



BY FACSIMILE
31 July 1998



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SUBJECT: Yakama Nation Staff Comments to 6/29/98 DOI Protocol

Mr. McManamon:

It was good to meet with you and the federal staff at the 14 July 1998 "consultation," and to share with you some of our ideas regarding issues surrounding the Uyátpamá Naxtítayt (Ancient Remains). We hope that all is well with you, your family, and staffs, back in Washington, D.C.

We are writing to reinforce to you some of the ideas discussed at the 7/14/98 meeting, and to provide you with some additional comment on a residuum of issues not thoroughly covered at the 7/14/98 meeting.

As stated, now at several points in the administrative process on the custody of the Uyátpamá Naxtítayt, the Yakama Nation has taken a position against any and all further study. Our position remains unflagging that disposition of the remains must be to the Claimant Nation/Tribes, as soon as possible, for reburial. These are the teachings of the Yakama "traditional" Peoples. We know that we have strongly emphasized this in all of our discussions, but it bears repeating and reaffirming here.

Notwithstanding both the Yakama Nation's "no-test" position, and its knowledge that the Ancient Remains are ancestral to the Columbia Basin Peoples, the plaintiff-scientists have sued alleging a right to study, and the federal defendants have taken a similar, albeit somewhat different, position that some scientific investigation and study are necessary. The Yakama Nation's firm resolve in its commitment to the "traditional" teachings of "no study," makes the task of deliberating study and test protocols particularly disconsoling and dispiriting. Nevertheless, the Yakama Nation staff see our role, within this scientific drama adverse to the Yakama Nation interests, to be one of ensuring that only necessary and sufficient testing, with minimal insult, is done to the Ancestor, providing the probability of discrete, determinative data that the DOI judges it needs to arrive at a supportable conclusion of whether or not the

Ancient Remains are "Native American." Accordingly we are, and will continue to be, involved actively in any examination and testing issues involving the Uyátpamá Naxtítayt.

There are a small cluster of ideas already discussed at the 7/14/98 meeting, that require some reiteration:

- **Title.** As mentioned at the 7/14/98 meeting, the document title properly should be changed to "... Human Remains **Inadvertently Discovered** at Columbia Park" While there remain significant difficulties with the term "inadvertently discovered" from the Nation/Tribal worldview, it is the term-of-art set out in the statutory scheme, and its use would better track the statutory language.

- **"Non-intrusive."** At "Introduction," ¶3, the 6/29/98 Draft Protocol [hereinafter "Protocol"] contains that statement that "the first stage will be nonintrusive and nondestructive." Additionally, the title of Section II is set out as "Nonintrusive Procedures" At several points, as well, during the discussions of 7/14/98 meeting, the participants picked up the use of the term "noninvasive."

While the Phase 1 procedures may be deemed non-destructive, they cannot be considered either "noninvasive or nonintrusive." The entirety of the Phase 1 protocol is "intrusive" and "invasive" both to the Remain's privacy and dignity, and to the hearts, spirit, and teachings of the Yakama Peoples. The handling, investigation, measurement, probing - even discussion of the Remains - tread heavily upon the Yakama Nation's "traditional" cultural norms of "rest" for ancestors. We have noted, in both horror and sadness, the intrusive handling, cleaning, and other investigative actions taken during the coroner's investigation of the Uyátpamá Naxtítayt, and the extraordinary intrusive act of stabilizing some of the bones and gluing others together for scientific purposes.

While not perfect, use of the term "non-destructive" perhaps is more apt, and we suggest the change.

- **Purpose of 6/29/98 Protocol.** For our own confirmation, let us articulate our understanding of the purpose of the draft Protocol. This Protocol runs primarily to the issue of identification of the Uyátpamá Naxtítayt as "Native American." Of course, several of the proposed examinations and testings - should testing be judged necessary - also will run to the issue of "cultural affiliation"; but, technically, we understand that the DOI will develop and route a separate protocol, with attendant Nation/Tribal consultation, for what the DOI determines it needs in the way of additional, if any, physical handling, examination, testing to

answer the NAGPRA cultural affiliation question. Presumably this is why Section III "Investigations Related to Cultural Affiliation" remains "[To be developed]." If our understanding is in any way incorrect, please advise.

