

UNDOING THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION
ACT: THE “KENNEWICK MAN” DECISION

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I. INTRODUCTION

As far back as the Mayflower, records show that the white man has been pillaging Native American graves and even documenting his success.¹ A Pilgrim on the Mayflower wrote in a journal about uncovering an Indian grave and taking the prettiest things and then covering up the corpse.² Grave robbery is not something that the ‘white’ population in the United States typically worries about, as there have been statutes in all 50 states protecting ‘white’ cemeteries and marked graves from vandalism and desecration.³ In contrast, some states even sanctioned exhumation of Native American graves for study while immediately reintering white graves that had been inadvertently discovered.⁴ This attitude toward Native American graves was especially reprehensible in 1868, when the United States Surgeon General ordered Army field officers to send him Native American heads from battlefields so he could compare the size of white and Indian crania.⁵ The officers collected and sent over 4000 heads under that order.⁶ The heads were then studied so the Surgeon General could attempt to prove a theory that Native Americans were inferior to whites biologically⁷ as well as intellectually.⁸

It is hard to believe that attitudes like these existed, and were even sanctioned by the government. Although attitudes toward Native American remains did change in the Twentieth

¹ Wendy Crowther, *Native American Graves Protection and Repatriation Act: How Kennewick Man Uncovered the Problems in NAGPRA*, 20 J. LAND RESOURCES & ENVTL. L. 269, 270 (1999).

² Id.

³ Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains*, 22 HARV. ENVTL. L. REV. 369, 371 (1998).

⁴ Id. at 394.

⁵ Id. at 393.

⁶ Id.

⁷ Id., and Crowther, *supra* note 1, at 270.

⁸ Douglas W. Ackerman, *Kennewick Man: The Meaning of “Cultural Affiliation” and Major Scientific Benefit” in the Native American Graves Protection and Repatriation Act*, 33 TULSA L.J. 359, 380 (Fall, 1997).

century,⁹ it was not until 1990 that legislation was passed that seemingly rectified some of these wrongs. The Native American Graves Repatriation Act (NAGPRA) was passed in 1990 in order to return Native American remains and funerary objects from museums and to protect Native American burial sites.¹⁰ Unlike past legislation such as the Antiquities Act of 1906 and the Archeological Resources Protection Act of 1979, which referred to Native American remains and objects as “artifacts” or “archeological resources” and assigned them as property of the United States,¹¹ NAGPRA took a step toward repatriating remains to Native American groups for reburial.¹² Under NAGPRA, federal agencies and museums are required to inventory their Native American artifacts and if possible, identify each item and notify an affiliated tribe.¹³ If an affiliated tribe requests the return of an artifact, the institution must comply.¹⁴ With regard to items that are found on federal or tribal land after the enactment of NAGPRA, there are provisions dealing with ownership or control of the items found.¹⁵

There have been many returns of remains to tribes as a result of NAGPRA, but there is a problem concerning ancient remains,¹⁶ which became apparent in 1996 when the remains that would come to be known as “Kennewick Man” were discovered.¹⁷ For almost ten years, “Kennewick Man” has been involved in a sort of custody battle, being claimed by scientists and various Native American Tribes.¹⁸ Ultimately, scientists were allowed to study the remains

⁹ Crowther, *supra* note 1, at 271.

¹⁰ See 25 U.S.C. §§ 3001-3013 (1994).

¹¹ Crowther, *supra* note 1, at 271.

¹² *Id.* at 273.

¹³ 25 U.S.C. § 3005 (a) (1994).

¹⁴ *Id.*

¹⁵ See 25 U.S.C. § 3003 (1994).

¹⁶ Crowther, *supra* note 1, at 274.

¹⁷ *Id.* at 276, *and* Lannan, *supra* note 3, at 371.

