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## Case Kennewick Man – Bonnichsen v. United States

*Private person/personne privée – United States/Etats-Unis – Human remains/restes humains – Post 1970 restitution demands/demandes de restitution post 1970 – Judicial claim/action en justice – Judicial decision/décision judiciaire – Ownership/propriété – Request denied/rejet de la demande*

*The skeleton of a 9,000 year old man was discovered on Federal territory near the city of Kennewick, Washington. Authorities decided to grant the request of five American Indian tribes, and transferred the remains to those tribes for burial. Several scientists, including Robson Bonnichsen, opposed the return and filed suit in the District Court of Oregon. Finding that evidence was not sufficient to link the remains to any present-day American Indian tribe, the District Court vacated the authority's decision and ordered further examination of the remains. The Ninth Circuit affirmed the order on appeal.*

*I. Chronology; II. Dispute Resolution Process; III. Legal Issues; IV. Adopted Solution; V. Comment; VI. Sources.*

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## I. Chronology

### Post 1970 restitution demands

- **July 1996:** Teenagers discovered a skeleton on Federal lands **near the city of Kennewick** in the U.S. State Washington.
- Scientists removed the remains for forensic analysis. Studies revealed that the remains were those of a **man of either early European or American Indian descent from 9000 years ago**, “making them one of the most complete early Holocene human skeletons ever recovered in the Western Hemisphere”<sup>1</sup>. The discovery attracted great attention from the media, who called the skeleton “Kennewick Man”<sup>2</sup>.
- While arrangements were being made for the skeleton’s transfer to the Smithsonian Institution to conduct further research, **five local Indian tribes – Umatilla, Yakama, Nez Perce, Wanapum and Colville** (hereafter Tribal Claimants) – opposed the transfer and further examination on religious grounds and asked that the skeleton be buried at a secret location instead<sup>3</sup>.
- **17 September 1996:** Since the skeleton had been discovered on **territory within the management authority of the U.S. Army Corps of Engineers (the “Corps”)**, the Corps took custody of the remains and published a “Notice of Intent to Repatriate Human Remains” in a local newspaper. The notice stated that: “(1) the notice of repatriation was being issued pursuant to the Native American Graves Protection and Repatriation Act, 25 USC § 3005(a) (“NAGPRA”); (2) the Corps had determined that the remains were of Native American ancestry; (3) the Corps had determined that the remains had been inadvertently discovered on federal land recognized as the aboriginal land of an Indian tribe; (4) the Corps had determined that there is a relationship of shared group identity which can be reasonably traced between the human remains and five Columbia River basin tribes and bands; (5) the Corps intended to repatriate the remains to those tribes, (6) notice had been given to certain Indian tribes; (7) “representatives of any other Native American Tribe which believes itself to be culturally affiliated with these human remains should contact the Corps of Engineers prior to October 23, 1996”; and (8) repatriation may begin after this date if no additional claimants come forward”<sup>4</sup>.
- **Late September 1996:** A few days after its publication, **several scientists**, including **Robson Bonnichsen**, objected to the Corps’ decision to return the skeleton to the Indian tribes and asked the Corps to reconsider.
- **16 October 1996:** After receiving no reply from the Corps, the scientists commenced litigation at the District Court of Oregon seeking a temporary restraining order to halt the repatriation.

<sup>1</sup> Katja Lubina, *Contested Cultural Property – The Return of Nazi Spoliated Art and Human Remains from Public Collections* (Maastricht: Katja Lubina, 2009), 195-196.

<sup>2</sup> John Henry Merryman et al., *Law, Ethics and the Visual Arts* (Alphen aan den Rijn: Kluwer Law International, 2007), 388.

<sup>3</sup> See James C. Chatters, “Kennewick Man,” *Newsletter of the American Anthropological Association* (2004).

<sup>4</sup> Robson Bonnichsen et al. v. United States et al., 969 F. Supp. 614; 1997 U.S. Dist. LEXIS 9239, at 2-3.

