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Sherry Hutt, Ph.D.
Manager, National NAGPRA Program
National Park Service
RIN 1024-AC84
1849 C Street, NW (2253)
Washington, D.C. 20240

Re: Proposed rulemaking
Native American Graves Protection and Repatriation Act Regulations
Disposition of Culturally Unidentifiable Human Remains
RIN 1024-AD68

Dear Dr. Hutt:

On Tuesday, October 16, 2007, the National Park Service (“NPS”) published proposed draft rules in the *Federal Register* to regulate the disposition of culturally unidentifiable human remains under the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. § 3001, *et seq.*¹ This notice provides for the acceptance of written comments from, *inter alia*, the general public, through January 14, 2008. The following are my comments.

I. Introduction

As an initial matter, and as I have stated in print in numerous places,² the general concept behind NAGPRA is an important one: the protection of the remains of culturally affiliated Native American³ human remains and the correcting of the past wrongs foisted upon the Native peoples of the United States by the *historic* field of anthropology. There is little doubt within the anthropological community of today that Native Americans’ remains, historically, were not

¹ Native American Graves Protection and Repatriation Act Regulations – Disposition of Culturally Unidentifiable Human Remains, 72 FR 58582.

² See e.g., Ryan M. Seidemann, *Time for a Change? The Kennewick Man Case and its Implications for the Future of the Native American Graves Protection and Repatriation Act*, 106 W. VA. L. REV. 149 (2003); Ryan M. Seidemann, *Congressional Intent: What is the Purpose of NAGPRA?*, 18(3) MAMMOTH TRUMPET 1 (2003); Ryan M. Seidemann, *Bones of Contention: A Comparative Examination of Law Governing Human Remains from Archaeological Contexts in Formerly Colonial Countries*, 64 LA. L. REV. 545 (2004).

³ For the purposes of efficiency, the term “Native American” as used in this letter refers to the terms “Native American,” “Native Hawaiian,” and members of any Alaska native village, as defined in 25 U.S.C. § 3001. Further, the term “group” as used in this letter refers to the terms “Indian tribe” and “Native Hawaiian organization,” as defined in 25 U.S.C. § 3001.

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afforded the respect that they deserved. To the extent that some of those past wrongs can now be undone by returning remains that were illicitly or surreptitiously gathered to groups that have a direct lineal and cultural connection to the deceased, such activities should proceed with all deliberate speed.

Such is not the subject of the currently proposed regulations. The currently proposed regulations would return unaffiliated human remains that were recovered historically as well as those using modern archaeological methods with the full knowledge of the public and with the utmost respect for the remains. In addition, the proposed regulations would mandate the return of ancient human remains that have no known living descendants, whether biological or cultural, based upon ephemeral standards of current group geographical location. Further, the proposed regulations are based, in part, on modern Western concepts of property ownership that are simply not reconcilable with unaffiliated human remains, or even human remains in general. Finally, as will be demonstrated below, the proposed regulations are not what Congress intended when it enacted NAGPRA in 1990. Indeed, the proposed regulations appear to represent an end-run around recent jurisprudence⁴ that properly interprets the purposes of NAGPRA.

II. NAGPRA – Congressional Intent

Before going any further, the NAGPRA legislation must be placed in its historical context. Any consideration of the history of NAGPRA must necessarily incorporate a review of the history of the National Museum of the American Indian Act (NMAIA).⁵ This Act started the repatriation ball rolling in the mid-1980s. NAGPRA grew out of Native American and lawmaker concerns over the disposition of the Smithsonian Institution's skeletal collections during the early NMAIA hearings. Since that time, both the NMAIA and NAGPRA have been considered together in the Congressional hearings and the legal literature. The histories of both NAGPRA and the NMAIA are considered in concert here, but are referred to as NAGPRA for convenience.

The legislative history is virtually devoid of references to material older than A.D. 1492.⁶ One

⁴ *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D.Or. 2002); *Bonnichsen v. United States*, 357 F.3d 962 (9th Cir. 2004); *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004).

⁵ 20 U.S.C. § 80(g).

⁶ See generally, Sen. Comm. on Indian Affairs, *Native American Cultural Preservation Act*, Hearings on S.187, 100th Cong. (Feb. 20, 1987) (hereinafter 1987 Senate hearings); Sen. Comm. on Indian Affairs, Comm. on Rules and Administration, *National American Indian Museum Act (Part 1)*, Hearings on S.1722 and S.1723, 100th Cong. (Nov. 12, 1987); Sen. Comm. on Indian Affairs, Comm. on Rules and Administration, *National American Indian Museum Act (Part 2)*, Hearings on S.1722 and S.1723, 100th Cong. (Nov. 18, 1987); Sen. Comm. on Indian Affairs, *Native American Museum Claims Commission Act*, Hearings on S.187, 100th Cong. (July 29, 1988) (hereinafter 1988 Senate hearings); House of Rep. Comm. on Interior and Insular Affairs, Comm. on House Administration, Comm. on Public Works and Transportation, *Establishment of the National Museum of the American Indian*, Hearings on H.R.2668, 101st Cong. (Mar. 9, 1989; July 20, 1989) (hereinafter 1989 House hearings); Sen. Comm. on Indian Affairs and Sen. Comm. On Rules and Administration, *National Memorial Museum of the American Indian*, Hearings on S.978, 101st Cong. (May 12, 1989); Sen. Comm. on Indian Affairs, *Native American Grave and Burial Protection Act (Repatriation)*; *Native American Repatriation of Cultural Patrimony Act*; and *Heard Museum*