¹⁸ ENDURING LEGACIES: NATIVE AMERICAN TREATIES AND CONTEMPORARY CONTROVERSIES, (Bruce E. Johansen ed., 2004) (See chapter 10 for a factual and procedural history of the “Kennewick Man” controversy).

against the wishes of the tribal claimants who wanted to rebury them pursuant to NAGPRA.¹⁹

This result was a step in the wrong direction for the rights of Native Americans, and it is important that something be done so the fate of future ancient remains will not be the same.

a. Factual Background

“Kennewick Man” consists of a set of remains that is thought to be approximately 9,000 years old.²⁰ The skeleton came to be known as “Kennewick Man” because of the discovery of his skull by two college students on the banks of the Columbia River at Kennewick, Washington.²¹ The students were in Columbia Park, which is federal land managed by the U.S. Army Corps of Engineers.²² They contacted local authorities, who took the skull to the Benton County coroner.²³ The coroner contacted Dr. James J. Chatters, an anthropologist, who examined the skull and later excavated the rest of the remains, which consisted of a nearly complete skeleton.²⁴ Initially, Dr. Chatters believed the remains were that of an early white settler or explorer, but upon further examination, noticed features that were characteristic of prehistoric skulls.²⁵ Dr. Chatters then consulted with other anthropologists who eventually dated the skeleton between 9200 and 9600 years old.²⁶ He consulted with other anthropologists who noted that the skull resembled early inhabitants of Europe and South Asia, unlike most American Indians whose features resemble descendants of North Asia.²⁷ Dr. Chatters made other comparisons based on the rest of the skeletal features, all of which he found to be consistent with

¹⁹ See Bonnichsen v. United States Dept. of Army 357 F. 3d. 962, 979 (9th Cir. 2004).

²⁰ Lannan, *supra* note 3, at 373.

²¹ Lannan, *supra* note 3, at 371.

²² *Id.* at 370.

²³ *Id.* at 371.

²⁴ *Id.*

²⁵ *Id.* at 372.

²⁶ *Id.*

²⁷ *Id.* at 374.

“Caucasoid” not Native American features.²⁸ Caucasoid refers to features consistent with early inhabitants of a broad set of regions including Europe and South Asia.²⁹

Later that summer, several Indian tribes in the Pacific Northwest region were notified of the remains and a coalition of five regional tribes sent a unified claim for the remains to the Army Corps of Engineers.³⁰ The coalition announced that when they received the remains, they would rebury them in a secret location following a ceremony observing the religious customs of the tribes.³¹ This is precisely what the Shoshone-Bannock Tribe did in Buhl, Idaho when a 10,000-year-old female skeleton was returned to them after their request for repatriation.³² In each case, the claim was made pursuant to the Native American Graves Repatriation Act (NAGPRA), which will be discussed in section III.

b. Procedural Background

After the U.S. Army Corps of Engineers issued a Notice of Intent to return the “Kennewick Man” remains to the Native coalition, a group of eight scientists filed a complaint³³ seeking a temporary restraining order to halt the repatriation and for access to the remains for study.³⁴ In Bonnichsen v. U.S. Dept. of Army³⁵, the scientists claimed that the “Kennewick Man” remains were a rare discovery and could “provide information important to an

²⁸ Id. at 374.

²⁹ Id.

³⁰ Id. at 376.

³¹ Id. at 376.

³² Samantha Silva, *A Famous Skeleton Returns to the Earth*, HIGH COUNTY NEWS, Mar. 8, 1993, available at http://www.hcn.org/servlets/hcn.Article?article_id=2100, (describing how the Tribal elders allowed initial testing but demanded immediate reburial after deaths on the reservation which were believed by the elders to have been caused by the woman’s spirit).

³³ The complaint was joined by another group, the Asatru Folk Assembly, which will not be discussed in this paper.

³⁴ Crowther, *supra* note 1, at 278.

³⁵ See Bonnichsen v. United States Dept. of the Army, 969 F. Supp. 614 (D. Or. 1997).

understanding of the peopling of the Americas and human evolution in general.”³⁶ They also claimed that the Corps had violated NAGPRA by determining the remains were Native American without sufficient evidence.³⁷ The scientists argued that only forensic anthropology showing ancestry between the claimant and the remains would provide sufficient evidence.³⁸

In June 1997, the District Court of Oregon denied motions for summary judgment by both the Army Corps of Engineers and the plaintiff scientists and remanded the matter to the Corps for further proceedings.³⁹ The responsibility of deciding whether the remains were “Native American” was delegated to the Department of the Interior. The Secretary of the Interior later announced that they were and published notice that the Department would repatriate. The plaintiff scientists then filed an amended complaint in the District Court challenging the Secretary’s findings. The court found in favor of the plaintiffs and vacated the Secretary’s decisions as contrary to the Administrative Procedure Act and held that NAGPRA did not apply for the reasons discussed below. The Secretary and the tribal claimants appealed, but the 9th circuit upheld the district court’s decision that the Secretary had insufficient evidence to support the findings.⁴⁰ There were no other appeals, and scientists began testing on “Kennewick Man.”

