Title:Complex legal legacies: the native American graves protection and repatriation act, scientific study, and Kennewick Man.(Native American Grave Protection and Repatriation Act).

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Abstract:
Debates over disposition options for an inadvertently discovered set of early Holocene human remains known as Kennewick Man have fueled discussions about the scientific, cultural, and ethical implications of the anthropological study of human remains. A high-profile lawsuit over Kennewick Man has led to the most extensive judicial analysis to date of the Native American Graves Protection and Repatriation Act (NAGPRA), the primary law affecting access to, and the ultimate disposition of ancient human remains found in the United States. However, despite years of litigation, some key questions remain unanswered. The judicial decisions in Kennewick address important questions about determining Native American status and assessing cultural affiliation under the law. However, the court opinions fail to address the role of scientific study within NAGPRA 's confines. This article examines NAGPRA and concludes that two provisions in the law expressly permit the scientific study of human remains if certain conditions are met. Significantly, Kennewick Man might have qualified for study under NAGPRA even if found to be Native American and culturally affiliated with the claimant tribes, which would have enabled study to proceed from the outset while the parties debated the issues of Native American status and potential cultural affiliation.

Los debates acerca de la forma de disponer de los restos humanos del holoceno temprano accidentalmente descubiertos conocidos como "Kennewick Man" han precipitodo discusiones sobre las implicaciones cientificas, culturales, y eticas del estudio antropologico de los restos humanos. Una demanda que ha llamado mucho la atencion sobre Kennewick Man ha provocado el analisis judicial mas extensivo hasta la fecha del Native American Graves Protection and Repatriation Act (NAGPRA), la ley principal que gobierna la forma de disponer de los restos humanos antiguos encontrados en los Estados Unidos. Sin embargo, a pesar de varios anos de litigacion algunas preguntas clave permanecen sin respuesta. Las decisiones judiciales con relacion al Kennewick Man consideran preguntas importantes sobre la determinacion de la clasificacion Nativo Americana y la evaluacion de la afiliacion cultural segun la ley. Sin embargo, las opiniones de la corte no consideran el papel del estudio cientifico bajo los parametros determinados por NAGPRA y concluye que dos provisiones de la ley permiten explicitamente el estudio cientifico de restos humanos siempre y cuando se cumplan ciertas condiciones. Mas importante aun cabe hacer notar que Kennewick Man pudo haber calificado para estudios bajo NAGPRA aun cuando hubiese sido clasificado como Nativo Americano y afiliado culturalmente alas tribus demandantes, lo que hubiese permitido que se comenzaran investigaciones mientras se debatian los asuntos concernientes a la clasificacion Nativo Americana y la posible afiliacion cultural.

In 1996, two individuals walking along an embankment of the Columbia River during a .hydroplane race near Kennewick, Washington, happened upon a skull. That discovery ultimately led to the recovery of one of the most complete early Holocene (>8000 B.P.) skeletons found to date in the Western Hemisphere (Chatters 2000; Bonnichsen et al. v. United States et al., 217 E Supp. 2d 1116 [Dist. OR] [2002]: 1121). The remains subsequently gained considerable notoriety under the name Kennewick Man. Debates over Kennewick Man's fate have fueled growing scholarly and public discussion of the legal and ethical implications of the anthropological study of Native American human remains. In addition, a high-profile lawsuit over the scientific study of the remains has led to the most extensive judicial analysis to date of the Native American Graves Protection and Repatriation Act (NAGPRA; Public Law 101-601, November 16, 1990, 25 U.S. Code 3001 et seq.), the primary federal law governing the rights of Native Americans and scientists to access and control such remains. The contentious Kennewick Man dispute has, perhaps more than any other event to date, called into question NAGPRA's ability to balance tribal, museum, and archaeological interests in ancient human remains (Thomas 2000:231).

Since its inception, NAGPRA has notably affected the archaeological profession, both by requiting increased interaction with extant Native American groups and by limiting access to certain materials traditionally available for scientific study. NAGPRA has also led to an increase in the workload of agency and museum officials, archaeologists, and Native American representatives as they implement the statute's inventory, affiliation, and repatriation processes. Despite such effects, there have been very few court decisions interpreting the statute. It is encouraging that most NAGPRA dispositions have been resolved without the need to resort to legal action, and many positive relationships have been forged between archaeologists and tribes as a result of the increased number of collaborations (Swidler et al. 1997; Zimmerman et al. 2003). However, the Kennewick

lawsuit, perhaps inevitably, has attracted public and scholarly attention far beyond the many successful collaborative efforts that have occurred and continue to occur.

Recent years have yielded a growing number of scholarly debates and analyses of the myriad interests at stake when human remains and culturally sensitive objects become the subjects of scientific inquiry. A rich mosaic of publications has likewise explored various perspectives on archaeologist--tribal relations and the handling of human remains (see, e.g., Brown 2003; Dongoske et al. 2000; Evers and Toelken 2001; Fine-Dare 2002; Fluehr-Lobban 2003; Mihesuah 2000; Richman and Forsyth 2004; Swidler et al. 1997; Watkins 2000; Zimmerman et al. 2003). This article seeks to restrict its focus to the legal structure underpinning scientific study within the context of NAGPRA. The goal is to step back from specific stakeholder perspectives to examine the law itself, in its own words and as interpreted in the context of the Kennewick Man controversy, in hope of illuminating aspects of the present legal framework--with its attendant strengths, weaknesses, and arbitrary boundaries--within which the many discussions and debates unfold.

Brief Background on Kennewick Man's Discovery

Following the July 28, 1996, discovery of human remains scattered along the Columbia River near Kennewick, Washington (Figure 1), the Benton County coroner contacted archaeologist James Chatters (2000) to assist with the recovery and initial analysis of the remains. Initial studies revealed a stone point embedded in the hip, suggesting the remains were of great age. That suggestion was confirmed when radiocarbon dating of a small amount of metacarpal bone put Kennewick Man's antiquity at 8000-8500 B.P. (Taylor et al. 1998; U.S. Department of the Interior [DOI] 2000a). However, the remains were alleged to have characteristics inconsistent with other documented ancient Native American remains found in the region. The discovery aroused the interest of many, including prominent scientists, Native American groups, and the media.

In its capacity as manager of the federal land on which the remains were discovered, the U.S. Army Corps of Engineers took control of Kennewick Man. The corps halted plans to relocate the remains to the Smithsonian Institution for further study, after several tribes asserted claims under NAGPRA to take control over the remains in order to rebury them. In considering the tribal claims, the Army Corps found Kennewick Man to be Native American and a group of claimants to be culturally affiliated with the remains. Based on those findings, the Army Corps determined that NAGPRA's prerequisites for repatriation were satisfied. The corps consequently refused to allow additional study and instead announced its intention to repatriate the remains to the claimant tribes for reburial (Bonnichsen et al. v. United States et al., 217 F. Supp. 2d 1116 [Dist. OR] [2002]: 1121). Following the agency's denials of repeated requests by archaeologists and physical anthropologists to conduct additional studies, a group of scientists sued the U.S. government, claiming rights under a variety of legal theories to conduct in-depth scientific studies of the remains as "a 'rare discovery of national and international significance' that could shed considerable fight on the origins of humanity in the Americas" (Bonnichsen et al. v. United States et al., 969 F. Supp. 614, 618 [Dist. OR] [1997]:618). The protracted, highly publicized case of Bonnichsen et al. v. United States et al. ensued.

