

## APPENDIX G

### Two High-Profile Federal-Tribal Case Studies

Since the enactment of the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990, Native Americans have found themselves engaged in a complex set of relations with museums, scientific institutions, and Federal agencies with the outcomes of those relationships ranging from positive cooperation to bitter conflict. A significant source of discord amongst the parties involves the process of determining cultural affiliation. NAGPRA leaves it up to Federal agencies and museums to determine cultural affiliation of human remains and objects in consultation with lineal descendants, Indian tribes, and Native Hawaiian organizations. Although some Federal agencies have followed the spirit and letter of NAGPRA in matters regarding cultural affiliation and repatriation, others have not. The recalcitrant ones, many fear, have sought to retain control and possession of as many human remains and funerary objects as possible by listing them as culturally unaffiliated. Doing so enables avoidance and/or minimization of meaningful consultation with tribes. In the process, Native American oral traditions and traditional and religious beliefs are often devalued.

This section examines two case studies involving the issue of cultural affiliation of human remains and associated funerary objects and the classification by two Federal agencies of the remains and objects as being culturally unidentifiable. Various sources call attention to problems involving Federal NAGPRA compliance, especially regarding the issue of cultural affiliation.

It must be understood that many Native Americans, as defined by the Act, reject the notion that Native American human remains and burial property lack a cultural connection with present-day peoples. This view, which is based on their existence and habitation of America, often puts them at odds with some Federal agency officials in determinations of cultural affiliation.

The first case study examines the Spirit Cave controversy. The second probes the issues surrounding the Ancient One, or the Kennewick Man, disagreement.

Beginning in the 1990s, the Spirit Cave remains dispute pitted the Fallon Paiute-Shoshone Tribe (FPST), who represented the Northern Paiutes in this intense controversy, against the U.S. Bureau of Land Management (BLM) and the Nevada State Museum. The dispute concerns the issue of what constitutes good faith consultation by a Federal agency under NAGPRA. This research examines major aspects of the FPST's efforts to have the BLM change its classification of the Spirit Cave remains and associated funerary objects from culturally unidentifiable to culturally-affiliated for the purpose of repatriation.

Section 5 of NAGPRA requires museums and Federal agencies to complete inventories of human remains and funerary objects in their control or possession. The law directs these entities to identify cultural affiliation by determining if there is a "shared group identity which can be reasonably traced historically and prehistorically between a present-day Indian tribe or individual and an identifiable earlier group." Without a demonstrable relationship, the remains are to be identified as culturally unidentifiable. Culturally affiliated human remains and funerary objects are subjected to repatriation by lineal descendants and culturally affiliated American Indian tribes and Native Hawaiian organizations, pursuant to Section 7(a)(4) of NAGPRA. To claim human remains classified as culturally unidentified, the claimant tribes and Native Hawaiian organizations must demonstrate by a preponderance of evidence that the human remains and funerary objects are culturally affiliated, but they are not required to provide evidence that meets a standard of scientific certainty. Geographical, kinship, biological, archeological, anthropological, linguistic, oral tradition, folklore, historical, expert witness, or other evidence may substantiate cultural affiliation.

The Ancient One case also involves a dispute over the cultural affiliation of an ancient set of human remains stemming from a 1996 inadvertent discovery that occurred six years after NAGPRA became law on lands

managed by the U.S. Army Corps of Engineers (COE). This research discusses some of the key facts of this highly-publicized case including the legal challenge initiated by a group of scientists to a 2000 Secretary of the Interior decision that culturally affiliated the Ancient One, based on a preponderance of the evidence, with four Northwest Indian tribes and one non-federally recognized band.

Before proceeding it is important to establish a context for comprehending disputes arising from the process of determining cultural affiliation and Federal agency compliance and oversight of the Act. Some Federal agencies are attempting to establish a standard that exceeds the preponderance of evidence requirement of NAGPRA. For instance, in the Spirit Cave controversy, BLM rejected a finding of cultural affiliation with the Fallon-Paiute Shoshone Tribe because “[t]here is no evidence showing which language or languages were spoken in the middle Holocene and no evidence suggesting details of social or political organization, territorial boundaries, kinship patterns, religious beliefs, or world view.”<sup>1</sup> Under BLM’s standard, if Native Americans of the distant past made cultural adjustments to accommodate new ecological and climatic conditions, or developed and adopted new technologies, modes of living, and burial practices, their behavior exceeded the ability of some anthropological scientists to understand the process of cultural development by Native Americans. These scientists usually defined the Native American past in accordance with their own sensibilities and failed to understand or acknowledge that their actions disrupted the sanctity of unmarked Native American graves in the name of knowledge.

Grave looting and the warehousing of appropriated burial contents – occurring within the context of a broader history involving the subjugation of Indian lands, resources and cultures – began in earnest as the nineteenth century went forward. In 1867, the U.S. Surgeon General issued the first of several memoranda directing Army field surgeons to take the heads of Indians killed in battle and to take bodies from Indian cemeteries. Western law, beginning with the Antiquities Act of 1906, placed Native Americans in an inferior position under a system of hegemonic control and domination that defined the contents of Native burials as the cultural resources and the property of the United States. The Archaeological Resources Protection Act (ARPA) follows this same line of reasoning regarding Congress’s classification of Indian human remains as being cultural resources.<sup>2</sup>

This history of grave looting has had profound consequences on Native American life, and it gave rise to a human rights movement dedicated to graves protection and repatriation that led to the enactment of NAGPRA. Religious and ceremonial traditions also underscored the movement’s purposes. Many Native Americans have refused to forfeit their traditional values, beliefs, languages, and customs even though they suffered through forced removal from their traditional homelands, coercive assimilation, and political subjugation. Oral histories, traditional teachings and instructions, and spiritual values and ceremonies form the tenets of their opposition to the sacrilege of grave looting that has been and continues to be conducted in the name of science, as well as unwanted studies on human remains.

## **A. METHODOLOGY**

This research draws from the National NAGPRA website, including the Minutes of the NAGPR Review Committee meetings, the “Culturally Unidentifiable Native American Inventories Pilot Database,” and the NAGPR Review Committee Reports to Congress. It also references legal briefs, legal cases, newspapers, and other websites.

### **i. Federal Compliance and the Spirit Cave Remains Dispute**

NAGPRA requires Federal agencies in control or possession of Native American human remains and funerary objects to determine if those remains and objects have a shared group identity with any present-day Indian tribe(s) and Native Hawaiian organization(s). The lack of good faith consultation over the cultural affiliation of the

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<sup>1</sup> Pat Barker, Cynthia Ellis, and Stephanie Damadio, “Determination of Cultural Affiliation of Ancient Human Remains from Spirit Cave, Nevada,” Bureau of Land Management, Nevada State Office, July 26, 2000, 62.

<sup>2</sup> For information about the history of looting Indian graves, generally see, James Riding In, “Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians,” *Arizona State Law Journal* 24 (Spring 1992): 11-34. For detailed accounts regarding the history leading to the enactment of NAGPRA and other related laws, also see, *American Indian Culture and Research Journal* 16, no. 2 (1992).

Spirit Cave remains and associated funerary objects touched off a dispute that has yet to be resolved involving the Fallon Paiute Shoshone Tribe and the BLM. Since 1996 the members of the Fallon Paiute Shoshone Tribe (FPST), along with their Northern Paiute relatives, have been engaged in a bitter clash with the BLM over a set of human remains estimated to be 9,400 years old which were taken from Spirit Cave, a small cave situated within the boundaries of the Northern Paiute's traditional homeland, now under BLM control. The FPST has always considered the cave, located a short distance from their reservation, to be sacred and the surrounding area as the place of their origin, an event that reaches back in time thousands of years.<sup>3</sup>

The physical remains found in Spirit Cave, along with his associated funerary objects, lay undisturbed for more than 9,000 years in a shallow grave partially protected by the cave's dry air. At the time of his death, someone had taken great care to dress him in a rabbit fur robe and moccasins, wrapped him with two finely woven reed mats, and placed him in a shallow grave.

