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Kennewick Man Case: Tribal Consultation, Scientific Studies, and Legal Issues



Francis P. McManamon
Center for Digital Antiquity, School of Human
Evolution and Social Change, Arizona State
University, Tempe, AZ, USA

Introduction

The human skeletal remains now referred to as the “Kennewick Man” or the “Ancient One” were found in July 1996 in shallow water along the southern shore of Lake Wallula, a section of the Columbia River pooled behind McNary Dam in Kennewick, Washington. In February 2017, at an undisclosed location somewhere in the internal basin of the Columbia River, not far from the river, the remains were reburied by members of the tribes who had constantly sought such an outcome throughout the more than two decades since the discovery of the remains. This act concluded, if it did not resolve, arguments about how this set of ancient human remains should be treated. One can anticipate that cultural, legal, and scientific aspects of the case will continue to be debated and discussed in the future although the proximate question about how to treat the remains has been answered.

Discovery and the Start of the Case

The Kennewick skeletal remains were discovered by a pair of college students wading in the shallow water along the southern bank of Lake Wallula. From the end of July 1996, when the remains were first recognized until early September, whole and fragmentary human skeletal materials that eventually proved to be a single, nearly complete, and ancient human skeleton were gathered in shallow water from the bottom of Lake Wallula in Kennewick, Washington. The collection was made by James Chatters, a local professional archaeologist working for the county coroner. He recorded some information about the remains and showed the remains to a few other individuals who inspected them briefly (Downey 2000:3–12; Nickens 1996, 1998). Based on these cursory inspections, many simple facts were unclear. For example, were these the remains of one or more than one individual, and what was the age of the remains? Were these the remains of a Euro-American settler or a “Native American”? If the latter, because they were found on land administered by the US Corps of Engineers (CoE), a federal agency, the Native American Graves Protection and Repatriation Act (NAGPRA) would apply to determine how the remains were treated. Radiocarbon testing of a piece of bone from the skeletal remains returned a very early date of about 8400 BP. When the date and other preliminary interpretations

were announced at a press conference in August, the controversy regarding how the Kennewick remains should be treated became more pronounced and more widely known.

Over 350 separate, unarticulated human bones were gathered during several weeks by repeatedly wading in the water and picking up bones observed on the river bottom. We now know that the remains eroded into the lake from the river bank near the area where they were found. These remains were recovered from an extremely disturbed context; bones were collected, piece-by-piece, from beneath the shallow lake water with only general recording of their locations and spatial relationships (Nickens 1996, 1998; Chatters 2000: Fig. 3). The archaeological context, typically so informative concerning behavioral, chronological, and cultural interpretations, was lost almost completely after the remains eroded into the river bed. The skeletal remains were handed over to the CoE in early September 1996. Apart from brief notes made available in the fall of 1996, no further reporting about the initial collection activities and spatial distribution of the Kennewick remains at the discovery site was provided until 2000 (Chatters 2000). The CoE did not allow further study of the skeletal remains from that time until the government team studies that began in February 1999.

Despite the scanty information that was available at the time, individuals and organizations took steps to try and resolve the controversy that quickly developed concerning the proper treatment of the remains. Claims for repatriation were made by Indian tribes whose historical traditional territories overlapped the discovery site. Members of the scientific community called for full scientific study of the remains. In late September, local CoE officials began procedures to turn over the remains to the local tribes who claimed them. This attempt was challenged in federal court in October. In order to have time to address the legal complaint against the CoE, the court ordered the agency to halt its planned repatriation.

Reviewing the CoE activities during this period, the federal magistrate ruling on the case, John Jelderks, determined that the agency had not

used adequate information to resolve the matter. In June 1997, he ordered the CoE to reconsider its decision-making and report to the court quarterly on its progress in resolving the matter.

