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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FALLON PAIUTE-SHOSHONE TRIBE, a
federally recognized Indian tribe,

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

Plaintiff,

v.

**BRIEF OF AMICUS FRIENDS OF
AMERICA'S PAST**

UNITED STATES BUREAU OF LAND
MANAGEMENT,

Defendant.

BRIEF OF AMICUS FRIENDS OF AMERICA'S PAST

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INTRODUCTION

This memorandum is filed by Amicus Friends of America's Past to assist the Court in its consideration of the legal issues presented by this case. Friends of America's Past is a nonprofit organization dedicated to promoting and advancing the rights of scientists, teachers, students and the public to learn about this country's past. Friends of America's Past believes that the legal issues discussed in this memorandum are particularly important because the parties have failed to raise them properly, notwithstanding a controlling decision by the Ninth Circuit Court of Appeals. Spirit Cave Man is one of the few human remains older than 9000 years ever found in this country, and is of immeasurable significance for the study of the peopling of the Americas. The Court is at risk of being presented with an incomplete, and therefore inaccurate, analysis of the law because of the failure of the parties to identify and discuss a critical legal issue: the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§3001-3013 ("NAGPRA"), does not even apply to this skeleton.

The Fallon Paiute-Shoshone Tribe (the "Tribe") and the United States assume that they can stipulate that NAGPRA applies simply because they do not want to address this issue. However, they completely ignore the controlling precedent of the Ninth Circuit, which is binding on this Court and on federal agencies. Before human remains can be claimed under NAGPRA, indeed before NAGPRA even applies, there is a threshold test: the remains must be Native American as defined by the statute.

"NAGPRA mandates a two-part analysis. The first inquiry is whether human remains are Native American within the statute's meaning. If the remains *are not* Native American, then NAGPRA does not apply. However, if the remains *are* Native American, then NAGPRA applies, triggering the second inquiry . . . [i.e., affiliation]." *Bonnichsen et.al. v. U.S.*, 357 F.3d 962 (9th Cir. 2004), reh. denied and opinion modified 367 F.3d 864,875 (2004) (italics in original).

The record fails here to establish that the remains of Spirit Cave Man are Native American which is essential for NAGPRA to apply. Accordingly, the Tribe's claim to the skeleton must be rejected, for NAGPRA is the sole basis for that claim.

In *Bonnichsen*, both the government and the tribal claimants were content to call the skeleton Native American. The Ninth Circuit said that was not sufficient; instead they must prove that it meets the applicable standard. The parties here seek to make an end run around that requirement through their pleadings. If precedent and judicial authority are to have any meaning, they should not be allowed to succeed.

The parties to this controversy cannot confer jurisdiction or authority on the Court to dispose of these remains merely by "agreeing" that these remains are "Native American." If NAGPRA is the basis for the Court's jurisdiction, there is an independent obligation to ensure that such a basis is sound. *Spencer Enterprises, Inc. v. U.S.*, 345 F.3d 683, 687 (9th Cir. 2003). Beyond that, a reviewing court is not a rubber stamp to an agency's decision. Instead, it must be independently satisfied that the agency has relied on factors that Congress intended, and that the full record supports the agency's conclusions:

“See Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367, 1374-75 (9th Cir.1995) ("When the arbitrary and capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test.") (internal quotation marks omitted), rev'd on other grounds, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). We consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the Secretary's decision. *See Mayes v. Massanari*, 276 F.3d 453, 459 (9th Cir.2001).” *Bonnichsen v. U.S.*, 367 F.3d fn. 19 at 880.

To satisfy that obligation, a reviewing court must conduct a searching and careful inquiry into the facts. *Citizens to Preserve Overton Park v. Volpe*, 401 US 402, 416 (1971). This inquiry

must include the facts that provide a basis for constitutional and statutory jurisdiction. See *Douglas v. E.G. Baldwin & Associated, Inc.*, 150 F.3d 604, 606-607 (6th Cir. 1998).

I. BLM USED AN INCORRECT AGE DEPENDENT TEST.

It is controlling law in this circuit that age alone is an insufficient basis to call something Native American. Yet the age of the Spirit Cave Man remains was the only reason given by the Bureau of Land Management (“BLM”) for concluding that the remains are Native American. See BLM Determination, AR 1986, 1987.