³⁶ Crowther, *supra* note 1, at 278.

³⁷ *Id.*

³⁸ Andrew Slayman, *A Battle Over Bones*, *ARCHAEOLOGY*, Jan./Feb. 1997. *available at* <http://www.archaeology.org/9701/etc/specialreport.html>. (last visited 8/8/05).

³⁹ See 969 F. Supp. 614.

⁴⁰ See 357 F.3d. 969, at 977.

II. NATIVE BELIEFS VS. SCIENCE

The debate between scientists and Native Americans regarding treatment of human remains is certainly not new.⁴¹ Generally, Native Americans believe that remains should not be disturbed after they are buried.⁴² They oppose testing for various reasons, including religious beliefs, the belief that scientific research is unnecessary and several other moral and religious beliefs.⁴³ Scientists, on the other hand, feel research on human remains and other objects holds valuable data and historical information.⁴⁴ They argue that they are committed to preserving history for the “public good.”⁴⁵ There may never be a middle ground to this debate, as both sides are equally committed to their arguments.

a. Native American Arguments Against Testing on “Kennewick Man”

Most Native Americans believe that life is a circular process and it must not be interrupted.⁴⁶ It is because of this belief that they feel “...death is not an end, but a beginning to a new life, either on this earth...or in a transcendent hereafter.”⁴⁷ It is also believed that for a spirit to be at rest, the “remains must be returned to the earth and must remain there for nature to take care of them.”⁴⁸ Many tribes share a belief that that the living have a responsibility to take care of the spirits of the deceased to make sure that they remain at rest.⁴⁹ A member of the Nez

⁴¹ See Seidemann, *infra* note 76, at 172 (describing anthropological study of human skeletal remains since at least the mid-nineteenth century to understand the lifeways of past people), *But see* Ackerman, *supra* note 8, at 374 (describing a Native American view reflecting their traditional belief that individuals must be buried and not disturbed).

⁴² Michelle Hibbert, Comment, *Galileos or Grave Robbers? Science, The Native American Graves Protection and Repatriation Act, and The First Amendment*, 23 AM. INDIAN L. REV. 425, 431 (1998/1999).

⁴³ *Id.*

⁴⁴ *Id.* at 435.

⁴⁵ *Id.*

⁴⁶ *Id.* at 432.

⁴⁷ Ackerman, *supra* note 8, at 375.

⁴⁸ Lannan, *supra* note 3, at 389.

⁴⁹ *Id.* at 390.

Perce Tribe spoke of his dying father's request that he never sell his bones.⁵⁰ He assured his father that he would "...protect his grave with [his] life..." and stated, "...A man who would not love his father's grave is worse than a wild animal."⁵¹ Some tribes are so protective of their ancestors that they dig up their remains when they move and rebury them near the tribe's new location.⁵² The journey of the dead is believed to be affected by disinterment and the spirit can get 'lost,' which, in turn, can affect the living as well with resulting sickness or even death until the spirit is reburied.⁵³

Disturbing human remains is also thought by many Native Americans to be oppressive.⁵⁴ They claim that scientists have never given a satisfactory explanation as to why Native American remains are of more scientific value than the remains of white Americans.⁵⁵ Further, there is no explanation as to why the research is necessary, proper or beneficial.⁵⁶ For example, upon request by the Pawnee Tribe for a specific, empirical showing of the scientific value of their remains, they have only received speculation as to the possible, unnamed future uses, generalities and conclusory allegations of scientific importance without any supporting facts to validate the importance they claim.⁵⁷ It is also thought that the research is racist and deprives them of equal burial rights.⁵⁸ They are especially offended by research such as DNA analysis, which is destructive to tissue, and refer to this type of destruction as a desecration with devastating spiritual consequences.⁵⁹

⁵⁰ *Id.*, (quoting Chief Joseph who addressed the United States Congress in 1879).

