Dr. Harry Glynn Custred, Jr.
Department of Anthropology
California State University
148 Los Cerros Avenue
Walnut Creek, California 94598
Phone: (925) 934-3969
glynncustred@sbcglobal.net

Dr. Andrei Simic
Department of Anthropology
University of Southern California
3601 Watt Way GFS 120
Los Angeles, California 90089
Phone: (480) 609-7349

Amici curiae,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

| | | |
|---|---|---|
| FALLON PAIUTE-SHOSHONE TRIBE, a federally recognized Indian tribe, Plaintiff, | ) | No.CV-N-04-466-LRH (RAM) |
| v. | ) | |
| UNITED STATES BUREAU OF LAND MANAGEMENT, Defendant, | ) | |

***APPLICATION FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT***

The undersigned hereby request leave of the court to file an amicus memorandum in opposition to the Fallon Paiute-Shoshone Tribe's motion for summary judgment. Two copies of the amici's proposed memorandum have been submitted to the court concurrently with this motion.

Dated this 28th day of October, 2005.

Respectfully submitted,

AS.

Dr. Harry Glynn Custred, Jr.
Department of Anthropology
California State University
148 Los Cerros Avenue
Walnut Creek, California 94598
Phone: (925) 934-3969
glynncustred@sbcglobal.net

Dr. Andrei Simic
Department of Anthropology
University of Southern California
3601 Watt Way GFS 120
Los Angeles, California 90089
Phone: (480) 609-7349

## CERTIFICATE OF MAILING

Case Name: *Fallon Paiute-Shoshone Tribe v. Bureau of Land Management* Case No. CV-N-04-466-LRH (RAM)

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within action; my residence is Portland, Oregon.

On October 28, 2005 I served the attached APPLICATION FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT on behalf of Drs. Harry Glynn Custred, Jr. and Andre Simic by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and causing said envelopes to be deposited in the United States Mail at PORTLAND, OREGON, with postage thereupon fully prepaid. There is delivery service by United States Mail at each of the places addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

Marc D. Slonim
Brian W. Chestnut
Ziontz, Chestnut, Varnell, Berley & Slonim
2101 Fourth Avenue, Ste. 1230
Seattle, WA 98121
206-448-1230

///

///

Gordon H. DePaoli, Nev. Bar No. 195
Woodburn & Wedge
P.O. Box 2311
Reno, NV 89505
775-688-3000

Attorneys for Plaintiff, Fallon Paiute-Shoshone Tribe

Greg Addington
Assistant United States Attorney
Office of the United States Attorney
100 W. Liberty Street, Suite 600
Reno, NV 89501
775-784-5438

Elsie B. Kappler
Trial Attorney
Environmental & Natural Resources Div.
Department of Justice
General Litigation
Post Office 663
Washington, D.C. 20044
202-305-0430

Of Counsel:
Clementine Berger
Deputy Regional Solicitor
Pacific Southwest Region
Department of the Interior
Sacramento, CA 95825-1890
916-978-5682

Attorneys for Defendant United States Bureau of Land Management

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 28, 2005 at Portland, Oregon.

Kathy F. Kudrna

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 BRIEF OF CUSTRED AND SIMIC*


Dr. Harry Glynn Custred Jr.
Department of Anthropology
California State University
148 Los Cerros Avenue
Walnut Creek, CA 94598
Phone: (925) 934-3969
glynncustred@sbcglobal.net

Dr. Andrei Simic
Department of Anthropology
University of Southern California
3601 Watt Way GFS 120
Los Angeles, CA 90089
Phone: (480) 609-7349

## TABLE OF CONTENTS


STATEMENT OF INTEREST ..... 1

SUMMARY OF ARGUMENT ..... 2

I. PRINCIPLES OF FOLKLORE ANALYSIS ..... 3

A. The Nature of Oral Traditions ..... 3
B. Distinguishing Between Different Narrative Genres ..... 4
C. Story-Telling as a Social Process ..... 5

II. ANALYZING ORAL TRADITIONS ..... 7

A. Narrative Purpose ..... 7
B. Age of the Account ..... 10
C. Content Completeness ..... 11
D. Consideration of Alternative Versions ..... 13
E. Analysis for Recurrent Themes, Plots and Motifs ..... 13
F. Source Reliability ..... 15
G. Contrary Evidence ..... 16
H. Physical Improbabilities ..... 17

