

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 02-35996
(District Court No. 96-1481 JE (D. Or.))

ROBSON BONNICHSEN, ET AL.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants - Appellants,

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
ET AL.,

Intervenors - Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

**AMICUS BRIEF OF THE OHIO ARCHAEOLOGICAL COUNCIL
IN SUPPORT OF PLAINTIFFS -APPELLEES FOR AFFIRMANCE
OF THE DISTRICT COURT'S DECISION**

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INTEREST OF AMICUS CURIAE¹

The Ohio Archaeological Council (“OAC”) is a not-for-profit corporation organized under the laws of the State of Ohio and is the major voice of professional archaeology in that state.² The OAC has followed this lawsuit with interest involving the disposition of and access to the ancient human remains known as “Kennewick Man.” In the professional judgment of the OAC, the District Court’s decision (“Decision”) correctly sets aside the earlier administrative decision of the United States Department of the Interior (“DOI”) awarding the remains to the tribal claimants and properly permits the plaintiffs-appellees to conduct scientific investigations of the remains of Kennewick Man.

The Kennewick case provides an important precedent regarding how the Native American Graves Protection and Repatriation Act, 25 USC

¹ Pursuant to Fed. R. App. Proc. 29(a), the Ohio Archaeological Council sent letters to counsel for the defendant-appellants and intervenor-appellants informing them of its intent to file this brief and seeking their comments. None of the recipients objected to the OAC filing this brief.

² The OAC is a membership organization comprised of over 100 professional archaeologists and five institutional members engaged in archaeological research, interpretation, site preservation, and public education in Ohio. Its five institutional members are the Cleveland Museum of Natural History, the Cincinnati Museum Center, the Dayton Society of Natural History, Hopewell Culture National Historical Park, and the Ohio Historical Society. Its mission is to promote the advancement of archaeology in Ohio through research, publication and education.

§3001 *et seq.* (“NAGPRA” or “Act”), enacted in 1990, will be interpreted throughout the country. The OAC views the Decision as a well-reasoned application of NAGPRA and urges this Court to deny the claimants’ appeal.

In Ohio, archaeologists and others have discovered many ancient human burials and associated cultural objects that are presently curated by OAC’s institutional and individual members, though none of these human remains are as old as those of Kennewick Man. Although there are no federally-recognized American Indian tribes or designated tribal lands in Ohio today, the OAC expects that future claims for repatriation of these ancient human remains and associated objects will be asserted under NAGPRA, and as a result, courts of appropriate jurisdiction will be asked to interpret the Act.

The OAC believes that the Decision correctly recognizes the balance Congress sought in NAGPRA among the interests of the scientific and museum communities and the interests of Native Americans concerning the treatment of human remains and cultural items. As one of the first decisions construing NAGPRA and the disposition of prehistoric human remains, the Decision establishes an important road map for other courts regarding the disposition of human remains and cultural objects from great antiquity. The OAC believes that the Decision will affect future NAGPRA determinations

not only within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, but in Ohio and other jurisdictions as well. For the following reasons, the OAC supports Magistrate Judge Jelderks' decision and urges that it be upheld on appeal as being well founded under the facts of the case and the requirements of NAGPRA.

SUMMARY OF ARGUMENT

The OAC supports the Decision because it properly found that (i) the Windust and Cascade archaeological phases relied upon by DOI do not constitute valid "groups" under the Act, (ii) Kennewick Man cannot reliably be assigned to any archaeological phase, (iii) no shared group identity exists between the claimant tribes and Kennewick Man, and (iv) cultural changes through time preclude linking Kennewick Man with any present-day American Indian group. As a result of its findings, the District Court correctly held that Kennewick Man is not subject to disposition under NAGPRA.

