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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

REPLY MEMORANDUM ON MOTION TO DISMISS AND CLARIFY

I. INTRODUCTION

In September 2002, after six years of litigation and a decision by this court in plaintiffs' favor, the Tribes moved to intervene in the case for the sole purpose of appealing those portions of the court's decision relating to their claims to ownership of the Kennewick Man skeleton. Their motion was granted. They appealed unsuccessfully to the Ninth Circuit. Since the limited purpose for their intervention has been completed, their status as parties to the case has expired and they should be dismissed from it.

There is no merit to the Tribes' argument that dismissal would be improper because they have a "spiritual, cultural, and property interest in the remains." See Tribes' Response In Opposition To Request To Dismiss Intervenors at 3 (hereinafter the "Tribal Response"). That argument is in direct contradiction of the findings by this court and the Ninth Circuit that the skeleton has no demonstrated link to the Tribes or any other present-day American Indian tribe. Those findings are now final, and as a consequence the Tribes lack the requisite standing to support their intervention claim.

Plaintiffs began this litigation eight years ago this fall. They are still waiting for an opportunity to study this important skeleton. It would be improper to permit persons who have no relationship to the skeleton to interfere with the court's study order and force plaintiffs to wait even longer.

II. DISCUSSION

A. The Tribes' Status As Intervenors Has Expired.

The Tribes' argument that they have a right to participate as parties in all further proceedings in this case ignores the fact that they were originally allowed to intervene only for a single limited purpose that has now expired.[1] The Tribes' September 2002 motion stated that they were asking to intervene only "for purposes of appealing interpretations of the Native

[1] Because that right to intervene expired when the appeal ended, the Tribes are incorrect when they claim the benefit of LR 7.1. That Rule applies only to parties.

American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. § 3001 *et seq*. in this Court's Order and Opinion of August 30, 2002." Joint Tribal Claimants Motion For Intervention For Purposes of Appeal at 2, dkt #498. Nowhere in their motion and supporting memoranda did they argue that they were seeing intervention for any broader purpose. This court had a similar understanding of the limited purposes of the Tribes' intervention. Its order simply states that it was "Granting Joint Tribal Claimants' Motion to Intervene for Purposes of Appeal." Order dated October 21, 2002, dkt #541 (emphasis added). The Tribes now seek to convert that limited intervention into one that is unlimited as to scope and duration. They should not be permitted to do so.

B. The Tribes Improperly Seek to Challenge Findings That Have Become Final.

In their appeal to the Ninth Circuit, the Tribes argued that they have "a statutory property interest" in the skeleton, and that there was ample evidence to support their cultural affiliation claim. See Appellant Tribes' Opening Brief at 6; Appellant Tribes' Reply Brief at 15-16. The Ninth Circuit rejected those claims. It specifically found that "no cognizable link exists" between Kennewick Man and modern Columbia Plateau Indians. *Bonnichsen v. U.S.,* 367 F.3d 864, 880 (9th Cir., 2004). It also found that the record shows no relationship between Kennewick Man and the Tribal Claimants, *Id.* at 877, that no reasonable person could conclude on this record that Kennewick Man is Native American, *Id.* at fn.20 at 880, that the record demonstrates the absence of evidence that Kennewick Man and modern tribes share significant genetic or cultural features, *Id.* at 880, that Congress' purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them, *Id.* at 876, that the exhumation, study, and display of ancient human remains that are unrelated to modern American Indians was not a target of Congress's aim, nor is it precluded by NAGPRA. *Id.* at 876.

This court made similar findings. Among other things, it found that the record would not support a conclusion that the Kennewick Man skeleton is Native American, *Bonnichsen v. U.S.*,

217 F.Supp.2d 1116, 1138 (D. Or., 2002), that the record was insufficient to establish cultural affiliation between the skeleton and the Tribes, *Id*. at 1156, and that one can only speculate about which group Kennewick Man belonged to and whether his group even survived for very long after his death. *Id.* at 1147.

These findings leave no room to claim, as the Tribes do, that they have a "spiritual, cultural, and property interest" in the remains.[2] Tribal Response at 3. The implications of that argument should not be mistaken; it is a declaration that the Tribes want to continue to participate in order to relitigate this case.[3]

The Tribes voluntarily intervened in this case so they could appeal it. Having done so, they are bound by the rulings of the Ninth Circuit and this court that they have no relationship to the skeleton. See *U. S. v. California Mobile Home Park Management Co.,* 107 F.3d 1374, 1378 (9th Cir., 1997); *U. S. v. Van Cauwenberghe*, 934 F.2d 1048, 1057 (9th Cir., 1991) (parties are bound by principles of *res judica*). See also, *Martin v. Wilks,* 490 U.S. 755, 765, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (joinder as a party binds one to judgment or decree); *Galbreath v. Metropolitan Trust Co. of California*, 134 F.2d 569 (10th Cir., 1943), *Moore v. Tangipahoa Parish School Bd.*, 298 F.Supp. 288 (E.D. La.,1969).

