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## Contextual issues in Paleoindian repatriation

### *Spirit Cave Man as a case study*

**HEATHER J.H. EDGAR**

*Maxwell Museum of Anthropology and Department of Anthropology, University of New Mexico, Albuquerque, USA*

**EDWARD A. JOLIE, JOSEPH F. POWELL, JOE E. WATKINS**

*Department of Anthropology, University of New Mexico, Albuquerque, USA*

#### **ABSTRACT**

Judge John Jelderks found that Kennewick Man cannot be defined as Native American under the Native American Graves Protection and Repatriation Act. A recent *amicus* brief in the legal case regarding repatriation of materials from Spirit Cave, Nevada, suggests that the Kennewick case should be used as legal precedent, and that the remains of Spirit Cave Man are also not Native American. We suggest that a precedent in cases of Paleoindian human remains is inappropriate and unnecessary. We provide bioarchaeological, human variation, archaeological, social, and cultural contexts of the Spirit Cave Man remains. These contexts indicate that this case, and likely all of the few Paleoindian cases, is unique. Determinations of repatriation of Paleoindians should be handled on a case-by-case basis.

**KEYWORDS**

anthropological context ● Kennewick ● Paleoindians ● repatriation ● Spirit Cave

**■ INTRODUCTION**

The Nevada State Museum controls access to many prehistoric Native American human remains. Particular among them is a partially mummified skeleton and the artifacts associated with it. Designated AHUR 2064, the remains are popularly known as ‘Spirit Cave Man’ or the ‘Spirit Cave Mummy’, after the rock shelter in which they were found. Currently there is controversy in the public and scientific communities, as well as an ongoing legal case, about whether these remains should be repatriated to the Fallon Paiute-Shoshone tribe of Nevada. While Spirit Cave is in an Indian Land Area judicially established in 1978 as Northern Paiute (Barker et al., 2000; National Park Service, 1978), the Fallon Paiute-Shoshone include the area in their description of their traditional lands (Fallon Paiute-Shoshone Trust, n.d.). The tribe’s oral traditions are unclear about whether they originated in this area or migrated from somewhere else (Sutton, 1993). Some of the artifacts found with the mummy may share some cultural attributes with materials created by them in historic times. One researcher has also found biological (dental morphological) continuity between Spirit Cave Man and later prehistoric peoples who lived in the area, and from whom the Fallon Paiute-Shoshone claim descent (Plaintiff’s Motion for Summary Judgment, *Fallon Paiute-Shoshone Tribe v. United States Bureau of Land Management*, No. CV-N-04-466-LRH [U.S. Dist Nev., 2 Sept. 2005]) However, there are strong arguments to be made against repatriation of these remains to the federally recognized Fallon Paiute-Shoshone, and possibly to any modern Native American group. The remains represent an individual who lived a very long time ago; approximately 470 human generations have passed since his lifetime. It is possible that changes in human variation and material culture are simply too great to allow cultural affiliation under the Native American Graves Protection and Repatriation Act (NAGPRA) of this single set of remains to any extant tribe.

The controversy surrounding the disposition of Spirit Cave Man recalls similar arguments regarding a more famous legal case for repatriation of human remains. The case involving remains from Washington State that came to be known as Kennewick Man caused a legal battle that lasted for six years (Watkins, 2004). Associated with the legal battle fought in court, scientists, tribes, and to some extent the general public engaged in discussions of the ethical and scientific ramifications of reburial of these

human remains, which many consider to be extremely rare scientific materials. In non-legal arenas, two mutually exclusive points of view were weighed. On the one hand was the need to allow purported descendants to treat their ancestor with respect in their own fashion. On the other hand was the need for unique materials to be available for scientific inquiry into human history. However, the legal questions were different and centered on whether, under the definitions put forth in NAGPRA, the remains of Kennewick Man met the definition within the law of 'Native American' and whether they could be culturally affiliated with a federally recognized Native American tribe.

On 30 August 2002, Judge John Jelderks determined that the Kennewick Man remains did not meet the definition of Native American under the NAGPRA, thereby making the determination of cultural affiliation legally moot (*Bonnichsen v. U.S.*, 367 F.3rd 864 [9th Cir., OR., 2004]). The Confederated Tribes of the Umatilla, one of the groups seeking repatriation of the remains, has not pursued their action with the Supreme Court. In a recent *amicus* brief, Friends of America's Past, a nonprofit organization 'dedicated to promoting and advancing the rights of scientists and the public to learn about America's past' (Friends of America's Past, 2005: 4), stated that the case of Kennewick Man can and should be seen as precedent setting for the Spirit Cave Man case. We disagree with this assessment. The Spirit Cave Man case, probably like all cases of requested repatriation of Paleoindian human remains and associated artifacts, should be considered in its own context, on a case-by-case basis. In this article, we provide insights into the particular archaeological, biological and social, and cultural contexts of Spirit Cave Man. This information is indicative of the individuality of all Paleoindian human remains. We intend to demonstrate the inapplicability of the Kennewick Man ruling, particularly regarding the case of Spirit Cave Man, but also more generally to possible future legal cases involving repatriation of Paleoindian human remains.

