

C.A. No. 12-17489

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**TIMOTHY WHITE, ROBERT L. BETTINGER, and
MARGARET SCHOENINGER,**

Plaintiffs-Appellants

vs.

UNIVERSITY OF CALIFORNIA, et al.,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of California
Honorable Richard Seeborg, Judge Presiding
Northern District of California No. C 12-01978 RS

**AMICI CURIAE BRIEF OF
THE OHIO ARCHAEOLOGICAL COUNCIL AND
DR. BRIAN KEMP IN SUPPORT OF
PLAINTIFFS-APPELLANTS'
PETITION FOR REHEARING EN BANC**

Darian Stanford (Oregon Bar No. 994491)
Slinde Nelson Stanford
1740 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 417-7777

Attorneys for The Ohio Archaeological Council and Dr. Brian Kemp

TABLE OF CONTENTS

- I. INTEREST OF AMICI CURIAE 1
- II. SUMMARY OF ARGUMENT SUPPORTING REHEARING
EN BANC..... 3
- III. ARGUMENT..... 5
 - A. Introduction..... 5
 - B. La Jolla Skeletons Are Not “Native American” According to
NAGPRA..... 7
 - C. Scientific Value of La Jolla Skeletons..... 9
- IV. CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Bonnichsen v. United States, 367 F.3d 862 (9th Cir. 2004) 1,2,6,7,8

Statutes

Native American Graves Protection and Repatriation Act, 25 U.S.C. §3001 et seq. ("NAGPRA")..... 1,2,3,4,5,6,7,8,9,11

25 U.S.C. § 3001(9) 7

Publications

Kennewick Man: The Scientific Investigation Of An Ancient American Skeleton, pp. 7-29 (edited by Douglas W. Owsley and Richard J. Jantz), Texas A & M University Press (2014) 3

Native Americans and Archaeologists: Stepping Stones to Common Ground, pp. 120-127 (N. Swindler, K. E. Dongoske, R. Anyon, and A. S. Downer), Altamira Press, Walnut Creek, California (1997) 10

Now comes the Ohio Archaeological Council (“OAC”) and Dr. Brian Kemp (“Kemp”), by and through the undersigned counsel, in support of Appellants’ Petition for Rehearing En Banc (Doc. #57) of the majority Opinion issued as Doc. #56. For the reasons in Appellants’ Petition, the legal analysis presented in the Opinion’s dissent, and under the controlling authority of *Bonnichsen v. United States*, 367 F.3d 862 (9th Cir. 2004), the OAC and Kemp assert the panel’s majority erred in finding that a pair of 9,000 year-old skeletons (the “La Jolla Skeletons”) are “Native American” as defined in the Native American Graves Protection and Repatriation Act, 25 U.S.C. §3001 et seq. (“NAGPRA”). Rehearing is necessary to protect the delicate balance between the scientific and museum communities and the interests of Native Americans in the treatment of these and other human remains and cultural items under the provisions of NAGPRA. Here, scientific studies and the University of California (the “University”)’s own findings establish that the La Jolla Skeletons are not subject to NAGPRA.

I. INTEREST OF AMICI CURIAE

A. The Ohio Archaeological Council

The OAC is an Ohio not-for-profit corporation that constitutes the major voice of professional archaeology in that state. It is owned by its members and has no parent organization. The members of OAC include

over 100 professional archaeologists engaged in archaeological research, interpretation, site preservation, and public education. OAC's mission is to promote the advancement of archaeology in Ohio through research, publication and education.

As part of that mission, the OAC participated in the national dialogue during the late 1990s that evolved into NAGPRA. Since NAGPRA's passage, the OAC has shared its expertise with the National Park Service and others through its public comments on NAGPRA's implementing rules and regulations. In addition, OAC members have participated in NAGPRA training workshops throughout the country and have attended many regional meetings of the NAGPRA Review Committee. Many OAC members have completed the NAGPRA inventory and review process for their host institutions and universities and are familiar with its requirements.