Unless and until a judicial decision is reversed by orderly review, it must be respected. *Rein v. Providian Financial Corp.*, 270 F.3d 895, 902 (9th Cir., 2001). See also, *Tahoe Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency,* 322 F.3d 1064, 1077 (9th Cir., 2003) (recognizing merits of finality if a party has had a full and fair opportunity to be heard). It would stand principles of *res judicata* and finality on their head to permit the Tribes to interject

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[2] When the Tribes asked to intervene in September 2002, there was at least some arguable basis for such a claim since they would have become the owner of the skeleton if the Secretary's decision was reinstated on appeal. But it was not reinstated, and they have been determined to have no cognizable connection to the skeleton.

[3] Assertions in their Response make it clear that endless relitigation is their aim. For example, they claim that the record "conclusively establishes" their interest in the remains. The Ninth Circuit rejected that theory. They claim a right to reinternment of the remains. Tribal Response at 3-4. But the Ninth Circuit and this court have held that they have no relationship to the skeleton.

themselves into this case so that they can delay implementation of the court's study order. They are bound by the findings entered against them and have no further rights in this case.

C. <u>The Tribes Lack Standing and Should Not Be Allowed to Intervene</u>.

Because the Tribes' intervention for purposes of appeal ended with the appeal's conclusion, their request to continue as parties in this case must be evaluated under the same principles that would apply if the court were considering a new motion for leave to intervene. The considerations that informed the court's decision in 2002 no longer apply. A new Tribal intervention must be decided on the basis of the circumstances that now exist.

In addition to making a timely request[4], a person seeking to intervene must demonstrate a significantly protectable interest relating to the subject of the action, or be supported by independent jurisdictional grounds; in short, the prospective intervenor must have standing. *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir., 2003), *as amended, cert. denied*, 124 S.Ct. 570, 157 L.Ed.2d 430 (2003) (intervention as of right); *Greene v. U.S.*, 996 F.2d 973 (9th Cir., 1993), *aff'd,* 64 F.3d 1266 (9th Cir., 1995); *Blake v. Pallan*, 554 F.2d 947, 955-956 (9th Cir., 1977) (permissive intervention). The Tribes recognize that they must demonstrate that they have standing; but they are unable to demonstrate they have suffered an injury which is a prerequisite to standing, a requirement they disregard.

1. There can be no standing without an injury. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC) Inc.,* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000), upon which the Tribes rely, describes the requirements for standing. These begin with the necessity of showing an injury in fact; such an injury must be actual or imminent, concrete and particular, and fairly traceable to the challenged action. The Tribes do not satisfy this requirement. Since they have "no cognizable link" to the skeleton, they cannot show that they will suffer any actual,

[4] In August 2000, the court refused to allow the Confederated Tribes and Bands of the Yakama Nation to intervene because their motion was not timely and intervention "would further delay a process that has been less than expeditious, and would be prejudicial to the parties' interest in efficient and timely resolution of this litigation." Order dated August 2, 2000 at 4, dkt #291. The same considerations apply here.

concrete and particular injury from the study that they seek to block.[5] Their argument that further study of the skeleton might show that it is Native American is insufficient. See Tribal Response at 2. Standing cannot be based upon this kind of guesswork. There must be an injury in fact, not something hypothetical. *Friends of the Earth,* 528 U.S. at 180.

2. The provisions of the American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. § 1996, do not provide a substitute for the requirement that there be an actual injury, or overcome the judicially determined fact that the Tribes have no cognizable link to Kennewick Man. They argue that they have a "deeply personal stake" in preserving the skeleton because of their interest in carrying out "their spiritual practices" and "protecting their cultural patrimony."[6] See Tribal Response at 4. However, nothing in the AIRFA or the Free Exercise Clause of the First Amendment permits a person to manufacture standing where there is no injury.

