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IN THE UNITED STATES DISTRICT COURT
FOR THE 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, vs. UNITED STATES OF AMERICA DEPARTMENT OF THE ARMY, U.S. ARMY CORPS OF ENGINEERS, BARTHOLOMEW B. BOHN II, DONALD R. CURTIS and LEE TURNER, Defendants, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, NEZ PERCE TRIBE, CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION Defendant-Intervenor-Applicants.	Civil No. 96-1481 JE **TRIBES' MEMORANDUM IN SUPPORT OF MOTION FOR INTERVENTION** **Pursuant to Fed. R. Civ. P. 24(a) and 24(b)** ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Confederated Tribes of the Colville Reservation, Nez Perce Tribe, Confederated Tribes of the Umatilla Indian Reservation, and Confederated Tribes and Bands of the Yakama Nation (collectively "Tribes"), respectfully request the Court grant the Tribes' motion for intervention as of right, or in the alternative for permissive intervention, in this latest phase of the Ancient One ("Kennewick Man") litigation.

Intervenor-applicant Tribes have a long history of substantial involvement in this action to ensure the appropriate disposition of the ancient human remains at issue in this case. The issues to be resolved in this phase of the litigation are of critical importance to the Tribes. The present phase of the litigation addresses significant questions concerning both the disposition of the remains and the burial site along the Columbia River, raising critical matters of first impression for the Court concerning the role of tribes in cultural resource protection under the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. § 470aa, *et seq*., and the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470. *Bonnichsen v. United States*, 217 F.Supp.2d 1116, 1162-65 (D. Or. 2002), *aff'd and remanded*, 367 F.3d 864 (9th Cir. 2004) (as amended) (discussing remaining issues).

The Tribes do not seek to relitigate issues previously decided by the Ninth Circuit. Quite the contrary, the Tribes seek party status to ensure that their interests are considered concerning study plans for the remains and the possible excavation of the remains' burial site. Only through full participation in this case can the Tribes work with the parties towards achieving the Tribes' goal of "reinterment of [the] human remains" with the Tribes once the permitted studies are concluded. 36 C.F.R. § 296.14(c)(7).

BACKGROUND AND NATURE OF PROCEEDINGS

The Tribes previously sought and were granted intervention for purposes of appeal on October 21, 2002.[1] Earlier this year, the Ninth Circuit Court of Appeals ruled against the Tribes and affirmed the decision of this Court, concluding that the remains of the Kennewick Man are not "Native American" for purposes of Native American Graves Protection Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq*. *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004) (as amended). On July 23, 2004, plaintiff academics filed a motion with the district court to clarify the service list and to dismiss the Tribes as intervenors.

On August 17, 2004, the Court granted plaintiffs' motion as to the service list and denied plaintiffs' motion to dismiss the Tribes as moot. Noting that the Tribes were granted intervention for the limited purpose of "appealing interpretations of [NAGPRA] in this Court's Order and Opinion of August 30, 2002," the Court found that because the Ninth Circuit held that "NAGPRA does not apply," the "Ninth Circuit's disposition of the appeal precludes the tribal claimants' further participation in this litigation." The Court did not address the Tribes' contentions that they retained a continuing legal interest in this matter that warranted continued intervention pursuant to ARPA and the NHPA. *See* Tribes' Response in Opposition to Request to Dismiss Intervenors (filed Aug. 3, 2004).

The Tribes do not dispute that the question of the applicability of NAGPRA has been resolved

[1] At the time of intervention, the Tribes filed an answer in intervention responding to each of the allegations in plaintiffs' complaint, including those relating to ARPA and the NHPA. *See* Tribes' Answer in Intervention (Dkt. No. 500). To eliminate duplicative filings, and for the Court's convenience, the Tribes incorporate the responses of the Answer in Intervention herein rather than submitting another proposed Answer in Intervention herewith.

for now.[2] However, the Court has recognized that significant questions remain concerning the scope of permissible studies of the remains and a possible remedy concerning the recovering of the remains' burial site in violation of the NHPA. *Bonnichsen*, 217 F. Supp.2d at 1162-65. The Tribes have a legally protectable interest in seeing that the remains and their burial site, items of great religious and cultural importance to the Tribes, are properly and respectfully studied, curated, and returned to the Tribes pursuant to ARPA and its regulations.[3]

The applicants have a substantial and consistently demonstrated interest in seeking the repatriation of the ancient human remains at issue, and have an ongoing stake in the outcome in this litigation. The Tribes should be granted leave to intervene as of right, or with the Court's permission, in this new phase of the litigation.