Since its inception, the OAC, through its Native American Concerns Committee, has monitored the discovery, study and disposition of ancient human remains throughout North America. The OAC has consulted with scientists and others involved in the interpretation of ancient human remains across the country and in 2003 filed an amicus curiae brief supporting the scientists-plaintiffs in *Bonnichsen* regarding the nearly 9,200 year-old human remains known as "Kennewick Man". Recently, one of its Trustees

contributed a chapter to a major new scientific publication exploring ancient human remains in North America¹.

The resolution of the La Jolla Skeletons dispute can be an important road map for other courts regarding the disposition of human remains from great antiquity. As Ohio's documented human history reaches back at least 13,000 years, the OAC believes the majority's decision provides an inappropriate framework and slippery slope for addressing potential NAGPRA issues in this state and elsewhere. If left standing, the decision will negatively affect future NAGPRA determinations not only within the Ninth Circuit, but in Ohio and other jurisdictions as well. As such, the OAC supports appellants' call for rehearing *en banc* of the majority's misapplication of NAGPRA. The OAC's Board of Trustees approved the filing of this amici brief via electronic voting on September 12, 2014. No party contributed input, content or money in the preparation of this amici brief, and the OAC does not have an interest in the outcome of the proceedings.

¹ OAC member Dr. Bradley T. Lepper, Curator Of Archaeology, Ohio History Connection, authored "The People Who Peopled America", pp. 7-29, Kennewick Man: The Scientific Investigation Of An Ancient American Skeleton, edited by Douglas W. Owsley and Richard J. Jantz, Texas A & M University Press, 2014.

B. Dr. Brian Kemp

Dr. Brian M. Kemp is a molecular anthropologist at Washington State University (“WSU”) with an expertise in the field of ancient human genetics. He earned his PhD in Anthropology in 2006 from the University of California-Davis and holds a BS degree in Anthropology/Zoology from the University of Michigan. He has been jointly appointed in the Department of Anthropology and the School of Biological Sciences at WSU since the fall of 2007. Dr. Kemp’s *curriculum vitae* is attached as Exhibit 1.

The bulk of Dr. Kemp’s research is focused on the analysis of mitochondrial DNA (mtDNA) and Y-chromosomal DNA variation in extant and prehistoric Native American populations. He uses these data to address questions about the entrance of humans into the Americas and the ensuing 15,000 years of prehistory that are not approachable from culture history alone. In particular, he is interested in detecting parallels between the genetic and archaeological records, as signatures of past demographic shifts, population interactions, and population movements have been recorded in our genomes.

The ability to analyze DNA from ancient humans, animals, and plants (i.e. ancient DNA) opens up a tremendous potential for studying evolution. However, the potential of aDNA evidence is tempered by the challenging

nature of its retrieval. In this case, another major focus of his research has been in improving methods for the recovery of genetic data from ancient remains, which has direct applicability to forensic science as well.

Dr. Kemp approved the filing of this amici brief on September 19, 2014, and does not have an interest in the outcome of the proceedings.

II. SUMMARY OF ARGUMENT SUPPORTING REHEARING EN BANC

The OAC and Kemp support the Appellants' petition for rehearing en banc on the grounds that the majority erred in dismissing the Appellants' lawsuit challenging the University's determination that the La Jolla Skeletons are "Native American" under the terms of NAGPRA. This case will provide an important precedent regarding how NAGPRA will be interpreted across the country by scientists, universities, agencies, museums, Indian tribes and, most importantly, the courts. The University's decision to surrender the La Jolla Skeletons to the Kumeyaay tribe was contrary to NAGPRA and constitutes a direct threat to the scientific understanding of America's past not intended by the Act.

In Ohio, archaeologists have discovered numerous ancient human remains and associated funerary objects and many of these are presently curated in Ohio museums and institutions of higher learning. Only one of

the human remains in Ohio may be as old as the La Jolla Skeletons.

