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## Examining the Administrative Unworkability of Final Agency Action Doctrine as Applied to the Native American Graves Protection and Repatriation Act

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# EXAMINING THE ADMINISTRATIVE UNWORKABILITY OF FINAL AGENCY ACTION DOCTRINE AS APPLIED TO THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

*Adam Gerken\**

*The application of the Administrative Procedure Act (“APA”) to the Native American Graves Protection and Repatriation Act (“NAGPRA”) creates unique practical and doctrinal results. When considering the application of the current law concerning judicial review of final agency action under the APA to NAGPRA, it is evident that the law is simultaneously arbitrary and unclear. In the Ninth Circuit’s holding in Navajo Nation v. U.S. Department of the Interior, the Court applied final agency action doctrine in a manner that was legally correct but administratively unworkable. The Court’s opinion contravenes both the reasoning behind the APA final agency action doctrine and the purposes of both NAGPRA and the APA. The holding further allows for a finding of a final agency action despite the fact that the application of NAGPRA is the beginning of a process that will result in its own final agency action – the determination of which tribe owns the remains and artifacts. Such a result ignores sensitive issues of cultural patrimony (the identification of cultural heritage as to specific sets of remains or sacred object) associated with the NAGPRA inventory process, which requires that Native American remains and sacred objects found on federal land be inventoried by the federal agency that manages that land.*

*The unworkability and legal incoherence of the Ninth Circuit’s decision in Navajo Nation stems from an underlying final agency action doctrine developed to protect property rights that fails to properly consider the unique context of cultural heritage rights implicated by statutes such as NAGPRA. These rights involve the recognition that human remains and ceremonial objects belong to a specific culture. The application of final agency action doctrine invites legal claims before anyone can adequately determine what culture the remains and artifacts belong to. Because of this, the courts or Congress must develop an alternative set of rules to be used when dealing with a final agency action that implicates the cultural heritage rights associated with ancient remains and sacred objects. Such an action would account for the unique nature of the rights in question. Doing so would make administrative agencies better equipped to provide inclusive protections to minority cultures in the performance of their duties.*

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## INTRODUCTION

The Native American Graves Protection and Repatriation Act (“NAGPRA”) is a federal statute that regulates Native American remains and sacred objects on federal land and under the control of museums. In *Navajo Nation*, the Ninth Circuit Court of Appeals held that the application of NAGPRA to human remains and artifacts found at Canyon de Chelly National Park was a final agency action reviewable by a court under the Administrative Procedure Act (“APA”).<sup>1</sup> Normally, remains and sacred objects found on federal land are repatriated to their tribe of origin, meaning that they are inventoried, matched to a specific tribe, and physically returned to that tribe.<sup>2</sup> Even though the National Park Service’s application of NAGPRA to the Canyon de Chelly remains and artifacts marked the start of a multi-stage inventory process – a process which would ultimately result in a separate determination of cultural affiliation by the National Park Service – the application of NAGPRA in and of itself constituted a final agency action to the Ninth Circuit.<sup>3</sup> The court reasoned that the application of NAGPRA marked the end of the agency’s decision-making as to the legal issue in question and implicated the religious rights of the Navajo Nation.<sup>4</sup> The court’s holding that the application of NAGPRA in and of itself constituted a final agency action highlighted the unworkability of the underlying legal doctrine applied in the case. This conclusion

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1. *Navajo Nation v. U.S. Dep’t of the Interior*, 819 F.3d 1084, 1085-86 (9th Cir. 2016).

2. 25 U.S.C. §§ 3001-3013 (2012).

3. *Navajo Nation*, 819 F.3d at 1091.

4. *Id.* at 1094-95.

allows tribes to present legal claims requiring repatriation of remains and artifacts without a definitive determination of tribal association under NAGPRA.

In Section I of this Note, I analyze the APA's final agency action requirement and NAGPRA's inventory process requirement, the contributory legal doctrines, and the unique ways in which these two statutes interact. I illustrate how final agency action doctrine necessarily views the rights implicated by agency action to be property rights, not cultural heritage rights. In Section II, I use *Navajo Nation v. U.S. Department of the Interior* as a case-study highlighting the theoretical problems underlying the application of final agency action doctrine to cases implicating NAGPRA. The case presents the following key inconsistency: the decision to apply a law which begins process that will result in a final agency action is, in and of itself, its own final agency action. When combined with the unique cultural heritage rights implicated by NAGPRA (which implicate the rights of the deceased Native Americans at issue and may prevent the remains from being returned to their proper culture) this result contravenes the purpose of the agency action in the first place. The decision in *Navajo Nation* chooses to value property ownership over the protection of the cultural patrimony associated with such remains.

In Part B of Section II, I identify some of the criticism of the doctrine as illustrated in its confusing application and result in *Navajo Nation*. First, I discuss some of the tension between *Navajo Nation* and existing jurisprudence concerning the final agency action requirement of the APA. Second, I discuss how final agency action doctrine undermines the purposes of the underlying statutory scheme in respect to the APA, NAGPRA, and the treaties and statutes resulting in the creation of Canyon de Chelly.

In Part B of Section II, I argue that the fundamental problem with this final agency action problem in the context of NAGPRA and its associated cultural heritage rights is that final agency action doctrine has traditionally been implemented to protect private property rights. Property rights are crucially different in application when compared to cultural heritage rights. Since cultural heritage rights implicated by statutes such as NAGPRA are intrinsically different than standard private or public property rights on which final agency action doctrine is based, the law should develop a system sensitive to the unique circumstances of cultural heritage rights.

In Section III, I consider potential solutions to this problem by proposing either reframing the judicial doctrine or pursuing new legislation. Regardless of how this problem is solved, I argue that a separate set of rules should be developed for final agency action cases that implicate cultural heritage rights.

## I. THE UNDERLYING LAW: THE APA, NAGPRA, AND HOW THEY INTERACT

The APA lays out its final agency action doctrine in § 704, which dictates that an agency decision must be a "final agency action" before affected parties can seek

judicial review.<sup>5</sup> This process views agency decision-making as implicating private property rights, and the underlying doctrine has been applied with that reasoning in mind.<sup>6</sup> Conversely, NAGPRA regulates the repatriation of Native American remains and sacred objects found on federal and Indian land.<sup>7</sup> The application of the APA's final agency action requirements to NAGPRA renders NAGPRA unworkable.