It was precisely this kind of reasoning, deciding Native American status by age alone, that was soundly rejected by the Ninth Circuit in the *Bonnichsen* litigation. There, the Secretary of the Interior had decided that all pre-Columbian human remains found on federal land would automatically be deemed Native American for purposes of NAGPRA even if they had no cultural or biological connection to present-day American Indians. See *Bonnichsen et.al. v. U.S.*, 217 F. Supp. 2d 1116, 1134, 1137 (D.Or. 2002), *affd.* 367 F.3d 864 (9th Cir. 2004). The District Court concluded this 1492 rule was improper, and the Ninth Circuit agreed.¹ Both courts concluded that an age dependent test for determining Native American status for NAGPRA purposes is defective for several reasons. First, it is inconsistent with NAGPRA’s use of present tense words which expressly limit its application to remains and objects that have a relationship to present-day Native Americans. *Bonnichsen*, 367 F.3d at 875-876. Second, it is inconsistent with Congress’ purposes for enacting NAGPRA:

¹ BLM’s failure to raise or discuss this critical issue in the present case is perplexing. It cannot claim to be unaware of (or exempt from) the *Bonnichsen* decision since the Department of the Interior, of which BLM is a part, was a party to that litigation, and the Ninth Circuit’s decision was announced more than 11 months before BLM filed its answer. The Department of the Interior has since announced that it agrees that the Ninth Circuit decision on this point was correct. See Statement of Paul Hoffman, Deputy Assistant Secretary for Fish and Wildlife and Parks, at 4 (printed at friendsofpast.org).

“NAGPRA was intended to benefit modern American Indians by sparing them the indignity and resentment that would be aroused by the disposing of their ancestors’ remains.

* * * *

Congress’ purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them. Yet, that would be the result under the Secretary’s construction of the statute, which would give Native American status to any remains found within the United States regardless of age and regardless of lack of connection to existing indigenous tribes.” *Bonnichsen*, 367 F.3d at 876.

Application of NAGPRA must therefore be limited to those remains and objects that have a “special and significant genetic or cultural relationship to some presently existing indigenous tribe, people or culture.” *Bonnichsen*, 367 F.3d at 879. See also *id.* at 882. Such a relationship or connection cannot be incidental, tenuous, unknown or unproven. *Bonnichsen*, 367 F.3d at 879. Above all, it must be based upon substantial evidence. 367 F.3d at 879-880.

Applying these standards to the facts before it in the *Bonnichsen* case, the Ninth Circuit concluded that the 9,000 year old Kennewick Man skeleton was not Native American and therefore was not governed by NAGPRA. The same conclusion applies here.

II. THE FACTS OF THIS CASE ARE INDISTINGUISHABLE FROM THOSE IN BONNICHSEN AND THIS COURT MUST APPLY THE REASONING OF THAT CONTROLLING DECISION.

There is no significant difference between the facts that prompted the Ninth Circuit’s decision in *Bonnichsen* and the facts established by the record in this case. All of the important considerations are the same.

A. Relying on the Age of the Remains is Insufficient.

Both of these skeletons are separated from the modern world by an enormous span of time. The Kennewick Man skeleton was radiocarbon dated to be 8410+/- 60 years B.P. (years before present). After adjustments and corrections, this is equivalent to sometime between 8340 and 9200 calendar years. *Bonnichsen*, 217 F. Supp.2d at 1120 and fn. 6 at 1120. As the Ninth

Circuit noted, such an age represents “a time predating all recorded history from any place in the world, a time before the oldest cities of our world had been founded . . .” *Bonnichsen*, 367 F.3d at 868. Such a span of time complicates all issues of proof, and makes it virtually impossible to establish any connection with modern Native Americans. See 367 F.3d at 879 and 882. Spirit Cave Man is even older than Kennewick Man as it has been radiocarbon dated to a weighted mean age of 9415 +/- 25 years B.P. BLM Determination, AR 1992.

It cannot be assumed that all ancient skeletons found in this country represent the ancestors of contemporary American Indians. That was the government’s error in the *Bonnichsen* litigation, and that is the parties’ error here. Human settlement of the Americas was a complex process, and many questions about the timing and nature of the process remain unanswered. Hare, AR 1935. Multiple groups, possibly from different source areas in Eurasia, may have been involved in the colonization process. Kaestle, AR 1090-1091. Some of these groups may not have survived over time to have descendants in contemporary populations. Hare, AR 1935, 1943, 1944. Other groups may have migrated to areas not presently identifiable. Miller, AR 629. See also O’Rourke, AR 1916 (the Navajo and Apache are descendants of groups that once lived in subarctic Canada). Multiple groups may have lived in the western Great Basin, and it is not known how many of them became extinct or migrated elsewhere. BLM Determination AR 1996, 2040, 2043.

B. There is Such Limited Knowledge of Ancient Cultures That No Connection Can Be Shown.

The Ninth Circuit noted that little is known about the people and cultures that existed in Kennewick Man's world. *Bonnichsen*, 367 F.3d at 868, 882. The same is true for Spirit Cave Man's even earlier time. Damadio, AR 2111; Thomas, Plaintiff's Exh. J at 165. Western Great Basin people of his time are thought to have been hunters and gatherers who used stone tools, exploited a wide range of animals and plants, and traveled long distances in their search for subsistence. See BLM Determination, AR 1995-1996; Goodman, AR 1899. Population density was low, and people probably lived in small, mobile, "free roaming" bands. Elson, Plaintiff's Exh. K at 6. Such a lifestyle was not unique to the Great Basin. It was also followed in the Pacific Northwest during Kennewick Man's era. *Bonnichsen*, 367 F.3d at 881; 217 F. Supp. 2d at 1144-45.