Although there are no federally-recognized American Indian tribes or designated tribal lands in Ohio today, the OAC expects that future claims for repatriation of ancient human remains and associated objects in Ohio will be asserted under NAGPRA, and as a result, courts of appropriate jurisdiction will be asked to interpret the Act. The precedent established regarding the La Jolla Skeletons will thus affect how NAGPRA is interpreted and applied to potential future cases in Ohio.

Moreover, the exceptional scientific importance of these remains arising from their great antiquity and high degree of preservation should compel the University to retain these remains and allow for their study by qualified archaeologists and physical anthropologists. Such studies will no doubt significantly advance scientific knowledge about the earliest people to inhabit the Americas, a scientific inquiry that is of compelling interest not just to California or Ohio archaeologists, but to scientists and others of many disciplines throughout the world interested in understanding the human diaspora out of Africa and across the globe.

III. ARGUMENT

A. Introduction

The OAC and Kemp concur with the Appellants that the University's administrative determination to give the La Jolla Skeletons to the La Posta Band of Diegueno Mission Indians of the Law Posta Indian Reservation under the terms of NAGPRA, in the absence of a determination that the remains qualify as Native American, is fundamentally flawed. It is, in fact, abundantly clear from a plain reading of NAGPRA and 9th Circuit decisions that the nearly 9,000-year-old La Jolla Skeletons are not Native American remains as defined in NAGPRA. Therefore, no extant federally-recognized Indian tribe could have a special interest in the Appellant's Petition for Writ of Administrative Mandamus, because the writ petition addresses only whether the University complied with NAGPRA and other legal requirements.

The La Jolla Skeletons are not "Native American" because they cannot be shown to bear some special relationship to a presently existing tribe, people, or culture that is indigenous to the United States. "NAGPRA requires that human remains bear a significant relationship to a presently existing tribe, people, or culture to be considered Native American." *Bonnichsen*, 367 F.3d at 878. Without that significant relationship,

NAGPRA does not apply to human remains of ancient origin. *Id.* at 875.

Extensive studies over the years by appellants, other scientists and the University itself have failed to establish any relationship between the La Jolla Skeletons, the Kumeyaay tribe or other present-day Indian groups. Indeed, the University's Notice of Inventory Completion in 2011 stated that a relationship of shared group identity cannot be established between the La Jolla remains and any present-day Indian group. As such, NAGPRA is inapplicable to these remains, and the majority erred in dismissing appellants' petition.

The OAC and Kemp unequivocally support Appellants' Petition for a Rehearing *en banc* because the courts must be allowed to determine whether universities and government agencies have made the appropriate legal and scientific determinations about what human remains qualify as "Native American" under NAGPRA. The standing of the Kumeyaay tribe is a red herring.

Although the La Jolla Skeletons are not "Native American" under NAGPRA's definition, this does not mean necessarily that they are not Native American in a broad anthropological sense or even that they may not be ancestral to contemporary Native Americans. However, in the technical, legal framework established by NAGPRA and affirmed in *Bonnichsen*, the

La Jolla Skeletons are not “Native American” remains subject to repatriation. The La Jolla Skeletons possess the highest importance for science, and they should be carefully and respectfully curated to allow for future study.

B. La Jolla Skeletons Are Not “Native American” According to NAGPRA

The majority erred by not first analyzing the threshold question: are the La Jolla Skeletons subject to NAGPRA? The Act requires that for human remains to be considered as “Native American” there must be evidence to establish that they are “of, or relating to, a tribe, people, or culture that is indigenous to the United States” (25 U.S.C. § 3001(9)). *Bonnichsen* determined that the very antiquity of remains as old as the La Jolla remains makes it “almost impossible to establish *any* relationship between the remains and presently existing American Indians” (*Id.* at 879) and that mere geographical proximity, the principal criterion relied upon by the Kumeyaay tribes in their argument for cultural affiliation with the La Jolla Skeletons, would provide “at most a tenuous, unknown, and unproven connection.” (*Id.*) The record contains absolutely no evidence to support the assertion that the La Jolla Skeletons are Native American under NAGPRA or bear any relation whatsoever to the Kumeyaay or other present-day group.

