

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

ROBSON BONNICHSEN; C. LORING BRACE;)
GEORGE W. GILL; C. VANCE HAYNES, JR.;)
RICHARD L. JANTZ; DOUGLAS W. OWSLEY;)
DENNIS J. STANFORD; and D. GENTRY)
STEELE,)

Plaintiffs,)

v.)

UNITED STATES OF AMERICA;)
DEPARTMENT OF THE ARMY;)
U.S. ARMY CORPS OF ENGINEERS;)
U.S. DEPARTMENT OF THE INTERIOR;)
NATIONAL PARK SERVICE; FRANCIS P.)
McMANAMON; ERNEST J. HARRELL;)
WILLIAM E. BULEN, JR.; DONALD R.)
CURTIS; LEE TURNER; LOUIS CALDERA;)
BRUCE BABBITT; DONALD J. BARRY;)
CARL A. STROCK; and JOE N. BALLARD,)

Defendants.)

ORDER

Civil No. 96-1481-JE

Paula A. Barran
Barran Liebman LLP
601 S.W. 2nd Avenue, Suite 2300
Portland, OR 97204

Alan L. Schneider
1437 S.W. Columbia Street, Suite 200
Portland, OR 97201-2535
Attorneys for Plaintiffs

Sydney F. Cook
U.S. Department of Justice
Environment & Natural Resources Division
General Litigation Section
601 D Street, NW
Washington, D.C. 20044

Timothy W. Simmons
Assistant U.S. Attorney
U.S. Attorney's Office
1000 S.W. 3rd Avenue, Suite 600
Portland, OR 97204-2902
Attorneys for Defendants

JELDERKS, Magistrate Judge:

The Confederated Tribes of the Colville Reservation, Nez Perce Tribe, Confederated Tribes of the Umatilla Indian Reservation, and Confederated Tribes and Bands of the Yakama Nation (the Tribes) move to intervene in this action. I deny the motion.

DISCUSSION

In an Order dated October 21, 2002, this court granted the Tribes' motion to intervene for the purposes of appealing the court's interpretations of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 *et seq.*, set out in an Opinion and Order filed on August 30, 2002.

After the Ninth Circuit affirmed the decision from which the Tribes appealed, plaintiffs sought an Order formally dismissing the intervenors, and clarifying their obligation to serve materials filed in this matter only on the United States. In an Order dated August 17, 2004, this court denied the motion to dismiss the intervenors as moot on the grounds that the Ninth Circuit's decision precluded the Tribes' further participation in the action. The Order noted that, following the Ninth Circuit's decision, there was no basis for concluding that the Tribes had "a legally cognizable interest which would entitle them to participate as parties in any further proceedings in this court."

In the present motion, the Tribes assert that they seek to intervene

on the two limited issues that remain pending in this litigation: (1) the scope of permissible studies of the remains under the Archaeological Resources Protection Act . . . and (2) the appropriate remedy, if any concerning the Court's finding that the Army Corps of Engineers violated the national Historic Preservation Act ("NHPA"), 16 U.S.C. § 470 *et seq.*, by reburying the discovery site

Tribes' motion to intervene at 1.

The Tribes state that they "have no intent to relitigate matters that have been previously litigated or to raise any claims unrelated to" those issues, but assert that they have a "continuing legal interest" in those matters that requires their continued participation as "defendant intervenors." They add that they "have a legally protectable interest in seeing that the remains and their burial site, items of great religious and cultural importance to the Tribes, are properly and respectfully studied, curated, and returned to the Tribes pursuant to ARPA and its regulations." The Tribes further assert that they have a substantial, demonstrated interest in seeking repatriation of the remains, that they have an interest in ensuring that the studies do not unnecessarily harm the "fragile remains," and that they have an "ongoing stake in the outcome of this litigation." They also contend that their cultural issues are "recognized and protected by the American Indian Religious Freedom Act of 1978 ('AIRFA')."