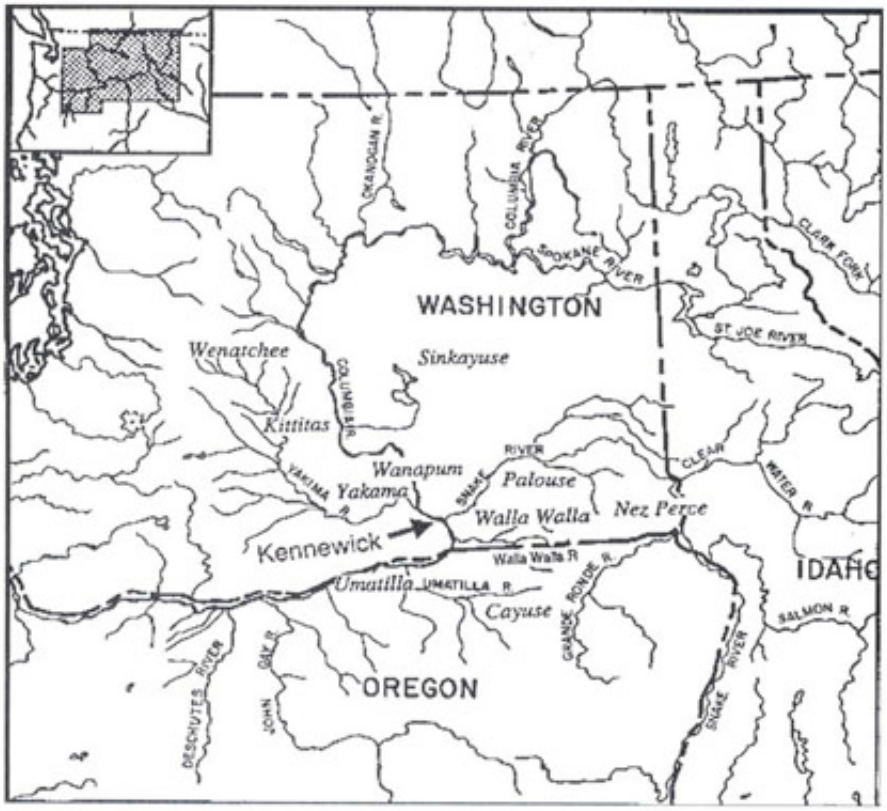

Figure 1. Map depicting locations of the tribal claimants and of Kennewick Man's discovery. From Daniel L. Boxberger, "Review of Traditional Historical and Ethnographic Information," National Park Service, www.cr.nps.gov/aad/kennewick/boxberger.htm. Used with permission.

Some important studies were conducted on the remains through a coordinated effort of the Department of the Interior, the National Park Service (NPS), and the Army Corps of Engineers, in an effort to assess potential cultural affiliation with the claimant tribes (NPS 2000b). However, efforts by the plaintiff scientists to pursue studies based on broader research interests were denied during pendency of the lawsuit. In August 2002, the Oregon District Court ruled in favor of the scientists (Bonnichsen et al. v. United States et al., 217 F. Supp. 2d 1116 [Dist. OR] [2002]: 1167). Within Judge Jelderks's 51-page opinion, which authorizes additional studies of Kennewick Man, one might expect to find an exhaustive examination of the circumstances under which NAGPRA permits scientific study of human remains. Instead, in a single footnote of analysis, the court concluded that NAGPRA's impact on scientific study rights need not be addressed (Bonnichsen et al. v. United States et al., 217 E Supp. 2d 1116 [Dist. OR] [2002]:1165). Why such brevity? The district court declined to analyze NAGPRA's scientific study provisions because it found that NAGPRA did not apply to the case. According to the court, the government failed to prove that Kennewick Man is, according to NAGPRA, a Native American (Bonnichsen et al. v. United States et al., 217 E Supp. 2d 1116 [Dist. OR] [2002]:1139). NAGPRA only applies to remains that are Native American, as definied in the statute; other remains of archaeological interest found on federal or tribal land are governed by the Archaeological Resources Protection Act (ARPA; Public Law 96-95, October 31, 1979, 16 U.S. Code Sec. 470aa et seq.), the 1979 law that remains in effect unless superseded by NAGPRA's provisions. The court relied on ARPA, rather than NAGPRA, as the basis for authorizing scientific study. As a result, more than six years of litigation and over 22,000 pages of documented effort (Bonnichsen et al. v. United States et al., 217 F. Supp. 2d 1116 [Dist.

OR] [2002]:1120) in the district court phase of the Kennewick lawsuit culminated in a court opinion devoid of any analysis of NAGPRA's impact on scientific study.

The case was appealed to the Ninth Circuit. The circuit court's opinion, published on February 4, 2004, upholds the district court's ruling that the government failed to prove Kennewick Man's status as a Native American. It agrees that ARPA, rather than NAGPRA, governs the disposition of Kennewick Man and that scientists have the fight to study the remains pursuant to an ARPA permit (Bonnichsen et al. v. United States et al., Ninth Circuit Court of Appeals, No. 02-35996, 2004 U.S. App. LEXIS 1656 [February 4]). Additional studies finally commenced in July 2005 (Cable News Network 2005). In considering the appeal, the appellate court focused on the question of Kennewick Man's status as a Native American and, like the district court, failed to provide any substantive analysis of NAGPRA's impact on the scientific study of human remains.

After almost a decade of litigation over NAGPRA's role in allocating control of Kennewick Man, the statute's role in governing the scientific study of ancient human remains has yet to be clarified. Nonetheless, the Kennewick Man controversy represents a legal watershed in American anthropology. The cacophony of legal wrangling has fueled widespread debates about NAGPRA's reach in determining cultural identity, the expansion of tribal rights to exercise control over ancient remains and objects, and the appropriate parameters of scientific inquiry into the human past when that inquiry conflicts with the beliefs and interests of present-day groups. The intensity of debate and entrenchment of positions become particularly acute when attempting to set legal and ethical boundaries for the excavation, study, and handling of human remains. These issues certainly transcend the fate of Kennewick Man. Although litigation in that case may have reached an end, NAGPRA's role in defining and enforcing the boundaries of the scientific study of ancient human remains continues to be both crucial and largely untested.

NAGPRA's Historical Context

Events in the prologue to NAGPRA's passage, as well as the language of the law itself, suggest that remains of great age and unclear identity were not a primary focus of the law's drafters. A few notable events in the complex history preceding NAGPRA's enactment help illustrate this suggestion. In the 1970s, following negotiations over the return of several skulls of Modoc tribal members to their descendants, the Smithsonian Institution adopted its first departmental policy on repatriation. That policy authorized the institution to return named individuals to their identifiable descendants. In the 1980s, the policy was expanded to allow for the repatriation of human remains and associated funerary objects "that could be culturally linked to extant Native American groups, going well beyond descendants of named individuals" (Ortner 1994:12). Those efforts culminated in the passage of the National Museum of the American Indian Act (NMAIA), which was signed into law on November 28, 1989. The NMAIA, which continues to govern the Smithsonian's repatriation obligations, played a significant role in paving the way for NAGPRA's enactment one year later.