### A. *The APA and The Final Agency Action Requirement*

The APA, passed in 1946,<sup>8</sup> remains one of the most influential federal statutes passed by Congress. The stated purpose of the Act is “to improve the administration of justice by prescribing fair administrative procedure.”<sup>9</sup> The APA added a number of provisions to the U.S. Code that laid out a basic framework for rule-making and adjudication, and administrative agencies – governmental bodies typically constituted in the Executive Branch – must follow these provisions.<sup>10</sup>

Of particular importance is the Act's requirement that decisions made by federal agencies are only subject to judicial review when such decisions constitute a “final agency action.”<sup>11</sup> This requirement is intended to maintain governmental efficiency.<sup>12</sup> The APA provides a right to judicial review in such cases where there is a final agency action for which there is “no other adequate remedy in a court.”<sup>13</sup> Courts lack subject-matter jurisdiction over actions that are *not* final agency action.<sup>14</sup> For that reason, the precise definition of “final agency action” is disputed, with interpretations varying from decisions that affect broadly defined property rights to the effective fulfillment of an agency's legal duty.

The Supreme Court's broadest approach to defining “final agency action” involves a vaguely-defined two-step test that leaves much to the interpretation of lower courts.<sup>15</sup> First, such actions must “mark the ‘consummation’ of the agency's decision making process.”<sup>16</sup> Second, “the action must be one by which ‘rights or

5. 5 U.S.C. § 704 (2012) (“A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”).

6. See *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

7. 25 U.S.C. §§ 3001-3013 (2012).

8. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

9. *Id.*

10. *Id.*

11. 5 U.S.C. § 704 (2012) (“A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”).

12. *Id.*

13. *Id.*

14. *Id.*; *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994).

15. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

16. *Id.* (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948)).

obligations have been determined,' or from which 'legal consequences will flow.'"<sup>17</sup> The broad wording of this test leaves a significant number of cases up to a court's judgment. The varied subject matters that agencies oversee makes such a determination even more difficult, and this wide variety in subject matter necessitates essential procedural differences in how agencies regulate. Agencies regulate everything from fish and wildlife to finance to the management of the American electoral system.<sup>18</sup> As such, the question of what constitutes "final agency action" remains difficult to answer. How can such a rule purport to be uniformly applied to both fishing regulations and Federal Election Commission decisions?

Despite this problem, case law has started to hone in on a consistent meaning of "final agency action," and various lower courts have defined the meaning of the term in specified contexts.<sup>19</sup> "[F]inal agency action" includes approvals for developments that may harm the environment,<sup>20</sup> as well as a Department of Labor letter indicating that the use of volunteer workers to organize consignment sales requires them to be paid wages.<sup>21</sup> Such examples may help shed some light on the distinction between "intermediate agency action" and "final agency action."

Regardless, this distinction is vague when considered in the broad landscape of potential agency action. This landscape covers everything from labor regulation to the management of federal land to the laws and regulations determining the federal government's relationship with Native American tribes.<sup>22</sup> It is that final category of agency action that will be discussed most in-depth in this note.

A line of cases provides a general framework for the application of final agency action doctrine. The landmark case of *Bennett v. Spear* held that a biological opinion issued by the Fish and Wildlife Service constituted final agency action, because the damming and irrigation project at issue may have affected two endangered species of fish and because the opinion requested that specific "reasonable and prudent alternatives" be taken.<sup>23</sup> Writing for the Court, Justice Scalia reasoned that whether a decision is a final agency action is connected to a decision

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17. *Id.* (quoting *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

18. See *Employee Pocket Guide Fundamentals*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/info/pocketguide/fundamentals.html> (last visited Nov. 11, 2018); see also *About the FTC*, FED. TRADE COMMISSION <https://www.ftc.gov/about-ftc> (last visited Nov. 11, 2018); see also *FEC Mission and History*, FED. ELECTION COMMISSION, <https://www.fec.gov/about/mission-and-history/> (last visited Nov. 11, 2018).

19. See *Pacificans for a Scenic Coast v. Cal. Dep't of Transp.*, 204 F.Supp.3d 1075, 1085 (N.D. Cal. 2016); *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023,1033 (D.C. Cir. 2016); *Veldhoen*, 35 F.3d at 225.

20. *Pacificans for a Scenic Coast*, 204 F.Supp.3d at 1087.

21. *Rhea Lana, Inc.*, 824 F.3d at 1024.

22. See 25 U.S.C. §§ 3001-3013 (2012).

23. *Bennett v. Spear*, 520 U.S. 154, 158-59 (1997).

having “direct and applicable legal consequences.”<sup>24</sup> Even though the opinion did not conclusively determine the technicalities of the alternatives (*i.e.* giving general guidance on the maintenance of minimum water levels),<sup>25</sup> the opinion did create actual legal consequence for the plaintiffs in the action, implicating the management of the plaintiffs’ property – the dam.<sup>26</sup>

In *Pacificans for a Scenic Coast v. California Department of Transportation*, the District Court for the Northern District of California helped refine the meaning of final agency action by ruling that final agency action is an action in which an agency fulfills its legal duty as a federal agency.<sup>27</sup> That case involved another biological opinion issued by the Fish and Wildlife Service on the basis of faulty information from the California Department of Transportation (“Caltrans”) that authorized continued development of a highway.<sup>28</sup> Under federal law, the Department of Transportation is allowed to assign its duties as to federal environmental statutes to state agencies, and, here, the Federal Highway Administration did so with respect to Caltrans.<sup>29</sup> In giving final approval to the development, Caltrans (acting as the Federal Highway Administration) took a final agency action.<sup>30</sup> Even though the court had other state-level administrative processes at their disposal, the court held that Caltrans had consummated its duties as a federal agency, allowing for judicial review.<sup>31</sup> Therefore, a final agency action is an action in which an agency fulfills their legal duty as a federal agency, specifically.

The D.C. Circuit further illustrated the contours of the final agency doctrine in *Rhea Lana, Inc. v. Department of Labor*, holding that civil penalties qualify as legal consequences in the context of final agency action doctrine.<sup>32</sup> In that case, the Wage and Hour Division of the Department of Labor investigated Rhea Lana, Inc. for violations of the Fair Labor Standards Act (“FLSA”) and determined that the company’s consignor-volunteers were employees under the FLSA who were entitled to wages.<sup>33</sup> The agency sent two letters: one to the consignor-volunteers encouraging them to bring suit under FLSA and another to Rhea Lana.<sup>34</sup> These letters explained the FLSA violations and informed the company that the company

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24. *See id.* at 178.

25. *Id.* at 159.

26. *Id.* at 178.

27. *Pacificans for a Scenic Coast v. Cal. Dep’t of Transp.*, 204 F.Supp.3d 1075, 1086 (N.D. Cal. 2016). Notably, this holding may be characterized as dicta, since the court suggests that final agency action is not required in Endangered Species Act citizen-suit cases. *See id.* at 1085.

28. *Id.* at 1082.

29. *Id.* at 1081-82.

30. *Id.* at 1086.

31. *Id.*

32. *Rhea Lana, Inc. v. Dep’t of Labor*, 824 F.3d 1023 (D.C. Cir. 2016).

33. *Id.* at 25.

