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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF OREGON

ROBSON BONNICHSEN, C. LORING BRACE,	)	Civil No. 96-1481 JE
GEORGE W. GILL, C. VANCE HAYNES, JR.,	)	
RICHARD L. JANTZ, DOUGLAS W. OWSLEY,	)	
DENNIS J. STANFORD and D. GENTRY STEELE,	)	TRIBES' RESPONSE IN
	)	OPPOSITION TO REQUEST TO
Plaintiffs,	)	DISMISS INTERVENORS
	)	
vs.	)	
	)	
UNITED STATES OF AMERICA DEPARTMENT OF	)	
THE ARMY, U.S. ARMY CORPS OF ENGINEERS,	)	
BARTHOLOMEW B. BOHN II, DONALD R. CURTIS)	)	
and LEE TURNER,	)	ORAL ARGUMENT REQUESTED
Defendants,	)	
	)	
CONFEDERATED TRIBES OF THE COLVILLE	)	
RESERVATION, NEZ PERCE TRIBE,	)	
CONFEDERATED TRIBES OF THE UMATILLA	)	
INDIAN RESERVATION, CONFEDERATED	)	
TRIBES AND BANDS OF THE YAKAMA NATION	)	
	)	
Defendant-Intervenors.	)	
	)	

Defendant-Intervenors 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 (collectively “Tribes”), hereby respond in opposition to Plaintiffs’ Request to Dismiss Intervenors.<sup>1</sup>

Plaintiffs’ Request to Dismiss the Tribes should be denied on both procedural and substantive grounds. Procedurally, Plaintiffs’ Request violates Local Rule 7.1(a)(1). Plaintiffs’ Request is also substantively flawed. While the question of the applicability of the Native American Graves Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. § 3001 *et seq.*, has been resolved for now, significant questions remain concerning both the disposition of the remains and the burial site along the Columbia River.

The Court has previously identified the issues that remain pending in this litigation. First, the Court must determine the scope of permissible studies of the remains under the Archaeological Resources Protection Act (“ARPA”), 16 U.S.C. § 470aa, *et seq.* *Bonnichsen v. United States*, 217 F.Supp.2d 1116, 1165 (D. Or. 2002), *aff’d and remanded*, 367 F.3d 864 (9th Cir. 2004) (as amended). Second, the Court must consider 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. *Id.* at 1162-64 (finding “no relief other than this declaration is appropriate at this time”). The Tribes have a continuing legal interest in both of these matters that precludes dismissal and requires the Tribes’ continued participation in this case as intervenors.

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<sup>1</sup> The Tribes do not oppose the other portions of Plaintiffs’ motion seeking to clarify the service list to eliminate stale parties and Ninth Circuit *amici*.

Although not clearly stated as such, Plaintiffs are asking this Court to find that the Tribes no longer have standing. Request to Dismiss at 2. However, this is not the case. The Tribes satisfy the requirements for standing under both ARPA and the NHPA. Moreover, the additional studies to be performed by the Plaintiffs may determine that the remains are, despite the Ninth Circuit's opinion to the contrary, "Native American," thereby re-triggering the applicability of NAGPRA. *Bonnichsen*, 217 F. Supp.2d at 1167 (noting that "further study may yield additional information and serve as a check on the validity of earlier results" which determined that the remains were "Native American"). To dismiss the Tribes now would be premature and would deprive the Tribes of their legal right to participate in the significant ARPA and NHPA issues still pending before the Court. The Tribes respectfully request the Court deny Plaintiffs' Request to Dismiss the Tribes.

#### **I. PLAINTIFFS' REQUEST VIOLATES THE LOCAL RULES.**

Plaintiffs' failed to certify their Request to Dismiss as required by Local Rule 7.1. Local Rule 7.1 (a)(1) provides that

the first paragraph of every motion must certify that: (A) The parties made a good faith effort through personal or telephone conferences to resolve the dispute, and have been unable to do so; or (B) The opposing party willfully refused to confer; or (C) The moving party or opposing party is a prisoner not represented by counsel.

If a motion fails to meet the certification requirements of Local Rule 7.1(a)(1), "[t]he court may deny" the motion. *Id.* 7.1(a)(2).