AIRFA does not grant rights in excess of First Amendment guarantees. *Attakai v. U. S.*, 746 F.Supp. 1395, 1405 (D. Ariz., 1990). Its purpose is simply to protect the right of Native Americans to believe, express, and exercise their traditional religions. Nothing in the statute authorizes tribes to exercise veto rights over the study or use of something that has been conclusively determined not to be Native American. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) which rejected a First Amendment challenge to a road project transecting a portion of a national park traditionally used for religious purposes by members of three American Indian tribes:

> "The Free Exercise clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual

[5] That their objective here is to block study of the skeleton by plaintiffs is clear. See Tribal Response at 1 (one issue to be resolved is "the scope of permissible studies of the remains"), 3 (Tribes have right to protect the skeleton from "invasive and destructive studies"), 4 (mere handling of the skeleton will damage it), and 5 (plaintiffs' studies are duplicative and destructive).

[6] Their ultimate goal, however, is not to protect the skeleton, but to have it buried. See Tribal Response at 6. Doing that would result in its destruction.

> a right to dictate the conduct of the Government's internal procedures." 108 S. Ct., at 1325, quoting *Bowen v. Roy*, 476 U.S. 693, at 699-700, 106 S.Ct. 2147, at 2152, 90 L.Ed.2d 735 (1986).

The Court rejected the thought that one person has a right to impose his or her religious beliefs or practices on others who might believe differently:

> "Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O road will 'virtually destroy the Indians' ability to practice their religion,' [Northwest *Indian Cemetery Protective Ass'n. v. Peterson*] 795 F.2d [688], at 693 [(1986)] (opinion below), the Constitution simply does not provide a principle that could justify upholding respondents' legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. A broad range of government activities--from social welfare programs to foreign aid to conservation projects--will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion. The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion." 108 S.Ct. at 1326-1327.

The Tribes cite *Attakai v. United States* as support for their argument that AIRFA gives them standing to prevent plaintiffs from studying the Kennewick Man skeleton. However, *Attakai* relied on *Lyng* to reject claims based on a First Amendment and AIRFA analysis. In *Attakai* and *Lyng*, the tribal claimants lost even though they had a clear connection to the subject matter of the dispute. Here the Tribes' attempt to claim such a connection has already been rejected in two decisions that are now final. AIRFA does not support the Tribes' argument, and it does not permit them to interfere with study of a skeleton to which they have "no cognizable link."[7]

[7] Without such a connection, there is no reason why the Tribes' religious beliefs should predominate over those of other Americans. The Tribes want to bury the skeleton. Others might believe that it should be cremated, or left on the ground, in order to free the soul. Others might believe that it should be studied because study might uncover information supportive of their religious beliefs.

3. The Tribes' lack of standing is not cured by the Archaeological Resources Protection Act, 16 U.S.C. § 470aa *et seq*. ("ARPA"). Whatever their consultation rights might (or might not) be under ARPA,[8] consultation does not carry with it a right to intervene as a party in the conduct of this litigation. First, there is no suggestion that this lawsuit has interfered so far with ARPA consultations between the Tribes and defendants.[9] Whether any interference might occur in the future is speculation. Second, consultation merely means an opportunity to present views to, and to have discussions with, agency officials who are contemplating some activity or other action. Consultation does not confer the right to approve or veto the activity or action being contemplated or become a party in a lawsuit.[10] If at some time in the future agency officials were to violate any consultation obligations that they might owe to the Tribes, that would be a separate dispute between them. That remote possibility does not give the Tribes the right to intervene in this litigation to relitigate the orders permitting plaintiffs to study the skeleton.

4. Nor does the National Historic Preservation Act § 470 *et seq*. ("NHPA"), authorize the Tribes to participate in this case as a party. Their Response, filed in August 2004, is the first time the Tribes have expressed any interest in the outcome or consequences of plaintiffs' NHPA claim. Their memorandum for the June 2001 hearing did not bother to argue this matter, nor did their appeal to the Ninth Circuit. This is a belated intervention request, and it is untimely. See *U.S. v. Alisal Water Corp.* 370 F.3d 915, 919 (9th Cir., 2004) (intervention as

[8] The Tribes claim that they must be consulted under ARPA about study and disposition of the skeleton because it is of "religious or cultural importance" to them. Tribal Response at 8. No such claim can credibly be made about a skeleton that has no cognizable link to them.

[9] Such a claim would be difficult to make in view of the close partnership that has existed between the Tribes and defendants throughout the entire course of this case. That collaboration continues. The Tribes quickly obtained a copy of plaintiffs' plan for study of the skeleton even though plaintiffs only sent a copy to defendants. See Joint Tribal Claimants Memorandum in Support of Motion for Stay Pending Appeal at 12 and attached Affidavit of Dr. Manfred Jaehnig, dkt #548, 549.

