

## Prologue The Kennewick controversy

As the curator of biological anthropology at the Maxwell Museum, I often passed through the exhibits in the biological anthropology area, on my way to the Museum office. One day, I encountered a group of second graders examining the displays of fossil hominids. I noticed that one group of kids was gathered around a display, a reproduction of a 17 000-year-old human burial from a Pleistocene site in France. Our replica had been arranged in the exact state of repose that the original skeleton held for nearly 18 000 years: legs and arms flexed as if asleep, and surrounded by grave goods, including stone tools and shell beads from a necklace. I approached the kids and asked what they could tell about this person. Most smiled and shrugged.

“He’s dead,” one boy said in a flat voice.

I asked, “Are you sure it’s a ‘he’?” after the giggles died down.

“How can you tell?” another kid looked to me and asked.

That was my opening to explain the differences in male and female skeletal anatomy and show them the features used to determine sex from a skeleton. Several hands went up, and I called on a girl who seemed particularly interested in the burial display.

“What was her name?” the girl asked.

“We don’t know – we can’t tell that from the bones,” I said.

I went on to use the well-worn “book analogy,” explaining how a skeleton was like a book, containing different kinds of information about the person to whom it belonged, provided you could read the information correctly. A boy raised his hand,

“But you don’t know who she was?” he asked.

As I thought about how better to explain this, I realized that these kids, like most Americans, were *less* interested in the *what* and *why* questions and simply wanted answers to the *who* questions. *Who* was this person? *Who* were her relatives?

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In 1996, the *who* questions were so important that a skeleton was dragged into federal court. American Indians (Native Americans) requested that a 9000-year-old skeleton be returned to them under federal law, while scholars demanded access to it for research purposes. For the first time since its inception, NAGPRA became a (nearly) household word in the USA.

### THE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT

On November 16, 1990, the 101st US Congress passed Public Law 101-601 (HR 5237; 104 STAT.3050), a piece of human rights legislation better known as the *Native American Graves Protection and Repatriation Act* (NAGPRA).<sup>1</sup> A coalition of lawmakers, Native American activists, tribal elders, and leaders from the museum, archaeology and physical anthropology communities wrote to NAGPRA, to regulate the disposition of Native American remains and associated grave goods.

Many museums contained large skeletal and artifact collections derived from Work Progress Administration<sup>2</sup> (WPA)-era and other excavations of prehistoric and historic archaeological sites in the USA. In addition to human remains, NAGPRA also pertained to “associated funerary objects,” “sacred objects,” as well as “objects of cultural patrimony.” What constituted an “object of cultural patrimony” was open to broader interpretation, despite the two pages-worth of circuitous definitions within the document.

Institutions, such as publicly funded museums, universities, and federal agencies, were required by NAGPRA to create a summary of human remains and artifacts and send it to culturally affiliated Native American tribes, no later than November 2, 1993. The institutions were required to make complete and detailed inventories of human remains, associated funerary objects, and items of cultural patrimony by this date, and then to send the summaries to federally recognized Native American tribes or Native Hawaiian organizations to which these collections were *culturally affiliated*.

It is stated in NAGPRA that, for purposes of repatriation, “cultural affiliation” could be proved by tribes using a

preponderance of the evidence based on geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, and oral traditional, historical or other relevant information or expert opinion.  
(PL101-601; USC 3005. Sec. 7)

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The problem was that the law incorporated geographic proximity to the source of a collection or set of remains as a means of determining their cultural affiliation. This was much to the consternation of some biological anthropologists and archaeologists. Geographic proximity has been perhaps the strongest rule used for some prehistoric archaeological collections.

In NAGPRA, museums, institutions, and federal agencies were required to produce summaries of their affected holdings by November 2, 1993, and completed inventories by November 2, 1995. Punishment for those who failed to do so was severe: civil penalties and damages for each offense – each artifact or skeleton was one offense – so that penalties for non-compliance could potentially be in the millions of dollars, in the case of a large collection. Some museums feared loss of federal funding, something not specified in the damages portion of the law. Complicating matters was a concern that museums could be sued over their repatriation decisions. A few last-minute changes to NAGPRA cleared that up.

