NAGPRA and its regulations "[f]or the disposition *following* lawful removal or excavations of Native American human remains and 'cultural items', as defined by [NAGPRA],"43 C.F.R. § 7.3(a)(6) (emphasis added), and "for determining the disposition of Native American human remains and other 'cultural items', as defined by NAGPRA, that *have been* excavated, removed, or discovered *on public lands*," 43 C.F.R. § 7.13(e) (emphases added). Contrary to the Government's assertion otherwise, NPS Br. 41-42, the regulations nowhere direct federal land managers to use NAGPRA Sections 5-7 for cultural items already removed from *tribal lands*, because "[a]rchaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources, and who, as stated in ARPA, determine the

appropriate treatment."[4] 60 Fed. Reg. at 5,258. The Government's unsubstantiated assertion is contrary to the plain language of the regulations, the federal register notice, and the drafting history.

D. NAGPRA Sections 5-7 Are Consistent with ARPA Because NAGPRA Regulations Require NPS to Have a Property Interest in NAGPRA Cultural Items Before Those Sections Apply.

NAGPRA Sections 5-7 are consistent with ARPA because, in order to apply those sections to cultural items in its physical custody, a federal agency must have a property interest in the items. Federal agencies cannot take non-federal property and give it to others without providing compensation, and NAGPRA does not permit them to do so. The plain language of NAGPRA requires a federal agency to first have "possession" or "control" of NAGPRA cultural items before it can go through a cultural affiliation process and then give them to a tribe deemed culturally affiliated. *See* 25 U.S.C. §§ 3003(a), 3004(a).[5] Section 5 of NAGPRA provides that

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[4]Nowhere in the federal register notice does it state that treatment of burials on Indian lands would be "covered by BIA's regulations," as the Government baldly asserts. NPS Br. 43-44. The BIA regulations cited by NPS are likely invalid anyway. *See* NN Br. 27 n. 6.

[5]NAGPRA Sections 5-7 nowhere address the legal effect of tribal geographic origin of cultural items on an agency's "possession or control" of such items, and *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996), relied on by the Government, NPS Br. 26, is inapposite. In *Ridlon*, the NAGPRA cultural item at issue had been discovered in Los Alamos New Mexico *County* lands, not tribal lands, and the County subsequently assigned its property interest in the cultural item to the tribe that was asserting a cultural affiliation claim. *Ridlon*, 103 F.3d at 937. The

> Each Federal agency and each museum which has *possession or control* over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.

25 U.S.C. § 3003(a) (emphasis added); *accord id.* § 3004(a) ("Each Federal agency or museum which has *possession or control* over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects . . . .") (emphasis added).

The terms "possession" and "control" are not defined in NAGPRA, but are defined in the NAGPRA regulations:

> The term "*possession*" means having physical custody of human remains, funerary objects, sacred objects, or objects of cultural patrimony *with a sufficient legal interest to lawfully treat the objects as part of its collection for purposes of these regulations*. Generally, a museum or Federal agency would not be considered to have possession of human remains, funerary objects, sacred objects of cultural patrimony on loan from another individual, museum, or Federal agency.

43 C.F.R. § 10.2 (a)(3)(i) (2011) (emphases added); *accord id.* § 10.2(a)(3)(ii) ("control" requires, without necessarily having physical custody, a "*legal interest* . . . sufficient to lawfully permit the . . . Federal agency to treat the objects as part of its

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Ridlon Court also never analyzed or needed to analyze whether the museum ever had "possession" or "control" for purposes of applying NAGPRA Sections 5-7 in the first place, a central issue here. *See id.* at 939.

collection . . . .") (emphasis added). Thus, under the definitions, physical custody is insufficient for Sections 5-7 of NAGPRA to apply; the key element is having a "legal interest." The Government thus incorrectly asserts that the Section 5 NAGPRA inventory process applies "broadly" to collections in the mere "physical possession" of federal agencies, "without regard to potential claims of private property rights," NPS Br. 23, and that "'possession or control' refers to the current possession or control of a *custodian*, not any ultimate property right," NPS Br. 36 (emphasis added). The Government's attempts to redefine "possession" or "control" by comparing them with various other terms used in NAGPRA contradict the applicable definitions in NAGPRA and its implementing regulations and must be rejected. As shown above, the Monument Act did not convey any legal interest in Canyon de Chelly to the United States. Lacking a "legal interest" in the Canyon de Chelly remains and artifacts, NPS cannot proceed under Sections 5-7 of NAGPRA.

