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Secretary of the Interior

WASHINGTON

Sept 21, 2000

The Honorable Louis Caldera
Secretary of the Army
101 Army Pentagon
Washington, D.C. 20310-0101

Dear Mr. Caldera,

This letter provides the Department of Interior's (DOI) final determination and resolution of the issues delegated to DOI by the Department of the Army (DOA) in a March 1998 interagency agreement. In this agreement, DOI agreed to make the following two determinations related to the set of human skeletal remains recovered on July 26, 1996, from Columbia Park, land controlled by the U.S. Army Corps of Engineers (COE), near the city of Kennewick, Benton County, Washington: 1) whether these human remains meet the definition for "Native American" within the meaning of the Native American Graves Protection and Repatriation Act (NAGPRA); and, if so, 2) the appropriate disposition of the remains under the terms of the statute and its implementing regulations at 43 C.F.R. Part 10.

In January 2000, DOI released its finding that the remains are considered Native American under the statute and regulations. The attached "Memorandum to the Assistant Secretary, Fish Wildlife and Parks" provides the background for this decision. (See Enclosure 1) The Native American determination was based upon chronological information supplied by the radiocarbon analysis of bone samples and previously conducted scientific examinations

The initial determination that the remains were Native American triggered the application of NAGPRA and the second inquiry regarding appropriate disposition. The disposition of Native American human remains is directed by Section 3 of NAGPRA and its implementing regulations. Section 3 establishes that the Federal government does not have the right of possession to or ownership of Native American human remains and other cultural items recovered from Federal or tribal lands after November 16, 1990. Instead, the statute is designed generally to promote the transfer of such remains and cultural items to the custody of lineal descendants, Indian tribes, or Native Hawaiian organizations. To that end, the statute establishes the following priority for such remains and cultural items that are excavated or removed from Federal or tribal lands after November 16, 1990:

1. in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or
2. in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony

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- A. in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
- B. in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
- C. if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe -
 1. in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or
 2. if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects. (25 U.S.C. 3002 (a)).

If found to fall under one of the hierarchical priorities enumerated at 25 U.S.C. 3002 (a) and at 43 C.F.R. 10.6 (a), the Native American human remains and cultural items are disposed of to the appropriate entity that claims their custody. If, however, it is determined that human remains or cultural items do not fit any of these categories, and, therefore, cannot be validly claimed, they are considered unclaimed for purposes of NAGPRA (25 U.S.C. 3002(b)).

The Report of the House Committee on NAGPRA described the statute's purpose as "to protect Native American burial sites and the removal of human remains, funerary objects, sacred objects, and objects of cultural patrimony on Federal, Indian and Native Hawaiian lands." (H.R. Rep. 101-877 p. 8.) Section 12 of NAGPRA recognizes the unique legal relationship between the United States and Indian tribes. Given its purpose and this recognition, DOI construes the statute as Indian legislation. Therefore, any ambiguities in the language of the statute must be resolved liberally in favor of Indian interests.

The Kennewick human remains were removed from Federal land, under the control of COE, after November 16, 1990. Therefore, Section 3 of NAGPRA and its implementing regulations at 43 C.F.R. 10.3-10.7 control the decisions addressing the scientific examination, determination of custody, and disposition of these remains. Other Federal law is also applicable under certain circumstances. For example, under Section 3 of NAGPRA and its implementing regulations at 43 C.F.R. 10.3-10.4, the Archaeological Resources Protection Act (ARPA) is invoked to ensure appropriate recovery, description, analysis, and documentation of human remains and other cultural items excavated or removed from Federal lands.

DOI gathered and considered an extensive array of information to reach the decision regarding the disposition of the Kennewick human remains. Representatives of DOI consulted, in accordance with the requirements of the Act and its implementing regulations (43 C.F.R. 10.5), with representatives and religious leaders of the Confederated Tribes of the Colville Reservation, Confederated Tribes of the Umatilla Reservation, Confederated Tribes and Bands of the Yakama Indian Nation of the Yakama Reservation, the Nez Perce Tribe of Idaho, and the Wanapum

Band, a non Federally recognized Indian group. All five Indian tribes have submitted a joint claim under NAGPRA for custody of the Kennewick human remains.

Additionally, data and observations supplied by DOI-sponsored investigations (Enclosure 2), reports submitted by the claimant Indian tribes and other relevant sources were collectively used to determine the disposition status of these remains. Many of the information sources are listed in the reference section of the cultural affiliation document (Enclosure 3).

Following the order of priority for custody set out in the statute, DOI first determined that a claim brought for the custody of the Kennewick human remains based upon lineal descent, under 25 U.S.C. 3002 (a)(1), cannot be validated. According to NAGPRA, lineal descendant "means an individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descent to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under these regulations" (43 C.F.R. 10.2 (b)(1)). Given the very ancient date for the Kennewick remains (9500-8500 years ago), we found that no present-day lineal descendants, as defined by NAGPRA at 43 C.F.R. 10.2 (b)(1), exist.