Complying with NAGPRA was a nightmare for some museums, many of which held extensive archaeological collections. For example, prior to NAGPRA, the Peabody Museum at Harvard University contained a mere 8 million artifacts and other items from North America alone (Lawson, 1999). The situation was no easier for the 771 federally recognized Native American nations, tribes, and bands that were buried in a deluge of NAGPRA-generated paperwork from the 700 or so museums around the country (Lawson, 1999). This meant that tribes often had the burden of responding to numerous NAGPRA requests for consultation from museums that were hundreds or even thousands of miles away. This was especially true in the case of tribes or native organizations in Alaska and Hawaii.

Another difficulty for both museums and tribes in complying with the consultation mandate in NAGPRA relates to the shameful history of forced relocation of Native Americans from their traditional tribal lands. The question for museums was in the case of collections from areas no longer occupied by a tribe (the result of expatriation during the early nineteenth century), such as those tribes relocated to reservations in the Oklahoma and Kansas Territories, during the 1838 “trail of tears.” Those tribes would need to prove their cultural affiliation by means other than geographic proximity. That was the tricky part. NAGPRA allowed historical, cultural, archaeological, biological, folkloric, and oral traditional evidence to determine cultural affiliation with artifacts or human remains. However, the law gave no indication

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of which criterion should have the greatest weight in determining cultural affiliation. This aspect of NAGPRA caused a great deal of consternation for those trying to comply with the law. Some anthropologists felt that mere geographic proximity was not a valid rule for tribes to make affiliation claims for some museum collections, given the history of fluidity of prehistoric peoples across the landscape of North America, especially during the earliest occupation of the Americas by prehistoric peoples known as Paleoindians.<sup>3</sup>

The other problem – how to resolve competing claims – was also dealt with in the details of the law (NAGPRA Sec. 7). The latter is a sore point for some tribal representatives and elders with whom I consulted during the Maxwell Museum's NAGPRA inventory process. Some of the elders distrusted NAGPRA and felt that the law was intended to create inter-tribal conflict over sacred items, which in fact did happen in a few instances, although inter-tribal difficulties were resolved through compromise and discussion.

One repatriation case in which I took part involved over two thousand human remains and their associated grave goods from the site of Pecos Pueblo, New Mexico. Several museums (Peabody Harvard, Peabody Andover, and Maxwell museums) with skeletal collections from the prehistoric Pecos Pueblo and the associated Spanish mission participated in the repatriation process. The museums and tribes coordinated their inventory and consultation process over a period of two years. Ultimately, many of the initial claimant tribes bowed out to allow the Pecos descendants, now living at Jemez Pueblo, to take the lead in accepting the repatriation and in conducting a mass reburial ceremony near the original site. For many museums the inventory process was painful, because of the significant role Pecos collections played in A. V. Kidder's reconstruction of southwestern prehistory, and because of the role the Pecos skeletons played in early attempts to understand *temporal* changes in skeletal variation (Hooton, 1930). Despite some anthropologists' misgivings, the repatriation proved meaningful in terms of understanding and incorporating the tribal views regarding handling the remains and their concerns over accidental inclusion of European burials along with their honored dead. The latter almost occurred at Pecos, as the inventory identified one non-native person (probably a Spanish priest serving at the Pecos mission), whose remains were subsequently returned to the Museum and excluded from the repatriation and reburial ceremony, after consultation with the claimant pueblos and Pecos Pueblo Governor Ruben Sando. Cases of mistaken identity can, and do, happen (Owsley, 1999)

but are less frequent in prehistoric collections than those from more recent times.

Many anthropology professors and their graduate students were concerned that their ongoing research would be devastated as skeletal material was repatriated and reburied. But lawmakers included provisions in NAGPRA for that situation, with a catch: the repatriation process and deadline could be delayed if the studies would be of “major benefit to the United States” (PL 101–601 Sec. 7: 5b). Other scientists feared that NAGPRA was the death-knell of scientific archaeology and bioarchaeology in America. This fear resulted from the fact that scientific studies require replication and confirmation of results by independent researchers. Repatriation with subsequent reburial makes confirmation of results impossible. Those fears appear to be unfounded because, as of 2000, only a small proportion (9.5%) of the nearly 200 000 individual Native American skeletons then in museum collections have been repatriated and reburied (Lawson, 1999). NAGPRA’s requirement of consultation has led to new research questions and has encouraged improved relationships between anthropologists and the people whose ancestors they study.