ARGUMENT

I. Introduction

One important aspect of the Decision was its consideration of whether Kennewick Man was shown to be culturally affiliated with the claimant tribes (including the non-federally-recognized Wanapum band). NAGPRA

clearly requires appropriate evidentiary support for claims of cultural affiliation. The categories of allowable evidence under the Act and its regulations include “geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.” 25 USC §3005(a)(4); 43 C.F.R. § 10.14(e). Sustaining a claim for cultural affiliation requires proof of the following:

1. Existence of an identifiable present-day Indian Tribe.
2. Evidence of the existence of an identifiable earlier group.

Evidence to support this requirement must:

- (i) Establish the identity and cultural characteristics of the earlier group,
 - (ii) Document distinct patterns of material culture manufacture and distribution methods for the earlier group, or
 - (iii) Establish the existence of the earlier group as a biologically distinct population.
3. Evidence of the existence of a shared group identity that may be reasonably traced historically or prehistorically between the present-day Indian Tribe and an identifiable earlier group. The standard of

proof for sustaining a claim is a "preponderance of evidence." 43
C.F.R. §10.14(e) & (f).

After reviewing the evidence in the record in the Kennewick case, Magistrate Judge Jelderks decided correctly that Secretary Babbitt failed to establish that Kennewick Man is culturally affiliated with the intervenor-claimant tribes ("Claimant Tribes").

II. KENNEWICK MAN IS NOT CULTURALLY AFFILIATED WITH THE CLAIMANT TRIBES.

In order to establish entitlement to ancient human remains and related cultural objects, NAGPRA requires a claimant to prove cultural affiliation between the ancient archaeological remains and the modern claimant tribe(s). The District Court properly decided that the DOI failed to prove that Kennewick Man is culturally affiliated with any of the Claimant Tribes. As a result, the Claimant Tribes are not entitled to ownership of Kennewick Man under NAGPRA.

Magistrate Judge Jelderks found the government's position unsupported by the evidence in the record. The OAC agrees. In its Final Determination filed with the District Court, DOI attempted to identify the "earlier group" to which Kennewick Man belonged, and to which the Claimant Tribes claim cultural affiliation, as "part of the Windust and early

Cascade archeological phases." DOI 10054; SER 1152. By making this claim, the DOI is asserting three things:

1. The Windust and/or early Cascade archaeological phases constitute a valid "group" for the purposes of NAGPRA.
2. Kennewick Man belonged to a group associated with one or the other of these phases.
3. There is an unbroken chain of "shared group identity that can be reasonably traced" between the Claimant Tribes and Kennewick Man's earlier group.

Based on the data provided by the DOI's own expert consultants and other lines of evidence not considered by Secretary, these assertions are untenable.

a. **The Windust And Cascade Archaeological Phases Are Not Valid "Groups" For Purposes Of NAGPRA**

Archaeological "phases" and other classificatory units are not directly interpretable as biological populations, ethnic groups, or socio-political entities in any way equivalent to modern tribes. Archaeological phases are heuristic devices defined by archaeologists to bring order to the archaeological record for purposes of classification, study, and comparison.³

³ The fact that phases have been defined in most areas and for most time periods in North America is a testimony to their utility for these purposes. It should be pointed out, however, that archaeologists working in other areas of the world, including China, India, Europe, and Africa, make little or no use of this construct. Those scientists have developed other taxonomic schemes that work equally as well.

The academic origins of the phase concept in North American archaeology clearly lie in the first half of the Twentieth century, but most scholars agree that as currently utilized, the definition of the concept provided by G.R. Willey and P. Phillips in *Method and Theory in American Archaeology* (1958) is most relevant. Willey and Phillips regard a phase as "the largest archaeological unit" (Id. at 41) for comparing sets of traits that are limited in time and space (Id. at 22).

A phase as defined is supposed to be an analytical unit of comparable scale to a modern people or society, but with the important caveat that it is not equivalent to an ethnic unit of any sort: "It looks as though the present chances are against archaeological phases having much, if any, social reality..." (Id. at 50).

The adequacy of phase definitions is itself quite variable, and generally correlates with the antiquity of the material remains in question, and also, to some degree, with the lifestyle and/or material inventory of the past people being studied. It also is important to add that a succession of phases in a "regional sequence" does not necessarily implicate either continuity or discontinuity (Id. at 23).