NAGPRA's passage was also preceded by intensive efforts to explore and understand the balance of interests at stake in handling Native American human remains and objects. In 1988, the Senate Select Committee on Indian Affairs conducted a hearing on possible

legislation to establish a repatriation process for human remains. Action was postponed in acquiescence to several witness requests that museums and Native American communities first have the opportunity to discuss the subject (U.S. House of Representatives 1989:13). In 1989, the Heard Museum in Phoenix, Arizona, hosted a year-long dialogue on museum-Native American relationships. The resulting report, issued on February 28, 1990, acknowledges the legitimate interests of multiple stakeholders and calls for legislation respecting Native American human rights while also valuing scientific study and education:

> The panel recommended that all resolutions be governed by respect for the human rights of Native Americans and the value of scientific study and education. The majority believed that "Respect for Native human rights is the paramount principle that should govern resolution of the issue when a claim is made...." The Panel was split on what to do about human remains which are not culturally identifiable. Some maintained that a system should be developed for repatriation while others believed that the scientific and educational needs should predominate. The report strongly supported dialogue between museums and Indian tribes during all aspects of both the acquisition of sensitive materials, and repatriation requests. The Panel concluded that Federal legislation on this matter was needed. [U.S. House of Representatives 1989:14]

On July 10, 1990, U.S. Representative Morris Udall introduced Bill H.R. 5237 in the House of Representatives; Senator Daniel Inouye introduced the bill in the Senate. After four revisions, the fifth version of the House bill became law on November 16, 1990. NAGPRA was born, and relationships among the scientific, museum, and indigenous communities of this country were markedly transformed.

Changes in the language of the bill prior to its enactment reflect congressional efforts to balance the interests of Native American groups with those of the scientific and museum communities. In deference to concerns expressed by Native American groups, the Review Committee's right of access to culturally sensitive materials was reduced from "full and free" (U.S. House of Representatives 1990: Section 7e) to "reasonable" (NAGPRA, Section 8f). Additionally, scientific involvement in NAGPRA's implementation was increased through changes to the legislation. The early language of the bill required that the committee consult only with Native American groups when dealing with unclaimed and unidentifiable remains (U.S. House of Representatives 1990: Sections 3b, 7d). As enacted, however, NAGPRA (Sections 3b, 8e) requires the committee to include the museum and scientific communities in that process. The composition of the Review Committee itself was changed to augment scientific community involvement. Although early language in the bill called for four of the seven members to be nominated by the Native American community

(U.S. House of Representatives 1990: Section 7b), the statute as enacted mandates that the Secretary of the Interior select three members from Native American nominations, three from scientific organization and museum nominations, and one from mutually approved nominations (NAGPRA, Section 8b).

The resulting legislation establishes a structure within which federally funded institutions, Native American groups, and the scientific community are expected to collaborate to implement NAGPRA's inventory, repatriation, and disposition processes. Although respectful treatment of Native American human remains remained a prominent concern expressed by lawmakers throughout the process of drafting NAGPRA, changes to the bill reflect a conscious effort on the part of Congress to provide a system that would balance the interests of the Native American, scientific, and museum communities, rather than simply favoring one group to the exclusion of the others. NAGPRA certainly dilutes the control previously accorded to scientists, by requiring consultations with tribes and empowering descendants and culturally affiliated claimants to control the disposition of certain Native American human remains. However, NAGPRA does not prohibit all scientific study, or mandate the repatriation, of the human remains and other cultural items subject to its coverage. The law provides mechanisms within which scientific researchers, museums, and tribes are expected, and empowered, to coexist as they pursue their interests--at times shared, at times divergent--in managing the material record of the past.

Statutory and Regulatory Framework

NAGPRA is federal legislation applicable nationwide to Native American remains, funerary objects, sacred objects, and objects of cultural patrimony held in federally funded institutions or removed from federal or tribal lands since the statute's enactment. The statute has augmented, not replaced, legal structures already in place to govern the handling of human remains. ARPA continues to govern the excavation and handling of human remains discovered on federal or tribal lands, as it has since its enactment in 1979, although NAGPRA's provisions (Section 3c), when applicable, must be adhered to as well. In order to better understand NAGPRA and the ways in which it has been interpreted, it is important to look carefully not only at the wording of the statute itself but also at its regulations.

Statutory Interpretation

As with any law, parties with differing perspectives will, intentionally or inadvertently, interpret the wording and intent of NAGPRA in varying ways. A basic tenet of statutory interpretation is that the statute's language should be read with the expectation that every word has a purpose and that each word should be accorded its plain, common meaning (Bennett v. Spear, 520 U.S. 154 [1997]:173). However, when a statute provides definitions for specific terms, those definitions control for the purpose of interpreting the statute, even if they imbue words with meanings that differ from their meanings in other contexts. In order to understand NAGPRA, it is essential to begin with the foundation upon which the statute rests: its definitions of key terms such as Native American, Indian Tribe, and cultural affiliation. While those definitions may help clarify lawmakers' perspectives, they also create additional layers of complexity as groups struggle to determine whether particular items or circumstances meet the statutory definitions. Complexity also arises when

statutory definitions are invoked in situations beyond the bounds of the statute, which can create controversy by heightening the influence of definitions beyond the scope intended by the law.

Regulatory Interpretation

The Secretary of the Interior is empowered by NAGPRA (Section 13) to develop regulations implementing the statute's provisions. There are, however, limits on the authority of the Interior Department to interpret, and issue regulations pertaining to, NAGPRA. Regulations must align with congressional intentions as expressed in the language of the statute itself. Indeed, federal courts are empowered to review the appropriateness of regulations to ensure that the statute's intentions are upheld. While courts must defer to a regulatory agency's reasonable interpretations of a statute (United States v. Mead Corp., 533 U.S. 218 [2001]:218), "when an agency's decision turns upon the construction of a statute or regulation, the court must consider whether the agency correctly interpreted and applied the relevant legal standards" (Bonnichsen et al. v. United States et al., 217 F. Supp. 2d 1116 [Dist. OR] [2002]:1132). A federal court may review agency decisions, such as the overturned decision by the Department of the Interior to repatriate Kennewick Man to the tribal claimants, in order to assess whether they are based on correct interpretations of the law.

The Concept of "Indian Legislation"

NAGPRA expressly declares that it "reflects the unique relationship between the federal government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government" (Section 12). The Interior Department has stated that it construes NAGPRA as Indian legislation and would consequently resolve any ambiguities in the law "liberally in favor of Indian interests" (2000a). Others have argued that the statute represents compromise legislation, rather than Indian legislation, designed to strike a balance between scientific interests in studying ancient remains and tribal interests in reburying such remains (Society for American Archaeology [SAA] 2001:10). NAGPRA falls into a unique realm of legislation tailored to address specific aspects of the federal government's relationship with Indian tribes and to protect and respect certain interests of the Native American community, while at the same time protecting and respecting certain interests of the museum and scientific communities.

The U.S. Supreme Court has taken the position that "legislation singling out Indians for particular and special treatment, if tied rationally to the fulfillment of Congress's unique obligations toward the Indians," will not be disturbed (Morton v. Mancari, 417 U.S. 535 [1975]:55), and it has recognized that regulators and courts may interpret ambiguous statutory provisions, when "rooted in the unique trust relationship between the United States and the Indians" for the benefit of Indian interests (Montana et al. v. Blackfeet Tribe of Indians, 471 U.S. 759 [1985]:766). However, when statutory provisions are clear and unambiguous, they must be adhered to as written. The Supreme Court has specifically acknowledged that "the canon of construction regarding the resolution of ambiguities in favor of Indians ... does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress" (South Carolina v. Catawba

Indian Tribe, 476 U.S. 498,506 [1986]; SAA 2001:10-11). Consequently, regardless of whether NAGPRA qualifies as "Indian legislation," its unambiguous provisions must be implemented as written, and any interpretation of ambiguities must comport with congressional intent expressed at the time of the law's passage. Compromise certainly was a focus of those drafting the law. In a joint letter to President George Bush supporting the passage of NAGPRA, numerous tribal and scientific organizations described the law as "the product of a carefully constructed compromise" (SAA 1990b). Similarly, Senator McCain commented on the compromise nature of NAGPRA's passage, noting, "In the end, each party had to give a little in order to strike a true balance" (U.S. Senate 1990; SAA 2001:10).