Not only is there no evidence to support an interpretation that the Kumeyaay tribes have any special relationship with the La Jolla Skeletons to justify a claim for repatriation under NAGPRA, there is no indication in the record that the University even considered the question. Indeed, the record shows that the University, through its Vice Chancellor for Resource Management and Planning, made the political and policy decision to circumvent NAGPRA's delicate balance to further its own interests:

“Native Americans comprise less than 1% of the students at UC San Diego with not one Kumeyaay student represented in the merger numbers ... [o]ne strategic and meaningful step forward would be to address the spirit of the law and required actions contained within NAGPRA” by repatriating the remains to the [Indian tribe]. “This action would have a profound effect on bridging the gap that is clearly evident between the Native American Community and the University of California.”
Opinion at 13.

In other words, the University saw no harm in giving away a few old bones to appease an underserved constituency. Such calculated disregard of a public institution's fiduciary duties is shocking and offensive to the Act.

Bonnichsen held that NAGPRA requires two levels of inquiry, the first being “*whether* human remains are Native American.” (*Id.* at 875). If the remains are not Native American under this prong, NAGPRA does not apply and the second level of inquiry is moot. *Id.* The University has, as did the United States Department of the Interior in *Bonnichsen*, improperly

collapsed NAGPRA's first inquiry into the second – simply “asking *which* American Indians or Indian tribe bears the closest relationship to Native American remains.” (*Id.*) As a result, the University failed to properly apply the NAGPRA criteria to determine the disposition of these human remains.

C. Scientific Value of La Jolla Skeletons

The OAC and Kemp assert that ancient human remains are an indispensable component to understanding human history. It supports the laudable goals of NAGPRA but also recognizes that some ancient remains, including the La Jolla Skeletons, fall outside its coverage and will only reveal their secrets through scientific investigation. The appellants are noted experts who are eminently qualified to unlock the scientific information contained within the bones of the La Jolla Skeletons for the mutual benefit and knowledge of humankind.

Dorothy Lippert, archaeologist and Choctaw Indian, has written that “for many of our ancestors, skeletal analysis is one of the only ways that they are able to tell us their stories... it is difficult to speak with a voice made of bone. Nevertheless, while so much has been lost, these individuals have found one last way to speak to us about their lives.” Dorothy Lippert, *In Front of the Mirror: Native Americans and Academic Archaeology*, *Native Americans and Archaeologists: Stepping Stones to Common Ground*,

120-127 (N. Swindler, K. E. Dongoske, R. Anyon, and A. S. Downer),
Altamira Press, Walnut Creek, California (1997).

There are very few North American human remains as ancient as the La Jolla Skeletons. This adult male and female are likely to teach us much about the earliest peoples to inhabit the Americas, if only scientists are permitted to sufficiently study them. Since the story of the peopling of the Americas is an international, indeed, a global story of great importance, the information we are going to glean from studies of the La Jolla Skeletons is almost equally pertinent to Ohio as it is to California. Moreover, new technologies are constantly being developed that will allow us to learn more from ancient human remains than previously imagined. Trace element analysis can now give us clues to diet and migration patterns. Ancient DNA can be recovered that eventually might be used to establish the closest living relatives of these earliest Americans. Who knows what future developments might someday allow us to learn from these unique ambassadors from Ice Age America? Therefore, it is of paramount importance to preserve these remains in a museum collection so are available for scientists to study. It is not enough to allow for a single study. Other scientists must have the opportunity to study the remains for themselves in order to corroborate or

overturn previous interpretations, or to apply new techniques to their analysis revealing new insights on the earliest history of the Americas.

