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Ohio Archaeological Council
P.O. Box 82012
Columbus, OH 43202
614-268-2514 x18

Amicus curiae,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

FALLON PAIUTE-SHOSHONE TRIBE,)
A federally recognized Indian Tribe,)
Plaintiff,)
v.)
UNITED STATES BUREAU OF LAND)
MANAGEMENT,)
Defendant,)

No.CV-N-04-466-LRH (RAM)

**APPLICATION FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The undersigned hereby request leave of the court to file an amicus memorandum in opposition to the Fallon Paiute-Shoshone Tribe's motion for summary judgment. Two copies of the amici's proposed memorandum have been submitted to the court concurrently with this motion.

Date this 27th day of October, 2005.

Respectfully submitted,



Alan C. Tonetti
Trustee
Ohio Archaeological Council
P.O. Box 82012
Columbus, OH 43202
Phone: 614-268-2514 x18
Fax: 614-268-7881
atonetti@ascgroup.net

CERTIFICATE OF MAILING

Case Name: Fallon Paiute-Shoshone
Tribe v. Bureau of Land Management

Case No. CV-N-04-466-LRH(RAM)

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within action; my residence is Columbus, Ohio.

On October 27th, 2005 I served the attached APPLICATION FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and causing said envelopes to be deposited in the United States Mail at COLUMBUS, OHIO, with postage thereupon fully prepaid. There is delivery service by United States Mail at each of the places addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

Alan C. Tonetti
Trustee
Ohio Archaeological Council
P.O. Box 82012
Columbus, OH 43202
614-268-2514 x18
atonetti@ascgroup.net

Marc D. Slonim
Brian W. Chestnut
Ziontz, Chestnut, Varnell, Berley & Slonim
2101 Fourth Avenue, Ste. 1230
Seattle, WA 98121
206-448-1230

Gordon H. DePaoli, Nev. Bar No. 195
Woodburn & Wedge
P.O. Box 2311
Reno, NV 89505
775-688-3000

Attorneys for Plaintiff, Fallon Paiute-Shoshone Tribe

Greg Addington
Assistant United States Attorney
Office of the United States Attorney
100 W. Liberty Street, Suite 600
Reno, NV 89501
775-784-5438

Elsie B. Kappler
Trial Attorney
Environmental & Natural Resources Div.
Department of Justice
General Litigation
Post Office 663
Washington, D.C. 20044
202-305-0430

Of Counsel:
Clementine Berger
Deputy Regional Solicitor
Pacific Southwest Region
Department of the Interior
Sacramento, CA 95825-1890
916-978-5682

Attorneys for Defendant United States Bureau of Land Management

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 27th, 2005 at Columbus, Ohio.



Alan C. Tonetti

DISTRICT OF NEVADA
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

OCT 29 2005
ERK, U.S. DISTRICT COURT

District Court No. CV-N-04-466-LRH (RAM)

FALLON PAIUTE-SHOSHONE TRIBE
Plaintiff

v.

UNITED STATES BUREAU OF LAND MANAGEMENT
Defendant

AMICUS CURIAE BRIEF

RESPECTFULLY SUBMITTED BY

THE OHIO ARCHAEOLOGICAL COUNCIL

Alan C. Tonetti, Trustee

27 October 2005

INTRODUCTION

The Ohio Archaeological Council (OAC) is a nonprofit organization and the major voice of professional archaeology in the State of Ohio. We have followed with interest developments relating to the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), and are concerned that it be interpreted and applied in a manner that will preserve the balance it originally sought between the interests of Native Americans, the scientific and museum communities, and the general public. We were one of the amici in *Bonnichsen v. U.S.* 367 F. 3d 864 (9th Cir., 2004). That case raised issues similar to those presented by the current court case of the *Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management* involving the disposition of the ancient human remains known as "Spirit Cave Man." In our judgment, this case will have far-ranging effects regarding how the language of NAGPRA is interpreted.

NAGPRA clearly states that claims for human remains and cultural items must be supported by credible evidence. The types of allowable evidence include "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion," 25 U.S.C. 3005, Section 7(a)(4). Sustaining a claim for cultural affiliation requires proof of the following:

1. Existence of an identifiable present-day Indian Tribe.
2. Existence of an identifiable earlier group.
3. A shared group identity between the earlier group and the claiming tribe.