- **Definition of "Native American."** We also would like to obtain clarification of another point that continues to harry us in our understanding of the DOI position in this case. In the 12/23/98 McManamon letter, the federal government informed the Court that the term "Native American" "is clearly intended by NAGPRA to encompass all tribes, peoples, and cultures that were residents of the lands comprising the United States prior to historically-documented European exploration of these lands." In other words, whatever Peoples were here before the EuroAmerican explorers, are, by law, deemed "Native American," independent of physical features, metrical and non-metrical indicators, and apparently independent of genetic distance from contemporary Native Americans. We concur with your determination of this definition. If this is a "true" statement of the law, however, and if the Uyátpamá Naxtítayt is dated older than EuroAmerican exploration, the proof seems relatively uncomplicated to establish the Ancient Remains as "Native American."

Our notes of the 5/12/98 meeting, reflect that upon our questioning to DOI on this issue, you assured us that this opinion of the law continues to be the official federal opinion, but that there remain questions about the age of the Remains. It was pointed out that even if the Ancient Remains weren't exactly 9200+ years old, the Remains only needed to be +500 years old to satisfy this standard of "before EuroAmerican exploration." The probability is likely that the Remains are in that age range, given the preliminary corroborating evidence presented in the the draft report of Wakeley, et al. Perhaps, with tongue in cheek, we stated we would even stipulate to such an age, if we could be assured that that would bring the date of the Remains within the ambit of this definition of "Native American." The response, was that there are two choices to confirm the date issue: (1) either an additional C-14 test battery could confirm the age, or (2) because the Nation/Tribes are opposed to destructive testing, the DOI proposed the battery of non-destructive tests set out in the May and June DOI draft Protocols.

This single issue is critical to some Tribes' discussion and consultation with the DOI. The Nation/Tribes, for example, may elect to dispense with so much handling of the Remains during the extensive non-destructive testing, as set out in the 6/29/98 Protocol, and move directly to a dating confirmation procedure to settle the "Native American" issue. While this is an extraordinarily sensitive and delicate consideration for the Nation/Tribes, it is one surely to be weighed.

Let us suggest a possible alternative procedure to provide a relative certainty of date, without the destruction of another piece of bone of the Ancient Remains. The Wakeley, et al. Draft Report, submitted as an appendix to the Federal Defendant's Fourth Quarterly Status Report, notes, at 42, that "the question of association of the Remains with one sedimentary interval is still open," but that "[c]areful study of the sediments still associated with the Remains ... might answer questions about positioning or burial." Given the fairly firm data regarding the dates of the various sediments from the site, it appears that comparison of the sediments, if any, still attached to the bones, could provide an independent confirmation of date for the Ancient Remains. This procedure would have the additional advantage of not requiring the destruction of any further pieces of Remains to get at the dating issue. Please consider such a procedure for incorporation into the DOI protocol.

In sum, we request DOI confirmation or clarification of the accuracy of the assessment above to further the Nation/Tribal deliberations on this difficult issue.

- ***Additional consultation.*** A frequent topic of discussion at the 6/14/98 meeting was the need and extent of future consultation on the DOI Protocol. While we appreciate your verbal assurances, we are asking that you confirm in the final DOI Protocol that, before proceeding to destructive testing, the DOI again will consult with the Nation/Tribes on proper protocols for destructive testing. Our further comments on destructive analysis will await movement to Phase 2, should the DOI judge that necessary, and the development of more complete protocols.

- ***"Lineal descent."*** "Introduction," ¶6, contains the statement "it is not possible for any relationship of lineal descent to be made." Yakama Nation staff have three comments, that previously were raised at the 6/14/98 meeting, but which we reiterate here:

- There is no citation for such an aggressive statement. While it may sound logical, may even sound probable from a western scientific standpoint, that does not remove a requirement that some proof be provided to support such a statement. We note it ironic that when the Claimant Nation/Tribes make assertions, grounded in their belief systems and teachings, we are rebuffed with demands for proof. Here, we make no less a request for proof.