⁵¹ *Id.*

⁵² Ackerman, *supra* note 8, at 374.

⁵³ Lannan, *supra* note 3, at 390.

⁵⁴ Hibbert, *supra* note 43, at 432.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See Ackerman, *supra* note 8, at 378.

⁵⁸ See Hibbert, *supra* note 42, at 432.

⁵⁹ *Id.* at 433.

b. Scientists/Archaeologists Arguments for Testing on “Kennewick Man”

Generally, the argument from the scientists is that studying human remains will give them a better understanding of human history.⁶⁰ They view such studies as integral to knowledge about the past that cannot come from any other source of information.⁶¹ Further, they believe that the knowledge gained outweighs the damage to Native Americans.⁶² They argue that they are preserving an historical record that would otherwise be destroyed or altered if they did not intervene on behalf of the common good.⁶³ They not only imply, but state that by not studying their own remains, Native Americans are working against their own best interests.⁶⁴

It is clear that both the Native Americans and scientists have very strong views on this issue. Compromise will be reached in some situations, but others will be left in the hands of Congress and the courts, as was the “Kennewick Man.” Even when the court does intervene, there will be one side that is not satisfied with the results.

III. NAGPRA: THE LEGISLATION AT ISSUE

The Native American Graves Protection and Repatriation Act (NAGPRA) was passed in 1990 in an attempt to return Native American remains and funerary objects from museums, and to protect Native American burial sites.⁶⁵ Section 3 of NAGPRA deals with protection of Native American burial sites, and has provisions that were made for the ownership or control of items “... excavated or discovered on Federal or tribal land after the enactment of [this] Act...”⁶⁶ If the discovery involves human remains, ownership or control is given to the lineal descendants of the Native American, or, if lineal descendants cannot be ascertained, the Indian tribe with the

⁶⁰ Lannon, *supra* note 3, at 390.

⁶¹ *Id.* at 391.

⁶² Hibbert, *supra* note 42, at 436.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See 25 U.S.C. §§ 3001-3013 (1994).

⁶⁶ *Id.* at § 3003 (1994).

closest cultural affiliation with the remains.⁶⁷ In the case of the “Kennewick Man,” the two issues involved focused on whether the remains were “Native American” within the statute’s meaning and whether there was a cultural affiliation between the remains and the tribal claimants. Ultimately, in Bonnichsen v. U.S. Dept. of Army⁶⁸, the Ninth Circuit held that there was not enough evidence to support the Department of Interior’s decision that the remains were Native American within the definition set forth in NAGPRA.⁶⁹

a. Kennewick = Native American within NAGPRA

In order for the statute to cover “Kennewick Man,” the remains must be “Native American as defined by NAGPRA. NAGPRA defines “Native American” as “of, or relating to, a tribe, people, or culture that is indigenous to the United States.”⁷⁰ The court in Bonnichsen placed emphasis on the fact that the language is written in present tense “...*that is* indigenous...”⁷¹ and held that this meant there was an unambiguous requirement that there be a relationship between the remains and a presently existing tribe, culture or people in order to be Native American.⁷² However, the court did not even consider the legislative history when deciding whether the Act would apply to ancient remains, even though there were several indications that it would apply to remains from throughout the 12,000 years people were presumed to have inhabited what is now the United States.⁷³ The legislative history further

⁶⁷ Id. at § 3003 (a) (2) (B) (1994). (Please note there are other ways listed in the statute to gain ownership or control, but they do not apply to the “Kennewick Man” litigation and will not be discussed in this paper.)

⁶⁸ See Bonnichsen v. U.S. Dept. of Army, 357 F.3d 962 (9th Cir. 2004).

⁶⁹ Id.

⁷⁰ See U.S.C. § 3001 (9) (1994).

⁷¹ Id. (emphasis added).

⁷² 357 F.3rd 962 (9th cir. 2004).