Consultation with the Tribes and the Government Studies

At this point, the CoE and Department of the Army (DoA) turned to the Department of the Interior (DoI), which had expertise in both archaeology and the implementation of NAGPRA, for assistance. A series of discussions ensued involving officials from these departments and the Department of Justice (DoJ), which was representing the CoE in the case. In March 1998, the Secretary of the Interior agreed to assist the Secretary of the Army in resolving the issues related to the Kennewick Man human remains (Spiegel and Barry 1998). The Secretary agreed to have experts at the DoI assist in the case by:

1. Determining if the human remains found in the Columbia River near Kennewick, Washington, are “Native American” within the meaning of NAGPRA
2. Determining their appropriate disposition under the terms of the statute and its implementing regulations if these remains are found to be “Native American”

Within the DoI, the Departmental Consulting Archeologist (DCA) and National Park Service (NPS) were assigned to develop and carry out a program to resolve the issues at hand. Although one of the questions raised by the court was whether or not NAGPRA applied in this case, the NPS also undertook from its earliest involvement consultation with the Indian tribes that had come forward to claim the remains when they were found.

Most commentators and reporters described the legal controversy that developed and swirled around the Kennewick remains in rather superheated rhetoric pitting the interests of “science” against those of Native Americans. This characterization ignores the detailed, intensive, and

wide-ranging historical and scientific investigation of the Kennewick remains undertaken by scientists and scholars as part of the government team's effort to determine the facts relevant to the questions in the case. Many news reports inaccurately suggested that scientific study of the Kennewick remains did not occur or that studies were hidden from the American public. In fact, this is quite untrue. A number of studies were conducted (McManamon 2013). These studies have been easily and publically accessible since shortly after their completion between 1998 and 2000, initially in a website maintained by the NPS Archeology Program, at (<http://www.nps.gov/archeology/kennewick/>). These reports and additional documents now also are available in tDAR (the Digital Archaeological Record) at (<https://core.tdar.org/project/6325/the-archaeology-of-kennewick-man>).

The government team responsible for trying to resolve the case successfully also organized and carried out a series of consultation meetings with representatives of the Indian tribes. These meetings, outlined in Table 1, were attempts to find common ground between the need to study the remains and the general opinion of tribal representatives that no studies were needed. The consultations also were justified on the grounds that if the Kennewick remains were found to be "Native American," consultation with possibly culturally affiliated Indian tribes would be required for compliance with NAGPRA. The combination of scientific studies and consultation with the tribal representatives reflects the balanced approach to resolving the case that characterized the overall approach of the government agencies involved.

As part of the consultation activities, the DCA, other DoI, NPS, and CoE representatives, as well as attorneys of the Department of Justice (DoJ), which was conducting the legal case, met with tribal representatives six times between 1998 and 2000 to ascertain the tribal perspectives on the case and to discuss the approach to the scientific studies, the rationale for such studies, and the results of the investigations (Table 1). The consultations all were held in the state of Washington at locations near where members of the tribes resided. The face-to-face meetings usually lasted

for a day and gave officials of the agencies involved the opportunity to describe their plans to resolve various aspects of the case and listen to the concerns of the tribes. Officials considered many suggestions of the tribal representatives to fashion the necessary studies in ways that were as inoffensive as possible for the tribal members yet without compromising the methods and techniques essential for conducting the necessary historical and scientific research. Tribal representatives frequently expressed their frustrations with the process and the agencies' positions, but at least the meetings provided a channel for communication.

Consultation with tribes was a major part of the DoI's involvement. NAGPRA requires consultation with tribes that have or may have a cultural affiliation with the human remains of objects covered by the law. Section 3 "Consultation with the Tribes and the Government Studies" of the statute directs that consultations should start soon after any discovery of remains on federal land and should address issues related to excavation, documentation, analysis, recording, and ultimate disposition of the remains or objects in question. The Kennewick case presented a situation, not uncommon when remains that may be subject to NAGPRA are found accidentally, in which facts and evidence are needed in order to make determinations of whether the law applies and, if so, what disposition is appropriate. In such cases both scientific and historical investigations frequently are necessary to establish facts about the remains and answer basic questions. The studies necessary must be developed and conducted in concert with consultations with representatives of the tribes who were potentially culturally affiliated with the remains, although, except for discoveries on tribal lands, the consent of tribe(s) is not a requirement.