## ■ THE BIOARCHAEOLOGICAL CONTEXT

Spirit Cave was excavated in one day, 11 August 1940. The work was performed by Sydney (S.M.) and Georgia Wheeler, who were doing salvage work in the dry caves around Grimes Point, Nevada. There is some disagreement in the literature over whether the Wheelers were professional or avocational archaeologists, but, overall, authors agree that they did excellent work given the standards of the time (Dansie, 1997).

Four burials were removed from Spirit Cave that day; the stratigraphically lowest burial is AHUR 2064, the Spirit Cave Man. Wheeler estimated the age of the burial at 1500 years (Archaeological Survey Burial Data



Form, on file with Nevada State Museum), although years later Georgia Wheeler stated that she had considered the burial much older (Dansie, 1997). The excellent quality of the preservation of the head, parts of the body, and the artifacts was recognized even then. The remains were exhibited at the Nevada State Fair for three days a few weeks after excavation. After the fair, the remains were moved to the Office of the State Archaeologist. Around this same time, Spirit Cave Man also traveled to Los Angeles for study by Mark Harrington, who was considered the Dean of Great Basin archaeology at the time. Harrington indicated that he felt the burial to be closer to 2000 years old, possibly based on work he performed at Lovelock Cave and familiarity with developments in Southwest archaeology, including the Pecos classification (Loud and Harrington, 1929).

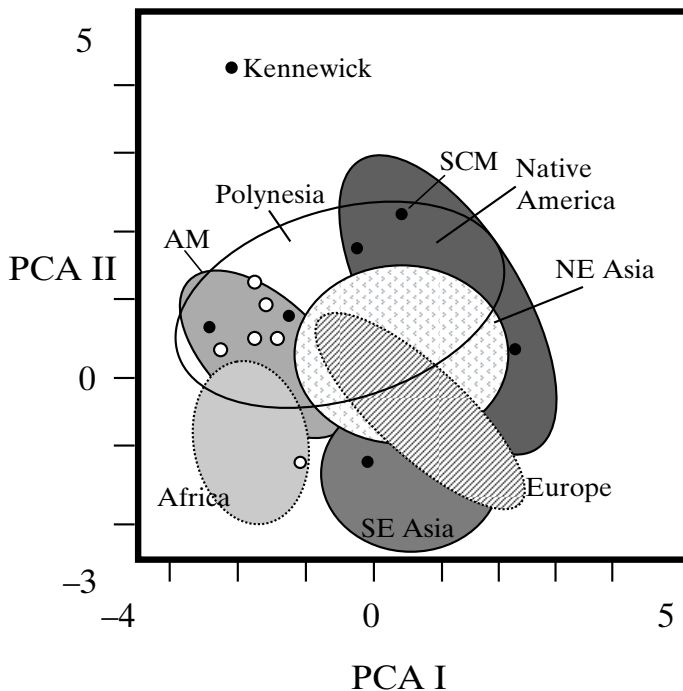
Over time, Spirit Cave Man's remains were placed in a wooden box, covered with naphthalene crystals, and stored in the general collections area of the Nevada State Museum (NSM). It seems that, other than the preliminary report published by S.M. and Georgia Wheeler (1969; reprinted as Wheeler, 1997), little to no research was performed on the mummy until it was carbon dated in 1994 at the request of Donald Tuohy as part of his work on the archaeology of the Pyramid Lake area. The dates returned estimated the body and artifacts at  $9415 \pm 25$  BP, making Spirit Cave Man the oldest known North American mummy (Dansie, 1997).

The publication of the great age of the remains stimulated two important developments: interest in their research value, and interest in their repatriation. To promote the former interest, the Calhoun Foundation (then Truman-Orr) made at least three grants to fund research visits by biological anthropologists, including two of the authors of this article. When this research took place in 1995 and 1996, there was a definite sense of urgency about it. The NSM expected a repatriation claim virtually any day, and expected that the remains would be buried, lost to scientific investigation shortly thereafter.

During the winter of 1995–6, at least three separate investigations were undertaken into the bioanthropological information provided by Spirit Cave Man. Heather Edgar performed the first, including the burial in a NAGPRA-driven study of 44 mummies and skeletons housed at the NSM. Edgar performed a general skeletal analysis, collecting information guided by *Standards for Data Collection from Human Skeletal Remains* (Buikstra and Ubelaker, 1994) including common cranial measurements, but not focused on biological affinity. The paper that resulted from the work on these remains, as well as those of Wizard's Beach Man, focused on paleopathological conditions in evidence (Edgar, 1997). Most notable were developmental anomalies of the spinal column (13 thoracic vertebrae and sacralization of the fifth lumbar vertebra), degenerative pathological conditions associated with these anomalies (spondylolysis of the fifth lumbar vertebra) and a well-healed cranial fracture. As the cranial fracture

is on the left side of the frontal bone, it has been interpreted as evidence of interpersonal violence.

The next researchers to arrive were D. Gentry Steele and Joseph Powell. While performing a second complete skeletal analysis, these workers focused their attention on the biological affinity of the remains, examined through craniometrics. Their analysis indicated that while the samples most similar to Spirit Cave Man were Polynesians and Native Americans (see Figure 1), the remains were very different from any particular archaic or recent Native American sample. Spirit Cave Man's skull is also very different from that of the Wizard's Beach skeleton (Powell and Neves, 1999; Steele and Powell, 2002).