34. *Id.* at 1025-26.

was on notice, that the agency would take no further action, and that penalties would be assessed for future violations.<sup>35</sup> The court held that these letters constituted final agency action.<sup>36</sup> The court reasoned that since the letter made Rhea Lana a candidate for civil penalties, sufficient legal consequences attached for it to qualify as final agency action.<sup>37</sup> Thus, civil penalties qualify as legal consequences in the context of final agency action doctrine.

The Fifth Circuit considered a final agency action question in *Veldhoen v. U.S. Coast Guard*. There, the court examined what traditionally does *not* look like a final agency action: namely, an attempt to “shortcut” administrative proceedings.<sup>38</sup> In this case the U.S. Coast Guard convened a Marine Board to investigate a high-seas collision, and the sailors involved sought a declaratory judgment from the district court for lack of jurisdiction.<sup>39</sup> The court, however, noted that legal rights and obligations did not attach to this decision and held that the Marine Board Inquiry was not a final agency action.<sup>40</sup> The basic doctrine of *Bennett* is built around a view that the final agency action doctrine should be exercised in the context of private property rights.<sup>41</sup> After all, when an agency action implicates such rights, the question as to whether an agency decision is final and reviewable does hinge on the attachment of rights.<sup>42</sup> It makes sense to frame the doctrine in such a way when considering private property rights, because a simple rights attachment question is easily resolved in such a framework. Indeed, much of final agency action doctrine centers around private property rights.<sup>43</sup> And, such reasoning naturally extends to public property rights (*i.e.* environmental law).

When an agency makes a determination on private or public property rights, this determination naturally implicates a conflict between two parties – the private or public party and the government seeking to regulate in such a way as would impede on the use of such party’s property – on a readily quantifiable issue. The property either belongs to the private or public party or the government. This is

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35. See *id.* at 1026.

36. *Id.* at 1032.

37. *Id.*; see also *W. Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659, 663 (7th Cir. 1998) (holding that a similar Department of Labor letter was a final agency action).

38. *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 226 (5th Cir. 1994) (“The obligation to defend oneself before an agency is not the type of obligation that creates final agency action.”).

39. *Id.* at 224.

40. *Id.* at 226.

41. See *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (decided in the context of water use for “recreational, aesthetic and commercial purposes”).

42. See *Bennett*, 520 U.S. at 177-78 (1997) (holding that, in order for an action to be a final agency action, it must (1) mark the “consummation of the agency’s decision making process,” and (2) must be an action by which “rights or obligations have been determined” or from which “legal consequences will flow”).

43. See *Rhea Lana, Inc. v. Dep’t of Labor*, 824 F.3d 1023, 1025 (D.C. Cir. 2016); see also *Veldhoen*, 35 F.3d at 226.



illustrated in *Bennett* as a dispute between parties both public and private – state organizations and ranchers who use the water for discrete property – based purposes – and the federal government seeking to regulate that water in order to protect an endangered species.<sup>44</sup> As such, the court must analyze the issue in respect to the conflict between a discrete property right and a general governmental interest.

However, cultural heritage rights are not so easily divided or quantifiable, given the multitude of potential stakeholders involved in each claim, the difficulty inherent in determining affiliation, and the sensitive political and ethical issues underlying such a determination. For instance, under NAGPRA, an agency must make a determination as to cultural affiliation with regard to human remains, associated funerary objects and other sacred objects and objects of cultural patrimony and then must repatriate the items to the proper culture.<sup>45</sup> NAGPRA further defines “cultural affiliation” as when “there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.”<sup>46</sup> As such, the right that is being determined is not simply the federal government’s, but those of the various tribes that the remains may be associated with and the deceased individual themselves. Such rights implicate complicated issues of tribal sovereignty and human dignity not typically implicate in respect to traditional, resource-centric, property rights. One could even characterize the right as belonging to the objects themselves in many cases, given that many such objects are human remains. When the object is human remains, the agency determines which tribe that person is to be returned to in accordance with the rights given to such tribes.<sup>47</sup> Additionally, these remains and items are typically very old with vague identifiers as to cultural affiliation.<sup>48</sup> Because of the unique context of these rights, the artifacts present a determination that is not easily divided or quantifiable. This results in administrative unworkability when applied to cases in which items are not easily identifiable and may be attributed to multiple different tribes, both large and small.

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44. *Bennett*, 520 U.S. at 160 (1997).

45. 25 U.S.C. § 3005 (2012).

46. 25 U.S.C. § 3001(2) (2012).

47. 25 U.S.C. § 3005 (2012).

48. See *Navajo Nation v. U.S. Dep’t of the Interior*, 819 F.3d 1084, 1096 (9th Cir. 2016) (Ikuta, J., dissenting):

The Canyon has been inhabited by humans for nearly 4,500 years and has been home to permanent settlements for about 2,000 years. Starting around 750 A.D. the Canyon became home to the ancient Pueblo, sometimes referred to as the Anasazi. The ancient Pueblo remained in the Canyon until about 1300, when they left to seek better farmlands. Their descendants, the Hopi Indians, continued to live in the Canyon until about 1600. The modern Zuni and Hopi Indians are the descendants of the ancient Pueblo. The Navajos are relative newcomers, arriving at the Canyon around 1700.

### B. *NAGPRA and the Inventory Process*

Passed in 1990, NAGPRA sought to “provide for the protection of Native American graves.”<sup>49</sup> There is some disagreement as to why NAGPRA was originally passed. Some commentators argue that it was passed in order to form a compromise between scientists, and America generally, seeking to study Native American human remains and sacred objects and tribes seeking to bury their dead and reclaim their cultural artifacts.<sup>50</sup> The other, more supported, view is that NAGPRA was passed in response to an ugly history of colonial archaeologists effectively looting and grave-robbing without any respect for the sovereignty of tribal nations.<sup>51</sup> In this respect, NAGPRA was passed to create positive law establishing the right tribal nations have to remains and cultural objects affiliated with them. Broadly speaking, NAGPRA details the administrative procedures that must be followed to repatriate Native American human remains and associated cultural objects possessed by museums and federal agencies.<sup>52</sup> Museums failing to comply may be assessed a civil penalty,<sup>53</sup> and anyone who “knowingly sells, purchases, uses for profit, or transports for sale or profit” such remains, and items may be criminally prosecuted.<sup>54</sup>

Under NAGPRA, federal agencies and museums must compile an inventory of all Native American human remains and associated funerary objects to which they have possession or control over to determine geographic and cultural affiliation.<sup>55</sup> NAGPRA outlines several requirements for this process. Agencies must complete these inventories “in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders” and must make the inventories available “both during the time they are being conducted and afterward to a review committee established under section 3006 of [Title 25 of the U.S. Code].”<sup>56</sup>

NAGPRA also requires that such inventories be completed no later than “the date that is 5 years after November 1990,”<sup>57</sup> although this deadline may be extend-

49. Native American Graves Protection Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990).

50. Cf. Clayton W. Dumont, *Contesting Scientists' Narration of NAGPRA's Legislative History: Rule 10.11 and the Recovery of "Culturally Unidentifiable" Ancestors*, 26 WICAZO SA REV. 5, 6 (2011).