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[2] The Tribes note, however, that the studies to be performed by the plaintiffs may determine that the remains are, despite the Ninth Circuit's ruling, "Native American" retriggering the applicability of NAGPRA. *Bonnichsen*¸ 217 F. Supp.2d at 1116 (noting that "further study may yield additional information and serve as a check on the validity of earlier results" which determine that the remains were "Native American").

[3] That the remains are not "Native American" for purposes of NAGPRA does not mean that the Tribes cannot have a religious and cultural interest in the remains. NAGPRA define "Native American" as "of or relating to a tribe people or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). "Native American" is a term of art under the statute and is not synonymous with American Indian. The Tribes continue to believe that the remains of the Kennewick Man are those of an Indian ancestor, even if the remains are not entitled to the protections afforded to "Native American" remains under NAGPRA. Minthorn Decl. ¶¶ 2, 4 (filed herewith). This is not an argument of semantics; rather, it is an important distinction between statutory language, ethnicity, and the Tribes' beliefs that cannot be callously dismissed. *Id.* ¶ 6.

ARGUMENT

I. APPLICANTS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

The Tribes are entitled to intervene in the current phase of this litigation as a matter of right. Fed. R. Civ. P. 24(a) provides:

> [u]pon timely application anyone shall be permitted to intervene in action . . . when the applicant claims an interest relating to the property or transaction which the subject of the action and the applicant is so situated that the disposition of the action may as a particular matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

In the Ninth Circuit, intervention "is construed broadly in favor of the applicants." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995). Accordingly, the Ninth Circuit has established a four-part test to determine the applicability of Rule 24(a) as follows: "timeliness, an interest relating to the subject of the action, practical impairment of the party's ability to protect that interest, and inadequate representation by the parties to the action. The Rule is construed broadly in favor of applicants for intervention." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993) (citing *United States v. Oregon*, 913 F.2d 576, 587 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991)). Practical considerations guide courts in applying this test. "[I]f any applicant would be substantially affected in a practical sense by the determination made in an action, [the applicant] should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24(a)(2), Advisory Committee Note. The Tribes satisfy each of the intervention requirements under Rule 24(a).

A. The Tribes' Motion for Intervention is Timely.

The intervention is timely. Courts examine three factors to determine the timeliness of a motion

to intervene: (1) the stage of proceedings that which an applicant seeks to intervene; (2) the prejudice of the existing parties if intervention is allowed; and (3) the reasons for and length of the delay. *County of Orange v. Air of California*, 799 F.2d 535, 537 (9th Cir. 1986), *cert. denied, City of Irvine v. County of Orange*, 480 U.S. 946 (1987).

Of particular relevance here, this case has now entered a new phase. The Ninth Circuit affirmed and remanded the case to the Court. Now pending before the Court are the two issues the Court has recognized are unresolved: the scope of permissible studies of the remains under ARPA, and a possible remedy for the violation of the NHPA found by the Court relating to the burial site. *Bonnichsen*, 217 F. Supp.2d at 1162-65. It is well established that when litigation enters a new stage, the new stage of the proceeding is a factor which miliates in favor of granting the application. *Oregon*, 745 F.2d at 552 (citing *Hodgson v. United Mine Workers of America*, 473 F.2d 118 (D.C. Cir. 1972) (request to intervene as of right after trial stage allowed where applicants sought to participate in the remedial and appellate stages of the case and agreed not to reopen matters previously litigated) and *Janusziewicz v. Sun Shipbuilding and Drydock Co*., 977 F.2d 286, 293 (3rd Cir. 1992) (intervention should have been granted where applicant sought to participate in a new phase of litigation)). Considering the new stage of the litigation, the Tribes' motion is timely.

Likewise, there is no prejudice to existing parties. The plaintiffs' study plan is still pending before the Court, and discussions between the United States and the plaintiffs concerning the scope of the studies appear to have stalled. *See* Minthorn Decl. ¶ 5. Likewise, the Court has taken no action on

the NHPA violation.[4] This new phase of the litigation is in its earliest stages. There would be no prejudice to either the plaintiffs or the United States from the Tribes' continued participation.