Although claims need not be proven to a "scientific certainty" they must be supported by a "preponderance of evidence."

In Ohio, many ancient human burials have been discovered, and although there are no recognized tribal lands in Ohio today, we expect that multiple claims for repatriation will be made based on NAGPRA. Critical to a correct and fair resolution of such claims will be the establishment of the meaning of the term "identifiable earlier group." Based on the merits of this case, as we understand them, we support the Bureau of Land Management's 26 July 2000 finding that there is no verifiable cultural affiliation between the Spirit Cave Man remains and the Fallon Paiute-Shoshone Tribe (the "Tribe"). We urge the court to uphold that finding and deny the Tribe's motion for summary judgment.

**FUNDAMENTAL OBJECTIONS TO THE TRIBE'S CLAIM OF
CULTURAL AFFILIATION WITH SPIRIT CAVE MAN**

The Tribe, in its "Motion for Summary Judgment and Memorandum of Point and Authorities in Support Thereof" (SJ Motion at 5-6) asserts that a grouping as broad and eclectic as "the Indians of California – that is, the Indians, and their descendants, who inhabited California since time immemorial" should qualify as an "identifiable group" for the purposes of NAGPRA. Such an argument would deprive the cultural affiliation requirement of any substantive content.

The State of California is a modern politically defined region that has no intrinsic geographic significance. In the recent historic era, this area contained more than 100 separate tribes from a number of distinctive language families, including Athapascan, Algonquin, Yukian, Hokan, Penutian, and the Uto-Aztecan (Shoshonean), many of which were divided into multiple dialects and sub-languages. Many more languages may have existed prehistorically that did not survive into modern times to be recorded. These tribes were separated not only by language, but also by lifestyles and belief systems. Some subsisted primarily on marine resources, others emphasized hunting, while others focused on the collection of plant foods. They had different and distinctive customs, religious beliefs, kinship

structures, and settlement patterns. To suggest that such an artificial mélange of separate and distinctive populations constitutes some sort of homogenous "identifiable group" is to render meaningless those sections of NAGPRA that deal with establishing cultural affiliation.

The tribe further asserts that a finding of cultural affiliation "should not be precluded solely because of some gaps in the record" (p. 7). While "some gaps" may be allowable, the Tribe stretches the point too far. Congress cautioned that there must be a reasonable connection between the claiming tribes and the object being claimed. House Report 877, 101st Cong. 2nd Sess. (1990); Senate Report 473 at 9, 101st Cong., 2nd Sess. (1990). Consequently, gaps in the data cannot simply be ignored as the Tribe wishes to do. Significant gaps, such as those discussed in the BLM's determination of cultural affiliation of the ancient human remains from Spirit Cave, are positive evidence of the lack of any demonstrable connection to the remains in question. Under the Tribe's interpretation of what a gap means coupled with its overly broad definition of group, no conceivable gaps would be sufficient to undermine a claim of cultural affiliation.

The Tribe refers to a report "authored by a leading DNA researcher" and reports from "two other scientists" suggesting that any scientific data that might be derived from a study of Spirit Cave Man's remains "would be

of limited scientific import" given "the number and geographic distribution of other Paleo-Indian remains available for study" S.J. Motion, fn 6 at 28.

The OAC strongly disagrees with this conclusion. Human remains of such antiquity are extraordinarily rare and many important discoveries are no longer available for scientific study (see "Evidence of the Past: A Map and Status of Ancient Remains" by Cleone Hawkinson and Beth Walton <http://www.friendsofpast.org/earliest-americans/map.html>). Each individual set of human remains is unique and each has the potential to contribute to our understanding of these ancient people and their world.

Dorothy Lippert, who is a Choctaw Indian and an archaeologist, believes that human skeletal remains, such as Spirit Cave Man, can share their stories with us in a "voice made of bone" (Lippert 1997:126). Surely it is a sign of the utmost respect that modern people wish to listen to those stories. The BLM's determination that Spirit Cave Man is not culturally affiliated with any modern Native American tribe means that these remains will not be subjected to destruction through reburial, which would silence, forever, a "voice" that could tell us much about our ancient heritage. The BLM recognized this and the OAC fully supports its determination.

