Paula A. Barran, OSB No. 80397
pbarran@barran.com
Barran Liebman LLP
601 SW Second Avenue
Suite 2300
Portland, Oregon 97204-3159
Telephone: (503) 228-0500
Facsimile: (503) 274-1212

Alan L. Schneider, OSB No. 68147
alslawoffices@uswest.net
1437 SW Columbia Street, Suite 200
Portland, Oregon 97201
Telephone: (503) 274-8444
Facsimile: (503) 274-8445

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

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

Plaintiffs,

v.

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

Defendants.

CV. 96-1481-JE

PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE

I. INTRODUCTION

Following their unsuccessful appeal of this court's decision, their unsuccessful request for rehearing, and their failure to seek review by the Supreme Court, the Tribes have moved to intervene so they can participate as a party in any further proceedings in this lawsuit. Plaintiffs ask the court to reject their motion. The Tribes have been conclusively determined to have no link to the Kennewick Man skeleton. Their motion to intervene is an improper attack of the court's August 17, 2004 ruling that the Tribes have no right to participate further in this litigation, and is largely repetitive of arguments already considered and rejected by the court. Plaintiffs ask the court to exercise its inherent authority as well as the authority granted by 28 USC § 1927, and award plaintiffs their costs of responding to this new but repetitive motion.

In order to avoid repetition in this response, plaintiffs are attaching their supporting memorandum and reply memorandum from their July 2004 motion to dismiss intervenors which the court has previously considered.

II. DISCUSSION

A. The Tribes Do Not Meet the Standards for Intervention.

Intervention is not a substitute for standing. Rather, standing is a prerequisite to intervention. If it were otherwise, any person could become a party to any litigation and thereby interfere with or affect the rights of the legitimate parties, or prolong the proceedings. A person seeking to intervene must therefore show a significant interest in the subject matter of the action or independent basis for jurisdiction. That, in turn, requires a timely application as well as a significantly protectable interest in the subject of the action, an impairment of the ability to protect that interest, and inadequate representation of that interest (Rule 24(a)) or a timely application as well as independent grounds for jurisdiction (Rule 24(b)). See *State of Montana v. U.S. E.P.A.*, 137 F.3d 1135, 1141 (9th Cir. 1998), *cert. denied*, 525 U.S. 921 (1998); *Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989), *aff'd*, 495 U.S. 82, 110 S. Ct. 1679, 109 L.Ed.2d 74 (1990).

This is not a timely motion. This litigation was filed in October 1996. The Tribes did not intervene until six years later, and then only for purposes of appealing the court's decision.[1] That appeal is now over, and the only issues remaining are remedial (i.e., plaintiffs' claim for fees and costs, and implementation of the court's study order). Those issues do not represent a new or distinct phase of litigation. Plaintiffs have always sought to study the skeleton, and the general nature of their proposed studies has been known from the beginning of this litigation. Likewise, the Tribes have always opposed study of the skeleton (at least by plaintiffs). There is nothing new about these issues.[2]

Moreover, it has been conclusively determined that the Tribes have no relationship to these remains and therefore no further protectable interest in these proceedings. The Ninth Circuit ruled that the Tribes' connection to the remains was "tenuous, unknown, and unproven" (at best), and that "no cognizable link exists" between the remains and the Tribes. 367 F.3d at 879-880. In August 2004 this court ruled that any participation by the Tribes was at an end and that "there is no basis for concluding that tribal claimants have a legally cognizable interest which entitles them to participate as parties in any further proceedings in this court" (Order of August 17, 2004).[3]

B. This Motion Is An Effort to Attack Collaterally or Relitigate Prior Dispositive Rulings.

The proper way to challenge a disappointing ruling is to appeal. Otherwise, a decision

[1] In May 2000, the Yakama tried to intervene as a full party. Their motion was denied because it was not timely. See Order dated August 2, 2000, dkt # 291.

[2] The Tribes claim that they have no interest in re-litigating issues that have already been decided. It is clear from their memorandum, however, that their primary objective is to frustrate implementation of the Court's study order. See Intervention Memorandum at 9-10.