The long-enduring dispute over control of Kennewick Man highlights the power--and potential ambiguity--of legal definitions, and the importance of examining the minutiae of statutory and regulatory wording, when attempting to understand, interpret, and implement a law such as NAGPRA. NAGPRA provides clear mechanisms for repatriating the remains of culturally identifiable individuals to their known descendants or clearly affiliated tribal groups. The law's intent becomes much more obscure, however, when remains are ancient and identity is unclear. Into such a quandary falls Kennewick Man.

Determining Native American Status

According to Vine Deloria Jr., "The conflict between Indians and anthropologists in the last two decades has been, at its core, a dead struggle over the control of definitions. Who is to define what an Indian really is?" (1997:215). Definitions, in the legal realm, serve very precise purposes as tools for use in interpreting and implementing particular laws. A term defined in one statute can be very differently defined or interpreted in another legal scenario. While the use of definitions may be helpful in clarifying particular legal intentions, the Kennewick controversy has surely highlighted the complexities of attempting, within a legal framework, to define terms with strong (and varied) cultural, political, and individual interpretations. The drafters of NAGPRA defined the term Native American in the law's earliest draft and retained that definition, unchanged, throughout its four revisions, and the statute's legislative history does not suggest that the definition was the subject of any ongoing consideration or debate. As we have seen within the Kennewick case, however, a single definition can create significant controversy, as parties with differing interests imbue a term with significantly different meanings.

NAGPRA defines the term Native American to mean "of, or relating to, a tribe, people, or culture that is indigenous to the United States" (Section 2). To be subject to NAGPRA, human remains must qualify under the statute as Native American. In connection with the Kennewick lawsuit, the Interior Department advised the U.S. Army Corps of Engineers of its interpretation of NAGPRA's definition:

> 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. [1997]

The department emphasized that a connection between remains and a present-day group comes into play when a group asserts cultural affiliation and claims control over disposition, rather than when a determination is made as to whether the remains qualify under NAGPRA as Native American:

> There is nothing in the statute or its implementing regulations which states or implies that NAGPRA's applicability is limited to Native American human remains and cultural items which are directly related to present-day Indian tribes. However, the matter of a direct relationship with present-day Indian tribes is of concern with respect to disposition of Native American human remains and cultural items pursuant to NAGPRA. [1997]

The Society for American Archaeology (2000) issued a position paper indicating its agreement with the Interior Department's interpretation. Nonetheless, the Kennewick district court imposed a more stringent test to invoke NAGPRA's coverage. It ruled that the present-tense statutory wording "is indigenous" in the definition requires proof of a cultural relationship between human remains and a presently existing indigenous tribe, people, or culture in order for those remains to qualify as Native American under NAGPRA (Bonnichsen et al. v. United States etal., 217 F. Supp. 2d 1116 [Dist. OR] [2002]: 1138).

On appeal, the Ninth Circuit grappled with the congressional intent behind NAGPRA's definition of Native American. The primary issue debated during the oral hearing was whether all human remains predating documented European contact and found within the U.S. borders should be deemed to be Native American under NAGPRA (Bonnichsen et al. v. United States et al. 2003). In its opinion, the circuit court affirmed the district court's ruling that a finding of Native American status requires evidence of a relationship to a present-day group, ruling that the definition requires evidence that remains share "special and significant genetic or cultural features with presently existing indigenous tribes, peoples, or cultures" (Bonnichsen et al. v. United States et al., Ninth Circuit Court of Appeals, No. 02-35996, 2004 U.S. App. LEXIS 1656 [February 4]:1608). The court attempted to clarify its newly articulated test by stating that the relationship must be one that "goes beyond features common to all humanity" (Bonnichsen et al. v. United States et al., Ninth Circuit Court of Appeals, No. 02-35996, 2004 U.S. App. LEXIS 1656 [February 4]: 1599).

NAGPRA does not specify with any particularity how Native American status must be determined. The Interior Department and SAA approached the matter by presuming that, for the purposes of NAGPRA, any human remains predating documented European

contact that are found within the country's borders would qualify under the law as Native American. From a legal standpoint, such a presumption would place the burden of proof on a party challenging the Native American status of precontact remains, by requiring it to prove that the remains are not Native American. In contrast, the Kennewick courts determined that Congress intended to require proof of Native American status for all remains, regardless of age, in order for NAGPRA to apply. The courts' rulings place the burden of proof squarely on the shoulders of a party claiming that remains are Native American. As a result, both courts required proof of Kennewick Man's status as a Native American before applying NAGPRA to the case, and they both ruled that the government failed to provide sufficient evidence to satisfy its burden.

Recent legislative efforts have considered the possibility of amending the definition of Native American to read "is or was indigenous" (U.S. Senate 2004, 2005). The proposed amendment, clearly targeting the judicial interpretation of the definition in the Kennewick case, would eliminate the need to prove a link to a present-day group in order to find remains to be Native American under NAGPRA. However, the proposed language would not automatically assume Native American status for all precontact remains; it would still require evidence that the remains relate to an "indigenous" tribe, people, or culture. The next debate may very well be over the meaning of indigenous, instead of the meaning of is.

In response to the proposed legislative change, a flurry of comments and published statements revealed various misunderstandings about NAGPRA's disposition process. For example, one commentator proclaimed that the amendment "would allow tribal groups to claim exclusive ownership of all prehistoric human remains found on federal land even if those remains have no relationship to any living American Indian" (Center for the Study of First Americans 2004). Contrary to that sweeping pronouncement, simply determining that items are Native American does not, in itself, mean that ownership will pass to a tribe or other group. A claimant group must demonstrate that it is qualified to make a claim based on its status as a federally recognized Indian tribe or Native Hawaiian organization, and it must demonstrate its specific relationship to the item according to the qualifications set forth in the statute. The most prominent of these is a qualification based on cultural affiliation.

Assessing Cultural Affiliation

The concept of cultural affiliation, as well as the concept of Native American status, is culturally and politically complex. It is contingent on how groups identify themselves and define their links to ancestral peoples. Scientific, tribal, and other approaches to understanding cultural links to the past are reflected in the diversity of ways that people assert control over the material remains of the past. None of these diverse viewpoints will necessarily find its direct correlate in NAGPRA. The statute's purpose in assessing cultural affiliation is limited to its goal of resolving the particular matters addressed by the statute itself. It does not endeavor to explain links between the present and the past in terms that satisfy Native American or scientific views; instead, NAGPRA's goal is limited to establishing a legal process to resolve claims for control over particular Native American remains and cultural items.

Under NAGPRA, 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" (Section 2). In order to prove a claim of cultural affiliation, the statute identifies nine lines of potential evidence--geography, biology, archaeology, anthropology, linguistics, kinship, folklore, oral tradition, and history--as well as "other relevant information or expert opinion" that a claimant may draw on to establish its claim (Section 7[a][4]). Notably, the definitional language for cultural affiliation explicitly requires a relationship with a present-day group, unlike the definition of Native American. NAGPRA's regulations (Title 43, Subtitle A, Part 10, Code of Federal Regulations; 43 CFR 10.1 et seq.) require that a claimant demonstrate (1) the existence of an identifiable present-day Indian tribe or Native Hawaiian organization with standing under NAGPRA, (2) evidence of the existence of an identifiable earlier group, and (3) evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe or Native Hawaiian organization and the earlier group. The types of evidence identified in the regulations as potentially useful to demonstrate the existence of an identifiable earlier group include (1) the identity and cultural characteristics of the earlier group, (2) documentation of distinct patterns of material culture manufacture and distribution methods for the earlier group, and (3) evidence establishing the existence of the earlier group as a biologically distinct population. The evidence must, according to the regulations, establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group (43 CFR 10.14[c]).