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of the few instances in which Congress made a statement regarding ancient remains is the following quote from Senator Inouye (D-HI).

We are also fully in concurrence with the importance of knowing how we lived a thousand years ago or a million years ago, whatever it may be.⁷

What is abundantly evident from the legislative history is that Congress was especially concerned with reparations for the wrongs committed against Native Americans since A.D. 1492.⁸ Issues of the age of remains are dominated by an interest in United States Army acquisitions in the nineteenth century.⁹ Indeed, the members of the museum and anthropological community attempted to raise questions of ancient remains in their testimony before Congress,¹⁰ but these attempts were not addressed by the Congressional committees.¹¹ Instead, Congress immediately reverted to questions of the whereabouts and disposition of recent remains.¹² Indeed, in at least one report issued by Congress subsequent to hearings on the NMAIA, the House of Representatives Committee on Public Works reports that “H.R. 2668 provides a reasonable method and policy for the repatriation of Indian bones and funerary objects in the

Report, Hearings on S.1021 and S.1980, 101st Cong. (May 14, 1990) (hereinafter 1990 Senate hearings); House of Rep. Comm. on Interior and Insular Affairs, *Protection of Native American Graves and the Repatriation of Human Remains and Sacred Objects*, Hearings on H.R.1381, H.R.1646, and H.R.5237, 101st Cong. (July 17, 1990) (hereinafter 1990 House hearings). See also, S. Rep. No. 100-494 (Aug. 25, 1988); S. Rep. No. 100-601 (Oct. 21, 1988); S. Rep. No. 101-143 (Sept. 27, 1989); H.R. Rep. No. 101-340 (Part 1) (Nov. 9, 1989); H.R. Rep. No. 101-340 (Part 2) (Nov. 13, 1989); S. Rep. No. 101-473 (Sept. 26, 1990); H.R. Rep. No. 101-877 (Oct. 15, 1990). The legislative history includes the history of NAGPRA and the NMAIA. Inclusion of the history of the NMAIA is due to the fact that many of the provisions of NAGPRA are modeled on this earlier law. See S. Rep. No. 101-473, *supra*, at 3.

⁷ 1988 Senate hearings, *supra*, at 66.

⁸ “It is the view of this Committee that there is a need for legislation in order to rectify the harm which has been inflicted upon Native American religious liberty and cultural integrity by the systematic collection of Native American skeletal remains, grave goods, and certain ceremonial objects which are required for the on-going conduct of religion.” S. Rep. No. 100-601, *supra*, at 2.

⁹ This is evidenced by the following quote. “How many were acquired during the Indian Wars?” Question by Senator Inouye, 1988 Senate hearings, *supra*, at 50. See also, 1989 House hearings, *supra*, at 115, 119, 181-185; 1987 Senate hearings, *supra*, at 32. See also, S. Rep. No. 100-494, *supra*, at 28; S. Rep. No. 100-601, *supra*, at 2,4.

¹⁰ E.g., “I don’t think that it necessarily follows that the bill pertains only to extremely recent remains.” Comment by Dr. Thomas King, 1987 Senate hearings, *supra*, at 50. See also, Dr. Richard Stamps’ comment that, “I have been told that all artifacts from the Earth are spiritual and should be returned. Where do you draw the line?” 1989 House hearings, *supra*, at 276.

¹¹ Immediately after the comment by Dr. King, *supra*, Senator Inouye returned to questions of recent remains, never addressing the issue of the application of the bill to ancient remains. *Id.* See also the comments of Dr. Keith Kintigh, 1990 House hearings, *supra*, at 138. In this case, the problem was acknowledged by the Congressmen, but they, too, quickly returned to a discussion of recent remains, admitting that they did not know what to do about ancient, unaffiliated remains. 1990 House hearings, *supra*, at 230. See also the statements of Dr. Robert Adams, 1989 House hearings, *supra*, at 228, 265-267. These discussions did not amount to any resolution of note.

¹² 1987 Senate hearings, *supra*, at 50; 1990 House hearings, *supra*, at 230. Indeed, S. Rep. No. 100-601, *supra*, at 4 indicates that at least the Senate was not at all concerned with remains recovered through legitimate archaeological excavations.