THE HISTORY OF THE CONCEPT OF "ARCHAEOLOGICAL CULTURES"

The Tribe's attempts to equate archaeological cultures to an identifiable earlier group are not consistent with modern archaeological understandings and practices. Archaeological "cultures" and other similar classificatory units are not directly interpretable as biological populations, ethnic groups, or socio-political entities in any way equivalent to modern tribes. Archaeological cultures are only heuristic devices defined by archaeologists to bring order to the archaeological record for purposes of classifying, studying, and comparing artifacts and sites.

It once was considered legitimate to attempt to use archaeological cultures as proxies for ancient ethnographic cultures. This practice arose in the early 20th century when a "cultural archaeology" began to be distinguished from, and eventually to supercede, the "evolutionary archaeology" practiced by archaeologists since the publication of Darwin's *On the Origin of Species* in 1859 (Trigger 1968). Scholars such as V. Gordon Childe "argued that close similarities in material culture were possible only if people shared a common way of life. Hence they concluded that the people who produced an archaeological culture must have spoken

the same language, had a common sense of identity and been bound together by social and political affiliations" (Trigger 1968:529).

It soon was recognized, however, that there is only a very limited correspondence between archaeological cultures and ethnic categories. In discussing problems with the "Direct Historical Approach,"¹ Lyman and O'Brien (2001:317) stated that critics of the approach noted that such analogies between ethnographic and archaeological "cultures" work "progressively less well as the subject archaeological manifestation increases in age." One of the reasons for this was "the fact that groups of people do not remain in one place on the landscape. They move around, and the greater the temporal distance between source and subject, the greater the possibility that one or the other moved" (Lyman and O'Brien 2001:317). Among mobile hunting and gathering groups, in particular, "band composition is often less stable and casual contact between different groups is more frequent. As a result, instead of finding geographically restricted and well-bounded cultures, the archaeologist is confronted with basic tool assemblages spread over vast distances and with stylistic variations that intergrade with one another ... Under these circumstances, *a meaningful*

¹ This was a method that involved using ethnographically known cultures to illuminate archaeological cultures that occupied the same region and which therefore were assumed to share a cultural affiliation

distinction of individual cultures with a culture area may become impossible" (Trigger 1968:533, emphasis added). In one of the most influential treatments of archaeological method and theory, Willey and Phillips (1958:52) concluded "it remains to be seen whether or not the unit, culture, is intelligible on the Archaic stage of development."

Modern archaeologists continue to use the concept but appreciate its limitations. Straus, in a recent overview of the Upper Paleolithic of Cantabrian Spain, stated that such "traditional taxonomic units are merely convenient tools that permit communication among archaeologists. ... But there was not, for example, an Aurignacian or even a Solutrean 'culture' *per se*. These terms are abstractions. Moreover, the longer the period represented and the broader the area covered ... the less likely the terms are to correspond to anything remotely resembling a 'culture' in the ethnographic present" (2005:147). Aikens (1978:85), in an overview of the archaeology of the Great Basin, writes:

"The much-discussed and often-doubted stability and uniformity of the Desert Culture ... are also seen in a new perspective. If Great Basin archaeologists ever really took those terms to mean that the lives and habits of the aboriginal people did not vary over hundreds of generations, or thousands of square kilometers, they do not think that now. The stability and uniformity of the Desert Culture exist largely in the fact that throughout time and over space, the biota exploited by Great Basin people has been much the same, both in species composition and seasonal availability. Because of this, certain

techniques of exploitation were appropriate to conditions over a vast territory and were widely known and long used."

In sum, to treat archaeological cultures as equivalent to modern-day tribes such as the Fallon Paiute-Shoshone goes beyond the bounds of the discipline that has defined and used the concept. Both the "Desert" and "Lovelock" cultures are archaeological analytical units. They are not ethnic categories, nor are they analogous to ethnic categories.