III. DIFFUSION OF ORAL TRADITIONS ..... 17

IV. LACK OF VERIFIABLE CHRONOLOGY ..... 19

V. OTHER DEFECTS IN THE TRIBE'S CLAIMS ..... 21

CONCLUSION ..... 26

## TABLE OF AUTHORITIES

**Cases**

*Bonnichsen v. United States,* 367 F.3d 864 (9th Cir. 2004). ..... 1

**Publications**

Allen, Barbara and William Montell, "From Memory to History," *Identifying Folklore Themes,* Nashville, Tenn., American Association for State and Local History, 1981 ..... 14

Allen, Barbara and William Montell, *Migratory Legends and Ancedotes,* 1981 ..... 14, 19

Bartlett, F. C., "Some Experiments in the Reproduction of Folk Stories," reprinted in Alan Dundes (ed.), *The Study Of Folklore,* Englewood Cliffs, New Jersey, Prentice Hall, 1965 ..... 3

Bauman, Richard, "Folklore," in R. Bauman (ed.), *Folklore, Cultural Performances And Popular Entertainments*, Bloomington, Indiana University Press, 1992 ..... 6

Boas, Franz, "The Growth of Indian Mythologies: A Study Based on the Growth of the Mythologies of the North Pacific Coast," in *Race, Language And Culture,* New York, Macmillan, 1959 ..... 18

Bunzel, Ruth, *Zuni Origin Myths*, Forty-Seventh Report of the Bureau of American Ethnology, Washington, D. C., Smithsonian Institution, 1929-1930 ..... 11

Clifton, James, *The Prairie People, Continuity and Change in Potawatomi Indian Culture*, Iowa City, University of Iowa Press, 1998..... 9

Cruikshank, Julie, *The Social Life Of Stories: Narratives And Knowledge In The Yukon Territory*, Lincoln, University of Nebraska Press, 1998..... 6

Dundes, Alan, "Structural Typology in North American Indian Folktales," reprinted in A. Dundes (ed.), *A Study Of Folklore*, Englewood Cliffs, New Jersey, Prentice Hall, 1965 ..... 14

Erdoes, Richard and Alfonso Ortiz (eds), *American Indian Myths and Legends*, New York, Pantheon Books 1984 ..... 18

Erdoes, Richard and Alfonso Ortiz (eds), *American Indian Trickster Tales*, New York, Viking 1998 ..... 18

Gayton, A. H., "The Orpheus Myth in North America," *Journal of American Folklore*, Vol. 48, 1935 ..... 14

Henige, David P., *The Chronology Of Oral Tradition: Quest For A Chimera*, Oxford, Clarendon Press, 1974 ..... 12, 13 ..... 19, 20

Henige, David P., *Oral Historiography*, New York, Longman, Inc., 1982 ..... 4

Hultkranz, Ake, *The North American Orpheus Tradition*, Stockholm, The Ethnological Museum of Sweden, Monograph Series, No. 2, 1957 ..... 14

Kluckhohn, Clyde, "Recurrent Themes in Myths and Myth Making," reprinted in Alan Dundes (ed.), *A Study Of Folklore*, Englewood Cliffs, Prentice-Hall, 1965 ..... 14

Lamb, Sidney M., "Prehistory in the Great Basin," *Journal of American Linguistics* 24(2): 95-100, 1958 ..... 23

Levi-Strauss, Calude, "The Structural Study of Myth," *Structural Anthropology*, New York, Basic Books, 1965 ..... 14

Lowie, Robert, "Oral Tradition and History," *Journal of American Folklore*, Vol. 30, No. 116, 1917 ..... 12, 13

Malinowski, Bronislav, "Myth in Primitive Psychology," in *Magic Science And Religion*, Garden City, New York, Doubleday and Company, 1954 ..... 6

Mason, Ronald, J. "Archeology and Native North American Oral Traditions," *American Antiquity*, Vol. 65, No. 2, 2000 ..... 4, 10
..... 15, 19
..... 20

Mullin, Patrick J., "Modern Legend and Rumor Theory," *Journal of the Folklore Institute*, Vol. 9, 1972 ..... 4

