

THE U.S. ARMY CORPS OF ENGINEERS RESPONSE TO REQUESTS FOR
SCIENTIFIC STUDY – KENNEWICK MAN HUMAN REMAINS

1. BACKGROUND

Human remains that have come to be referred to as the Kennewick Man, or the Ancient One, were found in July, 1996 below the surface of Lake Wallula, a pooled part of the Columbia River behind McNary Dam, federal land under the management authority of the U.S. Army Corps of Engineers. Upon discovery, the coroner and local police were notified. At the request of the county coroner, a local anthropologist, Dr. James Chatters, examined a cranium removed from the site and performed a site visit at the location of the discovery. After concluding that the skeleton was not of recent origin, Dr. Chatters contacted the Army Corps of Engineers and was subsequently issued a permit under the Archaeological Resources and Protection Act (ARPA), 16 U.S.C. §§ 470aa-470mm, to collect the human skeletal remains from the discovery site. Dr. Chatters subsequently initiated a series of tests on the human remains. Radiocarbon test results received by Dr. Chatters in late August 1996 indicated that these human remains were between 9,200 and 9,600 years old.

Because the remains were found on federal property under the control of the Walla Walla District of the U.S. Army Corps of Engineers (Corps), the Benton County coroner subsequently delivered the human remains to the Walla Walla District on September 5, 1996. The remains were delivered to the Corps at the Pacific Northwest National Laboratory, a facility managed by the Battelle Corporation and under contract with the Corps for curation services. In October 1998 the remains were moved to the Thomas Burke Memorial Washington State Museum in Seattle, Washington where the remains have been curated to the present time. The Board of Regents of the University of Washington manages the Burke Museum.

Soon after the remains were returned to the Corps, the Corps published notices of its intent to repatriate these human remains pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013, to five Columbia River basin tribes and bands. These notices were published on 17 and 24 September 1996 in the Tri-City Herald, Kennewick, Washington. The Corps' notices of intent to repatriate were based in part upon findings that the remains had been inadvertently discovered on federal land recognized in claims litigation as the aboriginal land of an Indian tribe and that there existed a shared group identity which could be reasonably traced between the human remains and the five Columbia River basin tribes and bands to whom the Corps intended to repatriate the remains.

2. KENNEWICK MAN LEGAL PROCEEDINGS

Following publication of the notice of intent to repatriate, several scientists notified the Corps of their objections regarding the proposed decision to repatriate the remains. The scientists believed that the remains represented a "rare discovery of national and international significance" that should be subject to examination and study. Following these notifications, a group of scientist filed suit on October 16, 1996 in the United States

District Court for the District of Oregon seeking a temporary restraining order to halt the repatriation and the opportunity to subject the remains to detailed scientific study, Bonnichsen, et al. v. United States, et al., (D. Oregon, Civil No. 96-1516-JE). A second suit was also filed in the same court on October 22, 1996, by members of the Asatru Folk Assembly, who characterized themselves as a legally-recognized church "that represents Asatru, one of the major indigenous, pre-Christian, European religions." The Asatru plaintiffs also sought to set aside the decision of the Corps to repatriate the remains and to compel the Corps to allow scientific testing, Asatru et al., v. United States, et al., (D. Oregon, Civil No. 96-1516-JE). If the testing indicated that the remains were European, the Asatru plaintiffs also requested custody of the remains for reinterment in accordance with native European beliefs.

On March 23, 1997, the Corps rescinded the notices of intent to repatriate. The Corps' rescission was based upon a determination that there were no Indian Claims Commission (ICC) final judgments establishing these lands as aboriginal lands of any particular tribe. As indicated previously, the original notices of intent to repatriate had been issued by the Corps based in part upon findings that the place of discovery was recognized under claims litigation as the aboriginal land of an Indian tribe.

Remand to the Corps of Engineers For Further Consideration.

