until January 31, 2001. *Id.* at 2202-2203. The Tribe explained it needed additional time to study the determination, the biological paper, and the new materials that had been added to the record but not previously disclosed to the Tribe. *Id.* at 2202; *see also id.* at 2189-2190 (August 18, 2000, letters forwarding new materials to the Tribe). It also pointed out that, after years of working on this issue, BLM needed eight months to prepare its determination after receiving the Tribe's submissions in December 1999, and that the Tribe could not adequately respond in the 45-day period provided by BLM. *Id.*

On October 17, 2000, BLM's Nevada State Director denied the Tribe's request and issued his "final determination." AAR 2228-2229. Again, the State Director did not cite to any provision in NAGPRA or its implementing regulations that imposes a deadline on a tribe's submission of a claim for repatriation of remains that have been determined to be unaffiliated, but simply stated his belief "that this issue has been thoroughly deliberated at this level." *Id.* at 2228. The State Director also stated "there is neither a specific appeal process, nor a clear directive which applies to disputes of this type"; however, he noted the NAGPRA regulations encourage a person who wishes to contest actions taken by Federal agencies "to do so through informal negotiations," and they provide that the "Review Committee may aid in this regard." *Id.*, quoting 43 C.F.R. § 10.17(b). The State Director explained that Review Committee actions "may include convening meetings between parties to disputes, making advisory findings as to contested facts, and making recommendations to the disputing parties or to the Secretary as to the proper resolution of disputes." *Id.*, quoting 43 C.F.R. § 10.17(b).

The State Director's reference to the Review Committee was consistent with the determination itself, which stated the Tribe could "request review of this matter from the NAGPRA Review Committee," and that the Committee could "make findings related to cultural items, including human remains," including findings addressing "cultural affiliation or the return of any such items." AAR 1986.

M. Proceedings Before the Review Committee.

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 seek to facilitate a resolution of the dispute between the Tribe and BLM. *See* AAR 2242, 2246, 2254, 2258-2264. In March 2001 the Committee agreed to consider the matter, and requested that the Tribe and BLM each provide a summary of the dispute. *Id.* at 2247-2250. The Tribe provided its summary on April 20, 2001. *Id.* at 2254-2257. In contrast, BLM now took the position that the dispute was not appropriate for consideration by the Review Committee:

> The [BLM] decision was based upon a finding of fact, and as such, it does not appear to be subject to reconsideration, except by the presentation of new evidence not yet considered. The differing positions of the Fallon Paiute-Shoshone tribe and the BLM regarding this decision, therefore, *do not appear to be the kind of dispute that lends itself to resolution as provided for in NAGPRA, its implementing regulations, and the Review Committee guidelines.*

Id. at 2251 (emphasis added). BLM made no attempt to reconcile this position with the actual provisions of NAGPRA or its implementing regulations, which specifically authorize the Review Committee to review and making findings regarding the cultural affiliation of human remains and associated funerary objects. Nor did BLM seek to reconcile this position with its own prior

statements that the Tribe could seek the assistance of the Review Committee. *Id.* Nevertheless, to be responsive to the Committee's request for information, BLM referred the Committee to its determination and biological paper. *Id.*

The Review Committee scheduled the dispute for its November 2001 meeting and invited the Tribe and BLM to submit written materials in advance of the meeting and to attend the meeting in person. AAR 2268-2270. The Review Committee's intent to consider the dispute was published in the Federal Register, and members of the public were invited to attend the meeting and provide input to the Committee. 66 Fed. Reg. 51059 (Oct. 5, 2001).

In addition to the materials it had previously provided to BLM, the Tribe provided five new expert reports and a memorandum summarizing its position to the Review Committee. The expert reports included reports by Professors Goodman, Sprague and Walker, who responded to BLM's determination and discussed its failures to consider relevant evidence or its mischaracterization of the evidence it did consider. *See* AAR 1893-1913 (Goodman), 1860-1868 (Sprague), 1869-1892 (Walker). Professor Goodman's report also presented Turner's new study linking dentition from the Spirit Cave remains to recent Native Americans from Nevada. *Id.* 1902-1903. The other two reports were authored by Professor Dennis O'Rourke, who summarized his earlier DNA study finding geographic stability in haplogroup frequencies between ancient and modern Native Americans, a study BLM did not address, and Professor Mark Plew, who reviewed BLM's use of archaeological evidence. *Id.* at 1914-1918 (O'Rourke), 1807-1859 (Plew). The Tribe's own report provided a comprehensive summary of its position,

and included significant anthropological and ethnographic information that had not been addressed by BLM. *Id.* at 1685-1806.

BLM, for its part, again asserted the dispute did not lend itself to resolution under "NAGPRA, its implementing regulations, and the Review Committee's guidelines," and referred the Committee to its determination and biological paper for its position. AAR 2286-2287.

Tribal elders, tribal leaders, tribal attorneys, and Professors Goodman, Plew and Sprague attended the Review Committee meeting and participated on behalf of the Tribe. AAR 2292-2371. BLM did not attend the meeting. *Id.* at 2335-2336, 2352. Almost every member of the Committee commented on BLM's failure to attend the meaning, with several noting that BLM's absence, especially after telling the Tribe it could seek assistance from the Review Committee, demonstrated a lack of good faith, was "grievous," and frustrated the Committee's dispute-resolution function. *Id.* at 2352, 2365, 2368, 2372, 2373-2374, 2378-2379, 2380, 2381, 2383. 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.