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possession of the Smithsonian Institution. However, many human remains in the collection are of unknown origin and will, therefore, remain in the collection.”¹³

The record from the Congressional hearings on pre-NAGPRA bills are replete with references to and concerns about remains that are 200 or less years old.¹⁴ Indeed, Senator Inouye went as far as stating that remains as old as 2,000 years were not the primary interest of the bill.¹⁵ Additionally, Senator Melcher, who was the author of the original Senate repatriation bill,¹⁶ stated that, “remains were also obtained by archaeologists. In general those are older remains, gathered for study to piece together the millennium of our unknown beginning. *We do not intend in any way to interfere with this study and science in the bill.*”¹⁷

In only a few places were there vague references to a question of ancient items and the difficulty of cultural affiliation on the part of Congress. One such reference was to cultural material and not human remains.¹⁸ The remainder of comments addressing the application of this legislation to ancient remains were raised by the archaeological, museum, and Native American communities. In testimony before the Senate Select Committee on Indian Affairs, representatives of the archaeological and museum communities raised issues of problems with the legislation’s application to ancient remains. These issues were ignored by the Senators.¹⁹ Representative Charles Bennett (D-FL) directly addressed the issue of ancient remains in the House of Representatives hearings in 1990. He commented that, “we should not overlook the fact that there are some of the deceased who don’t have modern descendants, and *their remains still should be kept with care.*”²⁰ This strongly suggests that Congress’ intent for the repatriation legislation was that it should not apply to ancient remains.²¹ Senator Daniel Akaka (D-HI) also

¹³ H.R. Rep. No. 101-340 (Part 1), *supra*, at 16. *See also, id.* at 15, commenting that repatriation was only intended to apply to the remains of known individuals.

¹⁴ *See e.g.*, 1987 Senate hearings, *supra*, at 50, 60, 68; 1988 Senate hearings, *supra*, at 48, 50, 65; there was no addressing of the age of remains in the 1990 Senate hearings. *See also*, 1990 House hearings, *supra*, at 36. *See also*, H.R. Rep. No. 101-877, *supra*, at 10.

¹⁵ 1987 Senate hearings, *supra*, at 50.

¹⁶ S.187, 100th Cong. (1987).

¹⁷ 1987 Senate hearings, *supra*, at 27 (emphasis added).

¹⁸ 1990 Senate hearings, *supra*, at 68. The House of Representatives hearings in 1989 did address the problematic issue of cultural affiliation. *See* 1989 House hearings, *supra*, at 195. However, the consideration of this important issue was limited to a question posed by Rep. Ben Campbell (R-CO) regarding whether tribes would fight over reburial rights to remains of questionable affiliation. No answer to this question appears in the record, and the issue was not addressed again.

¹⁹ *See e.g.*, 1987 Senate hearings, *supra*, at 50; 1988 Senate hearings, *supra*, at 64. For a similar response in the House of Representatives, *see* 1989 House hearings, *supra*, at 17, 228; 1990 House hearings, *supra*, at 138. The Native American community also mentioned ancient remains on several occasions. Their attempts at getting this issue addressed were also largely unsuccessful. *See e.g.*, 1990 House hearings, *supra*, at 111, 123; 1989 House hearings, *supra*, at 149-153 (Mr. Echo-Hawk addressing the disposition of all remains), 181-185 (Congress responding by questioning nineteenth century actions, with no reference to ancient remains).

²⁰ 1990 House hearings, *supra*, at 130 (emphasis added).

²¹ Although Rep. Bennett’s statement continues that, “I think that they would feel that these remains and their ways of being buried should also be respected and taken care of in any legislation we pass” almost seems to suggest an

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touched on this notion, and stated that, “I think there should be some consideration in the bill that would speak to this, so that the Government may be ... the caretaker of peoples who are extinct.”²²

Based upon the foregoing examination of the legislative history of NAGPRA, it is difficult to argue that the proposed regulations encapsulate the intentions of Congress when it passed this landmark legislation in 1990. It is apparent from the legislative history that Congress intended to leave intact the study of ancient, unaffiliated remains, without the fear that such remains would be subject to repatriation to an unaffiliated present-day group. Such a contrary purpose is precisely what the currently proposed regulations would facilitate.

III. Geographic Affiliation is Not Supported by the Law

Section 10.11(c)(1)(iii) of the proposed regulations does not comport with the purposes of NAGPRA. As was demonstrated above, Congress did not intend for NAGPRA to simply give any remains to any existing group with no consideration for cultural affiliation. Indeed, due to the highly mobile nature of Native American groups in the years since European contact, it is without scientific support to claim or assume that human remains excavated from one locale must be culturally or genetically related to the group or groups that are currently occupying that area. It simply may be impossible to identify cultural relationships between the culture to which a particular collection of human remains belongs and modern Native American groups.