- A second action was filed against the Corps by the **Asatru Folk Assembly**, which described itself as “a legally-recognized church that represents Asatru, one of the major indigenous, pre-Christian, European religions.”<sup>5</sup> The suit claimed that the skeleton was of Asatru descent and not Native-American. The Asatru Folk Assembly also requested a temporary suspension of the repatriation in order to proceed with research and determine the precise origin of the remains. If the analysis concluded the remains were of European origin, the Assembly requested restitution.
- **27 June 1997**: The District Court issued its opinion, holding that the Corps’ decision-making process had been flawed because it failed to consider essential aspects of the problem before granting the Tribal Claimants’ request<sup>6</sup>. It therefore vacated the restitution decision until the Corps could conduct further investigations and reach a decision based upon all available evidence. The Court also denied the defendant’s motion for summary judgment along with the scientists’ motion to study the human remains.
- **24 March 1998**: The Corps and the Secretary of the Interior (hereafter the Secretary) entered into an Interagency agreement. The agreement effectively assigned the Department of the Interior (DOI) responsibility of deciding whether the human remains were “Native American” under NAGPRA, and of determining their proper disposition.
- **In April 1998**: The Corps buried the discovery site of the human remains, thereby hindering efforts to conduct further sedimentary research regarding the age of the remains and the further discovery of other remains that the site might include<sup>7</sup>. Meanwhile, the DOI conducted several studies on the remains, including DNA testing with the Corps’ authorisation.
- **13 January 2000**: The Secretary concluded that the human remains were “Native American” as defined by NAGPRA based upon two factors: the age of the remains and their discovery on U.S. territory.
- **25 September 2000**: The Secretary determined that “a preponderance of the evidence supported the conclusion that the Kennewick remains were culturally affiliated with present-day Indian tribes”<sup>8</sup>. Consequently, the remains were awarded to the Tribal Claimants and further examination by the plaintiffs was foreclosed. Accordingly, the plaintiffs filed an amended complaint in the District Court challenging the Secretary’s decision.
- **30 August 2002**: Finding that the remains lacked an established lineal relationship to the Tribal Claimants, the District Court concluded that the Secretary had improperly determined that NAGPRA applied<sup>9</sup>. Therefore, the Court held that the plaintiffs should be given the opportunity to examine the remains, and vacated the government’s disposition of the Kennewick Man’s remains a second time. The defendants and the Tribal Claimants appealed.

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<sup>5</sup> *Ibid.*, at 5-6.

<sup>6</sup> *Bonnichsen v. United States*, 969 F. Supp. 628; 1997 U.S. Dist. LEXIS 9323 (*Bonnichsen II*).

<sup>7</sup> Merryman, *Law, Ethics and the Visual Arts*, 391.

<sup>8</sup> *Bonnichsen v. United States*, 367 F.3d 864; 2004 U.S. App. LEXIS 7467, at 13-14.

<sup>9</sup> *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 at 1138 (*Bonnichsen III*).

- **4 February 2004:** The Court of Appeals affirmed the lower court's decision permitting the plaintiff scientists to study the remains under the Archaeological Resources Protection Act of 1979<sup>10</sup>. Accordingly, scientific examinations were conducted on the Kennewick Man.

## II. Dispute Resolution Process

### Negotiation – Judicial claim – Judicial decision

- Before commencing legal action, the scientists besought the Secretary informally to reconsider its decision. After the Secretary failed to respond, the scientists filed suit. In its claim, the Bonnicksen plaintiffs demanded that a detailed scientific study be conducted to determine the Kennewick Man's origins before allowing the Corps to repatriate the remains. The scientists argued that the discovery of the antique remains was of national and international significance, the study of which could shed light on the origins of humanity in the Americas. The scientists' main argument against restitution was that the examinations had failed to establish a link between the remains and any particular tribe of the Tribal Claimants, or that the remains were Native American for purposes of NAGPRA. The plaintiffs therefore sought to enjoin NAGPRA's application, to declare the Corps' decision null and void, and to obtain an injunction preventing the defendants from depriving plaintiffs of access to Kennewick Man.
- In turn, the Asatru plaintiffs asked the Court to compel the Corps to allow scientific testing in order to determine the Kennewick Man's origin and the contemporary tribe with which he was most closely associated. Should the remains prove to be of European origin, the Asatru plaintiffs asked for custody in order to study and for the eventual reinterment in accordance with native European belief. Similar to the Bonnicksen plaintiffs' claim, the Asatru Folk Assembly also asserted challenges to the constitutionality of NAGPRA and to the legality of various actions taken by the Corps.
- Relying solely on the age of the remains and the location where they were found, the defendants argued that they were Native American.

## III. Legal Issues

### Ownership (defining “Native American” + cultural affiliation to present-day tribe)

- From a cultural heritage law perspective, the dispute was mainly centred around two issues: (1) Whether the Kennewick Man qualified as Native American within the meaning of NAGPRA, and (2) whether the remains were “culturally affiliated” to the coalition of tribal claimants pursuant to NAGPRA.

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<sup>10</sup> Bonnicksen v. United States, 357 F.3d 962; 2004 U.S. App. LEXIS 1656.