Despite their assertion to the contrary, the Tribes' continued effort to participate in this action constitutes an attempt to litigate matters that have been previously decided in favor of the plaintiff scientists, and the present motion is inconsistent with this court's Order of August 17, 2004. In opposing plaintiffs' motion to dismiss the Tribes as intervenors, the Tribes argued that they had a continuing legal interest in the scope of the studies and the treatment of the site where the remains were discovered. They argued that additional studies might determine that the remains were Native American, asserted that dismissal would deprive them of their right to participate in pending ARPA and NHPA issues, claimed they had a property interest in the remains under ARPA that allowed them a right to protect the remains from "invasive and destructive" studies, asserted that they had a "spiritual, cultural, and property interest in the remains," asserted that the additional study that plaintiffs planned would damage the remains and duplicate studies already performed, and argued that they had interests in the remains that were

protected by AIRFA. In deciding that there was no basis for concluding that the tribal claimants had a legally cognizable interest that would entitle them to further participation as parties in this matter, the court considered and rejected those contentions.

More importantly, the Tribes' motion to intervene is fundamentally inconsistent with the current status of this action. On August 30, 2002, this court entered a final judgment that disposed of all claims. Plaintiffs were required to submit a proposed study protocol to the agency within 45 days. Defendants were ordered to respond within 45 days, and were ordered to allow plaintiffs to study the remains "subject only to the normal terms and conditions routinely imposed when studies of objects subject to ARPA are carried out." Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1167 (D. Or. 2002). Plaintiffs' Freedom of Information Act claim was declared moot, plaintiffs' claim for a declaration that defendants had violated NHPA was granted, plaintiffs' claim that defendants had violated ARPA was dismissed with prejudice, and any additional claims and any pending motions were dismissed with prejudice. In an Opinion filed on February 4, 2004, the Ninth Circuit Court of Appeals filed an opinion affirming that decision. Bonnichsen v. United States, 367 F.3d 864 (9th Cir. 2004). A mandate filed by the Ninth Circuit Court of Appeals on April 30, 2004, which also stated that the trial court decision was affirmed, remanded no issues to this court for further proceedings.

Tribes assert that this litigation has entered a "new phase." To the extent that this implies that substantive issues remain for resolution, I disagree. In ordering defendants to allow plaintiffs to study the remains, I did not expect or intend for the court to oversee study of the remains in a "new phase" of the action. This litigation is now in the "post judgment" phase. The action has been terminated, and only those issues that are typically resolved after judgment has been entered, such as determination of attorney fees and costs, remain. Those issues are largely resolved by an Opinion and Order that is also being filed today. This leaves only calculation of the appropriate attorney fees based upon instructions set out in that decision.

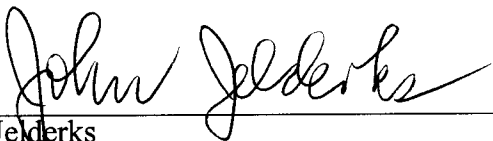
Certainly, it is possible that further issues could arise later: Where, as here, the court has entered a judgment having continuing effects, the court retains authority to enforce its judgment.

See, e.g., Covanta Onondaga Ltd. v. Onodaga County Resource Recovery Agency, 318 F.3d 392, 396 (2nd Cir. 2003). However, no party has taken steps to seek enforcement of any part of the court's judgment, and any suggestion that such action will ultimately be sought or required is merely speculative at this point. Under these circumstances, even if the Tribes could establish that they had a legally cognizable interest that would entitle them to participate as parties (and they cannot), there are no further court proceedings in this action in which they might participate. As indicated above, this action is terminated.

CONCLUSION

The Tribes' motion to intervene (#617) is DENIED. Plaintiffs' request for the attorney fees incurred responding to this motion, which is set out in plaintiffs' responding memorandum, is DENIED.

DATED this 15th day of December, 2004.



John Jelderks
U.S. Magistrate Judge