During a 1940 salvage excavation on BLM land near Fallon, Nevada, a pair of contract archaeologists disrupted the sanctity of the Spirit Cave grave, taking the partially mummified body of the black-haired man and associated burial property. Believing the mummified human remains to be about two thousand years old, the archaeologists took their find to the Nevada State Museum, where it has remained under BLM control.<sup>4</sup>

The Spirit Cave remains aroused scant scholarly interest until radiocarbon testing conducted in 1994 or 1995 set the body's age at 9,400 years old, making him one of the oldest sets of human remains ever disinterred in North America. Within a relatively short period of time, the Spirit Cave remains became a central figure in the Native American burial disputes and the object of extensive news coverage. The scientific community, as well as the national press, considered the news of his age as a potentially significant revelation for the propagation of the latest theories about the distant past associated with the peopling of the Americas. NOVA, the Discovery Channel, the New York Times, and the Washington Post joined the local press in carrying special features about the news.<sup>5</sup> A 1997 account speculated, "... preliminary research suggests Spirit Cave Man may have no connection to the American Indian tribes who have lived in western Nevada for the past several hundred years. Instead, he may represent a completely different migration to North America and could be genetically linked to ancient Japanese or the Norse of northern Europe."<sup>6</sup> Contributing to the frenzy were reports coming from the State of Washington in late July 1996 about the discovery of the Ancient One along the banks of the Columbia River.

As television and newspapers carried sensationalized stories about the Spirit Cave remains and the Ancient One, BLM and Nevada State Museum staff looked for ways to minimize the effects of NAGPRA on their collections. NAGPRA requires Federal agencies and museums to complete inventories of culturally-affiliated human remains and associated funerary objects and a listing of all culturally-unidentifiable human remains in their collections within five years of the Act's passage in 1990. As this deadline approached, BLM and Nevada State Museum employees began to fear the consequences of repatriation.

In 1994 Pat Barker, BLM's Nevada state archaeologist, coauthored an article entitled, "Legal and Ethical Implications of the Numic Expansionism," that criticized NAGPRA for weakening the archaeologists' control over the archaeological record.<sup>7</sup> The authors also warned readers about the pitfalls of establishing tribal cultural affiliation with items in museums, stating:

Control over cultural items is removed from federal agencies, museums and universities, and placed in the hands of the descendants. This means that the group or individual can manage and dispose of these items as if they are private property.<sup>8</sup>

<sup>3</sup> Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management, 03:04-CV-0466-LRH (RAM), 1.

<sup>4</sup> Ibid., 2.

<sup>5</sup> Ibid., 3.

<sup>6</sup> Las Vegas Review-Journal, Donrey Newspapers Review-Journal Online, September 1, 1997.

<sup>7</sup> "Fallon Tribe's Motion for Summary Judgment and Memorandum of Points and Authorities in Support Thereof," Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management, 12.

<sup>8</sup> Quoted in, Linda Bowman, et al, "Motion for Leave to File Amici Curiae Brief in Opposition to the United States Bureau of Land Management's Cross-Motion for Summary Judgment; and Supporting Memorandum of Points and Authorities," Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management.

By virtue of his position as the BLM's leading archaeologist in Nevada, Barker functioned as a key figure in the BLM's NAGPRA compliance responsibilities, including the process of inventory completion and tribal consultation with the FPST and other Indian tribes. He would participate in making the determination about the cultural affiliation of the remains found at Spirit Cave. He apparently was not alone, however. Many members of the anthropological science community shared his view about NAGPRA being an anti-science statute that empowered Native Americans to strip museum collections of Native human remains and irreplaceable cultural items.

In December 13, 1994, BLM and Nevada State Museum personnel met to discuss NAGPRA compliance issues. Amy Dansie's candid report of the meeting's dialogue provides a rare glimpse into the mindset of a cadre of scientists and museum personnel whose beliefs in the privileges of science would put them at odds with Native Americans seeking to rebury their deceased ancestors with respect and dignity. The report openly reflects the choices the participants made regarding their NAGPRA compliance responsibilities. Expressing the meeting's purpose, Dansie wrote:

Some of the most important prehistoric artifacts in our collections are human grave goods, so it is important to coordinate carefully with the BLM to do all we can to preserve information from these burials before repatriation destroys their scientific value forever. Barker and I arranged a meeting to discuss these issues.<sup>9</sup>

During the meeting, Barker suggested that the burial property and all other items over 3,000 years old could be protected from repatriation by being classified as culturally unaffiliated. According to a body of theoretical thought, that cutoff date was when Numic speakers, ancestors of the present-day Paiutes and Shoshones, had, presumably, entered the Great Basin. Regarding the issue of notifying tribes with a possible connection to NAGPRA items at the museum, Barker wanted surrounding tribes who had no connection to the Great Basin contacted so as to encourage competing claims. He reasoned that tribal disputes would take time to resolve. Expecting litigation to arise from the projected clashes he assumed that courts "will need hard facts to make a determination, and that is where science will come in, additional studies may be authorized, and in the process, we will have more time to study the burials."<sup>10</sup>

Concerning the structure and content of the inventories under development as required by NAGPRA, Barker wanted a list "not organized by tribe or geography, divided into affiliated and unaffiliated burials." This approach would "let the Indians sort the list according to their own beliefs."<sup>11</sup> Fearing that the museum would have to eventually repatriate the "mummies," Barker stated, "it could be several years before we lose them. This should give us time to study them thoroughly, if we start now."<sup>12</sup> Barker proposed using Section 7(b) of NAGPRA that allows museums and Federal agencies to delay the repatriation of items that "are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States."<sup>13</sup> He advised the group that all studies should be completed before May 1996, when the inventories would be sent to the tribes, so as to avoid time-consuming consultations and research approval requirements. He added that the examinations should be conducted without fanfare, even if the ongoing research is "within our legal rights." To make the proposed research seem as if it was ongoing, he recommended that the new studies would be combined with the Pyramid Lake project."<sup>14</sup>

Given this attitude regarding science as having rights that preempted the law protecting the Spirit Cave remains, the BLM allowed extensive study on the remains by at least fifteen (15) researchers who performed a variety of procedures, including scientific tests and examinations of the Spirit Cave gravesite. Much of the research was conducted in accordance with the opinions and recommendations expressed in the December meeting by

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<sup>9</sup> Amy Dansie, "NAGPRA Meeting Report," Carson City, Nevada, December 19, 1994.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

Barker and others. In March 1996, the BLM granted a request made by University of California-Davis physical anthropologists to initiate a collaborative study with forty-one (41) sets of Native human remains, including the remains from Spirit Cave. Alvin Moyle, a FPST leader, would later declare that these studies had begun well before the BLM notified his tribe about its holdings regarding the Spirit Cave remains.<sup>15</sup>

In May, with BLM plans on the table for additional study with the Spirit Cave remains, the BLM held its first consultation with the Northern Paiute tribes. The tribal representatives shared the creation accounts of their people, stating that they had lived in the Great Basin since time immemorial. Declaring their cultural affiliation with the human remains proposed for study, the tribal delegates demanded the immediate repatriation of their ancestor's physical remains and funerary objects and the discontinuance of research on the religious grounds. Tribal elders (traditional cultural authorities) presented geographic, textile, and other evidence to support their claim without effect. When the BLM denied the repatriation request, the Fallon Paiute-Shoshone, a small tribe with limited fiscal resources, became the lead tribe in the controversy with the BLM regarding the Spirit Cave remains and grave offerings.<sup>16</sup>

In keeping with the principles expressed in the December 1994 meeting, BLM and museum personnel took extraordinary measures to discourage FPST's repatriation efforts while allowing continuing and new studies of the Spirit Cave remains. Consequently, although FPST representatives spoke loud and clear to the BLM and museum staff, they were met with a series of frustrations in their attempts to protect the human remains ancestral to them from offensive forms of study and to establish a process of meaningful consultation and cooperative interaction with the BLM regarding matters essentially involving Federal compliance with NAGPRA issues.