The Tribe has no intent to relitigate matters which have been previously litigated, to raise claims unrelated to the ARPA and NHPA issues reserved by the Court, or to assert any other claims against the plaintiffs or the United States. *See Oregon*, 745 F.2d at 552-53 (finding State of Idaho's entry into litigation in a new phase timely and not prejudicial because Idaho disclaimed any intent to relitigate matters previously decided). Accordingly, the Tribes' motion to intervene is timely.

B. The Tribes Have an Interest in the Subject Matter of this Action.

The Tribes have a substantial interest relating to the subject matter of this litigation. Rule 24(a)'s "interest test" is not a rigid standard. Rather, it is "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *County of Fresno v. Andrews*, 662 F.2d 436, 438 (9th Cir. 1980). "No specific legal or equitable interest need to be established; rather, a proposed intervenor need only show a "protectable interest of sufficient magnitude to warrant inclusion in the action." *Greene*, 996 F.2d at 976; *Smith v. Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1981).

The record in this case conclusively establishes the Tribes' spiritual, cultural, and property interest in the remains. *See e.g.*, Minthorn Decl. ¶¶ 2-3; Tribes' Answer in Intervention (Dkt. No. 500); DOI 7621 (Umatilla Culture Affiliation Report); DOI 9003 (Yakama Culture Affiliation Report);

[4] That plaintiffs have not yet asked the court for any relief concerning the burial site is of no moment. This is a live issue on remand over which the Court has reserved jurisdiction. *Bonnichsen*, 217 F. Supp.2d at 1162-64 (finding "no relief other than this declaration is appropriate at this time").

DOI 9055 (Colville Culture Affiliation Report); DOI 7304 (Nez Perce Culture Affiliation Report); Dick, Jr. Decl. at 3-4 (Dkt. No. 391) (explaining that the cultural traditions of the Tribes include the practices and beliefs of tribal religion and spirituality). These cultural interests as they relate to this case are recognized and protected by the American Indian Religious Freedom Act of 1978 ("AIRFA"), 42 U.S.C. § 1996 (stating the policy of the United States to "protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . including, but not limited to, access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rights").

ARPA and the NHPA also recognize that the Tribes' continuing interest in these remains and the burial site supports a "protectable interest of sufficient magnitude to warrant inclusion in the action." *Greene*, 996 F.2d at 976. For instance, ARPA's regulations provide that collections "of religious or cultural importance to any Indian tribe having aboriginal or historic ties to such lands" must be burdened with terms and conditions that limit the time, duration, scope, and purpose of proposed studies. 36 C.F.R. § 79.10(d)(4); 296.9(a)(1). Moreover, collections must be curated consistently with the conditions of the original ARPA permit, which, in the instant matter, required that "No Indian grave or burial ground may be investigated without permission of the governing council of Indians concerns [sic], which supplemental authority must be promptly recorded with the official in charge of the designated area."[5] *Id*. § 79.3(d); COE AR 9498, DOI AR 1245. Continued participation by the Tribes will also

[5] The threshold inquiry for the Tribes' continued interest in this new phase of the litigation is easily met. ARPA and NHPA refer to tribal interests in terms of "religious or cultural importance" to an Indian tribe. *See, e.g.*, 16 U.S.C. § 470cc(c); 16 U.S.C. § 470 a(d)(6). The statutes and their regulations do

enable the Tribes to seek an appropriate remedy under ARPA, including the reinternment of the remains. 36 C.F.R. § 296.14(c)(7); Minthorn Decl. ¶ 6.

Likewise, the Tribes have an interest under the NHPA. Minthorn Decl. ¶ 3. Courts in this circuit have recognized that "when an undertaking may affect properties of historic value to an Indian tribe on non-Indian lands, the consulting parties shall afford such tribe the opportunity to participate as interested persons." *Attaki v. United States*, 746 F.Supp. 1395, 1408-09 (D. Ariz. 1990) (holding individual tribal members have standing to assert individualized interest in the "preservation of historical, archaeological, and cultural artifacts that are threatened with destruction under the NHPA); *see* 36 C.F.R. § 800.2(c)(2)(ii)(A)-(F). The right of participation and decisionmaking includes the right to determine whether there will be damage or alteration to a culturally significant property that will diminish the qualities of the property, and to avoid or mitigate damaging effects from those actions. *Id*. §§ 800.5(c), 800.9(b), 800.5(e).

