

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

FILED
05 OCT 27 PM 4:00
LANCE S. WILSON
CLERK
BY _____
DEPUTY

FALLON PAIUTE-SHOSHONE TRIBE,)
a federally recognized Indian tribe,)
)
Plaintiff,)
)
v.)
)
UNITED STATES BUREAU OF LAND)
MANAGEMENT,)
)
Defendant.)


No. CV-N-04-466 LRH (RAM)

**MOTION OF THE ETHNIC MINORITY COUNCIL OF AMERICA
FOR LEAVE TO APPEAR AS *AMICUS CURIAE***

The Ethnic Minority Council of America moves for an order granting it leave to appear and participate as *amicus curiae* in this action. The bases for this motion are set forth in the memorandum submitted herewith.

Respectfully Submitted,

Dated: Oct. 27, 2005



William E. Peterson (Nev. Bar No. 1528)
MORRIS, PICKERING & PETERSON
6100 Neil Road
Reno, Nevada 89511
(775) 829-6000

Richard M. Donaldson
MONTGOMERY, MCCrackEN, WALKER
& RHOADS, LLP
300 Delaware Avenue, Suite 750
Wilmington, DE 19801
(302) 504-7840

*Attorneys for the Ethnic Minority Council of
America*

CERTIFICATE OF SERVICE


I, William E. Peterson, certify that copies of the Motion of the Ethnic Minority Council of America for Leave to Appear As *Amicus Curiae* were served by first class mail, this 27th day of October, 2005, on:

Gordon Depaoli, Esquire
Woodburn & Wedge
P.O. Box 2311
Reno, NV 89505
Counsel for Plaintiff

Brian Chestnut, Esquire
Ziontz, Chestnut, Varnell Berley, et al.
2101 Fourth Avenue
Seattle, WA 98121
Counsel for Plaintiff

Marc Slonim, Esquire
Ziontz, Chestnut, Varnell Berley, et al.
2101 Fourth Avenue
Seattle, WA 98121
Counsel for Plaintiff

Greg Addington, Esquire
U.S. Attorney's Office
100 West Liberty Street
Reno, NV 89501
Counsel for Defendant



William E. Peterson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

DISTRICT COURT
RECEIVED
OCT 27 2005
DISTRICT COURT

FALLON PAIUTE-SHOSHONE TRIBE,)
a federally recognized Indian tribe,)
)
Plaintiff,)
)
v.)
)
UNITED STATES BUREAU OF LAND)
MANAGEMENT,)
)
Defendant.)

No. CV-N-04-466 LRH (RAM)

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

The Ethnic Minority Council of America (the “EMCA”) seeks leave to appear and participate as *amicus curiae* in this action. The bases for this motion are set forth generally below and in greater detail in the *Amicus Curiae* Brief Submitted by the Ethnic Minority Council of America In Opposition to the Fallon Tribe’s Motion for Summary Judgment, which is being filed separately.

A. The EMCA

The EMCA was founded in 1985 to promote and protect our nation’s diverse ethnic heritage. Many of the EMCA’s members are of American Indian descent, living both within and outside the territorial limits of reservations created by treaty and recognized under federal law. The EMCA is politically and socio-economically diverse. Members of the EMCA are registered Democrats, Republicans and independents. They are located throughout the U.S. and pursue a wide variety of vocations ranging from homemakers to licensed professionals. They come from many religious backgrounds, including American Indian faiths, Christianity, Judaism, Islam, Hindu, Buddhism and agnostic belief systems.

B. The EMCA's Interest in the Spirit Cave Litigation

The EMCA supports the preservation of ancient remains and artifacts because these items are indispensable components of our common history. The EMCA believes that this history must be explored, understood and recorded for posterity. The EMCA believes that the cultural, educational, medical and scientific exploration of ancient artifacts and remains is a way of understanding and preserving our diverse cultural identities for our sake and for the sake of future generations.

Consistent with quasi-property rights long recognized in the law, the EMCA recommends repatriation of remains and other cultural items in cases *where the next-of-kin or other direct lineal descendants can be identified* and desire reburial, cremation or other disposition. Such repatriations should be reserved for *actual descendants*, not broadly-defined or aggregated groups or coalitions bound only by a common political or religious objective but with no historically shared group identity, or because of a mere geographic overlap.

The EMCA is concerned that the claiming tribe in this case seeks to exercise extraordinary property rights over the disposition of human remains and cultural material with which it has *no* demonstrated cultural affiliation, let alone one supported by a preponderance of the evidence. The exercise of these rights would impact many – indeed all – of our nation's diverse cultural citizens, including those represented by the EMCA.

The EMCA is concerned that while the Native American Graves Protection and Repatriation Act (“NAGPRA”) was intended to and has on the one hand provided a practical enforcement system for the rights of present-day American Indians relative to ancestral materials and remains, that enforcement system has been misapplied in ways that disrupt the delicate balance of interests NAGPRA was intended to preserve. The EMCA is concerned that the Fallon Tribe urges a misapplication of NAGPRA in this case. That is, the Fallon Tribe seeks to extend

NAGPRA to ancient human remains whose connections, if any, to *any* present day American Indians has not been and cannot possibly be established in light of our current state of knowledge. This is contrary to the beliefs and desires of the EMCA as well as other American Indians who have expressed views that are at odds with those held by the Fallon Tribe.