Significant developments contrary to the FPST's beliefs and values occurred in the spring and summer of 1996. In May, the BLM denied FPST requests to have the Spirit Cave remains placed in a temporary burial vault and to stop scientific testing. A BLM summary of that meeting clearly captured some important Paiute concerns. The tribal representatives stated that the BLM's treatment of Spirit Cave remains violated the teachings of their grandparents, who said, "the dead are not to be bothered, dug up, studied, or molested in any way." Those Paiutes present noted they were "the caretakers of all the 'old ones' and requested that they be allowed to rebury the mummy as soon as possible." They also declared that the disruptions of burials could bring harm to the living. Two spokespersons disclosed that "[t]ribal members [of all ages] were receiving 'visitations' from the spirits of the dead." The spirits' visits were signs of impending death.<sup>17</sup>

In another twist, BLM state archaeologist Pat Barker apparently misled the Paiutes by telling them that the BLM had not authorized any scientific studies on the remains and "had not allowed any photographs, or public viewings of any of the remains based on the concerns of Native Americans." (The following September, Barker would approve invasive testing of textiles from among the associated funerary objects found with the Spirit Cave remains.<sup>18</sup>)

In July, the museum completed its NAGPRA inventory. Of the 120 remains considered, 117 -- including the remains from Spirit Cave -- were listed as unaffiliated. The BLM accepted the museum's determinations of affiliation but declined to allow a period of time for tribal responses. It also violated the Paiutes' religious beliefs and human rights by approving requests for non-destructive studies of the contested remains and non-destructive and destructive analysis of the associated burial property.<sup>19</sup>

In early 1997, the tribe learned about the sacrilegious studies involving their ancestors. In May the tribe made another unsuccessful NAGPRA claim for the repatriation of those human remains and funerary objects. A Northern Paiute tribal representative reportedly heard Dr. Pat Barker comment during a November 1997 meeting that he opposed NAGPRA.<sup>20</sup>

<sup>15</sup> Minutes, NAGPRA Act Committee, Sixteenth Meeting, May 3-5, 1999.

<sup>16</sup> Pat Barker, Cynthia Ellis, and Stephanie Damadio, "Determination of Cultural Affiliation of Ancient Human Remains from Spirit Cave, Nevada," Bureau of Land Management, Nevada State Office, July 26, 2000, 7.

<sup>17</sup> "Fallon Tribe's Motion for Summary Judgment and Memorandum of Points and Authorities in Support Thereof."

<sup>18</sup> *Ibid.*, 16-17.

<sup>19</sup> Fallon Paiute-Shoshone v. United States Bureau of Land Management, 3: "Fallon Tribe's Motion for Summary Judgment and Memorandum of Points and Authorities in Support Thereof," 18.

<sup>20</sup> Barker denied making this statement.

In January 1998, the BLM contacted the FPST regarding a preliminary decision – made the previous fall – that the Spirit Cave remains were Native American but were not culturally linked to a present-day tribe. On May 22 of that year the tribe submitted another NAGPRA claim seeking to repatriate the Spirit Cave items. Four months later the BLM responded that the tribe would have to submit evidence to support its claim.

Tensions erupted again in early 1998 when the Nevada State Museum allowed Dr. Sharon Long to make facial reconstructions of the contested human remains in opposition to the tribe's objections. Photographic images of the offensive facial reconstructions also appeared on the cover of Newsweek and in newspapers.<sup>21</sup> Although the museum subsequently agreed not to display the items, Long had made a second set of busts without permission, copyrighted them, and displayed them at a conference in Santa Fe, New Mexico.<sup>22</sup>

Seeking a forum in which to air their grievances, the Northern Paiutes turned to the NAGPR Review Committee. In March 1997, a Pyramid Lake Paiute representative related problems his people were having with the BLM, stating that the BLM had allowed sacrilegious destructive analysis of human remains in its collections. He asked the Interior Department to implement a policy that would treat Native Americans fairly.<sup>23</sup> In its January 1998 meeting at Washington, DC, the Review Committee heard testimony from a number of Federal agencies regarding Federal compliance with NAGPRA, including the Nevada BLM. During the public comment part of the agenda, a Pyramid Lake Paiute tribal councilman responded negatively to the BLM's testimony suggesting it would take twenty years for that agency to comply with NAGPRA. Stating that Federal compliance with the law must be enforced, he declared that his people knew the identity of the Spirit Cave ancestor and another set of contested remains. Archaeology, he asserted, lacked effective methods for determining cultural affiliation of old human remains.<sup>24</sup>

In December, several Fallon Paiute-Shoshones and Pyramid Lake Paiutes addressed the Review Committee regarding the BLM's treatment of human remains, including those from Spirit Cave. They denounced the BLM's refusal to repatriate the remains from Spirit Cave, stating the sacrilege harmed the living by bringing bad dreams to people, a sign of impending death. They also charged that the BLM had not only shown disrespect for Indian oral traditions, values and beliefs but that it had also demonstrated indifference for NAGPRA's consultation requirements. One of the tribal representatives testified that the BLM refused to culturally affiliate any human remains over 600 years old although tribal history in the region stemmed as far back in time as 9,000 to 33,000 years.<sup>25</sup> Review Committee members also asked the NAGPRA staff to send the BLM a letter "stating that serious concerns have been raised regarding this situation, urging the BLM to make an expeditious determination regarding the human remains, and asking the BLM to provide a record of their consultation history with the Indian tribes."<sup>26</sup>

In January 1999, apparently reacting to the Review Committee's concerns, BLM announced that it would make its final affiliation determination within 45 days. The FPST, however, requested and received an extension from the BLM, with a deadline set in June for the tribe's submission of materials to support its claim of affiliation to the Spirit Cave remains. It would submit its evidence to the BLM in December of that year.

In May and June meetings with the BLM's state director, FPST representatives discussed five controversial matters. First, the BLM director granted the tribe's request for an extension of time to amass additional evidence supporting its affiliation request. A new deadline was set for December. Second, the director indicated that he would address the tribe's charges that museum employees were culturally insensitive. Third, the director denied a tribal request to place the contested human remains in a U.S. Fish and Wildlife vault as a means to temporarily protect the Spirit Cave remains. The BLM later rejected the plea on the grounds that the vault did not meet storage specifications. Fourth, the director responded positively to a tribal request for relevant BLM documentation so the tribe and its experts could evaluate the materials. Finally, the director rejected the tribe's

<sup>21</sup> *Ibid.* Also see, Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management, 4.

<sup>22</sup> Minutes, NAGPR Review Committee, Nineteenth Meeting, June 2-4, 2000.

<sup>23</sup> Minutes, NAGPR Review Committee, Thirteenth Meeting, March 25-27, 1997.

<sup>24</sup> Minutes, NAGPR Review Committee, Fourteenth Meeting, December 10-12, 1998.

<sup>25</sup> Minutes, NAGPR Review Committee, Sixteenth Meeting, December 10-12, 1998.