Sapir, Edward, *Time Perspective in Aboriginal American Culture: A Study in Method*, Canadian Department of Mines, 1916 ..... 23

Thompson, Stith, *Tales of the North American Indians,* Bloomington, Indiana University Press, 1967 ..... 18

Vansina, Jan, *Oral Tradition As History,* Madison, The University of Wisconsin Press, 1985 ..... 4, 12
..... 19

Von Gernet, Alexander, *Oral Narratives And Aboriginal Pasts: An Interdisciplinary Review Of The Literature On Oral Traditions And Oral Histories,* Research and Analysis Directorate, Vol. I, a report submitted to the Department of Indian Affairs and Northern Development under contract 95-205, "Oral Traditions", Part 2, 1996 ..... 8, 10

Von Gernet, Alexander, "What My Elders Taught Me: Oral Traditions as Evidence in Aboriginal Litigation," in Owen Lippert (ed.), *Beyond The Nass Valley: National Implications Of The Supreme Court's Delgamuukw Decision, Vancouver, British Columbia,* The Fraser Institute, 2000 ..... 19

## 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 71 articles, books and monographs on anthropological topics and has produced or consulted on 21 ethnographic 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.

The *amici* are concerned about the way in which the Fallon Paiute-Shoshone Tribe (the Tribe) has misused oral traditions in their effort to claim the Spirit Cave Man remains. The Tribe's arguments give a false impression of what can be learned from folklore and mythology. Given the nature of oral traditions and the great time depth involved here, the Tribe's oral accounts do not establish a reasonable connection between them and Spirit Cave Man. Concerns about similar attempts to misuse oral traditions led the *amici* to file a brief in the Kennewick Man case. See *Bonnichsen v. U.S.*, 367 F.3d 864, fn. 23 at 882 (9th Cir. 2004).

///

## SUMMARY OF ARGUMENT

The Tribe argues that the absence of any references to a migration in their oral traditions demonstrates that their ancestors settled in the Great Basin over 9,000 years ago. Similarly, it is claimed that the lack of any reference to non-Numic speaking peoples in the Lahontan Basin in two versions of the Sai'dukai legends indicates the antiquity of settlement in the region by the Tribe's ancestors. The validity of these assertions depends on two suppositions: (1) that the cited oral traditions were originally an accurate account of actual circumstances that existed 9400 years ago; (2) that these tales have remained stable in content over millennia. Neither supposition is consistent with what we know about the historical accuracy of such tales in general.

Oral narratives are extremely mutable, and are unlikely to retain any historical accuracy after even 500 to 1000 years. To use myths as proof of a claimed cultural and/or biological connection over a period of more than 9,000 years 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 their cultural and historical context. None of the appropriate studies have been made here. Furthermore, the absence of any

reference to a migration or prior inhabitants in oral accounts proves nothing. The literature contains numerous examples of groups whose oral traditions lack such references, but who are known to have once inhabited a different homeland.

## 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 sometimes add valuable facts to the historical record. 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.

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), *A Study Of Folklore,* 1965, at 243-258. 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 P.B. Mullin, "Modern Legend and Rumor Theory," *Journal of the Folklore Institute*, Vol. 9, 1972, at 95-109.

The passing down of information, customary behavior and social patterns from one generation to another adds 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. D. Henige, *Oral Historiography*, 1982, at 5. See also J. Vansina, *Oral Tradition as History*, 1985, at 172; R. Mason, "Archeology and Native North American Oral Traditions," *American Antiquity*, Vol. 65, No. 2, 2000, at 249, 256-257.

Thus, as is true of all aspects of culture, oral traditions are in a continuing process of change and reinterpretation. Due to shifting exigencies and changing and evolving socio-historical contexts, they constantly assume new meanings and functions.

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 (usually not too distant in time) and human figures acting in the real world. Legends may sometimes include stories of bizarre, often supernatural, incidents.

Myths deal not with the supposed historical past, but rather with Creation or a timeless realm of fabulous happenings, animal people, monsters, superhuman heroes, wondrous transformations, and the like. 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 ways unrelated to the way the real world functions. 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 the cultural and psychological realm not in historical fact.

The oral traditions cited by the Tribe 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." J. Cruikshank, *The Social Life Of Stories: Narrative And Knowledge In The Yukon Territory,* 1998, at xv.

