

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBINSON BONNICHSEN,
C. LORING BRACE, et al
Plaintiff-Appellees

vs.

CV 96-1481-JE
CASE NO. 02-35970,
02-35994

UNITED STATES OF AMERICA et al,
Defendants-Appellants

02-35996

**MOTION OF THE ETHNIC
MINORITY COUNCIL OF
OF AMERICA FOR LEAVE TO
PARTICIPATE AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS**

The Ethnic Minority Council of America hereby moves this court for leave to participate as *amicus curiae* in this case supporting the plaintiff-appellees. The motion is based on our interest in this case and that we are an organization of ethnic minority members who desire to promote our ethnic heritages (culture, descendants). Some of our ethnic heritages are related to prehistoric Kennewick Man, the object of this case.

The preservation and study of Kennewick Man, as a potential ancestor, has direct impact on our American Indian and Asian related members who may be biologically related to this ancient man. Preserving and studying the remains of this prehistoric human, as advocated by plaintiff-appellees, will help further the knowledge of our prehistoric past and thus some sources of our ethnic heritages.

Denying scientists' access to Kennewick Man, as recommended by the appellants and joint tribal claimants, will limit important data we believe necessary for identifying all the direct biological descendants and the effects of disease, environment and other factors related to Kennewick Man and our people's lives.

We have sent a request to Federal Defendants (Ellen Durkee, Environmental & Natural Resources Division, U.S. Dept. of Justice) asking if they object to this filing as recommended in Note 5 to Circuit Rule 27-1. As of this time, we have received no response.

Dated this 6th day of May, 2003.

Ellis J. Neiburger

Director

ETHNIC MINORITY

COUNCIL OF AMERICA

33263 N Cove Rd.

Wildwood, IL 60030

Telephone.... 847-223-1689

Facsimile.... 847-223-5077

E-mail...eneiburger@cs.com

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INTEREST OF *AMICI CURIAE*

The Ethnic Minority Council of America represents a group of ethnic minority families who wish to promote their ethnic heritages. Our members include people of American Indian, Asian and Polynesian ancestry; people who are scientifically linked to Kennewick Man.

On August 30, 2002, the court vacated the U.S. Department of the Interior's determination and then ruled that the plaintiffs-appellee's could have access to study Kennewick Man subject to the type of reasonable terms and conditions that normally apply to studies of archaeological resources under the Archaeological Resources Protection Act, 16 U.S.C. & 470aa *et seq.* (ARPA). The plaintiffs-appellees were ordered to submit a proposed study protocol to the agency which it did on October 10, 2002. On October 21, 2002 the Joint Tribal Claimants were granted leave for filing their appeal. Federal agencies have entered an appeal of the lower court's decision. The Ethnic Minority Council of America supports the appellee's position and urges the court to affirm the decision of the lower court.

SUMMARY OF ARGUMENT

The Ethnic Minority Council of America believes the Kennewick Man is a valuable and unique aspect of our history and biological-cultural heritage. The remains of this man should be preserved for the benefit of all Americans. The Ethnic Minority Council of America believes that the Joint Tribal Claimants have not shown that they represent all direct descendants who at this time are unknown and must be identified.

The Ethnic Minority Council of America believes all Americans have a right to know about this country's past and preserving access to Kennewick Man is one means of fulfilling this ideal. The Ethnic Council of America urges the court to affirm the decision of the lower court.

ARGUMENT

I. THE APPELLANTS DO NOT REPRESENT ALL DESCENDANTS OF KENNEWICK MAN

The Joint Tribal Claimants do not represent all parties who are related to the remains. To permit this small group of individuals, under the racial umbrella of “Indians”, to control Kennewick man’s remains is not in the best interests of the actual direct descendants who may exist. Kennewick Man’s remains are not clearly identified as to their direct relationship with the Joint Tribal Claimants.

Americans in general and Kennewick Man’s direct biological descendants, in particular, can significantly benefit from the scientific and educational use of these remains. The Joint Tribal Claimants have not established that they are the only direct descendants of Kennewick Man and they exclude people who may be related but not affiliated to the listed tribes, political Indian governments or holders of land presently occupied by the Joint Tribal Claimants. Potential descendants may not be members of the Joint Tribal Claimants or believe in the expressed “Indian” religious interpretations made by the

political leaders of the tribes.

Even if the joint tribal claimants are the direct descendants of Kennewick Man, there is no proof that they are the only direct descendants. Potentially direct descendants may be of mixed heritage (race) and subscribe to the Judeo-Christian or other modern religions which are not given expression by the Joint Tribal Claimants.

“Cultural affiliation”, a possible help in determining direct relations to Kennewick Man is a poorly defined term being used by the Joint Tribal Claimants to link these remains, which represent an unknown prehistoric culture, to that of historic natives.

The Ethnic Minority Council of America believes this term must be closely defined and not used as a broad brush to encompass all that is “prehistoric” or “Indian”.