The Committee considered the material presented to it, questioned the witnesses, and deliberated in open session. *See, e.g.* AAR 2335-2412. Exercising its statutory responsibilities, the Committee first found, by a 6-to-1 vote, that BLM failed to fairly and objectively consider all of the available relevant information. *Id.* at 2384-2387. One Committee member, Rosita Worl, explained that "BLM acknowledged some things but . . . ignored others and then didn't respond at all." *Id.* at 2384. She particularly noted the tribe's comment that, after it retained experts, "the

communication just seemed to end at that point." *Id.* Another Committee member, James Bradley, stated "it seems quite clear to me that they [BLM] have not considered all the evidence that was made available to them." *Id.* at 2385; *see also id.* at 2366 (agreeing "true consultation has not occurred"); 2378 (expressing the view that BLM failed to consult with the tribe and that tribes should not have to experience what the Fallon Tribe went through with BLM); 2383 (finding failure to consult). Even the lone dissenter, John O'Shea, believed BLM failed to consult and consider new evidence after it made its initial determination. *Id.* at 2384-2385. As he explained, a determination that remains cannot be culturally affiliated is essentially "a non-determination. There will always be the potential for new evidence to be presented that should be considered. So there is an obligation for continued consultation, *and that is where I think BLM has failed.*" *Id.* at 2385 (emphasis added).

The Committee next found, again by a 6-to-1 vote, that the Spirit Cave remains and funerary objects were culturally affiliated with the Tribe under NAGPRA. *Id.* at 2388-2399. James Bradley explained that, given the age of the remains, he came into the meeting with a presumption that it was going to be hard for the Tribe to show a connection to them. *Id.* at 2389. However, he believed "the tribe has presented very interesting and diverse evidence. And there's no question in my mind that geographically, archaeologically, oral tradition-wise, I think there's some biological evidence. There's a combination of scientific evidence and traditional evidence that do connect these. So I think these can be connected." *Id* Recognizing that gaps in the record should not prevent a finding of affiliation, and that the standard of proof was not certainty, but a preponderance of the evidence, Bradley concluded that "a determination of cultural

affiliation can be made." *Id.*; *see also id.* at 2362-2363 (comments of Garrick Bailey, also expressing concern over age of remains, but finding DNA evidence of regional stability "very strengthening"). Rosita Worl noted not only the scientific evidence but the traditional evidence as well, concluding that the Tribe had demonstrated that its people "do have a sense of shared identity with that individual." *Id.* at 2390. Even the lone dissenter, John O'Shea, agreed the Tribe had a shared "cultural relationship" with the remains, *id.* at 2353-2354, 2390, 2474-2475, and believed it would be possible, working with a coalition of Great Basin tribes, to repatriate the remains under the developing regulations for culturally unidentifiable remains. *Id.* at 2354.

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. *Id.* 2410-2413.

N. BLM's Failure to Consider the Information Presented to the Review Committee or the Committee's Findings and Recommendation.

In December 2001, the Committee, at BLM's request, forwarded to BLM all of the materials it had received from the Tribe. AAR 2419; *see also id.* at 2450. The Committee's findings and recommendation were published in the Federal Register on April 10, 2002. *Id.* at 2434-2436 (67 Fed. Reg. 17463). In a April 2002 briefing paper, BLM stated the Review Committee was "a civilian advisory group with no authority under NAGPRA to determine affiliation nor authority to enforce their findings," and 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.*" *Id.* at 2428-2429 (emphasis added); *see also id.* at 2443. Although the briefing paper claims the Nevada State Director remains "available and open to continuing consultation, or to consider any additional information the Tribe might have to offer," it makes no reference to

the extensive Tribal submissions to the Review Committee that had been provided to BLM, and there is no indication in the record that BLM gave any consideration to them. *Id.* at 2429. The briefing paper asserts BLM's position is set forth in its determination and biological paper, which were prepared *before* the Tribe submitted these materials to the Review Committee. *Id.*

In May 2002 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. *See* AAR 2477, 2490. The State Director stated he did not intend to take any further action and that this was now a matter for his superiors in Washington D.C. *Id.*

Tribal representatives met with BLM Deputy Director Jim Hughes in October 2002 and informed him that the Tribe intended to write to Secretary of the Interior Gale Norton to seek her assistance in resolving the matter. AAR 2485. The Tribe wrote to the Secretary in November, forwarding all of the materials it had previously submitted to BLM and the Review Committee, the Nevada Museum's response to the Tribe's submissions to BLM, the transcript of the Review Committee's meeting, and a copy of the Committee's written findings and recommendation. *See id.* at 2487-2492, 2522-2524. The Tribe also forwarded to the Secretary two resolutions adopted by the National Congress of American Indians expressing support for the Tribe's request for repatriation and concern about the integrity of the Review Committee process in light of BLM's refusal to participate in the Committee's meeting and its refusal to reconsider its decision in light of the Committee's findings and recommendation. *See id.* at 2414-2416, 2491, 2524. The Tribe

also provided to the Secretary a legal memorandum analyzing the decision in *Bonnichsen v. United States*, 217 F. Supp. 2d 1116 (D. Or. 2002). *Id.* at 2493-2521.

The Tribe's letter to Secretary Norton identified multiple flaws in BLM's determination and BLM's refusal to reconsider its decision in light of the Review Committee's findings. AAR 2490-2491. The Tribe also pointed out there was unanimous support in Indian country for the Tribe's repatriation request, and meaningful support in the scientific community as well. *Id.* at 2491. As to the latter, the Tribe pointed to the non-opposition of the Nevada Museum, the support of highly qualified scientists who prepared reports on the Tribe's behalf, and the position of the scientists on the Review Committee. *Id.*[16] The Tribe also noted that scientific interest in the remains was tempered by the extensive analyses that had already been undertaken. *Id.* Under these circumstances, the Tribe suggested that, even if there were doubts about the cultural affiliation of the remains, repatriation would be appropriate under the regulatory provision for repatriating 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. *Id.*

On December 20, 2002, BLM's Acting Assistant Director for Renewable Resources and Planning responded to the Tribe's letter to Secretary Norton. AAR 2527. The letter noted the National Park Service was in the process of promulgating additional regulations regarding

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[16] The six members who voted in favor of the Committee's findings included Dr. Garrick Bailey, an anthropologist at the University of Tulsa, Dr. James Bradley, an archaeologist at Harvard University's Peabody Museum of Archaeology and Ethnology, and Dr. Rosita Worl, a Harvard-educated anthropologist. *See* AAR 2241. The American Anthropological Association nominated Dr. Bailey to the Committee, and the American Association of Museums nominated Dr. Bradley. *Id.*