- NAGPRA defines human remains as “Native American” if the remains are “of, or relating to, a tribe, people, or culture that is indigenous to the United States”<sup>11</sup>. Given the present tense used in the definition, the Act requires a “present-day relationship” to a presently existing tribe, people, or culture. Under the Secretary’s interpretation of “Native American”, all pre-Columbian remains and objects would fall under this notion irrespective of whether the individuals or objects were related in any way to present-day American Indians. The application of this broad interpretation would yield far-reaching and absurd results. The Court therefore held that the Secretary had erred by basing his interpretation of the definition solely on the age of the remains.
- Moreover, the Court determined that the evidence the defendants produced did not permit a finding that the Kennewick Man was related to a specific identifiable tribe, people, or culture. In fact, the age of the skeleton alone made it almost impossible to establish a relationship with any presently existing group that is indigenous to the United States. The primary evidence relied on by the DOI was the Tribal Claimants’ oral traditions, which indicated these tribes had been in the relevant geographical area for many thousands of years. The Court rejected this evidence, pointing out many of the unreliable features inherent in oral traditions.
- The Court also distinguished between remains which are “indigenous” to the United States, and those which are “Native American” for the purposes of NAGPRA. The Court therefore concluded that NAGPRA did not apply to Kennewick Man and that the remains were controlled by other Federal law.
- Despite reaching the conclusion that the remains did not fall under the scope of NAGPRA, the Court proceeded to examine the second requirement of “cultural affiliation” for the purpose of creating a complete record for this case. Under NAGPRA, “cultural affiliation” is defined as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day-Indian tribe (...) and an identifiable earlier group”<sup>12</sup>. The Court thus examined whether the cultural affiliation of Kennewick Man could have been “reasonably” ascertained.
- The Secretary had promulgated regulations listing several criteria for the establishment of cultural affiliation. In particular, “the preponderance of the evidence – based on geographical, kinship, biological, archaeological, linguistic, folklore, oral tradition, historical evidence, or other information or expert opinion”<sup>13</sup> must reasonably lead to the conclusion of the cultural affiliation. However, scientific certainty is not required<sup>14</sup>. In the present case, the Court reviewed the Secretary’s conclusion that Kennewick Man was culturally affiliated with present-day Indian tribe claimants, namely the tribal claimants. It held that the Secretary’s determination of cultural affiliation could not be sustained for the following reasons: the Secretary (1) failed to adequately identify an earlier group to which the skeleton allegedly belonged, or even its belonging to a particular group; (2) did not articulate a sufficient basis for “the existence of a shared group identity that can be reasonably traced between the present-

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<sup>11</sup> 25 U.S.C. § 3001(9).

<sup>12</sup> 25 U.S.C. § 3001(2).

<sup>13</sup> 43 C.F.R. § 10.2(e) and § 10.14(c)-(f).

<sup>14</sup> 43 C.F.R. § 10.14(f).

- day Indian tribe (...) and the earlier group” as required by the Secretary’s regulations<sup>15</sup>; (3) did not satisfactorily argue its decision in light of the record; and (4) reached a conclusion that did not meet with the reasonable findings of the Secretary’s experts or the record as a whole<sup>16</sup>.
- (1) Regarding the first reason, the physical features of Kennewick Man appeared to be too dissimilar to all modern American Indians. Absent a satisfactory explanation for these morphological differences, the Court held that the Secretary could not have reasonably found, by a preponderance of the evidence, an association of the skeleton with a particular identifiable earlier group.
  - (2) Given the absence of requisite proof of a link between the skeleton and identifiable earlier group, there was no reason for the Court to examine whether a shared group identity existed between the tribal claimants and a particular earlier group<sup>17</sup>.
  - (3) The Court found that the Secretary had not sufficiently explained how the Kennewick Man was linked to the Tribal Claimants, as he had conceded physical differences between the two. It further did not satisfactorily clarify how Kennewick Man inferred a “shared group identity” between the tribal Claimants and an unknown earlier group.
  - (4) The Court finally held that the Secretary had failed to articulate an adequate rationale for his conclusions. Accordingly, the record would not provide a sufficient basis to support the Secretary’s decision.

#### IV. Adopted Solution

##### Request denied

- The Court rejected the Tribal Claimants request for the return of the human remains. Instead, it granted the scientists request to vacate the defendants’ decision to transfer the remains to the tribal claimants.
- The Tribal Claimants continued efforts to intervene during the remedy phase of the litigation. As a result of mediation, the Tribal Claimants were able to obtain permission to access the remains for a ceremony for the 10th Anniversary of the Kennewick Man’s discovery. The ceremony was held between 21 and 23 June 2006.

#### V. Comment

- The Bonnicksen litigation was plagued with evidentiary issues. First, the Court examined NAGPRA’s legislative history to determine that the statute was enacted with *modern-day* American Indians’ identifiable ancestors in mind. It then explained that balance must be obtained between Congress’s meaning of “ancestors” and the American Indians’ broader view regarding their Native American “ancestors.” The Court reasoned that it could not give

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<sup>15</sup> 43 C.F.R. § 10.14(c)(3).

<sup>16</sup> See Merryman, *Law, Ethics and the Visual Arts*, 399-400.

