Nos. 02-35996
(District Court No. 96-1481JE (D.Or))

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBSON BONNICHSEN, ET AL.,
Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellants

and

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
ET AL.,
Defendants-Intervenors-Appellants

On Appeal from the United States District Court
For the District of Oregon
Honorable John Jeldricks

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE
(In support of the Plaintiff-Appellees)

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TABLE OF CONTENTS

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STATEMENT OF INTEREST

Dr. Andrei Simic has been Professor of Anthropology at the University of Southern California, Los Angeles since 1971. His specialty is ethnic studies, including the role of folklore and oral tradition in the formation and development of the cultural identity of ethnic groups. He has authored and co-authored numerous articles, books and monographs on anthropological topics and has produced or consulted on seventeen films and video productions.

Dr. Harry Glynn Custred, Jr. has been Professor of Anthropology at California State University, Hayward since 1971 where he teaches cultural anthropology, linguistics and folklore. He has written approximately 40 anthropological books, articles, papers and reviews including several on evidentiary aspects of this lawsuit. See *Oral Traditions and Rules of Evidence*, Mammoth Trumpet, vol. 16, No. 3, at 17-19 (June 2001); *The Case of Kennewick Man: Linguistic Evidence and Cultural Affiliation*, Mammoth Trumpet, vol.17, No. 2, at 1-3, 17-20 (March 2002).

The *amici* are concerned about the Secretary of the Interior's misuse of oral tradition evidence to support his cultural affiliation determination. Given the nature of oral traditions and the great time depth involved here, the Tribes' creation stories do not establish a "reasonable connection"

between them and Kennewick Man's remains. To conclude otherwise, as the Secretary did, gives a false impression of what can be learned from folklore. The arbitrary nature of the Secretary's determination is further underscored by his statement that the determination he made was "informed by, but not controlled by, the evidence as a scholar would weigh it." COE 26; ER 6. This statement seems to imply that the rational methods developed by scholars for verifying and assessing evidence relating to oral traditions can be ignored by government decision makers at their convenience. Such a rejection of rationality is contrary to good public policy and the principles that *amici* seek to impart to their students.

SUMMARY OF ARGUMENT

The oral traditions put into evidence here consist of a report prepared by anthropologist Daniel Boxberger, a few published accounts of aboriginal folk narratives from the region and statements from individual tribal members. See DOI 6931-37, 6939-50, 7242-58, 7545-65, 7658-70, 9288-93, 10265-99. The stories in this assemblage deal with creation time. Many involve the mythic figure of Coyote who is said to be responsible for much of the world's present configuration. Those stories contain various giant creatures, monsters, people and animals that can change shape, and other supernatural elements.

Oral narratives are extremely mutable, and are unlikely to retain any historical accuracy after 500 to 1000 years. To use myths as proof of cultural affiliation to a 9500 year old skeleton ignores all that has been learned about the nature of such stories, the process of oral transmission and how orally transmitted narratives change over time to meet the evolving needs and aspirations of the people who tell them. The authenticity and accuracy of oral narratives can only be determined by critical analysis of their purpose, content and cultural context. None of the appropriate studies were made here.

ARGUMENT

I. PRINCIPLES OF FOLKLORE ANALYSIS

A. The Nature of Oral Traditions

Oral history differs from oral tradition. Oral history refers to knowledge from a person's direct experience or living memory transcribed from interviews to become a part of the written record. If properly collected, taking into account the fallibility of memory and other factors, oral history can add valuable facts to the historical record. Barbara Allen and William Montell, From Memory to History at 67-100, 157-160, (1981). Oral traditions, on the other hand, extend well back in time beyond the memory of the narrator. They purport to be memories of earlier narrators' memories.

Oral traditions and other types of folklore have been defined as "those materials in culture that circulate *traditionally* among members of any group in different *versions*, whether in *oral* form or by means of customary example, as well as the process of traditional performance and communication." Jan Brunvand**,** *The Study Of American Folklore* at 8, (1986), italics added.

When accounts are transmitted orally from one person to another the content is inevitably reshaped in response to a number of contextual and psychological factors**.** See F. C. Bartlett, *Some Experiments in the Reproduction of Folk Stories*, reprinted in A. Dundes (ed), The Study Of Folklore at 243-258, (1965). Indeed the spread of legends, one form of oral tradition, is similar to the dissemination of rumors. Consequently, many of the sociological and psychological theories of rumor are relevant in understanding the process of oral transmission in folklore. See Gordon Allport and Leo Postman, The Psychology Of Rumor at 164-169, (1965); Tomotsu Shibutani, Improvised News at 3-29, 164-183, (1966); Ralph C. Rosnow and Gary Alan Fine, Rumor And Gossip*:* The Social Psychology Of Hearsay at 8-20, 50-80. (1976); Patrick B. Mullin, *Modern Legend and Rumor Theory*, The Journal Of The Folklore Institute, vol. 9, at 95-109, (1972).