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. *Id.*[17] It also stated the materials provided by the Tribe to the Secretary had "been sent to appropriate BLM officials for their review." *Id.*

The Tribe responded to this letter on January 6, 2003. AAR 2420-2422. It 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, since the Review Committee had found the remains *were* affiliated with the Tribe, and since an *existing* regulation permitted their repatriation even if they were not affiliated.. *Id.* at 2420-21. The Tribe also asked BLM to advise it in writing of: (1) the purpose of the BLM review of the Tribe's materials; (2) the identity of the individuals who would be conducting the review; and (3) the scheduled completion date for the review. *Id.* at 2421. The Tribe offered to participate in the review process under NAGPRA's consultation provisions, to provide any additional information BLM's reviewers might need, and otherwise to facilitate the review process. *Id.* BLM never responded to this inquiry: 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. There is nothing in the record to indicate any such review took place.

On April 9, 2003, after receiving several congressional inquiries, BLM's Director wrote to the Tribe stating she had reviewed the Tribe's letter to Secretary Norton and would like to

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[17] As noted above, those regulations still have not been promulgated (or even issued in draft).

meet with the Tribe to discuss the information it submitted to the Secretary. AAR 2528-2533; *see also id.* at 2537. The meeting took place in Reno on July 16, 2003. *See id.* at 2538. Based on the Director's comments at the meeting, the Tribe understood that, rather than conduct an internal BLM review, the Director intended to assemble an independent team to review the matter with "fresh eyes" and make a recommendation for the Secretary's consideration. *Id.* at 2538, 2540. In an August 14, 2003, letter confirming this understanding, the Tribe requested that BLM advise the Tribe of the composition of the independent team upon its selection. *Id.* at 2538.

BLM's Assistant Director for Renewable Resources and Planning responded to the Tribe's August 14 letter on October 7, 2003. AAR 2539. 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." *Id.* The Tribe responded on November 12, 2003, and requested that BLM advise it of the time frame in which this determination would be made. *Id.* at 2540-41.

On February 27, 2004, BLM's Director wrote to the Tribe's Chairman. AAR 2549. The body of the letter states in its entirety:

> I want to thank you and other Tribal representatives for meeting with me on July 16, 2003, regarding your concerns about the Spirit Cave Man 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.

Id. 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 the Director 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.

The Tribe responded to the Director's letter on March 11, 2004. AAR 2554. 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. *Id.* 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. *Id.* And, the Tribe stated it understood the Director's plan to assemble an independent team to review the matter was never implemented. *Id.*

BLM did not respond to the Tribe's March 11, 2004. There is no indication in the record that BLM ever reviewed the materials submitted to the Review Committee or appointed anyone else to do so, or that BLM ever gave substantive consideration to the Committee's findings and recommendation.

V. ARGUMENT.

A. Standard of Review.

Under the APA, a reviewing court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that is made "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A) & (D). Under these provisions, a court's review is both substantive and procedural. *See, e.g., Greene v. Babbitt*, 943 F. Supp. 1278, 1285 (W.D. Wash. 1996). The court must review the ultimate decision of the agency and scrutinize all aspects of the agency proceedings to decide whether the agency acted fairly and followed the procedures required by law. *Id.* Accordingly, even if the record supports an agency finding, "the court must set the finding aside if the agency failed to follow the 'procedures required by law' in making its determination." *Id.*; *see also Natural Resources Defense Council v. SEC*, 606 F.2d 1091, 1048 (D.C. Cir. 1979) (judicial "review of an agency's procedural compliance with statutory norms is an exacting one").

Under the substantive arbitrary and capricious standard, the court must determine whether the agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Although the arbitrary and capricious standard is a narrow one, and the court may not substitute its judgment for the agency's, the court is "required to 'engage in a substantial inquiry[,] . . . a thorough, probing, in-depth review.'" *Native Ecosystems Council v. U.S. Forest Service*, No. 04-35375 (9th Cir. Aug. 11, 2005), Slip op. at 10418, *quoting Overton Park*, 401 U.S. at 415-16; *National Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1170 (9th Cir. 2004).

In order to permit meaningful judicial review, an agency must provide an explanation of its decision "that will enable the court to evaluate the agency's rationale at the time of decision." *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). A court may uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned, but it "cannot infer an agency's reasoning from mere silence or where the agency failed to address significant objections and alternative proposals." *Beno v. Shalala*, 30 F.3d 1057, 1073 & n. 41 (9th Cir. 1994). An agency's action must be upheld, if at all, on the basis articulated by the agency itself. *Id.* at 1073-74; *see also In re Sang-Su Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002); *Northwest Motorcycle Ass'n v. USDA,* 18 F.3d 1468, 1471 (9th Cir. 1994).

In applying the arbitrary and capricious standard, courts will normally give deference to agency findings that are the product of special agency expertise. *E.g, Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371, 1383 (9th Cir. 2003). However, the courts will not give deference to findings that do not involve specialized expertise of the agency that made the decision. *E.g. Sternberg v. Sec., Dept. HHS*, 299 F.3d 1201, 1205 (10th Cir. 2002). Here, the court should not give deference to BLM's findings for several reasons.

First, BLM is only one of many federal agencies charged with implementing NAGPRA, and was not responsible for promulgating NAGPRA's implementing regulations. In *Bonnichsen v. U.S. Army Corps of Engineers*, 969 F. Supp. 628, 643-44 & n. 12 (D. Or. 1997), the court declined to give deference to the Army Corps of Engineers' findings under NAGPRA because

the Corps was "just one of many federal agencies that might occasionally address NAGPRA issues," and, like BLM, did not promulgate the NAGPRA regulations.

