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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

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

No. CV-N-04-466-LRH (RAM)

v.)

UNITED STATES BUREAU OF LAND)
MANAGEMENT,)
Defendant.)

**FALLON TRIBE'S MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

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I. MOTION.

The Fallon Paiute-Shoshone Tribe ("Tribe") moves for summary judgment that the Bureau of Land Management's ("BLM's") determination that Native American human remains and associated funerary objects are culturally unaffiliated with the Tribe under the Native American Graves Protection and Repatriation Act ("NAGPRA"), and its denial of the Tribe's request to repatriate those items, was arbitrary, capricious, otherwise not in accordance with law, and without observance of procedure required by law, within the meaning of the Administrative Procedures Act ("APA").¹ As we show below, BLM violated NAGPRA and the federal trust responsibility to Indian tribes, and acted arbitrarily and capriciously, in multiple ways. In particular, BLM: (1) was hostile to NAGPRA from the outset; (2) prejudged the status of the human remains and funerary objects at issue; (3) misled the Tribe as to BLM's position; (4) deprived the Tribe of its procedural rights under NAGPRA; (5) arbitrarily refused to transfer the remains to a Fish and Wildlife Service vault; (6) issued a determination that failed to define key provisions in NAGPRA, failed to address significant evidence and argument supporting the Tribe's position, and distorted the evidence it did address; (7) failed to participate in the statutory review and dispute-resolution process; (8) disregarded the findings of the expert agency, the NAGPRA Review Committee, that BLM failed to fairly and objectively consider the available evidence and that the remains are culturally affiliated with, and should be repatriated to, the

¹ In *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004), the court held human remains that were estimated to be between 8,340 and 9,200 years old were not Native American within the meaning of NAGPRA. In this case, BLM concedes the remains at issue are Native American, see Tribe's Complaint ¶ 48 and BLM's Answer ¶ 48, and, as discussed below, there is overwhelming evidence to support that proposition in the record.

Tribe; and (9) provided no explanation whatsoever for its final decision rejecting the Review Committee's recommendation and all other options to address the Tribe's concerns. Under these circumstances, the Court, pursuant to NAGPRA, 25 U.S.C. § 3013, and the APA, 5 U.S.C. §§ 706(2)(A) & (D), should hold unlawful and set aside BLM's determination that the remains and funerary objects are not culturally affiliated with the Tribe and its decision not to repatriate them to the Tribe.

II. NAGPRA.

A. Statutory Framework.

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 their "geographical and cultural affiliation." 25 U.S.C. § 3003(a). Such inventories and identifications must be "completed in consultation with tribal government . . . officials and traditional religious leaders" and "made available both during the time they are being conducted and afterward to a review committee established under section 3006." *Id.* § 3003(b)(1)(A) & (C). The agency must supply additional available information regarding the items upon request of a tribe, but NAGPRA expressly does not authorize "the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects." *Id.* § 3003(b)(2).

An agency must notify affected tribes of any human remains or associated funerary objects for which cultural affiliation is determined in the inventory process and, upon request of

an affiliated tribe, subject to §§ 3005(b) & (e), “expeditiously return such remains and associated funerary objects.” *Id.* §§ 3003(d)(1), 3005(a)(1). If the cultural affiliation of Native American human remains and associated funerary objects with a particular tribe is not established pursuant to § 3003, upon request and subject to §§ 3005(b) & (e), such items must be returned expeditiously “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.” *Id.* § 3005(a)(4).

Congress directed the Secretary of the Interior to establish a seven-member Review Committee “to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 3003, 3004 and 3005.” *Id.* § 3006(a). The Secretary must appoint three Committee members from nominations submitted by Indian tribes, Native Hawaiian organizations and traditional Native American religious leaders; three members from nominations submitted by national museum organizations and scientific organizations; and a final member from a list developed by and consented to by the other six members. *Id.* § 3006(b). The Committee’s specific responsibilities include:

(2) monitoring the inventory and identification process conducted under sections 3003 and 3004 of this title 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.

Id. § 3006(c).