Finally, NAGPRA has prompted biological anthropologists to consider the implications of their work and its impact on Native peoples, which has been useful for most of us. On the museum side, the inventories have become very useful, since some collections had not been examined, because of a lack of funding and interest, nor inventoried in great detail since the day they were removed from the ground – with, of course, the exception of Kidder and Hooton’s studies.

Speaking of a lack of funding, NAGPRA was, and remains, an unfunded mandate for the institutions, as well as for the tribes. It was a source of financial burden at a time when funds for tribal economic initiatives and public museums were at a low. Ironically, the three- and five-year limits for summaries and inventories pushed institutions to update their collection records and made collections of human remains more accessible for research than they had been at any point over the past 50 years. The inventory process provided information needed by anthropologists to formulate new research questions about American prehistory.

The NAGPRA legislation addressed many issues of concern to Native Americans, as well as those of concern to anthropologists. The legislation was fairly clear on what to do with existing archaeological collections; it was a bit more muddled as far as new and inadvertent discoveries were concerned.

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## THE KENNEWICK SAGA

July 28, 1996, Columbia River near Kennewick, Washington DC:<sup>4</sup> two college students wading along the Benton county shore of the Columbia River in search of a better vantage point to watch for the start of the annual hydroplane race stumble across a “rock with teeth,” which turned out to be a human skull. After the race, they took the sodden skull, now secured in a bucket, to Kennewick police officers patrolling the area.

The officers, students, Benton County Coroner Floyd Johnson, and Deputy Coroner James C. Chatters went back to the recovery site to look for more of the skeletal remains. Once the search was completed and all the bones were collected, a nearly complete skeleton emerged from bones collected along a 60-foot stretch of the river’s shoreline. The coroner turned over the bones to Chatters for reconstruction and analysis. Chatters determined that the bones were the remains of a 5-foot-9 (1.75 m)- or 5-foot-10 (1.76 m)-inch tall, somewhat gracile, 40- to 50-year-old male, who had subsisted on a diet of soft foods with a lot of meat. More importantly, after analyzing the reconstructed skull, he reported that the biological heritage of the individual was “Caucasoid,” owing to the skull’s European morphological features, such as a long, low, cranial vault, and large projecting nose.

Historic-period artifacts were recovered at the discovery site, including an old metal knife. The historic artifacts, combined with the “Caucasoid morphology” of the skull, suggested that this man might have been a deceased trapper. Chatters knew that the first incursion of Europeans into the mid-Columbia plateau was the 1805 Lewis and Clark expedition. His examination of the post-cranial skeleton revealed a temporal inconsistency. Chatters had earlier noted something stone imbedded in the right ilium of the pelvis. He had the bone X-rayed, and when the object did not show up clearly on the X-ray film, as would a piece of metal, Chatters ordered a CAT scan.

The CAT scan revealed the object to be a 2-inch-long stone spear point similar to a Cascade point, a projectile point type common to the area about 4500 to 9000 years ago. Obviously, this was no recent homicide case, nor a lost trapper. This revelation suggested to Chatters and Johnson that an exact date for the skeleton might be in order before they could proceed further. They sent a small piece of bone (about 3g) to a radiocarbon laboratory. While they waited, Chatters made a set of plastic casts of the odd skull and contacted sculptor Tom McClelland, who often assisted Chatters and the

Coroner's Office in making facial reproductions of unknown persons using skull casts and markers of tissue depths at certain locations.

On August 28, 1996, Chatters and Johnson received the results from the bone sample they had sent to the University of California–Riverside radiocarbon laboratory. The radiocarbon ( $^{14}\text{C}$ ) age<sup>5</sup> confirmed their suspicions, based on the embedded projectile point, about the skeleton's age. The Kennewick skeleton was between 9200 and 9600 years before present (yr BP), with an average  $^{14}\text{C}$  age of 9400 yr BP, thus placing him among the limited number of human skeletons older than 8000 yr BP in North and South America. It was also one of the most complete skeletons dating to the time just after the Pleistocene (the Early Holocene), known archaeologically in some areas as the Late Paleoindian period or the Early Archaic period in others.