- Secondly, it appears to us that DOI has put the cart before the horse. The NAGPRA provides that a claimant may come forward making a claim, under NAGPRA § 3(a)(1), grounded in lineal descent. It then becomes the burden of the land management agency, or here, the DOI, to determine the validity of the claim based on the procedures set out at 43 CFR § 10.14. The "not possible" statement here makes the appearance that the DOI has pre-judged the issue, which we trust not to be true, and most surely will chill possible prospective claims of lineal descent.

- Lastly, we are putting in writing the objection, raised at the consultation, that most Native Peoples' "traditional" views of descendency overwhelmingly do not comport with the definition, set out at 43 CFR § 10.2(b)(1), of lineal descent. In our lifeways the concept is both much more expansive and more intricate than the "tracing [of] ancestry directly and without interruption" as set out in the NAGPRA Rules.

We recommend that you delete the sentence from the Protocol.

- **ICC/COC.** The "Introduction," ¶6, contains the statement that "the land where the Remains were discovered has not been judicially determined to be the aboriginal territory of any modern Indian tribe." As pointed out at the 7/14/98 meeting, this statement, to the uninformed, has the appearance of declaring that the lands belonged to no one - that there simply was a void on the landscape. This certainly is untrue; it is all the more emphatically untrue given the particularly heavily-used area of lands, by Columbia River ancestors, in and around the locus of this "inadvertent discovery." We will not proffer restructured language here since it is our recollection that other members of the Nation/Tribal Claimants will be crafting alternative language for DOI use.

- **C14 dating.** At several places in the 6/29/98 Protocol there are references to the "9000 years old" date of the Remains. Such statements are presumptive when the date has not been confirmed, a fact confirmed by DOI at "Introduction," ¶5 ("Ancient" date "suggested by radiocarbon date")(emphasis supplied), and the Plaintiffs, at Exhibit B, pp. 7-8, in 7/15/98 Plaintiff's Objections To Defendant's Timeline and Study Proposal.

The following represent our comments supplemental to those collective observations offered by Claimant Nation/Tribal staffs at the 7/14/98 meeting:

- At "Introduction," ¶6, the initial sentence states that "[o]ther investigations will be undertaken" Perhaps these "other" investigations simply are those listed recited in the latter half of that same paragraph. Nevertheless, this could be clarified. The Yakama Nation would be very concerned if there were other, unspecified investigations, not enumerated in the Protocol, and on which the Yakama Nation had not been consulted.
- We are mildly pleased with the draft Protocol's brief discussion of the "Current State of Information." While the discussion is not as complete and in-depth as we would prefer, it nevertheless is the first recorded statement by federal officials of the very flawed data and consequent conclusions that the Nation/Tribal Claimants have complained so bitterly about for two years now. We appreciate the initial DOI venture here. We also remind you of, and hold you to, your commitment that you will discuss, as well, the inadequacies of the existing destructive analyses done, to date, should the DOI take a decision that it needs such testing for NAGPRA compliance.
- ***Wakeley, et al. characterization of the "inadvertent discovery" site.*** At Protocol II.B., Wakeley is cited as a reference for a relatively specific description of the site of the "inadvertent discovery" - as "about" 10'x60'. The material that we have on file does not support such a characterization. The admitted "sporadic nature of the collections," and the accompanying reports - and many times, lack thereof - preclude such concretization. We are aware of at least eight separate collections from the site, see Nickens, Appendix I, at 13-15, to Wakeley, et al., of pieces of Remains, several of which receive only passing mention in text, with no specific reference to the physical location of the pick-up. Should there be additional information of which we are unaware, to permit such a statement, please provide us with the data and reports that warrant such a construction.
- ***Duplication of skeletal elements.*** At Protocol II.B.¶2 the statement is made that "[a]pparently there is no duplication of skeletal elements." We understand that that the statement likely is incorrect. We have been led to understand that a possible third pubis is contained among the Ancient Remains collection - indicating a duplication of skeletal element. We note, as well, the clear implications, that we trust the DOI also recognizes, of such a duplicate skeletal element, for any conclusions drawn in the Protocol regarding past C14 and mtDNA analyses.