Since folk narrative is a social process, it should not be viewed as a cultural inheritance firmly rooted in the past, but rather 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," in *Folklore, Cultural Performances And Popular Entertainments*, 1992, at 31-32. 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." B. Malinowski, "Myth in Primitive Psychology," in *Magic Science And Religion,* 1954, at 144, 146. 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.

## II. ANALYZING ORAL TRADITIONS

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 can only be determined through appropriate analysis and evaluation. In the absence of careful study, oral traditions cannot be accepted as reliable evidence of past events. In the present case, the Tribe has failed to test their oral tradition accounts in appropriate ways to determine whether they are authentic, credible and accurate. Consequently, the cited accounts and any conclusions based on them should be rejected.

### A. Narrative Purpose

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.

Narratives or "neo-traditions" are sometimes invented to establish a symbolic connection between aspects of the past and the present for the purpose of meeting 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 some people that the Lumbee's "self-identification was embedded in history". A. Von Gernet, *Oral Narratives And Aboriginal Pasts*, 1996, at 13-14.

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

later in the century in the Far West including ones involving the Paiute prophet Wovoka and the Ghost Dance of the Sioux. As James Clifton puts it, "Today's tradition is often last year's novelty". J. Clifton, *The Prairie People, Continuity and Change in Potawatomi Indian Culture*, 1998, at 30.

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, an 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 which selectively use only those pieces of datum which 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.

The Tribe made no effort here to undertake an analysis of this kind. Nor did the Tribe refute BLM's conclusion that "Great Basin storytellers do not distinguish between verifiable historical memories and legendary fiction." Bureau of Land Management, *Determination of Cultural Affiliation of Ancient Human Remains from Spirit Cave, Nevada,* 2000, AR 2030 ("BLM Determination").

B. Age of the Account

Even oral traditions that were once based in fact will tend to lose 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. He concluded that such claims "stretch credulity to unreasonable limits and offer arguments fraught with *non sequitur."* Von Gernet 1996 at 18-19. For another discussion of claims regarding oral traditions and remote antiquity, see Mason 2000 at 250-251.

These observations prompt the question, how long can historically accurate oral traditions be maintained? Few Native American 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 are plots, themes, motifs and patterns that meet current cultural needs. Thus, the further back in time one goes, the more historical fact becomes 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 9,400 years. The Tribe has provided no credible reason for concluding that their narratives are any different.

C. Content Completeness

Myths and other oral traditions are part of a community's complex body of folklore, and cannot be understood properly without reference to the other parts of that folklore. See R. Bunzel, *Zuni Origin Myths*, 1929-1930, at 547-549. Such a context was not provided for the myths cited here since the Tribe failed to present the entire narratives from which the myths in question were taken. 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 Northwest Plateau 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, 1908, at 158) "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, 1917, at 164-165. 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 1985 at 118-119. Another motive for omission, says David Henige "is that unpleasant realities are optimistically ignored or artfully camouflaged." Henige *The Chronology Of Oral Tradition: Quest For A Chimera,* 1974 at 191.

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 1917 at 165.

The Tribe completely ignores the possible effects of these processes on the myths which they offered as evidence.

D. Consideration of Alternative Versions

Oral traditions usually exist in different versions. If only one or even several versions are considered, other versions that more accurately represent folk traditions and beliefs may be overlooked. The result is a misleading picture of what a group once believed and how its folklore may have changed over time. Here, no attempt was made to collect and compare all extant versions of the accounts relied upon.

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 and narrative elements, called motifs, and

structural features. B. Allen and W. Montell, "From Memory to History," *Identifying Folklore Themes,* 1981, at 71-76; B. Allen and W. Montell, *Migratory Legends and Anecdotes,* 1981, at 157-159. 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," *Journal of American Folklore,* Vol. 48, 1935; A. Dundes, "Structural Typology In North American Indian Folktales," *A Study Of Folklore,* 1965, at 210-211; A. Hultkrantz, *The North American Indian Orpheus Tradition,* 1957, at 15.

