

Society for American Archaeology Position Paper

The Secretary of the Interior's September 21, 2000 Determination of Cultural Affiliation for Kennewick Man

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Abstract

In a letter dated September 21, 2000 US Secretary of the Interior Bruce Babbitt conveyed his decision that the remains of Kennewick Man are Native American under the meaning of NAGPRA and that these remains are culturally affiliated with five claimant tribes. SAA is pleased that the remains have now received appropriate scientific documentation and appreciates the Department's extensive efforts to compile the evidence relevant to the question of whether the remains are Native American and to the assessment of their cultural affiliation. SAA supports the Secretary's position regarding these remains being Native American. However, we believe that the Secretary's decision on cultural affiliation is fundamentally flawed in its understanding of the term "cultural affiliation" and in its assessment of the evidence presented for cultural affiliation. Using the Secretary's standard, it appears possible to establish cultural affiliation, or to otherwise provide for disposition to tribes, no matter how tenuous the connection to a modern group. This decision on cultural affiliation sets a precedent that is clearly inconsistent with the balance struck by Congress in NAGPRA. If it stands, this decision by the Secretary of the Interior will have devastating implications for accommodating scientific and diverse public interests in the past along with those of Native Americans.

The Secretary of the Interior's Decision

On September 25, 2000, the Department of the Interior (DOI) released a letter dated September 21, 2000 from Secretary of the Interior Bruce Babbitt to the Honorable Louis Caldera, Secretary of the Army regarding the Department of the Interior's assessment of cultural affiliation for Kennewick Man in connection with the *Bonnichsen et al. v. United States* lawsuit. The Secretary's involvement in the case results from the Department of the Army's delegation of its authority to DOI (accepted in March, 1998) to determine whether the Kennewick remains are Native American under the Native American Graves Protection and Repatriation Act (NAGPRA) and to decide on the appropriate disposition of the remains.

In his September 21, 2000 letter, Secretary Babbitt makes two key decisions concerning Kennewick Man: 1) that the remains are Native American and are thus subject to NAGPRA; and 2) that the remains are culturally affiliated with the five claimant tribes: the Confederated Tribes of the Colville Reservation, Confederated Tribes of the Umatilla Reservation, Confederated Tribes and Bands of the Yakama Indian Nation, the Nez Perce Tribe of Idaho, and the Wanapum Band.

The Secretary's assessment explicitly references four enclosures in support of this determination. Enclosure 3, "Human Culture in the Southeastern Columbia Plateau, 9500-9000 BP and Cultural Affiliation with Present-day Tribes" provides the Department's lengthy summary of the evidence regarding cultural affiliation. The Department also released the reports of the experts it had engaged to assemble the relevant evidence from archaeology, traditional history and ethnography, linguistics, and bioarchaeology. DOI also sponsored reports on the osteology, sediments, and lithics that were

released in 1999. The Secretary's letter, the enclosures, and all the expert reports are available at <http://www.cr.nps.gov/aad/kennewick>.

The Society for American Archaeology and NAGPRA

The Society for American Archaeology (SAA), with more than 6600 members, is the leading professional organization advocating for archaeology and archaeological resources in the United States. SAA has, for more than a decade, led the scientific community in national discussions about the repatriation of Native American human remains and objects of importance to contemporary Native American tribes. In 1990, SAA was the primary scientific organization involved in the negotiations among Native American organizations, museums, and Congress that resulted in the landmark consensus represented by NAGPRA. Although each party to these discussions had to compromise, there was a general sense that Congress intended NAGPRA to reasonably balance Native American interests in the past with those of the scientific community and the broader public. SAA provided testimony at Senate and House committee hearings on NAGPRA and helped form a coalition of scientific organizations and Native American groups that, once the compromise had been reached, strongly supported NAGPRA's enactment.

Since NAGPRA's passage SAA has closely monitored its implementation and has consistently provided comment to the NAGPRA Review Committee, to the Department of the Interior, and to other agencies. SAA has twice testified at hearings of the Senate Committee on Indian Affairs on the implementation of NAGPRA. SAA has always strongly urged its members to work toward the effective and timely implementation of the Act. However, over the last 10 years, SAA has been alarmed to see an increasing divergence between the actual practice of NAGPRA implementation by some Federal agencies and museums and what the Society believes to be plainly required by the letter and spirit of the Act. The Kennewick Case is a prime example of this divergence.

