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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
AT RENO

FALLON PAIUTE-SHOSHONE
TRIBE, a federally recognized Indian
tribe,
Plaintiff,

v.

UNITED STATES BUREAU OF LAND
MANAGEMENT,
Defendant.

CV-N-04-0466-LRH-RAM

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

I. INTRODUCTION

1. This is an action for judicial review of administrative action. The plaintiff is the Fallon Paiute Shoshone Tribe ("Fallon Tribe" or "Tribe"), a federally recognized Indian tribe residing on the Fallon Indian Reservation in the vicinity of Fallon, Nevada. The defendant is the

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United States Bureau of Land Management ("BLM"). BLM is responsible for managing approximately 262 million acres of federal surface lands and over 300 million acres of federal subsurface mineral estate. The vast majority of BLM's work relates to mineral leasing, extraction and royalties, timber, rights-of-way, grazing, fire management, and wild animal management.

2. The Tribe seeks judicial review of BLM's consideration and denial of the Tribe's request to repatriate human remains and associated funerary objects under the Native American Graves Protection and Repatriation Act ("NAGPRA" or "Act"). The Tribe brings this action under NAGPRA and the Administrative Procedure Act ("APA"), and alleges violations of NAGPRA, the APA, and the Federal trust responsibility to Indian tribes.

3. The Court has jurisdiction under 25 U.S.C. § 3013 because the Tribe alleges violations of NAGPRA. The Court also has jurisdiction under 28 U.S.C. §§ 1331 and 1362 because this action arises under NAGPRA, the APA and the Federal trust responsibility to Indian tribes, and the Tribe's governing body is duly recognized by the Secretary of the Interior.

4. Venue lies in this judicial district under 28 U.S.C. § 1391(e) because BLM is an agency of the United States, a substantial part of the events or omissions giving rise to this action occurred in this district, and the Tribe resides in this district.

II. STATUTORY FRAMEWORK

5. Section 5(a) of NAGPRA requires each federal agency that has control over Native American human remains and associated funerary objects to compile an inventory of such items and, to the extent possible based on information possessed by the agency, to "identify the geographical and cultural affiliation of such items." Under section 5(b)(1) of the Act, such inventories and

identifications must be "compiled in consultation with tribal government . . . officials and traditional religious leaders."

6. If the cultural affiliation of Native American human remains and associated funerary objects with a particular tribe is established pursuant to section 5 of NAGPRA, section 7(a)(1) of the Act requires the federal agency, upon request of the tribe and pursuant to sections 7(b) and 7(e) of the Act, to "expeditiously return such remains and associated funerary objects." Section 7(b) allows an agency to retain an item that is "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States," and section 7(e) permits retention of items subject to multiple requests for repatriation if the agency "cannot clearly determine which requesting party is the most appropriate claimant." In the former case, the item must be repatriated "no later than 90 days after the date on which the scientific study is completed," and in the latter case when the requesting parties agree upon its disposition or the dispute is otherwise resolved.

7. If the cultural affiliation of Native American human remains and associated funerary objects with a particular tribe is not established pursuant to section 5 of NAGPRA, section 7(a)(4) of the Act still requires the federal agency, upon request of a tribe and pursuant to sections 7(b) and 7(e) of the Act, to expeditiously return such items "where the requesting Indian tribe . . . can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."

8. Section 8(a) of NAGPRA directs the Secretary of the Interior ("Secretary") to establish a seven-member Review Committee "to monitor and review the implementation of the

inventory and identification process and repatriation activities” under sections 5, 6 and 7 of the Act. Section 8(b) directs the Secretary to appoint three of the Committee’s members from nominations submitted by Indian tribes, Native Hawaiian organizations and traditional Native American religious leaders, to appoint three additional members of the Committee from nominations submitted by national museum organizations and scientific organizations, and to appoint the Committee’s seventh member from a list developed by and consented to by the other six members.

9. The Review Committee’s specific responsibilities are set forth in NAGPRA section 8(c), and include the following:

(2) monitoring the inventory and identification process conducted under sections 5 and 6 to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon request of any affected party, reviewing and making findings related to –

(A) the identity or cultural affiliation of cultural items; or

(B) the return of such items; [and]

(4) facilitating the resolution of any disputes among Indian tribes . . . and Federal agencies . . . relating to the return of such items including convening the parties to the dispute if deemed desirable

10. Section 15 of NAGPRA gives United States district courts jurisdiction “over any action brought by any person alleging a violation of” the Act and “authority to issue such orders as may be necessary to enforce the provisions of” the Act. Under section 8(d) any records or findings made by the Review Committee relating to the cultural affiliation of any cultural items may be admissible in such an action.

11. Section 2 of NAGPRA defines certain terms for purposes of the Act. The term "Native American" means "of, or relating to, a tribe, people, or culture that is indigenous to the United States." The term "cultural items" includes both human remains and associated funerary objects. And, the term "cultural affiliation" means that "there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe . . . and an identifiable earlier group." Neither NAGPRA nor its implementing regulations define the term "shared group identity" or "identifiable earlier group."

12. The House and Senate Committee reports on NAGPRA explained that the requirement of cultural affiliation was "intended to ensure that the claimant has a *reasonable connection* with the materials." H.R. Rpt. 877 at 14, 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 4367; S. Rpt. 473 at 9, 101st Cong., 2d Sess. (1990) (emphasis added). According to the House Report, Congress did not intend that gaps in the record would prevent a finding of cultural affiliation:

[I]t may be extremely difficult, in many instances, for claimants to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

H.R. Rpt. 877 at 14. The Senate Report made the same point, adding that claimants need not establish cultural affiliation with "scientific certainty." S. Rpt. 473 at 8-9.

13. The Secretary adopted these standards in promulgating regulations to implement NAGPRA:

A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

43 C.F.R. § 10.14(d).

14. NAGPRA's implementing regulations set forth three specific requirements to make a finding of cultural affiliation: (1) the "[e]xistence of an identifiable present-day Indian tribe" with standing under the Act and the regulations; (2) "[e]vidence of the existence of an identifiable earlier group"; and (3) "[e]vidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe . . . and the earlier group." With respect to the second requirement, the regulations state "[s]upport for this requirement may include, but is not necessarily limited to evidence sufficient to: (i) [e]stablish the identity and cultural characteristics of the earlier group, (ii) [d]ocument distinct patterns of material culture manufacture and distribution methods for the earlier group, or (iii) [e]stablish the existence of the earlier group as a biologically distinct population." 43 C.F.R. § 10.14(c).

III. FACTUAL BACKGROUND

A. Disinterment of Human Remains and Funerary Objects from Spirit Cave

15. In 1940, the Nevada Parks Commission contracted with Sydney and Georgia Wheeler to explore a cave area outside Fallon, Nevada. The Wheelers' explorations took them onto federal lands managed by BLM, within a few miles of the Fallon Indian Reservation and in the heart of the Fallon Tribe's aboriginal territory.