51. *Id.* at 14.

52. 25 U.S.C. §§ 3001-3013 (2012).

53. 25 U.S.C. § 3007(a) (2012).

54. 18 U.S.C. § 1170 (2012).

55. See 25 U.S.C. § 3003(a) (2012):

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.

56. 25 U.S.C. § 3003(b)(1)(B) (2012).

57. *Id.*

ed through an appeal to the Secretary of the Interior if a good faith effort to conduct an inventory has been made.<sup>58</sup> That means that practically all inventories are put under a broadly defined time limit. Given the narrow nature of the deadline and the ongoing discovery of Native American artifacts and human remains on federal territory, many inventory processes are still ongoing. Upon completion of the process, agencies must provide notice to the affected American Indian tribes and Native Hawaiian organizations within six months.<sup>59</sup> The Code of Federal Regulations contain a number of provisions detailing the application of NAGPRA to agency action and its ensuing implementation.<sup>60</sup> Once an inventory is completed, the National NAGPRA Program posts the inventory as a notice in the Federal Register.<sup>61</sup>

Subsequent lower court case law has filled in the interstices of the NAGPRA inventory process in practice. As an example, NAGPRA does not require the intentional excavation of items in the inventory process.<sup>62</sup> As such, the duty to inventory is only triggered once the relevant items have already been excavated.<sup>63</sup> Additionally, although NAGPRA does require ongoing consultation with American Indian tribes, such a requirement has presented a fairly low bar.<sup>64</sup> To properly inventory items under NAGPRA, an agency must be allowed to engage in research to determine cultural affiliation.<sup>65</sup> Once the inventory process is completed, however, a federal agency may not further delay repatriation by conducting additional research.<sup>66</sup>

Scholars and advocates have viewed NAGPRA as representing shift in the relationship between the United States federal government and American Indian tribes to one of trust through respect for tribal sovereignty and acknowledgement of past colonial wrongs.<sup>67</sup> Given the statute's legislative history, NAGPRA respects tribal sovereignty and serves as an example of the federal government actively working to respect and protect tribal culture – a noble goal in light of countless atrocities committed by the United States in the past.<sup>68</sup> But the

58. 25 U.S.C. § 3003(c) (2012).

59. 25 U.S.C. § 3003(d) (2012).

60. 43 C.F.R. § 10 (2010).

61. 43 C.F.R. § 10.9(e)(7) (2010).

62. *Geronimo v. Obama*, 725 F.Supp.2d 182, 187 n.4 (D.D.C. 2010).

63. *See id.*

64. *See Fallon Paiute-Shoshone Tribe v. U.S. Bureau of Land Mgmt.*, 455 F.Supp.2d 1207, 1219 (D. Nev. 2006) (holding that, because “there were at least some meetings that touched on the affiliation issue and would be considered consultation,” the Bureau of Land Management had met its consultation duty).

65. *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F.Supp. 1397, 1412 (D. Haw. 1995).

66. *Id.*; 25 U.S.C. § 3003(b)(2) (2012).

67. *See* Lauryne Wright, *Focusing on American Indians in Cultural Resource Preservation Laws*, 47 *ADVOCATE* 20, 20-21 (2004); *see also* Dumont, *supra* note 50, at 14.

68. Dumont, *supra* note 50, at 14.

implementation of NAGPRA has not been without criticism. Critics maintain that NAGPRA fails to protect the rights of tribes that are not federally recognized<sup>69</sup> and does not adequately cover ancient remains or remains not discovered on federal lands.<sup>70</sup> Regardless of these weaknesses, the law remains an essential judicial tool that Native American tribes can use to work with the federal government to protect their cultural sovereignty and ensure respect for their dead.

NAGPRA's interaction with the APA – in particular, the APA's "final agency action" requirement – raises further difficulties with respect to the fair administration of justice and the need for culturally-inclusive protection of cultural heritage rights. As has been discussed, under the APA, final agency actions can be reviewed by a court,<sup>71</sup> and agency actions that are not final remain unreviewable.<sup>72</sup> The federal judicial system is an essential tool for Native American tribes to contest agency action regarding their cultural heritage and the remains of their ancestors.<sup>73</sup> If an agency refuses to repatriate an object, a tribe can bring that decision to the judicial branch to protect their rights.<sup>74</sup> But the NAGPRA inventory process raises problems in this regime. The complicated study, contentious politics, and slow-moving nature of bureaucracy delays the inventory process significantly.<sup>75</sup> Because of this, tribes are essentially shut out from repatriation of their remains and cultural objects for long periods of time while civil servant anthropologists work to determine the precise affiliation of the items being inventoried. Due to the age of the objects involved in the inventory process, determinations of affiliation can be remarkably difficult, and the specific heritage of an object can remain unclear even after a determination is made.<sup>76</sup> This situation presents a difficult problem where both sides have valid concerns. This problem has been at the center of very recent case law dealing with the intersection of NAGPRA and the APA.

## II. NAVAJO NATION'S CENTRAL QUESTION

*Navajo Nation v. U.S. Department of the Interior* presents an application of final agency action doctrine to the NAGPRA inventory process.<sup>77</sup> The case, and its ef-

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69. Edward D. Melillo, *Make No Bones About It: The Need to Reform the Native American Graves Protection and Repatriation Act*, 30 QUINNIPIAC PROB. L.J. 149, 156-57 (2017).

70. *Id.* at 156-59.

71. 5 U.S.C. § 704 (2012).

72. *Id.*

73. *Id.*; see, e.g., *Na Iwi O Na Kupuna O Mokau v. Dalton*, 894 F.Supp. 1397, 1403 (D. Haw. 1995); *Bonnichsen v. United States*, 367 F.3d 864, 875 (9th Cir. 2004).