As written, NAGPRA does contain some geographic affiliation language.²³ However, this language refers only to the disposition of human remains excavated in a post-NAGPRA environment. It is probable that Congress did not attempt to apply similar laws to unaffiliated remains that were already in archaeological collections around the country because they recognized that geographic proximity is not tantamount to cultural or biological affiliation. Because NAGPRA is intended to provide a mechanism for reclaiming the remains of individuals whose groups are extant – thus righting the wrongs of the nineteenth and early twentieth century anthropologists and their dubious collection practices – the geographic proximity language that does exist in NAGPRA cannot be applied to unaffiliated remains excavated pre-NAGPRA. Such an action would be contrary to the law and would not represent a reasonable application of the power granted to NPS or the Department of the Interior (“DOI”) by Congress.

intent to have NAGPRA apply to ancient remains (at least to ensure respect for them), Bennett quickly dispels this notion by stating that, “[w]e should not overlook the fact that they [sic] are not modern descendants to take care of those remains and we as a nation should take care of those remains.” 1990 House hearings, *supra*, at 130.

²²*Id.* at 135.

²³ See *e.g.*, 25 U.S.C. § 3005(a)(4).

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IV. Property Law Problems and Current Archaeological Methods

The proposed regulations rely on modern concepts of property ownership and attempt to apply these concepts to human remains. The proposed regulations would permit institutions to retain control over human remains that to which they can prove a right of possession. 72 FR 58589 (proposed 43 CFR § 10.11(c)(1)). This provision erroneously implies that the dominion over human remains is a transferable property right. Such is simply not the case in the absence of a lineal relationship. Once there is no longer an identifiable cultural or genetic link between human remains and an extant group of people, the remains of these ancient people become a ward of the State.²⁴ The government thus has a public trust duty to ensure that such remains are kept with care and respect and to ensure that the information that can be learned from these remains is not lost through arbitrary reinterment.

In addition to the mischaracterization of human remains as property, the proposed regulations also fail to consider the dichotomy between the excavation of Native American remains under modern anthropology and the same excavation under the anthropology of the past. NAGPRA was created to address the acquisition problems of the latter. Pre-NAGPRA excavations of human remains that fall within the ambit of modern anthropological study, by and large, were recovered according to strict modern ethical and scientific standards. These remains also were recovered with the full knowledge of the public. NAGPRA was not intended to stifle this sort of science. There is no doubt that objections of lineal descendants were not considered during the nineteenth and early twentieth century when human remains were disinterred and secreted to America's museums to fulfill the colonial desire to subjugate the conquered peoples of the United States. Such is not the case today and it was not the case for many years prior to the passage of NAGPRA. Institutions with meaningful research and teaching collections that were acquired in open view of the public, ethically, and according to the law should not now be penalized by reburying these collections to whom lineal affiliation cannot be determined. NAGPRA was never intended to be applied in this manner. Accordingly, the proposed regulations are inconsistent with the authority that Congress delegated to NPS and DOI through NAGPRA.

V. The Continued Need for Study of Ancient and Recent Remains

Human skeletal remains have been studied by anthropologists since the mid-nineteenth century.²⁵ The uses of these remains can largely be divided into two categories: general human history and medical/forensic applications.

²⁴ Indeed, as was noted above, that is precisely what Congress had envisioned for ancient remains during the NAGPRA debates. See, Testimony of Rep. Bennett, 1990 House hearings, *supra*, at 130.

²⁵ See generally, Jerome C. Rose, Thomas J. Green, and Victoria D. Green, *NAGPRA Is Forever: Osteology and the Repatriation of Skeletons*, 25 ANN. REV. ANTHROPOL. 81 (1996); Stephen D. Ousley, William T. Billeck, and R. Eric Hollinger, *Federal Repatriation Legislation and the Role of Physical Anthropology in Repatriation*, 48 YEARBOOK PHYS. ANTHROPOL. 2 (2005).

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Human skeletal remains are used to better understand the lifeways of past peoples.²⁶ These remains offer a glimpse into human morphological variation between groups and across time. The general consensus in academia regarding studies of human remains, especially on ancient skeletal material is that, “bones ... offer a picture of time in our collective history.”²⁷ Yet another scholar captures the collective history argument thus: “all humans are members of a single species, and ancient skeletons are the remnants of unduplicable evolutionary events which all living and future peoples have the right to know about and understand.”²⁸

Data derived from the study of human skeletal remains can provide insights into population movement and migration as well as the specific genetic composition of individual populations.²⁹ Additionally, skeletal studies provide insights into the impacts of pathological conditions on humans.³⁰ Such studies allow for the interpretation of the interactions of humankind with various diseases and have applications to both the study of past peoples and the investigation of remains associated with modern crimes. Examinations of dentition and skeletal remains have led to the reconstruction of prehistoric diets and health patterns,³¹ a necessity to understanding the complex lifeways of past cultures.