16. In a rocky outcropping known as Spirit Cave, the Wheelers discovered two burial pits, one on top of the other, a cremation trench, human remains, and a variety of artifacts. Beneath the

first, or upper, burial the Wheelers found a sagebrush-lined burial pit that had been covered with brush and filled in with rocks. They removed a mortuary bundle from the pit and, unwrapping it, found a well-preserved set of partially mummified remains lying on a rabbit-fur robe and wearing leather moccasins and a fiber breechcloth. The body was wrapped in two woven mats, and a small tuft of straight, black hair remained on the scalp. A local doctor identified the remains as those of a young adult male, and the Curator of the Southwest Museum estimated that they were approximately 1,500 to 2,000 years old. The Wheelers believed the remains were those of a prehistoric occupant of the area, and noted that the woven mats were similar to others that had been found in the region.

17. The human remains and associated funerary objects disinterred from the second, or lower, burial in Spirit Cave are the remains and funerary objects at issue in this case (“Spirit Cave remains and funerary objects”). Because they were found on BLM lands, these remains and funerary objects have been under the control of BLM’s Nevada State Office since their disinterment in 1940. However, they have been stored in the Nevada State Museum (“Nevada Museum” or “Museum”) in Carson City, Nevada. For most of this time, they remained in a box on a shelf, the forgotten remains of a prehistoric ancestor of the local Paiute Indians. However, in the mid-1990s, as a result of an unauthorized radiocarbon dating project, the Spirit Cave remains and funerary objects would gain substantial notoriety.

B. Opposition to NAGPRA Within BLM’s Nevada State Office and the Nevada Museum

18. Congress enacted NAGPRA in 1990. In 1994, BLM’s Nevada State Office and Nevada Museum staff expressed concern that implementation of the Act would lead to the

repatriation of human remains and associated funerary objects in the Museum's collections, and sought to prevent or delay that result.

19. In 1994, BLM Nevada State Office staff persons Pat Barker and Cynthia Pinto co-authored an article entitled "Legal and Ethical Implications of the Numic Expansion." (Numic is a branch of the Uto-Aztecan language family, and was the predominant language of Native American people in the Great Basin at the time of European contact.) The article stated that NAGPRA "represents one of the anti-science social trends developing in the United States" and allows groups or individuals to dispose of human remains and other items "as if they were personal property." The article advised scientists to be careful when associating ethnic groups with the archaeological record because of the legal and practical ramifications, which are "especially critical" in the Great Basin.

20. In December 1994, Barker met with Nevada Museum staff person Amy Dansie. At the time, the Museum was under contract with BLM to prepare an inventory of Native American human remains and associated funerary objects in its collections, and to identify the geographical and cultural affiliation of such items. According to Dansie, the purpose of the meeting was to discuss coordination between BLM and the Museum to preserve information from prehistoric "human grave goods" in the Museum's collections before "repatriation destroys their scientific value forever."

21. Barker and Dansie discussed several strategies to achieve this goal in the context of the Museum's preparation of a NAGPRA inventory. First, relying on the hypothesis that Numic speaking people first arrived in the Great Basin between 500 and 3,000 years ago, Barker suggested that any items more than 3,000 years old should be listed as unaffiliated. Second, Barker suggested

that as many tribes as possible (including tribes from California, such as the Maidu) should be notified of the human remains in the Museum's collections in order to promote conflicting tribal claims. Barker explained that the resolution of such conflicting claims would take time and could be used to justify additional scientific studies. To further this strategy, Barker advised Dansie not to make any findings of geographical affiliation, and not to make any findings of tribal affiliation if such affiliation was not "explicit in the original records." Third, Barker and Dansie believed it would be prudent to complete any scientific study of human remains before May 1996, because any further study would "require time-consuming consultations, letter writing, and legal justifications for repatriation delays."

C. Radiocarbon Dating of the Spirit Cave Remains and Funerary Objects and Its Aftermath

22. In 1994 and 1995, the Nevada Museum took samples of hair and bone from the Spirit Cave remains and samples of textiles from the associated funerary objects for purposes of radiocarbon dating. The results indicated the Spirit Cave remains and funerary objects are approximately 9,400 years old.

23. In March 1996, Dansie requested permission from BLM to conduct additional radiocarbon dating and DNA testing of the Spirit Cave remains as well as other remains in its collections. In April 1996, Barker informed various Nevada tribes of this request and scheduled a meeting with the tribes for April 23, 1996. He informed the tribes that BLM and the Museum "believe these studies to be fully justified and of major significance to all of us." However, at the meeting the tribes, including the Fallon Tribe, opposed any further testing of the remains.

24. The day after the meeting, Barker and Dansie spoke at a press conference to announce the finding regarding the age of the Spirit Cave remains. According to Dansie, they “wanted to know what the whole world feels about whether we have the right to defy the Native Americans’ desire not to allow us to study the remains of people that are not demonstrably their ancestors.” The press conference was covered by the Associated Press and other media organizations, and resulted in stories in television and print media in Nevada and across the country. Dansie and another Nevada Museum staff person, Donald Tuouy, were interviewed by the New York Times, the Washington Post, and the Discovery Channel. BLM staff persons, including Cynthia Pinto, met with representatives of the public television show NOVA who would produce a show about the remains. The Sacramento Bee later reported the Spirit Cave discovery “catapulted Dansie and Tuouy . . . from the relative obscurity of archaeological journals onto the pages of newspapers across the country.”

25. BLM and Nevada Museum staff also made presentations regarding the Spirit Cave remains at a series of scientific conferences. Their objective, according to the Museum’s newsletter, was to put the Spirit Cave remains and funerary objects “into a world class context.”

26. In July 1996, Dansie sent Barker the Nevada Museum’s inventory of human remains, which listed the Spirit Cave remains as culturally unidentifiable. BLM staff reviewed and agreed with this listing in October 1996.

27. Although BLM did not permit destructive testing of the Spirit Cave remains (such as DNA testing or additional radiocarbon dating), it did permit destructive testing of the associated funerary objects. Accordingly, the Nevada Museum conducted or permitted outside scientists to conduct a battery of scientific examinations, including non-destructive examinations of the remains

and both destructive and non-destructive examinations of the associated funerary objects. By February 1997, the Museum reported that, in addition to its own staff, 15 different scientists had examined the remains, associated objects and Spirit Cave environs. The results of these examinations were published in a 1997 issue of the Nevada Historical Society Quarterly that was devoted exclusively to the Spirit Cave remains and funerary objects.