Second, as discussed above, the record indicates BLM was hostile to NAGPRA from the outset, prejudged the status of the remains at issue here, worked with the Nevada Museum to delay or block their repatriation and to conduct scientific analyses without disclosing them to the Tribe, and misled the Tribe as to BLM's positions and actions with respect to the remains. Where, as here, the record provides evidence of prejudgment and bias, the deference to be accorded to the agency is diminished. *See Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002) (agency's prejudgment and bias diminishes deference accorded under APA); *Maggard v. O'Connell*, 671 F.2d 568, 570-71 (D.C. Cir. 1982) ("the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia ... and judicial intervention is required if the court becomes aware, especially from a combination of danger signals, that the (tribunal) has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making") (citations omitted); *International Snowmobile Mfrs. Ass'n v. Norton*, 304 F. Supp. 2d 1278, 1291 (D. Wyo. 2004).

Third, exercising its statutory responsibilities, the NAGPRA Review Committee found BLM failed to give fair and objective consideration to the available evidence and concluded, contrary to BLM's determination, that the Spirit Cave remains and funerary objects are culturally affiliated with the Tribe. Although advisory decisions are not binding, they should be accorded deference if reasonable and harmonious with the language and purpose of the involved statute. *EEOC v. Exxon*, 202 F.3d 755 (5th Cir. 2000); *Mary P. v. Illinois Bd. of Ed.*, 919 F. Supp. 1173

(N.D.Ill. 1996). In this case, BLM has never responded to the Review Committee's findings, and has made no attempt to show they were erroneous.

In *Bonnichsen*, 969 F. Supp. at 643, the court found that the Review Committee was "established by Congress as an integral part of NAGPRA and specifically charged, *inter alia*, with overseeing implementation of certain provisions of the law and consulting with the Secretary of the Interior in the development of regulations to implement NAGPRA." The court believed the Review Committee's special agency expertise should be respected because there is a potential for inconsistent interpretations of NAGPRA when multiple federal agencies separately administer the Act. *Id.* Moreover, the court noted that the Committee's findings and recommendations are important considerations for any action the Secretary takes under NAGPRA. *Id.* at 643 n.13 (quoting *Implementing the Native American Graves Protection and Repatriation Act*, 24 Ariz. St. L. J. 217, 228-29 (1992)). For these reasons, the court stated that it would "pay particular attention to the comments of the Review Committee" even though it only acts in an advisory role. *Id.* at 643. Given the deference owed to the Review Committee, and especially its unrebutted finding that BLM failed to fairly and objectively consider the available evidence, the court should not give the normal degree of deference to BLM's determination in this case.

B. BLM's Decision Was Made Without Observance of Procedure Required by Law.

1. BLM Failed to Consult with the Tribe After the Tribe Retained Experts.

As discussed above, NAGPRA requires inventories and the identification of the geographic and cultural affiliation of human remains and associated funerary objects to be "completed in consultation with tribal government . . . officials and traditional religious leaders." 25 U.S.C. § 3003(b)(1)(A); *see also* 43 C.F.R. 10.9(b). In addition to this statutory obligation, the federal trust responsibility requires BLM to consult with the Tribe before taking action that may affect its cultural resources. *E.g., Northern Cheyenne Tribe v. United States Bureau of Land Management*, Slip op. at 20-21.

Although BLM held meetings with the Tribe in 1997, 1998 and the first half of 1999, it refused to engage in meaningful consultations with the Tribe after the Tribe retained experts in the relevant scientific fields. Moreover, BLM never solicited recommendations from the Tribe on how the consultation process should be conducted, as required by NAGPRA. 43 CFR 10.9(c)(4)(ii). In May 1999, the Tribe requested a series of consultation meetings to better understand the evidence BLM had collected and BLM's analysis of it, to make a preliminary presentation of the Tribe's research and get feedback from BLM, and to engage in in-depth discussions upon completion of the research. BLM rejected this request in its entirety, despite the Review Committee's recommendation that it continue to consult with the Tribe. Although the State Director and his assistant met with the Tribe in early 2000, no BLM staff person who worked on the Spirit Cave matter was present and BLM did not discuss its view of the evidence or any aspect of its analysis. In its determination, BLM does *not* claim this was a consultation meeting under NAGPRA, and BLM held no other meetings with the Tribe before issuing its

determination. Virtually every member of the Review Committee commented that BLM had failed to consult with the Tribe.

BLM's failure to properly consult with the Tribe should be contrasted with its close working relationship with the Nevada Museum. BLM staff met with Museum officials as early as 1994 to discuss means of delaying or preventing repatriation, engaged in strategy discussions with the Museum about how to conduct additional scientific analyses of the remains despite tribal opposition, participated in a news conference with the Museum to advertise the age of the remains, attended a scientific conference organized by the Museum (to which no Native Americans were invited) that was devoted to the Spirit Cave remains and repatriation issues, and provided a complete copy of the Tribe's submissions to the Museum for its review and comment. BLM's continued availability to meet and confer with the Museum, while it was unwilling to meet and confer with the Tribe and its experts, violated both NAGPRA and the trust responsibility.

2. BLM Set an Arbitrary Deadline for the Tribe to Submit a § 3005(a)(4) Claim in Response to BLM's August 2000 Determination.

NAGPRA provides that, if the cultural affiliation of Native American human remains is not established through the inventory process, they may nevertheless be repatriated if a requesting tribe can show cultural affiliation by a preponderance of the evidence. 25 U.S.C. § 3005(a)(4). This section imposes no time limit on when a tribe may make such a request. *Id.*

In the period leading up to its August 2000 determination, BLM repeatedly insisted to the Tribe and to the Review Committee that it had made no decision on the cultural affiliation of the Spirit Cave remains, *i.e.,* that it had not completed the inventory and identification process for

these remains. Indeed, BLM used this assertion as its rationale for refusing to engage in further discussions with the Tribe and refusing to discuss the matter with the Review Committee. Thus, when the BLM State Director forwarded the August 2000 determination to the Tribe, he acknowledged that the Tribe could "make a claim regarding human remains and associated funerary objects which are determined unaffiliated." However, even though § 3005(a)(4) is the provision in NAGPRA that authorizes such a claim, the State Director then imposed an arbitrary 45-day deadline for the Tribe to submit new evidence supporting its position, a deadline that is not found in § 3005(a)(4) or any other provision of NAGPRA or its implementing regulations.