The first paragraph of Plaintiffs' Request, which is more properly characterized as a Motion to Dismiss, contains none of the certifications required by Local Rule 7.1(a)(1). More importantly, Plaintiffs never contacted undersigned counsel prior to filing their motion. The

Tribes should have been conferred with concerning Plaintiffs' Request to Dismiss to enable the parties to seek a resolution of this matter before burdening the Court with this Request. Having failed to comply with the requirements of the Local Rules, Plaintiffs' Request should be denied.

## **II. THE TRIBES HAVE A CONTINUING LEGAL INTEREST IN THIS CASE.**

Plaintiffs boldly assert that the Tribes no longer have any "right to control or influence what happens to the remains." Request to Dismiss at 2. The Plaintiffs are wrong as a matter of law. While the Tribes' claims under NAGPRA have been resolved by the Ninth Circuit, the Tribes' property interest in the remains continues under ARPA. The Tribes have standing under the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, to assert their right to protect the remains from invasive and destructive studies under ARPA. *See Bonnichsen*, 217 F.Supp.2d. at 1164-67 (permitting study under ARPA). The Tribes also have standing as "interested persons" to protect the burial site from further excavations under the NHPA. *Id.* at 1162-64 (finding violation of the NHPA concerning reburial of discovery site but not ordering relief).

The record in this case conclusively establishes the Tribes' spiritual, cultural, and property interests in the remains. *See, e.g.*, Tribes' Answer in Intervention (Dkt. No. 500) (answering Plaintiffs' ARPA and NHPA claims); DOI 7621 (Umatilla cultural affiliation report); DOI 9003 (Yakama cultural affiliation report); DOI 9055 (Colville cultural affiliation report); DOI 7304 (Nez Perce cultural affiliation report). Moreover, both ARPA and the NHPA recognize that the Tribes' interests in these remains and the burial site qualifies the Tribes as "interested parties" with certain procedural and substantive rights under the statutes, including the right to be consulted on matters relating to the remains. ARPA's uniform regulations also provide for the possibility of

“reinterment of human remains” with the Tribes once any studies are completed. 36 C.F.R. § 296.14(c)(7). As such, there are ample grounds for the Tribes to remain an active participant in any proceedings before the Court affecting the future treatment and disposition of the remains and their burial site.

**A. The Tribes Have a Religious and Cultural Interest in the Treatment of the Remains and the Burial Site.**

To satisfy Article III, which is the irreducible constitutional minimum of standing, a plaintiff must demonstrate that he has suffered injury in fact, that the injury is fairly traceable to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Svcs.*, 528 U.S. 167, 180-81 (2000). A plaintiff bringing suit under the APA for a violation of a particular statute must also show that his injury falls within the “zone of interests” the statute was designed to protect. *Douglas County v. Babbitt*, 48 F.3d 1495, 1499 (9th Cir. 1995); *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001). The Tribes satisfy both the constitutional and APA standing requirements.

The Tribes have a deeply personal stake in the protection and preservation of the remains in this case, and for that reason have opposed the invasive and destructive testing and examination that has occurred during the past eight years. The additional testing proposed in Plaintiffs’ study plan, which provides for handling of the remains by more than a dozen, and probably several dozen individuals, inevitably will damage these precious human remains and in large part will duplicate the invasive and destructive studies already performed by government scientists.

As set forth in the declaration of Matthew Dick, Jr., prepared in this case on February 13, 2000, the cultural traditions of the claimant tribes include the practices and beliefs of tribal religion and spirituality. Religion and spiritual belief are not separated from other parts of tribal members' lives. Religious activity is not limited to a set time and place, but permeates all facets of life. Explanation of spirituality to non Indians involves difficult issues of translation of concepts and words. However, a tenet of tribal beliefs is:

[T]he sanctity of the spirit of the deceased. Those who have passed on are not to be disturbed and are entitled to a deference in which there should be no disruption of their resting place and their remains. . . . The Creator created each one of us in the manner in which we are born and in which we grow throughout life. The only way in which we can come to the Creator at the time of our passing and at times of support and guidance is to come to him in the form in which we are created, and to come to him 'whole.'

Dick, Jr. Decl. at 3-4 (Dkt. No. 391).