[10] The tribes themselves concede that they merely have the right to "suggest" changes. See Tribal Response at 9. The fact that Dr. Chatters' ARPA permit stated that no Indian grave or burial ground could be investigated without tribal permission is irrelevant. There is no evidence that Kennewick Man was Indian.

of right; motion must be timely); *Venegas v. Skaggs,* 867 F.2d 527 (9th Cir., 1989) *reh. denied, cert. granted*, 110 S.Ct. 45, 493 U.S. 806, 107 L.Ed.2d 15, *aff'd*, 495 U.S. 82, 110 S.Ct. 1679, 109 L.Ed.2d 74 (1990) (permissive intervention; motion must be timely). Moreover, the Tribes' interest in any future proceedings that might occur in this litigation relating to the skeleton's discovery site is speculative. Plaintiffs have not asked the court for any future relief relating to the discovery site. Nor have they submitted a new request to defendants for a permit to investigate the site. Even if plaintiffs were to do so at some point in the future, there is no evidence to suggest that defendants will not consult with the Tribes if the law requires.[11] The mere possibility that such a failure might occur does not give the Tribes standing to intervene now in this case.[12] See *Silver v. Babbitt,* 166 F.R.D. 418 (D. Ariz., 1994), *aff'd,* 68 F.3d 481 (9th Cir., 1995) (intervention not justified since possible impacts of habitat designation depended on future post litigation actions by federal agency).

D. <u>This New Request Interferes with Plaintiffs' Judicially Recognized Rights</u>.

Resolution of this case has been woefully plagued by delays due, at least in part, to the Tribes' opposition to any study of the skeleton by plaintiffs. They have made no secret of that opposition. It has been open and continuous. Working in concert with defendants, the Tribes have used every tactic they could to delay, hinder and block plaintiffs' studies of the skeleton. As shown by their own statements, that purpose is the only reason they want to extend their limited and now expired intervention in this litigation.

This attempt by the Tribes to sidestep the principles of standing and *res judicata* so they can continue to interfere with plaintiffs' study of a skeleton that has <u>no</u> relationship to them should not be countenanced.

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[11] Nothing in defendant's past conduct suggests that consultation would be denied. The Tribes were allowed to participate in the December 1997 site study, which was severely restricted in response to their concerns. 217 F.Supp.2d at 1124. They were also consulted long before defendants buried the discovery site. *Id.* at 1125.

[12] If intervention were appropriate with respect to plaintiffs' NHPA claim, it would not entitle the Tribes to also intervene as to other issues. See also, *U. S. v. State of Wash.,* 86 F.3d 1499, 1505 (9th Cir., 1996).

> "Courts should not become so zealous in attempting to prevent a multiplicity of actions that they injure or hamper the rights of the original litigants.* * * Rule 24(a) is a valuable and useful rule but it should not be construed out of all recognition to its laudable purpose. Concrete issues, not abstractions, must appear on the face of the record. *United Public Workers of America (C.I.O.) v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). 'Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention.'" *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 324, 56 S.Ct. 466, 472, 80 L.Ed. 688 (1936)." *Kelley v. Pascal System, Inc.*, 183 F.Supp. 775, 777 (E.D. Ky., 1960).

See also, *U.S. v. U.S. Steel Corp.,* 548 F.2d 1232 (5th Cir., 1977) (interventions after judgment have strong tendency to prejudice existing parties to litigation or to interfere substantially with orderly process of court).

Plaintiffs have an order from this court authorizing them to study the skeleton. They have a similar order from the Ninth Circuit. Those orders are final, and the Tribes have no right to relitigate them or interfere with their enforcement. Whatever the Tribes wish to say about plaintiffs' studies can be expressed without the need to intervene in these proceedings. Requests to intervene can be denied where there are other means available for a person to protect its interests. See *Bates v. Jones,* 127 F.3d 870, 874 (9th Cir., 1997); *Greene v. U.S.*, 996 F.2d 973, 978 (9th Cir., 1993); *Hopwood v. State of Tex.,* 21 F.3d 603 (5th Cir., 1994); *Bush v. Viterna,*

740 F.2d 350 (5th Cir., 1984); *Brewer v. Republic Steel Corp.,* 513 F.2d 1222 (6th Cir., 1975) (proposed intervenors could provide input through amicus status).

DATED this ____ day of August, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, 2004, I served the foregoing REPLY MEMORANDUM ON MOTION TO DISMISS AND CLARIFY on the following party by

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