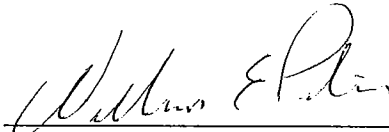
In particular, the EMCA seeks to demonstrate to the Court that concerns over the relaxed application of NAGPRA's "cultural affiliation" requirement proposed by the Fallon Tribe are more than merely academic. On the contrary, bending the cultural affiliation requirement to empower contemporary tribes to dictate the disposition of ancient remains and cultural items where, as here, (1) the remains cannot now and may never be assigned to an identifiable earlier group and (2) a showing of shared group identity is thus foreclosed from the start, would impinge upon the real-world rights and interests of other citizens. These other citizens include American Indians and other ethnic minorities who may have or in the future may be shown to have a more direct cultural relation to the remains than the claiming tribe or who may not, in any event, share the claiming tribe's traditionalist beliefs.

C. Request for Relief

The Court has broad discretion to appoint *amici curiae*. See, e.g., *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). Accordingly, for these reasons and those more fully set forth in its *amicus* brief, the EMCA seeks leave to participate in this litigation as *amicus curiae* so that it can present to the Court perspectives not yet represented in this litigation but which, it believes, are directly implicated by this dispute and should be considered by the Court in rendering a decision.

Respectfully Submitted,

Dated: Oct. 27, 2005



William E. Peterson (Nev. Bar No. 1528)
MORRIS, PICKERING & PETERSON
6100 Neil Road
Reno, Nevada 89511
(775) 829-6000

Richard M. Donaldson
MONTGOMERY, MCCracken, WALKER
& RHOADS, LLP
300 Delaware Avenue, Suite 750
Wilmington, DE 19801
(302) 504-7840

*Attorneys for the Ethnic Minority Council of
America*

CERTIFICATE OF SERVICE

I, William E. Peterson, certify that copies of the Memorandum In Support of Motion of the Ethnic Minority Council of America For Leave to Appear As *Amicus Curiae* were served by first class mail, this 27th day of October, 2005, on:

Gordon Depaoli, Esquire
Woodburn & Wedge
P.O. Box 2311
Reno, NV 89505
Counsel for Plaintiff

Marc Slonim, Esquire
Ziontz, Chestnut, Varnell Berley, et al.
2101 Fourth Avenue
Seattle, WA 98121
Counsel for Plaintiff

Brian Chestnut, Esquire
Ziontz, Chestnut, Varnell Berley, et al.
2101 Fourth Avenue
Seattle, WA 98121
Counsel for Plaintiff

Greg Addington, Esquire
U.S. Attorney's Office
100 West Liberty Street
Reno, NV 89501
Counsel for Defendant



William E. Peterson

FILED

05 OCT 27 PM 4:01

LANCE S. WILSON
CLERK

BY _____
DEPUTY

Richard M. Donaldson
MONTGOMERY, McCracken, Walker & Rhoads, LLP
300 Delaware Avenue, Suite 750
Wilmington, DE 19801
(302) 504-7840

William E. Peterson (Nev. Bar No. 1528)
MORRIS, PICKERING & PETERSON
6100 Neil Road
Reno, Nevada 89511
(775) 829-6000

Attorneys for the Ethnic Minority Council of America

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

FALLON PAIUTE-SHOSHONE TRIBE,)
a federally recognized Indian tribe,)
)
Plaintiff,)
)
v.)
)
UNITED STATES BUREAU OF LAND)
MANAGEMENT,)
)
Defendant.)

No. CV-N-04-466 LRH (RAM)

**AMICUS CURIAE BRIEF SUBMITTED BY THE ETHNIC
MINORITY COUNCIL OF AMERICA IN OPPOSITION TO THE
FALLON TRIBE'S MOTION FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. BACKGROUND AND STATEMENT OF INTEREST	3
A. The EMCA	3
B. The EMCA’s Interest in the Spirit Cave Litigation	3
III. ARGUMENT	5
A. “Any Indian” Will Not Do Under NAGPRA’s Cultural Affiliation Requirement	5
B. The Fallon Tribe Has Not Established “Cultural Affiliation” Under NAGPRA	7
1. The “Identifiable Earlier Group”	7
2. “Shared Group Identity”	9
3. The “Present Day Indian Tribe”	11
C. The Fallon Tribe’s Motion Is Based On The Erroneous Premise That American Indians Comprise A Homogenous And Unified Culture, And That The Fallon Tribe Represents The Views And Preferences Of All American Indians	13
D. The Fallon Tribe Does Not Represent The Views Or The Interests Of American Indians And Other Ethnic Groups Represented By The EMCA.....	14
E. The BLM’s July 26, 2000 Determination Must Be Upheld.....	16
IV. CONCLUSION.....	17

TABLE OF AUTHORITIES

Page

CASES

<i>Bonnichsen v. United States</i> , 217 F. Supp. 2d 1116, <i>aff'd</i> , 367 F.3d 864 (9th Cir. 2004)	1,5, 6, 8, 9, 10, 11, 13, 15, 16
--	----------------------------------

STATUTES

<i>Native American Graves Protection and Repatriation Act</i> , 25 U.S.C. § 3001 <i>et seq.</i>	5, 6, 7, 8, 9, 11, 14, 16
<i>National Museum of the American Indian Act</i> , 20 U.S.C. § 80q-9(b)	8
20 U.S.C. § 80q-9(b).....	8
25 U.S.C. § 3001(2)	5
25 U.S.C. §3002(a)(2)(B)	5

