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What Is the Significance of "Is"?
Another Attempt to Amend NAGPRA

by Ryan M. Seidemann

Discretely tucked away in Senate bill 2843, Senator Benjamin Nighthorse Campbell has proposed a seemingly minor amendment to a definition in the Native American Graves Protection and Repatriation Act (NAGPRA). Section 14 of S.2843 proposes to add the words "or was" after the word "is" in Section 2(9) of NAGPRA. If the bill is passed, the implications of this proposed change will be profound.

Before going any further, it is necessary to understand what "is" is. Section 2(9) of NAGPRA is the definition of "Native American." Under NAGPRA, "'Native American' means of, or relating to, a tribe, people, or culture that is indigenous to the United States." The importance of "is" in this definition was highlighted in the Kennewick Man case. It was upon the present tense of this definition (i.e., "is") that Judge Jelderks decided that Kennewick Man must be related to a currently existing culture to maintain a valid NAGPRA claim. Thus the significance of the word "is" is substantial: It ensures that human remains cannot be claimed under NAGPRA unless they are related to modern Native Americans. This limit is consistent with Congress's original intent for enacting the legislation, to protect the human rights of existing Native Americans through respect for the remains of their deceased relatives (**MT 18-3,** "Congressional Intent: What is the Purpose of NAGPRA?"). The proposed addition of the words "or was" is another attempt to expand NAGPRA beyond its human rights purposes in a way that could interfere with the future of scientific study. This eventuality was expressly avoided by the Congress that enacted NAGPRA.

The addition of these two words to NAGPRA would define any group, regardless of their cultural or biological affiliation to any modern Native American group, as Native American as long as they were "indigenous" to the United States. Under this proposed definition, if it were discovered that the initial inhabitants of the New World were Ainu peoples from Japan, the remains of these culturally and biologically distinct peoples

would be considered Native American, along with the distinct Indian peoples that later migrated to the New World. Thus, the proposal would subject the remains of non-Indians to repatriation claims by unaffiliated modern Native American groups. Such a scenario would lead to obviously absurd results that are inconsistent with the original intent of Congress when it passed NAGPRA.

Despite the creation of a seemingly counterintuitive reality for repatriation claims under this new definition, simply being able to make a claim for repatriation under NAGPRA is not tantamount to actually being allowed to repatriate items. Any such claim would still have to pass muster under the ownership priority provisions of Section 3(a) of NAGPRA. Unfortunately, not all these provisions would remain unaffected by the proposed changes in S.2843. Briefly, Section 3(a) looks to the following groups to determine ownership of Native American cultural items:

(1) lineal descendants of the Native American remains;

(2) in the absence of lineal descendants, the items may be repatriated by:

  (a) the group on whose tribal land the items are discovered;

  (b) the group with the closest cultural affiliation;

  (c) if cultural affiliation cannot be determined, then to the tribe legally recognized as having aboriginally occupied the federal land where the remains were discovered (or another group by a preponderance of the evidence).

The major problem is that, if S.2843 passes, the expansion of the term "Native American" correlatively expands the category of materials considered to be Native American cultural items under NAGPRA. Section 3(a)(1) would not be expanded because it allows for claims by lineal descendants. "Lineal descendant" is not defined in NAGPRA, leading to the reasonable inference that lineal descendants must refer to actual, documentable descendants. This inference is consistent with Congress's intent to have NAGPRA allow for repatriation of close relatives' remains. Section 3(a)(2)(A) could be substantially affected by the proposed change. The change would allow for the repatriation of items regardless of their cultural or genetic affiliation, simply by virtue of their location on tribal lands. Section 3(a)(2)(B) looks to closest cultural affiliation and is invoked when items are found on federal (as opposed to tribal) lands. There is no indication that items found in such contexts, if the bill passes, would be subject to any

different regulations than those applied in the Kennewick Man case. Thus, no substantial change is anticipated here. Finally, Section 3(a)(2)(C) kicks in if cultural affiliation cannot be determined and if a court has recognized the land on which the items were discovered as having been aboriginally occupied by a tribe. Here again, the expanded definition of "Native American" could allow for repatriation claims by nonculturally affiliated groups whose Native American ancestors once occupied the same land as those of a pre-Native American group.

If S.2843 passes, Judge Jelderks's comment in the Kennewick Man case that "courts do not assume that Congress intends to create odd or absurd results" will be turned on its head. In future cases brought under NAGPRA, courts might have to consider that Congress intended for NAGPRA to allow modern groups to make claims to culturally and/or genetically unaffiliated items, an "odd or absurd" result indeed.

Ultimately, the significance of "is" is that it maintains the delicate balance between Native American and scientific interests that Congress created with NAGPRA. "Is" does this by ensuring that the human rights of modern Native Americans are protected by allowing them to make claims to items to which they, as a currently existing group, can demonstrate a filial relation. "Is" also protects the scientific study of our shared history as Americans by allowing research to continue. The addition of "or was" to the definition of "Native American" under NAGPRA would eviscerate this balance by thwarting Congress's intention to protect both human rights and science together in one law.

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