

## **Society for American Archaeology Position Paper**

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

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#### **Abstract**

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

#### **The Secretary of the Interior's Decision**

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

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

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

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

### **The Society for American Archaeology and NAGPRA**

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

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

### **Scientific Documentation and Collection of Evidence**

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

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

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

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

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

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

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

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

### **Kennewick Man as Native American**

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

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

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

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

### **Cultural Affiliation of Kennewick Man**

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

### **The Meaning of "Cultural Affiliation"**

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

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

"cultural affiliation" means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group (25 U.S.C. 3001 Sec. 2(2)).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Evidence for Cultural Affiliation**

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

straightforward reading of this document strongly indicates the opposite conclusion: that no relationship of shared group identity can be reasonably traced from the groups living in the area 9000 years ago to any present-day tribes. SAA's reading of the DOI experts' reports leads to the same conclusion.

A finding of cultural affiliation requires that there be: (1) an "identifiable earlier group"; (2) a present-day Indian tribe; and (3) a relationship of shared group identity that can be reasonably traced between them. According to the statute, the relationship must be established relying on a "preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."

In the Kennewick case, both the identifiable earlier group and the traceable shared group identity present problems. While the Secretary's letter acknowledges the need to establish "an identifiable earlier group" of which the individual was a member, there is no identification of the earlier group. There appears instead to be an assumption that all inhabitants of the Middle Columbia River basin were members of a single group associated with the Windust and Early Cascade periods. SAA does not believe that such broad classifications of archaeological patterning identify specific groups that had cognized identities in the sense required by the statute.

Ames' report on the archaeological evidence that accompanies the Secretary's decision properly states that "the relationships between archaeological manifestations and actual ancient human groups or societies that produced them are, at best, indirect." In the Kennewick case, he found it impossible to link the ancient archaeological manifestations with historically documented social groups. He attempted to trace the continuity of the archaeological manifestations through time but concluded that "the empirical gaps in the record, preclude establishing cultural continuities or discontinuities, particularly before about 5000 BC."

The Secretary's determination of cultural affiliation relied exclusively on the geographical and oral tradition evidence.

While some gaps regarding continuity are present, DOI finds that, in this specific case, the geographic and oral tradition evidence establishes a reasonable link between these remains and the present-day Indian tribe claimants.

In Secretary Babbitt's letter, the discussion of the oral tradition never specifies how this evidence shows cultural affiliation and there is no discussion of the geographic evidence for cultural affiliation. The most salient point of the brief discussion of the geographic evidence for cultural affiliation provided in Enclosure 3 to the Secretary's letter is:

The existence of earlier human groups in the same geographic location as the historic period ancestors of the present-day tribes does not automatically indicate cultural affiliation between the former and the latter...

This summary goes on to properly point out the need to demonstrate "shared group identity" in this context. Geographic evidence is useful only insofar as it bears on the establishment of shared group identity. In relatively recent periods, geographic proximity to a modern group may have considerable

evidential value in establishing shared group identity. Knowledge of historic period relationships makes clear that cultural identities can change quite rapidly due to population movement, conflict, and the coalescence of once-distinct groups. As the temporal separation between a present-day tribe and an earlier group increases, the ability of geographic proximity to inform on shared group identity, and hence, cultural affiliation, declines.

Enclosure 3 discusses the oral tradition evidence at length. As with geography, and all other categories of evidence, oral tradition becomes evidence when it bears on the actual relationships between the earlier group and the present-day tribe. SAA concurs with the approach advocated in Enclosure 3 which makes “use of the oral tradition information as sources of historical information,” and points out that “traditions may or may not remain stable over long periods of time.” Quoting Echo-Hawk (2000, *American Antiquity* 65 (2):272), Enclosure 3 utilizes an approach in which it is necessary “to evaluate the historical information in a given oral tradition by measuring its content, where possible, against other relevant data about the past.” This is not singling out oral tradition for special treatment, but recognizes that oral tradition, like all other categories of evidence, is subject to evaluation.

The DOI summary of the evidence concludes that oral tradition put forth by the Colville tribe provides “explanations of modern landscape features in terms of the original creation of these features by mythical animals and other beings.” These explanations are inconsistent with geological evidence for the development of these features. Indeed the DOI summary later concludes that “The stories related to the shape and features of the regional landscape are explanations of how it has come to be so shaped, not descriptions of the actual Late Glacial geological and fluvial events.”