The Tribe did not seek an unlimited amount of time to respond to BLM's initial determination and submit a claim under § 3005(a)(4). After an initial review of the determination and consultation with its experts, it requested a four-month extension until January 31, 2001, to make its submission. Given the length of time BLM had been working on this matter, the length and complexity of the determination, the inclusion of new materials in the record not previously disclosed to the Tribe, and the conflicting schedules of its experts, the Tribe's request was entirely reasonable. In rejecting it, BLM did not identify any statutory or regulatory basis for its deadline, any harm to the agency or the public that would result from the extension requested by the Tribe, or any reason to conclude the Tribe's request was unreasonable.

The imposition of an arbitrary deadline for the Tribe to respond to BLM's initial determination and to submit a claim under § 3005(a)(4) violated NAGPRA and the trust responsibility. As one of the members of the Review Committee explained, a determination that

human remains are unaffiliated under NAGPRA is a "non-determination"; a tribe can always submit new evidence under § 3005(a)(4) in an effort to prove affiliation. BLM's refusal to permit the Tribe to do so here was unlawful.

3. BLM Failed to Participate in the Statutory Review and Dispute-Resolution Process.

Congress established the Review Committee "to monitor and review the implementation of the inventory and identification process and repatriation activities" required under NAGPRA. 25 U.S.C. § 3006(a). It required agencies to make their inventories available to the Review Committee "both during the time they are being conducted and afterward," *id.* § 3003(b)(1)(C), and authorized the Committee to monitor the inventory and identification process "to ensure a fair, objective consideration and assessment of all available relevant information and evidence," to review and make findings related the cultural affiliation and return of cultural items, and to facilitate the resolution of disputes between tribes and Federal agencies, "including convening the parties to the dispute if deemed desirable." *Id.* § 3006(c).

BLM did everything possible to frustrate this statutory process and marginalize the Review Committee. First, before issuing its initial determination, BLM refused to meet with the Committee to discuss the inventory process or the Tribe's concerns, claiming it would be "premature and inappropriate" to discuss its decision-making process with the Committee. Then, after making its determination and repeatedly stating the Tribe could invoke the Review Committee's dispute-resolution procedures, BLM refused to attend the Review Committee's meeting at which the dispute was considered. BLM's only justification for not attending the meeting was its claim that it was now too late for the Review Committee to address the matter,

since its determination did "not appear to be subject to reconsideration." *E.g.* AAR 2251. Finally, as soon as the Review Committee's findings and recommendations were published in the Federal Register, BLM took the 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." AAR 2429. Consistent with this statement (which rests on a clearly erroneous reading of NAGPRA), the record does not reflect that BLM gave *any* consideration of the extensive materials submitted to the Review Committee, the proceedings before the Committee, the Committee's deliberations, or the Committee's findings or recommendation.

BLM's refusal to participate in the Review Committee process – before or after making its determination – violated NAGPRA, completely frustrated the Review Committee's ability to attempt to resolve the dispute, and was inconsistent with the trust responsibility. Under NAGPRA, BLM should have "pa[id] particular attention to the comments of the Review Committee" rather than denying the Committee's jurisdiction and ignoring its findings. *Bonnichsen*, 969 F. Supp. at 643. Like its failure to consult with the Tribe after the Tribe retained experts, BLM's decision not to participate in the Review Committee process reflects BLM's unwillingness to engage in any substantive scientific discussion of its determination.

C. BLM's Decision to Not Repatriate the Spirit Cave Remains Was Arbitrary, Capricious, and Otherwise Not in Accordance with Law.

1. BLM Was Hostile to NAGPRA and Prejudged the Status of the Remains.

NAGPRA requires that federal agencies fairly and objectively consider and assess all available relevant information and evidence. 25 U.S.C. § 3006(c). The federal trust

responsibility likewise requires agency action to be judged "by the most exacting fiduciary standards." *Seminole Nation*, 316 U.S. at 297. Accordingly, an agency determination under NAGPRA that is not based on a fair and objective consideration of all available relevant information is "not in accordance with law" and should be set aside under the APA, 5 U.S.C. § 706(2)(A).

Moreover, under the APA an agency decision motivated by bias or bad faith is arbitrary and capricious and should be overturned. *Latecoere Int'l, Inc. v. U.S. Dept. of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994); *Apex Constr. Co. v. U.S.*, 719 F. Supp. 1144, 1150 (D. Mass. 1989); *Dynalectron Corp. v. U.S.*, 659 F. Supp 64, 68 (D.D.C. 1987); *see also Sierra Club v. U.S. Army Corp. of Engineers*, 701 F.2d 1011, 1035 (9th Cir. 1983) ("a decision made in reliance on false information, developed without an effort in objective good faith to obtain accurate information, cannot be accepted as a 'reasoned decision'" under NEPA). Evidence of bad faith can be direct or circumstantial. *Apex*, 719 F. Supp. at 1151-53. Bad faith or bias can be shown through statements of the decision maker (*see Latecoere, Dynalectron*), restructuring or manipulating ratings to achieve the desired result (*see Latecoere, Dynalectron*), or other evidence such as evidence of prejudgment. *See, e.g., James Madison Ltd. v. Ludwig*, 868 F. Supp. 3, 9 (D.C.C. 1994) ("if there were evidence that [defendants] specifically set out to find [plaintiff] banks insolvent and place them in receivership, regardless of their true financial state, this court would intervene").

There is substantial evidence in the record in this case that BLM was hostile to NAGPRA, prejudged the status of the Spirit Cave remains, opposed repatriation, and was

unwilling to participate in good faith in the Review Committee process. First, the principal authors of BLM's determination, Pat Barker and Cynthia Pinto (Ellis), published an article in 1994 declaring NAGPRA reflected an "anti-science social trend[]" that allowed groups or individuals to dispose of human remains "as if they were personal property." They cautioned that scientists should be particularly careful when associating ethnic groups with the archaeological record because of the legal and practical ramifications, especially with objects from the Great Basin. The article makes no mention of the compelling reasons for which NAGPRA was enacted. Exh. D (Barker).