<sup>26</sup> *Ibid.*

request as “not prudent” for the BLM to participate in three consultation meetings with the tribe before the Federal agency rendered its decision regarding the cultural affiliation of the Spirit Cave remains and associated funerary objects. The director indicated that the BLM might be willing to participate in further consultation if the tribe found additional research.<sup>27</sup> Meanwhile, with tensions continuing to run high and experts retained by the FPST pursuing their research, Northern Paiute representatives appeared at two Review Committee meetings in 1999 and spoke out about the Spirit Cave remains controversy and how archaeology was infringing on their religious beliefs and human rights. In early May, Alvin Moyle charged that the Nevada State Museum had exhibited “antagonism toward and disregard for NAGPRA” while denying a link between Spirit Cave remains and his tribe. The museum’s disparaging actions, he declared, undermined his people’s “free exercise of tribal religion and rights to repatriation.”<sup>28</sup> In December, the Review Committee responded to Northern Paiute concerns by directing the National Park Service to send a letter to the BLM’s Nevada state director detailing three issues. First, the letter declared the Committee’s support of the tribe’s claim to cultural affiliation with the Spirit Cave human remains and funerary objects. Second, it recommended that when determining cultural affiliation the BLM should fully consider those materials submitted by the tribe. Finally, it suggested that the BLM must continue its consultation with the FPST and other interested Indian tribes regarding the cultural affinity of the Spirit Cave remains.<sup>29</sup>

With the BLM claiming it had not yet made a final determination of cultural affiliation, the tribe, in December of 1999, submitted eight expert opinion reports with scientific interpretations that affiliated the Northern Paiutes’ with the Spirit Cave items by a preponderance of relevant evidence. Supporting tribal oral history, the information asserted that Spirit Cave is located within the Northern Paiutes’ aboriginal homelands, that the remains found there shared biological features with contemporary Indians, and that “prehistoric” and historic Great Basin people shared common burial customs and patterns. An analysis of the Paiutes’ origin stories found that Uto-Aztecan people may have originated in the Great Basin thousands of years ago. Another held that the theory about Numic speakers had replaced another culture in the area lacked scientific merit. Another pointed out that while DNA and serum albumin studies were of questionable use in this situation, the results of these tests nonetheless supported the Northern Paiutes’ claim of cultural affiliation with the Spirit Cave remains.<sup>30</sup>

During a March 17, 2000, meeting, the BLM state director stated that his agency felt that the human remains were Native American, that there were no active requests for scientific testing of the human remains, and that the BLM was no longer considering scientific testing.<sup>31</sup> Following the process established by NAGPRA to resolve disputes, FPST took steps to present the issue to the NAGPR Review Committee. Despite the cost and time the FPST expended to produce its expert reports and carry out other activities involving the controversy, the BLM and the museum, according to the FPST, had already decided against the tribe. They asserted that the FPST’s expert reports and tribal testimony was never assessed in a fair and impartial manner. FPST provided the BLM and members of the NAGPR Review Committee eight reports from experts in the fields of anthropology, biology, burial practices, ethnography, folklore, linguistics, archaeology, and DNA.

Later, in early June of that year in Juneau, Alaska, Moyle addressed the Review Committee with a note of optimism in his voice. He stated the Nevada State Museum had recently seemed to move away from its ardent anti-repatriation stance to a more positive position. “The Fallon Paiute-Shoshone Tribe,” Moyle continued, “is pleased with the progress made to prove cultural affiliation with the Spirit Cave remains and hope that a decision to repatriate the human remains is made promptly so the human remains can be returned.” He added that the BLM, National Park Service, Bureau of Indian Affairs, and the Department of Interior’s Solicitor’s Office in Washington, DC, were reviewing his tribe’s repatriation request. He noted that the director of the Department of Museums, Library and Arts of the State of Nevada had sent a letter asking his staff to seriously consider and respect the reports’ opinions.<sup>32</sup>

<sup>27</sup> Testimony of Alvin Moyle, Minutes, NAGPR Review Committee, Eighteenth Meeting, November 18-20, 1999.

<sup>28</sup> Minutes, NAGPR Review Committee, Eighteenth Meeting, May 3-5, 1999.

<sup>29</sup> *Ibid.*

<sup>30</sup> “Fallon Tribe’s Motion for Summary Judgment and Memorandum of Points and Authorities in Support Thereof,” 27.

<sup>31</sup> Linda Bowman, et al, “Motion for Leave to File Amici Curiae Brief in Opposition to the United States Bureau of Land Management’s Cross-Motion for Summary Judgment; and supporting Memorandum of Points and Authorities, January 30, 2006, 21-24.

<sup>32</sup> Minutes, NAGPR Review Committee, Nineteenth Meeting, June 2-4, 2000.

Moyle also noted problems involving the repatriation process. He indicated that the ordeal had placed a heavy financial burden on his small tribe as it struggled against a Federal agency supported by Federal funds.

As these events unfolded, on January 24, 2000, the Nevada State Museum notified the BLM that it had opted to withdraw as the lead entity for scientific investigations. On April 6, the museum dropped its request for DNA analysis of the Spirit Cave ancestor and forty (40) other remains.<sup>33</sup>

On July 26, the BLM issued its preliminary determination regarding the cultural affiliation matter. A report entitled, "Determination of Cultural Affiliation of Ancient Humans from Spirit Cave, Nevada," discussed cultural history, textiles, burial practices, biological, kinship/genealogy, descriptive linguistics, anthropology, historic and expert testimony evidence. The report's authors, including Pat Barker, determined that the preponderance of the available evidence demonstrates that the human remains from Spirit Cave are appropriately considered to be unaffiliated with the Northern Paiutes, i.e., the remains predate contemporary Northern Paiute tribes and cannot reasonably be culturally affiliated with any of them. Thus, the BLM has determined that the remains from Spirit Cave are unaffiliated with any modern individual, tribe, or other group and are therefore culturally unidentifiable.<sup>34</sup>

On August 15, the BLM Nevada state director Robert V. Abbey forwarded the report to the FPST. The cover letter stated that the preponderance of the evidence did not establish the Northern Paiutes' cultural affiliation with the Spirit Cave remains because "[t]he remains predate contemporary Northern Paiute Tribes and cannot reasonably be culturally affiliated with any of them." He gave the FPST a time period not supported by the Act (six weeks, ending on October 2), in which to respond in writing with any new evidence. He also wrote that he would "not approve of any research that involves invasive testing of human remains from Spirit Cave while the Secretary of Interior is considering recommendations from the NAGPR Review Committee on the disposition of culturally unidentifiable human remains." In closing, he declared his commitment to continuing his agency's NAGPRA consultation responsibilities.<sup>35</sup>

On that same day, the BLM also issued a press release with information concerning its preliminary decision that the "ancient human remains from Spirit Cave . . . could not be affiliated with the Fallon Paiute-Shoshone Tribe or any other contemporary group . . . the remains, including Spirit Cave Man, will remain in federal ownership." Justifying the decision, Abbey stated that "[a]fter more than four years of consultation with the tribe, analyzing the evidence and reviewing policy, I feel that it is time to make this determination . . . Although this information is disappointing to the tribes, I am committed to continue to determine the affiliation of human remains from BLM-managed lands."<sup>36</sup> The BLM reasoned that an analysis of the evidence showed no demonstrable cultural, linguistic, textile, burial traditions, biological, expert testimony, or other connection between the Spirit Cave remains and any present-day Indian tribe or individual.<sup>37</sup>

On October 17, the BLM handed down its final decision, repeating its conclusion that the Spirit Cave remains were not culturally affiliated with contemporary Indian tribes. Once again, the BLM rejected the FPST's request for adequate time to submit additional materials pertaining to its preliminary determination. The BLM also advised that the tribe could challenge the decision before the NAGPR Review Committee.<sup>38</sup>

FPST officials sought relief by taking the issue to the NAGPR Review Committee as a dispute at the November 2001 meeting. Rejecting the BLM's written contention that the Review Committee lacked authority to hear the dispute, Committee members listened as a spiritual leader, tribal representatives, expert witnesses, and legal counsel presented oral, historical, and other evidence to support the tribe's position regarding its cultural affiliation with the Spirit Cave remains and funerary objects.<sup>39</sup> They heard testimony calling into question the fairness and impartiality of the BLM's decision-making procedures. After weighing the body of relevant oral

<sup>33</sup> Pat Barker, Cynthia Ellis, and Stephanie Damadio, "Summary of the Determination of Cultural Affiliation of Ancient Human Remains from Spirit Cave, Nevada," Bureau of Land Management, Nevada State Office, July 26, 2000, 2.