- ***Examination, analysis, and test protocols.*** We are requesting that, as examination and test protocols - should the DOI eventually take a decision that it needs the latter - are developed, these be provided in writing to the Yakama Nation at least two weeks prior to the initiation of each individual examination or test. This will provide us with a brief but sufficient opportunity to review and comment on the proposed protocols prior to study. The Nation will commit to a 14 day deadline for providing comments to you, or you may proceed without undue delay. We trust that you will find this a satisfactory and sensible alternative to formal consultation on each protocol. You may send the protocols to the Office of Legal Counsel.

- ***Selection of experts.*** At Protocol II.A. the notation is made that the "experts [will be] selected by DOI." As with the protocols, we request that you apprise the Yakama Nation in writing at least two weeks prior to the final selection of test laboratory and principal investigator. This will provide us with a brief but adequate time in which to provide our comments to you, again, under the same conditions set out above for the investigation protocols.

Some of the Yakama Nation staff have had some experience with the U.S. Army Central Identification Laboratory, Hawai'i (CILHI). The CILHI recently was profiled in 19(10) CRM (1996). We recommend them for your screening of appropriate laboratory stations.

- ***Phase 1 Investigation***

- ***Graphic recording system.*** At Protocol II.C.1.¶2. A "graphic recording system" is noted to be part of the proposed inventory. Given the sensitivity of the Nation/Tribal Claimants to the issue of the Remains, and its deep general concerns for respect of ancestral Remains, and the Yakama Nation's extensive prior efforts to contain the public gawking and spectacle that such pictures/data engender, we would like to see some restrictions on distribution of data generated by the implementation of the Protocol. There are manifest associated issues of intellectual property here, especially when the Remains do prove to be "Native American," and to be culturally-affiliated with the Claimant Nation/Tribes.

Aside from the general mention of a graphic recording system, the Protocol fails to mention any other aspect of data recordation, photographic recordation, drawing, etc. that will be used to document the investigations and possible testing. There are many and

substantial concerns surrounding this issue that must be incorporated into the Protocol. The sensitivity of the Ancient Remains issue to the Nation/Tribal Claimants calls for consultation on this point.

It would be our preference to see that any decision on the public release of data on the Uyátpamá Nahtítayt be withheld from the public until after a determination is made by the DOI whether or not the Remains and "Native American." There is ample justification for such withholding in the NHPA § 304(a) and ARPA § 9(a). Should the judgement be made that the Remains are Native, the Claimant Nation/Tribes certainly would press for continued confidentiality. Should the DOI judgement come out otherwise, it obviously would be more difficult for us to continue to press for continued confidentiality.

● ***Characteristic indicators.*** At Protocol II.C.1.¶3. "Characteristics ... such as: the nasal sill, zygomatics, nasal guttering, prognathism, orthoanthism, and tooth alignment and shape should be noted as indicators of ethnic identity."

We need some data/information regarding the utility of these non-metrical indicators as "indicators." There are no citations to references, in the Protocol, from which we could glean how these "characteristics" are indicators of "ethnicity" - particularly for Paleolndian populations. Since we presume that the DOI has some basis for including these indicator characteristics, please provide us with appropriate references on the subject.

Please explain, as well, how "observable occupational indicators" indicate "ethnic identity"? We would appreciate some data, information, citations, other, to support this statement, especially as related to a set of Remains potentially 9K years old. What would a listing of occupations from that era look like? And how long could such a list be?

What is meant by the use of the term "ethnic identity" here and in other sections of the draft Protocol? Why was the term selected? The available literature is replete with academic debate on the definition of "ethnicity." As with the term "race," "ethnicity" is a sociological construct of much heated debate, not generally recognized as a scientific fact susceptible to rigorous proof. If you think "Native American" is a morass Moreover,

"ethnic," or derivatives thereof, appears nowhere in the NAGPRA or its Rules. Accordingly, we recommend that the DOI use the statutory term "Native American." Although there are equally significant difficulties surrounding the use of this term, it has the narrow advantage of being the term of statutory selection and legal art.

Later, at Protocol II.C.2.¶2, the Protocol variously uses the terms "population comparisons" and "population affiliations" In the second sentence, the term "ethnic affiliations" appears. Are these discreet terms of art? We are very concerned about the range and variety of terms, and lack of consistency of terms, used throughout the Protocol. It begins to take on the appearance that DOI, struggling with ambiguity of some NAGPRA statutory words, is opting for other, equally mercurial terms. At a minimum, terms of choice and comparison parameters should be defined in the Protocol; we may need to consult further, however, upon DOI's selection of definitional characteristics of some terms.