D. The Tribe's Request for Repatriation

28. The Fallon Tribe formally requested repatriation of the Spirit Cave remains and funerary objects in May 1997. The Tribe's request is supported by all other Great Basin tribes and by the National Congress of American Indians. No tribe or individual tribal member opposes the Tribe's request.

29. At a meeting in November 1997, Barker informed the Tribe that BLM had not reached a decision whether the remains were affiliated with the Tribe. Barker did not disclose his general opposition to NAGPRA, his 1994 position regarding the Numic expansion hypothesis, or BLM's staff review of and agreement with the listing of the remains as unaffiliated on the Nevada Museum's inventory.

30. The Nevada Museum continued to oppose repatriation of the Spirit Cave remains and associated funerary objects. It organized a conference in November 1997, at which the Spirit Cave remains were featured and "[a]ffiliation issues under NAGPRA" were discussed. The Museum invited Barker and other BLM staff, as well as scientists and lawyers who were opposing repatriation of other remains under NAGPRA. No Native Americans were invited.

31. In January 1998, the Museum announced that it would display a bust of the man disinterred from Spirit Cave. The bust had been created from the results of a CAT scan of the remains, which had been authorized by the Museum. When Nevada tribes, including the Fallon Tribe, learned of the existence of the bust and the Museum's plans to display it, they reacted with disgust and outrage. Although the Governor of Nevada stated the bust had been created for research purposes and would not be displayed or reproduced, it later appeared on the cover of Newsweek magazine and in other periodicals such as Discover Magazine.

32. In September 1998, the Museum submitted to BLM its final project report regarding its inventory of human remains under NAGPRA. The report, authored by Dansie, concluded that the 9,400-year-old Spirit Cave remains could not be affiliated with any modern tribe. It relied on the Numic expansion hypothesis, measurements of the cranium (which indicated that it fell outside the range of any modern population), changes in Great Basin basketry techniques over time (which allegedly showed that different peoples had occupied the Great Basin over time), and Paiute myths about red-headed giants (allegedly representing another people who had occupied the region before the Paiute).

33. In November 1998, BLM's Nevada State Director wrote to the National Park Service in response to a request by the Tribe to place the Spirit Cave matter on the Review Committee's agenda for its December 1998 meeting. The State Director stated BLM was still gathering information to make decisions regarding the Spirit Cave remains, and had "not reached any conclusion about their status." The State Director also stated it would be "premature and inappropriate to discuss the details of this case in a public forum like the upcoming NAGPRA

Review Committee Meeting,” because such discussions would “compromise[] the integrity of the decision process and [might] unnecessarily politicize this important decision.” On the basis of the State Director’s letter, the Review Committee decided not to place the Spirit Cave issue on its agenda.

34. The Tribe met with BLM in May 1999 to discuss a schedule for the submission of information in support of the Tribe’s request for repatriation. The Tribe requested an opportunity to meet with BLM staff to discuss BLM’s assessment of the evidence collected to date, in order to help focus the Tribe’s own research and analysis in a way that would be most helpful to BLM. It also requested an additional meeting to make a preliminary presentation of its research and receive comment and feedback from BLM, and a final meeting after submission of its written research. BLM agreed that the Tribe could have until December 1999 to submit evidence in support of its request, but refused to permit the Tribe to meet with BLM staff, stating that it was “not prudent to hold [such] pre-decisional meetings.”

35. In December 1999, the Tribe submitted a memorandum and a series of expert reports to BLM containing scientific support for the propositions that the Spirit Cave remains and funerary objects are Native American and are culturally affiliated with the Tribe under NAGPRA. BLM immediately forwarded the Tribe’s submissions to the Nevada Museum for comment. The Museum responded that it believed the remains are Native American, respected the opinions of the scholars retained by the Tribe, and recommended BLM give their views serious consideration. Despite its prior opposition to repatriation, the Museum did *not* oppose the Tribe’s request for repatriation, and

subsequently withdrew its request for further testing of the remains. No other museum or scientific organization has opposed the Tribe's repatriation request.

36. In August 2000, eight months after receiving the Tribe's submissions, BLM's Nevada State Office issued a 111-page preliminary determination and an accompanying 36-page paper regarding biological aspects of the Spirit Cave remains. The preliminary determination found the Spirit Cave remains and funerary objects are Native American, but that they could not be culturally affiliated with the Tribe on the existing record. Pat Barker, Cynthia Ellis (formerly Cynthia Pinto) and Stephanie Damadio wrote the preliminary determination, and Ms. Damadio also wrote the biological paper. The preliminary determination relied on an alleged lack of information regarding the particular tribal affiliation of the individual whose remains were at issue, such as information concerning his religion and world view, changes in the archaeological record over time, including changes in basketry techniques on which the Museum had relied, cranial measurements of the Spirit Cave remains, DNA studies of more recent Western Nevada remains, the Numic expansion hypothesis, and the tribal myths on which the Museum had relied.

37. Although BLM and the Museum had been working on the issue of affiliation of the Spirit Cave remains for many years, and BLM spent an additional eight months preparing its preliminary determination after receiving the Tribe's submissions, BLM gave the Tribe only 45 days to respond to its preliminary determination. Most of the Tribe's experts were employed full time as scientists and professors, and were not immediately available to review BLM's preliminary determination and prepare a response. Given the length and complexity of the determination, the new biological paper on which it relied, and the scheduling issues confronting the Tribe's experts,

the Tribe requested additional time to consult with its experts and prepare a meaningful response. BLM denied this request on the grounds that the Tribe's repatriation request had been pending for a long time and it was time to make a decision. However, no statutory or regulatory deadline required BLM to make a decision without allowing the Tribe additional time to respond, and no harm to the agency or the public would have resulted from the Tribe's request for additional time. Nevertheless, the Nevada State Director adopted the preliminary determination as his "final" decision denying the Tribe's request for repatriation in October 2000.

E. Proceedings Before the Review Committee.

38. The BLM determination states (at p. 5):

While BLM is the decision-maker for the agency, it recognizes that the tribe may request review of this matter from the NAGPRA Review Committee. The Committee may make findings related to cultural items, including human remains. The Review Committee findings could address cultural affiliation or the return of any such items. Any such finding by the Review Committee may be admissible in any action brought alleging violation of NAGPRA.

39. In his October 2000 letter informing the Tribe of his "final determination," the Nevada State Director stated there was no clear appeal mechanism within BLM, and instead referred the Tribe to the NAGPRA Review Committee dispute resolution procedures as set out in 43 C.F.R. § 10.17.

40. In December 2000, the Tribe requested that the Review Committee review and make findings regarding the cultural affiliation and return of the Spirit Cave remains and associated funerary objects, and that it seek to facilitate a resolution of the dispute between the Tribe and BLM. The Committee agreed to consider the matter, and requested that the Tribe and BLM provide a summary of the dispute. The Tribe provided its summary on April 20, 2001. In contrast, BLM now

took the position that the Review Committee's dispute resolution procedures were *not* available to the Tribe and indicated it would rely on its written determination at any hearing before the Committee.