The Committee is also charged with “compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains.” *Id.* § 3006(c)(5). Although the Committee made such a recommendation in 2000, 65 Fed. Reg. 36462, the Secretary has not yet promulgated regulations to implement it. NAGPRA’s existing regulations provide that an agency must retain possession of culturally unidentifiable remains pending the promulgation of such regulations, unless “recommended to do otherwise by the Secretary.” 43 C.F.R. § 10.9(e)(6). Such a recommendation may be requested “prior to final promulgation” of regulations governing disposition of culturally unidentified remains. *Id.*

United States District Courts have jurisdiction “over any action brought by any person alleging a violation of” NAGPRA and “authority to issue orders as may be necessary to enforce the provisions of” the Act. 25 U.S.C. § 3013. Any records or findings made by the Review Committee relating to the cultural affiliation or return of cultural items may be admissible in such an action. *Id.* § 3006(d).

In NAGPRA, Congress defined “Native American” to mean “of, or relating to, a tribe, people, or culture that is indigenous to the United States.” *Id.* § 3001(9). The term “cultural items” includes both human remains and associated funerary objects. *Id.* § 3001(3). And the term “cultural affiliation” means “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.” *Id.* § 3001(2). NAGPRA contains no “cut-off” date on the age of human remains subject to its provisions and, as these definitions establish, prehistoric remains are within the scope of the Act.

B. The Meaning of “Shared Group Identity” and “Identifiable Earlier Group.”

Neither NAGPRA nor its implementing regulations define the term “shared group identity” or “identifiable earlier group.” A standard dictionary definition of the term “group” is simply “a number of individuals assembled together *or having some unifying relationship.*” Webster’s New Collegiate Dictionary at 508 (G. & C. Merriam Co. 1977) (emphasis added). Notably, these NAGPRA phrases are similar to the phrase “identifiable group of American Indians,” which was used in the 1946 Indian Claims Commission Act (“ICCA”), 60 Stat. 1049. In *Northern Paiute Nation et al. v. United States*, 7 Ind. Cl. Com. 322, 337 (1959), *aff’d*, 393 F.2d 786, 791-92, 183 Ct. Cl. 321 (1968), the Indian Claims Commission held, “regardless of their status as a so-called ‘tribe,’ ‘bands’ or ‘nation,’” the Northern Paiute “are a clearly defined group of American Indians within the meaning of the term ‘identifiable group’” as used in the ICCA. The Commission relied on the fact that the Northern Paiute, as described by early explorers, government officials, and anthropologists possessed certain distinguishing similarities, including the same language, a common economic life, and a similar Indian culture.” *Id.* at 336.

In affirming this holding, the Court of Claims relied on its earlier holding in *Thompson v. United States*, 122 Ct. Cl. 348, 1952 WL 5988 (1952). In that case, the court held the Indians of California – that is, the Indians, and their descendants, who inhabited California since time

immemorial – 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. *Id.*

These holdings suggest the analogous NAGPRA phrases “shared group identity” and “identifiable earlier group” need not refer to a particular tribe or band of Indians. Congress did not require a showing of shared “tribal” or “band” identity with an earlier identifiable “tribe” or “band” of Indians. *Cf. Thompson* (rejecting argument that Congress in ICCA intended to keep the category of claimants “closed to all except recognized tribes and bands, when it used words *the ordinary meaning of which manifestly enlarged the groups entitled to assert claims*”) (emphasis added). Rather, the NAGPRA phrases can be read to encompass broader groups that have been identified by contemporary observers, government officials, anthropologists and archaeologists, or Indian people themselves, and to require only that a present-day tribe demonstrate a reasonable connection with such a group.

NAGPRA’s language, legislative history, implementing regulations, and applicable rules of construction support this reading. For example, § 3003(d)(2)(C) does not require and funerary objects be “clearly identifiable as being culturally affiliated” as long as they are “determined by a reasonable belief to be . . . culturally affiliated.” The House and Senate Committee reports on NAGPRA explained 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 gaps in the record to 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.

NAGPRA's implementing regulations likewise provide "[a] finding of cultural affiliation should be based upon an overall evaluation of the totality of 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). The 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) (emphasis added).

NAGPRA "reflects the unique relationship between the Federal Government and Indian tribes." 25 U.S.C. § 3010. It is a "deeply rooted" principle of Federal Indian law that such

“statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.” *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992), quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). This principle has been applied expressly to NAGPRA, *Yankton Sioux Tribe v. United States Army Corps of Engineers*, 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000), and provides further support for reading the terms “shared group identity” and “identifiable earlier group” broadly, without limiting them to particular tribes or bands.