NAGPRA's definition of cultural affiliation is deceptively simple. A glance through the hundreds of pages of documents submitted to the court on Kennewick Man's potential cultural affiliation (DOI 2000b) demonstrates the actual complexity of such an investigation. The categories of evidence recognized in the law as viable to prove cultural affiliation reflect congressional intent to empower Native American groups to assert claims using a broad variety of information. Among the nine identified categories of evidence, it is no easy task to assess the relative legal weight that should be accorded to any particular piece of evidence. Nonetheless, the law requires courts to do so once disputes over cultural affiliation move to the courtroom, and those legal decisions often have strong and lasting effects beyond the dispute at issue.

Establishing Group Identity

A finding of cultural affiliation requires a finding of "shared group identity" between present-day groups and earlier groups. The process begs the question of what constitutes a group. Whereas the law clearly defines present-day claimant groups based on the statutory definitions of Indian tribe and Native Hawaiian organization, it does not provide guidance on identifying earlier groups.

Group identity is continually shaped and altered in a variety of ways (Cohen 1978). It is multiscalar in nature, historically contingent, and differentially perceived by group members and nonmembers (Dongoske et al. 1997). Many contemporary tribes may be culturally affiliated at various levels with multiple past groups (Brandt 1997; Moore 2001; Terrell 2001), particularly in areas such as the American Southwest, where, for more than a century, archaeologists have sought to clarify links between historic Pueblos and the plethora of archaeological sites in the region (Adler 1996). The formation of Southwest

tribes over the course of the last millennium has involved shifting populations affecting social identities at a variety of scales (Bernardini 2005:5, 171), illustrating the complexity of tracing strands of cultural affiliation over long time periods and, more dauntingly, endeavoring to determine which contemporary group should be deemed to be most closely affiliated with an earlier identified group. When experts who are recognized as such in their respective communities, such as archaeologists and tribal elders, present contrasting views of group identity to a court, the judge or jury must reconcile the evidence offered and make findings for the benefit of one party at the expense of another. The types of evidence used by various parties to measure cultural affiliation will vary according to the particular circumstances of each situation. NAGPRA requires satisfaction of its particular legal standards, whether or not those standards correspond to indigenous, scientific, or other viewpoints.

The Role of Cultural Affiliation in Determining Repatriation Rights

Legal inquiry into cultural affiliation may vary significantly from typical archaeological inquiries into relationships between past and present groups. NAGPRA's regulations confirm that proof of cultural affiliation for NAGPRA's purposes does not require scientific certainty (Regulation 10.14[f]). Each museum or agency subject to NAGPRA is required to determine the cultural affiliation of Native American remains in its possession or control "to the extent possible based on information possessed" by the institution and in consultation with tribal and Native Hawaiian officials and traditional religious leaders (Section 7[a]). Institutions may be unable to determine cultural affiliation based on available information, or they may make determinations that differ from the views of tribes or Native Hawaiian organizations. An Indian tribe or Native Hawaiian organization may assert its own claim of cultural affiliation under NAGPRA, by demonstrating its cultural affiliation with an item through a preponderance of the evidence (Section 7[a][4]). That legal standard requires, in essence, showing that a particular outcome is more likely than not supported by all of the presented evidence. A court need only be 51 percent certain that its finding is correct. However, the burden of proof is on the claimant tribe to satisfy the court that it is culturally affiliated (or, in a case with multiple affiliated claimants, that it is the most closely affiliated) with the earlier group represented by the cultural items at issue. In the end, there must be sufficient evidence offered to support findings of (1) an identifiable earlier group associated with the remains or items and (2) a relationship of "shared group identity" that is reasonably traceable between that earlier group and the claimant tribe. As we have seen with the Kennewick courts' approach to assessing Native American status, it is no easy matter to ascertain what specific evidence will suffice in a courtroom to meet NAGPRA's requirements in a particular case.

A finding of cultural affiliation does not automatically result in repatriation. The affiliated tribe or organization will not have a right to the repatriation of remains for which a lineal descendant is identified or remains removed from tribal land. If no lineal descendant or tribal landowner rights take precedence, then Section 3 of NAGPRA vests ownership of "Newly Discovered Remains" in the group "which has the closest cultural affiliation ... and ... states a claim" (Section 3[a]). In addition, Section 7(e) states that an institution may retain the remains until the "most appropriate claimant" is identified or the dispute is resolved. If multiple parties claim to be culturally affiliated with a particular set of remains, things become even more complicated from an evidentiary standpoint. If all culturally

affiliated parties can agree on a disposition, then Section 7 directs the institution to proceed in accordance with the agreement. Otherwise, no disposition is directed by NAGPRA until a claimant with standing to make a claim demonstrates that it is more closely affiliated with the item than the other claimants. The Kennewick courts found that the preponderance of the evidence did not support a finding of cultural affiliation between the remains and any of the claimants, even if the remains had been deemed to be Native American. Consequently, even if NAGPRA had applied, none of the claimants would have been entitled to repatriation.

Culturally Unidentifiable Human Remains

When items of great antiquity, such as the Kennewick Man remains, are at issue, evidence of cultural affiliation is likely to be more tenuous than evidence relating to historical or late prehistoric items. Archaeological evidence presented in the case was deemed insufficient to resolve Kennewick Man's cultural status from a scientific perspective. Dr. Kenneth Ames, who prepared the summary of archaeological information for the Interior Department's (2000b) cultural affiliation report on Kennewick Man, reported that "the empirical record precludes establishing cultural continuities or discontinuities across increasingly remote periods" and that "the available evidence is insufficient either to prove or disprove cultural or group continuity dating back earlier than 5000 B.C., which is the case with regard to Kennewick Man's remains" (Bonnichsen et al. v. United States et al., Ninth Circuit Court of Appeals, No. 02-35996, 2004 U.S. App. LEXIS 1656 [February 4]: 1605). Although a finding of cultural affiliation does not require scientific certainty, the Kennewick district court declared that, where evidence fails to explain "the significant gaps in the archaeological record, it is simply impossible to find that cultural affiliation has been established by a preponderance of the evidence" (Bonnichsen et al. v. United States et al., 217 F. Supp. 2d 1116 [Dist. OR] [2002]: 1150).

The court also found the oral tradition evidence in the case to be insufficient to establish the requisite link between a prior and present group, noting that "the 9,000 years between the life of the Kennewick Man and the present is an extraordinary length of time to bridge with evidence of oral tradition" (Bonnichsen et al. v. United States et al., 217 F. Supp. 2d 1116 [Dist. OR] [2002]:1155). The district court concluded that "NAGPRA was intended to reunite tribes with remains or cultural items whose affiliation was known, or could be reasonably ascertained. At best, we can only speculate as to the possible group affiliation of the Kennewick Man, whether his group even survived for very long after his death, and whether that group is related to any of the Tribal Claimants" (Bonnichsen et al. v. United States et al., 217 F. Supp. 2d 1116 [Dist. OR] [2002]: 1157). The circuit court concurred, noting that "scant or no evidence of cultural similarities between Kennewick Man and modern Indians exists" (Bonnichsen et al. v. United States et al., Ninth Circuit Court of Appeals, No. 02-35996, 2004 U.S. App. LEXIS 1656 [February 4]: 1605). Despite NAGPRA's explicit recognition of oral tradition and folklore as valid lines of evidence in demonstrating cultural affiliation, the Kennewick courts' rulings suggest that it may be a challenge to convince judges and juries of the probative value of such evidence when dealing with items of great antiquity.