41. The Review Committee scheduled the matter for its November 2001 meeting, and invited the Tribe and BLM to submit written materials in advance of the meeting and to present testimony at the meeting. The Review Committee's intent to consider the Tribe's dispute with BLM was published in the Federal Register, and members of the public were invited to attend the meeting and provide input to the Committee.

42. BLM forwarded a copy of its determination and accompanying biological paper to the Review Committee, but otherwise chose not to participate in the Committee's review of the Spirit Cave matter. It did not attend the November 2001 meeting, and thereby prevented the Committee from attempting to facilitate a resolution of the dispute between the Tribe and BLM.

43. The Tribe provided copies of the materials it had previously submitted to BLM, as well as new materials that responded to BLM's determination, scientific studies not previously available, and a written summary of the Tribe's position. These are the materials the Tribe would have presented to BLM had it been given a reasonable opportunity to respond to BLM's determination.

44. Tribal elders, tribal leaders, some of the Tribe's experts, and tribal attorneys attended and provided testimony at the Review Committee's meeting.

45. No scientist, museum, scientific or museum organization, or any other member of the public appeared before or submitted comments to the Review Committee in opposition to the Tribe's request for repatriation.

F. Evidence Before the Review Committee

46. The written materials and testimony submitted to the Review Committee showed that BLM failed to act in a fair and neutral manner. The Tribe cited documents in the administrative record showing that key BLM staff members were hostile to NAGPRA generally, and opposed to repatriation of the Spirit Cave remains and funerary objects even before the Tribe made its request for repatriation or had an opportunity to submit evidence in support of that request. Moreover, BLM was reluctant to consult with the Tribe after the Tribe retained experts to assist it, and never permitted the Tribe's experts to meet directly with BLM staff responsible for drafting BLM's determination. The BLM determination ignored significant material evidence submitted by the Tribe and misrepresented materials cited as the basis for its decision.

47. The Tribe's submissions to the Review Committee affirmatively showed that the Tribe is a proper claimant under NAGPRA, because it is a federally recognized Indian tribe.

48. The evidence before the Review Committee showed that the Spirit Cave remains and funerary objects are "Native American" within the meaning of NAGPRA, that is, they belong or are related to "a tribe, people, or culture that is indigenous to the United States." This evidence included the results of the multiple scientific examinations of the Spirit Cave remains and funerary objects performed by or on behalf of the Nevada Museum, as well as scientific examinations and analyses performed by the Tribe's experts and independent scientists. This evidence demonstrated the Spirit

Cave remains and funerary objects were not only related to the indigenous people of the United States generally, but to the Fallon Tribe and its immediate ancestors in particular, and included the following:

- a. With one exception, every scientist that examined the hair, including an FBI analyst, concluded that it is of Asian origin and consistent with that of a Native American.
- b. The world's leading authority on dental discrete trait genetics, Christy Turner II, found that the teeth fit a common dental pattern found in Native North Americans and Northeastern Asians named Sinodonty. Scientists working for the Tribe reviewed Turner's data collection sheets as well as those of other scientists, and conducted their own examination, and concluded that the "dental evidence strongly suggests that Spirit Cave Mummy is biologically related to North Asians and Native Americans. The chance of a European having all five of the traits [analyzed by the scientists] may be close to nil."
- c. In a more recent analysis using a comparative data base of over 30,000 individuals, Dr. Turner found that the Spirit Cave remains are most closely linked to recent Native Americans from Nevada who are identified as Paiute, and then to eight other Native American groups.
- d. Occupational markers on the Spirit Cave remains, such as evidence of arthritis and bone spurs on the feet, are most consistent with activities related to walking over rough terrain for long periods, fishing, hunting, and other subsistence activities that required squatting, lifting, and carrying heavy loads. These lifestyle-related biological indicators are consistent with the oral narratives provided by the Fallon Tribe and a leading ethnographer

that document the ancestral life ways of the indigenous people living in the Western Great Basin. Similarly, evidence of string grooving on the anterior teeth of the Spirit Cave remains is probably the result of tule or other string material being worked through the teeth, perhaps as netting or fish line. Similar evidence has been found on more recent remains from the Carson Sink and Stillwater Marsh and is quite common in the Great Basin.

e. Because of the well-preserved condition of the Spirit Cave remains, scientists were able to analyze food and pollen in preserved fecal materials. These analyses, conducted on behalf of the Nevada Museum, indicate that the individual whose remains were disinterred from Spirit Cave had a diet that included small fish (including tui-chub, speckled dace or Lahontan reddsides, and suckers) and bulrush seeds, and that he was part of a cultural adaptation that exploited a marshland or meandering stream environment and mass captured fish for consumption, "possibly with basketry or very fine net-mesh dip techniques." Museum staff opposed to repatriation acknowledged that this ancient desert marsh adaptation has many similarities to cultures found in the Western Great Basin over the ensuing millennia, and bears remarkable similarity to the ethnographic life ways of the Fallon Tribe's ancestors.

f. The only scientific study of the remains that did not support their affiliation with Native Americans generally or the Fallon Tribe specifically involved cranial measurements. The researchers who conducted this study for the Nevada Museum reported that the measurements of the Spirit Cave cranium fell outside the range of variation of all modern populations. However, experts retained by the Tribe pointed out that this finding is

essentially irrelevant to the issue of biological or cultural affiliation, since: (1) cranial measurements are highly variable and affected by conditions of life such as diet, developmental musculo-skeletal forces, and cultural processes such as cradle-boarding; (2) cranial measurements have changed in all known populations that span thousands of years in one region with unbroken cultural continuity; (3) given evolutionary changes over the past 9,000 years, one would *not* expect the Spirit Cave remains to look like or be measurably similar to remains of indigenous people from the same cultural group in the last thousand years; and (4) the data base used by the craniometric researchers was flawed, since the "Numic" sample consisted of only 22 skulls, with no indication of the number of males and no mention of cultural practices in infant and child rearing that would alter cranial size and shape. Notably, an analysis of the use of cranial measurements to identify *contemporary* human remains as Native American found that the technique was successful only about one time in three, a result that "is no better than random assignment." The Tribe's experts therefore concluded that the craniometric data are irrelevant to the question of cultural affiliation, and pointed out that the cranial measurements are the least precise of all the biological data (teeth, hair, skeleton) for establishing biological or cultural affiliation.