Further, W. Raymond Wood, in an analysis of the utility of the phase concept for studies of “ethnogenesis,” concluded that:

Tracing a dynamic social entity such as a ‘tribe’ into a past that is populated by such intuitively derived ‘phases’ transforms ‘interpretation’ into *rank speculation*. Emphasis added.

W.R. Wood, The Realities of Ethnogenesis. *Missouri Archaeologist* 63:71-82 (2002).

Here, the OAC suggests that DOI’s attempt to link the Claimant Tribes to Kennewick Man is an example of such ‘rank speculation,’ and as such, the District Court properly rejected the government’s attempt to associate the nine thousand year old human skeleton with any present-day group.

In sum, to treat archaeological phases as equivalent to modern-day tribes such as ‘Nez Perce,’ ‘Yakama,’ or ‘Umatilla’ goes beyond the bounds of the discipline that has defined and used the concept. Both the “Windust” and “Cascade” phases are archaeological analytical units. They are not ethnic categories, nor are they analogous to ethnic categories. As such, it is not scientifically accurate to attempt to link any present-day group with any earlier ancient group using the phase concept. Accordingly, the government’s analysis fails.

b. Phase Affiliation: Kennewick Man Cannot Be Assigned to Any Ancient Archaeological Phase

DOI has asserted that Kennewick Man belonged to a group or community associated with either the Windust or Cascade phase. DOI 10054; SER 1152. This assertion apparently is based on a single line of empirical evidence -- the style of the projectile point embedded in the pelvis of Kennewick Man. The federal defendants follow and affirm this same line of reasoning in their Opening Brief to the Court in their companion appeal (02-35994) at 51-52.

This is a very tenuous and scientifically inappropriate basis for making a phase association of any sort. The stylistic properties, or morphology, of the projectile point in question are ambiguous and not sufficiently constrained to make any determination of phase association. Simply stated, it is impossible to determine with any degree of scientific certainty which ancient group made the weapon that is imbedded in Kennewick Man's pelvis. Second, the projectile point most likely pertains to an adversary of this ancient man, not to him or his cultural group. It would be equally plausible to argue that this single projectile point represents the material culture of an enemy group that attacked Kennewick Man.

The archaeology of the Columbia River Valley documents considerable variability and the comings and goings of many past peoples in

this rich environmental area. K.M. Ames, *Kennewick Man Cultural Affiliation Report*, National Park Service Archeology and Ethnography Program, U.S. Department of the Interior, National Park Service Center for Cultural Resources (2000). It is inappropriate to try to encompass all of that variability within a single archaeological phase, and then assert that the resulting composite provides a meaningful surrogate for the "group" to which Kennewick Man belonged. Kennewick Man might have belonged to any one of a number of groups or societies that lived in, near, or traveled through this region. There is no archaeological evidence to specify even how many distinct groups might have occupied this region during the life of Kennewick Man. As a result, it is impossible, on the basis of the available data, to affiliate his remains with any particular group in unambiguous fashion.

It is worth noting, as did Magistrate Judge Jelderks, that the actions of the Army Corps of Engineers in burying the discovery site under tons of earth and rubble virtually precludes the recovery of other evidence from this locality that might contribute to the ability of archaeologists to determine the cultural affiliation of Kennewick Man. As a consequence, Kennewick Man's true cultural affiliation (and possible link to present-day groups) may

remain unknown unless future scientific examination of his remains can unlock his secrets.

c. **The Broken Chain: No Shared Group Identity Exists Between The Claimant Tribes And Kennewick Man**

The OAC cannot support the Secretary's argument that there is an unbroken chain of "shared group identity that can be reasonably traced" between the Claimant Tribes and the earlier group to which Kennewick Man belonged. By present scientific estimations, Kennewick Man died over 9,000 thousand years ago. NAGPRA and its regulations clearly state that present-day American Indian tribes asserting claims of cultural affiliation must demonstrate these claims by a preponderance of the evidence, with allowable evidence defined to include "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." 25 USC 3005 §(a)(4); 43 C.F.R. §10.14(e).