The Department further determined that a claim brought for the custody of the Kennewick human remains based upon its excavation or removal from tribal lands, under 25 U.S.C. 3002(a)(2)(A), cannot be validated. Under NAGPRA, tribal lands "means all lands which: (i) Are within the exterior boundaries of any Indian reservation including, but not limited to, allotments held in trust or subject to a restriction on alienation by the United States; or (ii) Comprise dependent Indian communities as recognized pursuant to 18 U.S.C. 1151..." (43 C.F.R. 10.2 (f)(2)). The Kennewick human remains were discovered on and removed from Federal lands administered by COE.

The Department next analyzed whether a claim could be validated based on cultural affiliation as required by 25 U.S.C. 3002(a)(2)(B) (see Enclosure 3). DOI reviewed geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, and other relevant information and expert opinion evidence to make this determination. All lines of evidence were deemed equally important and all were accorded equivalent weight. The determination of cultural affiliation requires evaluation of evidence from as many credible, reliable, and relevant sources of information as available. The standard of proof under NAGPRA is the "preponderance of the evidence." This is a threshold that many scholars hesitate to use for interpretations based upon archeological, anthropological, and historical evidence. The determination to be made here is informed by, but not controlled by, the evidence as a scholar would weigh it. Instead, the determination is for the Secretary of the Interior to make as the one that, on the evidence, would best carry out the purpose of NAGPRA as enacted by Congress.

While many sources of evidence may be considered, the statute and regulations do not specifically answer whether cultural affiliation with a single identifiable tribe is required, or whether such affiliation may be established with a group of modern-day Indian tribes filing a joint claim. Section 3002(a)(2)(B) speaks of an Indian tribe with the "closest cultural affiliation," which suggests a congressional recognition that more than one, and perhaps, many, tribes may have a cultural affiliation with remains discovered on federal land. We believe the statute permits finding cultural affiliation with one or more of multiple tribes where, as here, they submit a joint claim.

In examining the issue of cultural affiliation for this very ancient set of Native

American human remains, DOI considered the purpose of the statute, the general emphasis of NAGPRA's Section 3 on returning Native American remains and cultural items to Indian tribes, and the guidance set forth in the regulations at 43 CFR 10.14. While some gaps regarding continuity are present, DOI finds that, in this specific case, the geographic and oral tradition evidence establishes a reasonable link between these remains and the present-day Indian tribe claimants.

Cultural affiliation is defined as "a relationship of shared group identity that may be reasonably traced historically or prehistorically between a present-day Indian tribe or Native Hawaiian organization and an identifiably earlier group." 43 C.F.R. 10.14(c)). Consequently, cultural affiliation exists when there is (1) an identifiable present-day Indian tribe or Native Hawaiian organization with standing under NAGPRA and its implementing regulations, (2) evidence of the existence of an identifiable earlier group, and (3) evidence of a shared group identity that can be reasonably traced between the present-day Indian tribe or Native Hawaiian organization and the earlier group.

Four of the five Indian groups who have submitted a joint claim for the Kennewick remains constitute identifiable present-day Indian tribes with standing under NAGPRA and its implementing regulations¹. The attached report includes evidence of the cultural characteristics of the group that lived in the Columbia Plateau region during the lifetime of the Kennewick Man and evidence of a shared group identity that can be reasonably traced between the present-day Indian tribe claimants and the cultural group that existed in the Columbia Plateau region during the life time of the Kennewick Man.

Radiocarbon and other scientific information indicate that the Kennewick Man lived approximately 8500 to 9500 years ago. The modern-day claimant tribes are known to have been living in the Columbia Plateau region where the Kennewick remains were discovered at the time of the Lewis and Clark expedition in the early 1800s. Cultural and historical evidence firmly links the modern-day claimant tribes to the cultural pattern often referred to as the "Plateau culture" that existed in the Columbia Plateau region 2000-3000 years ago. Consequently, the cultural affiliation determination must focus on whether there is evidence establishing a reasonable cultural connection between the Indian tribes inhabiting the Columbia Plateau approximately 2000-3000 years ago and the cultural group, represented by the Kennewick human remains, which inhabited the same region 8500-9500 years ago.

The collected oral tradition evidence suggests a continuity between the cultural group represented by the Kennewick human remains and the modern-day claimant Indian tribes. The oral tradition evidence reveals that the claimant Indian tribes possess similar traditional histories that relate to the Columbia Plateau's past landscape. The oral tradition evidence also lacks any reference to a migration of people into or out of the Columbia Plateau.

Some of the evidence was too limited to draw any conclusions on the cultural relationship between the two groups. For example, there is very little evidence of burial patterns during the 9500-8500 period and significant temporal gaps exist in the mortuary record for other periods. Similarly, the linguistic analysis was unable to provide reliable evidence for the 8500-9500 period but suggests that the antecedents of the historic language may have been spoken on the Columbia Plateau 4000 years ago. The fact that the morphological characteristics of the remains differ from modern day Indian tribes may indicate a cultural discontinuity between the two groups, or may indicate that the cultural group associated with the Kennewick Man may have subsequently intermixed with other groups migrating into or through the region, leading to changes in the morphological characteristics of the group.