Apart from these broad outlines, the known facts are meager, as BLM's determination concedes. Great Basin archaeological evidence from the early Holocene (10,000 to 7500 years B.P.) comes primarily from surface quarry sites, lithic sites and shallow cave deposits. BLM Determination, AR 1995. There are no known village or house sites. BLM Determination, AR 1996. Nor is there any evidence for other types of structures. BLM Determination, AR 1996. As the Tribe concedes, the religious beliefs and world views of these ancient humans are unknown. Tribe's Report to the NAGPRA Review Committee (2001), AR 1773 (the "2001 Tribal Review Report"). Also lacking is any evidence concerning their rituals, ceremonies, customs, folklore, marriage and healing practices, kinship patterns or other key social

arrangements. There are no known rock art sites for this period in the Great Basin. BLM Determination, AR 1996.

The evidence does not establish how many people lived in the region during this time. Nor do we know how many different groups there may have been, or how they may have related to one another. BLM Determination, AR 1996; 2001 Tribal Review Report, AR 1738. Projectile point styles varied, and the function of some artifacts is unknown. 2001 Tribal Review Report, AR 1738, 1740. Spirit Cave Man's lifestyle, occupational activities, diet and development stages were probably very different from those of later New World populations. Goodman and Martin, AR 988.

C. Morphological Differences May Indicate a Discontinuity.

The Ninth Circuit noted that analysis of craniometric measurements indicated that Kennewick Man's skull does not resemble modern American Indians or any other living population. *Bonnichsen*, 367 F.3d at 871, 880. The same is true of Spirit Cave Man.² BLM Determination, AR 2018-2019. Two of the leading experts in the field stated that such morphological differences "are inconsistent with [an] hypothesis of an ancestor-descendant relationship" between Paleoamericans and later New World populations. Damadio, AR 2106 (quoting Drs. Jantz and Owsley). Dr. Alan Goodman, who was hired by the Tribe, contends that craniometric analyses are inconclusive and represent "garbage in, garbage out." Goodman, AR 1894. However, studies by other, less partisan investigators indicate that craniometric data are good indicators of genetic relationships (or lack thereof). See, e.g., J.H. Relethford, "Boas and Beyond: Migration and Craniometric Variation," *Am. J. Hum. Biol.* 16(4) at 379-386 (2004)

² Both skulls have some resemblances to Polynesian populations, but even these resemblances are slight. BLM Determination, AR 2018; *Bonnichsen*, 367 F.3d at 871, 880; *Bonnichsen*, 217 F. Supp. 2d at 1127.

(developmental plasticity and climatic adaptation do not erase, or even obscure greatly, underlying genetic patterns reflected in craniometric data); C.L. Brace, D.P. Tracer, et al., “Clines and Clusters Versus Race,” *Yearbook of Physical Anthropology* 36:1 (1993) (verifiable continuities can be shown in craniofacial measurements in Egyptian populations over more than 5000 years).

Personal or philosophical preferences appear to have much to do with Dr. Goodman’s disagreements with the results of craniometric analyses. See Goodman and Martin, AR 982-983, 993 (concluding that even though there are difficulties in finding any connection between Spirit Cave Man and modern American Indians, his remains should be given to the Tribe because it cannot be foreseen when better evidence will become available).³ Such a standard is hardly an appropriate basis for resolving either scientific or legal questions.⁴ Even if they are not conclusive, the differences reflected by craniometric analysis cannot be simply ignored as the Tribe seeks to do. As the District Court observed in *Bonnichsen*:

“ . . . absent a satisfactory explanation for these differences, it does make such a relationship less likely, and suggests that the Kennewick Man might have been part of a group that did not survive . . .” 217 F. Supp. 2d at 1146.

³ One reason given by Dr. Goodman for rejecting craniometric data is that race is an arbitrary construct that cannot be defined in a stable, repeatable way. Goodman, AR 1007. Such misgivings, however, do not prevent him from finding racial connections between Spirit Cave Man and modern groups based upon hair and dental evidence. Goodman, AR 1900, 1902. Dr. Goodman has also argued, erroneously, that Kennewick Man is Native American. Anthropology Newsletter (“AN”) October 1997, at 3. There is no indication that he has changed methodology or analysis to conform to the Ninth Circuit’s views. For related responses, see AN January 1998, at 2 (Gill) and AN, March 1998, at 56 (Jantz).

⁴ Science is constantly developing new techniques for obtaining and analyzing evidence. For example, no one would have conceived 40 years ago that DNA could be extracted from skeletons that are thousands of years old, or that organic materials as small as a few milligrams could be radiocarbon dated.