The La Jolla Skeletons are from the remotest antiquity of North America. We know little of their lives and times beyond what archaeologists have gleaned from the scattered flint spear points and other artifacts that have survived millennia in the soil. Like the more than 3-million-year-old skeleton of the human ancestor known as “Lucy,” the mummy of the Egyptian pharaoh Tutankhamen, or the body of the Neolithic “Iceman” found melting from an Italian glacier, the La Jolla Skeletons have important stories to tell about their place in human history.

IV. CONCLUSION

The OAC and Kemp support the appellants’ petition for a rehearing en banc because the majority erred in its decision to dismiss the appellant’s lawsuit challenging the University’s determination that the La Jolla Skeletons are “Native American” under NAGPRA. The La Jolla Skeletons are not “Native American” because they cannot be shown to bear some special relationship to a presently existing tribe, people, or culture. The La Jolla Skeletons possess unique scientific importance, which should compel the University to preserve them so that they can be studied now and in the

future by qualified archaeologists and physical anthropologists, such as the appellants.

Respectfully submitted:

/s/ Darian Stanford

Darian Stanford (Oregon Bar No. 994491)

Slinde Nelson Stanford

1740 U.S. Bancorp Tower

111 S.W. Fifth Avenue

Portland, Oregon 97204

(503) 417-7777

Attorneys for the Ohio Archaeological

Council and Dr. Brian Kemp

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP.
32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 12-
17489**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 2,669 words.

Dated: September 22, 2014

/s/ Darian Stanford
Darian Stanford (Oregon Bar No. 994491)
Slinde Nelson Stanford
1740 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 417-7777
*Attorneys for the Ohio Archaeological
Council and Dr. Brian Kemp*

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September, 2014, I served the foregoing Amici Curiae Brief on the following parties via ECF filing at the addresses provided on the Court's website or via regular U.S. Mail, postage prepaid, at the following addresses:

James McManis, Esq.
Lauren R. Coatney, Esq.
Michael G. Reedy, Esq.
McManis Faulkner
Fairmont Plaza – 10th Floor
50 W. San Fernando Street
San Jose, CA 95113
Attorneys for Plaintiffs-Appellants

Charles F. Robinson, General
Counsel
The Regents of the University of
California
1111 Franklin Street
Oakland, CA 94607-5200
Attorneys for Defendants-Appellees

Karen J. Petrulakis
Margaret Wu
The Regents of the University of
California
Office of General Counsel
1111 Franklin Street
Oakland, CA 94607-5200
Attorneys for Defendants-Appellees

Dennis M. Klein
University of California at San Diego
Office of Campus Counsel
Mail Code 0097
9500 Gilman Drive
La Jolla, CA 92093-0097
Attorneys for Defendants-Appellees

Bradley S. Phillips, Esq.
Munger, Tolles & Olson LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071-1560
Attorneys for Defendants-Appellees

Dorothy Ann Alther, Esq.
California Indian Legal Services
609 South Escondido Boulevard
Escondido, CA 92025
Attorneys for Defendants-Appellees

/s/ Darian Stanford

Darian Stanford (Oregon Bar No. 994491)
Slinde Nelson Stanford
1740 U.S. Bancorp Tower
111 S.W. Fifth Avenue
Portland, Oregon 97204
(503) 417-7777

Attorneys for the Ohio Archaeological Council and Dr. Brian Kemp

EXHIBIT 1

Curriculum Vitae

Brian M. Kemp **Associate Professor**

e-mail: bm Kemp@wsu.edu; website: <http://public.wsu.edu/~bm Kemp/brianmkemp.html>

Department of Anthropology
Washington State University
Pullman, WA 99164-4910
office: 509.335.7403
fax: 509.335.3999

School of Biological Sciences
Washington State University
Pullman, WA 99164-4236
office: 509.335.8170
fax: 509.335.3184
lab: 509.335.6351