Tradition refers to the passing down of information, customary behavior and social patterns from one generation to another, thus adding a temporal dimension to the transmission process**.** Over time the process can retain or delete information, fuse events and persons, transform meanings and otherwise change narrative form and content. As David Henige states, "the mental landscape is repeatedly being exposed to weathering", thus diminishing the value of oral tradition as a source of historical facts to the point where "inevitably, many traditions cannot be regarded as historical fact" at all**.** David Henige, Oral Historiography at 5, (1982). See also Jan Vansina, Oral Tradition as History at 172, (1985); Ronald Mason, *Archeology and Native North American Oral Traditions,* American Antiquity vol. 65, no. 2 at 249, 256-257, (2000).

B. Distinguishing Between Different Narrative Genres

The historical accuracy of oral traditions is also affected by their kind or genre. Two categories of oral traditions are *legends* and *myths*. Legends are narratives that purport to describe the historical past and human figures acting in the real world. Legends may sometimes include stories of bizarre, often supernatural, incidents.

Myths are the least factually reliable type of oral tradition. They deal not with the historical past but rather with Creation or a timeless realm of

fabulous happenings, animal people, monsters, superhuman heroes and wondrous transformations. Myth addresses the unknowable, attempting to answer such metaphysical questions as where we came from, how things came to be, why our ways are different from those of others and why the human condition is the way it is. Myth depicts a reality quite different from that of nature, exhibiting a dream-like quality by taking reality apart and putting it back together again in illogical ways**.** Indeed some scholars argue that both myths and dreams spring from the same sources deep in the human psyche. Myth also has a moral dimension, explaining in moral terms why things happened and how people should behave. The significance of myth, therefore, lies in its cultural and psychological realm not in historical fact.

The oral traditions the Secretary relied upon are clearly myths, and should not be treated as if they were factual histories.

C. Story-Telling as a Social Process

Another parameter affecting the reliability of oral traditions is the dynamics of story-telling. Telling a story is a social event involving an interaction between a narrator and an audience in a specific contextual setting. Stories are always told for a purpose which may change from time to time depending on the intent of the story-teller or the event. As a result, oral narratives are perhaps "better understood as a social activity than as a

reified text, that meanings do not inhere in a story but are created in the everyday situations in which they are told." Julie Cruikshank, The Social Life Of Stories: Narrative And Knowledge In The Yukon Territory, at xv, (1998).

When folk narrative is viewed as a social process, the perspective shifts away from a view of tradition as a cultural inheritance firmly rooted in the past to one in which tradition is "seen as a selective, interpretive construct, the social and symbolic creation of a connection between aspects of the present and an interpretation of the past." R. Bauman, *Folklore*, Folklore, Cultural Performances And Popular Entertainments, at 31-32, (1992). This selective and interpretive aspect of tradition is often overlooked by those who claim historical accuracy for folk narratives that purport to describe events from the distant past.

The changeable nature of myths has also been emphasized by Bronislaw Malinowski who observed that they serve "to establish a sociological charter, or a retrospective moral pattern of behavior" and are constantly regenerated, as "a constant by-product of living faith." Bronislaw Malinowski, *Myth in Primitive Psychology*, Magic Science And Religion at 144, 146, (1954). Thus an essential part of myth is its continuing adaptability to meet changing human needs.

II. ORAL TRADITIONS AND KENNEWICK MAN

Because of the foregoing considerations, scholars agree that oral traditions cannot be taken as invariably accurate accounts of past events, particularly in the case of traditions that are said to be more than several generations old. Scholars have learned that the authenticity, reliability and accuracy of any oral tradition must be determined through appropriate analysis and evaluation. In the absence of careful study, oral traditions cannot be accepted as reliable evidence of past events.

The Secretary's staff was properly dubious of the oral tradition information compiled by the Tribes and Dr. Boxberger. See DOI 10072-76; SER 1170-74.