One reason for the recurrence of similar elements in oral narratives throughout the world may be psychological. Anthropologist Claude Levi-Strauss surveyed "the astounding similarity between myths collected in widely different regions" and concluded that the structure and themes of myths are often the products of the human mind when unfettered by reality. C. Levi- Strauss, "The Structural Study of Myth," *Structural Anthropology,* 1965, at 158-168. 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 experiences as birth, death, incest, etc. C. Kluckhohn, "Recurrent Themes in Myths and Myth Making," in *A Study Of Folklore* (A. Dundes ed.), 1965, 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. This issue has not been addressed by the Tribe.

F. Source Reliability

Whether oral accounts are truly representative of prevailing traditions and were faithfully recorded cannot be taken for granted. Consequently, they "have to be assayed for credibility if anything of weight is to be built on their testimony". Mason 2000 at 261.

Such an assessment must weigh not only the reliability of the collector, but also the credibility of the narrators themselves. For example, 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 2000 at 261.

For these reasons, 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 Tribe 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

The Tribe places great significance on the supposed lack of any reference in their oral traditions to any migration by their ancestors from a prior homeland outside the western Great Basin. See Fallon Tribe's Motion For Summary Judgment And Memorandum Of Points And Authorities In Support Thereof, at 87 ("Tribal Motion"). However, there are at least some Paiute oral traditions that do refer to a migration into the area. See references in BLM Determination at AR 2032-2033, 2034. Furthermore, even when oral traditions do lack a migration component, such an absence proves nothing. That the Tribe's ancestors at some point in the past did migrate into the area from elsewhere is self-evident since all humans originated in the Old World.

Interpretations of oral traditions 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 which disregard these standards are not reliable.

H. Physical Improbabilities

The narratives in question contain numerous elements that are clearly contrary to probability or the laws of nature. One example is Toidikodi stories claiming that "children were dispersed to start human populations from Fox Peak in the Stillwater Mountains." Tribal Motion at 87.

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

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, concluded that this process has resulted in the "dissemination of tales all over the continent" F. Boas, "The Growth of Indian Mythologies," in *Race, Language and Culture*, 1959, at 425-450. Thompson concludes that "language frontiers or even the boundaries of linguistic families have played little role in retarding or facilitating the spread" of myths over vast distances. S. Thompson, *Tales of the North American Indians,* 1967, at 458.

Narratives involving Coyote as either a creator, a trickster or an epic figure can be found not only in Nevada but also in California, Utah, the Southwest, Texas, the Great Plains and the Pacific Northwest. See, e.g., R. Erdoes and A. Ortiz, *American Indian Myths and Legends,* 1984, at vi-x; R. Erdoes and A. Ortiz, *American Indian Trickster Tales*, 1998, at vii-viii. Given their vast geographical distribution, it is obvious that 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.

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. Thompson 1967 at Chapters VII and IX.

The Tribe has provided no data to show which elements in the narratives they offered are original and unique to them and which are attributable to

diffusion. 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 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 the Spirit Cave Man remains.

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 2000 at 260-261. See also Henige 1974 at 190-191; Vansina 1985 at 23-24, 168-169. Accurate chronologies are often difficult to establish even with oral histories that purport to be an informant's recollections of his or her 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". Allen and Montel 1981 at 26. 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". A. Von Gernet, "What My Elders Taught Me," *Beyond The Nass Valley*, 2000, at 109. See also Henige 1974

at 17-70, Mason 2000 at 258. 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." See D. Henige 1974.

Such is the case with the fragments of myths cited in this case. The stories themselves do not say when they occurred, except that it was sometime in the past whenever that was. Such vague time references are characteristic of the oral narratives of preliterate peoples 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. No credence can be given to the Tribe's claims that their myths are at least 10,000 years old because they refer to environmental conditions supposedly present at their ancestral home, i.e., a place of lakes. Such conditions are not limited solely to that time period. Consequently, the references here may be to conditions that prevailed at a time long after Spirit Cave Man. They may even refer to conditions in a different locale.

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.

## V. OTHER DEFECTS IN THE TRIBE'S CLAIMS

The Tribe claims that the lack of any mention in Uto-Aztecan origin myths to a replacement of previous populations is evidence that Spirit Cave Man was one of their ancestors. Tribal Motion at 87. However, omissions of this kind prove nothing. See earlier discussion in Section IIG concerning the lack of references to ancestral migrations. There is ample archaeological evidence demonstrating that the Great Basin was inhabited prior to the advent of Uto-Aztecan languages approximately 5,000 years ago. Unless those languages spread through the Great Basin solely by the process of diffusion, [1] Uto-Aztecan speakers must have replaced at least some, if not many, preexisting earlier populations.