<sup>34</sup> *Ibid.*, 8.

<sup>35</sup> Robert V. Abbey to Alvin Moyle, Chairman, Fallon Colony and Reservation, August 15, 2000.

<sup>36</sup> "BLM Makes Spirit Cave Man Cultural Determination," BLM Press Release, August 15, 2000.

<sup>37</sup> *Ibid.*

<sup>38</sup> Fallon Paiute-Shoshone Tribe, "Brief Chronology of Human Remains and Associated Objects Removed from Spirit Cave," n.d.

<sup>39</sup> Federal Register 67, no. 69 (April 10, 2002): 17463.

and written evidence, the Committee, by a 6-to-1 vote, determined that the “preponderance of the evidence indicates a relationship of shared group identity which can be reasonably traced between the present-day Fallon Paiute-Shoshone Tribe and the human remains and associated funerary objects from Spirit Cave in Nevada.”<sup>40</sup> The Committee’s majority stressed that the BLM’s Nevada State Office had failed to give a “fair and objective consideration and assessment of all the available information and the evidence in this case.”<sup>41</sup> Dr. John O’Shea, a Committee member representing scientific institutions and museums, cast the dissenting vote on the grounds that the BLM had engaged in good faith consultation. O’Shea subsequently sent letters to the BLM and the FPST claiming that the Review Committee had undermined its credibility and its longstanding policy by issuing a finding without a consensus decision.<sup>42</sup>

BLM personnel, however, simply dismissed the Review Committee’s findings as advisory without seriously considering the FPST’s repatriation petition. Concerning the BLM’s refusal to participate in the NAGPRA dispute process and its willingness to reject the tribe’s evidence, FPST officials sought redress by writing a letter to the Secretary of the Interior and others.<sup>43</sup> The Secretary of the Interior assigned the Spirit Cave dispute to the BLM’s national director, Kathleen B. Clarke. In mid July 2003, Clarke met with the FPST representatives regarding the tribe’s appeal of the BLM’s decision. On February 27, 2004, she upheld the determination of cultural affiliation made by BLM’s Nevada State Office regarding the Spirit Cave remains in a very brief letter devoid of any explanation about how she reached that conclusion. “As I promised,” she wrote, “in our meeting . . . I have reviewed all of the options to address your concerns and there is no additional course of action appropriate to pursue at this time.”<sup>44</sup>

Responding to the BLM’s refusal to follow the Review Committee’s recommendation, the FPST opted to take the litigation route. The tribe initiated a lawsuit in a Federal district court in Reno, Nevada, requesting a motion for summary judgment. On September 21, 2006, in Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management, Judge Larry R. Hicks granted the tribe’s motion determining that BLM had violated NAGPRA and the Administrative Procedures Act. Hicks reasoned that the BLM had failed to weigh cultural, historical, scientific, and other evidence presented by the plaintiffs and to address the NAGPRA Review Committee’s findings regarding the BLM’s initial determination.<sup>45</sup> NAGPRA, he wrote, “requires BLM to fully and fairly consider this evidence and to uphold or reverse its determination based on reasoned and coherent discussion of the evidence and BLM’s reasons for believing it or disbelieving it. “This discussion,” Hicks wrote, “never occurred, necessitating a finding that BLM’s determination was arbitrary and capricious.” Hicks directed BLM to compare its initial determination with the tribe’s evidence and the Review Committee’s findings, and to “explain why its determination is, or is not, still the most correct finding available.”<sup>46</sup>

The United States appealed the decision to the 9th Circuit Court of Appeals on November 21, 2006. On December 4 the FPST filed a cross-appeal to the same court. On April 5, 2007, the United States government dismissed its appeal and the tribe followed suit soon thereafter, leaving the final determination up to the district court’s process on remand.<sup>47</sup>

To date (October 2007), the FPST’s dispute with the BLM is still unresolved. The Review Committee has continued to follow this issue. A Fallon Paiute-Shoshone representative updated the Committee at its November 2006 meeting in Denver, Colorado, about the Federal district court’s decision without any BLM representatives present.<sup>48</sup>

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<sup>40</sup> Federal Register 67, no. 69 (April 10, 2002): 17463. John O’Shea, a Review Committee member representing the scientific/museum community, opposed the majority perspective.

<sup>41</sup> *Ibid.*

<sup>42</sup> John M. O’Shea to Robert Abbey, State Director, Bureau of Land Management, May 9, 2002.

<sup>43</sup> Minutes, NAGPR Review Committee, Thirty-Third Meeting, November 3-4, 2006, Denver, Colorado; Donna Cossette, Chairperson, Fallon-Paiute Chairperson, Fall Paiute-Shoshone Tribe, to Aaron Horton, Acting Assistant Director, Renewable Resources and Planning, Bureau of Land Management, Washington, D.C., January 6, 2002.

<sup>44</sup> Kathleen B. Clarke to Alvin Moyle, February 27, 2004.

<sup>45</sup> Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management.

<sup>46</sup> Walter Echo-Hawk and David Gover, “Spirit Cave Repatriation Litigation,” Native American Rights Fund. [www.narf.org/cases/spiritcave.html](http://www.narf.org/cases/spiritcave.html).

<sup>47</sup> *Ibid.*

<sup>48</sup> Minutes, NAGPR Review Committee Meeting, Thirty-Third Meeting, November 3-4, 2006.

## ii. Federal Compliance Issues and The Ancient One

The controversy over a 9,000 year old set of well-preserved human remains known as the Ancient One erupted in 1996 shortly after two young men discovered his physical remains along the banks of the Columbia River near Kennewick, Washington, on lands managed by the U.S. Army Corps of Engineers (COE). The representation of the remains as having Caucasoid features in the shape of its face and skull and the length of its extremities set in motion a press sensation when the estimated age of the individual became known.<sup>49</sup> The ensuing struggle between four Indian tribes and a non-federally recognized band, and scientists over the Ancient One resulted in one of the most highly publicized and contentious NAGPRA issues to date. In addition to being waged at high levels of the U.S. government, this clash was played out in the Federal court system with differing results in each arena.

At issue in this inadvertent discovery of human remains were several legal, political, and social questions. First, would the interested Federal parties comply with NAGPRA? Second, did those human remains fit the definition of Native American under NAGPRA? Third, if those remains were Native American, what was the appropriate disposition for them under this law? Fourth, how much weight would oral history carry in decisions involving cultural affiliation? Fifth, would the Federal courts interpret NAGPRA in such a way as to enable scientists to have their way?<sup>50</sup> The answers to these questions would appear as the struggle for the Ancient One unfolded.

Not long after his remains were taken from his grave, county coroner Floyd Johnson requested the assistance of James Chatters, a self-employed forensic anthropologist. Together, with the police present, they removed many of the Ancient One's bones, an activity that clearly violated both NAGPRA and the Archeological Resources Protection Act (ARPA), both of which laws established procedures for inadvertent discoveries of unmarked Native burials found on Federal lands. Chatters gathered other bones of the Ancient One during subsequent trips. The discoloration of and soil clinging to the bones informed Chatters that the remains were older than a recently deceased individual. Although he found nineteenth century artifacts lying near the remains, he applied for an ARPA permit from the COE on July 31, which was illegally made retroactive to the 28th. Interestingly, neither Chatters nor Johnson, the county coroner, complied with Federal laws or regulations regarding inadvertent discoveries of Native human remains. Had they done so, they would have been required to notify the Federal agency with jurisdiction over the land where the remains had been found. The COE, in turn, would have had to fulfill its legal responsibilities to the affected Indian tribe(s) by notifying them that human remains had been discovered, triggering the required consultation process with affected Indian tribe(s). In the advent of inadvertent discoveries or planned excavation, the purpose of NAGPRA is to determine "the ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990," and to make possible disposition to the owners.<sup>51</sup> Conversely, the purpose of ARPA is "to secure, for the present and future benefit of the American people, the archaeological resources and sites which are on public lands and Indian lands . . ."<sup>52</sup> In this case of inadvertent discovery, the COE should have initiated a consultation process with surrounding tribes, a process that should have occurred before it issued an ARPA permit to Chatters.