<sup>17</sup> See Merryman, *Law, Ethics and the Visual Arts*, 400.



- credence to a broad interpretation of NAGPRA that would “apply its provisions to remains that have at most a tenuous, unknown, and unproven connection, asserted solely because of the geographical location in mind.” However, this approach ignores issues regarding the United States’ history of continual dispossession of land from Native Americans and their forced assimilation into modern culture<sup>18</sup>. It also excludes from evidence oral tradition about ancestors, histories, and territories, which is often a tribe’s only historical account of such events. As a result, tribes must try to corroborate evidence with Western scientific opinions to prove the desired objects are “Native American.” Then, they must prove a link reasonably establishing a “cultural affiliation” to the modern American Indian group. This can often lead to a battle between the parties’ experts, all of which is conducted at the expense of the tribe<sup>19</sup>.
- Evidentiary obstacles counteract Native Americans’ efforts hoping to link newly-discovered remains and burial objects to their “presently existing” tribe, a tribe which no longer exists in its original form due to repeated relocation and forceful assimilation. Nor are these issues exclusive to the United States’ history with indigenous persons, as the entire North and South American continents have had troubling histories regarding the mistreatment of indigenous people. Though Canadian courts allow oral tradition as evidence, NAGPRA prevents Canadian tribes from claiming remains located in the United States, even though tribal lands do not coincide with modern political boundaries<sup>20</sup>.
  - To make matters more difficult, a tribe must be federally recognized to pursue a claim under NAGPRA, a process that is long and complicated. Congress’s enactment of NAGPRA was an effort to return back to Native Americans the control of their past by recognizing their cultures as “living”, instead of only existing in the past<sup>21</sup>.
  - The Court’s decision cleared the way for scientists to conduct extensive examinations on the skeleton. Scientists hope to answer several questions about Kennewick Man, namely his age at the time of death, his origins, and what type of culture he belonged to<sup>22</sup>. Thanks to high-resolutions scans, scientists have been able to produce casts and replicas of the skull for historic preservation. Further, a forensic anthropologist at the University of Washington’s Burke Museum of Natural History and Culture was able to conduct a detailed autopsy on the skeletal remains.
  - For those seeking dispute resolution, the Native American Graves Protection and Repatriation Regulations encourage people who wish to contest actions taken by Federal agencies to do so “through informal negotiations to achieve a fair resolution of the matter”<sup>23</sup>. A Review Committee advises Congress and the Secretary and may aid in this regard. In the Kennewick case, however, informal negotiations did not occur, since the Secretary refused to answer to the scientists’ first informal request. Regardless, it seems the Review Committee was never

<sup>18</sup> See Gerstenblith, *Art, Cultural Heritage, and the Law*, 894-895.

<sup>19</sup> See Catherine E. Bell and Robert K. Paterson, “Aboriginal Rights to Cultural Property in Canada,” in *Box of Treasures or Empty Box: Twenty Years of Section 35*, ed. Ardith Walkem (Vancouver: Theytus Press, 2003).

<sup>20</sup> See Gerstenblith, *Art, Cultural Heritage, and the Law*, 896.

<sup>21</sup> *Ibid* at 893-894.

<sup>22</sup> See Timothy Egan, “A Skeleton Moves from the Court to the Laboratory,” *The New York Times*, July 19, 2005, accessed July 19, 2013, <http://www.nytimes.com/2005/07/19/science/19skul.html?pagewanted=all&r=0>.

<sup>23</sup> 43 C.F.R. § 10.17(a).

approached to issue a recommendation on the resolution of this dispute, or to intervene as a facilitator in negotiations as provided by the Regulations<sup>24</sup>.

- In 2007, Congress proposed an amendment that would change the definition of Native American in NAGPRA to be: “of, or relating to, a tribe, people, or culture that is or was indigenous to any geographic area that is now located within the boundaries of the United States.” Such a broad definition would have allowed more expansive repatriation, but as of the date of this article, the Amendment had not been adopted<sup>25</sup>.

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### b. Court decisions

- *Bonnichsen v. United States*, 969 F. Supp. 614 (D. Or. 1997); 1997 U.S. Dist. LEXIS 9239 (*Bonnichsen I*).
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- *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. Or. 2004); 2004 U.S. App. LEXIS 7478.

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<sup>24</sup> 43 C.F.R. § 10.16 and § 10.17(b).

<sup>25</sup> *Ibid.*



c. Legislation

- Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001 et seq. (November 16, 1990).
- Native American Graves Protection and Repatriation Regulations, Code of Federal Regulations, 43 C.F.R. § 10.1 et seq.

d. Media

- Egan, Timothy. "A Skeleton Moves from the Court to the Laboratory." *The New York Times*, July 19, 2005. Accessed July 19, 2013.  
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