III. THE FEDERAL TRUST RESPONSIBILITY.

It is well established that there is “a general trust relationship between the United States and the Indian people.” *United States v. Mitchell*, 463 U.S. 206, 225 (1983). All federal agencies are subject to the trust responsibility that flows from this relationship. *See, e.g., Nance v. Environmental Protection Agency*, 645 F.2d 701, 711 (9th Cir.) *cert. denied*, 454 U.S. 1081 (1981). In the absence of specific duties placed on the government with respect to Indians, the trust responsibility is discharged by compliance with generally applicable statute and regulations. *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 574 (9th Cir. 1998). In this case, however, NAGPRA imposes specific duties on federal agencies for the benefit of Indian people. *See, e.g., 25 U.S.C. § 3010* (NAGPRA “reflects the unique relationship between the Federal Government and Indian tribes”); *see also San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 886-887 (D. Ariz. 2003) (“NAGPRA represents the culmination of ‘decades of struggle by Native American tribal governments and people to protect

against grave desecration, to [effect the repatriation of] thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired cultural property”).

Under the trust responsibility the actions of federal agencies must be by judged “by the most exacting fiduciary standards.” *Seminole Nation v. U.S.*, 316 U.S. 286, 297 (1942). The trust responsibility requires federal agencies to act, to the greatest extent possible consistent with their other legal obligations, in the interests of the tribes. *See Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308 (9th Cir. 1997) (trust responsibility, “in essence, consists of acting in the interests of the tribes”); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1100-01 (8th Cir. 1989) (trust responsibility buttresses federal obligation to ensure cleanup of dump site on Indian land); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256-57 (D.D.C. 1973) (trust responsibility required Secretary to minimize water diversions to non-Indian irrigators in order to preserve water for tribe).

The trust responsibility also requires federal agencies to consult with and to consider and seek to protect the interests of tribes before taking actions that might adversely affect them. *See, e.g., Nance*, 645 F.2d at 711 (EPA required to consider impacts on Crow Tribe before approving air quality standards on adjoining lands); *Northern Cheyenne Tribe v. United States Bureau of Land Management*, No. CV 04-17-BLG-RWA (D. Mont. June 6, 2005), Slip op. at 20-21 (BLM violated trust responsibility by failing to “consult with, consider, and protect the Tribe’s [traditional cultural properties] when undertaking land management decisions that may affect these properties”) (copy attached as Exh. W) (appeal pending); *Northern Cheyenne Tribe v. Hodel*, 12 Ind. Law Rptr. 3065, 3071 (D. Mt. 1985) (BLM violated trust responsibility by failing

to consider and protect "the special needs of the tribe" before leasing coal reserves near the Northern Cheyenne Reservation).

IV. FACTUAL BACKGROUND.

A. The Fallon Tribe.

The Fallon Tribe is a federally recognized Indian tribe, occupying the Fallon Indian Reservation and Colony in Churchill County, Nevada. Amended Administrative Record ("AAR") at 1703. The Tribe is comprised of descendants of Northern Paiute and Western Shoshone people who, at the time of European contact, were part of a varied desert culture tradition that had developed in the Great Basin over thousands of years. *Id.* at 1689, 1734-1735, 1738-1739, 1754-1755.

In *Northern Paiute Nation*, 7 Ind. Cl. Com. at 372 (1959) (AAR 0051), the Indian Claims Commission found the Northern Paiute had aboriginal title to an area, largely in Nevada, which they had "exclusively occupied and used in Indian fashion from time immemorial." At the time of European contact, the portion of this area currently occupied by the Fallon Tribe was the home of the *Toidikadi*, or Cattail eaters, a Northern Paiute group whose material culture and subsistence focused on the resources of the Stillwater Marshes and surrounding areas. AAR at 1689, 1709-1732. Many of the Fallon Tribe's members are direct descendants of *Toidikadi* people. *Id.* at 1710; Exh. A at 21-23 (Fowler).²

² The exhibits produced herewith contain scientific papers and other articles that were cited in and are part of the underlying administrative record. The parties agreed that, rather than including all such papers and articles in the Amended Administrative Record lodged with the Court, they would each provide copies of those papers and articles on which they intend to rely as exhibits to their respective summary judgment motions.