Scientific Documentation and Collection of Evidence

In the Kennewick case, the Department of the Interior has assumed and carried out the government's responsibility under the Archaeological Resources Protection Act (ARPA) to do scientific recording and documentation of new discoveries of human remains and cultural items from Federal land. This responsibility was clearly articulated by NPS Associate Director Katherine H. Stevenson in the Department of the Interior's June 10, 1998 testimony on HR 2893 before the House Resources Committee:

The use of contemporary, professional scientific archeological methods and techniques is required. Proper professional recording, examination, interpretation, and reporting of the results of the excavation or removal must be carried out by the responsible agency before any disposition of the remains occurs.

Secretary Babbitt reaffirmed this commitment in his September 21, 2000 letter:

Other Federal law is also applicable under certain circumstances. For example, under Section 3 of NAGPRA and its implementing regulations at 43 C.F.R. 10.3-10.4, the Archaeological Resources Protection Act (ARPA) is invoked to ensure appropriate recovery, description,

analysis, and documentation of human remains and other cultural items excavated or removed from Federal lands.

Federal agencies too often fail to ensure that the necessary scientific documentation is completed. Because scientific documentation serves to mitigate the loss of scientific information that results from repatriation, SAA is gratified by the Secretary's explicit acknowledgment of this Federal responsibility and acknowledges the efforts of the National Park Service to thoroughly document the Kennewick remains.

NAGPRA demands that agencies do a reasonable job of collecting the available scholarly evidence in order to make rational, evidentially-based determinations of cultural affiliation. While Federal agencies too often fail to fulfill this responsibility, DOI has gone to considerable lengths to develop an evidentiary record bearing on the status of Kennewick Man as Native American and his cultural affiliation with present-day tribes. SAA appreciates the efforts of the National Park Service to assemble extensive evidence relevant to cultural affiliation, including the important studies by outside experts.

While most human remains will not receive the intense scrutiny that the Kennewick remains did, the assessment of cultural affiliation under NAGPRA demands that agencies and museums systematically collect and consider the available evidence. Although there are some deficiencies in the evidentiary record for the Kennewick remains, as discussed below, SAA appreciates the National Park Service's efforts to compile relevant scholarly and traditional information and believes that systematic efforts to collect this evidence are essential to proper determinations of cultural affiliation under NAGPRA.

Kennewick Man as Native American

In his September 21 letter, the Secretary affirms the Department's January 2000 finding that Kennewick Man is Native American under the definition in NAGPRA. This finding is based on DOI's interpretation of the definition of "Native American" and on the available evidence including a number of new radiocarbon dates obtained by DOI. The Department's interpretation of the meaning of "Native American" was laid out in the December 23, 1997 letter from Departmental Consulting Archaeologist Francis McManamon to Lieutenant Colonel Curtis of the US Army Corps of Engineers, in response to a number of questions put to the government by the Court in the Kennewick case. This conclusion was repeated in Kennewick Enclosure 1 (also written by McManamon):

As defined in NAGPRA, "Native American" refers to human remains and cultural items relating to tribes, peoples, or cultures that resided within the area now encompassed by the United States prior to the historically documented arrival of European explorers, irrespective of when a particular group may have begun to reside in this area, and, irrespective of whether some or all of these groups were or were not culturally affiliated or biologically related to present-day Indian tribes.

SAA has publicly endorsed both the Department's position on the interpretation of "Native American" for purposes of NAGPRA and the specific conclusion that the remains of Kennewick

Man are Native American. SAA continues to believe this interpretation of the term is fully consistent with the Congressional intent and that the evidence supports this conclusion.

Cultural Affiliation of Kennewick Man

Although SAA agrees that Kennewick Man is Native American, we believe that the Secretary's decision on cultural affiliation is fundamentally flawed in its understanding of the term "cultural affiliation" and in its assessment of the evidence presented for cultural affiliation. This decision sets a precedent that, if it remains in effect, largely eliminates the compromise between the scientific and Native American interests that was embodied in NAGPRA.