[3] The Tribes argue that the rules governing intervention are intended to be construed broadly in favor of the applicants; however, they have cited no decision where intervention has been permitted after an appellate court has ruled that the proposed intervenor has no cognizable interest in the subject matter of the litigation. In contrast, *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995), involved an appeal by a party allowed to intervene in the litigation below. *Greene v. U. S.*, 996 F.2d 973, 976 (9th Cir. 1993), cited the standards which govern intervention, but then went on to affirm the denial of the motion to intervene. Moreover, in language which should be instructive here, the Ninth Circuit pointed out that speculative interests do not warrant intervention. 996 F.2d at 977.

that is not reversed by orderly review represents a final decision which must be respected. The Tribes' unsuccessful appeal to the Ninth Circuit and their decision not to seek review by the Supreme Court concluded their participation in this case. See *Rein v. Providian Financial Corp.*, 270 F.3d 895, 898-99 (9th Cir. 2001) (final judgment on merits precludes relitigation of all issues connected with the action that were or could have been raised in that action). When the Ninth Circuit issued its opinion and denied the request for rehearing *en banc*, the Tribes could have sought Supreme Court review. They elected not to do so, and should not be allowed to keep repeating the same arguments before this court.

This motion is nothing more than a dressed-up repeat of arguments this court rejected just a few weeks earlier. In their opposition to plaintiffs' July 2004 motion to dismiss the intervenors' participation in this case, the Tribes argued that they have a "continuing legal interest" in the scope of permissible studies of the remains and in the treatment of the discovery site (Response at 1). They argued that additional studies might determine that the remains are Native American despite the courts' decisions (Response at 2). They stated that dismissal would be premature and deprive the Tribes of "their legal right to participate" in the ARPA and NHPA issues still pending (Response at 2). They claimed they have a property interest in the remains which continues under ARPA and which affords a right to protect the remains "from invasive and destructive studies" (Response at 3). They claimed to have a right to protect the burial site from further excavations (Response at 3). They claimed to have a "spiritual, cultural, and property interest in the remains" (Response at 3). They asserted their desire to remain an active participant in proceedings which affect "the future treatment and disposition of the remains and their burial site" (Response at 4). They complained of the additional testing proposed in plaintiffs' study plan and the amount of handling that study would involve, arguing that it would inevitably "damage" the remains and "duplicate the invasive and destructive studies already performed by government scientists" (Response at 4). They stated that they have interests protected by the American Indian Religious Freedom Act of 1978 (Response at 5). They argued

a continuing interest "in the carrying out [of] their spiritual practices" and protecting "their cultural patrimony" (Response at 6). They asserted an interest under ARPA and NHPA (Response at 7-10).

The court rejected those theories and concluded the Tribes had no further right to participate. This motion offers nothing new or different. The arguments raised in support of the motion for intervention are virtually identical to those made only a few months ago. Compare, for example, the claims summarized in the preceding paragraph with the following: "the tribes have a substantial interest relating to the subject matter of this litigation" (Intervention Memorandum at 6); "the record in this case conclusively establishes the tribes' spiritual, cultural and property interest in the remains" (Intervention Memorandum at 6); "these cultural interests as they relate to this case are recognized and protected by the American Indian Religious Freedom Act" (Intervention Memorandum at 7); "the additional testing proposed in plaintiff's steady plan inevitably will damage these precious human remains and in large part may duplicate the invasive and destructive work already performed by government scientists" (Intervention Memorandum at 9).

This is not the only time that the Tribes have made these same arguments. In the petition for rehearing *en banc*, the Tribes argued that the Ninth Circuit decision interfered with NAGPRA's provisions for notifying tribes of discoveries and providing for the protection of remains and land (Petition at 2). They argued that the decision had rendered superfluous portions of NAGPRA's ownership provisions (Petition at 3). They criticized the necessity of study to determine whether remains are Native American in the first instance (Petition at 7).

Before that, in the appeal, the Tribes argued that they objected to study of the remains and demanded repatriation (Opening Brief at 7, 43), that the government performed many objectionable tests (Opening Brief at 54, Reply at 27), that they were affiliated with the remains (Opening Brief at 48, Reply at 15), that burial sites were to be protected and removal of remains prohibited (Opening Brief at 16, 38. Reply at 5), that plaintiffs had no right to study the remains

(Opening Brief at 14, 18, 63, Reply at 2, 30), and that the remains were to be returned to them (Reply at 8, 25). For the new motion, they have merely substituted some different citations and relied on different authorities.