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

In 1940, Sydney and Georgia Wheeler were exploring caves near Fallon, Nevada, for the Nevada Parks Commission. The Wheelers unearthed two burials, one on top of the other, a cremation trench, human remains, and a variety of artifacts in Spirit Cave. Beneath the first, or upper, burial the Wheelers found a second burial pit lined with sagebrush on which a mortuary bundle had been deposited and then covered with more sagebrush and filled in with rocks. The Wheelers removed the mortuary bundle and, unwrapping it, found a well-preserved set of partially mummified remains lying, with the legs semi-flexed, 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. Within an hour after exposure to light and air the black hair became reddish. The Curator of the Southwest Museum estimated the remains were approximately 1,500 to 2,000 years old. The Wheelers believed they belonged to a prehistoric occupant of the area, and noted the woven mats were similar to others that had been found in the region. AAR at 1732-1733; Exh. B at 15-17 (Wheeler); Exh. C at 5-6 (Dansie).

Spirit Cave is located in the center of *Toidikadi* territory, only a few miles from the Tribe's current Reservation, on lands to which the Northern Paiute held aboriginal title. AAR at 1689, 1708-1709, 1803-1806. The *Toidikadi* knew Spirit Cave contained ancient burials, and stayed away from the Cave out of respect for the dead and fear of disturbing their spirits. *Id.* at 1689, 1730-1732; 1167-1169, 1172-1173, 1181-1187; Exh. A at 163-164 (Fowler).

The human remains and associated funerary objects disinterred from the second, or lower, Spirit Cave burial are the remains and funerary objects at issue in this case. For most of

the time since their disinterment, they have been stored in a box in the Nevada State Museum ("Nevada Museum" or "Museum") in Carson City. Exh. C at 6-7 (Dansie). However, in the mid-1990s, as a result of an unauthorized radiocarbon dating project, they gained substantial notoriety.

C. Resistance to NAGPRA in BLM and the Nevada Museum.

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.

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." Exh. D (Barker). (Numic is a branch of the Uto-Aztecan language family, and was the predominant language of the Native American people in the Great Basin at the time of contact.) The article stated 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." *Id.* at 16-17. 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. *Id.* at 17, 19.

In November 1994, Nevada Museum staff person Amy Dansie wrote to Barker regarding human remains held by the Museum that were subject to NAGPRA, seeking permission to select samples for dating and DNA analysis, as well as to copy and photograph skulls and post-cranial

bones. AAR 0124. BLM authorized the Museum to proceed with “non-destructive techniques such as measuring, photographing, and copying” the remains, but stated it could only approve DNA analyses on a case-by-case basis. AAR 0126.

In December 1994, Barker and Dansie met 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.” AAR 0128. According to Dansie, they discussed several strategies to achieve this goal while preparing 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 stated any items more than 3,000 years old should “definitely be listed as unaffiliated.” *Id.* at 0130.³ Second, Barker suggested notice of the inventory be expanded to include tribes in surrounding areas, including California tribes with no known historical presence in Nevada. *Id.* at 0130-0131. The reason was that, if the tribes submitted conflicting claims, the time it would take to resolve those claims could be used to conduct additional scientific studies, and the conflicting claims themselves could be used to justify such studies. *Id.* at 0131-0132. Third, Barker and Dansie took an expansive view of the types of studies that could be conducted under NAGPRA without notice to the tribes. *Id.* at 0137. While claiming “we are within our legal rights to continue significant scientific research on these collections,” Dansie and Barker concluded it would best to complete such research

³ Barker also stated that burials from a “cultural entity” with no known descendants, such as Lovelock Culture, should be listed as unaffiliated. *Id.* at 0130. As discussed below, the Smithsonian Institution’s National Museum of the American Indian would later reach a different conclusion and repatriate ancient Lovelock remains to the modern Lovelock Paiute Colony. *See* pp. 52 below.

before the inventory was sent to the tribes in May 1996, and there was “no need to advertise that we are conducting this research” in the meantime. *Id.* at 0132.

D. Radiocarbon Dating and Its Aftermath.

Sometime in 1994 or 1995, the Nevada Museum arranged for samples of the Spirit Cave remains and textiles to be radiocarbon dated. The results indicated the remains and funerary objects are approximately 9,400 years old. *E.g.* AAR 0451-0453; Exh. E at 55 (Kirner).