The tribes made no attempt to test their oral tradition evidence to determine whether it is authentic, credible and accurate. Because of that failure the evidence and any conclusions based on it should have been rejected. Although Dr. Boxberger cited much of the relevant body of published oral traditions from the Plateau area and accompanying scholarly studies he did not subject the material cited to the kind of scrutiny necessary when attempting to extract historical fact from oral narrative. Some of the issues that should have addressed include the following.

A. Purpose of Analysis

The purpose of an oral narrative must be carefully analyzed before it is used as evidence of past events. As previously noted, all stories have a purpose and their purpose dictates the content of what is being told. Historical accuracy is only a secondary consideration to the metaphysical, moral and cultural purposes of myths, and may be disregarded entirely in order to tell a more compelling story. As a result, myths can be of recent origin even when they refer to events that supposedly occurred in the very distant past.

In some cases, narratives or "neo-traditions" can be invented to establish a symbolic connection between aspects of the past and the present to meet a group's changing needs and aspirations. The Lumbee of North Carolina provide one example of this process. They invented a tradition asserting that they are descendants of the offspring of Algonquin Indians and sixteenth century English settlers from the lost Roanoke Colony. This tradition, although not true, seems so compelling that it has convinced others that the Lumbee's "self-identification was embedded in history". Alexander Von Gernet, Oral Narratives And Aboriginal Pasts at 13-14, (1996). As James Clifton puts it, "Today's tradition is often last year's novelty". James

Clifton, The Prairie People, Continuity and Change in Potawatomi Indian Culture, 1665-1965 at 30, (1998).

Another example of how the past can be dramatically altered in oral traditions occurs in revitalization movements. When a society's meaning system comes under severe stress, it is sometimes jettisoned and replaced with another system that attempts to rationalize the prevailing unfavorable conditions by creating a new cultural synthesis more responsive to those conditions. Such revitalization movements typically involve supernatural and mythic components, and often promise either the restoration of an imagined "golden age" or the creation of a glorious "new age". Prominent examples of Native North America revitalization movements were the teachings of the Seneca prophet Handsome Lake in the East and the Shawnee prophet, Tenskwatawa, brother of Tecumseh, in the Midwest at the beginning of the 19th century. Similar movements occurred at the end of the century in the Far West including ones involving the Paiute prophet Wovoka and the Ghost Dance of the Sioux**.** The influential prophet and spiritual leader Smohalla along the Columbia River was yet another. Click Relander, Drummers and Dreamers (1956).

Because they are so prone to invention and change, myths must be carefully analyzed before any part is accepted as historically accurate.

Among other things, analysis should be made of the account's text for signs of internal inconsistencies, recent modifications or grafting from other sources, and other possible indications of content instability. In addition, inquiry should be made to determine whether the cultural group in question employed any rituals or other devices to ensure that oral accounts were accurately transmitted from one generation of narrators to the next. All relevant external sources of information should also be assessed for any insights they might provide about the historic accuracy, or inaccuracy, of the account.

The analysis should also be as objective as possible. Evaluations that seek to justify a preconceived conclusion (i.e., that an account is, or is not, historically accurate) and that selectively use only those pieces of data that support the desired conclusion do not meet accepted standards of scholarly analysis. Conclusions should not be reached on the basis of speculation or ambiguous data. Detailed discussions of methods of retrieving historical data from oral traditions are found in D. Henige, The Chronology of Oral Tradition, (1974) and Oral Historiography, (1982); Vansina, (1985); Mason at 239-266.

No analysis of this kind was conducted by the Tribal Claimants or Dr. Boxberger.

B. Age of the Account

Even oral traditions that were once true will tend to lose factual accuracy with the passage of time. Factual accuracy is rare in oral traditions older than 1000 years, and cannot be assumed even for accounts that are much younger.

Anthropologist Alexander Von Gernet has extensively studied claims of "fossilized memory" supposedly embedded in narratives that date to the late Pleistocene. These narratives allegedly describe events that occurred 10,000 or more years ago, and are said to include references to giant beavers, mastodons, and other extinct megafauna. His conclusion:

> "I have examined all reported cases and have concluded that, while intriguing, these traditions cannot be used as evidence for the existence and persistence of a long term cultural memory of Pleistocene North America or the Paleo-Indian Period. Aboriginal and non-Aboriginal proponents of such `fossil memories' stretch credulity to unreasonable limits and offer arguments fraught with *non sequitur*." Alexander Von Gernet, Oral Narratives And Aboriginal Pasts, vol. 1, at 18-19 (1996).

For a discussion of claims regarding remote antiquity see Mason at 250-251.