g. According to a leading anthropologist and ethnographer, in their manufacture and use of basketry and other textiles, the immediate ancestors of the Fallon Tribe "are linked tightly with other Great Basin peoples in the recent as well as the distant past, for basketry has been a major hallmark of cultures in the region for at least 10,000 years." The woven mats and rabbit-fur robe found with the Spirit Cave remains place them squarely within this

tradition. As Museum staff and other scientists have noted, twined mats such as those found with the Spirit Cave remains “were used extensively in the western Great Basin dating from rather recent times to as far back as 9460 [Before Present],” and “twined twisted fur robes were common throughout Great Basin prehistory into the historic era, usually rabbit fur.” Moreover, the known or likely uses of textiles by the individual whose remains were found in Spirit Cave, for fish nets or baskets, containers, and robes, all continue into ethnographic times.

h. The Spirit Cave burial is consistent with Great Basin burial patterns that span a period of 10,000 years, and is very similar to the burial practices of the Fallon Tribe in ethnographic times. According to an expert retained by the Tribe, Great Basin burials from the earliest to the historic period fall in a general pattern of mixed inhumation, cremation, and rock crevice disposal, a pattern which provides a “positive indication of cultural continuity from the earliest dated human remains to the historic period,” and which clearly encompasses the Spirit Cave burial. Ethnographic accounts of the Fallon Tribe report that an individual’s remains were wrapped in his or her robe, buried in sand hills or rock areas in the nearby foothills, interred in either an extended or flexed position, and covered with sagebrush to disguise the grave from predators.

49. The evidence before the Review Committee also showed that the human remains and associated funerary objects found in Spirit Cave belonged to an “identifiable earlier group,” one of the requirements for finding cultural affiliation under NAGPRA. This evidence included the following:

a. As a threshold matter, the Tribe explained that a finding of cultural affiliation under NAGPRA does not require a relationship of “shared *tribal* identity” with an “identifiable earlier *tribe*.” Instead, it requires a relationship of “shared *group* identity” with an “identifiable earlier *group*.” The term “identifiable earlier group” is similar to the phrase “identifiable group of American Indians,” which was used in the Indian Claim Commission Act and which has been broadly construed by the Indian Claims Commission and the Court of Claims in implementing that act. *See, e.g., United States v. Northern Paiute Nation*, 393 F.2d 786, 183 Ct. Cl 321 (1968); *Thompson v. United States*, 22 Ct. Cl. 348 (1952). In *Thompson*, the court held the Indians of California were an identifiable group within the meaning of the act, even though they descended from many *different* tribes and bands, and spoke many *different* languages. The court reasoned that Congress did not intend to keep the category of claimants “closed to all except recognized tribes and bands, when it used words [*i.e.*, “other identifiable group”] the ordinary meaning of which manifestly enlarged the groups entitled to assert claims.”

b. In its determination, BLM failed to consider the distinction between the terms “tribe” and “group” as those terms are used in NAGPRA. BLM likewise failed to consider the precedents under the Indian Claims Commission Act construing the term “group.”

c. The early Holocene occupants of the Western Great Basin are an “identifiable earlier group” within the meaning of NAGPRA and its implementing regulations. They are so identified based on a series of distinctive artifacts, including Great Basin stemmed points and associated artifacts such as crescents, their primary reliance on lake and marsh

adaptations to the unique physiography of the Great Basin, and their reliance on an array of marsh and desert resources (such as jack rabbit, hoofed animals, mollusc shells, rodents and lizards). In addition, they are known for their extensive utilization of textiles, including mats, baskets, other containers and nets, and for their rabbit fur robes. The dates for this group range from about 11,200 to 7,500 years ago.

d. In its determination, BLM stated it could not determine the specific *tribal* affiliation of the Spirit Cave remains and funerary objects, but did not consider their affiliation with a broader identifiable group such as the early Holocene occupants of the Western Great Basin. The individual whose remains were disinterred from Spirit Cave fits within the Great Basin stemmed point tradition that marks the early Holocene occupants of the Western Great Basin. He lived approximately 9,400 years ago in the middle of the stemmed point tradition, in an area in which numerous stemmed points have been identified. The location and scientific analysis of his skeleton and the examination of the coprolitic material all point to a desert and marsh adaptation. Moreover, the remains were found with material culture characteristic of this group, including twined textiles and a rabbit-fur robe.

50. The evidence before the Review Committee also showed there is a relationship of shared group identity between the early Holocene occupants of the Western Great Basin, including the Spirit Cave remains, and the Fallon Tribe. The evidence in support of this included the following:

a. *Geographical and Lifestyle.* Spirit Cave is within the heart of the Fallon Tribe's aboriginal territory. Both the early Holocene and the recent ancestors of the Tribe

shared a common lifestyle and culture in the vicinity of Spirit Cave: to the immediate north, south, east and west are the campsites where the people lived; the key resource areas where the people hunted, fished and gathered; the sites where the people gathered for communal events; and the people's sacred places. Tribal members explained that the Spirit Cave area itself was a known burial location which should be avoided out of respect for the dead.

b. *Archaeological – In General.* The archaeological evidence in the Western Great Basin demonstrates a remarkable degree of continuity from the time the man whose remains were removed from Spirit Cave lived until the time of European contact with the region's indigenous people. The indigenous Indian occupants and early Holocene occupants of the area manufactured and used much of the same material culture, and exhibited essentially the same adaptations to the environment. For example, textiles have been of central importance to the people of the Western Great Basin for over 10,000 years. Twining techniques used to construct textiles have been present throughout this time, including the twining techniques utilized in some of the Spirit Cave textiles. The known or likely uses of textiles by the group who left the Spirit Cave burial, *i.e.*, for fish nets, baskets, other containers and robes, all continue into ethnographic times. Similarly, stone tools, which were used to process plants, were found in Spirit Cave (although they may have been left there more recently than the burial) and were commonly used in the Great Basin, especially from the middle Holocene on. While the archaeological record does reflect changes in technology, as one would expect over a 10,000 year period, the changes appear to be the result of responses to changes in the environment and technological advancement, rather than

human extinction or a population migration or replacement. In its submissions to the Review Committee, the Tribe provided a thorough discussion of the archaeological record and showed that BLM's determination mischaracterized that record, failed to account for evolutionary changes in response to environmental change and human innovation, and misused the textile record, focusing on variations in technique while overlooking broad elements of continuity.

c. *Archaeological – From “Lovelock” to Northern Paiute.* In its determination, BLM relied on the Numic expansion hypothesis, which posits that Numic-speaking peoples, including the Paiute, arrived in the Great Basin about 1,000 years ago. In support of this hypothesis, BLM pointed to a textile, Lovelock Wickerware, that has a limited geographical and temporal range in the archaeological record, appearing about 3,000 years ago in Western Nevada and disappearing about 1,000 years ago. On this basis, the determination suggests that the people who manufactured Lovelock Wickerware were replaced by the Numic-speaking Northern Paiute. In response, the Tribe showed that BLM had disregarded the fact that the original, linguistic basis for the Numic expansion hypothesis has been completely discredited and is no longer accepted by linguists. Moreover, the Tribe showed that the most comprehensive analysis of “Lovelock” and Northern Paiute archaeology – a study disregarded by BLM in its determination – found that the record supports continuity, not discontinuity, between these peoples, and that there are reasonable explanations for both the appearance and disappearance of Lovelock Wickerware that have nothing to do with population replacement. Notably, the Smithsonian's National Museum of the American