⁷³ Sherry Hutt and C. Timothy McKeown, *In The Smaller Scope of Conscience: The Native American Graves Protection & Repatriation Act Twelve Years Later*, 21 UCLA J. ENVTL. L. & POL’Y 153, 163 (2002-2003), (quoting Francis C. McManamon, Chief of the Archaeology and Ethnography Program in the Department of the Interior).

implied that NAGPRA was to encompass all tribes, peoples and cultures that were residents of what is now the United States prior to documented European exploration without regard to whether there are any modern day descendants and irrespective of when those ancient peoples began to reside in a given area.⁷⁴ In addition, during committee hearings on this bill, “...committee members and witnesses made statements reflecting a presumption that the bill would apply to ancient remains.”⁷⁵ Some people argue that the legislative history does not reference material older than A.D. 1492.⁷⁶ However, the definition of “Native American” in NAGPRA is broader than in any other previous statute⁷⁷ as well as in any earlier versions of what became the final version of NAGPRA.⁷⁸ Because the difference in terminology distinguishes NAGPRA from previous statutes and bills that were rejected in favor of NAGPRA, the intent was for it to apply to a broader group, beyond “Indian”, “Alaska Native,” or “Native Hawaiian” which are protected in prior legislation.⁷⁹

In addition to the argument that the language in the statute is unambiguous, it has also been argued that “Kennewick Man” is not Native American since the features of his skull do not resemble modern Native American skulls. As stated above, Dr. James Chatters was the first anthropologist to examine the skull and found the features to be Caucasoid.⁸⁰ However, he also found features that resembled modern Native Americans, and still, other characteristics

⁷⁴ Id.

⁷⁵ See Lannan, supra note 3, at 412.

⁷⁶ Ryan M. Seidemann, *Time for a Change? The Kennewick Man Case and its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W. VA. L. REV. 149, 165 (Fall 2003).

⁷⁷ Lannan, supra note 3, at 425 (referring to the National Museum of the American Indian Act which defines ‘Indian’ as a member of an Indian tribe only if recognized in the Indian Self-Determination and Education Assistance Act (i.e., “Indian,” “Alaska Native,” or “Native Hawaiian.”)).

⁷⁸ Id.

⁷⁹ Id. at 427.

⁸⁰ Id. at 374, and Crowther, supra note 1, at 276.

resembled neither group.⁸¹ Even with predominant Caucasoid features, the Secretary of the Interior's experts cautioned that lack of physical resemblance does not rule out biological ancestry.⁸² However, even if there is not a biological connection, it does not mean that "Kennewick Man" is not Native American, since Native American is a question of politics and culture – not biology.⁸³ To a tribe, one is considered Native American if recognized by a tribe as being a member, similarly, one is not necessarily a member of a tribe by having Native ancestors.⁸⁴ Further, Natives often adopted people who weren't racially similar to them.⁸⁵ Some Native Americans do identify with a governmental or tribal requirement that some percentage of blood be "Indian," but others prefer definitions that emphasize cultural affiliation and reject the notion that race is determined by biology.⁸⁶ Indian tribal councils enjoy the autonomy that they have in determining membership requirements,⁸⁷ and they can be as broad or narrow as the council wishes to make them.⁸⁸ Since a tribal council can set membership requirements, and since it is commonly accepted that race and ethnicity are social constructs, not biological ones, a genetic inquiry into an individual's ancestral roots would not complete a description of his

⁸¹ Michael J Kelly, *A Skeleton in the Legal Closet: The Discovery of "Kennewick Man" Crystalizes the Debate Over Federal Law Governing Disposal of Ancient Human Remains*, 21 U. HAW. L. REV. 41, 44-45, (Summer 1999).

⁸² See 357 F.3d. 962, at 969.

⁸³ Jonathan Marks Ph.D. and Brett Lee, Shelton, J.D., *Genetic Markers Not a Valid Test of Native Identity*, available at <http://www.gene-watch.org/genewatch/articles/14-5nativeidentity.html> (last visited 7/24/2005), and Beckenhauer, *infra* note 85.

⁸⁴ *Id.*

⁸⁵ Johansen, *supra* note 18, at 285.

⁸⁶ Eric Beckenhauer, Note, *Redefining Race: Can Genetic Testing Provide Biological Proof of Indian Ethnicity?*, 56 STAN. L. REV. 161, 163 (Oct. 2003).