74. See *Navajo Nation v. U.S. Dep't of the Interior*, 819 F.3d 1084, 1090 (9th Cir. 2016).

75. *Id.*

76. See *id.* at 1096 (Ikuta, J., dissenting).

77. *Id.* at 1085-86.

fect on NAGPRA, raise criticism as it contravenes the purposes of the final agency action doctrine, NAGPRA, as well as other law cited in *Navajo Nation*.<sup>78</sup>

### A. *Navajo Nation: NAGPRA and the APA Applied*

*Navajo Nation* presents a problem in the application of the “final agency action” doctrine to NAGPRA.<sup>79</sup> In *Navajo Nation*, the Federal Court of Appeals for the Ninth Circuit was forced to determine whether the Navajo Nation could seek judicial review of the determination by the National Park Service (“NPS”) that the NAGPRA inventory process applies to Native American remains in the NPS’s possession.<sup>80</sup> More specifically, the Navajo Nation challenged the applicability of NAGPRA to the remains that were being inventoried, claiming that a treaty made in 1868 applied instead.<sup>81</sup> Accordingly, the court decided that the application and subsequent beginning of the inventory process under NAGPRA is a judicially reviewable final agency action.<sup>82</sup>

In reaching this holding, citing *Bennett v. Spear*, Judge Christen characterized the National Park Service’s initiation of the inventory process as the “consummation of the Park Service’s decision[-]making process regarding which statutory scheme would apply to determine the Navajo Nation’s property interests in the remains and objects,” and further signified that “significant legal consequences flow from the decision.”<sup>83</sup> The court further reasoned that “an agency’s determination of its jurisdiction is the consummation of agency decision[-]making regarding that issue.”<sup>84</sup> Since the National Park Service effectively determined its jurisdiction over the remains by beginning the inventory process on them, they met the first prong of the *Bennett* test.<sup>85</sup>

As to the second prong of the *Bennett* test, the court reasoned that the National Park Service’s decision to apply NAGPRA to the remains determined its property rights over the objects because the National Park Service only inventories remains or objects within their “possession or control.”<sup>86</sup> The court then cited a number of implementing regulations that support this interpretation.<sup>87</sup> Since

78. *Id.* at 1095-1102 (Ikuta, J., dissenting).

79. *Id.* at 1085-86.

80. *Id.*

81. *Id.* at 1085-87.

82. *Id.* The court also decided in the affirmative on the question on whether the claim was ripe for review, a holding which will not be examined in this Note. *Id.* at 1095.

83. *Id.* at 1091 (quoting *Bennet v. Spear*, 520 U.S. 154, 177-78 (1997)).

84. *Id.* (citing *Fairbanks North Star Borough v. U.S. Army Corps of Eng’rs*, 543 F.3d 586, 589-90 (9th Cir. 2008)).

85. *Id.* at 1092.

86. *Id.* (citing 25 U.S.C. § 3003(a)).

87. *Id.* (quoting 43 C.F.R. §§ 10.2(a)(3)(I) & 10.2(a)(3)(h)).

NAGPRA had been applied there, and not the alternative schemes under the 1868 treaty between the United States and the Navajo Nation, the facts before the court met the second prong of *Bennett*.<sup>88</sup>

It is important to consider the unique context before the court here, which illustrates problems concerning the extraordinarily lengthy nature of the inventory process that may have impacted the court's decision. The Navajo Nation was contesting the application of NAGPRA to remains and artifacts found at Canyon de Chelly National Park to which the Navajo Nation maintains belong to them.<sup>89</sup> The facts present a sluggish, fifteen year-long inventory process, stemming either from the nature of governmental bureaucracy,<sup>90</sup> ongoing resistance from the Navajo Nation,<sup>91</sup> or both. Notably, the process itself implicates a violation of the Navajo Nation's religious rights because the inventory process keeps the remains in question from being returned to the Navajo Nation.<sup>92</sup>

Canyon de Chelly's complex pre-colonial history is particularly important to the court's decision and the issues before it, presented by the *Navajo Nation* majority as follows:

Humans have lived in the canyon's caves for thousands of years. Hopi and Pueblo Indians were the canyon's primary occupants from roughly 750 A.D. until the 1600s. The Navajo began living in the canyon in significant numbers around the late 1600s. Navajo live in the canyon to this day and consider Canyon de Chelly sacred ground. Navajo creation stories include events in the canyon, and Navajo lore maintains that key spiritual figures still reside there.<sup>93</sup>

After the United States began expanding into the West, the federal government signed a treaty in 1849 acknowledging that the Navajo Nation was "under the exclusive jurisdiction and protection of the government of the said United States."<sup>94</sup> This treaty was broken when the government forced the Navajo to relocate to Fort Sumner, resulting in the deaths of hundreds of Navajo.<sup>95</sup> Four years later, the government allowed the Navajo to return to Canyon de Chelly, and an 1868 treaty established a reservation for the Navajo that included Canyon de Chelly.<sup>96</sup>

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88. *Id.*

89. *Id.* at 1085.

90. *Id.* at 1090.

91. *Id.* at 1096 (Ikuta, J., dissenting).

92. *Id.* at 1094-95.

93. *Id.* at 1086-87.

94. *Id.* at 1087 (quoting *America and the Navajo Tribe of Indians*, U.S.-Navajo Nation, September 9, 1849, 9 Stat. 974, 974).

95. *Id.*

96. *Id.*

In 1931, under the Antiquities Act, a national monument was created at Canyon de Chelly.<sup>97</sup> This Act retained title of the lands at the monument to the Navajo while charging the federal government with “care, maintenance, preservation and restoration of the prehistoric ruins, or other features of scientific or historical interest” in the monument.<sup>98</sup> Another statute essential to the court’s reasoning is the Archaeological Resources Protection Act (“ARPA”).<sup>99</sup> Passed in 1979, the ARPA distinguishes “public lands” and “Indian lands” held in trust by the United States.<sup>100</sup> Under the ARPA, the United States must obtain a permit in order to excavate or remove archaeological resources on Indian lands.<sup>101</sup>

Considering the unique facts at issue, the Ninth Circuit presents strong reasons for its determination. After all, the Navajo Nation had dealt with fifteen years of bureaucracy that they could reasonably interpret to have been harming the remains of the Navajo people. Regardless, the holding presents a major theoretical and practical problem. By holding that the beginning of the NAGPRA inventory process is in and of itself a judicially reviewable “final agency action” under *Bennett*, the Court is essentially holding that the beginning of an agency action can be a final agency action. This would seem inconsistent with what has traditionally been held to be a final agency actions – namely, decisions to which agencies have no subsequent procedures.<sup>102</sup> As such, this exposes the *Navajo Nation* decision to significant criticism.<sup>103</sup> Such criticism towards the court may, however, be misplaced. The real problem may lie in the contradictions between final agency action doctrine, the APA, and NAGPRA, both in purpose and when applied, and the resultant unworkability of the broader regulatory scheme when all of these laws are considered together.

### B. Criticism of *Navajo Nation*

The *Navajo Nation* decision, while somewhat legally coherent, treats human remains as property and results in administrative unworkability. As such, the decision is subject to criticism on various grounds, as it fails to consider the unique nature of cultural heritage rights, and conflicts with the purposes of the APA and NAGPRA. This will be discussed in the following section.

97. *Id.*

98. *Id.* (quoting 16 U.S.C. §§ 445a-445b).

99. 16 U.S.C. §§ 470aa-470mm (2017).

100. *Id.* §§ 470bb(3)-(4) (2017).

101. *Id.* § 470ee(a) (2017).

102. See *Pacificans for a Scenic Coast v. Cal. Dep’t of Transp.*, 204 F.Supp 1075, 1086 (N.D. Cal. 2016) (holding that approvals for developments that may harm the environment constitute final agency action); see also *Rhea Lana, Inc. v. Dep’t of Labor*, 824 F.3d 1023, 1024 (D.C. Cir. 2016) (holding that Department of Labor letter indicating the use of volunteer workers to organize consignment sales constitutes final agency action).