To resolve some of the factual matters in the Kennewick case and answer the interpretive questions asked by the federal court, the DCA organized and conducted three physical scientific examinations of the Kennewick remains (Table 1), as well as several background research investigations that did not involve direct examination of the Kennewick remains. The historical

Kennewick Man Case: Tribal Consultation, Scientific Studies, and Legal Issues, Table 1 Consultations with claimant Indian tribes and scientific examinations

Date	Topic	Location
Consultation meetings with tribal representatives		
May 1998	Proposed approach for DOI investigation	Walla Walla
July 1998	Draft multiphase DOI investigation plan	Walla Walla
July 1999	Plans for bone sampling and C14 testing	Walla Walla
October 1999	Plans for cultural affiliation investigation	Walla Walla
February 2000	Plans for bone sampling for DNA testing	Walla Walla
July 2000	Cultural affiliation investigation/interpretations	Spokane
Scientific physical examinations and studies		
February 1999	Examination, documentation, measurement	Burke Museum, Seattle
September 1999	Bone extraction for C14 tests – two samples/split	Burke Museum, Seattle
April 2000	Taphonomy investigation; microsampling bone for aDNA analysis	Burke Museum, Seattle

and scientific background research, undertaken between 1998 and 2000, included anthropology, archaeology, biology, history, linguistics, and traditional oral histories. Twenty-one nationally and internationally recognized scientists and scholars conducted this variety of historical and scientific examinations, analyses, tests, and studies (Table 2; McManamon 2013). Throughout this period and afterward the Kennewick skeletal remains were cared for professionally and skillfully by collection managers of the CoE Mandatory Center of Expertise for the Curation and Management of Archaeological Collections, curators at the University of Washington's Burke Museum, and additional conservation experts (Cassman and Odegaard 2004).

The detailed scientific examination and recording of the Kennewick skeleton, conducted at the Burke Museum, University of Washington, in late February 1999, were designed to be non-intrusive, that is, no physical samples of the remains were removed (Larson 1998; McManamon 1998; Smith 1998). The skeleton was physically examined, measured, and recorded using current and standard scientific methods and techniques. Sediments adhering to the bones and trapped within bone cavities were examined, described, and analyzed for similarity with the soil sediments in the vicinity of the discovery of the skeletal remains. The stone projectile point embedded in the skeleton's pelvis was described and analyzed.

The physical anthropological examination by Powell and Rose (McManamon et al. 1999, see chapter by Powell and Rose) indicates that the Kennewick skeleton represents a male who died between 45 and 50 years of age. He was about 5' 9" tall and well-muscled indicating a life of rigorous physical activity. His teeth have extremely worn surfaces but no caries. Evidence of arthritis is minor, and his joints were in excellent shape for a man of his age and activity. Early in his life, probably when he was still a teenager, he was involved in an accident or conflict in which a projectile point became embedded in the right iliac blade of his pelvis. His bones indicate that he recovered completely from this wound without any infection or disability and lived for many years afterward. Powell and Rose present many other details about the skeletal remains and their interpretation of them in their report.

Like other ancient American skeletons, the Kennewick remains exhibit morphological features not found in modern populations. For all craniometric dimensions examined, Powell and Rose note that this is not unexpected given that the Kennewick remains date over 8000 years earlier than the modern samples used for most of the comparative analyses. The Kennewick cranial measurements are most similar to populations from the south Pacific, Polynesia, and the Ainu of northern Japan, a pattern observed for other crania with such very old dates from North and South America. This similarity does not mean that

Kennewick Man Case: Tribal Consultation, Scientific Studies, and Legal Issues, Table 2 DOI/NPS Kennewick man scientific investigations