Using the approach advanced by DOI in Enclosure 3, in reviewing the summaries of the oral tradition evidence presented in Enclosure 3 and in the “Review of Traditional Historical and Ethnographic Information” (commissioned by DOI), SAA is unable to find grounds in the oral traditions to trace a relationship of shared group identity back 9000 years.

A conclusion on cultural affiliation must be made on a preponderance of the many categories of evidence cited in the law (and listed above). As indicated above, the Secretary’s determination relies completely on the geographic and oral tradition evidence, with the implication that this evidence does support a finding of cultural affiliation. Though not explicit, the argument further seems to be that as the oral tradition and the geographical are the only available evidence, they represent the preponderance of the evidence. There are two problems with this reasoning. First, as summarized above, neither oral tradition nor geographical evidence support a finding of cultural affiliation. Second, the Secretary appears to have relied only on the evidence *for* affiliation. Contrary evidence of critical importance from other disciplines is disregarded or given inadequate consideration. Archaeological, biological, linguistic, anthropological, historical, and geological evidence does not support the relevance of geographic data over that time span and casts serious doubt on the argument that a relationship of shared group identity has been reasonably traced back 9000 years. Furthermore, geological evidence casts doubt on whether the oral traditions presented demonstrate the occupation of this area by ancestral groups 9000 years ago.

SAA’s reading of the definition of cultural affiliation is that the agency has an affirmative obligation to establish—which is to say to *trace*—the relationship of shared group identity between the earlier group and the modern tribes. Even if the oral tradition establishes a *prima facie* case for a

cultural relationship with the distant past, and even if there were no contrary evidence, the standard the evidence must meet is not a “reasonable cultural relationship” or “continuity.” According to the statute, the evidence must permit us to reasonably trace a relationship of shared group identity. We believe that the logic of the Secretary’s decision creates an untenable framework in which it is easier to establish cultural affiliation in the distant past than it is with relatively close ancestors. Only more recent remains could possibly have an evidentiary record that is sufficiently rich to refute a finding of cultural continuity. This is clearly contrary to the legislative intent to repatriate the remains that are fairly closely related to modern tribes.

Furthermore, given the nature of the argument and the evidence that led to a finding of cultural affiliation, SAA finds it difficult to understand how affiliation can be limited to the five claimant groups. Using the same logic, it seems likely that other tribes residing on the Plateau could also be linked to this area since time immemorial. If that is the case, on what grounds consistent with this decision could they possibly be excluded? Under the law, cultural affiliation must be decided on the evidence, independent of who files a claim. We want to make clear that if the remains are to be returned, SAA has no interest in influencing the specific disposition. The point here is only to call into question the logic of this decision because of the critically important precedents that it sets.

### **NAGPRA as Indian Law**

The Secretary’s letter (and also Enclosure 4) argues that NAGPRA is Indian Law: “...DOI construes the statute as Indian legislation. Therefore any ambiguities in the language of the statute must be resolved liberally in favor of Indian interests.” However, the remarks of Senator McCain—one of the primary sponsors of NAGPRA—on the floor of the Senate on the day of NAGPRA’s passage indicates a broader purpose.

The passage of this legislation marks the end of a long process for many Indian tribes and museums. The subject of repatriation is charged with high emotions in both the Native American community and the museum community. I believe this bill represents a true compromise.... In the end, each party had to give a little in order to strike a true balance and to resolve these very difficult and emotional issues.” (*Congressional Record*, Oct 26, 1990, p. S17173)

While there is no question that NAGPRA was intended to address important concerns of Indian people, it did so with a clear recognition of the scientific and public interests that were also at stake. It was neither a piece of Indian legislation nor a piece of museum legislation—it was a piece of compromise legislation.

Even if one were to accept the argument that NAGPRA is Indian legislation, that would only matter where there is ambiguity in the law. The Secretary’s decision on Kennewick Man does not rest on the reasonable resolution of ambiguities, but on apparent disregard of the plain language of the statute. Under the law, any decision on cultural affiliation should rest on the Congress’ definition of that term and on the available evidence. In contrast, the argument advanced by DOI appears to reflect a tenuous attempt to find a legal justification to defend a decision that was not based on the evidence or the language of the statute. In any case, no resolution of ambiguity should undermine the fundamental compromise balancing Native American and scientific interests that was explicitly built into the legislation.