103. See *Navajo Nation*, 819 F.3d at 1096-1102 (Ikuta, J., dissenting).

## 1. The Failure to Consider Cultural Heritage Rights as Implicated Under NAGPRA

The holding of *Navajo Nation* conflicts with the doctrine underlying previous cases that applied final agency action doctrine to agency decision-making. The dissent in the *Navajo Nation* decision views the case as inconsistent with existing case law and therefore, wrongly decided.<sup>104</sup> However, the conflict highlights a fundamental problem present in the APA and final agency action doctrine when applied to issues of cultural heritage, like the NAGPRA inventory process.

Final agency action case law, as discussed earlier, seems to conflict with *Navajo Nation*'s result. These decisions show that the determination of whether there is a "consummation of agency decision-making" hinges on the legal consequences of an agency action.<sup>105</sup> At the same time, however, these decisions are typically associated with a lack of federal-level agency process after the decision in question.<sup>106</sup>

In *Navajo Nation*, however, the National Park Service clearly was not at the end of its process. The decision occurred in the middle of the inventory process required under NAGPRA.<sup>107</sup> In this respect, *Navajo Nation*'s factual predicate is closer to that of *Veldhoen v. U.S. Coast Guard*.<sup>108</sup> Both cases involve challenges to the applicability of an administrative process during the process itself, and this unique context was important to the reasoning of a court that viewed such a challenge as a way to circumvent administrative processes.<sup>109</sup>

Where the two cases diverge and where *Navajo Nation* is more consistent with final agency action case law is the issue of attachment of legal rights and obligations.<sup>110</sup> The line of case law sets a fairly low bar as to that issue for what decisions attach legal rights and obligations; even relatively minor effects on a private party may qualify.<sup>111</sup> In that respect, it is hard to argue that the agency's decision in *Navajo Nation* does not qualify as implying a legal right or obligation, given that keeping human remains in storage harms the religious beliefs of the Navajo.<sup>112</sup> The re-

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104. See *id.* at 1095-1102 (Ikuta, J., dissenting).

105. See *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 226 (5th Cir. 1994).

106. See *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997); see also *Pacificans for a Scenic Coast v. Cal. Dep't of Transp.*, 204 F.Supp 1075, 1086 (N.D. Cal. 2016).

107. *Navajo Nation v. U.S. Dep't of the Interior*, 819 F.3d 1084, 1090 (9th Cir. 2016).

108. *Veldhoen*, 35 F.3d at 224.

109. See *Navajo Nation*, 819 F.3d at 1090; see also *Veldhoen*, 35 F.3d at 226.

110. Compare *Navajo Nation*, 819 F.3d at 1092 (holding that legal rights are attached to the National Park Service's decision to apply NAGPRA); with *Veldhoen*, 35 F.3d at 226 (noting a lack of legal rights and obligations attached to the Marine Board's decision to simply recommend further civil or criminal action).

111. See *Bennett*, 520 U.S. at 158-59; see also *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1032 (D.C. Cir. 2016).

112. See *Navajo Nation*, 819 F.3d at 1094-95.



sult does, however, seem in tension with the purposes of NAGPRA, and that tension will be discussed later.

As illustrated above, a final agency action occurs when the agency has completed the administrative process in respect to its duties as a federal agency with no further agency action to consider.<sup>113</sup> Such a reading of the doctrine, then, seems to conflict with *Navajo Nation*'s basic holding that a final agency action can occur at what is practically the beginning of a decision-making process.<sup>114</sup>

Key to understanding this distinction is the fact that significant legal rights are attached to the choice of whether to apply NAGPRA or a treaty in *Navajo Nation* despite the fact that it continues to represent only the beginning of an agency's process.<sup>115</sup> In cases involving tangible property disputes, such as the ones that form much of final agency action doctrine, the two prongs – consummation of agency decision-making and attachment of legal rights and obligations – seem to go hand-in-hand, as a property deprivation is typically associated with the end of an agency's process.<sup>116</sup> When this doctrine is applied to the vague, intangible nature of cultural heritage rights, as in *Navajo Nation*, and courts are forced to consider the cultural affiliation of deceased Native Americans through the lens of a doctrine that is meant to protect economic property,<sup>117</sup> the application of final agency action doctrine breaks down.

The technically correct resulting decision in this case appears unworkable to agencies, seems to disregard the rights of smaller tribes without litigation resources, and treats human remains as property to be traded. After all, when determining cultural affiliation, archaeologists must sift through a small amount of information connected to a vast period of time, meaning that such artifacts may belong to a variety of cultures.<sup>118</sup> Further, any attempt to determine cultural affiliation necessarily involves a potential violation of a tribe's religious practices.<sup>119</sup> Finally a superseding complex web of law exists from early American history that was drafted without any particular regard for the rights of the array of Native American tribes the United States effectively governs.<sup>120</sup>

113. See *Bennett*, 520 U.S. at 158-59; see also *Pacificans for a Scenic Coast v. Cal. Dep't of Transp.*, 204 F.Supp. 1075, 1086 (N.D. Cal. 2016).

114. See *Navajo Nation*, 819 F.3d at 1090 (9th Cir. 2016).

115. See *id.* at 1094-95 (noting that selection of NAGPRA impacts tribal government consultation rights).

116. See *Bennett*, 520 U.S. at 158-59, 177-78 (holding that an agency action which modified a system of dams and irrigation such as to implicate property interests of the state and ranchers was a final agency action).

117. See, e.g., *Navajo Nation*, 819 F.3d at 1092 (framing the determination of the heritage of the remains and associated objects in question as a question of property rights).

118. See *id.* at 1096 (Ikuta, J., dissenting).

119. See *id.* at 1094.

120. See *id.* at 1087.

## 2. The Result's Conflict with the Purposes of the APA and NAGPRA

*Navajo Nation* is further in tension with the rationale driving the APA, NAGPRA, treaties, and the Monument Act, which are also discussed in *Navajo Nation*.<sup>121</sup> The stated purpose of the APA is “to improve the administration of justice by prescribing fair administrative procedure.”<sup>122</sup> Such a vague stated purpose, however, provides little guidance on what Congress meant to accomplish with the passage of the APA. The House Judiciary Committee report on the APA sheds more light on precisely its purpose, stating that the legislative intent is as follows:

to assure that the administration of government through administrative officers and agencies *shall be conducted according to established and published procedures which adequately protect the public interests involved*, the making of only reasonable and authorized regulations, the settlement of disputes in accordance with the law and the evidence, the impartial conferring of authorized benefits or privileges, and the effectuation of the declared policies of Congress in full.<sup>123</sup>

Essential to the APA is the establishment of set procedures in administrative law such that the public interest is efficiently protected.<sup>124</sup> As such, it seems reasonable to generally characterize the APA's passage as intending to properly balance the role of the administrative state with the need to hold the administrative state accountable for decisions it makes that implicate public concerns.<sup>125</sup> In the context of *Navajo Nation*, this can be characterized as balancing the role of the administrative state in protecting the cultural heritage rights of all tribes covered under NAGPRA, collectively, and the interest of the individual tribes that NAGPRA covers.