Scholars have addressed, and continue to address, the interplay of oral history and scientific inquiry into the past (Anyon et al. 2000; Bernardini 2005; Echo-Hawk 1997;

Whiteley 2002). However, it is unclear how future courts will weigh the merits of oral tradition evidence when assessing Native American identity or cultural affiliation and what role anthropological or indigenous perspectives might play in shaping judicial views. Many lines of evidence were explored in the government's effort to prove a legally acceptable cultural link between Kennewick Man and the coalition claimants, but to no avail. Even clear geographic proximity between the discovery site of the remains and the claimants' areas of historical occupancy (Figure 1) was deemed insufficient to trace shared group identity with reasonable certainty over the course of thousands of years. Further, because the remains were not found on land determined by a final judgment of the Indian Claims Commission to have been the aboriginal land of any of the tribal claimants, the claimants could not qualify as owners via aboriginal land use under Section 3 of NAGPRA (Bonnichsen et al. v. United States et al., 217 F. Supp. 2d 1116 [Dist. OR] [2002]: 1157). Regardless of tribal or scientific beliefs about the culture group identity of Kennewick Man, NAGPRA's legal requirements were deemed not to have been satisfied. According to the courts, it is not possible to prove a cultural relationship between Kennewick Man and any present-day group. He is, from a legal standpoint, culturally unidentifiable.

The category of culturally unidentifiable human remains constitutes a difficult, highly charged, and unresolved dilemma under NAGPRA. Debates continue as to whether Congress intended to ultimately repatriate all curated human remains or whether it intended to repatriate only those remains shown to be sufficiently related to entitled claimants. The Kennewick courts have taken the position that repatriation of all remains, regardless of the tenuous nature of a claimant's relationship, is inconsistent with NAGPRA's intent. The circuit court declared that "Congress's purposes would not be served by requiting the transfer to modern American Indians of human remains that bear no relationship to them" (Bonnichsen et al. v. United States et al., Ninth Circuit Court of Appeals, No. 02-35996, 2004 U.S. App. LEXIS 1656 [February 4]:1598). According to the district court:

> NAGPRA does not mandate that every set of remains be awarded to some tribe, regardless of how attenuated the relationship may be. On the contrary, the Act expressly contemplates instances in which no claimant can establish the requisite degree of cultural affiliation to be entitled to claim the remains.... The Tribal Claimants' reading of the statute would eliminate the requirement that a claimant establish, by a preponderance of the evidence, a shared group identity with the identifiable earlier group. [Bonnichsen et al. v. United States et al., 217 F. Supp. 2d 1116 (Dist. OR) (2002): 1156]

The court's acknowledgment of the crucial role played by cultural affiliation in the repatriation process raises a point of broader consideration about the limits of NAGPRA's mandates. Through its definitions, as well as through the limits of its reach in terms of the types of collections and locations of new discoveries, NAGPRA clearly sets limits on the

types of items subject to repatriation, on the groups entitled to participate in NAGPRA's processes, and on the relationship parameters that must be met before any claimant is entitled to take control over the disposition of an item.

Proposed Regulations for Culturally Unidentifiable Human Remains

The quandary of how to handle culturally unidentifiable human remains under NAGPRA is still unresolved (Figures 2-3). Despite the urging of the 1989 Heard Museum panel in its call for federal legislation, Congress did not establish a process in the statute for addressing culturally unidentifiable remains. Instead, it delegated to the NAGPRA Review Committee the responsibility for "compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for such remains" (NAGPRA, Section 8[c][5]). Thirteen years after NAGPRA's passage, no formal structure for addressing culturally unidentifiable human remains has yet been established. At the May 2002 meeting of the NAGPRA Review Committee, the Interior Department (2002) presented a proposed regulation that would empower, but not require, an institution to transfer culturally unidentifiable remains to claimants with more attenuated relationships than those otherwise required by NAGPRA, such as non-federally-recognized tribes.

The department's authority to enact regulations on this issue has been questioned. The SAA (2002a) responded to the proposed regulation by challenging the Interior Department's authority to adopt a regulation on this topic. It pointed out that the statute requires the Review Committee to make recommendations for dealing with unidentifiable remains, rather than directing the Secretary of the Interior to enact regulations (NAGPRA, Section 8[c][5]). By contrast, the statute (Section 3[b]) explicitly calls on the secretary to enact regulations dealing with unclaimed cultural items discovered after NAGPRA's enactment. In supporting the proposed regulations for culturally unidentifiable remains, the Review Committee asserted that "since human remains may be unclaimed, or determined to be culturally unidentifiable, for different reasons, there will be more than one appropriate disposition (repatriation) solution" (DOI 2002:7, emphasis added). Such a statement, equating disposition only with repatriation, contrasts with NAGPRA's legislative history as well as the wording of the statute itself, which indicate that Congress did not assume repatriation to be the only disposition solution. The Senate Select Committee on Indian Affairs has stated that "the Committee recognizes that Indian tribes and museums may agree to a mutually acceptable alternative to repatriation. The Committee intends that this process will facilitate the negotiation of agreements as to appropriate disposition of objects and remains in museum collections" (U.S. Senate 1990). Museums, universities, and tribes across the country are developing innovative and diverse ways of handling the disposition of human remains and culturally sensitive objects. For example, the National Museum of Natural History (2005) has developed a "Traditional Care Policy Statement" to assist tribes and curators in developing appropriate procedures for storing and treating sensitive items that remain curated at the museum.

NAGPRA grants tribal control over the disposition of newly discovered Native American human remains that are culturally unidentifiable if they are found on the tribe's land (Section 3[a][2][A]) or if they are found on land that has been recognized by final court judgment to be the aboriginal land of the tribe, and the tribe states claim (Section

3[a][2][C]). Cultural affiliation otherwise plays a crucial role in determining disposition options under NAGPRA. In a joint letter to the Senate Select Committee on Indian Affairs just prior to NAGPRA's passage, several organizations representing tribal and scientific interests submitted comments on the definition of cultural affiliation in order to "ensure that ... it is clear that the provision permitting tribes to request repatriation of remains and objects from museums applies only to culturally affiliated tribes" (SAA 1990a). Prior to the passage of NAGPRA, ARPA governed the ownership and handling of all human remains and items "of archaeological interest" greater than 100 years of age and found on federal or tribal lands. ARPA continues in effect, although NAGPRA's provisions take precedence when applicable. Consequently, it appears that ARPA or other applicable law should apply to govern the ownership of culturally unidentifiable remains unless NAGPRA explicitly provides otherwise.

Scientific Study

The legal, ethical, and moral bases for the scientific study of human remains, particularly the remains of indigenous peoples, have been topics of growing debate as parties with widely divergent perspectives make their cases for and against such studies based on their particular professional, ethical, or spiritual viewpoints. Conspicuously absent from many of these discussions pertaining to Native American human remains is a careful analysis of what NAGPRA itself expressly permits or forbids. Unfortunately, such an analysis is conspicuously absent from the legal opinions issued in the Kennewick case, as well.