D. There are Critical Archaeological Gaps and Discontinuities That Cannot be Bridged.

The archaeological record in *Bonnichsen* contained so many gaps and discontinuities that it was impossible to demonstrate any cultural connection between Kennewick Man and modern American Indians. These included substantial periods of time for which no relevant archaeological data is available, and evidence that substantial changes occurred in settlement patterns, housing, diet, trade, subsistence patterns, projectile point styles and technology. *Bonnichsen*, 367 F.3d at 881; 217 F. Supp. at 1149-1150. The same is true here. See BLM Determination, AR 1995-1999. Even the Tribe's own archaeological consultant conceded that "there are no known scientific ways of securely demonstrating whether the ca 9,400 year-old human remains from Spirit Cave represent a population of individuals who were or were not ancestral to the modern native peoples of the Lahontan Basin." Grayson, AR 1056. He also added that "I am aware of no human remains of this antiquity from anywhere in the world whose precise modern relationships have been established using scientific means." *Ibid.* See also Goodman and Martin, AR 988 (gaps in the archeological record make it difficult to prove whether early groups are related to later populations); Elston, Plaintiff's Exh. I at 137, 148 (major changes occurred in adaptive strategies after Spirit Cave Man's time).

E. The Mortuary Evidence is Insufficient to Prove a Relationship.

The Tribe argues that burial practices and other mortuary evidence demonstrate continuous human and cultural continuity in the western Great Basin over the past 10,000 years. This argument is as unpersuasive as the one made by the tribes, and rejected by the courts, in the *Bonnichsen* case. See *Bonnichsen*, 367 F.3d at 881; 217 F. Supp. 2d at 1148. In both cases, only a few burials have been found from the relevant period. 367 F.3d at 881; 217 F. Supp. at 1148;

Sprague, AR 1117.⁵ Likewise, in both cases, there is no consistent pattern of burial practices.⁶ *Bonnichsen*, 217 F. Supp. 2d at 1148-49; Sprague, AR 1105-1106, 1107-1109. Moreover, in both cases, significant temporal gaps exist in the record for which there is no evidence of burials. *Bonnichsen*, 367 F.3d at 881; BLM Determination, AR 2006.

Finally, as even the Tribe concedes, there is no necessary correlation between items of material culture and ethnic affiliation. 2001 Tribal Review Report, AR 1775. The supposed “mixed” mortuary pattern described by Sprague (i.e., inhumation burials and cremation) is not unique to Nevada, but can be found in a wide variety of geographic, linguistic and ethnic settings. See P.L. Crown and S.K. Fish, “Gender and Status in the Hohokam Pre-Classic to Classic Transition,” *American Anthropologist* 98:803, 807, 808 (1996) (central Arizona); T.L. Howell and K.W. Kintigh, “Archaeological Identification of Kin Groups Using Mortuary and Biological Data,” *American Antiquity* 61: 537, 541 (1996) (Zuni settlement in New Mexico); A. Jones, “Drawn From Memory,” *World Archaeology* 33:334, 341 (2001) (prehistoric settlement in eastern Scotland). Ambiguous evidence of this kind does “not support a finding that the ancestors of the American Indians were the only people here in prehistoric times, or that only one culture existed throughout prehistoric times.” *Bonnichsen* 217 F. Supp. 2d at 1138. To argue otherwise is to ask the Court to make a presumption that Congress did not intend. Ibid.

⁵ Other than Spirit Cave, all of the burials considered by Sprague were from other time periods or from far distant areas. See Sprague, AR 1105, 1106, 1107; BLM Determination. AR 2010.

⁶ What Sprague likes to call a general pattern of mixed mortuary practices could actually be evidence of separate traditions. BLM Determination, AR 2006, 2010-2011. Even Sprague concedes that the Great Basin evidence does not reflect a uniform and precise pattern, but rather “is defined as much by what is lacking as what is present.” Sprague, AR 1109. Such a vague argument cannot provide the substantial evidence needed to support the Tribe’s claim to these remains.

F. There is No Demonstrated Linguistic Connection.

In *Bonnichsen*, the Secretary properly concluded that linguistic analysis could not demonstrate any connection extending back in time over the past 9000 years. *Bonnichsen*, 367 F.3d at 881; 217 F. Supp. 2d at 1151. Equally proper is the similar conclusion reached by BLM in this case because this record compels it. BLM Determination, AR 2026. Despite broader claims made by the Tribe, its own consultants disagree about the value of linguistic analyses here. Compare Goss, AR 1042, with Grayson, AR 1057 (“the linguistic models do not provide an acceptable means of assessing the antiquity of a particular Great Basin native group.”).⁷ Even Goss who argues in favor of long-term continuity in the region admits that language histories are complex.⁸ Goss, AR 1039. In any event, the salient facts are that we do not know from the record what language Spirit Cave Man spoke, and in the absence of that knowledge all linguistic based arguments in favor of continuity are pure conjecture. As the District Court observed in *Bonnichsen*:

“Given the limited information available regarding Kennewick Man and his era, linguistics cannot tell us what language the Kennewick Man spoke, what group he was personally affiliated with, who else was in the region, or whether the tribal claimants are related to the Kennewick Man’s group.” *Bonnichsen*, 217 F. Supp. 2d at 1151 (also see fn 57).

A similar conclusion is warranted here.