Not long thereafter, Johnson and Chatters held a press conference to announce the exciting discovery of a 9400-year-old “Caucasoid” man, then dubbed the “Kennewick Man,” in the Pacific Northwest. The announcement created a media frenzy, with coverage in national magazines, newspapers, and television programs:

The cover of *The New Yorker* asked, “Was someone here before the Native Americans?” The tabloid-style headline in *Discover* magazine trumpeted “Europeans Invade America, 20 000 BC.” A cover story in *US News & World Report* featured Kennewick Man as evidence for “An America Before the Indians.” An article in the *Santa Fe New Mexican* began this way, “When Columbus came to the New World in 1492 and set into motion the chain of events that led to the decimation of Native Americans, was he unknowingly getting revenge for what was done to his ancestor thousands of years before?” (Thomas, 2000: xxi)

All of the fevered speculation about re-writing American pre-history based on just one odd-looking skeleton revealed the public's, and some scientists', very skewed view of human population variation in both the present and past.

On September 13, 1996, a mere five days after the announcement by the Coroner's Office, the US Army Corps of Engineers (COE) Walla Walla District (the federal agency that controls the Columbia River and its shoreline, including the Kennewick Man discovery site) announced its intention to turn the skeleton over to a coalition of five Native American tribes in the area, led by the Confederated Tribes of the Umatilla Indian Reservation, but also including the Colville and Nez Perce tribes, the Wanapum bands, and the Yakima Nation. Under NAGPRA's “inadvertent discoveries” provision (104 Stat.

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3051d). After the Corps's notification, "scientists across the country screamed 'foul'" (Thomas, 2000: xxii). Some anthropologists were alarmed about the Corps's decision, and felt that more than mere geographic proximity or oral tradition should be used in assigning cultural affiliation to such an ancient skeleton without detailed study. The provisions of NAGPRA stated that a "preponderance of the evidence" should be used to establish cultural affiliation. However, the COE's decision was based entirely on oral tradition and geographic proximity of the five tribes, and had not considered any possible archaeological, biological, and genetic evidence that could only be provided through a more intensive study of the Kennewick remains. Some anthropologists and other scientists felt that attempts to trace cultural affiliation back 9000 years would be difficult, if not impossible, to support – because the bones were "... so ancient, they rightfully belong to the American public, rather than any special-interest group" (Thomas, 2000: xxii). The media and plaintiffs continued to question how an ancient "Caucasoid" like the Kennewick skeleton might fit into the previously accepted anthropological view of Native American origins, in which Pleistocene-age north Asian people migrated from Siberia to Alaska using the so-called "Bering Land Bridge" and traveled south through an "ice-free" corridor between the Laurentide and Cordilleran glacial masses, subsequently exiting in what is now southern Saskatchewan Province in Canada.

Within weeks, the Kennewick Man became the most famous and controversial deceased person in America, with coverage of the furor in the worldwide media. One late-night television comedian quipped that more Americans could name "a 9000-year-old dead guy in Washington" than could name the Vice-President of the United States. Washington State's congressional delegation tried to persuade the Walla Walla District COE to allow detailed study by qualified scientists. But the COE had conducted a preliminary NAGPRA summary and a general inventory of the bones, and had locked the skeleton in a secure area of their Battelle facility to secure the remains (Thomas, 2000: xxii–xxiii).

The news of the impending repatriation and possible reburial of the Kennewick remains prompted a group of scientists to intervene in the COE repatriation plans. Led by archaeologist Robson Bonnichsen (Director of Oregon State University's Center for the Study of the First Americans), six other scientists specializing in Paleoindian archaeology and biology filed an injunction in federal court to stop the repatriation process for Kennewick, which they argued was not legal under NAGPRA.



The seven *Bonnichsen* plaintiffs were a very impressive group of scholars. In addition to Bonnichsen (a well-respected leader in Paleoindian-period archaeology), the others involved in the suit included Dr. Douglas Owsley (Smithsonian Institution, physical anthropologist), Dr. Dennis J. Stanford (Smithsonian Institution, archaeologist), Dr. D. Gentry Steele (Texas A&M University, physical anthropologist), Dr. Richard Jantz (University of Tennessee, physical anthropologist), Dr. George Gill (University of Wyoming, physical anthropologist), Dr. C Loring Brace (University of Michigan, physical anthropologist), and Dr. C. Vance Haynes, Jr. (University of Arizona, geoarchaeologist). Bonnichsen also contacted a Portland attorney and archaeology advocate, Alan Schneider, to represent the seven scientists. The case of *Bonnichsen et al. v. United States of America* began on October 16, 1996 (Shafer and Stang, 1996).