Plaintiffs' study plan, the approval of which is still pending before this Court, calls for duplicative and destructive examination of the remains and will irreparably injure the interests which have caused the Tribes to participate in this proceeding. Moreover, should the Court remedy the violations it found of the NHPA, the Tribes interests in securing the protection of the burial site from further excavation will be harmed. These interests are protected by the American Indian Religious Freedom Act of 1978 ("AIRFA"), 42 U.S.C. § 1996, which states the policy of the United States to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rights." These interests in the Tribes' cultural properties are concrete and particular, and are being injured by the Plaintiffs and Federal defendants' actions as

they move forward with the plans to study the remains without consideration of the impact of these actions on the Tribes beliefs and cultural practices.

Barring the Tribes from continued participation in this case violates the protections AIRFA affords the Tribes to practice their traditional beliefs, including the right to protect these remains and their burial site from damage caused by invasive scientific study, and may prevent the Tribes from ensuring the reinterment of the remains at the conclusion of Plaintiffs' studies. Allowing continued participation by the Tribes on remand will redress the Tribes' harms by permitting meaningful consideration of the Tribes' concerns before the federal agencies and the Court. The mere possibility that the Court may condition the study plans to protect some, if not all, of the Tribes interests is sufficient to satisfy the requirements of redressability. *See Public Citizen v. DOT*, 316 F.3d 1002, 1016-19 (9th Cir. 2003) (finding that redressability does not require that further analysis would lead to a different result). Such participation is also in the interests of judicial economy, as it will ensure that the considerations of all interested parties are fully vetted before irreparable harm is done to the remains or the burial site.

The Tribes' continuing interest in the carrying out their spiritual practices and protecting their cultural patrimony exceeds the requirements for APA standing under both ARPA and the NHPA. The Court's consideration of further studies of the remains and the possible excavation of the burial site will address important questions of first impression concerning remains of cultural importance to Indian tribes removed from the public lands. The Tribes' voice in these matters must be heard.

## 1. The Tribes' Continuing Interest Under ARPA.

The Archaeological Resources Protection Act prohibits the excavation and removal of archaeological resources from federal lands<sup>2</sup> and “Indian lands” unless done in accordance with a permit issued pursuant to the Act or an exemption from the permit requirement. One of ARPA’s purposes is to provide “adequate protection to prevent the loss and destruction of [ ] archaeological resources and sites resulting from uncontrolled excavations and pillage.” 16 U.S.C. § 470aa(a)(3). An “archaeological resource” is defined broadly to mean “any material remains of past human life or activities which are of archaeological interest” including “graves, human skeletal materials, or any portion or piece of any of the foregoing items.” *Id.* § 470bb(1).

The Court has already concluded that the human skeletal remains at issue are subject to ARPA. *Bonnichsen*, 217 F.Supp.2d at 1165. Thus, ARPA’s requirement that “the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance” before any activity takes place which “may result in harm to, or destruction of, any religious or cultural site” applies to this case on remand. 16 U.S.C. § 470cc(c) (emphasis added); *see also* 36 C.F.R. § 296.7. Accordingly, the required showing for the Tribes to demonstrate a legal interest under ARPA is much lower than was required under NAGPRA. The Tribes must

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<sup>2</sup> ARPA defines federal lands as lands “owned and administered by the United States as part of the national park, national wildlife refuge, and national forest systems, and all other lands owned in fee by the United States except for the outer continental shelf and lands under the jurisdiction of the Smithsonian Institution.” 16 U.S.C. § 470bb(3). The remains were removed from federal lands at Columbia Park within the Confederated Tribes of the Umatilla Indian Reservation’s ceded territory, as recognized by the United States government in its 1855 treaty with the Confederated Tribes of the Umatilla Indian Reservation. The Nez Perce Tribe, Confederated Tribes and Bands of the Yakama Nation, and Confederated Tribes of the Colville Reservation also traditionally used the area which now encompasses Columbia Park.

simply show that the remains and the burial site are of “religious or cultural importance.” The Tribes do not need to show any “modern day” connection with the remains, nor any proof of “cultural affiliation.” As such, courts in this Circuit have held that members of tribes have standing to assert particular individualized interests in the “preservation of historical, archaeological, and cultural artifacts” that are threatened with destruction. *Attakai v. United States*, 746 F. Supp. 1395, 1401 (D. Ariz. 1990). The same should hold true of the Tribes’ interests in the preservation of the archaeological resources at issue here.