**Figure 1** Principle components analysis of craniometric dimensions with 95% confidence intervals for PC scores for contemporary comparative populations. North American (black dots) and South American (white dots) Paleoindian remains. Note that most North American remains are widespread across the range of variation for other ecogeographic groups. Spirit Cave Man (SCM) rests in the range of variation for both Polynesians and contemporary Native Americans (modified with permission from Powell, 2005: 198). AM = Australo-Melanesia.



The third research team, headed by Richard Jantz and Douglas Owsley, also concentrated on biological affinity, while performing a full skeletal analysis. Among recent populations, Jantz and Owsley (1997) also found that Spirit Cave Man falls outside the range of variation to which it was compared, which included Howell's worldwide samples (Howells, 1989) as well as seven additional recent Native American samples. However, their statistical analysis indicates closest clustering with the Norse and Ainu. In their analysis, Spirit Cave Man does not cluster with any recent Native American groups.

Taken at face value, the two bioarchaeological studies aimed at addressing biological affiliation would seem to suggest that Spirit Cave Man was not a Native North American, but rather derived from an old world ancestral population. Douglas Owsley and Richard Jantz (2001, 2002) have remarked upon this lack of similarity between Spirit Cave Man and contemporary Native American populations at some length, but the question remains: Why don't Paleoindians look like modern Native Americans?

## ■ THE HUMAN VARIATION CONTEXT

The answer to this question seems fairly simple, and yet it has become the linchpin in the discussion concerning the relationship between Paleoindian human remains and contemporary Native Americans. The limited number of ancient American remains provides a picture of cranially and dentally diverse individuals living in diverse environments and spread across the Americas at or near the end of the Pleistocene (Jantz and Owsley, 1997; Neves and Pucciarelli, 1991; Powell, 2005; Powell and Neves, 1999; Steele and Powell, 2002). Researchers have suggested an explanation for the kind and degree of the biological variation they have observed from the phenotypes of Paleoindian remains. For most experts on this subject the post-Pleistocene diversity is demographic, resulting from some form of one or more mass migrations on foot or by boat (along coastlines).<sup>1</sup> However, migrations are merely proximate causes for many researchers.

Recent studies of the Paleoindians illustrate their within-group craniofacial diversity compared to that of modern human populations (Figure 1). Of course, the ultimate cause for the dissimilarity between Paleoindians and contemporary Native Americans is time – Paleoindians and other post-Pleistocene humans are *simply not contemporary*, which one might imagine is a source for diversity from a variety of evolutionary factors. Thousands of years and many generations could account for diversity between modern and ancient peoples simply because human populations experience microevolution over time and space (see Powell, 2005, and Powell and Neves, 1999, for more detail). People in the past clearly (Goodman, 1995) experienced different environments to which they and

their offspring adapted, as well as spatial dispersal across the new ice-free landscape, potentially leading to genetic isolation. Does this mean that the Spirit Cave Man and Kennewick Man were not 'native' people, unrelated to contemporary Native American tribes or First Nations? No. This assertion is absurd, based on an obsolete idea from European physical anthropologists whose conception of population variation was a product of typological thinking, such that biological variation can only be a product of past or present racial differences between human groups (Blumenbach, 1795/1969; Coon, 1954; Wolpoff and Caspari, 1997). The remains of some Paleoindians express craniodental phenotypes different from those of contemporary Native Americans, because *they are not contemporary*. Ancient Asian remains differ from contemporary Asian populations (Brace and Tracer, 1998). We do not need to invoke typological thinking to understand why the phenotypes of different human populations differ with time and space. Explanations that imply that Paleoindian remains are not ancestral to contemporary Native Americans stem from typological and racial thinking (Goodman, 1997, 1998; Powell, 2005) which has become all too common in modern physical anthropology (Goodman, 1995). The remains of Paleoindians are found in places where Native American populations are historically known to have lived. There are no good archaeological or biological data to support the notion found in the Jelderks decision that Paleoindians are not ancestors of today's Native American people. This kind of unscientific thinking plays into the hands of today's American religious and political conservatives in denying the role of evolution as a means of generating spatial and temporal variation in human beings.

While Spirit Cave Man and other ancient Americans differ in their craniofacial and dental morphologies from Native American tribes and nations in North America today, it is not at all clear that these remains can ever be affiliated with any specific contemporary human population in the New World. This is simply due to the temporal distance between ancient and contemporary native peoples in the Americas.

## ■ THE ARCHAEOLOGICAL CONTEXT

When Sydney and Georgia Wheeler excavated Spirit Cave in August of 1940, they encountered four discrete burials at depths in excess of two feet, each of which was associated with exquisitely preserved textiles (Wheeler and Wheeler, 1969). Burial No. 1 consisted of the remains of an adult female wrapped with finely woven matting. Modern dating by Tuohy and Dansie (1997) yielded an age determination of  $9270 \pm 60$  (UCR-3480) for this matting and  $9300 \pm 70$  (UCR-3475) for the human remains (Table 1; all dates are expressed as uncal. BP).