In January 1996, Dansie and another Museum scientist, Donald Tuohy, wrote a memorandum concerning further scientific research on human remains held by the Museum. AAR 0138-0143. They characterized the age of the Spirit Cave remains as “world class news of international significance,” and stated losing the opportunity to examine the remains would be “a crime against humanity.” *Id.* at 0138. Notably, Dansie and Tuohy did not believe the remains were culturally unidentifiable – “they are culturally quite distinctive and identifiable as an archaeological culture” – but were unrelated to any modern Indian cultures. *Id.* They also wrote that Museum staff had met with BLM archaeologist Pat Barker to discuss “conducting affiliation studies” on the remains, and decided one “appropriate approach” would be to develop “a well-planned publicity campaign” to announce the date of the remains and “the intent of BLM and the State of Nevada to evaluate affiliation under NAGPRA using the state-of-the-art science available today.” *Id.* at 0139.

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. AAR 0144-0147. Barker informed various Nevada tribes of this request and

scheduled a meeting for April 23, 1996. AAR 0148-0151. He informed the tribes that BLM and the Museum “believe these studies to be fully justified and of major significance to all of us.” *Id.* However, the tribes opposed further testing of the remains. AAR 0156-0158.

The day after the meeting, Barker and Dansie spoke at a press conference regarding the Spirit Cave remains. AAR 0169. 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.” Exh. F (Washington Post). 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. AAR 0169-0170. The New York Times, the Washington Post, and the Discovery Channel interviewed Dansie and Tuohy. *Id.* Representatives of the public television show NOVA met with BLM staff persons, including Pat Barker and Cynthia Pinto, and later produced a show about the remains. AAR 0159-0162, 0165. The Sacramento Bee reported the Spirit Cave discovery “catapulted Dansie and Tuohy . . . from the relative obscurity of archaeological journals onto the pages of newspapers across the country.” Exh. G (Sacramento Bee).

BLM and Nevada Museum staff, including Pat Barker, also made presentations regarding the Spirit Cave remains at 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.” AAR 0163, 0469-0471; BLM Answer ¶ 25.

E. Tribal Concerns About the Spirit Cave Remains.

In May 1996, the Chairman of the Fallon Tribe, Alvin Moyle, contacted the Manager of the Stillwater National Wildlife Refuge with concerns about the Spirit Cave remains. AAR 0178. The Tribe and Fish and Wildlife Service ("FWS") had cooperated on the disposition of human remains exposed by flooding in the Refuge in the 1980s. FWS arranged a meeting among the Tribe, the Museum, BLM and others, which was held on May 8, 1996. BLM's summary of the meeting discusses the Tribe's concerns:

Tribal members in attendance universally expressed their beliefs that the dead should be left alone; citing their grandparents' teachings that the dead are not to be bothered, dug up, studied or molested in any way. The age of the Spirit Cave mummy has no relevance, they said, nor does the mummy's relation to contemporary Indian populations. They consider themselves to be the caretakers of all the 'old ones' and requested that they be allowed to rebury the mummy as soon as possible They pointed out that when a burial is disturbed 'things are released' which may bring harm to others.

Norman Allen and Alvin Moyle revealed that Tribal members were receiving 'visitations' from spirits of the dead. They said that spirits appear to individuals who will soon die and many people, of all ages, are reporting these incidents. This is very serious and has caused some tribal members to leave their homes. It is the general opinion of most reservation members that this is a direct result of the recent 're-disturbing' of the dead.

Id.

At the meeting, Pat Barker denied a request from the Tribe, FWS, and a Fallon Naval Air Station Archaeologist to temporarily inter the remains in a vault that had been constructed to inter human remains from the Stillwater Marshes. AAR 0179; *see also* AAR 0825-0837 (MOU providing for construction and use of vault). Barker reassured the group, however, that BLM had not approved any studies to be conducted on the remains and "had not allowed any photographs, or public viewing of any of the remains based on the concerns of Native Americans." *Id.* In fact, as noted above, BLM had already authorized non-destructive analyses

of the remains "such as measuring, photographing, and copying," AAR 0126, and, as discussed below, these materials would be widely publicized by the Museum. Also, in August 1996 Dansie would request, and in September 1996 Barker would approve, "consumptive" testing of textiles found with the Spirit Cave remains. AAR 0282, 0293, 0451, 0461.