This observation prompts the question, how long can historically accurate oral traditions be maintained? Few narratives go back as far as the first contact with Europeans, only five hundred years ago on the East Coast, and most are no older than the nineteenth century. Over long periods of time,

memories of historical events are less likely to be transmitted than plots, themes, motifs and patterns that meet other cultural needs. Thus, the further back in time one goes, the more historical fact is masked or overcome by traditional forms and content. Eventually, there is no way of differentiating the former from the latter even assuming that any historical memory remains at all.

Despite claims to the contrary, no oral tradition has been demonstrated to be historically accurate over a span of 9500 years. The Tribal Claimants and Dr. Boxberger provided no credible reason for concluding that their narratives are any different.

C. Content Completeness

Myths and other oral traditions are parts of a community's complex body of folklore, and cannot be understood properly without reference to the other parts of that folklore. See Ruth Bunzel, *Zuni Origin Myths*, at 547-549, (1929-1930). Such a context was not provided for the myths put into evidence here. In most cases the Tribal Claimants and Dr. Boxberger did not even offer the entire narratives from which these myths were presumably taken. Instead, they offered only bits and pieces of unconnected accounts and people's recollections of stories they were told as children.

Without the full context of the folklore and culture from which these accounts were taken, it is impossible to assess their authenticity, reliability and accuracy. For example, we cannot determine how these myths may have been affected by the processes of *omission* and *fusion*.

Omission reduces the accuracy of oral narratives by eliminating information. Anthropologist Robert Lowie illustrated its effects by comparing the oral traditions of the Assiniboines of the Canadian plains with those of the Nez Perce of the Plateau culture area. “There are few events that can be regarded as equaling in importance the introduction of the horse”, Robert Lowie wrote in 1917. Moreover, the introduction of the horse “took place within so recent a period that trustworthy accounts of what happened might reasonably be expected. Nevertheless”, he says, “we find that the Nez Perce give a matter-of-fact but wholly erroneous account of the case” (as cited by Lowie, in an article from The Journal Of American Folklore vol. 21, at 158 (1908), “while the Assiniboine connect the creation of the horse with a cosmogonic hero-myth”. R. Lowie, *Oral Tradition and History*, Journal Of American Folklore, vol. 30, No. 116 at 164-165, (1917). Jan Vansina says that omissions of this kind can be explained by the cultural context of the oral tradition. It is the **“**consensus of what is important and interesting at the time, not what is important historically, [that] determines what will be

retained in folk memory and what will be lost." Vansina at 118-119, (1985). Another motive for omission, says David Henige "is that unpleasant realities are optimistically ignored or artfully camouflaged." Henige at 191, (1974).

Fusion, the merger of different elements into a single unit, is another process that distorts oral narratives. For example, multiple persons can be fused into one hero, several battles into a single battle and historical figures and events fused with mythic themes. The coming of the whites, like the coming of the horse, was a momentous historical event. Yet among the Lemi Shoshone, says Lowie, "I failed to find any recollection of Lewis and Clark's visit", but he did find "a purely mythical story about a contest between Wolf (or Coyote) as the father of the Indians, and Iron-Man as father of the whites". Lowie at 165.

The Tribal Claimants and Dr. Boxberger completely ignore the possible effects of these processes on the myths they offered as evidence.

D. Consideration of Alternative Versions

Oral traditions exist in different versions. For example, each Salishan family, band and tribe of the Columbia River region had its own version of Coyote stories. Mourning Dove (Humishuma), Coyote Stories at xiii, 1990 ed. If only one version is considered, other versions that may more accurately represent folk traditions and beliefs will be overlooked. The

result is a misleading picture of what a group once believed and how its folklore may have changed over time.

Such is the case with narratives offered by the Tribal Claimants and Dr. Boxberger. In most cases, they provided only one (and usually incomplete) version of a myth, despite the fact that Franz Boas and others collected numerous oral traditions on the Columbia River Plateau in the early part of the twentieth century. Since then this body of data has been expanded by other field workers. See R. Frey and D. Hymes, *Mythology*, Handbook Of North American Indians: Plateau, vol. 12, at 584-599, (1998).

For example, the Tribal Claimants and Dr. Boxberger did not mention a creation story recorded in 1887 and attributed to Smohalla, a prophet and leader of a revitalization movement influential on the Columbia River at the end of the nineteenth century. Smohalla related how the Creator made all of the animals, fish and plants of the earth. Many people came to the land, he said, but the strong drove out the weak, an act duly punished by the Creator. See J. W. McMurray, *The Dreamers of the Columbia River Valley in Washington Territory*, Transactions of The Albany Institute, at 241-248 (1887). Although aware of Smohalla and his movement **(**see DOI at 10294, 10295) Dr. Boxberger did not include this myth in the evidence he presented.