"ARCHAEOLOGICAL CULTURES" ARE NOT SURROGATES FOR ETHNIC CATEGORIES

The Tribe refers at various points in its motion to a "Great Basin Culture Area," the "Desert Culture," the "Lovelock people," and the "Lovelock Culture." S.J. Motion at 41, 44, 76, 85. These archaeological terms are said to constitute, either separately or together, an identifiable earlier group to which the Tribe can claim cultural affiliation. S.J. Motion at 76, 85, 120.

There are numerous problems with this assertion:

1) Archaeologically defined "cultures" and "culture areas" have no necessary correspondence to actual bands, tribes, or other ethnic or linguistic categories. They are merely convenient descriptive tools used by

prehistorians to compare and contrast cultural developments over time and across space as manifested in those elements of material culture that are durable. All conventional archaeologists agree that such concepts do not adequately represent the intangible elements of life, such as language, religion, customs, and traditions that together define ethnic groups.

2) Archaeologically defined "cultures" are blunt instruments for studying socio-cultural variability in the past. Typically they have a duration in time and an extent in space that far exceeds that of any ethnographically known example of an ethnic grouping. Ethnic identities are constantly changing "works-in-progress" that typically have lifespans measured in a few centuries (or even generations). Archaeological cultures, on the other hand, can span thousands of years.

3) The correspondence between "archaeological cultures" and ethnographic cultures is particularly weak when the concept is applied to groups with a mobile hunting and gathering adaptation, which characterized the way of life of Spirit Cave Man as well as every aboriginal group who ever inhabited the region.

4) As a general rule, the degree of correspondence between an "archaeological culture" and the actual, but not directly observable, ethnic group, or groups, that created the artifacts and sites studied by archaeologists

and used by them to define categories such as the Lovelock Culture, become progressively less congruent as the age of the material being studied increases (see, for example, Straus 2005:147). In other words, for a variety of reasons, our view of the past grows increasingly coarse-grained the further back in time we direct our attention. This is particularly true in the case of Spirit Cave Man. Sites from his era are rare, and the types of artifacts that have been recovered are quite limited. The available information is simply too sparse to make any realistic attempt to speak of an identifiable group of people from that period of prehistory.

5) The apparent homogeneity in material culture and economy over the vast area referred to as the Great Basin and the vast span of time in which hunting and gathering groups inhabited this region, almost certainly encompasses considerable variability in biology, language, kinship organization, ceremonialism, values, and other significant markers of ethnicity (see, for example, Aikens 1978:85). The extent of such variability would not be evident in the archaeological record.

**NO EVIDENCE OF A SHARED GROUP IDENTITY BETWEEN THE
TRIBE AND SPIRIT CAVE MAN**

The OAC finds no merit in the Tribe's argument that there is an unbroken chain of shared group identity that can be reasonably traced between the Tribe, or any present-day Indian tribe, and Spirit Cave Man. By most estimations, Spirit Cave Man died over 9,000 thousand years ago. NAGPRA clearly states that present-day Indian tribes making claims of cultural affiliation with archaeological materials must demonstrate these claims with 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 U.S.C. 3005, Section 7(a)(4)).

The time interval is so great in this particular case that tracing any modern-day tribal group, or even American Indians generally, so far back into the past is beyond the bounds of any recognized historical science. We are aware of no case anywhere 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, single group through all the known and unknown vicissitudes of nine millennia of oft-tumultuous history.

Archaeology documents changes in material culture, especially changes reflected in technology (stone tools, pottery, textiles, etc.). Changes

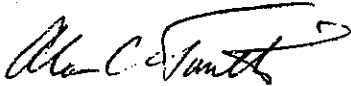
in technology may indicate an influx of people (migration) or cultural innovations (invention or borrowing) by the resident population. Our current understanding of the archaeological record of the Great Basin makes it incredible to imagine that there could be a demonstrably unbroken chain of cultural affiliation connecting Spirit Cave Man with any modern Native American tribe. Certainly, no empirical support is adduced, from any of the allowable categories of evidence, which would permit the bridging of the many gaps evident in the archaeological record. The preponderance of relevant evidence cannot sustain the Tribe's claim to these 9,400-year-old remains.