Cultural discontinuities are suggested by evidence that the cultural group existing 8500-9500 years ago was likely small in size and highly mobile while the Plateau culture consisted of larger, more sedentary groups. The evidence also suggests that there may have been differences in procurement and exchange of raw materials or specialized objects between the two time periods. New artifact types appear, such as the replacement of edge ground cobbles used in 8500-9500 with the mortars and pestles associated with the Plateau culture, and new materials are utilized.

The available information provides evidence of both cultural continuities and cultural discontinuities between the modern day claimant tribes and the cultural group that existed during the lifetime of the Kennewick Man. The cultural discontinuities are due, in part, to a lack of available data from the earlier time periods. Notably, none of the cultural discontinuities suggested by the evidence are inconsistent with a cultural group continuously existing in the region, interacting with other groups migrating through the area and adapting to changing climatic conditions.

After considering and weighing the totality of the circumstances and evidence, DOI has determined that the evidence of cultural continuity is sufficient to show by a preponderance of the evidence that the Kennewick remains are culturally affiliated with the present-day Indian tribe claimants.

DOI has further determined that a claim based on aboriginal occupation, 25 USC 3002(a)(2)(C)(1), is also a basis for the disposition of the Kennewick remains to the claimant Indian tribes in this case. The final judgments of the Indian Claims Commission (ICC) and the United States Court of Claims that encompass the Kennewick remains' recovery site and other judicially established Indian land areas have been extensively reviewed. For reasons explained in Enclosure 4, disposition under § 3002(a)(2)(C)(1) may not be precluded when an ICC final judgment did not specifically delineate aboriginal territory due to a voluntary settlement agreement. If the ICC's findings of fact and opinions entered prior to the compromise settlement clearly identified an area as being the joint or exclusive aboriginal territory of a tribe, this evidence is sufficient to establish aboriginal territory for purposes of § 3002(a)(2)(C)(1).

The Federal land where the Kennewick remains were found was the subject of several ICC cases brought by the Confederated Tribes of the Umatilla Reservation, a tribe composed of multiple Indian bands, in the 1950s and 1960s². These cases culminated in a final judgment in accordance with a compromise settlement. Although the compromise settlement did not delineate the aboriginal territory of the Umatilla, the ICC had previously determined in its opinion and findings of fact that several Indian tribes, including the Umatilla (Walla Walla and Cayuse) and Nez Perce, used and occupied this area where the Kennewick remains were found. (14 Ind. Cl. Comm. 14, (1964)). Because the Umatilla and Nez Perce, as well as the neighboring Yakama Tribe and Confederated Tribes of the Colville Reservation, have jointly filed a claim for custody of the remains under NAGPRA, DOI has determined that disposition to the claimant tribes is appropriate under 25 USC 3002(a)(2)(C)(1).

After reviewing the extensive cultural affiliation examinations and the history of the Indian Claims Commission findings, DOI has determined that proper disposition of the Kennewick remains based upon cultural affiliation and aboriginal occupation is to the claimants, the Confederated Tribes of the Colville Reservation, Confederated Tribes of the Umatilla Reservation, Confederated Tribes and Bands of the Yakama Indian Nation of the Yakama Reservation, the Nez Perce Tribe of Idaho, and the Wanapum Band.

This determination of disposition to the claimant Indian tribes under NAGPRA precludes any study of the remains by the public. Once a disposition decision has been made, NAGPRA does not permit further study prior to the transfer of the remains to the claimants. The claimants have been found to be the legal custodians of the remains and study may only be conducted with their permission.

Prior to any disposition of the Kennewick human remains, the COE must follow the procedures set forth in 43 CFR 10.6(c). These procedures include publishing general notices of the proposed disposition for the required time periods and respecting traditional customs of the claimant tribes when transferring custody.

Sincerely,
/s/ Bruce Babbitt

Enclosures

cc:
Patrick T. Henry, Assistant Secretary of the Army for Manpower and Reserve Affairs

Joseph W. Westphal, Assistant Secretary of the Army for Civil Works
Major General Hans A. Van Winkle, Deputy Commander for Civil Works, U.S. Army
Corps of Engineers
Brigadier General Carl A. Strock
Lieutenant Colonel Richard P. Wagenaar

¹One of the joint claimants, the Wanapum, is an unrecognized band that does not have standing to assert an individual claim under NAGPRA. However, as the other four joint claimants do have standing under NAGPRA, the fact that the Wanapum lacks standing does not preclude a disposition to the joint claimants under NAGPRA.

²In a Treaty dated June 9, 1855, and ratified March 8, 1859, (12 Stat. 945), the Umatilla, Walla Walla, and Cayuse Indians ceded lands, including the land where the Kennewick remains were found, to the United States and were formally confederated as the Confederated Tribes of the Umatilla Reservation.

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