Neither Kennewick court analyzed scientific study rights under NAGPRA in any depth, focusing instead on questions of Native American status and cultural affiliation. In its one comment on the potential right of scientists to study culturally unidentifiable Native American remains within the context of NAGPRA, the Kennewick district court inaccurately stated that "NAGPRA and its implementing regulations are silent on this point, and a reasonable argument could be made that ARPA is applicable under those circumstances" (Bonnichsen et al. v. United States et al., 217 F. Supp. 2d 1116 [Dist. OR] [2002]: 1165n71, emphasis added).

NAGPRA is not silent on the topic of scientific study. It does, in fact, authorize the study of human remains, even culturally affiliated remains subject to repatriation, under certain conditions. Two of NAGPRA's provisions expressly address scientific study: Section 3(c), dealing with remains removed from federal or tribal lands since NAGPRA's enactment ("Newly Discovered Remains"), and Section 7(b), dealing with remains in institutional possession or control ("Institutionally Held Remains"; Figure 2). The statute does not otherwise expressly authorize, or expressly forbid, scientific study.

Section 3: Study of Newly Discovered Remains

Under Section 3 of NAGPRA, human remains may be excavated and removed from federal or tribal land "for purposes of study" if they are removed pursuant to an ARPA permit and following consultation with (or, in the case of tribal lands, consent of) any appropriate Indian tribes or Native Hawaiian organizations (Section 3[c]). A right to study remains under this provision is subject to control over disposition by a party identified under Section 3(a) or, if applicable, to the provisions of future regulations that will apply to unclaimed remains

(NAGPRA, Section 3[c]). Section 3(a) sets forth the hierarchy of parties with potential control over the disposition of Newly Discovered Remains, including (1) a lineal descendant, (2) a tribal landowner, (3) a culturally affiliated tribe or Native Hawaiian organization, and (4) an adjudicated aboriginal land occupant, unless another tribe demonstrates a closer cultural relationship to the remains than the aboriginal land occupant. There is no default category of claimant under Section 3. If no potential claimant is identified within the stated hierarchy, the statute is silent on the question of control.

The excavation and study of remains subject to NAGPRA differ from a traditional ARPA process, most notably because excavations on federal land must involve consultation with Indian tribes or Native Hawaiian organizations and because control over the ultimate disposition of the remains may shift to Native American hands. The consultation process may lead to negotiated agreements as to specific methods of data collection that are viewed as more respectful to the concerns of the tribes involved, and it may create opportunities for tribal representatives to participate in the excavation, study, and disposition processes within the bounds of their cultural perspectives (Dongoske 2000; Ferguson et al. 2000).

The Interior Department (1997) has taken the position that once an owner is identified under Section 3(a), further study is subject to the owner's consent. If no owner is identified, however, it appears that study may continue according to the criteria established in the issued ARPA permit. When Newly Discovered Remains are found to be culturally unidentifiable, NAGPRA's current language does not restrict, in terms of scope or time frame, the study of those remains. ARPA's standards would presumably apply, unless and until new legal requirements for handling culturally unidentifiable remains are adopted under NAGPRA, as discussed above.

Section 7: Study of Institutionally Held Remains

Section 7 of NAGPRA, which sets forth the statute's repatriation requirements for all Institutionally Held Remains, provides another structure under which NAGPRA expressly authorizes certain scientific studies. If cultural affiliation is determined and the affiliated party requests repatriation, but the remains are shown to be "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States," then repatriation is not required until completion of the study (NAGPRA, Section 7[b]). Section 7 study can proceed, with or without the consent of the culturally affiliated claimant, if the remains are of sufficient scientific importance. The claimant does, however, have an ultimate right of repatriation once the study is complete. Section 7(b) emphasizes that the scientists must demonstrate the importance of the expected results of the study, must articulate the specifics of the study, and must ensure that the remains are promptly repatriated to the affiliated claimant following completion of the study. The legislative history confirms that scientific study of remains was expected to continue, albeit under more scrutinized conditions, in the era of NAGPRA and that the topic was one in which the stakeholders sought to strike a balance: "Native American witnesses have indicated that they do not object to the study of human remains when there is a specific purpose to the study and a definitive time period for the study" (U.S. Senate 1990a). Section 7(b)'s language appears to have been carefully crafted to serve as an important tool in implementing the balance of interests sought by those participating in the creation of

NAGPRA. It accommodates the interests of science under certain conditions by allowing studies to be completed prior to repatriation when scientific importance is sufficiently high. The potential for new knowledge deriving from future discoveries would seem to be a significant justification for such a balance of interests.

Had Kennewick Man been found to be subject to NAGPRA, the scientists would have been authorized to study the remains in accordance with the requirements of Section 3(c) unless and until one of the claimants, or some other claimant, succeeded in establishing a right under Section 3(a) to control the disposition of the remains and objected to the studies. However, if a Section 3(a) claimant had been identified, a key question would have arisen as to whether Section 7's study provision would have entitled the scientists to complete their study of the remains prior to repatriation, despite opposition from the claimant. It is very possible that Kennewick Man's scientific importance could have been demonstrated at a level to satisfy Section 7(b)'s requirements. If so, and if Section 7 would, in fact, apply, then study could have proceeded prior to any other disposition. Consequently, it is worth considering whether Congress intended Section 7 to apply to Newly Discovered Remains.

Does Section 7 Apply to Newly Discovered Remains?

Section 7 contains the only process articulated in NAGPRA for tribes to demonstrate entitlement to repatriation and for curating institutions to implement their repatriation obligations. An institution curating human remains and other cultural items may hold them under a variety of scenarios. Some items may be under the legal control of an institution as part of its own accessioned collections, whereas other items may be curated on behalf of other institutions. Items may be deemed to be the property of the U.S. government according to ARPA, whereas others may be curated as researchers attempt to determine cultural affiliation and potential ownership under NAGPRA. Section 3 defines which parties are entitled to control the disposition of Newly Discovered Remains, but it establishes no independent repatriation or other disposition process once remains have been excavated and placed in a repository for curation. Section 7's structure complements that of Section 3. Section 7 does not address the ownership status of items in an institution's possession; it simply sets forth NAGPRA's process for transferring control over the disposition of certain items from institutions to claimants, regardless of the status of legal title applicable to those items when they entered institutional hands. There is no indication in the wording of the statute that Section 7 should not govern the disposition process for all items subject to NAGPRA, including those excavated and placed in institutional curation after the statute's enactment.

Indeed, the Kennewick district court acknowledged that "NAGPRA's repatriation provisions do not depend upon when or where the object subject to repatriation was found, but whether the item is presently in the possession or control of federal agencies or federally-funded museums" (Bonnichsen et al. v. United States et al., 969 E Supp. 614, 618 [Dist. OR] [1997]:618). However, the Interior Department (1997) has argued that Section 7, including its study provision, would not apply to Kennewick Man or to any other Newly Discovered Remains. The crucial impact of the department's position would be to eliminate any right of scientists to study Newly Discovered Remains, regardless of scientific importance, if cultural affiliation is determined and the affiliated tribe objects. In light of the significance of such an interpretation, the statutory wording and congressional intent should

be carefully considered, and the department's position, closely scrutinized.