The study of ancient human skeletal remains also contributes to contemporary medical and forensic fields. Many of the techniques used in the identification of war dead, victims of mass

²⁶ See generally, Jane E. Buikstra and Douglas H. Ubelaker, STANDARDS FOR DATA COLLECTION FROM HUMAN SKELETAL REMAINS (Arkansas Archaeological Survey 1994); Colin Pardoe, *Why Physical Anthropology and Why Now?*, 28 COMA: BULL. CONF. OF MUSEUM ANTHROPOL. 40 (1996); Douglas W. Owsley, *Human Bones from Archaeological Context: An Important Source of Information*, 8 TENN. ANTHROPOL. 20 (1983).

²⁷ Peter R. Afrasiabi, *Property Rights in Ancient Human Skeletal Remains*, 70 S. CAL. L. REV. 805, 808 (1997).

²⁸ Christy G. Turner, II, *What is Lost With Skeletal Reburial? I. Adaptation*, 7(1) Q. REV. OF ARCHAEOLOG. 1 (1986).

²⁹ All of these tests can be accomplished (with varying degrees of accuracy) through the use of nondestructive means by the examination, recordation, and statistical analysis of metric and nonmetric traits of the human skeleton and dentition. See generally, G. Hauser and G.F. De Stefano, *Epigenetic Variants of the Human Skull* (Schweizerbart 1989). See also, Buikstra and Ubelaker, *supra*; Christy G. Turner, II, C. Nichol, and G. Scott, *Scoring Procedures for Key Morphological Traits of the Permanent Dentition: The Arizona State University Dental Anthropology System* in ADVANCES IN DENTAL ANTHROPOLOGY 13 (M. Kelley and Clark Spencer Larsen, eds., Wiley-Liss, 1991).

³⁰ Innumerable studies have been accomplished on individual samples, leading to the creation of pathological compendia. E.g., Donald J. Ortner and W.G.J. Putschar, IDENTIFICATION OF PATHOLOGICAL CONDITIONS IN HUMAN SKELETAL REMAINS (Smithsonian Institution Press, 1985). See also, Charlotte Roberts and Keith Manchester, THE ARCHAEOLOGY OF DISEASE, 2d ed. (Cornell Univ. Press, 1995); Arthur C. Aufderheide and Conrado Rodríguez-Martín, THE CAMBRIDGE ENCYCLOPEDIA OF HUMAN PALEOPATHOLOGY (Cambridge Univ. Press, 1998).

³¹ See e.g., M.W. Elvery, N.W. Savage, and J.B. Wood, *Radiographic Study of the Broadbeach Aboriginal Dentition*, 107(2) AM. J. PHYS. ANTHROPOL. 211 (1998);; Lori E. Wright, *Biological Perspectives on the Collapse of the Pasion Maya*, 8 ANCIENT MESOAMERICA 267 (1997); Judith Littleton and Bruno Frohlich, *Fish-Eaters and Farmers: Dental Pathology in the Arabian Gulf*, 92 AM. J. PHYS. ANTHROPOL. 427 (1993); Mary Jackes, David Lubell, and Christopher Meiklejohn, *Healthy but Mortal: Human Biology and the First Farmers of Western Europe*, 71 ANTIQUITY 639 (1997). The variety in the sources cited here illustrates several things: the international scope of skeletal studies and the cross-cultural applicability of research results (see, Elvery *et al.*, Table 1).

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disasters,³² and the victims of crimes were, and continue to be, developed on prehistoric human remains.³³ One example of this is the recent development of a sexing method for skeletal remains³⁴ that was initially devised and tested on a six thousand year old Native American archaeological sample³⁵ and has since been developed into a forensic identification method³⁶ and applied to the identification of American war dead from Southeast Asia.³⁷ Additionally, nondestructive studies of indigenous remains are currently being used to identify relationships between diet and dental anomalies.³⁸ Finally, the once extensive comparative indigenous skeletal collections around the world are “used in educating medical scientists concerning bone biology and human variation.”³⁹

The curation of human skeletal remains over long periods of time has several benefits. The primary benefit is the reality that new technology will be developed that will allow for more information to be obtained from the remains. No one could have imagined that, prior to the advent of PCR amplification of trace DNA material,⁴⁰ genetic data could be gathered on a long extinct population⁴¹ or species.⁴²

³² An example of this was the use of such methods in the recovery and identification efforts following the Branch Davidian compound standoff in Waco, Texas in the early 1990s. *See e.g.*, M.M. Houck, Douglas Ubelaker, Douglas Owsley, E. Craig, W. Grant, R. Fram, T. Woltanski, and K. Sandness, *The Role of Forensic Anthropology in the Recovery and Analysis of Branch Davidian Compound Victims: Assessing the Accuracy of Age Estimations*, 41 J. FORENSIC SCI. 796 (1996); *see also*, Jane E. Buikstra, *A Specialist in Ancient Cemetery Studies Looks at the Reburial Issue*, 3 EARLY MAN 26 (1981).