F. The Museum's Inventory and BLM's Response.

In July 1996, Dansie sent Barker the Nevada Museum's inventory of human remains, which listed the Spirit Cave remains as "unaffiliated." AAR 0203, 0208, 0266. Consistently with Dansie and Tuohy's January 17, 1996, memorandum, the inventory appeared to recognize the remains could be associated with an earlier identifiable group, but asserted "[n]o evidence supports tracing a shared group identity between any [modern] tribe and the earlier group affiliated with the burial." *Id.* at 0266. In particular, the inventory asserted an "unaffiliated earlier group (Lovelock Culture) lived in this area (Lahontan Basin) 4,000 to 600 years ago or later," some "local oral history documents a former group replaced by the Paiutes, about 200 years ago," and even "earlier cultures are known, all with no known descendants." *Id.*

Following receipt of the Museum's inventory, an October 17, 1996, BLM memorandum summarized the status of NAGPRA issues. AAR 0297-0299. According to the memorandum, "[w]orking with the Nevada State Museum, Carson City and others the BLM has completed the inventory of Native American remains and funerary objects required by NAGPRA." *Id.* at 0298. The inventory identified 120 sets of remains, of which the Museum listed three as affiliated and 117 as unaffiliated. *Id.* The Museum had requested permission to conduct consumptive testing on 41 sets of remains it identified as unaffiliated, including the Spirit Cave remains, but BLM

had deferred decision on that request pending completion of the NAGPRA inventory and a final determination of affiliation. *Id.* at 0298-0299. The report stated, however, that BLM staff had already reviewed and agreed with Museum's determination that the remains were unaffiliated:

Based on staff review and agreement, the Museum was correct in that the preponderance of the available data (including biological archaeologic [*sic*], linguistic, and Tribal oral history) demonstrates that the 41 sets of human remains identified in the Museum's request are appropriately considered to be unaffiliated, i.e. the remains predate contemporary tribal groups living in Nevada and cannot reasonably be culturally or genetically affiliated with any of them. Thus, the 41 sets of remains and objects are *determined to be unaffiliated.*

Id. at 0299 (emphasis added). The report recommended BLM notify all parties of this determination, allow 45 days for responses, and, assuming the tribes would appeal, proceed to a final determination. *Id.* However, no such notice was provided and, in subsequent versions of this "status" memorandum, BLM deleted all reference to its staff's 1996 review and agreement with the Museum's determination. *See* AAR 0420-0421, 0459-0460.

G, Scientific Analysis of the Spirit Cave Remains and Funerary Objects.

In the meantime, 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. AAR 0351-0353. The results of some 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. Exh. H (Nevada Hist. Soc. Q.).

The on-going examinations of the Spirit Cave remains, and the Museum's proposals for additional analyses, including destructive studies, led to protests from a variety of tribes and the National Congress of American Indians. See AAR 0300-0301, 0351-0353, 0354-0386, 0399-0402. BLM responded to the tribes' objections in March and April 1997, stating it was "now in the process of determining the cultural affiliation of the remains identified in the inventory," and had not yet made a decision on the Museum's request to conduct consumptive testing on them. AAR 0395-0398, 0403-0406. BLM did not disclose that its staff had already reviewed and agreed with the Museum's determination that the remains were unaffiliated. *Id.*

H. The Fallon Tribe's Request for Repatriation.

The Fallon Tribe formally requested repatriation of the Spirit Cave remains and funerary objects and an end to any further disturbance or destruction of the remains in May 1997. AAR 0422-0442. In June 1997, BLM's Nevada State Director, Ann Morgan, wrote to the Tribe acknowledging its request. AAR 0447. The State Director wrote she had "reviewed information provided by the Nevada State Museum, asserting these remains to be unaffiliated," but it was appropriate that "Native Americans have an equal opportunity to present evidence they believe supports their claim that the Spirit Cave material is affiliated with the Fallon Paiute-Shoshone Tribe." *Id.* She did not disclose that BLM staff viewed NAGPRA as one of the "anti-science social trends of the 1990s," that they had met with Museum staff to coordinate means of ensuring additional study of the remains during the inventory process, that they had instructed Museum staff to list remains more than 3,000 years old as unaffiliated, or that they had already reviewed and agreed with the Museum's determination that the Spirit Cave remains were unaffiliated. *Id.*

In September 1997, the State Director again wrote to the Tribe, enclosing information that BLM would use to determine cultural affiliation of the Spirit Cave remains and requesting that the Tribe provide information "about cultural origins or other factors . . . that are not available to us through our literary research efforts," but again did not disclose the positions or actions already taken by BLM's staff. AAR 0463. In a November 1997 meeting with tribal leaders, Pat Barker affirmatively claimed BLM had made no decision regarding the Spirit Cave remains and assured the tribes that, in his "personal opinion," the "remains will be eventually repatriated." AAR 0566-0567.⁴