Second, in December 1994 Barker met with Amy Dansie of the Nevada Museum. Dansie's summary of the meeting indicates it was designed to prevent or delay repatriation of human remains held by the Museum so that scientific testing and analyses could be undertaken. A central element of the strategy Barker proposed was that any items more than 3,000 years old should "definitely be listed as unaffiliated." AAR 0130. This directive effectively pre-judged the status of the 9,400-year-old Spirit Cave remains. BLM staff adhered to this view in October 1996, when they concluded the Spirit Cave remains "are determined to be unaffiliated." AAR 0299.

Third, BLM not only prejudged the status of the remains, it then misled the Tribe and the Review Committee about the status of its decision-making process. It provided no notice of its October 1996 determination, deleted all references to that determination in subsequent status reports, and publicly maintained for the next two years that it had made no decision about the

cultural affiliation of the remains. To make matters worse, Pat Barker personally assured the Tribe he believed the remains would be repatriated.

Fourth, during the same period, Barker met with Dansie to develop a "well-planned publicity campaign" and promoted additional studies of the remains. He spoke at a press conference covered by major media organizations and made presentations at scientific conferences. The media campaign and presentations were designed to promote study of the Spirit Cave remains. Also, Barker and his colleague Cynthia Pinto (Ellis) participated in a conference of scientists at which the Spirit Cave remains were featured, the preparation of a facial reconstruction of the remains was announced, and affiliation issues under NAGPRA were discussed. These actions led to a battery of scientific studies, the facial reconstruction, and the worldwide publication of photographs and the reconstruction of the Spirit Cave remains. These actions were undertaken over the objections of, and were deeply disturbing to, the Tribe.

Fifth, in this context as well BLM misled the Tribe. Barker claimed that photographs and public viewing of the remains were not allowed when BLM had already approved measuring, photographing and copying the remains. It was Barker who, in October 1996, advised Dansie there was no need to disclose scientific analyses of the remains to the Tribe. And, while BLM disclaimed any involvement in the facial reconstruction, Barker and Pinto were present when plans for the construction were announced and did not inform the Tribe or make any attempt to limit the massive publicity it would generate.

Sixth, BLM's response to the Tribe's requests to at least temporarily place the remains in the FWS vault demonstrates hostility to the Tribe's legitimate concerns. The Tribe's request was

supported by FWS, a FNAS archaeologist, and, in 1999, by the Museum itself. Nevertheless, Barker peremptorily denied the request when it was first made in 1996, and the State Director again denied it when it was renewed in 1999. In his denial, the State Director acknowledged he had not even seen the vault, did not disclose or provide any basis for disputing FWS's written assessment that the vault met the regulatory requirements for a curatorial facility, and provided no explanation for his own "assessment" to the contrary.

Seventh, BLM's refusal to consult with the Tribe after the Tribe retained experts, its arbitrary deadline for the Tribe's submission of a § 3005(a)(4) claim following BLM's determination, and its failure to participate in, or consider the evidence and findings that resulted from, the Review Committee proceedings, provide further evidence of hostility to NAGPRA's substantive and procedural requirements. Again, BLM said one thing to the Tribe and then did another. It advised the Tribe that it could seek review of BLM's determination before the Review Committee, but then argued to the Committee that such review was improper and failed to attend its meeting. And, it told the Tribe it was always willing to consider new evidence, but then failed to consider any of the evidence the Tribe submitted to the Review Committee.

Eighth, BLM's determination itself provides substantial evidence of bias and prejudgment. As explained in great detail above, BLM repeatedly misrepresented and distorted evidence it relied upon and ignored a multitude of evidence supporting the Tribe's position.

Cumulatively, these actions provide substantial evidence that BLM was hostile to NAGPRA's substantive goals and procedural requirements, prejudged the status of the Spirit Cave remains, and opposed their repatriation from the outset. The Review Committee agreed,

finding BLM did not fairly and objectively consider the evidence. Because BLM's decision was the produce of bias and prejudgment, and did not rest on a fair and objective consideration of the evidence, it was arbitrary, capricious and otherwise not in accordance with law.

2. BLM Failed to Consider Important Parts of the Problem and Distorted Much of the Evidence It Did Consider.

Agency action is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation that runs counter to the evidence." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Morall v. Drug Enforcement Admin.*, 412 F.3d 165, 178 (D.C. Cir. 2005) (agency decision cannot withstand review where decision maker entirely ignored relevant evidence); *Beno v. Shalala*, 30 F.3d at 1073-76 (setting aside agency decision where there was no indication the Secretary considered materials submitted by plaintiffs); *Jet Investment, Inc. v. Dept. of Army*, 84 F.3d 1137, 1141-43 (9th Cir. 1996) (when factual predicate for agency decision is not supported by sufficient evidence, the decision should be reversed); *Crutchfiled v. U.S. Army Corp. of Engineers*, 214 F. Supp. 2d 593, 620 (E.D. Va. 2002) (agency may not ignore evidence placed before it by interested parties); *San Luis v. Badgley*, 136 F. Supp. 2d 1136, 1148 (E.D. Cal. 2000) (federal agency's failure to consider state's biological opinion arbitrary and capricious).

As discussed in great detail above, BLM's August 2000 determination failed to consider "important aspect[s] of the problem" and distorted much of the evidence it did consider. And, there is no evidence BLM *ever* considered the extensive materials the Tribe submitted to the Review Committee, or the Review Committee's deliberations, findings, or recommendation. We briefly summarize the major omissions and distortions here.