Indian has repatriated ancient "Lovelock" remains to a modern-day Paiute tribe, notwithstanding the Numic expansion hypothesis, a precedent that BLM likewise disregarded.

d. *Burial Practices.* The only scholarly review of the archaeological, ethnohistorical and ethnographic evidence of Great Basin burial practices demonstrates a distinct pattern of inhumation with infrequent but regular use of cremation and rock crevice disposal. This is the same pattern that was discovered in Spirit Cave and contrasts with burial practices found in other locations across North America. In its submissions to the Review Committee, the Tribe provided a written report and expert testimony showing that BLM materially misunderstood the burial practice evidence in its determination.

e. *Biological.* Scientific examination of the Spirit Cave remains revealed that the individual buried in Spirit Cave was part of a desert and marsh tradition that persisted in the Western Great Basin from the early Holocene to ethnographic times. Dr. Turner's independent comparison of the teeth of the Spirit Cave remains with a database of more than 30,000 individuals shows they are most closely related to a group of recent Native Americans from Nevada who are identified as Paiute. DNA analysis of other ancient remains found in the vicinity of Spirit Cave – including studies on which BLM purported to rely and other studies it failed to consider – support the existence of a biological relationship between the remains and modern Native Americans in the same and nearby areas. While the ancient remains in these studies were not as old as the Spirit Cave remains, the studies provide evidence of continuity in the region over a significant period of time.

f. *Linguistics.* One of the unique features of the Great Basin is that not only did it comprise a unique physiographic region and culture area at the time of European contact, it also comprised a unique language area: with one exception, all of its inhabitants spoke Numic, a branch of the Uto-Aztecan language family. Two Great Basin scholars have concluded that, based on the way the Uto-Aztecan language has dispersed over time to other areas, including the Pacific Northwest and Mexico, it appears Numic-speaking people have been situated in the Great Basin for thousands of years, since before the Spirit Cave burial and possibly well before then.

g. *Oral Tradition.* The relevant origin stories of the Paiute Indians refer to the origin of the Tribe's ancestors as being in the Stillwater Mountains at Fox Peak, just a few miles from Spirit Cave. In contrast to many other Native American oral traditions, there is no reference to a migration to the area or replacing a prior group of people. As the Tribe's experts and its elders explained, BLM's reliance on the red-headed-giants myth was based on a misunderstanding of the myth and its significance in Paiute culture.

G. The Review Committee's Findings and Recommendation

51. The Review Committee considered all of the material presented to it, questioned the witnesses, and deliberated in open session. Exercising its statutory responsibilities, the Committee found, by a 6-to-1 vote, that BLM had failed to fairly and objectively consider all of the available relevant information, and that the Spirit Cave remains and funerary objects were culturally affiliated with the Tribe under NAGPRA. Even the lone dissenter agreed that the remains were Native American and that the Tribe had a "cultural relationship" with them. On the basis of its findings the

Committee recommended, again by a 6-to-1 vote, that the Spirit Cave remains and funerary objects be repatriated to the Tribe. The Committee's finding and recommendation was published in the Federal Register on April 10, 2002.

H. BLM's Failure to Consider the Materials and Testimony Submitted to the Review Committee or the Committee's Findings and Recommendation; Final Agency Action

52. BLM prepared an internal briefing paper on the Spirit Cave matter in April 2002. The paper describes the Review Committee as a "civilian advisory group with no authority under NAGPRA to determine affiliation nor authority to enforce their findings." According to the paper, it is BLM's position that "[t]here is no need to respond to the NAGPRA Review Committee finding as they have no authority under the Act to make a finding of affiliation." The paper also states that the basis for BLM's position that the Spirit Cave remains and funerary objects are not affiliated with the Tribe is set forth in its September 2000 determination and biological paper, which were prepared before the Review Committee meeting and without the benefit of written materials and testimony submitted to the Committee or the Committee's findings and recommendation. The paper itself contains no analysis of the materials and testimony presented to the Review Committee.

53. After publication of the Review Committee's findings and recommendation in the Federal Register, the Tribe's attorneys contacted BLM's Nevada State Director to inquire whether BLM would consider the materials and testimony presented by the Tribe to the Committee and the Committee's findings and recommendation. The State Director stated he did not intend to change his decision and this was now a matter for his superiors in Washington D.C.

54. On November 20, 2002, having heard nothing further from BLM, the Tribe wrote to Secretary of the Interior Gale Norton seeking her assistance in resolving the matter and requesting a meeting. The Tribe forwarded to the Secretary all of the materials it had submitted to BLM and the Review Committee, the Nevada Museum's response to the Tribe's submissions to BLM, the transcript of the oral presentations to the Review Committee and the Committee's deliberations, and a copy of the Committee's written findings and recommendation. The Tribe also forwarded to the Secretary two resolutions adopted by the National Congress of American Indians expressing its support for the Tribe's request for repatriation and its profound concern about the integrity of the Review Committee process in light of BLM's refusal to participate in the Review Committee's meeting and its refusal to reconsider its decision in light of the Review Committee's findings and recommendation.

55. In addition, the Tribe provided to the Secretary a legal memorandum analyzing the decision in *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002) (the "Kennewick Man" case), in which the court vacated former Secretary of the Interior Bruce Babbitt's determination that certain human remains were Native American and culturally affiliated with tribes on the Columbia Plateau. The memorandum explained that, because the Kennewick Man case was materially different procedurally and substantively from the Spirit Cave matter, the decision did not undermine in any respect the Fallon Tribe's request for repatriation.

a. Among other things, the memorandum pointed out that, because the Spirit Cave remains, unlike the Kennewick remains, had been disinterred from their original burial site, were well preserved, were accompanied by multiple funerary objects, and had been

subjected to extensive scientific examination, there was significantly more information about the Spirit Cave remains and their geographical and cultural affiliation than the Kennewick remains.

b. The memorandum also noted that, because of the unique features of the Great Basin culture area, there was significant archaeological, linguistic and other evidence of continuity in the Spirit Cave case that was not present in the Kennewick matter.

c. In addition, the memorandum noted that, in an earlier phase of the Kennewick case, the court declined to give deference to the Army Corps of Engineers' determination of cultural affiliation because it "is just one of many federal agencies that might occasionally address NAGPRA issues." In contrast, the court stated the Review Committee was "established by Congress as an integral part of NAGPRA" and its "special agency expertise" should be respected by the courts. *Bonnichsen v. United States*, 969 F. Supp. 628, 643 (D. Or. 1997). Unlike the Spirit Cave matter, the Review Committee had not been involved in, and had made no findings or recommendations with respect to, the Kennewick remains.