Viewing NAGPRA as Indian legislation is also used to justify an argument that in the absence of cultural affiliation, the Kennewick remains should still be returned to the claimants based on the applicability of NAGPRA section 3 language regarding aboriginal occupation. The text of NAGPRA specifies that disposition based on aboriginal occupation applies:

. . .if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe. . .

In Enclosure 4, the Secretary's solicitor acknowledges that "In the case of the Kennewick remains, there is no such final 'judgment,'" but goes on to argue that Section 3 ought to apply nonetheless because NAGPRA is Indian legislation. This is another case in which there is no apparent ambiguity to be resolved. This appears to be another attempt to find legal justification for a decision that is inconsistent with the evidence.

### **Precedents Set**

The Kennewick case sets positive precedents through its thorough documentation of the remains and by its substantial efforts to collect relevant evidence. It also reasonably relates the term "Native American" to groups within the borders of the United States prior to historically documented European exploration. The case also clarifies and confirms the continued need to properly record and document human remains and associated funerary objects in compliance with the requirements of ARPA.

Unfortunately, the decision concerning cultural affiliation by the Secretary of the Interior may have devastating implications for accommodating scientific and diverse public interests in the past.

(1) The decision has the effect of replacing the statutory definition of cultural affiliation with a very much broader concept of reasonable cultural relationship. The legislative record clearly shows that NAGPRA was intended as a compromise. This compromise attempted to balance traditional interests in human remains, funerary objects, sacred objects, and objects of cultural patrimony that have been expressed by Native Americans, and the interests of the scientific community and museums in the use of these remains and objects to enrich public and scientific understandings of the heritage of the Americas. *The balance struck in the law was embodied in the statutory definition of cultural affiliation.* In the cases that human remains or objects can meet that standard, then the traditional interests outweigh those of science and the public and the law provides that the affiliated groups can determine disposition. Substituting a much less restrictive definition for cultural affiliation effectively eliminates that compromise.

(2) While DOI's summary of the evidence provides an appropriate framework for the evaluation of oral tradition, the apparent disjuncture between the Secretary's conclusion and the Department's summary of the evidence leaves troubling questions about how evidence is to be finally evaluated in reaching a conclusion on cultural affiliation. In the absence of any clarification, it appears to set a precedent that oral traditions can be uncritically accepted and that relevant scientific evidence can be ignored. SAA certainly agrees that oral tradition can provide legitimate evidence with respect to cultural affiliation and, more broadly, important information about past events. We will continue to

seek ways in which to productively explore the relationship between the nature and evidence of Native American oral traditions and that of the archaeological record.

(3) DOI's view of NAGPRA as Indian legislation is ostensibly used as a means of resolving ambiguity in the law. The application of this argument to the Kennewick case yields interpretations of NAGPRA that are inconsistent with the plain language of the Act. It is hard to underestimate the danger of that precedent.

## **Conclusion**

In light of the Secretary's decision, it is difficult to imagine cases in which it would not be possible to establish cultural affiliation or to otherwise provide for disposition to tribes. However, it is clear that NAGPRA was not intended to provide for universal repatriation. Had that been the case, the law would have been constructed quite differently. By ignoring the statutory definition of cultural affiliation and substituting a much less restrictive one and by making a decision for cultural affiliation in apparent conflict with the evidential record, the balance of interests that was fundamental to NAGPRA has been eliminated. This represents a devastating loss to science and to the public.

Scientific interests in human remains and cultural items derive from their ability to tell us about our nation's and, indeed, our human heritage. There is enormous public interest in understanding the original peopling of the Americas and the history of Native American groups. Important medical research will continue to benefit from the study of ancient human remains. The study of Native American human remains, along with those from cultural groups both inside and outside of the Americas, will be essential to these and many other worthy efforts.

SAA does not suggest that public interests necessarily outweigh those of tribes. Indeed, since 1986, it has been SAA's position that Native American interests in repatriation must be taken into account and balanced with public interests in scientific study. The weight accorded traditional Native American interests should be based on the strength of their relationship to the human remains and the weight accorded scientific interests should depend upon the ability of the remains to contribute to scientific understandings of the past.

SAA supported NAGPRA in 1990 and has continued to support NAGPRA because we believed that it achieved a reasonable balance of competing interests. However, SAA will strive to remedy those aspects of the Secretary of the Interior's decision that serve to defeat this fundamental objective.