As a threshold matter, BLM never addressed the meaning of the term "group" in NAGPRA. The *dissenting* member of the Review Committee, John O'Shea, highlighted the importance of this term in deciding whether the Spirit Cave remains are culturally affiliated with the Tribe:

> I'd say in terms of the Native American origin of Spirit Cave, absolutely. I would say – is there a common existence in terms of lifestyle, technology, subsistence? I'd say yes. Do the Fallon Paiute-Shoshone share a cultural relationship with the place and the prior inhabitants of Spirit Cave? I would say yes. But does that equate with cultural affiliation as it's expressed and defined in NAGPRA? I'm afraid I don't think so. *And this comes back as you argued at the very beginning about how you define a group.* Does a Desert Archaic as a technocomplex constitute a group in the sense that it's used in NAGPRA? I think cultural affiliation is a more specific thing than a technocomplex.

AAR 2354-2355 (emphasis added). Although the other six members of the Review Committee disagreed with Mr. O'Shea's ultimate conclusion, no one disputed the importance of the meaning of the term "group."[18] Despite this, there is no evidence BLM ever attempted to define the term "group" as it is used in NAGPRA. And, to the extent its determination reflects an *ad hoc* interpretation that to establish the existence of a "group" under NAGPRA it is necessary to establish details of social and political organization, territorial boundaries, kinship patterns, religious beliefs, and worldview, *see e.g.* AAR 1996, that interpretation is contrary to the plain

[18] It should also be noted that Mr. O'Shea went on to state that "if you could demonstrate that there is, in fact, a relationship biologically between Spirit Cave and modern Paiute populations that would knock the knees out of an argument of discontinuity. And so although . . . biology isn't critical in determining cultural affiliation, it would offer strong support and it would offer really quite devastating dissupport for the BLM's contention." AAR 2354. As discussed above, the Tribe did offer such biological support for its position in the recent dental study by Turner, which found the Spirit Cave remains to be most closely linked biologically to recent Native Americans from Nevada. AAR 1902-1903, 1905; Exh. P at 140.

meaning of the statute, its legislative history and implementing regulations, the use of the term "group" in the ICCA, and the applicable rules of construction. *See* Part II.B above.[19]

BLM's discussion of the archaeological evidence is premised on its belief that significant changes in material culture, particularly in textiles, demonstrate the absence of continuity in the peoples occupying a region. However, BLM never confronts the analyses of scholars, including those such as Grayson and Elston on whom it relies, who believe changes in material culture, including changes in textile technologies, do not demonstrate changes in human populations. Moreover, BLM fails to address significant evidence of continuity in material culture. For example, it makes no mention of Jennings' Desert Culture concept, which recognized unifying features throughout the Great Basin archaeological record; erroneously states there were no stone seed processing tools in the Early Holocene; fails to mention the striking similarities between the material culture and lifeways exhibited by the Spirit Cave assemblage and those of later peoples in the region; does not consider the significance of continuity in textile techniques such as

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[19]BLM's *ad hoc* interpretation of the term "group" is not entitled to deference from the court. Deference to an agency interpretation of a statute is not appropriate where Congress's intent can be clearly ascertained through analysis of the language, purpose and structure of the statute. *Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984). Even where Congress's intent is not clear, a court should defer to an agency's interpretation only if "Congress delegated authority to the agency generally to make rules carrying the force of law, and [ ] the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.,* 533 U.S. 218, 226-27 (2001). Since neither of these factors is present here (Congress did not authorize BLM to makes rules implementing NAGPRA, and BLM's *ad hoc* interpretation of the term "group" was not promulgated in the exercise of any such authority), BLM's interpretation is not entitled to deference "but to a lesser 'respect' based on the persuasiveness of the agency decision." *Natural Resources Defense Council v. National Marine Fisheries Service,* No. 03-16842 (9th Cir. Aug. 24, 2005), Slip op. at 11418-19; *see also Bowen v. American Hospital Ass'n,* 476 U.S. 610, 632 n.30 (1986) (deference not appropriate where several agencies interpret the same statute).

twining; and completely ignores substantial evidence of continuity between Lovelock and Northern Paiute cultures documented by Grosscup. At the same time, in attempting to rebut Sprague's findings of a continuous Great Basin burial pattern, BLM disregards the textile evidence that links the Spirit Cave burials and cremation,[20] grossly distorts Ferguson's report for the National Museum of the American Indian, and ignores Korbori's findings that support Sprague's view that the Spirit Cave and Lovelock burials reflect a common burial pattern. And, it its discussion of Numic expansion archaeology, BLM misrepresents the "Basinist" perspective articulated by Aikens and others, erroneously describes the consensus view described by Madsen and Rhodes, and fails to discuss Madsen and Rhodes's observation, in the same paper, that in the western Great Basin "hunter-gatherers have operated in reasonably similar ways . . . over thousands of years."

BLM's discussion of the biological evidence emphasizes cranial measurements without ever addressing (or even acknowledging) Goodman and Martin's critique of such analyses, and without attempting to evaluate the *relative* value of the available biological evidence. It then downplays the more reliable dental evidence, which overwhelming demonstrated the remains were those of a Native American. Moreover, there is no evidence BLM *ever* considered Turner's more recent article, which found the Spirit Cave remains were most closely linked with modern Native Americans from Nevada. In its discussion of DNA, BLM makes no mention of

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[20] BLM's internally inconsistent use of the textile evidence – arguing that textile technology is a unique cultural marker, but then arguing that the Spirit Cave burials and cremation were the product of two different cultures, despite the presence of the unique warp-face-plain-weave textiles at both – is evidence of an arbitrary and capricious decision. *See Defenders of Wildlife v. EPA*, Nos. 03-71439 & 03-72894 (9th Cir. Aug. 22, 2005), Slip op. at 11006 (internally contradictory agency reasoning renders resulting action arbitrary and capricious).

O'Rourke's study finding regional stability in DNA haplogroups in the western Great Basin and adjacent areas over the last 2,000 years or more, a study at least one member of the Review Committee found especially noteworthy, or Kaestle's findings that support an admixture hypothesis in which Numic-speaking people are descendants of *both* a pre-Numic population in the Great Basin and later arriving Numic groups. Although the admixture hypothesis is discussed in several of Kaestle's papers, and is consistent with all of the archaeological and biological evidence, BLM never even mentions it. In its discussion of serum albumin, BLM quotes a passage from Kaestle out of context, simply ignoring conflicting hypotheses that do support BLM's preferred result.