Since those events were said to have occurred in the time just after Creation, they could be cited as evidence of migrations into the region and the displacement of prior inhabitants. On the other hand, the reference to events in the remote past may have been nothing more than an attempt to adapt local oral traditions to explain the stresses resulting from contact with Western culture. One scholar has concluded that Smohalla's story is "clearly a story about the oppression that Smohalla and the Indians suffered at the hands of American settlers and government authorities", directly reflecting "the situation at the time of the storytelling." Sam Gill, *Mother Earth: An American Myth*, in, James Clifton (ed.), The Invented Indian: Cultural Fictions And Government Policies at 136-137 (1994). In either case, Smohalla's creation story does not support the Tribal Claimants' argument that they are the only persons to ever inhabit this region.

Selective use of parts or versions of oral traditions to avoid potentially unfavorable data is not consistent with good scholarship. Mason at 261-262.

E. Analysis For Recurrent Themes, Plots and Motifs

Oral narratives should not be used as proof of historic fact without analysis for possible recurrent themes, plots, narrative elements, called motifs, and structural features. This also holds for internal tests of validity for oral history; recollections of personal experience transcribed for the

historical record. Barbara Allen and William Montell, From Memory to History, *Identifying Folklore Themes* at 71-76 and *Migratory Legends and Anecdotes* at 157-159, (1981). Such recurrent features are a common characteristic of preliterate cultures and may have no relationship to actual past events. For example, stories reminiscent of Greek myths can be found in Native North America. See A. H. Gayton, *The Orpheus Myth In North America,* The Journal Of American Folklore, vol.48, 1935**;** Alan Dundes, *Structural Typology In North American Indian Folktales,* A Study Of Folklore, at 210-211 (1965); Ake Hultkrantz, The North American Indian Orpheus Tradition at 15 (1957).

One reason for the recurrence of similar elements in oral narratives throughout the world is psychological. Anthropologist Claude Levi-Strauss has surveyed "the astounding similarity between myths collected in widely different regions" and concludes that the structure and themes of myths are the products of the human mind when unfettered by reality. Claude Levi-Strauss, *The Structural Study of Myth,* Structural Anthropology at 158-168 (1965). Anthropologist Clyde Kluckhohn, who studied the Navajo, also concluded that the repeated appearance of the same themes in mythic narrative is a psychological response to such common human experience as

birth, death, incest, etc. Kluckhohn, *Recurrent Themes in Myths and Myth Making,* A. Dundes (ed) The Study of Folklore at 161.

Myths stemming from such psychological impulses may have little time depth even though they purport to describe events that occurred thousands of years ago. Dr. Boxberger and the Tribal Claimants did not address this issue in their presentations.

F. Source Reliability

All accounts and reports of oral traditions "have to be assayed for credibility if anything of weight is to be built on their testimony". Mason, p. 261. Such an assessment cannot be made with the narratives at issue here. As the DOI staff noted, the published narratives cited by Dr. Boxberger and the Tribal Claimants have not been analyzed for historical accuracy. DOI 10075; SER 1173. Most were recorded by ethnographers whose primary goal was to collect "interesting" stories or to assess the stories "as literature". Id. Whether these accounts were truly representative of prevailing traditions and were faithfully recorded cannot be taken for granted.

The question of reliability also extends to the narrators themselves. For example, Mason reminds us that we must ask, "How knowledgeable is the informant? How did he/she come by the information being sought? Is it

verifiable?" Identification of an informant as an "elder" is no guarantee of the genuineness or accuracy of an account. Such a term is "a credential with known power to disarm otherwise worldly scholars" and as such is "a potential trap as likely to have been constructed by the information seeker as by its giver." Mason at 261. As literary critic Audrey Jaffe noted in a different context, "The assertion of knowledge and authority … does not necessarily reflect their secure position". Cited in Mason at 261. Consequently, appropriate information must be collected to determine whether an informant is in fact a credible source. When did the informant first learn of the account? Who was the informant's source? What was the source's position in the group? Were there any special rituals or circumstances associated with the telling of the account? Is the informant attempting to give a verbatim or a paraphrased account of what he or she heard? Are other members of the group more knowledgeable or credible?

Even if an informant is knowledgeable and credible, care must be taken to ensure that he or she is not omitting other conflicting versions of the story. If there are other versions, they should be recorded or at least noted in the record.