⁷ Both Goss and Grayson reject any attempts to date the antiquity of languages through glottochronology. Goss, AR 1040; Grayson, AR 1057. Grayson, who is an archaeologist, also rejects any attempts to establish linguistic affiliations through archaeological evidence. Grayson, AR 1057, 1058. No alternative methods are offered for dating languages or the length of their existence in a given region.

⁸ He also concedes that over the past 10,000 years “many more dialects and languages [may] have become extinct than have survived to be described.” Goss, AR 1039.

G. Oral Traditions are Unreliable and Provide No Evidentiary Support.

Another similarity between this case and the *Bonnichsen* case is the reliance placed by the respective tribal claimants on oral traditions. As the tribes did in *Bonnichsen*, the Tribe argues here that its oral traditions establish that they have resided in the region since Spirit Cave Man's time,⁹ and that there were no preceding people in the area.¹⁰ Similar arguments were rejected in *Bonnichsen*, and should also be rejected here for the same reasons. *Bonnichsen*, 367 F.3d at 881-882; 217 F.Supp. 2d at 1154-1155. Oral traditions are too susceptible to change over time and too open to conflicting interpretations to provide reliable evidence of what happened 9400 years ago.¹¹ As the Ninth Circuit concluded in *Bonnichsen*:

“Because oral accounts have been inevitably changed in context of transmission, because the traditions include myths that cannot be considered as if factual histories, because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins, we do not think that the oral traditions of interest to Dr. Boxberger were adequate to show the required significant relationship of the Kennewick Man's remains to the Tribal Claimants. [fn. omitted]. As the district court observed, 8340 to 9200 years between the life of Kennewick Man and the present is too long a time to bridge merely with evidence of oral traditions.” *Bonnichsen*, 367 F.3d at 881-882.

III. THE TRIBE OVERSTATES WHAT THE OTHER EVIDENCE SHOWS; THE COURT'S INDEPENDENT REVIEW OF THE RECORD SHOULD LEAD TO A REJECTION OF ITS POSITION.

The Tribe has claimed that there are factual differences between this case and *Bonnichsen*. See, e.g., Memorandum to Gayle Norton, AR 2494-2495. However, the things

⁹ This conclusion is said to follow from the asserted lack of any reference in their oral traditions to a migration from elsewhere. Tribe's Motion for Summary Judgment and Memorandum of Points and Authorities in Support Thereof at 87 (“Tribe's Motion”). However, there are at least some Paiute traditions that do refer to a migration. See BLM Determination, AR 2033, 2035. Furthermore, nothing would be proved even if there were an absence of migration references. *Bonnichsen*, 217 F. Supp. 2d at 1154.

¹⁰ Even Paiute oral traditions are not consistent on this point. Some claim that a different people, the Sai', were earlier inhabitants of the area. BLM Determination, AR 2032-2035, 2037.

¹¹ Even the Tribe concedes that oral traditions are “less reliable” than other types of evidence. 2001 Tribal Review Report, AR 1782.

cited by the Tribe are so ambiguous and so unhelpful that they provide no basis for connecting the Tribe or other American Indians to these remains. By no stretch of the imagination do they constitute substantial evidence of a special and significant cultural relationship between Spirit Cave Man and present-day American Indians as required by the statute.

A. The Hair Evidence is Ambiguous.

The Tribe’s investigators concluded that Spirit Cave Man’s hair was consistent with someone of either Native American or Asian origins. Goodman and Martin, AR 985. They were unable to be more specific. A third investigator, an FBI analyst, identified the hair as simply Asian in origin. BLM Determination, AR 2024. A fourth investigator stated that the hair was “typical of a Caucasian individual.” BLM Determination, AR 2023. Such conflicting opinions cannot be reconciled, do not provide substantial evidence, and fail to provide the requisite “rational and ample” basis for an agency’s decision. *Northwest Motorcycle*, 18 F.3d at 1468, 1471 (9th Cir. 1994).

Meaningful conclusions could not be reached even if one were to ignore the Caucasian identification and assume that the other identifications are correct. An Asian identification would merely provide a basis for concluding that Spirit Cave Man was part of a group that was derived from a population that once originated somewhere in Asia.¹² It would not tell us, however, what group that was, or whether the group was ancestral to modern American

¹² Such a conclusion would not be surprising. Virtually all scholars today agree that the New World was colonized, at least in part, by immigrant groups from the Asian mainland. Uncertainties exist, however, as to the timing of their arrival in the Americas, the means and routes of migration, how many groups (or waves) of people were involved in the colonizing process, and what happened to each group after arrival. See e.g., Hare, AR 1935; Kaestle, AR 1090-1091.