Courts have the inherent right to protect litigants from such duplicative litigation. See *Pipe Trades Council of Northern Cal., U.A. Local 159 v. Underground Contractors Ass'n of Northern Cal.*, 835 F.2d 1275, 1280-81 (9th Cir. 1988) (sanctions for transparent attempt to re-litigate issue raised by first motion; virtual identity between motions and accompanying points and authorities); *Stewart v. American Intern. Oil & Gas Co.*, 845 F.2d 196, 201 (9th Cir. 1988) (third party complaint was not only frivolous but also "nearly identical" to earlier action). See also *In re Grantham Bros.*, 922 F.2d 1438, 1442 (9th Cir. 1991), *cert. denied,* 502 U.S. 826 (1991) (collateral attack with no basis in law or fact is frivolous). Successive complaints based upon propositions of law previously rejected may constitute harassment. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 833 (9th Cir. 1986), *abg. on other issues,* 496 U.S. 384 (1990). An effort to re-litigate a prior case supports a finding of harassment sufficient to award sanctions. *Buster v. Greisen*, 104 F.3d 1186, 1190 (9th Cir. 1997), *cert. denied,* 522 U.S. 981 (9th Cir. 1997).

These repeated efforts to re-argue the same theories are burdensome to plaintiffs. Each time the Tribes make another lengthy filing, plaintiffs must divert their attention from issues related to the dispute with the federal defendants, review the Tribes' briefing, compare it to previous briefing, review case authorities and file a response. Such rehashing of rejected claims should not be allowed. This court and the Ninth Circuit have ruled conclusively that the Tribes have no interest in the skeleton. Those final decisions, which were not appealed further, should be the end of the matter.

C. Request for Costs of Responding to Motion.

The Tribes' claims, theories and arguments and their desire to prevent plaintiffs from investigating the remains have been a part of this controversy from the beginning. Plaintiffs prevailed in this court and before the Ninth Circuit. They should be permitted to resolve any

final disputes between themselves and the government without having to respond to the same arguments that have repeatedly been raised by the Tribes in an unsuccessful effort to block study of the skeleton.

Each time motions of this kind are filed, plaintiffs are put to the trouble and expense of responding. In the past plaintiffs have not asked the court to put an end to repeated reargument of the same claims, or asked the court to award their fees in responding. They do so now. The Ninth Circuit and this court have both ruled that the Tribes have no connection to these remains. Lacking such connection, and having been found to have no further right to participate in further proceedings, the Tribes' new motion is frivolous on its face. Plaintiffs ask the court to require that the Tribes pay their expenses of responding to this new motion. See *Earthquake Sound Corp. v. Bumper Industries*, 352 F.3d 1210, 1220 (9th Cir. 2003); *Adriana Intern. Corp. v. Thoeren*, 913 F.2d 1406, 1416 (9th Cir. 1990), *cert. denied,* 498 U.S. 1109 (1991) (fees for filing frivolous motion to reconsider). See also 28 USC § 1927 (award of costs, expenses and fees where proceedings multiplied unreasonably and vexatiously); *U.S. v. Blodgett*, 709 F.2d 608, 610-611 (9th Cir. 1983).

If the court allows, plaintiffs will file a separate statement of fees and costs.

DATED this 8th day of October, 2004.

BARRAN LIEBMAN LLP

By _____

Paula A. Barran, OSB No. 80397
Telephone: (503) 228-0500
Alan Schneider, OSB No. 68147
Telephone: (503) 274-8444
Of Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2004, I served the foregoing **PLAINTIFFS' RESPONSE TO MOTION TO INTERVENE** on the following parties at the following addresses:

Timothy W. Simmons (via e mail and regular mail)
Assistant United States Attorney
1000 SW Third Ave., Suite 600
Portland, Oregon 97204-2902

Sydney F. Cook (via regular mail)
U.S. Department of Justice
Environment & Natural Resources Division
General Litigation Section
P.O. Box 663
Washington, D.C. 20044-0663

Rob Roy Smith
Morisset,Schlosser,Homer,Jozwiak & McGaw
Suite 1115 Norton Building
801 Second Avenue
Seattle, WA 98104-1509

By causing the same to be: ☐ mailed ☐ hand delivered ☐ faxed to them a true and correct copy thereof.

Paula A. Barran, OSB No. 80397
Telephone: (503) 228-0500
Alan Schneider, OSB No. 68147
Telephone: (503) 274-8444
Of Attorneys for Plaintiffs