CONCLUSION

In conclusion, the OAC believes that the BLM correctly determined that the set of human remains known as Spirit Cave Man is not related to the Fallon Paiute-Shoshone Tribe. The Desert and/or Lovelock archaeological cultures do not constitute a valid "group" for the purposes of NAGPRA. Even if these archaeological cultures could be considered as "groups" for the purposes of NAGPRA, there is no unbroken chain of "shared group identity that can be reasonably traced" between those archaeological cultures and the present-day Fallon Paiute-Shoshone Tribe. For the reasons stated above, the

Ohio Archaeological Council supports the BLM's findings of no cultural affiliation between or among the Spirit remains and any identifiable present-day Indian tribe and respectfully urges the Court to deny the Tribe's motion for summary judgment.

Respectfully submitted,



Alan C. Tonetti
Trustee
Ohio Archaeological Council
P.O. Box 82012
Columbus, OH 43202
Phone: (614) 268-2514 x18
Fax: (614) 268-7881
Email: atonetti@ascgroup.net

REFERENCES CITED

- Aikens, C. Melvin
1978 Archaeology of the Great Basin. *Annual Review of Anthropology* 7:71-87.
- Hawkinson, Cleone and Beth Walton
2001 Evidence of the Past: A Map and Status of Ancient Remains. Posted on the Friends of America's Past website, <http://www.friendsofpast.org/earliest-americans/map.html>, site last viewed on 5 October 2005.
- Lippert, D.
1997 In front of the mirror: Native Americans and academic archaeology. In *Native Americans and Archaeologists: stepping stones to common ground*, edited by N. Swindler, K. E. Dongoske, R. Anyon, and A. S. Downer, pp. 120-127. Altamira Press, Walnut Creek, California.
- Lyman, R. Lee and Michael J. O'Brien
2001 The Direct Historical Approach, analogical reasoning, and theory in Americanist archaeology. *Journal of Archaeological Method and Theory* 8(4):303-342.
- Straus, Lawrence Guy
2005 The Upper Paleolithic of Cantabrian Spain. *Evolutionary Anthropology* 14:145-158.
- Trigger, Bruce G.
1968 Major concepts in archaeology in historical perspective. *Man*, new series, 3(4):527-541.
- Wiley, G. R. and P. Phillips
1958 *Method and theory in American archaeology*. University of Chicago Press, Chicago.

DISTRICT COURT
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OCT 28 2005

CERTIFICATE OF MAILING

Case Name: Fallon Paiute-Shoshone
Tribe v. Bureau of Land Management

Case No. CV-N-04-466-LRH/KRM

U.S. DISTRICT COURT
COLUMBUS, OHIO

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within action; my residence is Columbus, Ohio.

On October 27th, 2005 I served the attached AMICUS CURIAE BRIEF OF THE OHIO ARCHAEOLOGICAL COUNCIL by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and causing said envelopes to be deposited in the United States Mail at COLUMBUS, OHIO, with postage thereupon fully prepaid. There is delivery service by United States Mail at each of the places addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

Alan C. Tonetti
Trustee
Ohio Archaeological Council
P.O. Box 82012
Columbus, OH 43202
614-268-2514 x18
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Marc D. Slonim
Brian W. Chestnut
Ziontz, Chestnut, Varnell, Berley & Slonim
2101 Fourth Avenue, Ste. 1230
Seattle, WA 98121
206-448-1230

Gordon H. DePaoli, Nev. Bar No. 195
Woodburn & Wedge
P.O. Box 2311
Reno, NV 89505
775-688-3000

Attorneys for Plaintiff, Fallon Paiute-Shoshone Tribe

Greg Addington
Assistant United States Attorney
Office of the United States Attorney
100 W. Liberty Street, Suite 600
Reno, NV 89501
775-784-5438


Elsie B. Kappler
Trial Attorney
Environmental & Natural Resources Div.
Department of Justice
General Litigation
Post Office 663
Washington, D.C. 20044
202-305-0430

Of Counsel:
Clementine Berger
Deputy Regional Solicitor
Pacific Southwest Region
Department of the Interior
Sacramento, CA 95825-1890
916-978-5682

Attorneys for Defendant United States Bureau of Land Management

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Alan C. Tonetti