The Meaning of "Cultural Affiliation"

A determination of "cultural affiliation" depends on an understanding of that term as it is used in the law and on the evaluation of evidence with respect to that meaning. The logic put forth in Secretary Babbitt's letter reflects a meaning for that term that we believe is inconsistent with the statutory language.

NAGPRA's definition of cultural affiliation stipulates that the cultural relationship must meet the standard of a shared group identity that can be reasonably traced.

"cultural affiliation" means that 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 (25 U.S.C. 3001 Sec. 2(2)).

However, the Secretary appears to equate "cultural affiliation" with "reasonable cultural connection" and then goes on to associate "reasonable cultural connection" with "cultural continuity":

Consequently, the cultural affiliation determination must focus on whether there is evidence establishing a reasonable cultural connection between the Indian tribes inhabiting the Columbia Plateau region approximately 2000-3000 years ago and the cultural group, represented by the Kennewick human remains, which inhabited the same region 8500-9500 years ago.

The collected oral tradition evidence suggests a continuity between the cultural group represented by the Kennewick human remains and the modern-day claimant tribes.

...DOI has determined that the evidence of cultural continuity is sufficient to show by a preponderance of the evidence that the Kennewick remains are culturally affiliated with the present-day Indian tribe claimants.

"Continuity" or "reasonable relationship" is a far weaker criterion than "a shared group identity that can be reasonably traced," in terms either of their everyday meaning or of their anthropological usage. "Cultural continuity" implies a more or less continuous occupation of an area, but little more. A "reasonable cultural connection" with some group might reasonably be said to exist even though an individual's group identity is quite different. While many Americans could legitimately argue a reasonable cultural connection with 18th-century English culture (because of the origin of the

dominant cultural traditions in the United States), few would claim to have a shared group *identity* with the English. By substituting these less restrictive terms for the statutory language, the Secretary's decision undermines Congress' effort to balance scientific and Native American interests by limiting repatriation to cases where there is relatively strong connection with a modern tribe.

In fact, during its deliberations on NAGPRA, Congress explicitly rejected a definition that tied cultural affiliation to a "reasonable relationship." The July 10, 1990 draft of the House bill leading to NAGPRA stated:

The term "cultural affiliation" means that there is a reasonable relationship, established by a preponderance of the evidence, between a requesting Indian Tribe or Native Hawaiian organization and the Native Americans from which the human remains or other material covered by this Act are derived.

Through its substitution of the statutory definition involving "shared group identity" Congress clearly rejected the weaker "reasonable relationship" definition.

Maintenance of the more precise statutory meaning of cultural affiliation is also an issue of concern to the tribes. The Hopi Tribe relied upon a careful use of the statutory definition in a dispute with the National Park Service that was recently heard by the NAGPRA Review Committee and decided in favor of the tribe. Similarly, Harvard University's Peabody Museum of Archeology and Ethnology used the statutory language in reaching its decision in a case in which the Wampanoag and the Narragansett tribes had competing claims of cultural affiliation.

The "Background and Scope for the Cultural Affiliation Reports" that accompanies the DOI experts' reports also appears to mistakenly equate "cultural continuity" with "shared group identity" and seems to set up the primary problem facing the consultants as one of assessing continuity.

The focus of each study was to be on acquiring and investigating evidence for continuity ("existence of shared group identity"), between the Native American Indian tribes inhabiting the Mid-Columbia region in the early 19th century and the ancient group, represented by the Kennewick human remains, which likely resided within the same region 9,500 years ago. Evidence of discontinuities also were to be identified and described as well as gaps in the record resulting from insufficient data or information.

Unfortunately, this may have served to focus the consultants' attention away from the more demanding task of tracing a shared group identity.

While the statute's definition is quoted in the letter, the letter fails to provide any argument to justify the substitution of "reasonable cultural relationship" and "continuity" for a traceable "relationship of shared group identity" in interpreting the law. It is notable that "continuity" does not appear anywhere in the text of the statute or in the body of the implementing regulations.

Evidence for Cultural Affiliation

A review of Enclosure 3 to the Secretary's letter, the DOI summary of the evidence for cultural affiliation, does not sustain a finding of cultural affiliation as defined in the law. Indeed, a