The information provided by the Tribal Claimants and Dr. Boxberger is too meager to resolve these concerns. Without the proper foundation, it is

impossible to have any confidence that their oral tradition evidence is reliable.

G. Contrary Evidence

Some of the Tribes' oral narratives are inconsistent with the claim that their ancestors were the only inhabitants of the region prior to Euro-American contact. For example, one story refers to "people" who were already living "at the time the Indians were created, but were different from them". DOI 10075; SER 1173. Of this reference the Secretary's staff said, "… it was suggested [at a consultation meeting] that the reference to these people in the original story might refer to an actual earlier human population that lived in the Mid-Columbia region before the ancestors of the present-day tribes." Id. Another story in the record refers to "some people" who lived during the myth time before Indians were created. They "were like the Indians of today except that they were ignorant." DOI 7553; SER 749. "It is after this time that Indians were created". DOI 09290; SER 1131. At least some Wanapum believed that Indians were preceded in the area by other inhabitants called "Stick People." DOI 8980; SER 869. No attempt was made by the Tribal Claimants or Dr. Boxberger to explain these accounts.

The claim was also made that local oral narratives make no reference to any migration into the area. DOI 10288. The Secretary accepted this

claim and apparently found it significant. COE 27; ER 7. However, it is not true. For example, one story tells of how Coyote "… found that all the people had crossed the mountains into buffalo country. So he followed them". DOI 10291. In another story about the time of Creation "There were people from back east that came up here and likewise, we went other places". Coyote in another story vanquished Coldweathers because "when the new people come they will need to be plenty in number". DOI 10289. One story of Nami Piap refers to "nomadic people who came down the river and overran the Palouse Country". DOI 10295; 1209. Another tells of a distant time "when the myth people were preparing the way for the coming of the people". DOI 10272; SER 1207.

Furthermore, even when oral traditions do lack a migration component, such an absence proves nothing. As DOI staff noted, "origin stories without migration are not always affirmed by investigators using other independent data". DOI 10074; SER 1172 (citing examples**)**. Since all humans originated in the Old World, the Tribal Claimants' ancestors must have migrated into the region at some point in the past. For the Salishan speaking tribes, this happened within the last four or five thousand years. DOI 10322.

Interpretations of oral tradition that ignore contrary or inconsistent evidence do not meet accepted scholarly standards. If such evidence cannot be explained in a credible manner, the interpretation must either be revised or withdrawn. In addition, the proponent of an interpretation must demonstrate that a reasonable effort has been made to ensure that the accounts cited fairly reflect the group's traditions. Interpretations that disregard these standards, as was the case here, are not reliable.

H. Internal Inconsistencies

One test of reliability of oral traditions as carriers of historical fact is whether the narrative content is consistent with the known cultural context of the event being described. Narratives that contain historically inconsistent elements cannot be accepted at face value since such inconsistencies are a warning sign that content invention has occurred.

A good example of such an historical inconsistency is the story in the administrative record about how Coyote "had a big steam boat then" on the Columbia River that he turned into rock. DOI 7556; SER 752. This story is similar to a narrative collected among the Salish of the North Pacific coast early in the twentieth century about Coyote's unhappiness at the coming of the railroad and how he turned it into rock. Brunvand, *The Study Of American Folklore* at 141-142 (1986). Even though these events supposedly

occurred in the time of creation, we know that steam boats and trains did not exist until the early nineteenth century. The similarities between these two stories may reflect diffusion and adaptation to events of particular local significance (railroads in one area; steamboats in another). When and where the story first originated, we do not know from the evidence presented.

The narratives offered by the Tribal Claimants and Dr. Boxberger contain other historical inconsistencies. For example, one narrative has Coyote telling the Nez Perce, "You shall be skilled horsemen and brave warriors". DOI 7660. However, the Nez Perce did not obtain horses until around 1700, long after the Creation. DOI 10075; SER 1173. The myth people purportedly lived "in villages" (DOI 10272; SER 1207), even though villages did not appear in the region until long after Kennewick Man's time. DOI 10076; SER 1174. Other elements inconsistent with his era include references to cattle, stone houses, bow and arrow technology and written language. DOI 6942, 7551, 10294, 10295; SER 705, 747, 1208, 1209.

Another indication that these stories are not accurate copies of truly ancient accounts is their use of modern terms unknown to preliterate hunter-gatherers. See, e.g., DOI 7666; SER 7666 ("caldera"); DOI 7667; SER 7667 ("crater"); DOI 10295; SER 1209 ("lava").