In an order and opinion filed on June 27, 1997, the United States District Court for the District of Oregon vacated the Corps' decision to repatriate the skeleton to the extent that the Corps had not already withdrawn that decision. The Court then remanded the matter to the Corps for further consideration. Bonnichsen et al., v. United States et al., 969 F.Supp. 628 (D. Or. 1997).

The Court's order and opinion set out a series of issues that the Corps should consider in reaching its decisions on disposition of the remains and on whether to grant plaintiffs' requests for permission to study the remains: Bonnichsen, 969 F.Supp. at 651-654. These issues were primarily related to the application and interpretation of NAGPRA but also included whether plaintiffs have a right under the First Amendment to study the remains.

The Districts Court's June 27 Opinion questioned whether there was any merit to plaintiffs' equal protection arguments but did not rule on these claims. Bonnichsen, 969 F.Supp. at 648-651. As it is unclear whether an administrative agency has the authority to decide the constitutionality of a statute, the Court did not require the Corps to consider plaintiffs' equal protection claims on remand. Id. at 649. The Court did, however, direct plaintiffs to "present to the agency all arguments that plaintiffs intend to assert in this case, and to make any record below that is needed to support those contentions." Id. at 651. On remand, the plaintiffs did not submit any additional arguments to the agency regarding their equal protection claims. In these circumstances, and consistent with the District Court's order, the agency does not now address plaintiffs' equal protection claim.

In addition to providing specific remand instructions to the agency, the Court stayed the litigation pending completion of the administrative proceedings. The Court retained jurisdiction of the case to ensure protection of the remains, and the parties' respective

interests concerning the remains, and to address any problems that might arise on remand. The court required quarterly status reports beginning on October 1, 1997. The plaintiffs' motions to study the remains while the action was pending were denied without prejudice. The government was prohibited from disposing of the remains pending resolution of the case and was required to store the remains in a manner that preserves their potential scientific value.

With respect to the issues raised by the Court in its remand order dated June 27, 1997, and in response to correspondence from the Corps dated August 5, 1997, the National Park Service, on December 23, 1997, provided the Corps with their responses to the NAGPRA-related issues that had been raised by the Court (Attachment 1).

By order dated September 21, 1999, the Court ordered the federal defendants to respond to the plaintiffs' study request by March 24, 2000. In an order of the Court dated March 8, 2000, this date was extended until September 24, 2000 to allow additional time for DNA testing of the remains.

3. INTERAGENCY AGREEMENT BETWEEN THE DEPARTMENT OF THE ARMY AND THE DEPARTMENT OF THE INTERIOR

An Interagency Agreement between the Department of the Army and the Department of the Interior was entered into in March 1998. This agreement delegated responsibilities under Section 3(d)(3) of NAGPRA. Section 3(d)(3) generally provides that a federal agency having management authority with respect to Federal lands upon which Native American cultural items are found may delegate, upon certain conditions, to the Secretary of the Interior, in whole or in part, its responsibilities regarding inadvertent discoveries, 25 U.S.C. § 3003(d)(3). The responsibilities so delegated under the March 1998 interagency agreement included, determining whether the human remains found near Kennewick, Washington, are Native American within the meaning of NAGPRA, and, if it is determined that such human remains are Native American, to provide for their disposition under the terms of the statute and its implementing regulations (Attachment 2).

Determination of Native American by the Department of Interior

Pursuant to the interagency agreement between the Department of the Army and the Department of the Interior, and as a result of a series of studies carried out by the Department of the Interior in cooperation with the Department of the Army under the terms of the interagency agreement, the Department of the Interior issued its determination on January 13, 2000 that the Kennewick human skeletal remains are "Native American" for the purposes of NAGPRA. (Attachment 3, Enclosure 1).

As indicated in the Department of the Interior (DOI) decision dated January 13, 2000, radiocarbon testing provided the chronological information needed to make the determination that the Kennewick skeletal remains are Native American as defined by NAGPRA. This determination was also supported by results of the earlier documentation, examination, and analysis of the remains themselves, sediment analysis comparing the sediment of the bones with sediment from the soil profile near where they

were recovered, analysis of the lithic point embedded in the left ileum of the remains, and geomorphic studies near the discovery site (Attachment 3, Enclosure 1 at p. 5).