³³ Jane E. Buikstra, *Reburial: How We All Lose*, 17 SOC. FOR CALIFORNIA ARCHAEOLOG. NEWSLETTER 1 (1983).

³⁴ Ryan M. Seidemann, Christopher M. Stojanowski, and Glen H. Doran, *The Use of the Supero-Inferior Femoral Neck Diameter as a Sex Assessor*, 107 AM. J. PHYS. ANTHROPOL. 305 (1998).

³⁵ Ryan M. Seidemann, *Sex Assessment of the Human Femur Neck in Prehistoric Populations* (unpublished manuscript completed in 1994).

³⁶ Christopher M. Stojanowski and Ryan M. Seidemann, *A Reevaluation of the Sex Prediction Accuracy of the Minimum Supero-Inferior Femoral Neck Diameter for Modern Individuals*, 44 J. FORENSIC SCI. 1215 (1999).

³⁷ Franklin Damann, Anthropologist, United States Central Identification Laboratory, HI, personal communication, May 4, 2001.

³⁸ Ericka L. Seidemann, Ryan M. Seidemann, and Glen H. Doran, *The Occurrence of the Palatine Torus in the Windover Site Skeletal Sample* (presentation at the American Anthropological Association annual meeting, New Orleans, LA, 2002).

³⁹ Buikstra, *supra*, at 2. *See also*, Colin Pardoe, *Farewell to the Murray Black Australian Aboriginal Skeletal Collection*, 5 WORLD ARCHAEOLOG. BULL. 119 (1991); Tobias, *supra*.

⁴⁰ “Prior to the invention of PCR, it was not possible to retrieve enough high molecular weight DNA from ancient remains to perform DNA sequencing or restriction fragment length polymorphism (RFLP) analyses.” D. Andrew Merriwether, David M. Reed, and Robert E. Ferrell, *Ancient and Contemporary Mitochondrial DNA Variation in the Maya* in BONES OF THE MAYA: STUDIES OF ANCIENT SKELETONS at 208 (Stephen L. Whittington and David M. Reed, eds., Smithsonian Institution Press 1997). In short, this recent development revolutionized the field of archaeological DNA analyses.

⁴¹ *See e.g.*, Glen H. Doran, ed., WINDOVER: MULTIDISCIPLINARY INVESTIGATIONS OF AN EARLY ARCHAIC FLORIDA CEMETERY (Univ. Press of Florida, 2002).

⁴² *See e.g.*, I.V. Ovchinnikov, A. Gotherstrom, G.P. Romanova, V.M. Kharitonov, K. Liden, W. Goodwin, *Molecular analysis of Neanderthal DNA from the northern Caucasus*. 404 NATURE 490 (2000).

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In addition to the use of new technology, the ability to reexamine prior research often leads to a refinement of previous scholars' interpretations. This was recently demonstrated in a reanalysis of a Florida skeletal sample.⁴³ In this case, an original analysis of the individuals from the Calico Hill site in Florida identified malignant tumors in the two crania.⁴⁴ However, a more recent examination determined that the tumors were actually root damage, a fact that drastically changed the paleopathological status of the sample.

Perhaps even more important than some of the more esoteric scientific studies, human remains research has actually been used in the past decade to promote the purposes of NAGPRA. There are several examples of this scenario. One such example tells of a Native American skull that was confiscated in California and the classic physical anthropological analyses that were used (based largely on craniometrics obtained from comparative samples of Native American remains) to positively identify the grave from whence the skull had been stolen.⁴⁵ I have recently also participated in an attempt to identify a probable Native American skull recently recovered from a bust prompted by a sale of the skull on eBay. Unfortunately, due to the dearth of comparative craniometrics from the southeastern United States, it is virtually impossible to determine even a regional affiliation of the recovered skull.⁴⁶

Such would not be the case if more Native American remains were available for comparative study. What few remains continue to exist in collections around the country would be lost to study with the publication of the proposed rules. This would mean that future analyses of recovered remains from such illicit sales, which appear to be on the rise,⁴⁷ will continue to be difficult, if not impossible, thus frustrating the purposes of the law that the proposed regulations purport to support. This untenable position was certainly not the intent of Congress when it passed NAGPRA.

VI. The Proposed Regulations Appear to Frustrate Their Own Purpose

Section 10.9(e)(5) of the proposed regulations imposes conflicting duties on institutions that house unaffiliated remains. This section requires that institutions provide more information on

⁴³ Rachel K. Smith, *Analysis of Skeletal Material from Calico Hill, Florida: A Question of Paleopathology vs. Taphonomy*, 55 FLORIDA ANTHROPOLOGICAL 59 (2002).