**Table 1** Radiocarbon determinations from Spirit Cave, Nevada (Fowler et al., 2000; Tuohy and Dansie, 1997), by object dated and Nevada State Museum (NSM) specimen number

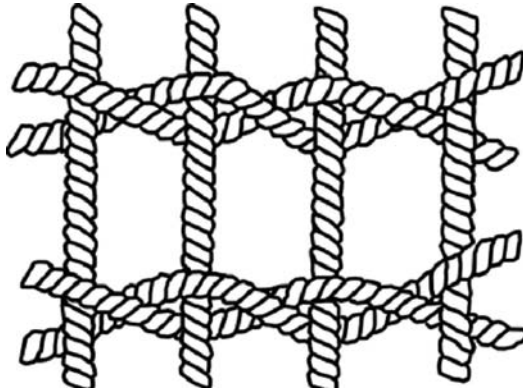
<i>Sample Nos</i>	<i>Object Dated</i>	<i>Specimen No.</i>	<i>Date (uncal. <sup>14</sup>C)</i>
UCR-3324-1/ CAMS 24194	Twined tulle mat, Burial No. 2	NSM 1-20-2.4a	9410 ± 60
UCR-3324-2/ CAMS 24197	Twined tulle mat, Burial No. 2	NSM 1-20-2.4b	9460 ± 60
UCR-3323/ CAMS 24199	Plain weave mat, Burial No. 2	NSM 1-20-2.5	9430 ± 70
UCR-3261-2/ CAMS 12353	Hair, Burial No. 2	AHUR 2064/ NSM 1-20-2	9360 ± 60
UCR-3261-4/ CAMS 12354	Hair, Burial No. 2	AHUR 2064/ NSM 1-20-2	9350 ± 70
UCR-3261-2	Hair, Burial No. 2	AHUR 2064/ NSM 1-20-2	9440 ± 60
UCR-3260/ CAMS 12352	Bone, Burial No. 2	AHUR 2064/ NSM 1-20-2	9430 ± 60
UCR-3480/ CAMS 30558	Plain weave mat, Burial No. 1	AHUR 770/ NSM 1-20-60	9270 ± 60
UCR-3475/ CAMS 33690	Bone, Burial No. 1	AHUR 770, scattered	9300 ± 70
UCR-3478/ CAMS 30557	Twined cordage bag, second cremation	AHUR 752/ NSM 1-20-5	9040 ± 50
UCR-3474/ CAMS 33689	Bone, Burial No. 3	AHUR 748, scattered	4640 ± 50
UCR-3479/ CAMS 3479	Coiled basket	NSM 1-20-7	2200 ± 60
UCR 3481/ CAMS 30738	Twined grass mat	NSM 1-20-65	1700 ± 60

Located beneath Burial No. 1 was Burial No. 2, the partially mummified remains of an adult male ('Spirit Cave Man') wearing hide moccasins, a fiber breechcloth, and wrapped in at least four layers of finely woven textiles, some of which were decorated with leather strips and feathers. Seven radiocarbon determinations run on hair, bone, and textiles from this burial produced a weighted mean of  $9415 \pm 25$ . Two cremations recovered ten feet from Burial No. 2 were found in direct association and each was comprised of a single cremation stored in a woven bag. A single assay run on the second cremation described by Wheeler and Wheeler (1969) returned an age of  $9040 \pm 50$  (UCR-3478) that also dates the other

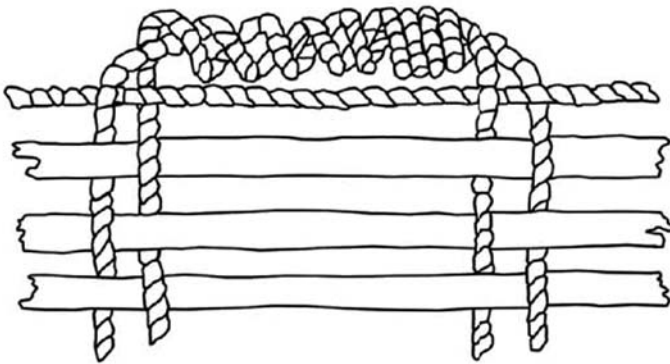
cremation. A third individual, that of a young male, was identified during modern biological analysis based on the presence of a single bone mixed in with Burial No. 1 (Tuohy and Dansie, 1997). This bone was AMS dated to  $4640 \pm 50$  (UCR-3474). Two even younger perishable artifacts were also recovered from the site. These include a coiled basket fragment dated to  $2200 \pm 60$  (UCR-3479) and a woven grass mat that produced an age of  $1700 \pm 60$  (UCR-3481). Additional artifacts, including groundstone ( $n = 3$ ), chipped stone ( $n = 5$ ), wooden objects ( $n = 3$ ), a mountain sheep horn pendant, and multiple pieces of loose cordage, plant fiber, and animal bone, were collected by the Wheelers, but their associations are not entirely clear and may be unrelated to the burials (see Tuohy and Dansie, 1997).