LEGISLATIVE MATERIALS

H.R. Rep. No. 101-877 (1990), <i>reprinted in</i> 1990 U.S.C.C.A.N 4367	5
H.R. 1646, 101 st Cong. (1989)	8
S. Rep. No. 101-473	5
S. 1980, 101 st Cong. (1989)	8

OTHER AUTHORITIES

43 C.F.R. § 10.2(c)(2).....	10
Zuni Tribe Resolution No. M70-90-L017	12, 13
William A. Lovis, Keith W. Kintigh, Vincas P. Steponaitis & Lynne G. Goldstein, ARCHEOLOGICAL PERSPECTIVES ON THE NAGPRA: UNDERLYING PRINCIPLES, LEGISLATIVE HISTORY, AND CURRENT ISSUES, IN LEGAL PERSPECTIVES ON CULTURAL RESOURCES, 165-184 (Jennifer R. Richman & Marion P. Forsyth, eds., Altimira Press 2004)	6

TABLE OF AUTHORITIES
(continued)

	Page
R. A. Mariar, L. L. Banks, B. R. Billman, P. M. Lambert, & J. E. Mariar, <i>Biochemical evidence of cannibalism at a prehistoric Puebloan site in southwestern Colorado</i> , Nature 407 (2000)	10, 11
1 R. Thwaites, <i>THE JESUIT RELATIONS AND ALLIED DOCUMENTS 1610-1791</i> (Burrows Bro. Pub., Cleveland Ohio, 1900)	10
O. H. Davis, <i>WINNEY ISLAND SYNOPSIS</i> (The Noteworthy Company, Amsterdam, New York, n.d.) .	10
T.J. Ferguson, <i>Historic Zuni Architecture and Society: An Archeological Application of Space Syntax</i> . Anthropological Papers, No. 60, 25-40 (University of Arizona Press, Tucson, Arizona 1996)	12

I. INTRODUCTION

The Ethnic Minority Council of America (EMCA) submits this *amicus curiae* brief in opposition to the Fallon Tribe's motion for summary judgment seeking to set aside the Bureau of Land Management's July 26, 2000 Determination of Cultural Affiliation of Ancient Human Remains from Spirit Cave, Nevada (the "Determination"). The EMCA, which represents American Indians¹ and other ethnic minorities² who do not uniformly share the Fallon Tribe's traditionalist views, believes that the positions taken by the Fallon Tribe, if accepted, would eviscerate NAGPRA's³ "cultural affiliation" requirement, disrupt the delicate balance of interests struck by NAGPRA's repatriation provisions, and trod upon the rights and interests of American Indians and other ethnic minorities represented by the EMCA and Americans at large.

Accordingly, the EMCA argues below that:

(1) The Fallon Tribe's unique adaptation of NAGPRA's "cultural affiliation" requirement is impermissibly broad, and impinges on the rights and interests of American Indians and other ethnic groups whose ancestry and views are not represented by the Fallon Tribe but who nonetheless have or may be proven to have a cultural or biological connection to the "Spirit Cave" remains and cultural items;

¹ The EMCA believes that the term "Native American" is problematic, in part due to inconsistent interpretations of that term under NAGPRA. (The EMCA also notes, however, that NAGPRA's "Native American" definition has been substantially clarified by judicial interpretation since the BLM issued its July 2000 Determination. *See Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1134-1139, *aff'd*, 367 F.3d 864 (9th Cir. 2004)). For this reason, the EMCA will refer to present-day aboriginal Americans recognized by the federal Indian laws as "American Indians."

² This submission is made not only on behalf of the EMCA's American Indian members, but represents the views of the EMCA's many other ethnic members as well. They, too, have a compelling interest in North American prehistory generally, and in light of questions surrounding the ethnic origins of the Spirit Cave mummy itself, believe that they have a direct interest in the curation and analysis of the Spirit Cave remains and cultural items.

³ To avoid unnecessary confusion, this brief will use where appropriate the same nomenclature used in the Fallon Tribe's Memorandum (the "Fallon Br."). Thus, "NAGPRA" refers to the Native American Graves Protection and Repatriation Act, the "Tribe" or "Fallon Tribe" refers to the Fallon Paiute-Shoshone Tribe, the "BLM" to the Bureau of Land Management, and so on.

- (2) The Fallon Tribe's motion for summary judgment is based on the flawed assumption that American Indians comprise a homogenous and unified culture;
- (3) The Fallon Tribe does not represent the views or the interests of American Indians represented by the EMCA or who otherwise do not share the Fallon Tribe's traditionalist views;
- (4) The American Indians and other ethnic minorities represented by the EMCA
- Reject the view that they or any particular ethnic group are the sole custodians of North American pre-history;
 - Oppose the repatriation of human remains or cultural items under circumstances that present a risk of the remains or items being given to individuals who may subscribe to religious beliefs and practices that are (a) unrelated to those practiced by the cultural group to which the human remains are actually affiliated or (b) unrelated to the beliefs and practices of other present-day Americans whose ancestral link to the remains or materials may be proven to be more direct;
 - Oppose the use of federal tax revenues to facilitate a repatriation project which, in essence, is a sectarian religious activity;
 - Support the responsible curation and study of all human remains and cultural artifacts pending positive identification, generally;
 - Support the careful and deliberate study and identification of the Spirit Cave remains and cultural items; and
 - Support the view that preservation of the Spirit Cave remains and cultural items will promote the interests of American Indians, and will unite all citizens in a mutual exploration and celebration of our individual ethnic heritages.