⁸⁷ *Id.*

⁸⁸ *Id.* at 167.

present day ties.⁸⁹ In fact, at least one anthropologist has cautioned that an attempt to define a social identity by using biological characteristics would be “absurd.”⁹⁰

b. Cultural Affiliation is Sufficient

In addition to the requirement that the remains be “Native American” within the definition of NAGPRA, the claimant tribe must also show a “cultural affiliation” between the object being claimed and the claimant.⁹¹ “Cultural affiliation” is defined as “...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.”⁹² In Bonnichsen, the Ninth Circuit found the evidence presented on this issue insufficient to meet the standard set forth in NAGPRA.⁹³ However, since the tribal claimants based their claims upon evidence that is permissible as well as sufficient under the Act to substantiate their claim, they should have been granted repatriation.

The requirements for showing cultural affiliation are the existence of a modern tribe with standing, the existence of an identifiable earlier group, and evidence of shared group identity that can reasonably be traced between the two groups.⁹⁴ Standing was not at issue in this case. The tribal claimants only had to show an affiliation between their tribe and the remains. Cultural affiliation must be established by a preponderance of the evidence.⁹⁵ The evidence must reasonably lead to a conclusion of a cultural affiliation between the object being claimed and the

⁸⁹ Id. at 187.

⁹⁰ Id., (quoting University of Oklahoma anthropologist Morris Foster).

⁹¹ See U.S.C. § 3001 (2) (1994).

⁹² Id.

⁹³ 357 F.3rd 962, at 979.

⁹⁴ See 25 U.S.C. § 3001 (2) (1994).

⁹⁵ See 43 C.F.R. § 10.2 (e).

claimant.⁹⁶ Cultural affiliation does not require scientific certainty⁹⁷ and among permissible evidence is “geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition, historical, other relevant information or expert opinions.”⁹⁸ The claimants in Bonnichsen, based their claim on permissible evidence such as oral history, location of remains, religious tradition and folklore.⁹⁹ The only arguments against the evidence were based on claims that there was a gap in the age of “Kennewick Man” to modern day Native Americans, that the Native oral tradition and other such evidence wasn’t sufficient and there is a preference for scientific means to establish a cultural affiliation.¹⁰⁰ The regulations specifically provide that scientific certainty is not necessary to show cultural affiliation.¹⁰¹ The regulations also state that evidence pertaining to a connection between the claimant and the object should not be precluded solely because of gaps in the record.¹⁰² Since the only arguments offered against the claimants’ evidence could be rebutted by the actual Act and regulations, there should not have been a question as to the sufficiency of the evidence presented.

There are also indications in the legislative history that would support the claim for repatriation in this case. The requirement for a cultural relationship between human remains and Native American claimants was relaxed over the different versions of the bill leading up to NAGPRA. The standard that was accepted in what became NAGPRA even did away with a requirement of continuity in which the claimant would have had to “...reasonably [establish] a

⁹⁶ Rebecca Tsosie, *Privileging Claims to the Past: Ancient Human Remains and Contemporary Cultural Values*, 31 ARIZ. ST. L.J. 583, 601. (Summer, 1999).

⁹⁷ Lannan, *supra* note 3, at 404.

⁹⁸ *Id.* citing 43 C.F.R. § 10.14(e).

⁹⁹ Tsosie, *supra* note 96, at 602.

¹⁰⁰ Seidemann, *supra* note 76, at 162.

¹⁰¹ Tsosie, *supra* note 96, at 602. (citing 43 C.F.R. § 10.14(f)).

¹⁰² Lannan, *supra* note 3, at 404. (citing 43 C.F.R. § 10.14(d)).

continuity of group identity from the earlier to the present day group.”¹⁰³ This is just another indication that the standard for “cultural affiliation” is not as strict as was first suggested.

Since the evidence by the claimants was permissible and sufficient under NAGPRA, and the legislative history indicated a relaxed standard was acceptable, a cultural affiliation between the claimants and the remains should have been deemed satisfied.