In some cases, misdated elements of this kind reflect recent embellishments to a preexisting and older oral narrative. In other cases, they are an indication that the narrative itself is a neo-tradition of fairly recent vintage. In the present case, insufficient information was given to determine which alternative is true.

I. Physical Improbabilities

The narratives contain numerous elements that are clearly contrary to the laws of nature. For example, one story tells of Indians who were as tall as trees. DOI 7667; SER 828. Another story refers to a flood so deep that only the highest ridges and tops of the Cascade Mountains remained dry. DOI 7662; SER 823. Other stories mention giant sea creatures that lived in lakes, monsters, and beings that changed form as needed or desired. DOI 7550, 10273, 10287; SER 746.

Such supernatural elements which are common to all myths demonstrate how strongly these stories are affected by the process of invention. As previously noted, historical accuracy is secondary to the metaphysical, moral or cultural purposes of myths. Consequently, nothing in a myth can be assumed to be factual unless unambiguously confirmed by external sources.

III. DIFFUSION OF ORAL TRADITIONS

The Tribal Claimants and Dr. Boxberger present their narratives as if they were unique to Claimants. That is not true. Diffusion and the incorporation of borrowed ideas are major processes in the dynamics of culture. Narrative plots, themes and motifs can spread by diffusion over vast geographic distances and many different cultural groups. Franz Boas, one of the founders of American anthropology, looked closely at the diffusion of oral narratives in the Pacific Northwest. He concluded that this process has resulted in the "dissemination of tales all over the continent." Franz Boas, *The Growth of Indian Mythologies*, In, Race, Language and Culture at 425-450 (1959).

As Boas observed, avenues of travel and points where people come into frequent contact are major channels for the diffusion of motifs, plots and narrative themes. The Columbia River has been a heavily traveled corridor for thousands of years, and consequently it is hardly surprising that motifs and plots from elsewhere characterize the oral traditions of the area.

One example is the Star Husband Tale which Stith Thompson plotted in an article described by Alan Dundes as "an important study by one of the world's greatest folklorists." Alan Dundes, A Study of Folklore at 414-459 (1965). The story tells of two girls who slept outside one night and wished

for stars as husbands, and what happened when their wish came true. This widely diffused story is still told in the Columbia River Plateau. Thompson in Dundes at 425-426. A version is found in the administrative record of the present case. DOI 07562, DOI 06934. Thompson concluded that "Language frontiers or even the boundaries of linguistic families have played little role in retarding or facilitating the spread of this tale" across the continent. Thompson at 458.

Narratives involving Coyote as either a creator, a trickster or an epic figure are also widespread throughout the western United States. See, e.g., Richard Erdoes and Alfonso Ortiz, American Indian Myths and Legends, at vi-x (1984); Erdoes and Ortiz, American Indian Trickster Tales, at vii-viii (1998). In addition to the Pacific Northwest, they can be found in California, Nevada, Utah, the Southwest, Texas and the Great Plains. Id**.** The similarities between Coyote stories found in the Columbia River Plateau and stories told elsewhere can be substantial. For example, a Nez Perce Coyote story tells of the separate creation of whites, blacks and Indians. Haruro Aoki and Deward Walker, Jr., Nez Perce Oral Narratives, at 101-110 (1989). The Pima of Arizona have a similar narrative. Erdos and Ortiz at 46-47 (1984). As previously noted, narratives in which Coyote turns

modern machines into rock can be found on both the Pacific coast and in the Columbia River Plateau.

Given their vast geographical distribution, it is obvious that the Star Husband tales and the Coyote stories have spread by diffusion. There is no agreement, however, among scholars where these narratives originated. Consequently, even if they do retain some elements of historical accuracy, those elements could refer to events that occurred in other geographic regions. And even if an element can be associated with a specific geographic region, there is no assurance that it was not borrowed from earlier inhabitants of the region.

North American Indian narratives also include elements and tales borrowed from European sources. Thompson has counted 19 examples of such borrowings, including four from Biblical sources. Stith Thompson, Tales of North American Indians, chapters VII and IX (1967).

The Tribal Claimants and Dr. Boxberger provided no data to show which elements in the narratives they offered are original and which are attributable to diffusion. They could have done so, for example, by comparing their accounts with narratives from other regions and by reference to the research tools developed by scholars for such purposes.

Failure to account for this highly important feature of oral narratives makes it impossible to reach any conclusions from the data they offered.