Determination of Cultural Affiliation by the Department of the Interior

Subsequent to the DOI determination that the skeletal remains are Native American, the Department of the Interior, in coordination with the Department of the Army under the terms of the interagency agreement, developed cultural affiliation study protocols, identified experts to perform and review these studies, and initiated a process to carry out DNA analysis. DOI has now completed their cultural affiliation studies which focused on four areas: (1) archeology (2) biology (3) history and (4) ethnography and linguistics. In addition, DNA testing and analysis of bone samples from the remains was conducted at three independent laboratories. None of the laboratories were able to successfully extract and amplify DNA from these human remains.

By correspondence dated September 21, 2000, the Secretary of the Department of the Interior forwarded DOI's final determination and resolution of the issues delegated to them by the Department of the Army in the March 1998 interagency agreement (see Enclosure 3). In their determination, DOI found that "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." In addition to a claim based upon cultural affiliation, DOI also determined that a claim based upon aboriginal occupation provides an additional basis for disposition of the Kennewick remains to the claimant Indian Tribes (Attachment 3 at p. 6).

As indicated in the letter from the Secretary of the Department of the Interior to the Secretary of the Department of the Army, five Indian tribes have submitted a joint claim under NAGPRA for custody of the Kennewick human remains. These tribes are: 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 (see discussion, Attachment 3 at pp. 4-5).

Determination of Disposition by the Department of the Interior

Based upon their extensive cultural affiliation studies and their review of the history of the Indian Claims Commission findings, DOI has determined that the proper disposition of the Kennewick remains based upon cultural affiliation and aboriginal occupation is to the five claimant tribes (Attachment 3 at p. 7).

4. THE BONNICHSEN AND ASATRU STUDY REQUESTS

As indicated previously, the Court ordered the Corps to respond to the plaintiffs' study request by March 24, 2000. This date was subsequently extended by order of the Court

dated March 8, 2000, until September 24, 2000, to allow additional time for DNA testing of the remains.

Correspondence between the parties to the ongoing litigation attempted to more specifically define the areas of study. This included a letter dated February 24, 2000 from the U.S. Department of Justice, the Bonnichsen plaintiffs' response thereto dated February 28, 2000, and a reply to this letter by the U.S. Department of Justice dated March 8, 2000 (Attachments 4-6). A brief summary of this correspondence is provided below.

By correspondence dated February 24, 2000, Department of Justice requested that the Bonnichsen plaintiffs review the documents identified therein and indicate whether this correctly described their study request. The documents referenced in the letter identified letters to the Corps dated September 24 and 26, 1996, a copy of a teleconference between plaintiffs and the Corps of Engineers, as well as details provided in plaintiffs' Motion For Order Granting Access To Study, filed with the Court on March 11, 1997, which set forth twelve (12) categorical areas of scientific study of the remains. These areas are as follows: morphological measurements (skeleton); taphonomic observations (skeleton); morphometric measurements (dental); imaging (dental); molds (dental); molds (cranium); imaging (skeleton); phytolith recovery (dental); radiocarbon dating; isotope analysis; DNA analysis; and histology.

Plaintiffs, in their response dated February 28, 2000, indicated that the "study requests are not as circumscribed as outlined in your letter of February 24, 2000. They include all correspondence between the plaintiffs and the government, the teleconference, and all pleadings and other documents filed in this litigation." By reply correspondence dated March 8, 2000, Department of Justice notified the Bonnichsen plaintiffs that until the agency received an official request to study or the additional information requested, "we will continue to assume that the basis of your request to study is contained in the March 11, 1997 filing." No additional information has been received by the agency from the Bonnichsen plaintiffs regarding their request to study. With respect to plaintiffs' study requests, the Department of the Interior has provided the Corps with detailed notes comparing the research undertaken and completed as part of the government's investigation of the Kennewick remains and the discovery site with the research proposed by the Bonnichsen plaintiffs (Attachment 7).