EDUCATION

- 2006 Ph.D., Anthropology, University of California, Davis. Dissertation title:
Mesoamerica and Southwest prehistory, and the entrance of humans into the Americas: mitochondrial DNA evidence.
- 2001 M.A., Anthropology, University of California, Davis
- 1998 B.S., Anthropology/Zoology, High Honors, University of Michigan, Ann Arbor

WORK HISTORY

- 2013-Present Associate Professor, Washington State University
- 2007-2013 Assistant Professor, Washington State University
- 2006-2007 Post Doctoral Researcher, Vanderbilt University

PRESENT RESEARCH

My research is focused on the analysis of mitochondrial DNA (mtDNA) and Y-chromosomal DNA variation in extant and prehistoric populations to address questions about Native American prehistory that are not approachable from culture history alone. I am particularly interested in detecting parallels between the genetic and archaeological records, as signatures of past demographic shifts, population interactions, and population movements will have been recorded in our genomes. More recently, I have become interested in reconstructing portions of ancient human behavior by observing the changes that humans had on the genetic composition of other species, the most common form of which is domestication. Another focus of my research is the advancement of ancient DNA methods for the improved collection and authentication of results. This aspect of my work is directly applicable to forensic science as well.

PAST RESEARCH EXPERIENCE

2006 to 2007 Postdoctoral Researcher. Genetic analysis of ancient and extant Peruvian populations.

Department of Anthropology and Center for Human Genetics Research, Vanderbilt University. Supervisors: Tiffany Tung, Ph.D. Jeff Canter, M.D., and Marshall Summar, M.D.

1999 to 2006 Graduate Student Researcher. Mitochondrial DNA analysis of ancient and extant Native American populations.

Molecular Anthropology Laboratory at the University of California, Davis. Supervisor: David Glenn Smith, Ph.D.

1997 to 1999 Research Assistant/Lab Manager. Investigation of mitochondrial DNA variation in modern human populations.

Molecular Anthropology Laboratory at the University of Michigan, Ann Arbor. Supervisor: D. Andrew Merriwether, Ph.D.

SELECT PUBLICATIONS

2014 Kemp BM, Monroe C, Judd KG, Reams E, and Grier C. "Evaluation of Methods that Subdue the Effects of Polymerase Chain Reaction Inhibitors in the Study of Ancient and Degraded DNA." *Journal of Archaeological Science* 42: 373-380.

2013 Barta JL, Monroe C, and Kemp BM. "Further Evaluation of the Efficacy of Contamination Removal From Bone Surfaces". *Forensic Science International* 231:340-348.

2011 Winters M, Barta JL, Monroe C, and Kemp BM "To clone or not to clone: Method analysis for retrieving consensus sequences in ancient DNA samples." *PLoS One* 6(6): e21247.

2010 Kemp BM, and Schurr TG. "Ancient and Modern Genetic Variation in the Americas." Auerbach BM (ed.): *Biological and Archaeological Variation in the New World* pp. 12-50.

2010 Kemp BM, González-Oliver A, Malhi RS, Monroe C, Schroeder KB, McDonough J, Rhett G, Resendéz A, Peñaloza-Espinosa RI, Buentello-Malo L, Gorodesky C, and Smith DG. "Evaluating the Farming/Language Dispersal Hypothesis with Mitochondrial and Y-chromosomal DNA variation in the Southwest and Mesoamerica." *Proceedings of the*

2007 Kemp BM, Malhi RS, McDonough J, Bolnick DA, Eshleman JA, Rickards O, Martinez-Labarga C, Johnson JR, Lorenz JG, Dixon EJ, Fifield TE, Heaton TH, Worl R and Smith DG. "Genetic analysis of early Holocene skeletal remains from Alaska and its implications for the settlement of the Americas." *American Journal of Physical Anthropology* 135: 605-621.