I. The Museum's Facial Reconstruction, Study Results, and Final Project Report.

The Nevada Museum organized a conference in November 1997, at which the Spirit Cave remains were featured, the preparation of a facial reconstruction was announced, and "[a]ffiliation issues under NAGPRA" were discussed. AAR 0469, 0473-0474. Pat Barker and Cynthia Pinto attended the meeting for BLM, along with scientists and lawyers who were opposing repatriation of other remains under NAGPRA. *Id.* at 0469-0471, 0474, 0484. No Native Americans were invited. *Id.*

In December 1997, the Museum wrote to BLM's new Nevada State Director, Robert Abbey, to renew the Museum's request to conduct destructive tests on the Spirit Cave remains. The Museum acknowledged the research already performed on the remains and funerary objects had "established a wealth of information about these early people and their way of life," but

⁴ According to BLM's October 1996 memorandum, if BLM made a final determination that the remains were unaffiliated, it would *not* repatriate the remains, but would instead "retain ownership and control and [could] legally authorize testing without further consultation with Native Americans." AAR 0299.

asserted additional studies were necessary "to fully and completely pursue understanding of ancestral lineage and affiliation." AAR 0628-0629.

In early 1998, when the Museum publicly disclosed plans to display the facial reconstruction of the Spirit Cave remains, the Pyramid Lake Tribe wrote to the Governor of Nevada to express the Nevada tribes' objections to and frustration with the Museum's treatment of the remains. Despite claims the reconstruction was 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. AAR 0637-0640, 0643-0644, 0819.

In September 1998, Amy Dansie prepared a Final Project Report for the Museum under a NAGPRA grant from the National Park Service. AAR 0685-0793. According to the Report, the Museum would continue to treat all prehistoric burials in the Lahontan Basin as unaffiliated unless there was "compelling reason to assign affiliation on biological or cultural data." *Id.* at 0727. The Report contended that archaeological evidence "revealed a succession of prehistoric cultures exemplified by complex technological traits which appear to be different enough from the historic Northern Paiute bands from the same area to cause significant doubt regarding any affiliation between these groups." *Id.* at 0726.

It is noteworthy that the Report acknowledged at least some conflicting views of the evidence. *See, e.g., id.* at AAR 0719-0720 (noting "common cultural use of the dry cave environments over a long time period" in the Lahontan Basin), 0741-0744 (noting skeletal, dental and DNA analyses that found no evidence of different populations over time). Moreover, the Report concluded "a reburial solution which does not require . . . an assertion [of affiliation]

would be acceptable.” *Id.* at 0766. Specifically, the Museum recommended reburial in the FWS accessible underground vault, which “would provide interment without a final affiliation decision, allowing different disposition in the future when the diverse evidence is more thoroughly understood.” *Id.*; *see also id.* at 0719-0720.

When the Fallon Tribe sought information about the facial reconstruction in October 1998, BLM responded that the reconstruction was solely the responsibility of the Museum (even though BLM staff were present when plans for the facial reconstruction were announced). AAR 0794-0796, 0799-0800. In response to the Tribe’s request for BLM’s NAGPRA inventory of human remains, BLM responded that it had previously provided an inventory of remains “determined to be affiliated with the tribe.” AAR 0794, 0796. BLM did not disclose that its staff had agreed with the Museum’s determination that all other remains, including the Spirit Cave remains, were “unaffiliated.” *Id.*

J. The Tribe’s Request for Assistance from the Review Committee.

In November 1998 the Tribe requested the NAGPRA Review Committee consider BLM’s treatment of the Spirit Cave and other human remains. To the Tribe’s knowledge, BLM had not completed an initial inventory under NAGPRA § 3003(a) identifying, to the extent possible, the geographical and cultural affiliation of the remains, and had not responded to the Tribe’s May 1997 request for repatriation. AAR 0802-0803. In a contemporaneous communication with the Tribe, BLM continued to maintain the State Director had made no decision about affiliation. AAR 0804.