As to the purposes behind the “final agency action” requirement in the implementing statute,<sup>126</sup> relevant case law provides the following purposes:

(1) avoid premature interruption of administrative process; (2) let agency develop necessary factual background upon which decisions should be based; (3) permit agency to exercise discretion or apply expertise; (4) improve efficiency of administrative process; (5) conserve scarce judicial resources; (6) give agency chance to discover and correct errors; and (7)

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121. See *id.* at 1090-91, 1089-95, 1093.

122. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946).

123. Frederick F. Blachly & Miriam E. Oatman, *The Federal Administrative Procedure Act*, 34 GEO. L.J. 407, 407-08 (1946) (quoting H.R. REP. NO. 1980, at 18 (1946)) (emphasis added). The authors of this article purport to establish a more cynical, though less supported, reading of Congress' purpose, stating that it was passed with the intent to cripple administrative action. *Id.* at 408.

124. *Id.* at 408.

125. See *id.*

126. 5 U.S.C. § 704 (2012).

avoid possibility that flouting of administrative processes could weaken effectiveness of agency by encouraging people to ignore its procedures.<sup>127</sup>

As such, the final agency action doctrine established in the implementing statute means to provide an avenue for the public to attain outside review of agency decision-making while allowing the agency to work unhindered while making a decision.<sup>128</sup> This is essential to the *Navajo Nation* context: rights implicated by NAGPRA involve complex anthropological determinations that are often based on limited evidence and implicate sensitive political issues.<sup>129</sup>

NAGPRA was passed with a clearly stated purpose: to “provide for the protection of Native American graves.”<sup>130</sup> However, the underlying purpose is more detailed than that, which is well illustrated in the House Report provided to accompany the legislation by the Committee on Interior and Insular Affairs. The report provides:

[T]o protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands. The Act also sets up a process by which Federal agencies and museums receiving federal funds will inventory holdings of such remains and objects and work with appropriate Indian tribes and Native Hawaiian organizations to reach agreement on repatriation or other disposition of these remains and objects.<sup>131</sup>

This is reflected in commentary that has been previously discussed, stating that NAGPRA represents an effort by the federal government to repair its relationship with Native American tribes, foster trust between the varied entities involved, and protect Native American cultural identity.<sup>132</sup> In the context of *Navajo Nation*, NAGPRA implicates the relationship between the National Park Service, the Navajo Nation, and any other tribes to which the remains in question could be associated.

It is, of course, essential to consider the other statutes at play in *Navajo Nation*. ARPA’s implementing legislation was established to protect “archaeological resources on public lands and Indian lands,”<sup>133</sup> and it is reasonable to read an intent

127. *Hells Canyon Pres. Council v. Richmond*, 841 F.Supp. 1039, 1044 (D. Or. 1993).

128. *See Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 226 (5th Cir. 1994) (“Here, the sailors’ petition was filed in district court in an attempt to shortcut the proceedings at the start of the Marine Board inquiry. The finality doctrine, however, does not allow this circumnavigation.”).

129. *See Navajo Nation v. U.S. Dep’t of the Interior*, 819 F.3d 1084, 1096 (9th Cir. 2016) (Ikuta, J., dissenting).

130. Native American Graves Protection Act, Pub. L. No. 101-601, 104 Stat. 3048, 3048 (1990).

131. H.R. REP. NO. 101-877, at 4367-68 (1990).

132. *See Wright, supra* note 67, at 23-24.

133. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. § 470aa (2014)).

to protect Native American cultural heritage and tribal sovereignty in the text of the act, given the strict requirement that archaeologists obtain permits prior to the excavation of archaeological resources on “Indian lands.”<sup>134</sup>

Of further interest is the Treaty of 1868 with the Navajo Nation, which establishes the Navajo Reservation containing Canyon de Chelly.<sup>135</sup> Given that this ended a period of hostility between the Navajo and the United States, stemming from a previously broken treaty made in 1849, it is reasonable to attribute some level of intent to cease hostilities and give Native American tribes some level of tribal sovereignty.<sup>136</sup> The Monument Act, passed in 1931, established the national monument of Canyon de Chelly within the Navajo Reservation. It further gave the Navajo Nation title to the lands in the monument but charged the National Park Service 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, or other features of scientific or historical interest within the area.”<sup>137</sup> As such, by giving the Navajo Nation title to the lands of the monument, the Monument Act seeks to maintain tribal sovereignty while establishing the monument, but also requires that the National Park Service follow its duties under federal law regarding the area around the monument.

The final agency action doctrine as applied in *Navajo Nation*, as has been illustrated, creates results that would seem to contravene many of the purposes in the underlying complex web of laws analyzed in the opinion. Most basically, the doctrine seems to conflict with its own purposes, making the system more inefficient and resulting in what many may view as premature interruption, as it allows for litigation to commence before anyone knows what tribe the remains or artifacts are associated with.<sup>138</sup> In regards to the APA, the doctrine only serves to confuse the procedure in question and places an undue burden on administrative agencies by allowing for judicial review at any point in the NAGPRA inventory process if there is some arguable question of which law applies.<sup>139</sup>

Final agency action doctrine as applied in *Navajo Nation* contravenes the purpose of NAGPRA in particular, given that the inventory process is meant to ensure that human remains are returned to their proper nation and regulates the removal of human remains found on “Federal, Indian and Native Hawaiian lands.”<sup>140</sup>

134. 16 U.S.C. § 470cc(g) (2014).

135. Treaty Between the United States of America and the Navajo Tribe of Indians, U.S.-Navajo Nation, June 1, 1868, 15 Stat. 667, 668.

136. See *id.* (noting that no persons, except those authorized, shall enter upon Indian reservations in discharge of duties imposed by law).

137. 16 U.S.C. §§ 445a-445b (2017).

138. See *Hells Canyon Pres. Council v. Richmond*, 841 F.Supp. 1039, 1044 (D. Or. 1993).

139. See *Blachly & Oatman*, *supra* note 123, at 407-08 (quoting H.R. REP. NO. 79-1980, 2d Sess. at 18 (1946)).

140. See H.R. REP. NO. 101-877, at 8-9 (1990) (The act works to return items to the rightful owners.); see also *Wright*, *supra* note 67, at 23-24.