Indians.¹³ Nor would a Native American identification (even if it were unequivocal) tell us anything useful since that term is a generalized category that can, and often does, include native populations outside the United States. See T.J. Ferguson, “Native Americans and the Practice of Archaeology,” *Annual Review of Anthropology* 25: 63, 64 (1996) (“The term Native American refers to the indigenous populations of Canada, the United States, Mexico, and Central and South America. . . .”); R. Thornton, “Aboriginal North American Population and Rates of Decline, ca. A.D. 1500-1700,” *Current Anthropology* 38:310 (1997). Consequently, the hair evidence is too ambiguous to establish any reliable connection between this skeleton and existing American Indians.¹⁴

B. The Dental Evidence Does Not Prove a Connection.

The same is true of the dental evidence. The dental analyses available to BLM showed only that Spirit Cave Man’s teeth appear to have a number of characteristics that are more commonly found in Asian and Native American populations than in other modern populations. BLM Determination, AR 2019-2020; Goodman and Martin, AR 990-992. As with the hair evidence, such analyses do not tell us which Asian-derived group Spirit Cave Man actually belonged to, or whether his group was ancestral to modern American Indians. Contrary to the Tribe’s claims, the paper later published by Dr. Turner does not resolve the issue. Tribe’s Motion at 64-65. Spirit Cave Man’s teeth are so severely worn that it is difficult to obtain useful

¹³ Some of those groups may have become extinct or moved elsewhere. Hare, AR 1935, 1943, 1944; Miller, AR 629. See also *Bonnichsen*, 969 F. Supp. 628, fn. 24 at page 651 (D. Or. 1987). The morphological differences between Spirit Cave Man and modern human populations may be an indication that his group did not survive over time to have presently living descendants. See *Bonnichsen*, 217 F. Supp. 2d at 1145, 1146.

¹⁴ The Tribe’s own investigators argue that biological data are not reliable indicators of cultural or ethnic affiliations. Goodman and Martin, AR 983, 993; Walker, AR 1290, 1294 (discussing DNA data). As previously noted, Goodman questions whether racial categories (such as Asian or Native American) have any validity at all. See fn.3.

information from them. BLM Determination, AR 2019; Goodman, AR 990. Dr. Turner’s conclusions (see Plaintiff’s Exh. P) consist solely of a single dendrogram with little explanation of the underlying data or other considerations that might affect the accuracy of his calculations,¹⁵ and consequently cannot be considered definitive.¹⁶ Dental data relate to the frequency of characteristics within large populations, and consequently may not accurately identify the ethnical affiliations of specific individuals. See BLM Determination, AR 2019; Kaestle, AR 1093-1094 (discussing analogous problem with DNA evidence).¹⁷ Another expert, Dr. Joseph Powell, found that Spirit Cave Man and other early New World skeletons are dentally “distinct” from modern Native Americans. Damadio, AR 2107.

C. The Textiles Evidence Demonstrates a Discontinuity.

The textiles found with Spirit Cave Man also fail to establish any significant connection between him and modern Native Americans. BLM expressly found that there was a lack of continuity in textile techniques and artifacts in the region over the past 9400 years. BLM Determination, AR 2041. This conclusion was well supported by the evidence. Among other things, the types of textiles found with the skeleton disappeared around 8800 to 9000 years ago. BLM Determination, AR 2005; Fowler, Plaintiff’s Exh. L at 14. At least one other different textile tradition appeared in the area between Spirit Cave Man’s era and more recent ethnographic times (BLM Determination, AR 2005, 2041), and the methods used to make the

¹⁵ Dr. Turner agrees that advanced wearing of teeth can affect the accuracy of dental classifications. See Plaintiff’s Exh. P at 135.

¹⁶ There is disagreement among researchers over the geographic and other population divisions proposed by Dr. Turner. See, T. Hanihara and H. Ishida, “Metric Dental Variation of Major Human Populations,” *American Journal of Physical Anthropology* 128:287, 292 (2005).

¹⁷ Although mtDNA haplogroup frequencies appear to have remained stable in some regions over the past several thousand years (see O’Rourke, Plaintiff’s Exh. R at 16), nothing useful here can be inferred from such evidence. Those data are based upon comparisons of groups, rather than attempts to identify specific individuals, and they involve people who lived long after Spirit Cave Man. His DNA has never been sampled.

Spirit Cave textiles cannot be identified. Fowler, Plaintiff's Exh. L at 6, 10. Discontinuities of this kind make it impossible to trace any connection between Spirit Cave Man or his people and modern American Indians. See *Bonnichsen*, 367 F. 3d at 880-881. Although the Tribe places a different construction on the evidence, the clear weight of the evidence favors BLM's interpretation.¹⁸ Moreover, the Tribe's argument on this point is admittedly insufficient since, by its own admission, there is no direct correlation between items of material culture and ethnic affiliation. 2001 Tribal Review Report, AR 1775 (referring specifically to basketry technology); Grayson, AR 1058; Plew, AR 1809, 1815. If that is true, than textile evidence becomes irrelevant, or at least ambiguous.