Taken as a unit, the Spirit Cave find stands in sharp contrast to the Kennewick discovery for several reasons. Not the least of these is the preservation of associated burial goods with Spirit Cave Man, whereas only a projectile point lodged in the pelvis of the Kennewick remains accompanied that individual. Thus, the recovery of a suite of artifacts with Spirit Cave Man ensures that the burial's archaeological and social contexts may be that much better understood than was possible with Kennewick Man. Without question, it is the well-preserved textiles that have assumed the most prominent role in discussions of Spirit Cave Man's material culture. This is not surprising given the scant information we have on Paleoindian occupations of the western Great Basin and the large quantities of perishable artifacts preserved in the region's dry caves and rock shelters (Adovasio, 1986b; Jones and Beck, 1999). The textiles associated with Spirit Cave Man are the major focus of our consideration of his archaeological context. Detailed technological data on all of the textiles can be found in Fowler et al. (2000) and we have consulted their descriptions for the information on Spirit Cave textile weave structure presented in the following paragraphs.

In general, there are two structural techniques commonly employed in both basketry and textile manufacture (Adovasio, 1977; Emery, 1995) that dominate this early textile assemblage: twining and plaiting. Twining is a technique that employs moving horizontal elements, called wefts, which twist around stationary vertical elements, called warps (Figure 2). Plaiting, by comparison, is a weaving technique wherein warps and wefts are usually all active and each element, or set of elements, passes over and under each other at a fixed interval without any twist. Both twining and plaiting can be used to manufacture a variety of forms, but the technique employed in the plaited textiles from Spirit Cave is an unusual variant of simple plaiting in which there are two cordage (possibly Indian Hemp, *Apocynum* sp.) weft elements (Figure 3). Called warp-faced plain weave with paired wefts in textile terminology, this technique is represented by the matting covering Burial No. 2's head, the shrouds wrapping burial Nos 1 and 2, and the outermost bag enveloping the first cremation described by Wheeler and Wheeler (1969). A second bag placed within this plaited bag was accomplished in twined weaving of probable Indian hemp warps and wefts. Twining was



**Figure 2** Schematic illustration of open, simple twined textile with cordage warps and wefts



**Figure 3** Schematic illustration of edge of warp-faced plain weave textile with paired cordage wefts redrawn from Fowler et al. (2000: Figure 7.5)

also employed to produce the second cremation bag and the twined fur (unidentified) blanket that served as Spirit Cave Man's innermost wrapping. The fourth and final layer wrapping Burial No. 2 consisted of a large twined bulrush (*Schoenoplectus* sp.) mat.

Examples of the plaiting variant observed in the Spirit Cave Man assemblage have been reported from other sites across the western Great Basin dating between 9450 and 8800 <sup>14</sup>C years ago (Fowler et al., 2000; Hattori and Fowler, 2005). A single specimen reported from Roaring Springs Cave, southern Oregon, and dated to 540 ± 50 (UCR-3527) documents the technique's chronologically bimodal distribution. At present, it is difficult to understand the long temporal gap between these finds. It is possible that

more examples await identification in museum collections as many large Great Basin textile assemblages remain poorly dated and described. Alternatively, the temporal discontinuity may be real and reflect a weaving technique that simply went out of fashion for a while.

The remaining perishable artifacts found with Spirit Cave Man include the as yet undescribed 'breechcloth of fiber' reported by the Wheelers (1969: 73), and a pair of hide moccasins. If the breechcloth exhibits a woven structure, it may or may not be comparable to the few specimens recovered from western Nevada dating between ca. 4000 to 600 <sup>14</sup>C years ago (Heizer and Krieger, 1956; Loud and Harrington, 1929). Moccasins rarely occur in western Great Basin archaeological sites, being far outnumbered in frequency by twined sandals (Andrews et al., 1986; Connolly and Barker, 2004; Cressman, 1942; Loud and Harrington, 1929). Few technological details have been published for these moccasins, but preliminary Great Basin-wide comparisons made by Tuohy and Dansie (1997: 35–6) suggest that there are a few, possibly superficial, similarities to footwear made within the last 3200 years in western Utah.

Adovasio's (1970, 1974, 1986b) extensive research on Great Basin textiles provides evidence of broad-scale regional patterns through time, and isolates a continuous weaving tradition in the western Great Basin nearly 11,000 years old. Regarding the Spirit Cave twined textiles, there are demonstrable similarities in technological style and decorative style to artifacts recovered from sites in western Nevada and southern Oregon that span a long period (Adovasio, 1986b; Cressman, 1942; Fowler et al., 2000; Hattori and Fowler, 2005). Flexible and semi-flexible twined fabrics dominate these more northern assemblages. Most share technological attributes, such as direction of weft twist, alluding to a broader relationship between these techniques. The exploitation of bulrush used to make several of the mats further suggests the antiquity and importance of the lake-marsh adaptation to Great Basin lifeways. As well, the practice of decorating textiles and basketry with feathers is common in the western Great Basin in the millennia following the Spirit Cave textiles' deposition. This form of decorative embellishment persists up until roughly 700 <sup>14</sup>C years ago in a variety of techniques and forms (Jolie, 2004), to a time coincident with the only major break in the western Great Basin's textile technological and temporal trajectory. This disjuncture, documented variously between 700 and 1000 years ago in textiles, ceramics, and other artifact classes, is interpreted as reflecting the expansion of the Numic language-speaking ancestors of the region's historic Northern Paiute occupants (Adovasio, 1986a, 1986b; Andrews et al., 1986; Fowler and Dawson, 1986; Jolie, 2004; Madsen and Rhode, 1994; see Fowler, 1994 for a discussion of continuities).