II. AMERICANS HAVE THE RIGHT TO KNOW ABOUT THEIR PAST

The Ethnic Minority Council of America believes all Americans have a right to know about their past. This knowledge includes information of our biological and geological ancestors' lives, genetics, diseases, effects of the environment and other data that continued study of Kennewick Man's remains can provide. This data comprises our heritage. By denying access to Kennewick man's remains (e.g. giving remains to the Joint Tribal Claimants) we lose this knowledge and heritage.

III. KENNEWICK MAN'S DESCENDANTS ARE UNKNOWN.

PRESERVING THE KENNEWICK MAN WILL HELP LOCATE THEM.

Because Kennewick Man's descendants may be anywhere in the US or elsewhere in the world and have not been identified, the Kennewick Man's remains should be preserved and studied. DNA and other scientific research, now and in the future, should make it possible to identify these individuals.

Denying scientists and historians access to Kennewick Man deprives direct descendants (present and future) of the opportunity to scientifically test for close biologic relationships which, once discovered, will allow these relatives an opportunity to treat the remains in their personal, accustomed manner (e.g. preservation, burial, cremation).

The Joint Tribal Claimants have not established clear, direct genetic relationships with Kennewick man except for occupying the territory once inhabited by Kennewick Man's people. It is quite

probable that at some distant time in the past, ancestors of present tribes, who differ genetically from Kennewick Man (established by scientific comparison of skeletal structures of individual(s) representing the two groups), “replaced” the original Kennewick Man-related inhabitants by force. The Ethnic Minority Council of America believes that returning Kennewick man to the descendants of the people who perhaps were enemies is as morally offensive as giving the bones of Jews to Nazis (even though both were German-Europeans), remains of Armenians to Turks or Tamarora Indians to Iroquois (in 1682 the Iroquois attacked and cannibalized the Tamarora tribe).¹

¹ Thwaites, R. *The Jesuit Relations and Allied Documents 1610-1791*.

Burrows Bro. Pub. 1900 Cleveland OH.

IV. KENNEWICK MAN IS FOR ALL AMERICANS

Congress, in its Native American Graves Protection and Repatriation Act, 25 U.S.C. & 3001 *et seq* and Archaeological Resources Protection Act, 16, U.S.C. & 470 aa *et seq.* legislation set a strong national policy for all Americans including those of minority background.

The Ethnic Minority Council of America believes many Indian people wish to preserve the history of their people whether they are or are not directly biologically related to ancient remains such as the Kennewick Man. These remains represent a history of the environment and its effects on humans. A scientific analysis of Kennewick Man may determine what diseases (e.g. cancer) and environmental conditions were present in the past and can potentially be of help in identifying the causes and new treatments of many present day diseases affecting minority groups.

This information is critical to American Indians who suffer from certain diseases to a greater degree than the general population (e.g. 627% greater alcoholism, 533% greater tuberculosis, 249% greater

diabetes and 71% greater pneumonia).² A prolonged scientific study of Kennewick Man may lead to explanations and cures for these diseases thus benefiting present and future populations.

***2 Trends in Indian Health.* US Dept. of Health and Human Services.**

Indian Health Service, 1998-99 p.6.

V. KENNEWICK MAN IS NOT AN AMERICAN INDIAN

It is most likely that Kennewick Man is not a direct ancestor to modern American Indians (Native Americans). Physical anthropologists, Powell, Rose and Steele, have demonstrated that Kennewick Man, as a representative of a unique racial group, has a collection of anatomical attributes (e.g. maxillofrontal and alpha indicies, cranial suture complexity, large nasal spine, vertical zygomatic bone positions, etc.) that distinguishes him as significantly different than American Indians of which the Joint Tribal Claimants are representative. 3,4

Kennewick Man does not possess the majority of these “Indian” characteristics but possess characteristics consistent with other races.³ Powell and Rose, after an exhaustive comparative examination of Kennewick man, summarize:

“Thus Kennewick appears to have the strongest morphological affinities with populations in Polynesia and southern Asia, and not with American Indians...”⁴

The Ethnic Minority Council of America believes that

Kennewick Man is very unlikely to be a direct ancestor/relation to the people represented by the Joint Tribal Claimants and other American Indians, who have not established any biological relationship to Kennewick man.

Based on evidence we have to date, Kennewick Man is not ancestral to the American Indian people.

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3. J. Powell & J. Rose. Report on the Osteological Assessment of “Kennewick Man” skeleton. Administrative Record. Department of Interior CD-2NPS 10-20-99 Index #922 pages 10684-10692.

4. Affidavit of D. Gentry Steele. Army Corps of Engineers . Exhibit 719 page 8100. paragraph #7.

CONCLUSION

The Ethnic minority Council of America believes the Kennewick Man should be preserved and access granted researchers for the benefit of all Americans. We believe that the Joint Tribal Claimants have not shown that they represent all direct descendants who, at this time, are unknown and must be discovered.

The Ethnic Minority Council of America believes that all Americans have a right to know about the past and the preservation of Kennewick man is one way of contributing to this effort.

We hope the court will find for the appellees and affirm the lower court's decision.

Respectfully submitted,

Ellis J. Neiburger, Director

Ethnic Minority Council of America

1000 North Ave.,

Waukegan IL 60085 847-244-0292