



SOCIETY FOR AMERICAN ARCHAEOLOGY

FAQs on the Society for American Archaeology's Amicus Curiae Brief in the Kennewick Case, June 2001

What is the current status of the lawsuit?

The Army Corps of Engineers (COE) was prepared in 1997 to repatriate the Kennewick remains to coalition of five tribes that had claimed the remains when the present suit was filed by an independent coalition of archaeologists and biological anthropologists. That year, the Federal court ruled that the COE had acted inappropriately by not fully considering the evidence in making its initial determination. As part this decision, the court nullified the COE's initial determination and instructed the agency to consider the matter again, this time using the correct procedures. The court also put the lawsuit "on hold," pending the outcome of this process. In order to comply with the Court's instructions, the COE asked for help from the Department of the Interior (DOI), which then took the lead in this matter. DOI consulted with tribes and commissioned an extensive array of scholarly studies focused on two questions: (1) is Kennewick Man Native American, and, (2) if so, can a cultural affiliation with one or more modern tribes be established? After considering the evidence, DOI concluded that Kennewick Man was indeed Native American and also was culturally affiliated with five claimant tribes. The Plaintiffs disagreed with both of these determinations, and so reactivated their lawsuit. Both the plaintiffs and the defendants have recently filed legal briefs in anticipation of a court hearing to be held in Portland on June 19th. It is in this context that SAA has filed its own brief as amicus curiae, a friend of the court.

Why did SAA file an amicus curiae brief?

Having played a pivotal role in writing the Native American Graves Protection and Repatriation Act (NAGPRA), SAA felt that it had information relevant to the case that would assist the court in reaching a fair decision.

Did SAA file its brief on the side of the plaintiffs (the scientists) or the defendants (US Government)?

Neither. SAA filed its brief as a friend of the court. We agree in part, and disagree in part, with both the plaintiffs and the defendants. The Kennewick case will be the first court decision that rules on such fundamental questions as the meaning of "Native American," the meaning of "cultural affiliation," and the proper treatment of evidence concerning cultural affiliation. As a consequence, it is clear that the outcome will set important precedents that will affect the way the law is implemented for years to come.

Does SAA stand behind NAGPRA?

SAA was the leading scientific organization in the drafting of NAGPRA. It stands behind NAGPRA as written and urges that its members always work towards the effective and timely implementation of the Act. SAA believes that archaeological research, including the study of human remains, is essential to understanding the ancient history of the Americas. But SAA also believes that it is appropriate for Native Americans to have an important voice in and power over their history and the physical traces of that history. SAA takes this stance not only because of its scientific benefits, but also as moral imperative.

Does SAA regret the fact that some members of the scientific community filed a lawsuit?

SAA regrets that a lawsuit was necessary to obtain a fair implementation of NAGPRA by the U.S. government. However, at the time the lawsuit was filed, the government was prepared to repatriate the remains on the basis of a perfunctory finding by the U.S. Army Corps of Engineers (COE) that the Kennewick remains were culturally affiliated with the modern tribes. In 1997, the Federal court ruled that the COE had acted inappropriately by not fully considering the evidence in making its initial determination. We hope that the law is clarified for all as a result of the lawsuit.

Does SAA agree, then, with the plaintiffs?

SAA agrees with the plaintiffs' general complaint that DOI's decision to culturally affiliate Kennewick Man with the five claimant tribes was not correct under the law. But SAA disagrees with a key element of the plaintiffs' argument: that Kennewick Man was not Native American according to NAGPRA. SAA believes strongly that the remains are indeed Native American, which is defined in the law as "of, or relating to, a tribe, people, or culture that is indigenous to the United States." The plaintiffs also raised a number of constitutional issues in their suit; SAA has not commented on these issues in their brief.

How did DOI misapply the concept of cultural affiliation?

In our opinion, DOI did two things that were incorrect under the law. First, in order to repatriate Kennewick Man, DOI illegally redefined the concept of cultural affiliation. NAGPRA defines cultural affiliation as a "relationship of shared group identity that can be reasonably traced" between a modern, federally recognized tribe and an identifiable earlier group. DOI used the far weaker criteria of "reasonable relationship" and "continuity" in making its determination, rather than the "relationship of shared group identity" that is required by law. Watering down the definition in this way makes it possible to affiliate human remains with almost any group that might claim them. For example, modern American culture exhibits a "reasonable relationship" with ancient Greek culture in terms of government, architecture, and other characteristics, but most modern Americans would not claim Greek as their "group identity."

Second, DOI ignored the fact that cultural affiliation must be established by "a preponderance of the evidence." DOI did a reasonable job of collecting all the relevant archaeological, geological, historical, biological, and oral historical data. But it chose to privilege some of the oral history and geographical data above all the other lines of evidence that do make a compelling case against cultural affiliation.