- At Protocol II.C.1.¶4, it is noted that a "detailed exam may be needed" Please confirm our understanding that there will be no invasive procedure beyond the already invasive handling, measuring, and recording of data expressly set out in Phase 1. Should there be any need to do additional probing, scraping, cleaning, the Claimant Nation/Tribes shall be consulted prior thereto.

Our concern here runs also to Protocol II.C.1.a., with its discussion of C14 dating of soils (*sic* "sediments"). It is our understanding that there will be no "testing" - e.g., C14 dating of "adhering soil" (*sic*) - without prior consultation with the Nation/Tribal Claimants.

- At Protocol II.C.1.b. At the 7/14/98 meeting, we received DOI assurance that the proposed "Analysis of Lithic Object," would be "visual analysis, in situ, only." We share other Claimant Tribes' staffs' expressed concerns about what this is going to provide the DOI in the way of determinable data regarding the answer to the "Native American" issue. Further analyses of the lithic object may provide some few facts about the object itself, but, can say precious little about whether the person in which it is embedded is or is not "Native American."

Nevertheless, given the original claim that the lithic date, when coupled with the yet-to-be-confirmed C14 date, provides corroborating evidence for the antiquity of the Remains, an expert diagnosis of what the object does and does not tell us, might prove helpful to expose the quality of prior assessments and deductive logic. There is to be no scraping or dislocation of any extant materials to assist the "visual analysis" without consultation.

- At Protocol II.C.2.¶2 the Protocol appears to be attempting to correlate osteometrics with genetics and ethnicity. Please provide us either with any available documentation that such correlation is possible/probable, or with an explanation.

- At Protocol II.C.2.¶2. As discussed at length at the 7/14/98 meeting, the Claimant Nation/Tribes are very concerned that comparisons of any derivative data from the Remains with "existing databases" are suspect. The existing database of PaleoIndian Human remains numbers in the low teens. With such a small data set, it would be a stretch for good science to draw firm conclusions.

On the other hand, there are existing, large databases, as noted, but these are not of PaleoIndian human remains. Use of these data sets surely will be extremely contentious, and any conclusions drawn unquestionably will be very debatable because of geographic, temporal, and possible genetic distances. We have difficulty seeing how this will adequately support any determination of whether the Remains are "Native American." We are very concerned about the danger of a false negative should the Remains be determined to lie outside the known/measured data sets. See, e.g., Goodman's discussion of Hooton's early work.

- At Protocol II.C.3.a. We fail to understand the relevance of trauma assessment to the central determination of whether the Remains are "Native American." While a statement is made that "[c]ertain patterns of skeletal trauma ... can be used as evidence concerning whether or not the Remains indicate someone of Native American descent," no citation is provided for support of this statement. Please provide some paleopathology reference

that links such trauma assessment to a potential determination of "Native American," especially as related to PaleoIndians.

- At Protocol II.C.2.¶2 The argument is made that the proposed metric recording and population comparisons have proved profitable in studies of ethnic affiliation. Again, see our comment about the words "populations," and "ethnic." In this instance the recorded metrics will be compared to "existing databases." We are uncertain as to what "existing databases" DOI is referring. Certainly there is at best a very shallow existing database on PaleoIndians, given the paucity of finds of skeletons in the date range of the Uyátpamá Naxtítayt. To what degree of certainty will comparison of the metrics, from Remains as old as the Ancient Remains, to the larger, "existing recorded Native American skeletal populations," assist in a determination of "Native American?" Is it not possible that, given the genetic distances at play here, and the range of intra-species variation, that this exercise, despite its antiquity of use in normative anthropology, is an exercise fraught with disabilities? Are there data correlating metrics from ancient sets of remains to the more modern databases? By focussing on "position[ing] of this set of remains within these populations of remains," doesn't DOI run the risk of a false negative if the data from the Ancient Remains are found to lie outside known/measured data sets? Please provide any documentation that may respond to our inquiries.

- At II.C.3. Again, while skeletal morphological aspects and teeth can display characteristics "linked to Native Americans," what provides the DOI with assurance that the characteristics that are normative in present-day Native Americans populations are present in PaleoIndian populations? Please provide documentation.

