

UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
Oversight Hearing on the Native American Graves Protection and Repatriation Act
Thursday, July 28, 2005, 9:30a.m., 485 Russell Senate Bldg.

Statement of the American Association of Physical Anthropologists

Presented by

Patricia M. Lambert

The American Association of Physical Anthropologists (AAPA) is the largest professional scientific organization devoted to the study of physical anthropology in the United States. We were part of the coalition of Native American and scientific groups that worked for the passage of the Native American Graves Protection and Repatriation Act (NAGPRA). The AAPA continues to support NAGPRA's key goal of ensuring that culturally affiliated, federally recognized tribes are allowed to make decisions regarding the disposition of their ancestral remains.

During the NAGPRA negotiations, it was our understanding that the term "Native American" encompassed both modern and ancient indigenous groups, including the many earlier archaeologically documented cultures that have disappeared and thus are not culturally affiliated with any modern, federally recognized tribe.

The Ninth Circuit court's ruling makes it clear that the current NAGPRA definition of "Native American" does not reflect this common sense understanding of the term. We consequently do not object to the insertion of "or was" into the current definition to clarify its meaning.

However, we do have a concern about the timing of the proposed amendment. It is impossible to judge effects of the proposed change in the absence of regulations regarding the disposition of "culturally unidentifiable human remains." It is our understanding that these regulations will soon be published in draft form. As we will explain, this apparently minor change in the definition of Native American could have profound legal ramifications at odds with the intent of NAGPRA depending on how these regulations are worded.

NAGPRA has been a success because of the careful way it was crafted to balance the disparate interests many different groups of Americans have in archaeological remains. NAGPRA's specific instructions regarding the composition of the Review Committee makes this balance of interests clear. The key to the compromise that allowed so many different groups to support NAGPRA's passage resides in the concept of "cultural affiliation." NAGPRA provides culturally affiliated tribes with the right to reclaim the remains of their ancestors where lineal descent or a relationship of shared group identity can be clearly established based on the preponderance of a broad range of different types of evidence provided by members of both the Native American and scientific communities. However, when a reasonably close relationship between human remains and a modern federally recognized tribe can not be established,

NAGPRA permits human remains to be retained for scientific study. In this way, NAGPRA balances the undisputed right close relatives have to decide the disposition of ancestral remains against the rich array of historical insights that can be derived through scientific study for all Americans.

The troubling aspect of the Kennewick case is not the fact that the Secretary of the Interior considered the Kennewick remains to be those of a Native American. Instead, it derives from the Secretary's lack of adherence to the statutory definition of cultural affiliation—"a relationship of shared group identity which can be reasonably traced between a present day Indian tribe...and an identifiable earlier group," and an apparent lack of appreciation for the delicately balanced compromise that is at the heart of NAGPRA.

Such attempts by the DOI to extend the concept of cultural affiliation to encompass very ancient remains with no demonstrable relationship to any modern tribe make us extremely apprehensive about the way the amendment you are currently considering will interact with pending draft regulations dealing with "culturally unidentifiable human remains." This is because the proposed amendment will bring very ancient human remains such as those of Kennewick man under the purview of NAGPRA by defining them as Native American.

NAGPRA neither instructs nor provides authority for mandatory mass repatriations of culturally unidentifiable human remains to culturally unaffiliated groups. However, it seems likely based on the position the DOI took in the Kennewick case that the proposed regulations will attempt to do just that. Culturally unidentifiable remains, by definition, are those of people who do not have a relationship of shared group identity with a modern tribe. Modern tribes, therefore, do not have the authority under NAGPRA to make decisions about the disposition of such collections.

Given these concerns, we hope that you will consider delaying passage of the proposed amendment until regulations dealing with culturally unidentifiable human remains are promulgated. We look forward to your assistance in making sure that any regulations dealing with such collections balance the absence of a relationship of shared group identity against the value these remains have as sources of information about our collective past. Culturally unidentifiable remains have enormous scientific value because the information they yield has broad implications for both historical and applied research in the social and natural sciences, medicine, and forensic work. That is, these remains have value for learning about life in distant times, as well as importance for significant present-day medical and forensic concerns. In many cases, these are remains of people who have many living descendants that may not be tribal members or even identify themselves as Native Americans. In other cases, culturally unidentifiable remains may be those of people from groups with no identifiable modern counterparts, very distantly related at best to any modern people.

In summary, the American Association of Physical Anthropologists supports the spirit of the proposed amendment and withholds its full support only because the legal ramifications of this change in the statute cannot be fully assessed in the absence of regulations dealing with the disposition of culturally unidentifiable human remains.