In their Memorandum in Support of Motion for Stay Pending Appeal, the Tribal Claimants assert they have "a proprietary, religious and cultural affiliation with the human remains" known as Kennewick Man. Motion for Stay at 15. Further, in their Motion for Stay Pending Appeal and Memorandum of Points and Authorities in Support they assert that one "tenet of tribal beliefs," is a belief in the "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.” Id. at 16.

As archaeologists and scientists, OAC’s members cannot verify the content or truth of the Claimants’ religious beliefs, but they can attest that those beliefs are not consistent with the archaeological record of the region. Moreover, in the absence of an established demonstration of cultural affiliation, beliefs concerning the sanctity and entitlements of deceased persons cannot reliably be attributed to ancient human remains and are irrelevant. Oral traditions cumulatively represent only one line of permissible evidence under NAGPRA for claims of an unbroken cultural chain from the present to this ancient man. The OAC contends the claimed tribal link falls under the significant weight of the opposing scientific evidence, which evidence is also permissible under the Act.

Further, the time interval involved here is so great that projecting any particular American Indian group back more than 9000 years is beyond the bounds of any recognized historical science. The OAC is not aware of any case in North America where this has been done over a comparable time frame. In short, there are many problems in culturally or linguistically or biologically tracing a particular, present-day American Indian group through

all the known and unknown vicissitudes of nine millennia of often tumultuous history in the Columbia Basin. Magistrate Judge Jelderks recognized this inherent limitation in the defendants-appellants' argument and ruled accordingly.

d. **Cultural Changes Through Time Preclude Linking Kennewick Man With Any Present-Day Group**

The science of archaeology seeks to document changes in material culture, especially changes reflected in technology (stone tools, pottery, house form, etc.). Changes in technology may indicate an influx of people (migration) or cultural innovations (invention or borrowing) by the resident population. Ames, in his review of the archaeological data presented in DOI's Kennewick Man Cultural Affiliation Report, notes that there is no single, unifying cultural sequence for the Columbia Plateau due, in part, to "the piecemeal nature of archaeological research in the region" (Ames at 10112).

Ames is able to assert that sometime after 9000 B.C. "the central Columbia Basin was abandoned" by the resident population (Id. at 10114). He relates this abandonment to increasingly warm and dry conditions that limited the availability of water in the region (Id. at 10147-8). Furthermore, Ames identifies "a period of significant culture change and reorganization" that took place after 4000 BC (Id. at 10172). He affirms that "it is clear from

the evidence ... that people have shifted around on the Columbia Plateau landscape during the Holocene" (Id. at 10149) and concludes that "the empirical record precludes establishing cultural continuities or discontinuities across increasingly remote periods" (Id. at 10172).

Ames only briefly mentions the cultural disruptions to groups in the region caused by the introduction of European diseases and the horse, but these are epochal events with potentially drastic consequences for the histories of local groups. Although the evidence is somewhat unclear for the Columbia Basin, in other regions of North America the impact of European diseases such as smallpox was catastrophic, virtually wiping out some villages. M. H. Crawford, *The Origins of Native Americans: Evidence from Anthropological Genetics*. Cambridge University Press, Cambridge (1998). Such catastrophes were certainly possible throughout the Columbia Basin throughout the early period of European contact and may have caused the decimation or relocation of untold tribal groups. Ames does report some evidence for "a population decline in central Washington in the period between AD 1520 and 1540" (Ames at 10140).

Finally, the introduction of the horse in the mid-1700s brought about significant changes in the cultures of the Columbia Basin. The most recent

research cited by Ames indicates that the adoption of the horse resulted in depopulation and "serious disruptions" to local cultures (Id. at 10140).

The combined evidence presented by Ames makes it statistically unlikely, and incredible to imagine, that there could be a demonstrably unbroken chain of shared group identity connecting Kennewick Man with any modern American Indian tribe. Certainly, no empirical support is adduced from any of the allowable categories of evidence under NAGPRA that would permit the bridging of the many gaps evident in the archaeological and historic records. The preponderance of relevant evidence adduced in this case cannot sustain any determination of cultural affiliation between any present-day American Indian group, including the Tribal Claimants, and Kennewick Man.