Moreover, as BLM noted, former U.C. Berkeley archaeologist R. F. Heizer (one of the most respected scholars of Great Basin prehistory) recorded that the Northern Paiute of the Humbolt Sink referred to a group of people already living in the region when the Northern Paiute migrated into the area, and who were subsequently driven out by the ancestors of the Kupa'dokado band of Northern Paiute. BLM Determination at 2032-2033. BLM concluded that "the core narrative of this account is so persistent that it may well be based in fact," that is, that at some time in the past another group occupied this area and was evicted by the ancestors of the Northern Paiute. See BLM Determination at 2033. Also,

[1] If that was what happened, it would mean that there is no linguistic connection between Spirit Cave Man and the Tribe, and that there are possibly other cultural discontinuities as well.

Heizer is reported to have collected other accounts from the local Paiute, which tell of different peoples, in both language and customs, living at Pyramid Lake. BLM Determination at 2033.

The same reasoning error pervades Walker's treatment of Uto-Aztecan, Paiute, and Shoshone mythology, folklore and oral traditions. He finds significance in the lack of any mention to a migration in the Tribe's oral narratives, and concludes that it demonstrates that the narratives are "firmly embedded in Great Basin geographic locations." Walker, AR 1882-1883. As previously noted, such an absence of reference proves nothing.

Walker's conclusions are suspect for another reason. He goes to great lengths to question the historical reliability of myth, citing, among others, Alan Dundes, whom he identifies as "probably the most influential contemporary scholar of Native American mythology, folklore, and oral tradition." AR 1875. Quoting Dundes, he asserts that the real functions of folklore are "projectile and psychological and have *little to do with empirical reality*". Ibid (emphasis added). The object of Walker's contention regarding the unreliability of myth as actual history relates to the reference in Paiute-Shoshone mythology to "Red Headed Giants". In this way he challenges the contention that the mention of such creatures provides evidence of the presence of a prehistoric population of people in the western Great Basin that was distinct from contemporary Numic occupants of

the area. AR 1883. This argument is seriously flawed: if one aspect of the Tribe's myths are open to question, so are others including the relevance of elements which are noted as being absent, in this case, the lack of specific mention of contact with or the displacement of other peoples.

Two of the most distinguished linguists in America, Edward Sapir and Sidney M. Lamb, have asserted that the fan-shaped spatial distribution of the Northern Paiute and the Western Shoshone people and their linguistic proximity suggest that Numic speakers expanded into the Great Basin no earlier than one thousand years ago. For instance, Sapir states that "there are a number of indicators that the Numic-speaking peoples are relative newcomers to the Basin, moving from their homeland somewhere near Death Valley." E. Sapir, *Time Perspective in Aboriginal American Culture: A Study in Method*, 1916, at page 102.

More recently, Sidney Lamb similarly concluded that the geographic distribution of these people and their linguistic proximity suggest that Numic speakers expanded from a region of common origin in Southern California into the Great Basin within the last one thousand years. S. M. Lamb, "Prehistory in the Great Basin," *Journal of American Linguistics* 24(2): 95, 1958. These arguments are based on the linguistic homogeneity of the Numic-speaking peoples of the Great Basin. Their lack of language divergence (linguistic drift) indicates that

Numic-speaking peoples were not present long enough in small, isolated communities to develop separate forms of speech. Given that radio-carbon dating of remains and textiles from Spirit Cave gives dates of approximately 9,400 years B.P., the linguistic evidence cited above would make any continuity between the Tribe and such ancient populations highly improbable.

The Tribe also claims that archaeological evidence of changes in material culture does not necessarily demonstrate the lack of continuity of peoples occupying the region. Tribal Motion at 45, 117-118. While this is undeniably true as a general proposition, it does not mean that all changes in material culture can be ignored. Furthermore, it underscores the inevitability of culture change such as those that have been documented for the Great Basin. Since mythology, oral history, and folklore are all part of culture, they, too, will inevitably undergo change over time. In addition, it should be noted that adaptations to the same physical environment and the limitations imposed by it can result in different ethnic groups exhibiting similar cultural characteristics. Archaeological, historical, and ethnographic evidence from various parts of the world reveal that peoples speaking different languages (even belonging to entirely different language families) and with different histories often share strikingly similar material cultures. In any analysis of the history of any population, it must always be

recognized that culture, language and biological characteristics are separate variables with relatively independent developmental histories.

