

NEWS

The Kennewick Man dispute: courts of last resort?

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For the past eight years, the phrase 'Kennewick Man' has been close to the lips of most American archaeologists and many American Indians. A flurry of recent court rulings suggests that the battle over the bones is finally drawing to a close. But these complex and sometimes conflicting verdicts suggest that the muddled legacy of Kennewick Man may linger for decades to come.

The Kennewick saga began in July 1996, when the coroner of Benton County, Washington showed archaeologist James Chatters a skull that had washed out from a Columbia River cutbank in the town of Kennewick, Washington. Chatters initially believed that the skeleton was 'caucasoid', likely a Euroamerican settler. But subsequent radiocarbon analysis showed that the man had died roughly 8000–8500 14C years BP (National Park Service 2000b), making this one of the very earliest skeletons in the Americas, and perhaps the most complete (Chatters 2000, 2001; see Fiedel 2004 for a recent review of the 'Kennewick follies').

Five days after the startling radiocarbon results were made public, an alliance of five American Indian tribes (the Umatilla, Yakima, Nez Perce, Wanapum, and Colville) claimed the remains under the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990; Echo-Hawk and Echo-Hawk (1994), Fine-Dare (2002) and Lovis et al (2004) provide a variety of perspectives on this legislation. The Army Corps of Engineers (the governmental agency with immediate jurisdiction over the find spot) refused to allow scientific study because the tribes said that such analysis would violate their religious beliefs about the dead. Many archaeologists countered that Kennewick Man could not be adequately affiliated with any living tribe and, most likely, not with Indian people at all. Although Washington's congressional delegation immediately urged that qualified scientists be allowed to examine the bones, the Army Corps refused.

In 1997, the Corps was prepared to repatriate the Kennewick remains to the tribal coalition. In *Bonnichsen et al v United States of America*, eight prominent archaeologists and physical anthropologists filed suit to stop the repatriation and obtain access to the

Kennewick bones for scientific investigation. The lawsuit questioned whether NAGPRA, a piece of legislation designed to protect Indian graves, could be applied to 8000–8500 year-old remains. Citing a lack of due process, the scientists accused the Army Corps of arbitrary and capricious decision-making, and raised several constitutional issues regarding NAGPRA. That same year, the Federal court ruled that the Corps had acted inappropriately and instructed the agency to review the matter using proper procedures (*Bonnichsen v US* 1997). The lawsuit was put on hold until this process could be completed.

Here is a timeline tracking subsequent legal actions.

- March 1998: The Department of the Interior and National Park Service agrees to assist the Army Corps of Engineers and commission a series of scientific examinations by eighteen distinguished scientists who conducted a variety of biological, radiometric, ethnographic, archaeological, and linguistic studies (available at <http://www.cr.nps.gov/aad/Kennewick>).
- September 2000: Bruce Babbitt (Secretary of the Interior) declares that Kennewick Man, by now stored at the Burke Museum of Natural and Cultural History in Seattle, is indeed culturally affiliated with the five Indian tribes and should be returned to them (National Park Service 2000a). The Secretary's determination precludes further study of the remains.
- The eight plaintiffs dispute Babbitt's determination and pursue judicial review. Judge John Jelderks, of Oregon's Ninth District Circuit Court, faces uncharted legal waters: is this 8000–8500 yearold man a Native American? And, if so, is he culturally affiliated with the modern tribe claiming him as an ancestor? The legal and scientific answers to these questions promise to condition the direction of American archaeology for decades.
- August 2002: Judge Jelderks overturns Secretary Babbitt's decision, concluding that the administrative record from the Department of Interior contains 'insufficient evidence to support the conclusion that the [Kennewick] remains are related to the present-day tribe, people, or culture that is indigenous to the United States as required by the statute' (*Bonnichsen vs US* 2002). Judge Jelderks declares that the plaintiffs can study the Kennewick skeleton and the tribal appellants appeal the decision.

- February 2004: The Ninth Circuit Court of Appeals upholds the previous District Court decision (*Bonnichsen v US* 2004). Writing for the three-judge panel, Judge Ronald M. Gould agrees that because the government had failed to establish Kennewick Man's status as Native American, NAGPRA does not apply. The Joint Tribal Coalition petitions for a rehearing.
- April 2004: The Ninth Circuit Court of Appeals denies the tribal appellant's petition, virtually exhausting their legal options.