For these reasons, the EMCA respectfully requests that the Fallon Tribe's motion be denied and that the BLM's July 26, 2000 Determination be upheld.

II. BACKGROUND AND STATEMENT OF INTEREST

A. The EMCA

The EMCA was founded in 1985 to promote and protect our nation's diverse ethnic heritage. Many of the EMCA's members are of American Indian descent, living both within and outside the territorial limits of reservations created by treaty and recognized under federal law.⁴

The EMCA is politically and socio-economically diverse. Members of the EMCA are registered Democrats, Republicans and independents. They are located throughout the U.S. and pursue a wide variety of vocations ranging from homemakers to licensed professionals. They come from many religious backgrounds, including American Indian faiths, Christianity, Judaism, Islam, Hindu, Buddhism and agnostic belief systems.⁵

B. The EMCA's Interest in the Spirit Cave Litigation

The EMCA supports the preservation of ancient remains and artifacts because these items are indispensable components of our common history. The EMCA believes that this history must be explored, understood and recorded for posterity. The EMCA believes that the cultural, educational, medical and scientific exploration of ancient artifacts and remains is a way of understanding and preserving our diverse cultural identities for our sake and for the sake of future generations.⁶

Consistent with quasi-property rights long recognized in the law, the EMCA recommends repatriation of remains and other cultural items in cases *where the next-of-kin or other direct lineal descendants can be identified* and desire reburial, cremation or other disposition. Such

⁴ Affidavit of Ellis J. Neiburger in Support of Amicus Curiae Brief of the Ethnic Minority Council of North America ("Neiburger Aff.," attached as Exhibit 1), ¶ 2.

⁵ *Id.* at ¶ 3.

⁶ *Id.* at ¶ 4.

repatriations should be reserved for *actual descendants*, not broadly-defined or aggregated groups or coalitions bound only by a common political or religious objective but with no historically shared group identity, or because of a mere geographic overlap.⁷

The EMCA is concerned that the claiming tribe in this case seeks to exercise extraordinary property rights over the disposition of human remains and cultural material with which they have *no* demonstrated cultural affiliation, let alone one supported by a preponderance of the evidence. The exercise of these rights would impact many – indeed all – of our nation’s diverse cultural citizens, including those represented by the EMCA.⁸

The EMCA is concerned that while NAGPRA was intended to and has on the one hand provided a practical enforcement system for the rights of present-day American Indians relative to ancestral materials and remains, that enforcement system has been misapplied in ways that disrupt the delicate balance of interests NAGPRA was intended to preserve. The EMCA is concerned that the Fallon Tribe urges a misapplication of NAGPRA in this case. That is, the Fallon Tribe seeks to extend NAGPRA to ancient human remains whose connections, if any, to *any* present day American Indians has not been and cannot possibly be established in light of our current state of knowledge. This is contrary to the beliefs and desires of the EMCA as well as other American Indians who have expressed views that are at odds with those held by the Fallon Tribe.⁹

⁷ *Id.* at ¶ 5.

⁸ *Id.* at ¶ 6.

⁹ *Id.* at ¶ 7.

III. ARGUMENT

A. “Any Indian” Will *Not* Do Under NAGPRA’s Cultural Affiliation Requirement.

NAGPRA neither promotes nor embodies a policy of universal repatriation.¹⁰ Rather, to prevail on a claim for repatriation where there is no known lineal descendant, a claiming tribe bears the burden of proving by a preponderance of the evidence that it is “culturally affiliated” with the remains or materials.

A finding of “cultural affiliation” with human remains requires proof of “a relationship of shared group identity which can reasonably be traced . . . between a present day Indian tribe . . . and an identifiable earlier group of which the decedent was a member. 25 U.S.C. § 3001(2) (emphasis added). *See also*, S. Rep. No. 101-473 at 8 (claimant must show “a continuity of group identity from the earlier present day group”).

Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1143, *aff’d*, 367 F.3d 864 (9th Cir. 2004).¹¹

In proving a “shared group identity,” a claiming tribe bears the burden of establishing a “commonality” that “distinguishes the group and its members from other groups, and legitimizes the present-day group’s authority to represent the interests of deceased members.” *Id.* at 1148.

Thus, NAGPRA’s cultural affiliation requirement is considerably more than window dressing.¹² As commentators have noted:

¹⁰ The first objective [of NAGPRA] deals with Native American human remains, funerary objects, sacred objects and objects of cultural patrimony which are excavated or removed from Federal or tribal lands after the enactment of the Act. . . . If any of such remains or objects are found on Federal Lands *and it is known which tribe is closely related to them*, that tribe is given the opportunity to reclaim the remains or objects.

H.R. Rep. No. 101-877 at 12 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4368 (emphasis added).

¹¹ Where competing interests exist, such as where more than one claiming tribe has derived from an earlier group, NAGPRA requires a determination of which tribe “has the closest cultural affiliation.” 25 U.S.C. §3002(a)(2)(B).

¹² Nor can “cultural *affiliation*” be equated with a less rigorous “cultural *relation*” standard. *See Bonnichsen* at 1138 (“It is clear from the full text of NAGPRA that the cultural relationship required to meet the definition of ‘Native American’ is less than that required to meet the definition of ‘cultural affiliation,’ . . .”). This makes sense if

Continued...