The Tribe challenges any linguistic evidence indicating a relatively late arrival of the ancestors of the Paiutes and Shoshones to the western Great Basin. See Tribal Motion at 79, 82-83, citing Goss. Goss argues that there is no evidence proving that peoples other than Uto-Aztecans ever lived in the Great Basin, and consequently since the language of the Paiutes and the Shoshone has been established as belonging to the Uto-Aztecan family, the Tribe's claims must be considered as legitimate. This argument is entirely inferential and based upon a complex of unproven assumptions. Moreover, he fails to address the validity of the theory underlying the evidence cited by Sapir and Lamb regarding the significance of the lack of language variation in the Great Basin (i.e., that it reflects a relatively recent expansion throughout the region).

In support of his conclusions in favor of long-term linguistic continuity in the Great Basin, Goss states that "in the 'real' Utaztekan linguistic community, neat breaks and diversification by complete isolation were probably very rare". AR 1039. First of all, it is not clear to whom "the real Utaztekan linguistic community" refers. If this is a reference to all Uto-Aztecan speakers, it is historically inaccurate. Uto-Aztecan speakers are spread from North America as far south as northern Columbia, and thus have a long history of migrations over

great distances and separation into distinct linguistic communities. If he is referring to only the Numic speakers of the Great Basin, one must take into consideration the fact that in pre-Columbian times they lived scattered in small groups over a vast desert area. It is highly unlikely that they could have remained in close communication and maintained linguistic similarities over a period of over 9,000 years.

## CONCLUSION

The narratives cited by the Tribe do not provide credible evidence of a cultural or biological connection between them and the 9000+ years old remains of Spirit Cave Man. All we have been given is a selected sample of stories that may exist in widely different versions. Appropriate analyses were not made of the purposes, content, and cultural context of the stories. No explanation was given of missing 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.

///

///

///

///

///

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 a cultural claim is a misuse of folklore.

Respectfully submitted,

Dr. Andrei Simic
Department of Anthropology
University of Southern California
3601 Watt Way GFS 120
Los Angeles, California 90089
Phone: (480) 609-7349

Dr. Harry Glynn Custred, Jr.
Department of Anthropology
California State University
148 Los Cerros Avenue
Walnut Creek, California 94598
(925) 934-3969
glynncustred@sbcglobal.net

## CERTIFICATE OF MAILING

Case Name: *Fallon Paiute-Shoshone Tribe v. Bureau of Land Management* Case No. CV-N-04-466-LRH (RAM)

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within action; my residence is Portland, Oregon.

On October 28, 2005 I served the attached AMICUS BRIEF on behalf of Drs. Harry Glynn Custred, Jr. and Andre Simic by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and causing said envelopes to be deposited in the United States Mail at PORTLAND, OREGON, with postage thereupon fully prepaid. There is delivery service by United States Mail at each of the places addressed, for there is regular communication by mail between the place of mailing and each of the places so addressed.

Marc D. Slonim
Brian W. Chestnut
Ziontz, Chestnut, Varnell, Berley & Slonim
2101 Fourth Avenue, Ste. 1230
Seattle, WA 98121
206-448-1230

///

///

///

Gordon H. DePaoli, Nev. Bar No. 195
Woodburn & Wedge
P.O. Box 2311
Reno, NV 89505
775-688-3000

Attorneys for Plaintiff, Fallon Paiute-Shoshone Tribe

Greg Addington
Assistant United States Attorney
Office of the United States Attorney
100 W. Liberty Street, Suite 600
Reno, NV 89501
775-784-5438

Elsie B. Kappler
Trial Attorney
Environmental & Natural Resources Div.
Department of Justice
General Litigation
Post Office 663
Washington, D.C. 20044
202-305-0430

Of Counsel:
Clementine Berger
Deputy Regional Solicitor
Pacific Southwest Region
Department of the Interior
Sacramento, CA 95825-1890
916-978-5682

Attorneys for Defendant United States Bureau of Land Management

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 28, 2005 at Portland, Oregon.

Kathy F. Kudrna