BLM minimizes the significance of geographical affiliation – despite NAGPRA's specific directive to identify the remains' "geographical . . . affiliation," 25 U.S.C. § 3003(a) – by considering the geographic evidence in isolation. It gives no consideration to the Tribe's view that it is responsible for the "old ones" in its aboriginal territory, or to whether there is a relationship of shared group identity between the Tribe and prehistoric occupants of the area given their common lifestyle, similar desert-marsh adaptations, common reliance on textiles and use of many of the same items of material culture, and biological links.

In its analysis of the linguistic evidence, BLM does not confront internal inconsistencies in the linguistic arguments for a Numic expansion, does not address Grayson's critique of glottochronology, on which those arguments were based, and does not address Kroeber's, Goss's or Aikens' contrary arguments on the merits (and, indeed, does not even mention Kroeber). Moreover, BLM makes no effort to reconcile the Numic expansion arguments with the

archaeological evidence of continuity in the western, central and northern Great Basin, such as that presented by Grayson, Grosscup, Thomas, and Connolly *et al.*, or with the biological evidence of continuity or admixture, such as that presented by Brooks and Brooks, Turner, O'Rourke and Kaestle.

Finally, in its discussion of anthropological evidence, BLM eschews any mention of the unifying characteristics that have been recognized in the Great Basin Culture Area, and disregards most of the ethnographic literature on the Northern Paiute and *Toidikadi*, focusing only on burial practices and Sai'dukai legends. It thus fails to acknowledge the many similarities between the ethnographic Northern Paiute and the archaeological Lovelock culture, or to note the striking similarities between the *Toidikadi* and the people who were responsible for the Spirit Cave burials. It makes no mention of Northern Paiute or other Uto-Aztecan origin stories, which place their homeland in the Intermountain West. And it draws conclusions from the Sai'dukai legends that are at odds with basic anthropological knowledge about the Northern Paiute and the historic record.

These omissions and distortions were compounded by BLM's failure to consider *any* of the materials the Tribe submitted to the Review Committee, the deliberations and findings of the Committee, or the materials the Tribe provided to BLM (either through the Secretary or directly) after the Review Committee's meeting. Specifically, there is no evidence in the record that BLM gave any consideration to or engaged in any analysis of any of the following materials before the Director made her final decision to deny the Tribe's request for repatriation in February 2004:

> the expert reports prepared by the Tribe after August 2000 by Professors Goodman, Sprague, Walker, Plew, and O'Rourke;

Turner's study linking dentition from the Spirit Cave remains to recent Native Americans in Nevada;

the Tribal memorandum summarizing the Tribal reports and other evidence in the record for the Review Committee;

the transcript of Review Committee proceedings at which Tribal representatives and scholars in the areas of archaeology, burial practices, and biological anthropology made presentations to and responded to questions from the Review Committee, and Review Committee members reviewed and analyzed the evidence;

the 6-1 findings and recommendation of the Review Committee that: (1) BLM failed to fairly and objectively consider all relevant information; (2) the Spirit Cave remains and funerary objects were culturally affiliated with the Tribe under NAGPRA; and (3) the remains and objects should be repatriated to the Tribe; or

other analyses and evidence provided by the Tribe after August 2000.

In sum, BLM failed to consider a large volume of important evidence supportive of the Tribe's position before making its August 2000 determination. Much of the evidence it did consider as part of that determination was distorted. BLM failed to consider any of the evidence developed since the determination when making its February 2004 decision. These actions and inactions were arbitrary and capricious under the APA, and violated NAGPRA and the federal trust responsibility.

3. BLM Provided No Explanation for Its February 2004 Decision.

On February 27, 2004, BLM's Director wrote to the Tribe stating she had "reviewed all of the options to address your concerns and there is no additional course of action appropriate to pursue at this time." AAR 2549. Although the Director did not identify the options she had considered, her letter effectively determined that:

-- BLM would not assemble an independent team to review the available information in light of the Review Committee's findings and recommendation, as the Director's had indicated in her meeting with the Tribe and as had been discussed in the Tribe's subsequent correspondence with her;

-- BLM would not itself review and analyze the new materials the Tribe provided to the Review Committee and subsequently to BLM, or review all of the evidence in light of the Review Committee's finding that it had failed to fairly and objectively consider the evidence in its initial determination;

-- BLM would not follow the Review Committee's recommendation and repatriate the Spirit Cave remains and funerary objects to the Tribe;

-- BLM would not pursue the Tribe's suggestion and seek a Secretarial recommendation to repatriate the remains under 43 C.F.R. § 10.9(e)(6); and

-- BLM would not otherwise pursue a regional repatriation solution as suggested by the dissenting member of the Review Committee.

Neither the Director's February 27 letter, nor any other document in the record, provides any explanation for these decisions. In particular, the Director's letter provides no explanation why the Review Committee's recommendation was not followed, why BLM did not review the materials submitted since August 2000, or why the remains could not be repatriated as culturally unidentifiable under the existing regulation identified by the Tribe.

An "agency's explanation must be sufficient to permit effective judicial review." *Northwest Motorcycle Ass'n*, 18 F.3d at 1478 (9th Cir.1994). Because BLM provided *no*

explanation for its February 2004 decision, it should be set aside. *See California Dept. of Water Resources v. F.E.R.C.*, 341 F.3d 906, 910 (9th Cir. 2003) (decision arbitrary and capricious because no explanation for decision in the record); *Pyramid Lake Paiute Tribe*, 354 F. Supp. at 256 (decision arbitrary and capricious because record devoid of explanation).

VI. CONCLUSION.

For the reasons set forth above, the Court should grant summary judgment holding unlawful and setting aside BLM's determination that the Spirit Cave remains and funerary objects are not culturally affiliated with the Fallon Tribe and its decision not to repatriate those remains to the Tribe.

Dated: September 2, 2005.

Respectfully submitted,

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