Consultation. We are very concerned with the decision on the part of the DOI that consultation has been completed on the Protocol. The DOI representatives, at the 7/14/98 consultation meeting, stated that there would be no further "meeting" on the proposed Protocol's Phase 1 or "Nonintrusive" procedures. See also, Exhibit A, the proposed DOI "Time-line for Transfer and Examination of Remains," to the 6/29/98 McManamon Declaration, included as an attachment to the Federal Defendant's Fourth Status Report. (Time-line contains no scheduled Nation/Tribal consultation

beyond that of 14-16 July 1998). Further, a 7/27/98 DOI letter, to the Yakama Nation Chairperson, states that, after submission of Nation/Tribes written comments by 7/31/98, the DOI will "then complete a final plan by 1 September 1998." See also, McManamon Declaration, ¶5, stating that "a revised draft [of the Protocol] is scheduled to be completed in August 1998."

The unilateral cut-off of consultation on this critical Protocol is unacceptable. We have set out above many of the concerns of the Yakama Nation, and have requested variously either responses, information, or documentation from the DOI. We note that the Plaintiffs, in Exhibit B to their 7/15/98 Objections To Defendant's Timeline and Study Proposal, at 7 and 9, mention that they have provided at least some of publications to the federal staff. We would appreciate copies of these materials. Upon receipt of the requested materials we expect to review them in a timely manner, and to provide additional commentary on various aspects of the Protocol that we already have touched upon, and perhaps have new or additional concerns generated by the materials provided by the DOI.

The Federal Defendant's Third Quarter Status Report, at ¶3, notes that Protocol development, "to the extent required by federal policy or law, ... will [] be carried out in consultation with" the Claimant Nation/Tribes. The DOI failure to provide further consultation on this issue, so central to the Claimant Nation/Tribes, is neither in keeping with the text of the federal government's own report to the Court in this matter, nor in keeping with the spirit or the text of President Clinton's 4/29/94 Executive Memorandum on Government-to-Government Relations. That document requires, among other things, at (b), that

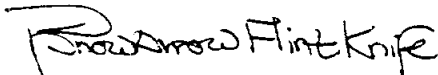
"Each Executive Branch Department or agency shall consult, to the fullest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals.

It is patently clear that any proposed investigation of the Uyátpamá Naxtítayt, against the expressed teachings and beliefs of the Yakama Nation, is an action that affects the Yakama Nation. We trust that this is roundly recognized at this point. Absent knowledge of the scientific foundations upon which the DOI has constructed its proposed Protocol, we cannot adequately "evaluate for ourselves" the Protocol, but can only question various of its aspects. A perfunctory, two-time consultation certainly does not satisfy the "to the fullest extent practicable" requirement of the President's Memorandum, and nothing in NAGPRA, or any other law of which we are aware, estops additional consultation on so important and precedential an issue as this. Cf. Exec. Order No. 13084, reprinted in 63 Fed Reg. 26755 (1998) ("Each

agency shall have an effective process to permit ... Indian tribal governments to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." (Emphasis supplied)).

The Yakama Nation has stated, since the earliest days of this "inadvertent discovery," that its ultimate goal is the earliest possible disposition of the Remains so that the Uyátpamá Naxtítayt can be put to rest. It is within the Yakama Nation's interest to expedite this administrative process. But expediency of process cannot hold sway over the deliberations both necessary and critical to resolution of the two central questions posed by the Court. Any examinations or testing in excess of that minimally necessary to provide data that directly bears upon the questions posed by the Court is repugnant to the Claimant Nation/Tribes, and violative of their most deeply held beliefs. The Yakama Nation only seeks assurance, through continued consultation, that the Protocol eventually adopted by the DOI will provide the necessary data, yet minimizes any further desecration of the Ancestor. We insist that the DOI provide the Yakama Nation with additional opportunity for consultation on the DOI Protocol. Contingent upon the receipt of the requested materials from the DOI, we can provide the DOI with an estimated timetable for completion of consultation on the Protocol.

Sincerely,



Office of Legal Counsel
Yakama Nation



Yakama Nation Archaeologist

cc: Robin Michael,
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