In November 1998, BLM's Nevada State Director informed the Review Committee "BLM is gathering information to make decisions regarding these remains, but has not reached any conclusion about their status." AAR 0808. Notwithstanding BLM's obligation under § 3003(b) to make its inventories available to the Review Committee "during the time they are being conducted," and the Committee's responsibility to monitor the inventory "process," the Director was unwilling to discuss the matter at the Review Committee's upcoming meeting. *Id.* He explained:

I consider it premature and inappropriate to discuss the details of this case in a public forum like the upcoming NAGPRA Review Committee Meeting. Discussing these issues with the committee before reaching a decision compromises the integrity of the decision process and may unnecessarily politicize this important decision.

Id.

The State Director met with the Chairman of the Fallon Tribe in late November 1998. In early December, the Director wrote to the Chairman to forward a "duplicate packet of information" BLM had compiled to make an affiliation determination for the Spirit Cave remains, and urged the Chairman to provide any additional comments or information about the issue that would help the State Director make a decision. AAR 0809. Again, the State Director did not disclose BLM's prior directive to the Museum to list remains older than 3,000 years old as unaffiliated, or its staff's prior review and agreement with the Museum's determination that the Spirit Cave remains were unaffiliated. *Id.* Nor did the State Director explain why BLM had yet to complete the initial inventory required by NAGPRA § 3003(a). Other than providing the packet of articles, BLM did not provide any information to the Tribe regarding its analysis of the

affiliation issue, but made it clear that, in BLM's view, it was up to the Tribe to prove affiliation. *Id.*; *see also id.* at 0811.

Representatives of the Fallon and Pyramid Lake Tribe attended the Review Committee's December 1998 meeting. AAR 0810-0813. The tribal representatives reported their tribes, as well as others in Nevada, were united in supporting the Fallon Tribe's claim for repatriation. *Id.* a 0813.⁵ The Committee decided, however, that it could not address the substance of the Tribe's claim pending a BLM determination. *Id.* at 0812.

K. The Tribe's Submission of Scientific Reports to BLM.

BLM believed it had been "castigated" by the tribes at the Review Committee meeting for not having made an affiliation decision regarding the Spirit Cave remains. AAR 0817. Accordingly, after attending an internal meeting in Washington D.C. on January 21, 1999, in which the staff's determination that the remains were unaffiliated was approved, *see* AAR 1984, BLM's State Director informed the Tribe that he would make a decision on the affiliation of the Spirit Cave remains within 45 days. AAR 0815. In light of prior statements that it was up to the Tribe to prove affiliation, and BLM's disclosure of its "preliminary" determination that the remains were unaffiliated, the Tribe requested an extension until June 11, 1999, to submit additional evidence in support of its claim. *Id.* at 0815, 1984. The State Director agreed. *Id.* at 0816.

⁵In April 1999, the Executive Board of the Inter-Tribal Council of Nevada unanimously adopted a resolution on behalf of its member tribes – comprising every federally recognized tribe in Nevada – supporting the Fallon Tribe's request for repatriation. AAR 0821-0823; *see also id.* at 2234.

At about the same time, the Tribe came to realize it needed legal and scientific assistance to deal with the complex issues surrounding its request for repatriation. *See* AAR 0818. After retaining counsel, the Tribe arranged to meet with BLM in May. *Id.* In connection with that meeting, the Tribe made three requests: (1) a further extension to submit relevant information in support of the Tribe's request (which the Tribe needed to retain experts and present analyses in diverse fields); (2) consultations at which the Tribe and its consultants could meet with the State Director and his staff "to better understand BLM's assessment of the evidence collected to date," make a preliminary presentation of their research and solicit feedback from BLM, and engage in in-depth discussion upon completion of the research; and (3) relocation of the remains to the FWS vault, as recently recommended by the Museum and previously recommend by FWS (which the Tribe believed appropriate in light of the extensive disturbance of and widespread publicity given to the remains while in the custody of the Museum). *Id.* at 0818, 0840-0847, 0860-0861.

The State Director agreed to consider the Tribe's request for an extension (on the condition the Tribe first submit a research plan) and to contact the FWS Manager at Stillwater to view the vault and evaluate the facility "according to the Secretary's Guidelines at 39 [*sic*] CFR Part 79.9." AAR 0856-0858. After reviewing the Tribe's research plan, the State Director agreed "to not make any final decision on the affiliation of the Spirit Cave remains until December 17, 1999," and expressed his hope that, "in granting this final extension, we will be able to review all the pertinent information" and make a decision "as soon as possible after the first of the calendar year." *Id.* at 0859-0862, 0868-0869. However, reiterating he had "not made a decision on