The determination of cultural affiliation is the *cornerstone* of NAGPRA because most decisions about disposition of human remains and objects are made with reference to that standard. In most circumstances, *cultural affiliation is the threshold for closeness of relationship that must be met for a Native American group to determine the disposition of the remains or objects.* As a consequence of its centrality to the decision-making process, the interpretation of this term is hotly contested.

William A. Lovis, Keith W. Kintigh, Vincas P. Steponaitis & Lynne G. Goldstein, ARCHEOLOGICAL PERSPECTIVES ON THE NAGPRA: UNDERLYING PRINCIPLES, LEGISLATIVE HISTORY, AND CURRENT ISSUES, IN LEGAL PERSPECTIVES ON CULTURAL RESOURCES, 165-184, at 177 (Jennifer R. Richman & Marion P. Forsyth, eds., Altimira Press 2004) (emphasis added).

The purpose of this submission is to demonstrate to the Court that concerns over the relaxed application of NAGPRA's "cultural affiliation" requirement proposed by the Fallon Tribe are more than merely academic. On the contrary, bending the cultural affiliation requirement to empower contemporary tribes to dictate the disposition of ancient remains and cultural items where, as here, (1) the remains cannot now and may never be assigned to an identifiable earlier group and (2) a showing of shared group identity is thus foreclosed from the start, would impinge upon the real-world rights and interests of other citizens. These other citizens include American Indians and other ethnic minorities who may have or in the future may be shown to have a more direct cultural relation to the remains than the claiming tribe or who may not, in any event, share the claiming tribe's traditionalist beliefs.

....Continued

one bears in mind the purpose of NAGPRA's repatriation provisions -- to re-unite remains and certain cultural items with an *appropriately affiliated tribe*, as opposed to *any tribe that makes a claim*. See *Bonnichsen*, 367 F.3d at 876 ("NAGPRA was intended to benefit modern American Indians by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors' graves and the study or display of their ancestors remains Congress's purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them.").

B. The Fallon Tribe Has Not Established “Cultural Affiliation” Under NAGPRA.

Views expressed by members of the Fallon Tribe during a May 8, 1996 meeting with representatives of the Nevada State Museum and the BLM were, regrettably, a harbinger of things to come. There, according to a summary of that meeting cited by the Tribe in its brief, Tribal representatives expressed the view that:

The age of the Spirit Cave mummy has no relevance . . . , nor does the mummy’s relation to contemporary Indian populations. They [members of the Tribe] consider themselves to be the caretakers of the ‘old ones’ and requested that they be allowed to rebury the mummy as soon as possible

Fallon Br. at 16 (quoting AAR 0178).

With the advent of litigation and the benefit of capable counsel, the Fallon Tribe’s position has taken on a new veneer, but has not changed in substance. The EMCA believes that the Fallon Tribe has failed to meet its burden under NAGPRA’s cultural affiliation requirement in at least three respects.

1. The “Identifiable Earlier Group”

First, the Tribe concocts and relies upon an expansive and ultimately indefensible “earlier group” theory. The Tribe argues that the occupants of the western Great Basin, which the Tribe attempts to unify under a “Desert Culture concept,” comprise an “identifiable earlier group” for purposes of establishing cultural affiliation. *See* Fallon Br. at 31, 43 (stating that the BLM improperly failed to consider “whether the occupants of the western Great Basin as a whole constitute an identifiable group. . . .”) and 85 (“The Great Basin Culture Area is a spatial grouping of peoples who, at the time of European contact, were far more similar to one another than they were to peoples in adjacent culture areas.”). This fails factually and legally.

Factually, the Tribe has failed to account for (among other things) the inevitable coming,

going, merging, splintering, and dying off of populations over the last *one hundred centuries* properly considered by the BLM. Determination at 14-19; 25-30; 59. It fails to account for the inevitable variations in populations (notwithstanding superficial similarities in material culture or adaptive strategies that may be observed or hypothesized) over an area so large.¹³ *See Id.* at 24-31. Indeed, even the Fallon Tribe concedes in its brief that “significant cultural variation” has been recognized in this region. Fallon Br. at 31. And it fails to account for unrelated, contemporary populations acknowledged even in the Tribe’s own oral histories. *See Id.* at 51-57.

Legally, it runs afoul of the “earlier group” concept envisioned by NAGPRA. As noted by the Society for American Archeology in its *amicus* brief filed in the *Kennewick Man* litigation:

Although the precise nature of the “earlier group” is not specified in the law or its regulations, NAGPRA’s legislative history and common sense imply that Congress intended it to be something on the scale of a modern tribe. This interpretation is supported by the prior use of “tribal origin” as the analogous term in the National Museum of the American Indian Act, 20 U.S.C. § 80q-9(b), which served as a model for NAGPRA. It is also supported by the synonymous use of the terms “tribal origin” and “cultural affiliation” in the 1989 bills introduced by Rep. Udall and Sen. Inouye (H.R. 1646 and S. 1980, respectively) that ultimately evolved into NAGPRA.[footnote omitted]

Memorandum of Law in Support of the Society for American Archeology’s *Amicus Curie* Submission at 16-17, *Bonnichsen v. United States*, CV 96-1481-JE, June 1, 2001, available at www.saa.org/repatriation/kennewickbriefs.html (last viewed on October 19, 2005). *See also Id.* at 17 (noting that “broad classifications of archeological patterning do not identify a specific group in the sense required by NAGPRA’s clear terms”).