Many Native American representatives are, of course, deeply disappointed in the outcome. The Umatilla had opposed the destructive DNA and radiocarbon testing conducted to prepare the court case, claiming 'these studies are not being done to prove cultural affiliation. They are being done to appease the scientists and the court' (*Confederated Tribes of the Umatilla Indian Reservation* 2000). A tribal spokesman termed the Gould decision 'a staggering blow to the tribes' ability to protect their cultural properties' (*Associated Press* 2004).

The Gould ruling also casts doubt upon the status of oral history in subsequent court cases. A key provision of NAGPRA stipulates that 'cultural affiliation' is established by 'a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion' (NAGPRA 1990, Sec 2(3)B; see also *Echo-Hawk* 2000; *Whiteley* 2002). But Judge Gould's decision states that 'because oral accounts have been inevitably changed in context of transmission, because the traditions include myths that cannot be considered as if factual histories, because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins, we do not think that the oral traditions ... were adequate to show the required significant relationship of the Kennewick Man's remains to the Tribal Claimants' (*Bonnichsen v US* 2004:1607). Thus, not only have the tribes (apparently) lost the battle over the bones, the February 2004 ruling may undermine the role of oral tradition in establishing cultural affiliation in future repatriation cases.

Archaeologist Robson Bonnichsen, one of the eight scientist-plaintiffs, calls the recent decisions 'fantastic news. We've been waiting so long, and it's been so immensely frustrating' (quoted in *Hill* 2004). But the Kennewick case has extracted a dear price from the scientific perspective as well. For one thing, the actual

site of the Kennewick discovery has been destroyed. Although permitting a preliminary geological study of the Kennewick site, the Corps defied the will of Congress and in April 1998, covered the Kennewick Man site with 600 tons of boulders, gravel, logs, and backdirt, planting thousands of closely-spaced cottonwood, dogwood, and willow trees on top of the fill. In this \$160,000 cover-up, the Army Corps had not only made the site inaccessible to scientists and tourists; they have destroyed any undiscovered evidence beyond recovery. In his August 2002 ruling, Judge Jelderks ruled that the Army Corps had violated the National Historic Preservation Act by burying the discovery site.

Many observers had hoped that the high-profile Kennewick lawsuit would generate, for the first time, an adequate judicial review of the circumstances under which NAGPRA would (or would not) permit the scientific study of human remains (*Ackerman* 1997, *Lannan* 1998 and *Tsosie* 1999 provide differing views on legal issues relating to the Kennewick case). Despite the 22,000 pages of documented testimony, this considered review did not take place. In a lone footnote, Judge Jelderks noted that because Kennewick Man was not a Native American under the law, the provisions of NAGPRA for scientific study were irrelevant. Furthermore, the 1990 statute had clearly established independent criteria for determining if remains are 'Native American' and, if so, whether they are 'culturally affiliated' with a modern tribe or Native Hawaiian organisation. The Jelderks and Gould decisions seem to muddy the waters by collapsing the two lines of inquiry and conflating the terms in a way that Congress certainly did not intend.

Many have mistakenly viewed the Kennewick case as a clash between science and religion, but the facts are otherwise: at its core, this was a lawsuit against a federal agency for lack of compliance with existing laws (see *Owsley and Jantz* 2002:155), and the costs involved are staggering. To date, the federal government has spent at least \$1.1 million (and perhaps as much as \$3 million) on this case, and these expenses continue to mount, for storage fees (to conservators, time and travel by government personnel) to store the skeleton at the Burke Museum. According to *Alan Schneider* (2004:202), lead attorney for the plaintiffs, 'Despite all the time and money invested by the federal government in the Kennewick Man affair, little has been accomplished other than to provide an expensive example of poor-decision making'.

Perhaps the lasting legacy of the Kennewick Man

dispute is that of negative role model. Litigation and legislation appear to be increasingly unattractive ways to settle conflicts over cultural patrimony and intellectual property rights. Over the past decade, we can document literally dozens (and dozens) of cases in which American Indian and scientific interests have elected to work together to resolve their differences amicably, doing what ethnologist Michael Brown characterises

as ‘thoughtful people coming together to negotiate workable solutions, however provisional and inelegant’ (Brown 2003: 9; see also Thomas 2000: 254–267).

Perhaps the Kennewick case will be viewed as a worstcase scenario – quite literally, a court of last resort – for resolving disputes between American Indians and the non-Indians who wish to study them.

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