Having considered the regional archaeological context of the Spirit Cave Man artifacts, it is now worth briefly discussing the role of textiles in archaeological inquiry. Specifically, the textiles are significant in this case



for their unique capacity to inform us about social boundaries and identities. Technological attributes, such as weave structure, starting method, edge treatment, and splicing method, reflect cultural standards resistant to rapid technological changes or innovation (Adovasio and Pedler, 1994; Mason, 1904; Morris and Burgh, 1941). It is not simply the presence or absence of a type of textile or the primary structural technique employed that indicates a social relationship, but rather a constellation of structural features that ultimately reflects the social context in which the technology was learned and the item produced. Some functional textile and basketry categories, however, appear so ubiquitous in time and space as to be uninformative beyond documenting general categories of use. For example, twined fur blankets and robes are well documented throughout western North America (e.g. Hedges, 1973; Kent, 1983), and a similar case obtains for twined matting. What do appear to be significant for sorting technological variability at different spatial-temporal scales are patterns in manufacturing decisions that correspond with conservative, repetitively learned motor habits. The direction of weft twist in twined weaving appears to be one such feature in the western Great Basin.

While it is premature to draw any firm conclusions about Spirit Cave Man's ethno-linguistic affinities based on the textiles, his plaited and twined burial wrappings represent clear examples of weaving forms and techniques known from other places and times throughout the region. The textiles preserved with his remains document the antiquity of several weaving technologies practiced continuously by later occupants.

In summary, the Spirit Cave textiles are in some ways unique, but research on early western Great Basin material indicates that they are indisputably part of a wider tradition of indigenous weaving in the region that is nearly 11,000 years old (Connolly and Barker, 2004; Cressman, 1942; Hattori, 1982; Hattori and Fowler, 2005). Surveys of these data reveal that there are clearly some forms and weaving techniques represented in the earliest assemblages that fade in popularity over time (Adovasio, 1986b). However, there are some that persist until the historic period (Fowler, 1994). This observation does not invalidate the applicability of textiles to studying Spirit Cave Man, but instead demands a rigorous, critical examination of all the available evidence in a broader regional context.

## ■ THE SOCIAL CONTEXT

The *amicus* brief filed by the Friends of America's Past in the United States District Court, District of Nevada, urges the Court to apply the precedent set in the case regarding Kenniwick Man, *Bonnichsen v. United States*, and to decide that the human remains described as Spirit Cave Man are not

Native American human remains within the meaning of the NAGPRA and that the NAGPRA does not apply to them. This is based on the argument that, since the Ninth District Court found that ‘Kennewick Man’s remains are not Native American human remains within the meaning of NAGPRA and that NAGPRA does not apply to them’ (quoted in Friends of America’s Past, 2005: 20), and since the Spirit Cave Man human remains are even older than those of Kennewick Man, therefore the Court must rule that the NAGPRA does not apply in the situation concerning Spirit Cave Man.

The *amicus* brief calls attention to the so-called threshold test of the NAGPRA, again citing *Bonnichsen*:

NAGPRA mandates a two-part analysis. The first inquiry is whether human remains are Native American within the statute’s meaning. If the remains *are not* Native American, then NAGPRA does not apply. However, if the remains *are* Native American, then NAGPRA applies, triggering the second inquiry . . . [i.e., affiliation]. (Quoted in Friends of America’s Past *amicus*, 2005: 1)

But that first inquiry into whether or not the remains are Native American under the NAGPRA must be informed by case-specific circumstances and cannot be dismissed out of hand based on age alone. The plaintiffs in *Bonnichsen* argued that the age of human remains could not be the sole factor in determining whether human remains are Native American (the so-called ‘1492 test’), but the *amicus* brief uses that same argument to lobby that Spirit Cave Man is *not* Native American. We cannot have it both ways. There must be a separate and distinct attempt to determine whether there exists information that can assist in making the determination of whether or not the remains *might or might not be* Native American, and, in the Spirit Cave Man situation, the materials associated with the human skeletal material should inform our decision and cannot be dismissed.

Magistrate John Jelderks of the 9th Circuit Court, in his August 2002 decision in *Bonnichsen* that the NAGPRA did not apply to the Kennewick Man human remains, based his decision on the definition of ‘Native American’ in the law: ‘“Native American” means of, or relating to, a tribe, people or culture, that is indigenous to the United States’ (25 U.S.C. 3001 § (2)(9)). Jelderks held that ‘. . . it is reasonable to infer that Congress intended the term “Native American” to require some relationship between remains or other cultural items and an existing tribe, people, or culture that is indigenous’ (Jelderks, 2002: 27), and that ‘[T]he culture that is indigenous to the 48 contiguous states is the American Indian culture . . .’ (Jelderks, 2002: 30).

The emphasis in Jelderks’ decision was on the use of the present tense in the definition. When a technical amendment to the NAGPRA was proposed to add ‘or was’, Alan Schneider, attorney for the plaintiffs in the Kennewick Man case, stated: ‘What they are trying to do is to change the statute so that it comes up with the *absurd* result that tribes can now claim



skeletons to which they have no cultural connection' (Associated Press, 2005, emphasis added).

Absurd? The narrow interpretation of the law directed by Jelderks is perhaps as absurd. One example should suffice.