¹³ The Great Basin encompasses approximately 200,000 square miles, and includes virtually all of Nevada and portions of Utah, Oregon, California and New Mexico. *See* <http://www.greatbasinweb.com/whatisgreatbasin.html> (last viewed on 10/19/05).

2. “Shared Group Identity”

The Fallon Tribe contends that NAGPRA’s requirement of a “shared group identity” with an “identifiable earlier group” need not “refer to a particular tribe or band of Indians.” Fallon Br. at 6. Rather, the shared group identity can encompass “broader groups that have been identified by contemporary observers, government officials, anthropologists and archeologists, or Indian people themselves, and to require only that a present-day tribe demonstrate a reasonable connection with such group.” *Id.*

Taken to its logical end, what the members of the Fallon Tribe appear to argue is that they (as “Indian people themselves”) are free to define a group as broadly as they see fit, and to include in that group largely unknown people who lived one hundred centuries ago. Thus, the Fallon Tribe argues that if it considers itself part of a “broader group” that hypothetically occupied 200,000 square miles covering portions of five states for a period of 10,000 years, then that meets NAGPRA’s shared group identity requirement.

If claiming tribes can define a group as broadly as this, then of course there is no “shared group identity” requirement under NAGPRA. As noted by the Ninth Circuit:

NAGPRA also was intended to protect the dignity of the human body after death by ensuring that Native American graves and remains be treated with respect. . . . Congress’s purpose is served by requiring the return to modern-day American Indians of human remains *that bear some significant relationship to them.*

Bonnichsen, 367 F.3d at 876-77 (emphasis added). In this sense, the Fallon Tribe’s view is not the only relevant point of reference; rather, the group of which the Spirit Cave mummy would have considered himself a member is equally if not more important. The latter cannot be gleaned from the unilateral pronouncements of the Fallon Tribe, but rather must be informed by factors

such as those set forth in 43 C.F.R. § 10.2(c)(2).¹⁴ See also *Bonnichsen*, 217 F. Supp.2d at 1147-48 (“The statutory language also implies that the members must perceive themselves as part of a group and function as such.”).

The peril of the Fallon Tribe’s grossly over-inclusive “shared group identity” theory is immediately apparent: While Jews may have resided in Nazi Germany, spoke German, and exhibited many material cultural traits common to the German population at-large, it certainly would not follow that German Jews and German Gentiles were at the time of the Third Reich united by a “shared group identity.” A more pertinent illustration of the peril of over-inclusion is the substantial archeological and historical evidence of cannibalism, ritualized torture and warfare among American Indian groups occupying common regions, utilizing similar tool kits, exploiting identical lithic resources, and otherwise arguably displaying more tangible cultural similarities than differences.¹⁵ But to suggest that the cannibalized remains of the unfortunate men, women and adolescents uncovered in Anasazi¹⁶ dwelling floors and refuse pits at the 850-

¹⁴ These factors are set forth in the Determination at 5-7.

¹⁵ See, e.g., R. A. Mariar, L. L. Banks, B. R. Billman, P. M. Lambert, & J. E. Mariar, *Biochemical evidence of cannibalism at a prehistoric Puebloan site in southwestern Colorado*, *Nature* 407, 74-78 (2000) (copy attached to Neiburger Aff. at Tab 2); I. R. Thwaites, *THE JESUIT RELATIONS AND ALLIED DOCUMENTS 1610-1791* (Burrows Bro. Pub., Cleveland Ohio, 1900) (describing an incident in 1682 in which the Iroquois attacked and cannibalized the Tamarora tribe); O. H. Davis, *WINNEY ISLAND SYNOPSIS* (The Noteworthy Company, Amsterdam, New York, n.d.) (describing cannibalized human remains unearthed in a Woodland refuse pit at “Locus II” of the Winney Island Site in Saratoga County, New York).

¹⁶ “Anasazi” is a Navajo term meaning “Ancient Ones.” The Anasazi generally are believed to have occupied the “Four Corners” country of southern Utah, southwestern Colorado, northwestern New Mexico, and northern Arizona from about A.D. 200 to A.D. 1300, after which time they abruptly disappeared from this particular region. By A.D. 1400 almost all the Anasazi from throughout the Southwest had aggregated into large pueblos scattered through the drainages of the Little Colorado and Rio Grande rivers in Arizona and New Mexico. Their descendants still reside there in the few surviving pueblos. Interestingly, the cause of their “disappearance” from the Four Corners region has been linked theoretically to a possible incursion by Numic speaking peoples (the Fallon Tribe is a member of this language group):

There is mounting evidence, however, that the Numic-speaking peoples, of whom the Utes and Paiutes are part, had spread northwestward out of southwestern Nevada and were in contact with the Pueblo-like peoples of western Utah by A.D. 1200.

Continued...

year-old “Cowboy Wash” site in southwestern Colorado were united by a “shared group identity” with the people who killed them and consumed their flesh would be utterly absurd.¹⁷ Surely, the Anasazi victims (who may on one level be grouped with their killers under the Fallon Tribe’s “Desert Culture” classification) would not have chosen to have their earthly remains entrusted to the care of their killers or their killers’ descendants.