In Section 3 of NAGPRA, Congress provided the mechanism to transfer title of NAGPRA cultural items found in *federal* lands from November 16, 1990 forward, first to a culturally affiliated tribe, if a claim is made. *See* 25 U.S.C. § 3003(a). Sections 5-7 of NAGPRA work in harmony with Section 3, and provide the process whereby federal agencies transfer federal title to NAGPRA cultural items found on federal lands prior to NAGPRA's enactment in 1990 and already in those agencies'

collections. Sections 5-7 do not provide a process for transferring title of NAGPRA cultural items owned by *tribes*, because federal agencies lack the requisite "legal interest" in them. The Government's contrary position here would permit confiscation by NPS of Navajo property, in derogation of its role as trustee and in contravention of the applicable regulations. *See Shoshone Tribe of Indians*, 304 U.S. at 116-117; 43 C.F.R. § 10.2(f)(2)(iv) ("Actions authorized or required under [the NAGPRA] regulations will not apply to tribal lands to the extent that any action would result in a taking of property without compensation within the meaning of the Fifth Amendment of the United States Constitution.").[6]

IV. BECAUSE THE GOVERNMENT REFUSED TO RETURN THE NATION'S RESOURCES AND CANNOT LAWFULLY PROCEED UNDER NAGPRA, THE NATION'S CLAIMS ARE RIPE AND THE APA WAIVES THE GOVERNMENT'S SOVEREIGN IMMUNITY; THE APA ALSO WAIVES IMMUNITY FOR THE NATION'S STATUTORY, CONSTITUTIONAL AND TRUST CLAIMS.

NPS lacks the requisite "possession" or "control" to proceed under NAGPRA, and its decision to proceed with inventorying and disposing of the Nation's property under NAGPRA, in contravention of ARPA, is final agency action for which the Government has waived its sovereign immunity. *See Sackett v. E.P.A.*, 132 S. Ct.

[6]The meaning of this regulation is clear and unambiguous, and NPS's contrary interpretation is entitled to no deference. *See Alhambra Hosp. v. Thompson*, 259 F.3d 1071, 1076 (9th Cir. 2001).

1367, 1371-72 (2012); *Hale v. Norton*, 476 F.3d 694, 698-99 (9th Cir.), *cert. denied*, 552 U.S. 1076 (2007); *Bonnichsen v. United States*, 367 F.3d 864, 874 n. 14 (9th Cir. 2004) (Court has jurisdiction to hear claim for over enforcement of NAGPRA pursuant to 25 U.S.C. § 3013 and 5 U.S.C. § 704). Additionally, regulations have been promulgated pursuant to ARPA, 16 U.S.C. §470dd, at 36 C.F.R. Part 79 and 43 C.F.R. Parts 7 and 10. NPS was required to return the remains and objects, the Nation's property, *see* 43 C.F.R. § 7.13(b), upon demand by the Nation, *see Hage v. United States*, 35 Fed.Cl. 147, 168 n. 10 (Fed. Cl. 1996) (if no public use, Fifth Amendment bars a taking and requires return of property); *cf. U.S. v. Clymore*, 245 F.3d 1195, 1200 (10th Cir. 2001) (controlled substances forfeiture statute defeats claim of property interest and right of replevin under the common law).

The Government also has express trust duties to care for and protect the Nation's resources in Canyon de Chelly that arise under the 1850 and 1868 Treaties, the Monument Act, 25 U.S.C. § 640d-9(a), and by virtue of the Government's actual supervision, occupation, and administration of Navajo trust resources in Canyon de Chelly. *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475-76 (2003). By trying to retain and give these resources away to others, the Government is violating those duties. The Government is also violating both ARPA and NAGPRA, and the Government's

sovereign immunity is independently waived for these statutory claims and the Nation's trust and constitutional claims pursuant to 5 U.S.C. § 702, with or without final agency action. *See Mitchell*, 463 U.S. at 227 & n.32; *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989); *Trudeau v. Federal Trade Commision*, 456 F.3d 178, 186-87 (D.C. Cir. 2006).

The Government asserts that the Nation's claims are not ripe because Congress intended challenges regarding property interests, and any "takings arguments" under NAGPRA, to be made only after summaries and inventories are completed, citing to Section 7(c) of NAGPRA, a so-called "step two." NPS Br. 21, 53-55. As the Government admits, though, that provision does not apply to human remains and associated funerary objects. *See* NPS Br. 55; 25 U.S.C. § 3005(c). Moreover, that provision provides the means for federal agencies or museums to defeat a repatriation claim of a lineal descendant or culturally affiliated tribe under Section 7 of NAGPRA, not for a tribe to challenge the applicability of NAGPRA in the first instance, as here. *See* 25 U.S.C. § 3005(c).

NPS continues to interfere with the Nation's treaty and property interests, seeks to force the Nation to participate in an unlawful process predisposed to adversely impact its property interests, and continues to block the Nation from returning the human remains to Canyon de Chelly for reinterment at their final

resting place. The APA waives the Government's immunity for the Nation's claims, and its suit need not await NPS' indefinite completion of an unlawful NAGPRA process. *See Sackett*, 132 S. Ct. at 1371-72; *Hale*, 476 F.3d at 698-99; *Bonnichsen*, 367 F.3d at 874 n. 14 (9th Cir. 2004). The District Court has jurisdiction for the Nation's claims and the Nation is entitled to an opportunity to have its claims heard.

CONCLUSION

The judgment of the District Court should therefore be reversed and the case remanded for an adjudication of the Nation's claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in *Fed. R. App. P.* 32(a)(7)(B). This brief contains 6,967 words, excluding the parts of the brief exempted by *Fed. R. App. P.* 32(a)(7)(B)(iii). The brief was prepared using Corel Word Perfect X3 word processing system, in 14.2-font proportionately-spaced Times New Roman type for both text and footnotes. *See Fed. R. App. P.* 32(a)(5) and 32(a)(6).

s/ William Gregory Kelly

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 21, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ William Gregory Kelly