IV. SUGGESTED REVISIONS TO NAGPRA AND THEIR FATE

If there is one thing both sides to this argument can agree on, it is that NAGPRA needs to be amended so that problems like this do not happen in the future.

a. Hastings

Representative Doc Hastings (R-WA) attempted a revision in 1997 that would have allowed testing on remains before they are culturally identified.¹⁰⁴ If no lineal descendants of the remains could be identified, the bill would expressly authorize studies on remains and funerary objects discovered on federal and tribal land.¹⁰⁵ In addition, his bill made no effort to clarify the definition of cultural affiliation, only what could be done to the remains prior to and immediately after determination.¹⁰⁶ He remarked that his bill “would ensure sound science is the deciding factor in determining what to do with remarkable discoveries such as ‘Kennewick Man.’”¹⁰⁷ Not surprisingly, some Native American organizations criticized Hastings’ bill noting that it put a priority on science and not on protecting graves, which is contrary to the heart of NAGPRA.¹⁰⁸

b. Senator Inouye and Representative Neil Abercrombie

¹⁰³ Lannan, *supra* note 3, at 429.

¹⁰⁴ Seidemann, *supra* note 76, at 170.

¹⁰⁵ Lannan, *supra* note 3, at 422-23.

¹⁰⁶ Seidemann, *supra* note 76, at 170.

¹⁰⁷ Lannan, *supra* note 3, at 422-23, (quoting Doc Hastings, *Kennewick Man Still Stirring Controversy*, TRI-CITY HEARALD (Kennewick, Pasco, and Richland, Wash.) Nov. 16, 1997.

¹⁰⁸ Lannan, *supra* note 3, at 424.

At the same time Rep. Hastings was trying to narrow the scope of NAGPRA, there were bills by Senator Inouye and Rep. Neil Abercrombie that would have required consultation with appropriate Indian tribes or Native Hawaiian organizations before any disposition of inadvertently discovered remains could be made.¹⁰⁹ This consultation would have given inadvertent discoveries a similar level of protection that exists for intentional excavation or removal of Native American cultural items.¹¹⁰ Both bills would have required notice of inadvertent discoveries by the federal agency to each appropriate tribe within three business days.¹¹¹

c. McCain

More recently, in March 2005, Senator John McCain proposed to expand NAGPRA by amending the definition of “Native American” to “of or relating to a tribe, a people or a culture that is *or was* indigenous to the United States.”¹¹² Members of the scientific community have criticized this amendment, and president of Friends of America’s Past, Cleone Hawkinson, even went so far as to say, “American archaeology would come to a standstill.”¹¹³ This is likely a large exaggeration considering claimants would still have to prove a cultural affiliation to the remains. This amendment was to go to the Senate Indian Affairs Committee for testimony on July 28, 2005 and there is no word yet as to its fate.

Considering the many revisions NAGPRA went through prior to passage in 1990, it is not likely that an amendment will be passed anytime soon. However, it is clear that something needs to be done before another “Kennewick Man” situation arises.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Sandi Doughton, *Fate of Kennewick Man Study Unclear*, THE SEATTLE TIMES, July 15, 2005 available at http://seattletimes.nwsourc.com/html/localnews/2002382732_kennewick15m.html. (last visited on 7/22/2005).

¹¹³ Id.

V. CONCLUSION

Considering the reasons for enacting NAGPRA, it is clear that “Kennewick Man” should have been repatriated to the claimant tribes pursuant to the Act and given the dignified burial all humans deserve. To say that NAGPRA does not apply to “Kennewick Man” is to allow the grave robbing of the past to continue. Once again, scientists have exposed Native Americans to testing that is offensive and against their beliefs with the approval of the government. It took much too long to enact legislation to protect Native American burial sites just to allow its undoing at the request of a few scientists. Even with the broad definition of “Native American” in NAGPRA, and the indications in the legislative history that the Act would apply to ancient remains, “Kennewick Man” was still held not to be “Native American.” Similarly, with all of categories of permissible evidence allowed by the statute and the legislative history showing a relaxed standard for “cultural affiliation,” the permissible evidence that was presented by the claimants was not found sufficient to show a “cultural affiliation” between the claimants and the remains. If NAGPRA is going to be effective in the future, an amendment will probably be a necessary first step. This first step in the right direction must be taken; otherwise we will be taking unacceptable steps back in the effort to rectify the past wrongs to Native Americans and their burial sites.