D. Native American Status is Not Proven by Evidence That Spirit Cave Man Was a Hunter Gatherer.

The Tribe claims that it has a demonstrable connection to Spirit Cave Man because analyses of his remains shows that he ate fish, plants and small game, that he traveled long distances on foot, and that he engaged in activities that required squatting, lifting and carrying heavy loads. Tribe's Motion at 74-76. Even if these interpretations of the evidence are correct, they do not establish that he is related to the Tribe or any other living Americans Indians. All they prove is that he engaged in activities typical of virtually all temperate climate peoples 9400 years ago and for many millenia thereafter. See e.g., K.B. Tankersley, "A Geoarchaeological Investigation of Distribution and Exchange in the Raw Material Economies of Clovis Groups in Eastern North America," *Publications in Anthropology* (A. Montet-White and S. Holen eds.), No. 19, University of Kansas, at 286, 296 (1991) (Clovis people in eastern United States 11,000

¹⁸ Evidence considered by BLM included papers published by the leading experts on Great Basin textiles. BLM Determination, AR 2000.

years ago); H. Lourandos, *Continent of Hunter-Gatherers*, Cambridge University Press, at 41, 119, 120 (1997) (prehistoric Australian populations).¹⁹

Such similarities (or, in some cases, inferences from ambiguous evidence) tell us nothing about what particular group, if any, Spirit Cave Man belonged to,²⁰ or whether his group was ancestral to modern Native Americans.²¹ In fact, the Tribe's list of cultural elements said to be characteristic of their people includes many items that have no known connection to Spirit Cave Man. See Tribe's Motion at 86-87 (e.g., duck decoys, houses and other structures, metates, manos, tule technology). Without more and better evidence than is currently available, Spirit Cave Man has not been shown to be Native American as defined by NAGPRA.

¹⁹ String grooves in teeth, for example, are not unique to the Lahontan Basin. See, e.g., J.S. Cybulski, "Tooth wear and material culture," *Syesis* 7:31, 33, 34 (1974) (examples from British Columbia, Alaska and Eskimos). Likewise, primitive people around the world make and use baskets. See, e.g., J. Adovasio and R. Andrews, "Selected Perishable Artifacts from Bab edh-Dhra," *Bulletin of the American Schools of Oriental Research* 247:59, 68-69 (Near East basketry from as early as 9500 B.C.); M.L. Kissell, "African Basketry Weaves," *Science*, Vol. 25, No. 647 at 828 (1907) (African and New World baskets share many similarities); S. Ryden, "Notes on a Knitting Technique from the Tukuna Indians, Brazil," *Man* 35:161 (1935) (coiled baskets in South America).

²⁰ The evidence does not even establish that Spirit Cave Man was part of a group that resided in the Spirit Cave area. Damadio, AR 2103 (no assumptions about regional origins can be made from the occupational stress markers on the skeleton's bones). The contents of his stomach and fecal remains show only what he ate shortly before his death. They do not show what he ate over extended periods of time. Evidence that he was adapted to walking long distances would support an inference that he was highly mobile and consequently could have traveled to the area from elsewhere. See also Goodman and Martin, AR 983 (difficult to tell which group an individual belonged to particularly "when groups are poorly defined and boundless entities, and when they change over time").

²¹ BLM properly concluded that the evidence was insufficient to show how many groups existed at this time and which ones, if any, survived to have descendants living today. BLM Determination, AR 1996. Even groups living in close geographic proximity may not have intermarried. See Kabori, Plaintiff's Exh. N at 191. See also Damadio, AR 2108 ("It is possible that diverse groups entered North America but came to genetic dead ends due to disease, accident or war").

IV. SPIRIT CAVE MAN IS A MYSTERY FROM THE PAST AND IS NOT COVERED BY NAGPRA.

The gulf separating Spirit Cave Man's time from ours is enormous. 9400 years is the equivalent of almost 500 human generations. It is twice the age of the Egyptian pyramids and more than four times the age of the Mayan pyramids of Central America. Agriculture was just beginning in the Middle East 9400 years ago, and was still unknown in the Americas. Writing was not even thought of. In the intervening years, numerous civilizations have come and gone, massive human migrations have occurred in Eurasia, Africa and the Americas, and the planet has gone through a multitude of climate and environmental fluctuations. Lifestyles have changed in ways we still do not understand, languages have arisen and disappeared (many without a trace), and whole groups of people have succumbed to disease, war, natural catastrophes and other causes. To trace the lineage of one person or group through all those changes and gaps in the known record is an impossibility. We simply cannot get there from here.

The conflicting, wishful arguments made by the Tribe in this case demonstrate how impossible it is to establish biological or cultural connections over a span of 9400 years. Even the Tribe's own consultants disagree over what evidence is relevant, and how to interpret the evidence they do accept. At one point or another, they have argued against the relevance or significance of archaeological evidence (Goodman, AR 1894; Grayson, AR 1056), linguistics (Grayson, AR 1057; Walker, AR 1290), craniometric analyses (Goodman, AR 1896-1897), DNA analyses (Walker, AR 1294-1295), material culture items (Plew, AR 1809, 1815; Sprague, AR 1864), ethnographic data (Plew, AR 1813), and anthropological evidence generally (Grayson, AR 1059). They overstate what can be inferred from mortuary, hair and dental evidence. They

are not sure what to do with oral traditions; some they like and some they don't, but they never give a convincing or consistent reason for their choices.²²