Within a few days, the coroner's office transferred the Ancient One's remains and burial property to the custody of Chatters for examination. Throughout most of August, Chatters and others studied the remains. Noting that the skull and extremities did not resemble those of the local Indians, Chatters speculated that the set of human remains was that of a Caucasian, suggesting that Europeans may have predated the presence of Indians in the Americas. After X-Rays and CT scans revealed an ancient spear projectile lodged in the Ancient One's hip, a consumptive (destructive) test called radiocarbon dating with a metacarpal bone placed the age of the bone to be from 8,340 to 9,200 years old.<sup>53</sup> The announcement of these findings by Chatters set off a news frenzy that usually cast the matter not in terms of a human rights issue but as a conflict between science and religion.

<sup>49</sup> "Kennewick Man," HistoryLink.org: The Online Encyclopedia of Washington State History, <http://www.historylink.org/>; Essay 5664.

<sup>50</sup> Bruce Babbitt, Secretary of the Interior, to Louis Caldera, Secretary of the Army, September 21, 2000.

<sup>51</sup> 25 U.S.C. 3002 (a).

<sup>52</sup> 16 U.S.C. 470cc (a).

<sup>53</sup> *Bonnichsen et al v. United States*, 367 F.3d 864, 869.

During an August 27 press conference, Chatters speculated that the unusual shape of the Ancient One's facial features indicated a non-Indian affiliation. Latching on to the suggestion that the remains might be Caucasoid, the media immediately took this to mean that the remains were Caucasian, meaning white (rather than meaning Caucasoid -- having a long, narrow skull). The matter turned into a national and international sensation. As with the Spirit Cave remains, scientists viewed the remains as a significant piece of evidence for telling their speculative version of the peopling of the Americas. In their eyes, burying the remains was tantamount to book burning. They showed scant concern for Native American beliefs and human rights.

As scientists became keenly interested in studying the ancient remains, representatives from Indian tribes from the surrounding Columbia River region stepped forward to carry out a tribal obligation of putting their ancestor back in the ground. Tribal representatives opposed additional studies on religious, historical, social and legal grounds. To them, it was a reenactment of the years of abuse they had suffered at the hands of scientific grave robbers who had taken many Indian bodies to museums. They categorically rejected such theories as the Europeans first entering the Americas as an affront to their knowledge, spirituality, and the longstanding presence in their homelands. Criticizing the proposed research in the context of sacrilege, a human rights violation, and disrespect, one tribal leader expressed a deeply rooted cultural view, stating that "[w]hen a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are not at rest . . . To put these spirits at ease, the remains must be returned to the ground as soon as possible."<sup>54</sup>

The COE, itself responsible for appropriating the contents of thousands of Indian burials throughout the West, sided with the tribes. As Chatters prepared to ship the Ancient One's remains to the Smithsonian Institution in Washington, D.C., on September 10 for additional studies planned by Douglas Owsley, a physical anthropologist employed by the Smithsonian and an outspoken opponent of repatriation, the COE seized the Ancient One's remains. The Corps prohibited further examination of the remains, including DNA testing.<sup>55</sup>

Local tribes expressed concern about the matter soon after a newspaper article published on July 30 noted that a set of remains had been found near Kennewick. Shortly after the COE took custody of the Ancient One's remains, the Confederated Tribes of the Colville Reservation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes and Bands of the Yakama Nation, the Nez Perce Tribe of Idaho, and the Wanapum Band made a NAGPRA claim of a shared-group relationship with the Ancient One on the basis of their oral histories. At this point, COE officials recognized the tribes' claim. Soon thereafter, on September 17 and September 24, 1996, the COE published a notice of the agency's intent to repatriate in a local newspaper. Under the law, competing claims could be made within thirty days of such publications.

After issuing the NAGPRA notices, the COE faced growing pressure from some scientists. Failing to convince the COE to allow additional testing, eight scientists filed suit on October 16 against the United States in Federal district court. After hearing the evidence, U.S. Magistrate Judge John Jelderks of Oregon issued his opinion on June 27, 1997, holding that the COE had acted too hastily and had failed to "fully consider or resolve certain difficult legal questions." The judge went on to vacate the COE repatriation decision and ordered the COE to reconsider the study request matter, although he declined to order the COE to take this action. Under the decision, the COE had to determine if NAGPRA applied in this matter.<sup>56</sup>

When the COE allowed the claimant Indian tribes to conduct religious ceremonies at Richland laboratory where the remains were held, Chatters and other scientists expressed indignation that the tribal representatives had placed ceremonial items with the remains, stating that such acts of contamination might destroy the bones' usefulness for scientific study.<sup>57</sup> In addition, the scientists formed an alliance with Asatru Folk Assembly, which according to one source, had ties with White supremacist organizations. Claiming that the Ancient One was their ancestor, the Assembly filed a lawsuit seeking further testing to prove that the remains had a "European origin."<sup>58</sup> This suit was subsequently dropped.

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<sup>54</sup> Quoted in *Bonnichsen et al v. United States*, 870, FN 8.

<sup>55</sup> *Bonnichsen v. United States*, 870.

<sup>56</sup> Quoted in *Bonnichsen et al v. United States*, 871.

<sup>57</sup> "Kennewick Man," *HistoryLink.org: The Online Encyclopedia of Washington State History*, <http://www.historylink.org/>; Essay 5664.

<sup>58</sup> *Ibid.*

Seeking to undermine the tribes' position of cultural affinity with the contested remains, some involved scientists, along with their supporters, blamed the tribes for attempting to undo the pursuit of scientific knowledge and for using NAGPRA as a weapon against those whose professions relied on the study of Native remains. They sought to portray the controversy as that between religion and science. However, not all scientists ascribed to this view. Those in this opposing camp feared that the research objectives of their colleagues who wanted to study the Ancient One might reach the conclusion and overarching similarities with those of discredited racial studies dating back to the nineteenth century. In other words, the plaintiffs risked "...resurrecting the outmoded concepts of race that had tainted early anthropological and archaeological studies."<sup>59</sup> Conversely, others viewed the controversy as a human rights issue, with burial rights of Indian tribes at stake.<sup>60</sup>

Through an agreement reached on March 24, 1998, with the COE, the Secretary of Interior assumed responsibility for deciding whether the Ancient One's remains met the definition of Native American under NAGPRA and for determining the disposition of the remains.<sup>61</sup> Subsequent non-invasive examinations began about two years later. These studies had similarities with those proposed by the scientists who wanted to study the Ancient One, conducted at the request of the Interior Secretary, and was followed with the examinations comparing teeth, skull, and bone measurements with those from other human remains. Although failing to find a physical resemblance between the Ancient One and contemporary Indians, Europeans, or any other contemporary people, these studies concluded that their findings did not eliminate a biological link between the Ancient One and the claimant tribes.<sup>62</sup>

Meanwhile, tension continued to grow. On March 28, 1998, a COE inventory revealed that parts of both femurs, the long leg bones, were missing. While tribal officials expressed outrage after hearing this news, Chatters held the COE responsible for the loss. The FBI launched an investigation into the missing bones affair, which reportedly focused on Chatters and Johnson, who had handled the physical remains of the Ancient One more than anyone else up to this time.<sup>63</sup> Johnson found the missing bones in his office in 2001.