Investigations and dates	Scientists and institutions ^a
1. NPS Research Design: Approach to Documentation, Analysis, Interpretation, and Disposition of Human Remains Inadvertently Discovered at Columbia Point, Kennewick, WA, November–December 1998	Dr. Francis P. McManamon; peer reviews by Dr. Bruce Smith, Smithsonian Institution, and Dr. Clark Larsen, University of North Carolina
2. Physical Examination of the Kennewick Remains, February 1999	Dr. John Fagan, Archaeological Investigations Northwest, Portland; Dr. Gary Huckleberry, Washington State University; Dr. Joseph Powell, University of New Mexico; Dr. Jerome Rose, University of Arkansas; and Dr. Julie Stein, University of Washington
3. C14 Dating of Kennewick Remains, September–November 1999	Dr. Douglas Donahue, University of Arizona, NSF Radiocarbon Lab; Mr. Darden Hood, Beta Analytical Laboratory; and Dr. R. E. Taylor, University of California, Riverside
4. Cultural Affiliation Report, November 1999–February 2000	Dr. Kenneth Ames, Portland State University; Dr. Daniel Boxberger, Eastern Washington University; Dr. Steven Hackenberger, Central Washington University; and Dr. Eugene Hunn, University of Washington
5. Physical Examination of Kennewick Remains; Analysis of organic content of bone samples; Sample Selection for ancient DNA analysis, April 2000	Dr. Clark Larsen, University of North Carolina; Dr. Joseph Powell, University of New Mexico; Dr. Phillip Walker, University of California, Santa Barbara; Dr. David Glenn Smith, University of California, Davis; and Dr. R. E. Taylor, University of California, Riverside
6. Tests of Bone Samples for Ancient DNA, June–September 2000	Dr. Frederica Kaestle, Yale University; Dr. Andrew Merriwether, University of Michigan; and Dr. David Glenn Smith, University of California, Davis
7. Potential for DNA Testing, December 1999	Dr. Connie Kolmon, University of Florida, and Dr. Noreen Tuross, Smithsonian Institution

Copies of reports of all of these investigations can be found in McManamon (2013) and accessed in tDAR (the Digital Archaeological Record)

^aIndividuals are listed with the professional affiliations they had when the investigations were conducted in 1999–2000. Dr. Phillip Walker is deceased

the Kennewick Man is an ancient Polynesian voyager who made his way up the Columbia River. Rather, the differences in cranial morphology observed probably reflect the complex events and different migrations of human populations into North America from 20,000 BP onward and the long ancient history of interaction among populations in the region since the original colonization of the continent (e.g., see Brace et al. 2001; Dillehay 2009; Schurr 2004).

Subsequent additional craniometrics analysis reported by Rasmussen et al. (2015, Supplemental Information No. 9) that was conducted along with the investigation of ancient DNA from the Kennewick Man skeleton concluded that the craniometrics features of the skeleton fall within

the range of affinity patterns of individual Native Americans. Commenting on the 2015 craniometrics analysis, Meltzer (2015: 1489–1490) notes that “. . . early Native American crania seem to differ from those of modern Native Americans. . . Craniometric variation is not solely a by-product of (separate) inheritance and history: mutation, isolation and drift, development and adaptation all converge to modify cranial form. . . .”

The February 1999 noninvasive examination included the removal, description, and analysis of soil sediments from the skeletal remains. Our original hope in using the sediments was that enough organic material from the original burial context of the remains could be obtained from the sediment adhering to the skeleton for a

radiocarbon date to be made on it. However, during analysis it could not be determined with sufficient reliability that the sediments were not recently associated with the bones from the river or that they were not older sediments into which the Kennewick remains had been buried (McManamon et al. 1999, see Huckleberry and Stein chapter). Both possibilities created contextual problems that made radiocarbon dating of the sediment an unreliable proxy for the age of the skeletal remains.