The application of final agency action doctrine here serves to remove any semblance of such regulation and forces a view of the human remains as property, owned by either a tribe or the government, rather than human beings who should be returned to their native cultures through a process that is as accurate as possible. It further ignores the interests of other Native American tribes to which the human remains may be attributed to, such as the Hopi tribe,<sup>141</sup> in favor of a scheme that gives more power to tribes with the resources to seek judicial review at the beginning of the NAGPRA inventory process.

With the complicated system of treaties and statutes that serve to establish Canyon de Chelly, the present application also serves to complicate and obscure the practicability of such laws. Canyon de Chelly, essentially both federal and Navajo land, presents a situation in which the Navajo have control over the property, but the National Park Service has control over the administration of the land.<sup>142</sup> Practically speaking, this means that Navajo have property rights associated with the land and the National Park Service exercises managerial duties over the land.<sup>143</sup> Since the doctrine here is centered around property rights,<sup>144</sup> it seems to only consider the former, ignoring the application of federal laws to Canyon de Chelly and the implicated rights and responsibilities.<sup>145</sup> In doing so, it contravenes the purpose of the act to delineate a balance between the two.

Given this illustrated doctrinal conflict, the final agency action doctrine leaves the underlying statutory scheme unworkable. It hampers the ability for administrative agencies to work under the APA,<sup>146</sup> serves to limit the rights given to every Native American tribe through NAGPRA,<sup>147</sup> and contravenes the establishment of mixed property and administrative rights and duties under the act establishing Canyon de Chelly.<sup>148</sup> In developing an administrative scheme framing issues of cultural heritage rights as that only of tangible property, the final agency action doctrine as applied damages the purpose of most modern Indian Law – to foster trust between sovereign tribal governments and the federal government<sup>149</sup> – by creating a scheme that destroys the very avenues that were created to establish a dialogue between Native American tribes and the federal government.

141. See *Navajo Nation v. U.S. Dep't of the Interior*, 819 F.3d 1084, 1086-87 (9th Cir. 2016).

142. 16 U.S.C. §§ 445a-445b (1931).

143. See *id.*

144. See *Bennett v. Spear*, 520 U.S. 154, 158-59 (1997) (holding that an agency action which modified a system of dams and irrigation such as to implicate property interests of the state and ranchers was a final agency action).

145. 16 U.S.C. §§ 445a-445b (2017).

146. See, e.g., Blachly & Oatman, *supra* note 123, at 407-08 (quoting H.R. REP. NO. 79 -1980, 2d Sess. at 18 (1946)).

147. See H.R. REP. NO. 101-877, at 3-4, 8-10 (1990); see also Wright, *supra* note 66, at 20-21.

148. 16 U.S.C. §§ 445a-445b (1931).

149. See Wright, *supra* note 67, at 23-24.

### III. GOING FORWARD

As has been illustrated, the law as applied in *Navajo Nation* conflicts with itself – the APA, NAGPRA, other statutes, and final agency action doctrine all interact to counteract the underlying purpose of every law involved – and this creates an unworkable administrative scheme. It may be easy to blame this issue on an incorrect application of the law by the *Navajo Nation* court,<sup>150</sup> but such a view would be wrongheaded. The problem does not lie with the *Navajo Nation* majority, nor the Navajo Nation or the National Park Service. It lies with an underlying doctrine that fails to consider final agency action in the context of the right to cultural heritage.

Considering this problem, the courts or the legislature must modify the law to adequately protect the unique nature of the rights in question. The courts could establish an alternative line of reasoning to apply to rights implicating cultural heritage concerns. Such reasoning would adequately represent all parties who may have rights in a given case and allow the government to utilize a workable legal doctrine.

The legislature should pass statutes governing this area of the law and creating clearer rules as to these rights: rules that currently largely do not exist outside of the realm of the judicial branch.<sup>151</sup> Such an alternative scheme should establish that judicial review of an agency decision implicating cultural heritage rights cannot be obtained until after the agency determines cultural affiliation. Only then will an agency action be considered a final agency action. To prevent abuse by federal agencies, a party who seeks judicial review might be able to circumvent this requirement by showing that the agency is not fulfilling its statutory duties and that (although no cultural affiliation has been determined) its decision is a *de facto* final agency action.

Regardless of what specific scheme is ultimately adopted, it seems clear that some line of rules regarding final agency action need to be developed specifically for contexts implicating cultural heritage rights, particularly those of Native American tribes. This principle may further apply to other cultural heritage contexts, including the rights of other minority cultures and the complex web of international laws governing cultural heritage. By doing so, the cultural heritage rights of all tribes, large and small, with an interest in the cultural affiliation of a specific object, can be adequately protected.

Some may argue that this scheme is perfectly functional as is and serves to protect the rights of indigenous cultures through the use of litigation. However,

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150. See *Navajo Nation v. U.S. Dep't of the Interior*, 819 F.3d 1084, 1102 (9th Cir. 2016) (Ikuta, J., dissenting) (“The majority’s strained attempt to detect a “final agency action” occurring at some point along the way, without a decisionmaking process, a written decision, or a determination that has any legal effect on the Navajo Nation, has no support in the record or in our precedent.”).

151. See *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (holding that a final agency action must be “one by which ‘rights or obligations have been determined’”).

NAGPRA, at its core, exists not to provide a cause of action, but to cement respect for tribal culture and sovereignty. It provides for an administrative scheme to enshrine such respect in the law and treating it as a simply cause of action works to dismantle that scheme. It could also be argued that tribes must be given a robust avenue to challenge administrative decisions in order to fully protect their rights. Such an argument is compelling given the United States' history of colonialism, oppression, and graverobbing. However, NAGPRA was created to protect the rights of *all* federally recognized Native American tribes. Allowing this scheme to function as a cause of action necessarily gives more power to larger tribes with more political power, who have more resources to spend on litigation. Such an adversarial system would ignore the rights of smaller tribes in favor of large ones. As such, a new system of rules should be established to protect both.

### CONCLUSION

*Navajo Nation* was not a poorly-reasoned, wrongly-decided case. The resulting doctrine, however, resulted in the unworkability of the sector of the administrative state that manages cultural heritage. The court was required to apply the complex doctrine of final agency action to the context of NAGPRA and gave an opinion that highlighted the problems currently present in the law.

In the context of NAGPRA, final agency action doctrine created a result that seems to conflict with itself. Although some case law would implicate a question as to whether the result is within the purpose of the doctrine, on a basic level, the result is within the guidelines set by law. It does, however, appear to allow for the circumvention of an administrative process, which final agency action doctrine was designed to prevent. Final agency action doctrine further contravenes the purposes of NAGPRA, creating an unworkable inventory process and ignoring the rights of smaller and less powerful Native American tribes.

Considering these doctrinal contradictions, it is essential that courts or the legislature work to develop a line of law that manages the unique circumstances of cultural heritage laws like NAGPRA, so that the administrative state can function. An effective administrative state allows the federal government to actively work with Native American tribes to properly repatriate sacred objects. If such workable procedures exist, then NAGPRA's goals can best be met.