Out-of-court mediation began on June 17, 1998, but the parties failed to reach an agreement. On September 3, a Federal court ordered the Ancient One's transfer to the University of Washington's Burke Museum in Seattle. Nearly two months later, the remains reached the museum.<sup>64</sup>

In the year 2000, Secretary of Interior Bruce Babbitt issued two determinations regarding the Ancient One's standing under the law and cultural affiliation that propelled the matter towards further litigation. Under the meaning of NAGPRA, Babbitt wrote on January 13, 2000, the Ancient One was Native American. On September 25, Babbitt determined that the preponderance of the evidence, mostly the Ancient One's antiquity, the location of his burial, and tribal oral traditions, showed that the claimant Indian tribes shared a cultural affiliation with the Ancient One. Seeking to clarify the intent of NAGPRA, Babbitt wrote:

Section 12 of NAGPRA recognized the unique legal relationship between the United States and Indian tribes. Given its purpose and this recognition, DOI construes the statute as Indian legislation. Therefore, any ambiguities in the language of the statute must be resolved liberally in favor of Indian interests.<sup>65</sup>

Babbitt's decision sparked intense outbursts from those who advocated scientific study of the Ancient One. The American Association of Physical Anthropologists decried the Secretary's determination as "a lack of adherence to the statutory definition of cultural affiliation . . . and an apparent lack of appreciation for the delicately balanced compromise that is at the heart of NAGPRA."<sup>66</sup> The following individuals filed suit<sup>67</sup> in a Federal district court

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<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Bonnichsen et al v. United States*, 871.

<sup>62</sup> Letter from Secretary of the Interior Bruce Babbitt to Secretary of the Army Louis Caldera Regarding Disposition of the Kennewick Human Remains (hereinafter Interior Letter), September 21, 2000, available on-line at [http://www.nps.gov/archeology/kennewick/babb\\_letter.htm](http://www.nps.gov/archeology/kennewick/babb_letter.htm)

<sup>63</sup> "Kennewick Man," HistoryLink.org: The Online Encyclopedia of Washington State History, <http://www.historylink.org/>; Essay 5664.

<sup>64</sup> "Kennewick Man on Trial," The Burke Museum of Natural History and Culture, <http://www.washington.edu/burkemuseum/kman/chronology.php>.

<sup>65</sup> Interior Letter, see footnote 62.

<sup>66</sup> Patricia M. Lambert, "Statement of the American Association of Physical Anthropologists," United States Senate Committee on Indian Affairs Oversight Hearing on the Native American Graves Protection and Repatriation Act, July 28, 2005.

<sup>67</sup> *Bonnichsen et al v. United States*, 969 F.Supp. 614 (D.Or.,1997).

in Portland, Oregon, to block the Ancient One's repatriation and to secure approval for research: Robson Bonnichsen, C. Loring Brace, George W. Gill, C. Vance Haynes, Jr., Richard L. Jantz, Douglas W. Owsley, Dennis J. Stanford, and D. Gentry Steele. Owsley and Stanford were at the Smithsonian Institution and the others held university positions.

On August 20, 2002, Jelderks held in favor of the plaintiffs by constructing a pro-science argument that privileged scientific research over the Indians' human and religious rights. Forcefully condemning Babbitt's cultural affiliation decision, Jelderks declared that the Federal government had "failed to consider all the relevant factors, acted before it had all the evidence, had failed to fully consider legal questions, had assumed facts that proved to be erroneous, had failed to articulate a satisfactory explanation for its action, and had followed a 'flawed' procedure and had prematurely decided the issue."<sup>68</sup> "Allowing study," he opined, "is fully consistent with applicable statutes and regulations, which are clearly intended to make archaeological information available to the public through scientific research."<sup>69</sup> The judge went on to give a restrictive interpretation of Indian rights under NAGPRA, holding that the tribes could not repatriate the Ancient One, even if NAGPRA applied, for three reasons. First, they did not present evidence showing cultural affiliation. Second, "only an individual Indian tribe – not a coalition of tribes – could be a proper claimant." Finally, "the Tribal Claimants alleged 'aboriginal occupation' of the discovery site was not a proper reason to give the Tribal Claimants the remains." Jelderk's opinion concluded that because the tribes lacked cultural affiliation with the remains, the ARPA applied and this statute allowed scientific study.<sup>70</sup>

Soon after receiving news about the decision, Alan Schneider, a lawyer for the scientists, contextualized the opinion's significance with an expansive interpretation. He declared that it "is going to encourage federal agencies to be more deliberate and fair when they make decisions concerning the study of ancient skeletal remains."<sup>71</sup>

The four claimant tribes, joined by the U.S. Justice Department, filed notice that they would appeal Jelderk's decision. In *Bonnichsen et al v. United States*, the 9th Circuit Court of Appeals upheld the lower court's pro-science decision in an April 2004 holding. Writing the court's unanimous decision, Judge Ronald M. Gould declared that the Ancient One was not Native American and that the administrative record did not establish a cultural or genetic relationship between the Ancient One and the claimant tribes. Under NAGPRA, he stated, Native American means "of, or related to, a tribe, people, or culture that is indigenous to the United States." Giving a dubious interpretation of congressional intent, he declared, "The statute unambiguously requires that human remains bear some relationship to a presently existing tribe, people, or culture to be considered Native American."<sup>72</sup> Further, the court expanded the required showing under NAGPRA for remains to be considered Native American by mandating that remains must "share[] special and significant genetic or cultural features with presently existing indigenous tribes, peoples or cultures."<sup>73</sup> The record, he deduced, contained no evidence linking the Ancient One with any present-day Indian tribe. Thus, the Secretary of Interior, in 2000, had erred by making an arbitrary and capricious decision that the Ancient One was Native American and was culturally linked to the claimant tribes.

Gould supported the court's rationale by articulating an argument based on the notion that tribal cultures change over time as a grounds for disallowing the establishment of cultural affiliation under NAGPRA. Geography, the site where the Ancient One was found, is not a basis for affinity, he found. Gould stated the evidence showed that "substantial changes had occurred in settlement, housing, diet, trade, subsistence patterns, technology, projectile point styles, raw materials, and mortuary rituals at various times between the estimated date when Kennewick Man lived and the beginning of the 'Plateau Culture' some 2000 to 3000 years ago."<sup>74</sup> Gould set out to destroy

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<sup>68</sup> "Kennewick Man is Awarded to Scientist," *Seattle Times*, August 31, 2002.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Bonnichsen et al v. United States*, 872.

<sup>71</sup> "Kennewick Man is Awarded to Scientist," *Seattle Times*, August 31, 2002.

<sup>72</sup> *Bonnichsen et al v. United States*, 875.

<sup>73</sup> *Ibid.*, 882.

<sup>74</sup> *Ibid.*, 881.

the viability of tribal oral history as a reliable source of information regarding the cultural affiliation of the Ancient One. He declared that “evidence in the record demonstrates that oral histories change relatively quickly, that oral histories may be based on later observations of geological features and deduction (rather than on the first teller’s witnessing ancient events) and that these oral histories might be from a culture or group other than that to which Kennewick Man belonged.”<sup>75</sup> Tribal accounts, he continued, “are just not specific enough or reliable enough or relevant enough to show a significant relationship of the Tribal Claimants with Kennewick Man.”<sup>76</sup> He supported the finding of the lower court that “8340 to 9200 years between the life of Kennewick Man and the present is too long a time to bridge merely with evidence of oral traditions.”<sup>77</sup>

The Gould decision effectively ended the claimants’ hope of repatriating the Ancient One for reburial and of protecting their cultural property from scientific attacks. The 9th Circuit Court subsequently rejected the tribes’ petition for a rehearing. In July 2004, the claimant tribes and the Justice Department decided not to appeal the case to the U.S. Supreme Court.