The only thing they seem to agree upon is the supposed relevance of geography. It is difficult to see, however, how any significance can be attached to the fact that the remains were found on land that the Tribe's ancestors occupied (or occasionally used) in the Nineteenth Century. Serious disagreements exist among scholars about how long Numic speaking people have resided in the Great Basin. Some say only a thousand years or so. BLM Determination, AR 2011-2012; Thomas, Plaintiff's Exh. J at 166. Others disagree, but vary widely in their estimates of Numic (or proto-Numic) presence in the area.²³ However, these arguments over the timing of the Numic expansion miss the point at issue in this case. Even if one assumes that the ancestors of the Paiute have resided in the Great Basin for the past 10,000 years, that fact alone would not establish that they were the only occupiers of the area and that Spirit Cave Man was one of their people. See *Bonnichsen*, 217 F. Supp. 2d at 1155 (inconclusiveness of geography).²⁴

The fact that researchers cannot agree on what evidence is relevant and what the evidence proves or disproves demonstrates how impossible it is to reach any reliable conclusions about Spirit Cave Man's place in American prehistory. The claim that he is Native American as defined in NAGPRA rests on nothing more than conjecture and possibilities, and that is not a sufficient basis to support a claim under the statute. Possibilities should not be confused with

²² Walker, for example, states that legends, myths and other forms of oral literature are less reliable than oral history (which he admits can only be accepted with caution if within the memory of living people). Walker, AR 1871, 1872, 1883. Nonetheless, he then tries to build a case based on origin and creation myths.

²³ See, e.g., NSM, AR 718 (5000 years); Plew, AR 1820 ("several thousand years").

²⁴ See also Steele, AR 346 ("... assuming a biological relationship of the Paleoamericans to more recent Native Americans simply on the proximity of their sites of recovery to [the] location of living Native American populations is not warranted.").

fact, or with evidence in the record.²⁵ As the Ninth Circuit observed in *Bonnichsen* in response to similar arguments based upon unproved possibilities:

“Considered as a whole, the administrative record might permit the Secretary to conclude reasonably that the Tribal Claimants’ ancestors have lived in the region for a very long time. However, because Kennewick Man’s remains are *so* old and the information about his era is *so* limited, the record does not permit the Secretary to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people or cultures. We thus hold that Kennewick Man’s remains are not Native American human remains within the meaning of NAGPRA and that NAGPRA does not apply to them.” 367 F.3d at 882 (italics in original).

The same is true here. As with Kennewick Man, we can speculate about Spirit Cave Man, but the known facts are few. We do not know his real name, who he was, his customs, religion or lifeways, what language he spoke, where he spent most of his time, what his group was, or what happened to his group after he died. The unknowns are simply too great to conclude that he has a special and significant connection to contemporary American Indians. Therefore, NAGPRA does not apply.

CONCLUSION

NAGPRA requires more than just age before human remains fall within the scope of the law. Whether NAGPRA even applies here is of critical importance to the Court’s jurisdiction and authority. The parties cannot stipulate away the Court’s obligation to do a searching review of the record and the law.

“Federal courts are courts of limited jurisdiction which may exercise only those powers authorized by Constitution and statute. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). *See also, O’Melveny & Myers v. FDIC*, 512 U.S. 79, 90, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (Stevens, concurring). Therefore, ‘[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.’ *Kokkonen*, 511 U.S. at 377, 114 S.Ct.

²⁵ The Tribe’s argument can be reduced to the following (faulty) syllogism: (a) the possibility must be considered that Spirit Cave Man is Native American; (b) there is no evidence conclusively refuting such a possibility; (c) therefore, we must conclude that it is true.

1673 (cites omitted). The first and fundamental question presented by every case brought to the federal courts is whether it has jurisdiction to hear a case, even where the parties concede or do not raise or address the issue. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986); *Delaware v. VanArsdall*, 475 U.S. 673, 692, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (Stevens, dissenting) (citing *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884)). Quite aside from whether the parties raise jurisdictional issues themselves—or even attempt to consent or agree to federal jurisdiction—federal courts have an independent obligation to investigate and police the boundaries of their own jurisdiction. *Ebrahimi v. City of Huntsville Board of Education*, 114 F.3d 162, 165 (11th Cir. 1997) (‘Federal courts have an independent obligation to police the constitutional and statutory limits on our jurisdiction.’) (citing *Minority Police Officers Ass’n v. City of South Bend*, 721 F.2d 197, 199 (7th Cir. 1983)).” *Douglas v. E.G. Baldwin & Associates, Inc.*, 150 F.3d 604, 606-607 (6th Cir. 1998).

NAGPRA is inapplicable here. As in *Bonnichsen*, the applicable statute is the Archeological Resources Protection Act of 1979, 16 U.S.C.A §§ 470aa-470mm. That Act does not provide for claims of the kind made here. The Tribe’s motion for summary judgment should be denied.

DATED this _28th day of October, 2005.

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