On 29 August 1911, Ishi stumbled into the modern world near Oroville, California. Theodora Kroeber's biography of him paints him as a 'wild man emaciated to starvation, his hair burned off close to his head' (Kroeber, 1962: 3). Ishi was taken to San Francisco by Professor T.T. Waterman and lived there the rest of his life under the care and protection of Alfred Kroeber and the staff of the University of California's Museum of Anthropology as a living exhibit.

Upon his death in 1916, Ishi's remains were cremated. However, the cremation occurred after Ishi's brain had been removed and sent to the Smithsonian Institution for preservation. Orin Starn (2004) describes the process that finally allowed the repatriation of the brain to tribal groups in California for reburial.

Legal purists will note that the NAGPRA does not apply in this case (the Smithsonian Institution is exempt from the NAGPRA but governed by a repatriation act of its own – the National Museum of the American Indian Act of 1989). However, a strict reading of the definition of 'Native American' under the NAGPRA (and perhaps especially in a court when Magistrate Jelderks was presiding) would not have allowed the repatriation of Ishi's brain had someone like the *Bonnichsen* plaintiffs intervened.

At the moment of Ishi's death, he stopped meeting the definition of 'Native American' under the NAGPRA. As the 'last Yahi', his death meant that the tribal group of which he was a member no longer met the definition of Native American under the law. With no living tribal members, the Yahi fell into limbo: no longer were they 'is indigenous', suddenly they were shuttled to being 'was indigenous', and therefore not covered by the NAGPRA under the narrow view taken in the Jelderks decision.

Currently, Native Americans are defined by law, but tribal membership is regulated by each tribal group. Tribes have a special relationship with the Federal government, a relationship described by Supreme Court Justice John Marshall in 1832. The Federal government has maintained that relationship while, at the same time, trying to find ways to legislate American Indians out of existence (see D'Errico, 2000, for a more detailed discussion of the history of the concept of tribal sovereignty in Indian law). The 9th Circuit Court's decision that the early inhabitants of North America do not meet the definition of 'Native American' under the Native American Graves Protection and Repatriation Act has the impact of calling into question the exact point in time that cultures 'became' Native American. Such a finding requires now that tribal groups must demonstrate a cultural 'pedigree' to maintain their rights under the NAGPRA. Thus, this ruling has social and political implications concerning who is and who isn't 'Native American' beyond this single legal case.

The general press presents the situation regarding repatriation as one of constant conflict and opposition. It has sometimes been painted as 'science versus religion'. We argue that such is not necessarily the case but that there exists a portion of overlap of perspectives. Rose et al. (1996), Swidler et al. (1997) and Dongoske et al. (2000) offer but a few examples of the cooperation that exists between scientists and tribal groups. The importance of these instances is that they likely represent the variation in attitudes held by tribal groups as well as those held by archaeologists. The portrayal of such attitudes as diametrically opposed to each other serves to inflame the issue rather than to alleviate it.

## ■ THE CULTURAL CONTEXT

The cultural context of the Kennewick situation, as alluded to earlier, is ambiguous. No cultural material was associated with the human remains with the exception of the portion of the projectile point embedded in the individual's pelvic bone. The discovery situation (the skeleton was found primarily in the Columbia River) possibly contributed to the lack of associated cultural material. Subsequent actions by the Corps of Engineers to 'protect' the discovery site by planting trees and placing tons of rock over it has made further investigation of the physical location impossible. In contrast, it was obvious from the initial investigations that Spirit Cave Man was intentionally buried, and that the associated cultural materials were representative of at least a portion of the individual's cultural inventory.

Initially researchers indicated that Kennewick Man had not been purposely buried, but that his remains were serendipitously deposited along the banks of the Columbia River. Jim Chatters is quoted as saying 'the 9,200-year-old bones likely were washed to their final resting place by the river – after being eaten by coyotes' (Lee, 1998), based on similarities of soil deposits on the bones with those of a stratum on the river bank, as well as the condition of certain bones which he saw as similar to those resulting from dog scavenging of exposed carcasses. More recently, however, Doug Owsley and colleagues, based on microscopic study of the human remains, indicated that they believe that Kennewick Man was actually buried:

... laid out on his back, arms at his sides and palms down ... The river was to his left and his feet downstream. His head was raised about 5 degrees so he was looking east toward his feet and the rising sun. His legs were straight and his feet slightly tipped outward ... (King, 2006; Owsley et al., 2006: 371)

There are two reasons why it is important whether Kennewick Man had been buried rather than left to the elements. The mere act of burial implies something about the relationship of the individual with other members of the group with whom he lived. Burial implies that the individual had some



importance to the group – an individual who meant nothing to a group would likely have been left to nature rather than ‘protected’ after death from the depredations of scavengers. In addition, the act of burial implies as well that other members of Kennewick Man’s culture (even if we cannot say anything about what that culture was) were present at or near the time of his death.

In the case of Spirit Cave Man, his contemporaries included elements of his culture with him. The breechcloth, moccasins, and all the other items that accompanied him in his burial offer us insights into not only his material culture but also his human culture. It is unlikely that such materials would have been preserved in a burial situation such as Kennewick Man’s, but the artifacts with Spirit Cave Man suggest that such materials *might* have been present – we know at least that such technology was present in North America at that time.