⁴⁴ Dan Morse, R.C. Dailey, and Jennings Bunn, *Prehistoric Multiple Myeloma*, 50 BULL. N.Y. ACAD. MED. 447 (1974).

⁴⁵ Turhon A. Murad and Todd D. Murad, *The Postmortem Fate of Pat Gregory: A Disinterred Native American*, 45(2) J. FORENSIC SCI. 488 (2000).

⁴⁶ Christopher M. Stojanowski, Report of Skeletal Remains for the Attorney General of the State of Louisiana, Case ID Number 33-238 (2007).

⁴⁷ Angie K. Huxley and Michael Finnegan, *Human Remains Sold to the Highest Bidder! A Snapshot of the Buying and Selling of Human Skeletal Remains on eBay, an Internet Auction Site*, 49(1) J. FORENSIC SCI. 17 (2004); Piotr A. Kubiczek, *Commentary on: Huxley AK, Finnegan M. Human Remains Sold to the Highest Bidder! A Snapshot of the Buying and Selling of Human Skeletal Remains on eBay, an Internet Auction Site*, 49(5) J. FORENSIC SCI. 1137 (2004).

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the remains that they hold regarding affiliation and other matters to potentially interested groups. Conversely, the rule restricts study to gain the further information that the institutions must provide. This proposed regulation establishes an impossible standard for institutions to meet. They cannot provide more information without being provided the opportunity to collect that information.

Indeed, this new restriction on the further study of unaffiliated remains is not supported by the original law. The original law permits continued research, without restriction, on unaffiliated remains. As has been belabored, at length, above, Congress did not intend, with NAGPRA, to frustrate the scientific study of ancient human remains.⁴⁸ Indeed, DOI does not, as has recently been discussed, have any Congressionally-granted authority to restrict the scientific study of unaffiliated human remains under any of its organic legislation.⁴⁹ As such, to the extent that the proposed regulations purport to restrict the scientific study of unaffiliated human remains, the proposed regulations are not in accordance with the authority granted to DOI or NPS under NAGPRA.

VII. The Courts Have Already Stated that Such Regulations as those Proposed by NPS/DOI are Not Supported by NAGPRA

In *Bonnichsen v. United States*,⁵⁰ a group of scientists sought to study the skeletal remains of an ancient individual, nicknamed Kennewick Man, who was found in Washington state. This case, which bumped around among the district court, the Ninth Circuit, and DOI for nearly eight years, represents the most substantial review of NAGPRA to date. The well-reasoned decision of Magistrate Judge John Jelderks provides insightful guidance for any regulations developed under NAGPRA authority.

With respect to the claims of DOI and the various Native American groups that were parties to the Kennewick Man case that the remains were affiliated regardless of age and attenuation of culture, Jelderks commented that, “courts do not assume that Congress intends to create odd or absurd results.”⁵¹ Jelderks was referring to the claim that NAGPRA should be read to mean that all individuals present in the United States before A.D. 1492 are subject to that law. Taken to its ends, such an interpretation – as in now urged by the proposed regulations – would mean that if remains of the Vikings, known to have inhabited portions of northeastern North America at least as early as A.D. 1000⁵² are found, they would have to be turned over to Native American control.

⁴⁸ 1987 Senate hearings, *supra*, at 27; 1988 Senate hearings, *supra*, at 66.

⁴⁹ See generally, Ryan M. Seidemann, *The Reason Behind the Rules: The Archaeological Resources Protection Act of 1979 and Scientific Study*, 13 B.U. J. SCI. & TECH. L. 193 (2007).

⁵⁰ *Bonnichsen v. U.S.*, 217 F.Supp.2d 1116 (2002) (hereafter, “Kennewick Man case”).

⁵¹ *Id.* at 1136.

⁵² This is the generally accepted date of the arrival of Norse Vikings on the North American continent. See generally, William W. Fitzhugh and Elisabeth I. Ward (eds.), *VIKINGS: THE NORTH ATLANTIC SAGA* (Smithsonian Institution Press 2000). There is, as yet, no evidence suggesting earlier forays into North America by these groups, but the possibility must not be ruled out for lack of data. Another example of possible problems of applying this

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This “[a]pplication ... could yield some odd results”⁵³ to say the least. Jelderks additionally commented that “[t]his court cannot presume that Congress intended that a statutory definition of ‘Native American’ requiring a relationship to a ‘tribe, people, or culture that is indigenous to the United States’ yield such far reaching results”⁵⁴ as to extend to culturally unrelated groups of unknown origin that inhabited the territory now encompassed by the United States at some time in the distant past.