56. In its letter to Secretary Norton, the Tribe identified multiple flaws in BLM's determination and its refusal to reconsider its decision in light of the Review Committee's findings, including the following:

a. The principal author of the determination was on record as being hostile to NAGPRA, and had met with Nevada Museum staff to coordinate strategies to delay or prevent repatriation before the Tribe formally submitted its request for repatriation and before it submitted its evidence in support of repatriation.

b. The determination did not fairly consider substantial scientific and traditional evidence presented by scholars even the Nevada Museum recognized to be highly qualified.

c. The Review Committee established by Congress and appointed by the Secretary to monitor the repatriation process, which combines substantial expertise in the fields of archaeology, anthropology, Native American traditions, and other relevant disciplines, found that BLM did not fairly and objectively evaluate the evidence and that, when the evidence was considered in a fair and objective manner, it supported the Tribe's claims.

d. BLM had not considered the materials submitted by the Tribe to the Review Committee and provided no explanation for rejecting the findings reached by the Committee following open, public deliberations.

e. BLM's disdain for the Committee's role under NAGPRA – its refusal to attend the Committee's meeting or consider the Committee's findings and recommendation – set a precedent that would severely undermine the Committee's oversight and dispute-resolution functions, as well as any effort to bring consistency to the implementation of NAGPRA by multiple federal agencies and museums across the country.

57. In its letter to Secretary Norton, the Tribe also pointed out that there was unanimous support in Indian country for the Tribe's repatriation request (despite BLM's efforts, no other tribe was seeking repatriation of the Spirit Cave remains and funerary objects), and meaningful support in the scientific community as well. As to the latter, the Tribe pointed to the non-opposition of the Nevada Museum, the support of the many highly qualified scientists who prepared reports on the

Tribe's behalf, and the position of the scientists on the Review Committee. The Tribe also noted that scientific interest in the remains was tempered by the extensive analyses that had already been undertaken. Under these circumstances, the Tribe suggested that, if there were any remaining doubt about the cultural affiliation of the remains, repatriation would be appropriate under a provision in NAGPRA's implementing regulations that provides for repatriation of culturally unidentifiable remains upon the recommendation of the Secretary, a provision which had been utilized on more than 20 occasions to repatriate unaffiliated Native American remains.

58. On December 20, 2002, BLM's Acting Assistant Director for Renewable Resources and Planning responded to the Tribe's letter to Secretary Norton. The letter noted that the National Park Service was in the process of promulgating additional regulations regarding disposition of culturally unidentifiable human remains under NAGPRA, and stated it would be premature to address the Tribe's concerns until those regulations were promulgated. It also stated that the materials provided by the Tribe to Secretary Norton had "been sent to appropriate BLM officials for their review."

59. The Tribe responded to BLM's Acting Assistant Director on January 6, 2003. The Tribe disagreed with BLM's assertion that it would be premature to address the Tribe's concerns pending promulgation of additional regulations regarding the disposition of culturally unidentifiable remains. The Tribe pointed out that its consistent position had been, and remained, that the remains and funerary objects were culturally affiliated with the Tribe. Moreover, the Tribe reminded BLM that the Review Committee had found the remains and funerary objects were culturally affiliated with the Tribe and recommended they be repatriated; it did not recommend that repatriation be

deferred pending promulgation of additional regulations regarding unaffiliated remains. And, the Tribe explained that it had identified an *existing* regulation that would allow BLM to repatriate the remains even if it still had doubts about their cultural affiliation. The Tribe suggested this approach in a good faith effort to find a compromise solution that would *expedite* repatriation of Native American human remains and funerary objects that had been disinterred over 60 years ago. In the Tribe's view, it was unfair and unjust for BLM to seize on this suggestion to *defer* consideration of the Review Committee's recommendation. On these and other bases, the Tribe renewed its request for a meeting with the Secretary.

60. In its January 6, 2003, letter to BLM, the Tribe also addressed BLM's statement that the materials the Tribe had sent to the Secretary had "been sent to appropriate BLM officials for their review." The Tribe requested that BLM advise it in writing of: (1) the purpose of the BLM review; (2) the identity of the individuals who were conducting the review; and (3) the scheduled completion date for the review. The Tribe offered to participate in the review process pursuant to NAGPRA's consultation provisions, provide any additional information BLM's reviewers might need, and otherwise facilitate the review process. BLM never responded to this request; it never identified any BLM personnel that were assigned to review the materials provided by the Tribe and never communicated with the Tribe regarding the purpose, schedule or results of any such review.

61. On April 9, 2003, BLM's Director wrote to the Tribe stating she had reviewed the Tribe's letter to Secretary Norton and would like to meet with the Tribe to discuss the information it submitted to the Secretary. The meeting took place in Reno on July 16, 2003. BLM's Director stated that, rather than conduct an internal BLM review, she planned to assemble an independent

team to review the matter with “fresh eyes,” and that the team would make a recommendation for Secretary Norton’s consideration. On August 14, 2003, the Tribe wrote to the Director thanking her for the meeting and requesting that she advise the Tribe of the composition of the independent team upon its selection.

62. BLM’s Assistant Director for Renewable Resources and Planning responded to the Tribe’s letter on October 7, 2003. He made no mention of an independent team, but stated BLM’s Director was “reviewing all of the options to address this issue and will respond more fully once a course of action is determined.” The Tribe responded on November 12, 2003, and requested that BLM advise it of the time frame in which this determination would be made.

63. On February 27, 2004, BLM’s Director wrote to the Tribe’s Chairman. The body of letter states in its entirety:

I want to thank you and other Tribal representatives for the meeting with me on July 16, 2003, regarding your concerns about the Spirit Cave materials. As I promised in our meeting, and as Mr. Shepard noted in his October 7, 2003 letter, 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.

The Director’s letter does not identify the options she considered or explain the basis for her conclusion that it would not be appropriate to pursue any of those options at this time. In particular, the Director did not explain why it would be inappropriate: (1) to follow the Review Committee’s recommendation and repatriate the remains and funerary objects to the Tribe; (2) for BLM itself to review the matter in light of the materials provided to the Review Committee and the Review Committee’s findings and recommendations; (3) for BLM to assemble an independent team to review the matter, as she stated she intended to do at the July meeting; or (4) to follow the Tribe’s

compromise suggestion and seek the Secretary's recommendation to repatriate the remains as culturally unaffiliated remains.