The 1999 investigation of the Kennewick remains included a careful examination of the lithic object lodged in right pelvic bone. The object, which probably is a projectile point, was examined, documented, and analyzed in place. CT scans were essential to this part of the investigation. The descriptive information could not have been determined in any other nondestructive manner. They revealed that the object is at least 5.6 cm long and 2 cm wide at widest end, tapering to 3 mm wide at narrowest end. The object has two convex faces with a wide, rounded base and a narrow tapering tip. There is no evidence of notches or stem. The exposed portion of the object, around the middle, is 6–5.5 mm thick. Based upon comparative analysis with other specimens in collections at the Burke Museum and the Oregon State Museum, Fagan infers that the size, shape, and raw material give the object the appearance of a Cascade projectile point. However, these characteristics are not exclusive to Cascade points (McManamon et al. 1999, see Fagan chapter). The possibility that this object is a Cascade point is particularly interesting because archaeological site components containing such points are common throughout the Pacific Northwest. These site components often are associated with deposits of volcanic ash that originated during the eruption of Mt. Mazama approximately 7600 years ago.

The 1999 physical examination provided the basic description and detailed documentation of the remains that is required by the Archaeological Resources Protection Act (ARPA), NAGPRA, and other resource management and protection laws and regulations. The characteristics of the skeleton, the nature of the sediments embedded in and on the bones, and the attributes of the stone

artifact in the pelvic bone all suggested an individual living a way of life consistent with an 8000-year date.

The information derived from the noninvasive studies, however, was not adequate to determine whether or not the remains fit the definition of “Native American” for purposes of NAGPRA, as understood by DoI officials at the time. Therefore, in order to make a reasonable decision about the age of the skeleton, which was considered at the time an essential aspect of making the “Native American” determination, DoI officials decided it was necessary to conduct additional tests, specifically radiocarbon dating of small samples of bone from the remains.

Following review and consideration of the results of the February examination, it was decided that two bone samples would be extracted from the Kennewick remains for radiocarbon dating. In September, bone samples were taken and sent to several radiocarbon dating labs to check and confirm the ancient date for the remains. Four C14 dates were obtained from these samples. The samples were processed and dated by Beta Analytical, Inc. (BA), of Miami, Florida; the Radiocarbon Laboratory of the University of California, Riverside (UC-R); and the NSF-Arizona AMS Facility of the University of Arizona. Two of the four new dates were in substantial conformance with the initial radiocarbon date of the portion of the metacarpal dated by UC-R in 1996. All the bone samples showed very low carbon content which slowed the processing of the samples and extended the time required to interpret the results. Taylor et al. (2001) describe this problem with dating ancient bone samples and also note the variability of carbon preservation displayed by the Kennewick samples.

The BA date (Beta-133993) gave a conventional radiocarbon age of 8410 ± 40 BP. The equivalent calibrated radiocarbon age (using the two sigma, 95% probability) in years BP is cal BP 9510–9405 and cal BP 9345–9320. The bone sample used for this date was approximately half of the right metatarsal, one of the load-bearing bones of the foot. The UC-R lab processed and dated two of the Kennewick bone samples. Like the BA sample, both of these were very low in

carbon content. Due to the low carbon content and the lack of clear collagen-like characteristics of the extracted carbon, the dates were reported as “the apparent C14 ages” for each sample. One of the samples was dated as 8130 ± 40 BP (UCR-3806/CAMS-60684), slightly different from the BA date but not inconsistent with it. These two samples, in fact, are from the same bone, the right first metatarsal. Both of these dates (Beta-133993 and UCR-3806/CAMS-60684) are consistent with the earlier C14 date (from the 1996 test) obtained from a portion of the fifth left metacarpal. The BA date, in fact, is almost identical to the first C14 date (McManamon 2000). The University of Arizona date (AA-34818) displayed very low carbon preservation, below the threshold for which the laboratory normally would report a date.