This is what NAGPRA’s “shared group identity” requirement is supposed to avoid, and why NAGPRA requires as a precondition to repatriation a showing of cultural *affiliation* and not merely a generalized cultural *relation*. *See supra* n. 12.

3. The “Present Day Indian Tribe”

The members of the Fallon Tribe – itself an amalgam of pre-existing tribes¹⁸ – also seek to fill the “cultural affiliation” breach by implying that, as the “caretakers” of the Spirit Cave remains, they act in accordance with the beliefs and wishes of all who may have an interest in the Spirit Cave remains and cultural objects. *See Fallon Br.* at 24 n. 5 (“In April 1999, the Executive Board of the Inter-Tribal Council of Nevada unanimously adopted a resolution on behalf of its member tribes – comprising every federally recognized tribe in Nevada – supporting the Fallon Tribe’s request for repatriation.”) and 16 (quoting meeting summary in which Fallon

....Continued

It is certainly possible that they were in San Juan County shortly after that. Ute and Paiute sites are very difficult to distinguish from Anasazi campsites, and we may not be recognizing them.

See <http://www.crystalinks.com/anasazi.html> (last viewed on 10/24/05).

¹⁷ *See Mariar (2000)*. While the Cowboy Wash example is particularly relevant because of its proximity to the Great Basin, such cannibalism was by no means confined to the American southwest, as evident from the Thwaites (1900) and Davis (undated) writings cited in n. 15 above.

¹⁸ “The Tribe is comprised of descendants of Northern Paiute and Western Shoshone people” *Fallon Br.* at 10.

representatives expressed view that mummy's relation to contemporary Indian populations "has no relevance," and that they consider themselves to be the "caretakers of the 'old ones'").¹⁹

But the Fallon Tribe does *not* represent the beliefs or the desires of all, nor do they even represent the beliefs and desires of all American Indians residing in the southwestern United States. By way of a concrete illustration, the Zuni Tribe,²⁰ which now occupies an area adjacent the Great Basin in western New Mexico, passed in November 1989 its formal Resolution No. M70-90-L017 (copy attached to Neiburger Aff. at Tab 1). In that Resolution, which was undertaken in response to inquiries from museums and research institutions about possible repatriation of affiliated remains, the Zuni concluded:

NOW, THEREFORE, BE IT RESOLVED, that the Zuni Tribal Council, in concurrence with religious leaders, has determined that these desecrated ancestral human remains, presently housed in museums and other institutions, should not be repatriated for reburial; and

BE IT FURTHER RESOLVED, that the Zuni Tribal Council, in concurrence with religious leaders, directs museums and other institutions to continue to respectfully care and curate any desecrated Zuni ancestral human remains.

BE IT FURTHER RESOLVED, that the results of any analyzes [sic] performed on ancestral Zuni remains will be sent to the Office of the Governor, the Zuni School District Library, and the Zuni

¹⁹ Notably, the Fallon Tribe does not identify which religious conventions will be followed in disposing of the Spirit Cave remains if repatriation is ordered – those of the Fallon Tribe's Christian members, or those of its non-Christian members?

²⁰ Of note, the dialect spoken by the Zunis (otherwise referred to as "Ashiwi") belongs to the same Uto-Aztecan language family as the Fallon Tribe's Numic dialects. See Fallon Br. at 78-84. See also <http://www.crystalinks.com/zuni.html> (last viewed on 10/19/05); <http://www.twingroves.district96.k12.il.us/NativeAmericans/Zuni.html> (last viewed on 10/19/05); and T.J. Ferguson, *Historic Zuni Architecture and Society: An Archeological Application of Space Syntax*. Anthropological Papers, No. 60, 25-40 (University of Arizona Press, Tucson, Arizona 1996). According to Zuni oral traditions, the Zuni for many generations wandered throughout the Mojave Desert area, from which, according to at least two scholarly writings, came the Numic-speaking people. *Id.* See also Fallon Br. at 78 (citing Lamb (1964) and Fowler (1971)).

Archeology Program Library, so that this knowledge is readily available to Zuni Tribal members.

Accordingly, at least one tribe whose affiliation with the Spirit Cave remains is no less tenable than the Fallon Tribe's has expressed a view regarding repatriation and study that is diametrically opposed to the position taken by the Fallon Tribe in this case.

C. The Fallon Tribe's Motion Is Based On The Erroneous Premise That American Indians Comprise A Homogenous And Unified Culture, And That The Fallon Tribe Represents The Views And Preferences Of All American Indians.

The Fallon Tribe may think it irrelevant whether the Spirit Cave mummy is related to them or not (Fallon Br. at 16), but members of the EMCA think it is very relevant. Likewise, the Fallon Tribe may consider itself to be the "caretaker" of the Spirit Cave remains and cultural items (*id.*), but the EMCA strongly disagrees. The Fallon Tribe's assumption that it thinks and speaks for all is what the EMCA finds most objectionable, and seeks to correct.

There is great diversity among American Indians. Far from being a one-dimensional, homogenous culture as the Fallon Tribe's brief suggests, American Indians have never, and do not now, speak with one voice. On the contrary, American Indians always have been and remain a remarkably varied group of peoples, with different languages, systems of governance, religious beliefs, economic strategies, internment practices, family structures, and so on. American Indians are not one culture; they are many cultures. And especially important here, there is no single tribe or organization that speaks on behalf of all American Indians. *Neiburger Aff.*, ¶ 9. Even among American Indians who generally may be said to hold "traditionalist" views, there is substantial diversity. *See, e.g., supra* discussion regarding the 1989 Zuni Resolution.