64. The Tribe responded to the BLM Director's letter on March 11, 2004. The Tribe stated it understood the letter represented final agency action by the Department of the Interior denying its request for repatriation of the Spirit Cave remains and funerary objects under NAGPRA. The Tribe also stated it understood BLM had not conducted a substantive analysis of the materials it provided to the Review Committee or the Committee's findings and recommendation. And, it stated the Tribe understood the Director's plan to assemble an independent team to review the matter was never implemented.

65. BLM did not respond to the Tribe's March 11, 2004, letter.

66. On March 3, 2004, the Tribe, through its attorneys, submitted a Freedom of Information Act request to BLM seeking any documents relating to the Spirit Cave matter following the Review Committee's proceedings. The documents produced by BLM in response to the Tribe's request do not reflect any internal BLM analysis of the materials submitted to the Review Committee or of the Committee's findings and recommendation, do not reflect any other analysis of those materials, and do not provide any explanation for the BLM Director's determination that it is not appropriate to pursue any option to address the Tribe's concerns at this time.

IV. CLAIMS

67. BLM's consideration and denial of the Tribe's request for repatriation of the Spirit Cave human remains and associated funerary objects was unlawful in the following respects.

68. BLM assigned responsibility for preparing its initial determination regarding the cultural affiliation of the Spirit Cave remains and funerary objects to staff who were hostile to NAGPRA, had met with the Nevada Museum to coordinate efforts to block or delay repatriation of human remains and funerary objects in the Museum's collections, had pre-judged the matter in issue, and had misled the Tribe regarding BLM's position. In so doing, BLM deprived the Tribe of a fair and objective consideration of its request for repatriation as required by NAGPRA and the APA, and violated the Federal trust responsibility to the Tribe.

69. BLM refused to permit the Tribe's experts to meet with BLM staff responsible for preparation of BLM's determination. In so doing, BLM violated the consultation provisions of NAGPRA, deprived the Tribe of a fair and objective consideration of its request for repatriation as required by NAGPRA, and violated the Federal trust responsibility to the Tribe.

70. BLM failed to give the Tribe a reasonable opportunity to respond to its preliminary determination, in violation of NAGPRA and the Federal trust responsibility to the Tribe.

71. BLM failed to participate in the Review Committee's consideration of the Spirit Cave matter and thus prevented the Review Committee from attempting to facilitate a resolution of the dispute between the Tribe and BLM, in violation of NAGPRA and the Federal trust responsibility to the Tribe.

72. BLM failed to consider the materials and testimony presented to the Review Committee, in violation of NAGPRA, the APA and the Federal trust responsibility to the Tribe.

73. BLM's determination that the Spirit Cave human remains and funerary objects are not culturally affiliated with the Tribe under NAGPRA is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law in the following respects, among others:

a. BLM failed to consider the distinction between the terms "tribe" and "group", and the precedent under the Indian Claims Commission Act, for purposes of determining the existence of an "earlier identifiable group" under NAGPRA;

b. BLM failed to consider the early Holocene occupants of the Western Great Basin as an earlier identifiable group under NAGPRA;

c. BLM failed to consider the geographical, biological, lifestyle, dietary and other evidence showing that the Spirit Cave remains belonged to an early Holocene occupant of the Western Great Basin;

d. BLM failed to consider Dr. Turner's study showing the Spirit Cave remains are related to recent Native Americans from Nevada who are identified as Paiute, as well as lifestyle evidence, dietary evidence, and funerary objects that showed a biological and cultural relationship between the Spirit Cave remains and the Fallon Tribe;

e. BLM disregarded significant evidence of continuity in the archaeological record in the Western Great Basin from the time of the Spirit Cave burial to ethnographic times, misunderstood the evidence regarding burial practices, failed to account for evolutionary changes in response to environmental change and human innovation, and misused the textile record, focusing on variations in technique while overlooking broad elements of continuity;

f. BLM relied on a study of cranial measurements but failed to consider evidence that cranial measurements are unreliable for purposes of determining biological or cultural affiliation in general and evidence that the comparative data base used by the craniometric researchers in this case was flawed;

g. BLM relied on DNA and serum albumin studies, but ignored findings in those studies supporting a biological relationship between ancient remains from western Nevada and modern Paiute Indians, and disregarded altogether other DNA studies that found such a relationship;

h. BLM relied on the Numic expansion hypothesis, but failed to consider evidence that the original linguistic basis for the hypothesis had been thoroughly discredited and is no longer accepted by linguists, and also failed to consider archaeological evidence showing significant elements of continuity over the period of the alleged Numic expansion;

i. BLM failed to consider the decision of the Smithsonian's National Museum of the American Indian to repatriate remains that pre-dated the hypothesized Numic expansion to a modern-day Paiute tribe;

j. BLM relied on Paiute myths but disregarded the testimony of experts and tribal elders, who explained that BLM had misunderstood the meaning and significance of those myths;

k. In its use of sources, BLM repeatedly took statements out of context and disregarded findings and statements supportive of the Tribe's position;

l. BLM disregarded Paiute origin stories, as explained by tribal elders and experts witnesses;

m. BLM failed to consider the materials and testimony presented by the Tribe to the Review Committee and failed to consider and give any weight whatsoever, much less deference, to the findings and recommendation of the Review Committee; and

n. BLM failed to provide any explanation for its determination that it was not appropriate to pursue any option to address the Tribe's concerns following the Review Committee's findings and recommendation, and failed even to disclose the options it had considered.

V. REQUEST FOR RELIEF

74. The Tribe requests the following relief:

a. a declaration that BLM violated NAGPRA, the APA, and the Federal trust responsibility to the Tribe by failing to fairly and objectively consider and consult with the Tribe regarding the Tribe's request for repatriation of the Spirit Cave remains and funerary objects;

b. a declaration that BLM violated NAGPRA and the Federal trust responsibility to the Tribe by failing to participate in the Review Committee's meeting regarding the Spirit Cave remains and funerary objects;

c. a declaration that BLM's determination that the Spirit Cave remains and funerary objects are not culturally affiliated with the Tribe under NAGPRA was made

without observance of procedure required by law and was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

d. an order holding unlawful and setting aside BLM's determination that the Spirit Cave remains and funerary objects are not culturally affiliated with the Tribe under NAGPRA;

e. an order compelling BLM to return expeditiously the Spirit Cave remains and funerary objects to the Tribe in accordance with NAGPRA and the Federal trust responsibility to the Tribe; and

f. other just relief, including but not limited to an award of the Tribe's attorney fees and costs in this action.

Dated: August 27th, 2004.

ZIONTZ, CHESTNUT, VARNELL,
BERLEY & SLONIM

By: Marc Slonim
Marc D. Slonim
Brian W. Chestnut

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