The suggestion that Kennewick Man was intentionally buried might have a bittersweet impact on Indigenous groups in North America. The act of burial further cements Kennewick Man (the individual) into a *group* of individuals that formed the culture of which he was a part. He no longer is a single individual, alone in a cultural vacuum. There is finally ‘culture’ associated with Kennewick Man even if we cannot describe much of it.

The fact that Owsley and other researchers can determine that Kennewick Man was intentionally buried based on the information from his bones also indicates the possibilities that more detailed scientific study of such human remains might illuminate. While some may not welcome these studies, this situation is an illustration of information they might provide.

Perhaps it is because we had no indication of the ‘culture’ to which Kennewick Man belonged that the court case proceeded the way it did. Perhaps Judge Jelderks’ decision might have been different if material culture of the sort that accompanied Spirit Cave Man had been found with the Kennewick human remains, or if the interpretation that Kennewick Man had been purposely buried had been available. Perhaps Jelderks would have been less likely to view Kennewick Man as not meeting the definition of ‘Native American’ under NAGPRA.

## ■ CONCLUSIONS

We wish to be clear on three points:

- 1 We do not currently endorse the repatriation of the Spirit Cave remains to any particular tribe, nor do we advocate the repatriation of these remains at all.
- 2 We do not currently advocate the permanent curation of the Spirit Cave remains.

- 3 Decisions regarding the repatriation or retention of human remains of Paleoindian age should (and must) be made on a case-by-case basis and informed by the specific circumstances of each situation.

The issues discussed here have repercussions beyond the Spirit Cave Man case, as well as beyond the repatriation of Paleoindian materials in general. The Jelderks decision regarding Kennewick Man indicates that legal determinations may be made at odds with common cultural perspectives concerning whether human remains can be believed to be Native American. We believe this development will have implications for other legal issues related to identity in living and past peoples. Additionally, the Kennewick case illustrates the differences in the ways that 'evidence' is developed and used in the legal system and the way it is developed and used within the scientific process of learning about our world. We are also concerned about the ways that these very different kinds of evidence might come into play regarding regulations yet to be promulgated for the disposition of culturally unidentifiable human remains and artifacts. We feel it may be valuable to keep these issues in mind while considering developments in the Spirit Cave Man case, as they may serve to set and/or reinforce unintended precedents.

The purpose of this article has been to demonstrate the clear, individual context that surrounds the human remains called 'Spirit Cave Man'. There are unique circumstances in the specific scientific and social aspects relating to the history and future disposition of these remains. The same could be said for each of the few remains that date to the Paleoindian period. We feel that the bioarchaeological, human variation, archaeological, social, and cultural contexts are so different for Spirit Cave Man from Kennewick Man that one should not be used as a precedent for the other. Additionally, as there are so few Paleoindian remains, each from very different contexts, it is unlikely (and unnecessary) that precedents can be set. Each case should be considered in its own context.

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## Note

- 1 Not to raise the specter of transoceanic migrations across the Pacific (Heyerdahl, 1950) or the Atlantic (Bradley and Stanford, 2004). A coastline migration first proposed by Fladmark (1983) has a growing number of proponents of late (Akazawa, Dixon, Fladmark, Powell and others).



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**HEATHER J.H. EDGAR** is Curator of Human Osteology, Maxwell Museum of Anthropology, and Research Assistant Professor of Anthropology, University of New Mexico. Her research focuses on micro-evolution of American populations, applying a biocultural perspective based in political economy. Additional interests include biological relationships among Paleoindians, archaic American groups, and recent Native American populations.

[email: [hjhedgar@unm.edu](mailto:hjhedgar@unm.edu)]

**EDWARD A. JOLIE** is a French and Oglala Lakota/Hodulgee Muscogee Indian PhD student in archaeology at the University of New Mexico. He is interested in anthropological ethics, Native American-anthropologist relations, and perishable artifacts. For his dissertation research he is using basketry to assess social diversity in the Chaco regional system (AD 850–1140) in the Four Corners region of the US Southwest.

[email: [edjolie@unm.edu](mailto:edjolie@unm.edu)]

**JOSEPH F. POWELL** is Associate Professor of Anthropology, University of New Mexico. He is the author of *The First Americans: Race, Evolution, and the Origin of Native Americans* (Cambridge University Press, 2005), and is co-editor of *Human Remains: A Guide for Museums, and Academic Institutions* (University of Las Vegas Press, 2005). His principal interests are in the application of population genetic models to Paleoindian remains in the New World, focusing on the roles of genetic drift and kin-based migration in shaping quantitative variation among the earliest Americans.

[email: [jpowell@unm.edu](mailto:jpowell@unm.edu)]

**JOE E. WATKINS**, Choctaw Indian and archaeologist (Associate Professor of Anthropology, University of New Mexico), researches the ethical practice of anthropology and its relationships with Indigenous populations. His book *Indigenous Archaeology: American Indian Values and Scientific Practice* (AltaMira Press, 2000) is in its second printing; his latest book is *Sacred Sites and Repatriation* (Chelsea House Publishers, 2005).

[email: [jwatkins@unm.edu](mailto:jwatkins@unm.edu)]