The Ninth Circuit has repeatedly concluded that intervention be construed broadly in favor of applicants to allow for the just and expeditious resolution of contested issues. The Tribes' interests in these remains, and consequently, right to be involved in this phase of the litigation, is no less important or concrete than that of plaintiffs. *Bonnichsen*, 217 F. Supp.2d at 1166 (recognizing "there is no absolute obligation to allow particular scientists to study" the remains); Minthorn Decl. ¶¶ 2, 4. The Tribes have a substantial interest in the subject matter of this action and, therefore, intervention is proper.

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not require the Tribes demonstrate a modern day connection, an ownership interest, or that they are "culturally affiliated" with the remains as was the case under NAGPRA.

C. The Tribes' Interest May Be Impaired as a Result of This New Phase of the Litigation.

Absent intervention, the rights and interest of the Tribes may be impaired. Rule 24(a) requires that an applicant for intervention as a matter right be "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest." Fed. R. Civ. P. 24(a) (emphasis added). "Rule 24 refers to impairment 'as a practical matter.' Thus, the Court is not limited to consequences of a strictly legal nature." *Forest Conservation Council v. United States Forest Serv*., 66 F.3d 1489, 1498 (9th Cir. 1995). As with the other prongs of the intervention test, the Ninth Circuit has interpreted this test liberally in favor of intervention. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983).

The additional testing proposed in plaintiffs' study plan inevitably will damage these precious human remains and in large part may duplicate the invasive and destructive work already performed by government scientists. A total of 12 examinations and two partial examinations by at least 17 scientists and their helpers, will irrefutably cause erosion of the human remains. Jaehnig Aff. ¶ 7 (Dkt. No. 549); *see* Hicks Decl. (Dkt. No. 550) (discussing adverse affects of studies). In addition, some of the tools to be used for examination and measurement will cause actual harm to the remains, such as use of dental picks and other sharp metal devices. *Id.* ¶ 8. Additional damage will be inflicted during sampling and testing using a drill bit which is 1.6 mm in diameter; even the most careful driller could probably only manage to hold the whirling drill steady enough to produce a hole of 2 mm in diameter. Forty holes, then, will cover about 125 sq. mm *Id.* ¶ 10. "Scientific" photography and x-rays will also require repeated handling of the whole skeleton by multiple scientists. *Id*. ¶ 13-15. Most of these individuals,

of course, are not plaintiffs in the case. The Tribes submit that the handling, erosion, destructive sampling, and invasive examinations may cause irreparable injury to the cultural and religious interests sought to be protected by the Tribes in this proceeding. Minthorn Decl. ¶ 2.

The overriding objective of the additional studies should be to provide interpretive information regarding this set of human remains beyond that already presented. The Tribes seek to ensure that the studies are so limited and do not unnecessarily cause harm to the fragile remains. *Id.* Since the remains shall be studied under ARPA and these unresolved legal issues are pending before the Court, it will be critical for the Tribes to have the opportunity to participate in these proceedings to ensure that proper terms and conditions are placed on the studies to satisfy everyone's concerns. *See* 36 C.F.R. § 79.10(d)(4) (stating that the United States "shall" place terms and conditions on "[s]cientific, educational or religious uses of material remains"); *see also id.* ¶ 6.

The significant impacts to the Tribes' interests meet the requirement of potential practical impairment of the Tribes' interest for intervention as of right. *Southwest Ctr. for Biological Diversity v. Burgh*, 268 F.3d 810, 824 (9th Cir. 2001) (quotation omitted) ("Resolution of this case will decidedly affect applicants to Applicants' legally protected interested and their sufficient doubt about the adequacy of representation to warrant intervention").

D. The Tribes' Interests Are Not Adequately Represented.

Finally, the significant interests of the Tribes' are not adequately represented by the existing parties in this case. *See, e.g.*, *Sagebrush Rebellion*, 713 F.2d at 527. Inadequate representation is demonstrated if the applicant shows that others' representation of their interest "may be" inadequate.