ARPA’s regulations concerning the disposition of collections in curation also mandate the Tribes’ continuing involvement in this case. ARPA’s regulations provide that, when, as is the case is here,

a collection is from a site on public lands [that] is of religious or cultural importance to any Indian tribe having aboriginal or historic ties to such lands, the Federal Agency Official shall place such terms and conditions as may have been developed pursuant to Sec. -.7 of uniform regulations 43 CFR part 7, 36 CFR part 296, 18 CFR part 1312, and 32 CFR part 229 on:

- (i) Scientific, educational or religious uses of material remains; and
- (ii) Access to associated records that contain information relating to the nature, location or character of the resource.

36 C.F.R. § 79.10(d)(4) (emphasis added). Such terms and conditions include “[t]he nature and extent of work allowed and required under the permit, including the time, duration, scope, location, and purpose of the work.” *Id.* § 296.9(a)(1).

The regulations also require that newly acquired collections be curated consistently with the conditions of the original ARPA permit. *Id.* § 79.3(d). The permit governing excavation of the remains under ARPA that was issued to Dr. James Chatters states: “No Indian grave or burial ground may be investigated without permission of the governing council of Indians

concerns [sic], which supplemental authority must be promptly recorded with the official in charge of the designated area.” COE AR 9498, DOI AR 1245. That the ARPA permit requires seeking permission from the Tribes before the burial grounds may be investigated is alone sufficient to confer standing on the Tribes. *See Bonnichsen*, 217 F. Supp.2d at 1162 (finding “Defendants’ must curate the remains in conformance with [ARPA]”). Likewise, because ARPA’s regulations provide for the “reinterment” of remains at the conclusion of study, the Tribes have a continuing interest in the scope of the studies to be performed to ensure that the remains are reinterred in substantially the same condition they are now. 36 C.F.R. § 296.14(c)(7).

While this Court and the Court of Appeals determined that the remains were not “Native American” for purposes of NAGPRA, it does not necessarily follow that the remains are not of religious and cultural importance to the Tribes for the purposes of ARPA. Cultural resources are of central importance to Indian tribes. The Tribes have standing to suggest changes to the terms and conditions of the Plaintiffs’ study plans and to address coordination of the planned studies of these archaeological resources under ARPA.<sup>3</sup>

## **2. The Tribes’ Continuing Interest Under the NHPA.**

The purpose of the NHPA is to remedy the dilemma that “historic properties significant to the Nation’s heritage are being lost or substantially altered, often inadvertently, with increasing frequency,” through a multi-faceted historic preservation program. 16 U.S.C. § 470(b)(3).

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<sup>3</sup> The Court has correctly recognized that “there is not an absolute obligation to allow particular scientists to study” the remains under ARPA. *Bonnichsen*, 217 F. Supp.2d at 1166 n.74. Accordingly, the Tribes are extremely concerned that other persons (whether they are affiliated with the Plaintiffs or not) may seek to study the remains. This could lead to open-ended study and overexposure of the remains to significant physical manipulation.

NHPA's regulations require federal agencies to provide interested members of the public and Indian tribes with a reasonable opportunity to participate in the NHPA process. *See generally* 36 C.F.R. §§ 800.1- 800.2. Thus, any member of the public who can demonstrate sufficient interest in the preservation of the historical lands at issue falls within the zone of interests protected by the NHPA. *Montana Wilderness Association v. Fry*, 310 F.Supp. 2d 1127, 1151 (D. Mont. 2004) (finding standing for individual tribal member under NHPA).

Under the NHPA, federally recognized tribes are given a substantial role in the designation and protection of "historic properties."<sup>4</sup> Federal agencies must follow a series of steps under a "consultation process" when planning an "undertaking." 36 C.F.R. § 800.1(c). An "undertaking" is generally any project, activity, or program funded under jurisdiction of a federal agency, or assisted by a federal agency. *Id.* § 800.16(y); 16 U.S.C. § 470f. The consultation process is designed to provide "a reasonable opportunity [for the tribe] to identify its concerns about historic properties, advise in the identification and evaluation of historic properties, including those of traditional, religious, and cultural importance, articulate its views on the undertakings, of effects on such properties, and participate in the resolution of adverse effects." *Id.* § 800.2(c)(2)(ii)(A); *see also* 16 U.S.C. § 470a(d)(6) (requiring consultation with tribes when federally-assisted undertakings may affect a historic property to which a tribe attaches religious or cultural significance). Consultation on historic properties of significance to a tribe is required

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<sup>4</sup> The term "historic properties" includes properties of traditional religious and cultural importance to an Indian tribe. 36 C.F.R. § 800.16(1)(1). The burial site may also be eligible for inclusion on the National Register. *See* 36 C.F.R. § 60.4 (listing criteria for inclusion, including sites that "have yielded, or may be likely to yield, information important in prehistory or history").

regardless of the location of the historic property. *Id.* § 800.2(c)(2)(ii).