Why is it bad to substitute "cultural relationship" for "cultural affiliation"? Isn't the purpose of NAGPRA to return all remains to Indians?

It would be bad for two reasons. First, NAGPRA was not intended to return all human remains. If that had been the intent, the law would have been written very differently. Instead, NAGPRA was designed as a balance between the legitimate concerns of Native Americans in the emotional and cultural issues that human remains entail, and the legitimate concerns of scientists and the public in the knowledge that those remains hold for humanity. The fulcrum of this balance is the concept of cultural affiliation: where human remains can be culturally affiliated with a federally-recognized tribe, then the Indians' concerns take precedence; where remains cannot be culturally affiliated, scientists' and the public's interests take precedence. As in any compromise, there will be some unhappy parties on both sides, and there will be some intractable cases. But compromise is how a democracy works.

Second, Congress designed NAGPRA to ensure that when human remains and objects were repatriated, they would be given to the tribe with the closest relationship. Proper determination of cultural affiliation protects the legitimate interests of Indians from claims by other groups. In the Kennewick case, for example, at least one group of Euroamericans has claimed the remains as those of one of its ancestors.

Oral history was a critical, perhaps decisive element of DOI's decision to affiliate the Kennewick remains with the five tribes that claimed them. Does SAA think that oral history is not admissible as evidence in determining cultural affiliation?

Oral history is unequivocally admissible. SAA believes that oral history can contain legitimate evidence that must be considered with the other available evidence in making decisions for or against cultural affiliation with a particular group. Oral tradition conveys two kinds of information that are often difficult to separate: material accounts of what actually happened in the past and metaphysical beliefs that help frame a world view. The material accounts can contribute to cultural affiliation decisions because they describe events or processes that may have left a physical record and so can be evaluated in concert with other evidence. While the metaphysical content can be of enormous cultural significance, it is much more difficult to weigh as evidence in cases like this because the events and processes it describes are ultimately matters of faith, and hence not amenable to evaluation as evidence. To argue that aspects of an oral tradition are not accurate representations of material history does not in any way undermine the potential veracity of the metaphysical truths embodied in oral history. One could reject the Biblical account of the world's creation as empirical truth, for example, and yet still accept the Bible as communicating fundamental spiritual truths.

The skull found at Kennewick bears little similarity to those of modern Native Americans; it has been said by some that in fact it is more similar to those of Europeans. If this is true, then Kennewick is not Native American, right?

No. The Kennewick skull — as well as certain other sets of remains of similarly ancient age in the Americas — is shaped very differently from later Native American skulls. Using an old terminology, some label this constellation of features "Caucasoid." This term was initially applied to the Kennewick remains, and it was unfortunately, and all too easily, misunderstood to mean "Caucasian," a term referring to people living in Europe or their recent descendants. As used narrowly by physical anthropologists, "Caucasoid" refers to a set

of skeletal traits, not to skin color or geographic origin. This set of traits is found throughout Europe and well into Asia, and characterizes early widely-spread members of our species, rather than a 'racial' group. The Ainu of northern Japan may be the genetic descendants of this once-widespread population.

At some time in the past, the population in Asia with these traits was replaced by people more similar to modern East Asians. Most living Native Americans are genetically descended from this East Asian population. The initial population of Native Americans, however, may have been a mix of descendants from different Asian populations, including some, such as Kennewick Man, exhibiting the "Caucasoid" pattern and others, such as the Buhl burial in southern Idaho, one of the oldest in North America, exhibiting the East Asian pattern. It is not easy to interpret the significance of skull shape—genetic drift, founder's effect, and selection all come into play. But since it is clear that people with an East Asian genetic heritage came from Asia across the Bering Land Bridge to North America, perhaps 14,000 or more years ago, it is reasonable to expect that those with the "Caucasoid" pattern did as well. One interpretation is that since the initial human population in North America was small, it is likely that groups became genetically isolated (unable to find mates from other groups). Such isolation would cause high levels of genetic variation among these earliest ancestors of Native Americans. As a consequence, we also expect wide variation in skull shape among these people as a natural consequence of the migrations, low population densities, and genetic drift.

A few archaeologists have suggested that people migrated to North America directly from Europe 14,000 years or more ago. While this hypothesis is accepted by only a small minority of scholars, it is an avenue of legitimate scientific inquiry. But even if we were to accept the argument that Kennewick Man's ancestors were a part of this ancient migration from Europe, Kennewick man would still have been indigenous to the U.S. under NAGPRA (since he was most likely born in what would become the U.S.) and thus, Native American, not European. Similarly, in the far more likely circumstance that his ancestors came from Asia, Kennewick man is not "Asian" under the law, but Native American.