The C14 chronological information added to other information about the remains that supported the determination that the Kennewick skeletal remains should be considered “Native American” as defined by NAGPRA. All the dates obtained from the Kennewick Man samples predate 6000 BP and are clearly pre-Columbian. Two of the dates match closely the C14 date obtained in 1996 on another bone fragment believed to be from the skeleton. This chronological information, along with the results of the earlier documentation, examination, and analysis of the remains themselves, led the DoI to conclude that, for the purposes of NAGPRA, the Kennewick remains should be considered as “Native American,” thus subject to the provisions and procedures of the law (McManamon 2000).

With this initial determination made, the government team next had to resolve the question of whether or not the Kennewick remains could be “culturally affiliated” with any of the Indian tribes who were claiming the skeleton as their ancestor. The DCA organized and coordinated the preparation of a series of scholarly reports by experts summarizing archaeological, biological, historical, linguistic, and traditional information that could be used for determining the cultural affiliation of the Kennewick remains (McManamon et al. 2000a). In April 2000, as part of the effort to determine the cultural affiliation of the

Kennewick remains, an additional physical examination of the remains was conducted and samples taken to conduct tests for the detection of ancient DNA in the bones. Physical anthropologists Clark Larson, Joseph Powell, and Phillip Walker conducted macroscopic and microscopic examinations of the Kennewick skeleton to determine the suitability of specific skeletal elements for DNA analysis (McManamon et al. 2000b).

The 2000 taphonomic examination confirmed the conclusion of Powell and Rose, based on their 1999 examination that these are the remains of a single individual who was interred at the site, not one whose remains decomposed on the surface of the ground or who was incorporated into the deposit through a catastrophic flood event. This conclusion is supported by the completeness of the skeleton and the absence of any clear indications of carnivore scavenging of the remains.

During the April 2000 examination, micro-samples were taken from the most suitable skeletal elements for analysis of the ancient DNA of the skeleton. The samples were analyzed by ancient DNA laboratories at the University of California – Davis, the University of Michigan, and Yale University. Each lab attempted to isolate and amplify ancient DNA from the skeleton; however, none of the tests were able to isolate and examine any ancient DNA (McManamon et al. 2000b).

In September 2000, Secretary of the Interior Bruce Babbitt recommended to the DoA Secretary Louis Caldera that the Kennewick remains could be culturally affiliated with the claimant tribes (Babbitt 2000). His decision was controversial within the DoI, where different interpretation and procedure were advocated by some of the officials involved in the case. The decision was criticized in the wider world as well (e.g., *The Economist* 2000), although supported strongly by the American Indian community.

Subsequently, following a 2-year-long review by the district court, the DoI determination that the Kennewick remains were culturally affiliated with the claimant tribes was rejected in a decision released in August 2002 (Jelderks 2002). The judge commented that the scientific evidence presented by the DoI’s investigations actually argued against the Secretary’s determination and was not

adequately taken into account in the reaching his conclusion. The district court also ruled that NAGPRA did not pertain to the Kennewick remains because the available evidence did not show a clear link between the remains and the claimant Indian tribes. The DoI and DoA accepted the first determination of the district court, i.e., that cultural affiliation between the remains and the tribes was not supported by a full consideration of the evidence. However, the government appealed the part of the district court ruling that NAGPRA did not apply to ancient human remains found within the jurisdiction of the Ninth Circuit Court of Appeals. Rather, the government argued that the archaeological, chronological, contextual, and taphonomic evidence developed by the government's scientific examinations and tests indicated that the remains should be considered "Native American" within the meaning of the term in NAGPRA.