Our understanding of the peopling of North America is still far from complete. Consistent with the BLM's determination, many, if not all, of the very ancient remains or cultural items discovered in North America may not be related to *anyone* living today. If there

are living descendants, such descendants could include people who are not American Indian at all, who live outside the specific geographic region in which remains or cultural items were discovered, or live outside the United States. This means that, in the case of truly ancient remains and cultural items, the required showing of cultural affiliation as a precondition to repatriation is especially important because the disposition may implicate the rights and interests of individuals whose cultural or biological connection to the remains may be proven to be more direct than the claiming tribe's. Put another way, any relaxation of NAGPRA's cultural affiliation requirement to accommodate claims such as the one made by the Fallon Tribe here would impinge upon the rights and interests of American Indians (or other citizens) whose ancestry and views are not represented by the claiming tribe.

As described above, the views and preferences of the Zuni Tribe – which does *not* seek repatriation of human remains held in museum or research collections, and does not object to the responsible curation and study of remains already in collections – are contrary to the views expressed by the Fallon Tribe. And as described below, the views of the EMCA are not represented by the Fallon Tribe either.

D. The Fallon Tribe Does Not Represent The Views Or The Interests Of American Indians And Other Ethnic Groups Represented By The EMCA.

The following are views held by the EMCA, which materially conflict with the positions taken by the Fallon Tribe:

(1) American Indians and other ethnic groups represented by the EMCA support DNA testing, carbon dating, taxonomic measurements, and other study techniques which may lead to the identification of direct ancestral links or the absence of such links. Techniques used to identify the ethnic origins of human remains have improved over time, and likely will continue to improve in the future. They are unavailing, however, where human remains and the

potentially boundless information they contain have been secreted away or, worse, disposed of altogether. Neiburger Aff. at ¶ 10.

(2) American Indians and other ethnic groups represented by the EMCA support the responsible curation and study of all remains and cultural artifacts pending positive identification. This is true for remains and cultural items which may be linked to present-day American Indians, and also is true for remains and cultural items of mixed heritage (*e.g.* White-Indian) or non-American Indian derivation. *Id.*

(3) American Indians and other ethnic groups represented by the EMCA support the careful and deliberate study and identification of remains. Native Americans represented by the EMCA do not support the hurried disposition of remains with only minimal or no study, as the Fallon Tribe advocates. *Id.*

(4) American Indians and other ethnic groups represented by the EMCA oppose the use of tax payer money to facilitate a repatriation project which, in essence, is a sectarian religious activity. *Id.*

(5) American Indians and other ethnic groups represented by the EMCA are troubled by the likelihood that the disposition advocated by the Fallon tribe will result in the repatriation of human remains to unrelated individuals who may subscribe to religious beliefs and practices that are (a) unrelated to those practiced by the cultural group of which the Spirit Cave Mummy was is a member or (b) unrelated to the beliefs and practices of other present-day American Indians whose ancestral link to the Spirit Cave Mummy may be proven to be more direct than that of the Fallon tribe. *Id.*

(6) American Indians and other ethnic groups represented by the EMCA support the concept that preservation of the Spirit Cave Mummy will promote the interest of American

Indians, and will unite all citizens in a mutual exploration and celebration of our individual ethnic heritages. *Id.*

(7) American Indians and other ethnic groups represented by the EMCA do not share the view that they are the sole caretakers of North American pre-history. Whatever the abuses of the past, ours is a shared continent and by virtue of that a shared heritage. *Id.*

(8) American Indians and other ethnic groups represented by the EMCA believe that what the Fallon Tribe seeks to do with the Spirit Cave remains and cultural items is *not* beneficial and is *not* in our best interest. *Id.*

E. The BLM's July 26, 2000 Determination Must Be Upheld.

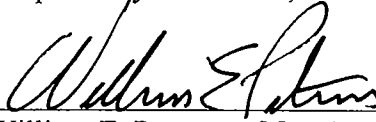
NAGPRA was not intended to give preemptive control over the prehistory of the southwestern United States to the Fallon Tribe. Nor was NAGPRA intended to elevate the religious views (be they Christian, non-Christian or agnostic) or political agenda of the Fallon Tribe over the beliefs and views of other tribes in the region (including the Zuni tribe) or elsewhere in the absence of a demonstration, supported by a preponderance of the evidence, of cultural affiliation.

The cultural origins and relationships of the Spirit Cave Mummy cannot be presumed. Because the Fallon Tribe's claim is not supported by a preponderance of the evidence, their motion for summary judgment must be denied and the BLM's Determination left in place.

IV. CONCLUSION

For each of the foregoing reasons, the EMCA respectfully requests that the Fallon Tribe's motion for summary judgment be denied and the BLM's Determination upheld.

Respectfully Submitted,



William E. Peterson (Nev. Bar No. 1528)
MORRIS, PICKERING & PETERSON
6100 Neil Road
Reno, Nevada 89511
(775) 829-6000

Richard M. Donaldson
MONTGOMERY, MCCRACKEN, WALKER
& RHOADS, LLP
300 Delaware Avenue, Suite 750
Wilmington, DE 19801
(302) 504-7840

*Attorneys for the Ethnic Minority Council of
America*

TAB 1