In addition to the requests to study by the Bonnichsen plaintiffs, the Asatru plaintiffs, as noted by the District Court, have also sought study of the remains, See Opinion at p. 4. The only specific study request made by the Asatru plaintiffs was for DNA testing, which has been conducted.

Corps' Response to Bonnichsen and Asatru Plaintiffs' Request for Study

As indicated above the Department of the Interior's National Park Service has, by correspondence dated December 23, 1997, provided guidance to the Corps concerning the questions previously posed by the Court. As noted by the National Park Service,

Congress directed the Secretary of the Interior to implement most aspects of NAGPRA, including the promulgation of implementing regulations, see 25 U.S.C. Section 3011. The Secretary of the Interior has delegated programmatic implementation of the statute to the National Park Service. Under these circumstances, it is highly appropriate that the National Park Service respond to those questions by the Court, which relate to NAGPRA and the ultimate disposition of Native American human remains.

As stated in the guidance provided by the National Park Service, a finding of cultural affiliation precludes study of Native American remains, "...if ownership and control of the human remains or cultural items is determined under NAGPRA to be with an individual or Indian tribe, no further study of such materials may be conducted without the consent of that individual or Indian tribe." (See Attachment 1 at p. 6) DOI's determination of disposition dated September 21, 2000 pursuant to the March 1998 interagency agreement is consistent with this guidance. "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." (See Attachment 3 at p. 7)

Views of the Department of Justice Regarding Plaintiffs' First Amendment Claims
Concerning their Right to Study the Kennewick Man Remains

As previously indicated, in its remand opinion dated June 27, 1997, the District Court requested that the Corps, in reaching its decisions on the ultimate disposition of the remains and on whether to grant plaintiffs' request for permission to study the remains, consider a series of questions posed by the Court, see Opinion at p. 45. Included in those questions was whether the plaintiffs have a right under the First Amendment to the United States Constitution to study the Kennewick Man human remains. The National Park Service in their response to the Court's question did not address this issue. Because of the emphasis placed by the Court on a response to this concern and in light of the expertise of the U.S. Department of Justice among the federal agencies in the area of constitutional law, the Corps has sought the advice and assistance of that agency with respect to this concern of the Court (Attachment 8).

The Department of Justice by correspondence dated September 19, 2000, has provided the Corps with guidance regarding the First Amendment and any right of the plaintiffs to study the Kennewick Man remains (Enclosure 9). This guidance indicates the Department of Justice can discern no legal basis for plaintiffs' assertion that they have a First Amendment right to study human remains in the custody of the United States pending a determination of ownership under NAGPRA. The guidance from the Department of Justice does indicate that the government may appropriately allow such access through legislation. While Congress has extensively legislated in this area, there is no statute that allows such study (see Attachment 9, enclosure at p. 8).

Corps Determination Regarding Plaintiffs' Study Request

The Department of the Interior pursuant to the delegation between the Department of the Army and the Department of the Interior has determined that under NAGPRA the proper disposition of the Kennewick remains is to the claimant tribes. The Department of Justice has also provided guidance to the Corps, which provides that there is no First Amendment right to study these remains. Based upon the determinations by the Department of the Interior and the guidance and advice provided by the Department of Justice, the requests by the Bonnicksen and Asatru plaintiffs to study the Kennewick remains are denied.

5. TRANSFER OF CUSTODY OF THE REMAINS

Pending resolution of the instant lawsuit, the Corps, in accordance with the Court's June 27, 1997 Order, will retain custody of the remains and will continue to curate the remains in a manner that preserves their scientific value. Once legally permitted to do so, the Corps will follow the regulatory procedures set forth at 43 C.F.R. § 10.6(c) for transferring the remains to the claimant tribes. 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. 43 C.F.R. § 10.6(c).

Encls



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22 SEP 2000