In the determination of affiliation under NAGPRA, Judge Jelderks held that it was not enough that the remains in question are potentially of Native American origin, but that they must be related to a currently existing culture for a valid NAGPRA claim to be made.⁵⁵ He based this conclusion on the present tense inherent in the definition of Native American in 25 U.S.C. 3001(9).⁵⁶ The judge reasoned that such an interpretation, “requiring a ‘present-day relationship’ is consistent with the goals of NAGPRA: Allowing tribes and individuals to protect and claim remains, graves, and cultural objects to which they have some relationship...”⁵⁷ This is an important reality when considering the currently proposed regulations. Although attempts have been made to redefine the term “Native American” in NAGPRA since the Kennewick Man case was decided,⁵⁸ Congress has passed no such legislation to date. Accordingly, unless and until such legislation is passed, the currently proposed regulations, which would direct the return of unaffiliated remains to current Native American groups, is without support in its organic legislation. These proposed rules are null *ab initio* for lack of a Congressional delegation of legislative authority to so regulate. There is no doubt that NAGPRA directs the Secretary of DOI to establish regulations to deal with unaffiliated human remains housed in the covered institutions. However, it does not contain the authority for DOI or NPS to simply direct or mandate the conveyance of such remains to random extant Native American groups.

The *Bonnichsen* case made clear, through an exhaustive analysis of NAGPRA and its legislative history, that Congress did not intend to encompass ancient, unaffiliated remains within the coverage of NAGPRA.⁵⁹ Subsequent to that ruling, and following an affirmation by the Ninth Circuit Court of Appeals,⁶⁰ DOI has made attempts to make end-runs around the Kennewick

suggested definition of “Native American” could result from the classification of the culturally unrelated inhabitants of the Caribbean as “Native Americans” under NAGPRA and returned to an unaffiliated North American group for reburial if their remains are found in the Southeastern United States. Such a scenario is equally as plausible as the Viking scenario. See generally, Ryan M. Seidemann, *The Bahamian Problem in Florida Archaeology: Oceanographic Perspectives on the Issue of Pre-Columbian Contact*, 54 FLORIDA ANTHROPOLOGY 4 (2001).

⁵³*Bonnichsen*, *supra*, at 1136.

⁵⁴*Id.* at 1137.

⁵⁵*Bonnichsen*, *supra*, at 1136.

⁵⁶Where “Native American” is defined as “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” (Emphasis added to the statutory language by Judge Jelderks). *Id.*

⁵⁷*Id.* at 1136.

⁵⁸ See e.g., Section 14, S. 2843 (2004).

⁵⁹ H.R. Rep. No. 101-877, *supra*, at 16.

⁶⁰ *Bonnichsen v. United States*, 367 F.3d 894 (9th Cir. 2004).

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Man ruling – largely by attempting to restrict access to those remains under nonexistent ARPA authority. This end-run did not succeed and it has become abundantly obvious that the currently proposed regulations are an attempt to side-step the Kennewick Man rulings and create a new set of regulations for application to unaffiliated human remains that at least two courts have already stated are not supported by the law. Accordingly, the currently proposed regulations have failed to meet the standard for support by their purported organic legislation before they have even been promulgated.

VIII. Conclusion

The currently proposed regulations are ostensibly being proffered by NPS and DOI as having been drafted pursuant to authority granted to those agencies under NAGPRA. As has been demonstrated above, NAGPRA provides no authority for the agencies to mandate that covered institutions convey unaffiliated remains to extant Native American groups in the absence of a showing, by a preponderance of the evidence, that the extant groups are affiliated with the human remains. Such a regulation would be contrary to the law.

In addition to the lack of support in NAGPRA for the proposed regulations, the impact of effecting such regulations would be staggering to the continued study of the human history of the Americas. Such regulations would also have a chilling effect on continued research in the medical and forensic science fields that depend on the availability of unaffiliated remains for study.

The comments accompanying the proposed regulations in the *Federal Register* project minimal to no financial impact for the implementation of the regulations. This statement ignores the reality that further study, either of existing data or newly collected data, would have to be analyzed to effectuate the charges of these regulations. This reality raises two problems. Although there may be minimal financial impact on the federal government, the personnel necessary for data collection and analysis is certain to be substantial for the covered institutions. Effectuating the tasks of the proposed regulations would certainly mean significant financial burdens on the numerous cash-strapped universities and museums covered by NAGPRA.

Further, as noted above, the regulations create a seemingly impossible conundrum: reviews must be accomplished to effectuate the purposes of the proposed regulations, but the collection of new data from the subject collections of human remains are not permitted by the regulations. It may thus be impossible to properly identify the remains that are to be conveyed under the proposed regulations because of the limitations placed on study by the proposed regulations themselves. NAGPRA does not provide authority for limiting the study of unaffiliated remains. These restrictions are simply too conflicting to be given effect.

I welcome the opportunity to work with NPS and DOI to confect regulations that comport with the authority granted to those agencies under NAGPRA. However, the currently proposed

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regulations are not these. Should you have any questions regarding the material contained in this letter, please feel free to contact me at (225) 202-7940 or rseidemann@cs.com.

With best regards, I am,

Very truly yours,

Ryan M. Seidemann

RMS