IV. LACK OF VERIFIABLE CHRONOLOGY

The Secretary's determination is contrary to accepted scholarly standards for another reason: the creation myths involved here cannot be placed in chronological time. Consequently, even if they are assumed to be true and did originate in the region, there is no way to connect them to Kennewick Man.

Chronology is fundamental to all investigations of this kind. Unless events can be put in a correct sequence and given an accurate (or at least reasonably approximate) date, there can be no history in the generally accepted sense of the term. Mason at 260-261. See also Henige at 190-191 (1974); Vansina at 23-24, 168-169.

Accurate chronologies are often difficult to establish even with oral histories that is, with informants' recollections of their own experiences. "In orally communicated history, standard chronology, whether as an over-all framework or as the order of events, is usually missing. The informant who remembers dates accurately is a rare find". B. Allen and W. Montell at 26 (1981). This problem is ever more acute in the case of oral traditions from preliterate cultures since their members seldom remember the past

sequentially, chronometrically or calendrically. For such cultures, "history may involve compression or telescoping of time, or may even be conceived of in cyclic terms". Alexander von Gernet, *What My Elders Taught Me*, Beyond The Nass Valley, at 109 (2000). See also Henige at 17-70, Mason at 258. On occasion, folk narratives can yield historical facts. Oral traditions of the Abenaki of Maine tell of events during the 18th century French and Indian War. When those stories were compared with French and English versions of the same events, they were confirmed by the written accounts and resolved a contradiction between them. Vansina at 189.

However, most oral traditions and particularly myths cannot be placed in real time. The constant processes of borrowing, accretion, fusion, omissions**,** inventions and telescoping of events that characterize oral transmission make the search for chronology in these narratives a "quest for a chimera." Henige, The Chronology of Oral Tradition*:* Quest for a Chimera, (1974)**.**

Such is the case with the fragments of myths in evidence in this case. The stories themselves do not say when they occurred, except that it was sometime during or around the time of creation, whenever that was. Such vague time references are characteristic of the oral narratives of preliterate people**s** who lack any system for recording the passage of time in calendar

years. Indeed the date on which an event supposedly occurred is usually irrelevant to the primary purposes of a myth.

The Tribal Claimants and Dr. Boxberger claim that these myths are at least 10,000 years old since they refer to floods, volcanic eruptions and other geologic events characteristic of the end of the last Ice Age. DOI 10292. However, such events were not limited to that time period. As the Secretary's staff noted, "large floods and volcanic eruptions have occurred in the region during the last 5,000 years", and consequently it is "possible that the effects of those recent events were incorporated into the mythical explanations for landscape formations." DOI 10076; SER 1174. They concluded that "The oral traditions and individual stories of the present-day tribes are difficult, if not impossible, to place in actual time." DOI 10073; SER 1171.

The Secretary, however, chose to ignore "these qualifications and data problems" DOI 10076; SER 1171. Instead, he concluded that the meager oral tradition evidence offered here was sufficient to establish a connection "between the cultural group represented by the Kennewick human remains and the modern-day Claimant Indian Tribes". COE 27; ER 7. Such a conclusion is pure speculation, and cannot be reconciled with logic or the evidence.

Even if one ignores all of the indications suggesting that these myths may be recent inventions or stories originating elsewhere, they cannot be assumed to have a great time depth. For preliterate people, long-term may be no more than a few centuries**.** As the Secretary's staff warned him "Events mentioned in origin stories may only date back a few centuries or less and such traditions may not remain stable over time." DOI 10075; SER 1173.

The Secretary should have listened to his staff. Their conclusions concerning the inadequacies of the oral tradition evidence were correct.

CONCLUSION

The narratives offered here do not provide credible evidence of cultural affiliation between the Tribal Claimants and the 9000 year old remains of Kennewick Man. All we have been given are fragmentary pieces of a limited sample of stories that once existed in many different versions. Appropriate analyses were not made of the purposes, content, and cultural context of the stories. No explanation was given of misplaced elements and physically impossible items that demonstrate that invention did occur. Contrary evidence was ignored, and source reliability was assumed not demonstrated. The stories cannot be dated and are clearly the result of diffusion.

Without proper analysis and evaluation, it is impossible to tell:

- whether any of these stories were stimulated by real world events;
- how they might have been modified over time;
- where they originated; or
- who created them.

To accept such inconclusive information as proof of cultural affiliation as the Secretary did here is a misuse of folklore. The trial court was correct to reject the Secretary's determination.

Respectfully submitted

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