With respect to participation by Indian tribes concerning NHPA matters, federal agencies:

should be sensitive to the special concerns of Indian tribes in historic preservation issues, which often extend beyond Indian lands<sup>5</sup> to other historic properties. . . . When an undertaking may affect properties of historic value to an Indian tribe on non-Indian lands, the consulting parties shall afford such tribe the opportunity to participate as interested persons. Traditional cultural leaders and other Native Americans are considered to be interested persons with respect to undertakings that may affect historic properties of significance to such persons.

*Attakai*, 746 F.Supp. at 1408-09 (internal citations omitted)(emphasis added); *see* 36 C.F.R. §

800.2(c)(2)(ii)(A)-(F). Indian tribes can insert themselves into the consultation process and participate as interested parties at every step of the consultation process. 36 C.F.R.

§§ 800.2(c)(2), 800.3(f)(2), 800.4(a)(4), 800.4(b), 800.4(c), 800.5(c), 800.6(a)(2), 800.6(b)(1)(i), 800.6(b)(2), 800.6(c)(2). This includes the right to participate in decisions to determine whether there will be damage or alteration to a culturally significant property that will diminish certain qualities of the property, and to avoid or mitigate damaging effects. *Id.* §§ 800.5(c), 800.9(b), 800.5(e).

The regulations clearly require that tribes be consulted concerning any matters under the NHPA that may affect properties of historic value to Indian tribes. *See, e.g., Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995) (National Forest Service failed to comply with NHPA when it did not evaluate in good faith use of canyon by Indian tribe for cultural and religious practices); *Attakai*, 746 F.Supp. at 1408-09 (requiring tribal participation as “interested persons” concerning NHPA claim over historic properties affected by livestock watering on lands beyond

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<sup>5</sup> The term “Indian lands” is defined as “all lands within the exterior boundaries of any Indian reservation . . . .” 16 U.S.C. § 470w(14).

their reservation). The Tribes' oral traditions, already before the Court, demonstrate the Tribes' significant religious and cultural interests in these "historic properties." *See* National Park Service, National Register Bulletin 38, *available at*, <http://www.cr.nps.gov/nr/publications/bulletins/htm> (last visited July 28, 2004) (recognizing the important role of oral traditions in determining locations of cultural properties); *see also* *Muckleshoot Indian Tribe v. United States Forest Service*, 77 F.3d 800, 807 (9th Cir. 1999) (acknowledging Bulletin 38 as providing "recognized criteria" for determining cultural properties). That these lands lie beyond the Tribes' reservations is no matter, especially given that the area was a joint aboriginal use area of the Tribes.

The Court is already familiar with requirements of standing under the NHPA, having found the Plaintiffs to be "interested persons" under the statute. *Bonnichsen*, 217 F. Supp.2d at 1162. The Tribes interests in the burial site are far more substantial than those of the Plaintiffs. Accordingly, the Tribes have standing as "interested persons" under the NHPA to continue participation in this case to ensure that decisions made concerning the remains and the burial site protect the Tribes' religious and cultural interests, and are consistent with federal cultural protection laws.

### **CONCLUSION**

For the foregoing reasons, the Tribes respectfully request the Court deny Plaintiffs' Request to Dismiss the Tribes.

DATED this 3rd day of August, 2004.  
TRIBES' RESPONSE IN OPPOSITION TO  
REQUEST TO DISMISS INTERVENORS- 12

RESPECTFULLY SUBMITTED,

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on the 3rd day of August, 2004, in addition to electronic service, I filed the original and one copy of Tribes' Response in Opposition to Request to Dismiss with the United States District Court, District of Oregon, via Federal Express next day air to:

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I further certify that on the 3rd day of August, 2004, I served one copy of Tribes' Response in Opposition to Request to Dismiss on counsel via First-Class Mail and/or E-mail to the following addresses:

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I declare the above to be true and correct under penalty of perjury. Executed this  
3rd day of August, 2004, at Seattle, Washington.

s/ Rob Roy Smith

nmc:8/3/04