When the story appeared in the press, it refueled the debate over the origins of Native Americans (see Chapter 1 for a discussion of the scholarly debates regarding Native American origins that began with de Acosta and Garcia in the sixteenth century). The Kennewick case continued in federal court, with federal magistrate John Jelderks reviewing the evidence provided by the defendants, the Army Corp of Engineers. After nearly a year of court arguments, Judge Jelderks issued a criticism of the COE decision to return the Kennewick remains to the tribal coalition without better evidence of cultural affiliation (McManamon, 1997).

On July 30, 1997, the Corps admitted in court that it had not limited access to the Kennewick remains, but had allowed members of the tribal coalition to observe the Corps's handling and storage of the bones. The COE had also permitted tribal elders and spiritual leaders to perform religious ceremonies where the bones were securely housed at Walla Walla District headquarters.

A month later, the Kennewick case took a rather unexpected turn, when another claimant group, the Asatru Folk Assembly, attempted to join the Kennewick fracas. The Asatru are a northern California neo-Pagan religious group who went to the Kennewick discovery site to perform ceremonies and rituals to worship the pre-Christian, northern European (Viking) god Odin. The Asatru Folk Assembly members' feelings of cultural affiliation appear to have been driven solely by the description of the Kennewick remains as "Caucasoid." Exploring this further, Chapter 2 presents past and present views on the concept of *race*, and its use in modern scientific studies of human diversity. The

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public and scientific confusion over *race* in the case of Kennewick and other ancient skeletons has had a major impact in studies of Native American origins and research regarding the peopling of the Americas.

As the *Bonnichsen et al.* case wound on, several additional controversies arose. First was the release of Chatters' and McClelland's facial reproduction based on the cast of the Kennewick skull. Although facial reproduction can be quite accurate, many tell-tale features critical for identification of a deceased person depend on an assessment of race to determine the size and shape of unpreserved soft tissue features such as the eyes, nose, ears, and lips (Ubelaker, 1989). These features are critical for positive identification in forensic cases, and are the choice of the artist. Chatters' and McClelland's Kennewick bust was beautiful. It depicted an average 40-year-old "Caucasoid" male (based on the initial assessment of the prehistoric skull) that was strikingly similar to English actor Patrick Stewart, of *Star Trek* fame. As noted by Vine Deloria, Jr. (Thomas, 2000: xxv), the bust was also similar to an 1833 portrait of the captive Sauk (Sac) Chief Ma-ka-tai-me-she-kia-kiah, also known as "Black Hawk." The Kennewick facial reproduction also kept the media frenzy going, prompting interviews with both Stewart and Chatters.

The second controversial event was the Corps's burial of the discovery site in April, 1998, during which they dumped several tons of rock and gravel on the bank and adjacent areas, then planted trees to "stabilize" the embankment against erosion. The Bonnichsen plaintiffs charged that the site was more than protected from erosion; it was also protected from any further scientific study. By April, 1998, the Corps had relinquished control of the Kennewick remains to the US Department of the Interior (DOI).

After an out-of-court mediation with all involved parties, the DOI began plans for a more detailed study of the skeleton which they hoped would resolve the question of cultural affiliation by providing geological, archaeological, and biological evidence of affiliation as stipulated in NAGPRA. In September, 1998, Judge Jelderks ordered the relocation of the skeleton to the University of Washington's Burke Museum, as agreed during the mediation, followed by implementation of the DOI's study plan.

In February, 1999 Dr. Jerome Rose (a physical anthropologist at the University of Arkansas), Dr. Julie Stein (a geoarchaeologist at the University of Washington), Dr. Gary Huckleberry (a geoarchaeologist at Washington State University), Dr. Vance Haynes (a geoarchaeologist at the University of Arizona), and I began a week-long inventory and