The Kennewick Man case in federal court, which began in October 1996, reached its legal conclusion in February 2004, when a three-judge panel of the Ninth U.S. Circuit Court of Appeals issued an opinion supporting the earlier decision of the district court in Oregon (Gould 2004). The circuit court decision emphatically agreed with the district court opinion that in order for NAGPRA to apply to a set of Native American human remains, the remains must "...bear some relationship to a *presently existing* tribe, people, or culture to be considered Native American" (emphasis in original; Gould 2004: 1596). The circuit court, again in support of the district court, stated that the facts about the Kennewick Man skeleton could not reasonably be construed to provide such a link to any of the modern tribes or Indian groups who claim a relationship with the remains. The court went on to generalize from the specifics of the Kennewick case, noting that the scientific excavation, investigation, and study of ancient human remains that are unrelated to modern American Indians are neither a target of the law nor precluded by NAGPRA (Gould 2004: 1598).

The Ninth Circuit Court decision provided some detail about the kind of a relationship that might serve as a threshold for other situations. In

other words, how much of a relationship and what kinds of relationships should exist for a set of remains to pass into the "Native American" category and thus be subject to NAGPRA? The opinion notes:

...though NAGPRA's two inquiries have some commonality in that both focus on the relationship between human remains and present-day Indians, the two inquiries differ significantly. The first inquiry [i.e., asking whether human remains are Native American] requires a general finding that [human] remains have a significant relationship to a presently existing 'tribe, people, or culture,' a relationship that goes beyond features common to all humanity. The second inquiry [i.e., asking which American Indians or Indian tribe bears the closest relationship to Native American remains] requires a more specific finding that [human] remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe. (Gould 2004: 1599)

The circuit court reviewed the evidence collected and used by the government in the case, in particular, the conclusions that the Secretary of the Interior had drawn for the evidence. The court found that the Secretary's interpretation had inadequate factual support for the remains being either Native American or culturally affiliated with the claimant tribes (Gould 2004: 1603 ff.). The court noted that the Secretary overlooked evidence for a lack of connection or cultural continuity between the ancient remains and the modern tribes that his own experts had pointed out. The Secretary relied upon interpretations of tribal oral history accounts to reach his decision that the Kennewick remains were both Native American and culturally affiliated. The court found this evidence unpersuasive concluding that:

...these accounts are just not specific enough or reliable enough or relevant enough to show a significant relationship of the Tribal Claimants with Kennewick Man. 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 accurate, 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. (Gould 2004: 1607)

The court acknowledged the legitimacy of oral and traditional histories and evidence as one kind of information used to answer the inquiries that NAGPRA poses. However, in the Kennewick case, the court found this evidence irrelevant and misinterpreted by the DoI.

More Legal Developments, Additional Studies, and Final Treatment of the Kennewick Man Remains

Following the Ninth Circuit Court decision, in 2004 and 2005, legislation was proposed by the Senate to amend NAGPRA to ease the need to demonstrate in detail that Native American human remains or objects are related to a current, federally recognized tribe in order for the remains to be subject to the law and regulations. The NAGPRA Review Committee annual report for 2006 endorsed this approach. However, in the House of Representatives, a bill designed to focus the intent of NAGPRA on remains for which clear tribal affiliation could be determined was introduced in 2006. Neither of these legislative approaches to clarifying appropriate implementation of NAGPRA on this matter moved any further in Congress.

Following the conclusion of the federal legal case, the CoE worked with the plaintiffs, whose request to study the Kennewick remains was approved as part of the federal court decisions, to plan and undertake another physical study of the remains. Researchers associated with the plaintiffs in the federal case examined the Kennewick Man remains in July 2005 and February 2006. Nearly a decade later, the large (650-plus page) report about these examinations and subsequent analysis of the measurements and observations was published (Owsley and Jantz 2014). Shortly after this publication, Rasmussen, with a large number of coauthors, reported a successful extraction and subsequent analysis of ancient DNA from a bone sample from the Kennewick skeleton (Rasmussen et al. 2015; Meltzer 2015). The study results showed a:

...stronger association of the Kennewick man with Native Americans than with any other continental group. We also observe that the autosomal DNA, mitochondrial DNA and Y-chromosome data all consistently show that Kennewick Man is directly related to contemporary Native Americans, and thus show genetic continuity within the Americas over at least 8 thousand years. Identifying which modern Native American groups are most closely related to the Kennewick Man is not possible at this time, since our comparative DNA database of modern peoples is limited, particularly for Native American groups in the United States...among the groups for which we have sufficient genomic data we find that the Colville, one of the Native American groups claiming Kennewick Man as ancestral, show close affinities to that individual or at least to the population to which he belonged. (Rasmussen et al. 2015: 458)

Perhaps this additional and independent piece of evidence would have persuaded the district and circuit courts that Kennewick Man was “Native American” for the purposes of NAGPRA, as the 1998–2000 DoI studies had inferred. However, the case was closed, and there may have been little interest in opening it again or starting a new case to see if this additional evidence would make a difference. In addition, having the remains determined to be Native American only meant that NAGPRA would apply to their treatment and disposition. Such a determination would not resolve automatically to which tribe or group of tribes the remains should be turned over. In most cases, a determination of “cultural affiliation,” which requires that there be a “relation of shared group identify” between Native American human remains and a claimant Indian tribe, is required to justify the return of remains to a tribe. In the Kennewick Man case, the district court, affirmed by the appeals court, had determined that the available evidence did not merit a determination of cultural affiliation between the Kennewick Man remains and the claimant tribes.

Following the publication of the Rasmussen et al.’s ancient DNA study and the wide publicity of the findings, the CoE funded a second ancient DNA study. The primary aim of the second study (Novembre et al. 2016) analysis was to provide an independent validation of the genetic evidence underlying the Rasmussen et al. study and its

interpretations. The Novembre et al. study results concurred with the findings of the earlier study. The 2016 report notes that the sample tested is genetically closer to modern Native Americans than to any other population worldwide. Several distinct analyses that were part of the investigation support this conclusion. The authors note that their investigation spanned three non-overlapping subsets of the data and that each distinct result was consistent with Native American ancestry.

In 2016, the CoE Northwestern Division office, which retained legal responsibility for the care of the Kennewick remains, reviewed the evidence about the remains from the reports prepared by the DoI, as well as the ancient DNA evidence from the 2014 to 2016 studies. The Division Commander, Brigadier General Scott A. Spellmon, formally determined that for the purposes of compliance with NAGPRA, the Kennewick Man skeletal remains should be considered “Native American.” The 14-page report (Spellmon 2016) describes the information and research results that support this determination.

Rather than rely upon a new case in the federal court system or amendments to NAGPRA to resolve these thorny matters, Senator Patty Murray of Washington and Representatives Newhouse, Heck, Kilmer, and Walden introduced in 2015 and 2016 legislation requiring that the CoE return the Kennewick remains to the claimant tribes. In December 2016, President Obama signed legislation requiring the return. On 17 February 2017, at the Burke Museum in Seattle, the remains were handed over to representative of the tribes (Inslee 2017). Early the next morning at a secret location near the Columbia River, Kennewick Man, the Ancient One, was reburied by tribal members.

Future and Ongoing Considerations

Opinions differ on the interpretation of evidence and the law in the complex and unusual case of the Kennewick Man. This case was surrounded with controversy from the very beginning. Numerous perspectives have been expressed on the various administrative, legal, and scientific aspects of the

case as it worked its way through the federal court system and since. In addition to the analyses and interpretations about the skeletal remains, the Kennewick case generated discussion and written opinions regarding the study and treatment of human burials and remains from archaeological sites; the appropriate balance between humanistic, cultural, and scientific investigation; and the appropriate interpretations of ARPA and NAGPRA (e.g., Bruning 2006; Burke et al. 2008; Colwell 2017; Downey 2000; Owsley and Jantz 2001; Melzer 2015; Swedlund and Anderson 1999, 2003; Thomas 2000; Watkins 2003). These debates and discussions certainly will continue. No doubt the case of Kennewick Man/the Ancient One will be part of such future consideration. For the present, at least, the remains are reinterred and that aspect of the case has been determined.

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