Trbovich v. United Mine Workers, 404 U.S. 528, 538 n. 10 (1972). "The burden of making this showing should be treated as minimal." *Id.*

The Tribes' religious and cultural interests are not being represented by other parties to the litigation. Certainly the plaintiffs, who brought this action seeking to conduct as many studies of the remains as possible, will not protect the Tribes' interests. The Federal defendants also do not adequately represent the Tribes' interests. It is unclear what position the Federal defendants will take concerning the scientists' proposed studies, especially since the United States has not formally consulted with the Tribes concerning the matter. Minthorn Decl. ¶ 6. In previous stages of this litigation, the interests of the Federal defendants and the Tribes have often diverged; the most recent illustration of this is that the Federal defendants appealed only one narrow issue of the Court's August 2002 decision to the Ninth Circuit, and did not join the Tribes in seeking a petition for rehearing of the adverse decision of the Ninth Circuit.

Moreover, the Tribes interests cannot be adequately represented by their participation in an amicus capacity rather than as a party. There are obvious distinctions between parties and amici, which make the Tribes' participation as amici in this case of little assistance to protect the Tribes interests. *See, e.g., Oregon*, at 745 F.2d at 553. If granted intervention, the Tribes will be able to ensure their participation in discussions of the study plan on the same basis as other participants. As a party to the action, the Tribes will be able to invoke the district court's jurisdiction to secure adherence to the orders of the court. An amicus curiae cannot provide such oversight over the decisions that are being made. In short, the Tribes likely have no other way to participate meaningfully in crafting a study plan that

satisfies the parties and controlling law, or contribute meaningfully to the terms and conditions that may be placed on the studies.

Based on the foregoing, the Tribes have more than satisfied the elements of intervention as of right and the Court should grant intervention.

II. THE TRIBES SATISFY THE STANDARDS FOR PERMISSIVE INTERVENTION.

The Tribes meet all of the requirements for intervention as of right under Fed. R. Civ. P. 24(a). However, should the Court deny the Tribes' application for intervention as of right, the Tribes should be granted permissive intervention under Fed. R. Civ. 24(b). Permissive intervention is proper when "an applicant's claim or defense and the main action have a question of law or fact in common." Fed. R. Civ. P. 24(b).

Here, the Tribes' defenses are both factually and legally related to the main action in this phase – studies of the remains under ARPA. Moreover, the Tribes' intervention is timely in this stage of the proceedings, and will not prejudice any of the existing parties or unnecessarily delay the conclusion of this matter. Rather, the Tribes "will significantly contribute . . . to the just and equitable adjudication of the legal questions presented" in this phase, all of which are cultural resource questions of first impression for the Court. *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977).

Permissive intervention is a question committed to the sound discretion of the Court. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). The Tribes have stood witness to the uncovering of

an ancient burial site and the subsequent exploitation of the remains which once rested peacefully there. The Court's discretion should be exercised to permit the Tribes' intervention in this latest phase of the litigation.

CONCLUSION

For the foregoing reasons, and in light of the gravity of the issues at stake, the Tribes respectfully request that the Court grant their motion to intervene as of right or, in the alternative, for permissive intervention.

DATED this 8th day of September, 2004.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 8th day of September, 2004, in addition to electronic service, I filed the original and one copy of Tribes' Motion for Intervention Pursuant to Fed. R. Civ. P. 24(a) and 24(b), Tribes' Memorandum in Support of Motion for Intervention, Declaration of Armand Minthorn in Support of Tribes' Motion for Intervention, and [Proposed] Order with the United States District Court, District of Oregon, via Federal Express to:

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I further certify that on the 8th day of September, 2004, I served one copy of Tribes' Motion for Intervention Pursuant to Fed. R. Civ. P. 24(a) and 24(b), Tribes' Memorandum in Support of Motion for Intervention, Declaration of Armand Minthorn in Support of Tribes' Motion for Intervention, and [Proposed] Order on counsel via **First-Class Mail and/or E-mail** to the following addresses:

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I declare the above to be true and correct under penalty of perjury. Executed this 8th day of September, 2004, at Seattle, Washington.

s/ Rob Roy Smith

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nmc:9/8/04

CERTIFICATE OF SERVICE