The Supreme Court has stated that "it is the 'cardinal principle of statutory construction' [to] give effect, if possible, to every clause and word of a statute" (Bennett v. Spear, 520 U.S. 154 [1997]:173). The statute refers to "holdings and collections" when addressing institutional obligations to inventory and repatriate items. By referring to the term holdings as well as the term collections, the statute appears to acknowledge that an institution may hold items that do not constitute part of its formal collections. This distinction finds support in the language of the federal curation regulations, which distinguish between "federally owned collections" and "federally administered collections" (36 CFR Part 79). Newly Discovered Remains being curated at an institution for temporary curation prior to final decisions about repatriation or other disposition may very well fall under the category of holdings. Nonetheless, the concept is given no force or effect in the current NAGPRA regulations (Subpart C), which focus exclusively on collections. The Kennewick circuit court criticized the Interior Department for removing the phrase "that is" (before the word "indigenous") in its regulatory definition of Native American (Bonnichsen et al. v. United States et al., Ninth Circuit Court of Appeals, No. 02-35996, 2004 U.S. App. LEXIS 1656 [February 4]: 1600). It seems that the department's decision to ignore the term holdings might be subject to similar criticism.

One explanation for the Interior Department's position may be that it created definitions for the general terms possession and control and limited the applicability of those terms to items that legally qualify as part of an institution's collections (NAGPRA Regulations, Section 10.2). However, the statute itself uses those terms without definition when addressing the obligations of federal agencies, museums, and institutions to document cultural items, assess cultural affiliation, and participate in the disposition process. According to the Supreme Court, undefined terms in a statute should be interpreted according to their ordinary meaning (Williams v. Taylor, 529 U.S. 420 [2000]:431). Since 1996, Kennewick Man has been under the control of a federal agency and in the possession of a federally funded institution, according to the common meanings of those terms. Section 7 provides the structure within which all potential claimants may assert claims to take control over the disposition of items and by which the disposition process should be completed once those items are in the possession or control of an agency or institution. By excluding from Section 7's coverage all Newly Discovered Remains, the Interior Department has interpreted the statute in ways that unnecessarily exclude future discoveries from key processes established in NAGPRA for documenting, repatriating, and otherwise resolving the disposition of those items while ensuring that discoveries of major scientific importance will be available for study.

Conclusion

NAGPRA breaks new ground in empowering Native American groups to assert control over ancestral remains and cultural items that have been removed from their original contexts. However, judicial review to date of the statute and its regulations is sparse. Congress intended to strike a difficult and careful balance by recognizing the overall need to respect human rights, the very important and recognized interests of Native Americans in resolving the status of disinterred remains with which they are affiliated, and the value of scientific investigation into the human past. The Interior Department has interpreted some provisions

of NAGPRA in ways that restrict scientific study rights more severely than the language of the statute requires, and courts addressing various provisions of NAGPRA have taken positions that are sometimes at odds with the regulations. Things remain far from settled.

We do, however, have some explicit direction from the statute itself on the parameters of authorized scientific study. NAGPRA expressly permits scientific study (1) when Newly Discovered Remains are removed from federal land pursuant to an ARPA permit and tribal consultation, at least until an entitled claimant is identified and intervenes; (2) when Newly Discovered Remains are removed from tribal land pursuant to an ARPA permit, subject to consent of the tribal landowner; and (3) prior to the repatriation of any culturally affiliated Institutionally Held Remains that "are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States" (Section 7[b]). If the Kennewick courts had conducted a thorough analysis of NAGPRA's two scientific study provisions, they might have determined that the study of Kennewick Man would have been authorized regardless of the potential applicability of NAGPRA. The scientific study of Kennewick Man could have then proceeded without delay, while the litigants made their arguments as to NAGPRA's applicability and the possibility of ultimate repatriation to one or more of the claimants (Figure 3).

Kennewick Man's cultural identity remains a topic of much debate. In the eyes of the law, he remains culturally unidentifiable. Nonetheless, he has become an inadvertent symbol of all that is ambiguous and contentious about NAGPRA, representing both the universe of scientifically important past humans whose remains may answer important questions about the peopling of the New World and the universe of disinterred past humans whom many indigenous groups wish to see returned to the earth. The protracted litigation over Kermewick Man highlights the complexity and uncertainty of NAGPRA's legal legacy. It also epitomizes NAGPRA's challenge to address the concerns of those with legitimate, yet competing, interests. This dispute very publicly highlights the difficulties of linking ancient remains to modern culture groups, the uncertainty of linking regulatory and court interpretations to the statute's mandates, and the dangers of linking specific legal findings to broader understandings of cultural identities. When addressing the potential cultural relationship of ancient human remains to present-day groups, particularly within NAGPRA's context, scientific research cannot avoid the political climate of the day (Swedlund and Anderson 2003). Human remains have been, and will continue to be, discovered on lands throughout the United States. NAGPRA anticipates this reality, and it provides various means by which those remains may be excavated, studied, identified, and controlled. However, where the law fails to tread in any substantive way is in the murky area of competing interests in ancient, scientifically valuable remains without clear links to any present-day group.

The Society for American Archaeology, in responding to the Kennewick district court ruling, has commented on its view of NAGPRA's legal legacy:

> The central compromise of NAGPRA, strongly supported by the SAA, was to provide tribes with the right to reclaim the remains of their ancestors where lineal descent or cultural

> affiliation could be established, but to retain human remains for scientific study where a reasonably close connection to a modern tribe could not be established. However, in the 12 years since the passage of NAGPRA, the balance between scientific and Native interests provided for in the law has been badly eroded through administrative decisions that have, in practice, distorted the statutory definition of cultural affiliation in order to accommodate the interests of Native American groups at the expense of scholars' ability to expand our knowledge of the past through study of the affected remains and objects. [2002b]

At the Southwestern Tribal Peoples NAGPRA Conference, Timothy Begay, a cultural specialist with the Historic Preservation Department of the Navajo Nation, stressed some difficulties resulting from NAGPRA's implementation: "Even though NAGPRA is a big plus for Native Americans throughout the United States, it ... forces Tribes to fight about who is more closely affiliated to these human remains. And yes this is good for the lawyers, but not so good for the ancestral people. I think the law focuses too much on finding a winner, instead of focusing on what all the Tribes want and what most can agree on" (1997:52). The current state of the law has raised a host of questions, leaving many with lingering questions about NAGPRA's impact on future scientific studies of ancient human remains. NAGPRA's legislative history supports the view that lawmakers intended to require the respectful treatment of Native American human remains by scientists, museums, and federal agencies. Changes to the law as it worked its way through Congress, and the wording of the statute as enacted, also indicate congressional intent to balance the interests of the Native American, museum, and scientific communities by requiring consultation and joint participation in many aspects of decision making. This intended balance of interests is also reflected in the parameters of NAGPRA's two scientific study provisions, which allow for the study of human remains under certain conditions while providing entitled claimants to control ultimate disposition.

It remains unclear whether NAGPRA, in its current form, can effectively balance the disparate concerns of those with interests at stake. What has become abundantly clear, however, is the difficulty of drafting laws and regulations that clearly and adequately address the rights and obligations of all parties involved. Debates triggered by NAGPRA reach many different legal, political, and philosophical realms. Perhaps changes should be made to clarify or modify the statute or its regulations, to more accurately interpret or implement those provisions, or to bring public expectations into better alignment with the law. David Hurst Thomas has summed things up concisely: "NAGPRA remains a very murky piece of legislation, and clarifying it will be a bumpy political process" (2000:275). Kennewick Man has become a prominent, yet enigmatic, icon of the ongoing struggles over controlling ancient human remains. The legal legacies of NAGPRA and Kennewick Man remain subject to ongoing debate. If NAGPRA's legal framework governing the scientific study of human remains is clarified and discussed in more detail, the various stakeholders in this debate should benefit from more precise legal tools that can assist them in

articulating their positions and negotiating resolutions without the need to resort to divisive litigation.

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