CONCLUSION

DOI's determination that the set of human remains known as Kennewick Man is culturally affiliated with the Claimant Tribes is fatally flawed. The Windust and/or early Cascade archaeological phases do not constitute valid "groups" for the purposes of NAGPRA. Even if the Windust and/or early Cascade archaeological phases could be equated with a group somewhat like a modern tribe, Kennewick Man cannot unambiguously be associated with either of these phases. Finally, even if these archaeological

phases could be considered as "groups" for the purposes of NAGPRA, and even if Kennewick Man could be assigned reliably to one or the other of them, there is no unbroken chain of "shared group identity that can be reasonably traced" between the present-day Claimant Tribes and the Windust and/or early Cascade archaeological phases. The Decision correctly decided that the plaintiffs-appellees are entitled to study the remains of Kennewick Man.

The defendants-appellants equate the scientific study of ancient human remains with affronts to "dignity and respect." See companion appeal 02-35994, Appellants' Opening Brief at 42. The Ohio Archaeological Council strongly disagrees with this characterization of the modern scientific process. Learning about ancient people is not disrespectful. NAGPRA itself does not prohibit scientific study of human remains, so the defendants-appellants' position in this regard is contrary to the Congressional intent expressed in the Act. Indeed, in the absence of a valid determination of cultural affiliation, how can the defendants-appellants or the Claimant Tribes assert that Kennewick Man or his people would have found the study of his remains offensive to his dignity?

Further, some American Indian scholars acknowledge the importance of the scientific study of Native American remains. Dorothy Lippert, who is

a Choctaw Indian and an archaeologist, believes that human skeletal remains, such as Kennewick Man, can share their stories with us in a "voice made of bone." Dorothy Lippert, *In Front of the Mirror: Native Americans and Academic Archaeology, Native Americans and Archaeologists: Stepping Stones to Common Ground*, 120-127 (N. Swindler, K. E. Dongoske, R. Anyon, and A. S. Downer), Altamira Press, Walnut Creek, California (1997). Surely it is a sign of the utmost respect that modern people wish to listen to those stories.

The OAC agrees that ancient humans remains are an important component to understanding the past. The plaintiffs-appellees in this case are noted experts who are imminently qualified to unlock Kennewick Man's secrets.⁴ DOI's initial decision to surrender Kennewick Man to a coalition with no demonstrable cultural affiliation is a violation of the clear language of NAGPRA and would have resulted in forever silencing a voice that can tell us much about our ancient heritage on this continent. Magistrate Judge Jelderks recognized this and acted judiciously under NAGPRA to prevent such a cultural and scientific tragedy.

⁴ As noted in Appellees' Opening Brief at Supplemental Statement of Facts, the plaintiff-scientists have more than 280 years of combined scientific experience and have authored more than 700 scientific papers and 16 books. In addition, their expertise is acknowledged by numerous governmental agencies.

Kennewick Man is a visitor from a surprisingly remote North American antiquity. We know little of his life and times beyond what archaeologists have gleaned from the scattered flint spear points and other artifacts that have survived nine millennia in the soil. The recovery of his remains was an improbable accident of fate. Like the mummy of the African Pharaoh Tutankhamen or the remains of the Neolithic Iceman found melting from a European glacier in 1991, Kennewick Man has an important story to tell about his place in human history.

The lower court's Decision correctly concludes that NAGPRA does not prevent the plaintiffs-appellees from unraveling that story. The Ohio Archaeological Council fully supports Magistrate Judge Jelderks' decision and respectfully urges this Court to deny the appeal herein and affirm the lower court's Decision.

Respectfully submitted,

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Certificate of Compliance Pursuant to Circuit Rule 32-1

The undersigned hereby certifies the amicus brief is proportionally spaced, has a type face of 14 points or more and contains 4390 words, as counted by MS Word 97, and thereby complies with the Federal Rules of Appellate Procedure and Local Rules of this Court.

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Certificate Of Service

I hereby certify that on the _____ day of May, 2003, I served the foregoing Amicus Brief of the Ohio Archaeological Council on the following parties by regular U.S. mail at the following addresses:

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