The decision to not appeal the circuit court’s decision enabled scientists to subject the Ancient One to new studies with the approval of the COE. With only the physical remains and spear point to study, the researchers, headed by Owsley, set out to learn where he came from, what he ate, and how he lived. On February 23, 2006, a delegation of six Yakamas attended an American Academy of Forensic Scientists meeting in Seattle in which Owsley provided a theory, based on hundreds of hours of analysis by a number of scientists, about the positioning of the Ancient One in his grave. LaRena Sohapp, the chairperson of her tribe’s culture committee, reflected the outrage of the delegation, declaring, “Scientists have no respect for anything. I had to shut my eyes. It is not a comfortable feeling.”<sup>78</sup>

In addition to allowing scientific examination of the Ancient One, the court essentially redefined NAGPRA consultation compliance requirements in matters of inadvertent discoveries. According to a 2005 National Congress of American Indian (NCAI) resolution, the decision “created a loop-hole whereby museums and agencies can, unilaterally, and without consultation, determine remains not to be Native American and therefore not start the NAGPRA process for repatriation.”<sup>79</sup> Facing the specter of other judges misinterpreting the intent of Congress, Indian tribes, joined by many supporters, pursued a political solution aimed at resolving the potential problems created by Gould’s decision. In 2004, Senator Ben Campbell introduced a bill designed to amend NAGPRA. Facing opposition from some scientists and their supporters, the proposed amendment called for adding two words, “or was,” to the Act. Had the amendment reached the floor of Congress for a vote, the term Native American would have been defined as the “means of, or relating to, a tribe, people, or culture that is or was indigenous to the United States.”<sup>80</sup> The NCAI, an organization composed of Indian tribes, and others supported the bill.

Friends of America’s Past, an organization formed in 1998 to support the fundraising and public information agendas of the anthropologists engaged in the Ancient One struggle, viewed the proposal as giving Indian tribes too much power over determinations involving cultural affiliation. Indians, the bill’s opponents declared, would be able to claim remains not affiliated with them. Other organizations, however, such as the Society of American Archaeology (SAA) saw the amendment as a simple clarification of Congressional intent, but it “strongly opposed the process through which this amendment is being put forward.” The SAA wanted any amendments to undergo an open hearing process.<sup>81</sup> It should be noted that SAA opposed the repatriation of the Ancient One on the grounds that the available information did not meet the standard for establishing cultural affiliation. The

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<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, 882.

<sup>78</sup> “Kennewick Man Was Buried When He Died,” Tri-City Herald’s Kennewick Man Virtual Interpretive Center News.

<sup>79</sup> National Congress of American Indians, Resolution TUL-05-029.

<sup>80</sup> Jackson Kuhl, “The Politics of Dead ‘Native Americans,’” <http://www.techcentralstation.com/112304E.html>.

<sup>81</sup> “SAA Statement on Proposed NAGPRA Amendment,” Society for American Archaeology, October 5, 2004; Jackson Kuhl, “The Politics of Dead ‘Native Americans,’” <http://www.techcentralstation.com/112304E.html>.

amendment was not enacted. The following year, Senator John McCain, an Arizona Republican, reintroduced the bill, which was approved by the U.S. Senate Indian Affairs Committee with opposition from some scientists and their supporters. As had happened during the previous year, the SAA endorsed the proposal.<sup>82</sup> The American Association of Physical Anthropologists, however, supported the “spirit of the proposed amendment and [withheld] its full support only because the legal ramifications of this change in the statute cannot be fully assessed in the absence of regulations dealing with the disposition of culturally unidentifiable human remains.”<sup>83</sup>

On September 7, 2006, Dennis “Doc” Hastings, a Republican congressman from Washington, introduced a bill to the Committee on Resources aimed at amending NAGPRA “so that it will be interpreted in accordance with the original intent of Congress to require a significant relationship be found between remains discovered on federal lands and presently existing Indian tribes.”<sup>84</sup> The amendment proposed changing the meaning of ‘Native American’ to mean that “cultural items had to have a significant and substantial genetic or cultural relationship, based on factors other than geography alone, to a presently existing tribe, people, or culture that is now indigenous to the United States.”<sup>85</sup> The bill also proposed a section allowing for the provision of “excavation, examination, investigation or scientific study under the Archaeological Resources Protection Act of 1979 of any cultural item found on federal land that has not been determined to be the property of an Indian tribe or a Native Hawaiian organization.”<sup>86</sup> This measure was not enacted.

In September 2007, another proposal to amend NAGPRA was referred to the U.S. Senate Committee on Indian Affairs. Backed by Indian tribes and organizations, along with their supporters, this bill seeks to refine the definition of ‘Native American’ by adding a few words to the proposed amendment. If enacted, the definition of ‘Native American’ will read: “Section 2 (9): ‘Native American’ means of, or relating to, a tribe, people, or culture that is or was indigenous to any geographic area that is now located within the boundaries of the United States.”<sup>87</sup>

## **B. CONCLUSIONS**

These case studies illustrate two examples of Federal agencies in conflict with Indian tribes in the implementation and compliance with NAGPRA. The record indicates that the BLM, joined by the Nevada State Museum, sought to control the process of determining cultural affiliation so as to reach a predetermined outcome. In doing so, the agency is manipulating basic compliance responsibilities. The Paiutes have endured a time-consuming and expensive process that has failed, to date, to establish cultural affiliation and subsequent repatriation of one of their ancestors. BLM’s maneuvering has allowed scientific studies on human remains and funerary objects that ran contrary to the beliefs of the Paiutes. The Federal district court’s decision, which found BLM’s behavior to be arbitrary and capricious, may yet result in that agency’s fair and impartial weighing of the FPST’s evidence.

The struggle over the Ancient One was decided by a Federal appellate court’s upholding of a lower court’s decision that vacated a Secretary of the Interior’s decision regarding cultural affiliation based on geography and oral history. The Secretary interpreted NAGPRA as Indian law, concluding that its ambiguities must be interpreted liberally and in the favor of Indian interests. This court’s decision could conceivably embolden institutions with anti-NAGPRA biases to place less reliance on oral evidence than information generated by other forms of evidence. Further, the narrow reading of definition of Native American might give those archaeologists and anthropologists who oppose NAGPRA a convenient loophole to claim that the human remains they encounter are not certain to be of or relating to a tribe, people or culture that shares special and significant genetic or cultural features with presently existing indigenous tribes, peoples or cultures.

<sup>82</sup> “Scientists Again Protest Senate Bill To Change Indian Graves Law,” *Corvallis Gazette-Times*, April 8, 2005. [http://www.gazettetimes.com/article/2005/04/08/news/the\\_west/friwes02.txt](http://www.gazettetimes.com/article/2005/04/08/news/the_west/friwes02.txt); Keith W. Kintigh, “Statement of the Society for American Archaeology,” Senate Committee on Indian Affairs, Oversight Hearings on the Native American Graves Protection and Repatriation Act, July 28, 2005.

<sup>83</sup> Lambert, “Statement of the American Association of Physical Anthropologists.”

<sup>84</sup> “H.R. 6043 [109th], To Amend the Native American Graves Protection and Repatriation Act,” 1. This bill may be accessed at <http://www.govtrack.us/congress/bill.xpd?bill=h109-6043>.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, 4.

<sup>87</sup> S. 2087, The Native American Omnibus Technical Corrections Act of 2007. Senators Byron Dorgan, a North Dakota Democrat, and John McCain, an Arizona Republican, introduced this bill on September 25, 2007, [indian.senate.gov/public/\\_files/0927Agenda.pdf](http://indian.senate.gov/public/_files/0927Agenda.pdf).

What these case studies point out is internal and external conflicts that have been created by some Federal agency officials and the lack of a process to ensure timely oversight of Federal NAGPRA responsibilities. The Federal government must assign that responsibility to an agency and empower it with the tools in which to take effective actions in matters of non-compliance. In the case of inadvertent discoveries, it must ensure that the consultation process with Native Americans begins before any scientific tests are allowed on the human remains and funerary objects in Federal agency possession or control. It must insist that those Federal agencies that have not yet completed summaries and inventories be held accountable until they come into compliance.