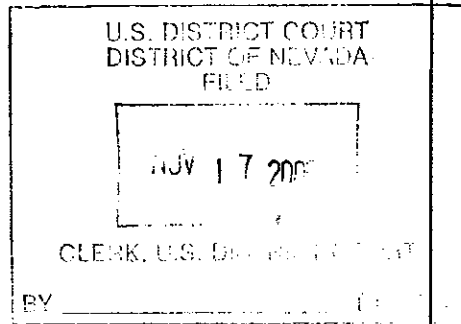


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12 UNITED STATES DISTRICT COURT
13 DISTRICT OF NEVADA

14 FALLON PAIUTE-SHOSHONE TRIBE,)
15 a federally recognized)
Indian tribe,)
16)
Plaintiff,)
17)
v.)
18)
UNITED STATES BUREAU OF)
19 LAND MANAGEMENT)
20)
Defendant.)
21)

CV-N-04-466-LRH (RAM)

22
23 **OPPOSITION OF THE UNITED STATES BUREAU OF LAND MANAGEMENT**
24 **TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND**
25 **CROSS-MOTION IN FAVOR OF SUMMARY JUDGMENT**
26
27
28

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MEMORANDUM

1
2 The United States Bureau of Land Management, an agency
3 or bureau of the U.S. Department of the Interior
4 (hereinafter "BLM" or "the government") hereby opposes the
5 Plaintiff Fallon Paiute-Shoshone Tribe's Motion for Summary
6 Judgment filed on September 12, 2005, and cross-moves for
7 summary judgment in its favor.¹ Grounds for this Opposition
8 and Cross-Motion ("Opposition") are stated below:

9 The Plaintiff Fallon Paiute-Shoshone Tribe ("the
10 Tribe") brought this action seeking review under the
11 Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et
12 seq., of actions of BLM in response to a request by the
13 Tribe under the Native American Graves and Repatriation Act
14 ("NAGPRA"), 25 U.S.C. § 3001 et seq., to repatriate the
15 approximately 10,000 year old human remains of "Spirit Cave
16 Man." NAGPRA and its implementing regulations impose a
17 systematic process for determining the rights of lineal
18 descendants or Indian tribes or Native Hawaiian
19 organizations to certain human remains, funerary objects,
20 sacred objects or objects of cultural patrimony with which
21 they are affiliated.

22 The Tribe maintains that the remains of Spirit Cave Man
23

24 ¹ Several parties have sought leave of this Court to
25 appear as amici curiae and to file briefs in support of their
26 various positions, including: The Ethnic Minority Council of
27 America; Friends of America's Past; Drs. Yves Goddard and Lyle
Campbell; Drs. Harry Glynn Custred, Jr. and Andrei Simic; and
the Ohio Archeological Council.

1 should have been repatriated to it under 25 U.S.C. §
2 3005(a)(4), and that the government's actions in making the
3 determination called for by that statute, as well as its
4 actions in carrying out its responsibilities under NAGPRA
5 and its trust duties to the Tribe, warrant setting aside
6 BLM's determination. The Tribe's arguments, however, do not
7 support their claim of repatriation, nor do they establish
8 any procedural impropriety or breach of trust by BLM in
9 carrying out the dictates of NAGPRA and the related
10 regulations.

11 As a threshold matter, the Tribe has failed to
12 establish this Court's jurisdiction over its substantive
13 claim arising from the government's determination that the
14 preponderance of the evidence amassed to date does not
15 support a finding of cultural affiliation of the Tribe to
16 the remains at issue. In the absence of a decision to
17 repatriate these remains, there is no "final agency action"
18 to review. The Plaintiff's substantive claim is therefore
19 not ripe and, accordingly, this Court has no jurisdiction
20 over it.

21 Even if this Court finds that it has jurisdiction over
22 the Tribe's claim regarding the substance of the
23 government's determination that the evidence does not
24 support a finding cultural affiliation, the Tribe has not
25 shown that the government's determination was arbitrary,
26 capricious, or otherwise not in accordance with law, and
27

1 therefore, cannot show that the decision of the BLM Director
2 not to alter that determination, communicated by letter to
3 the Tribe in February, 2004, should be held unlawful and set
4 aside under 5 U.S.C. § 706(2)(A).

5 Furthermore, the Tribe has not shown that in applying
6 NAGPRA, 25 U.S.C. § 3001 et seq. and its associated
7 regulations, the government departed from prescribed
8 procedures in any respect. Instead, the record establishes
9 not only the government's adherence to the letter of
10 NAGPRA's statutory and regulatory requirements, but also
11 that the government went above and beyond requirements to be
12 fair and equitable. The government's actions in applying
13 NAGPRA's requirements must therefore be upheld under 5
14 U.S.C. § 706(2)(D).

15 Finally, the Tribe asserts that the government breached
16 its trust obligations in several respects. This argument
17 assumes, however, that the government's trust
18 responsibilities to the Tribe in this context are more
19 expansive than its obligations under NAGPRA. The government
20 fulfilled its trust obligations to the Tribe by fulfilling
21 its obligations under NAGPRA. No additional obligations
22 arising from the government's trust obligations can be read
23 into the pertinent statutes and regulations. If the Tribe
24 cannot establish that the government's determination should
25 be set aside on the grounds that it was arbitrary,
26 capricious or otherwise not in accordance with law, 5 U.S.C.

27
28

1 § 706(2)(A), or that the government, in applying NAGPRA
2 "acted without observance of procedure required by" NAGPRA,
3 5 U.S.C. § 706(2)(D), then it cannot establish a right to
4 any relief based on a trust obligation to the Tribe.

5 As the argument below demonstrates, there is no basis
6 for setting aside the government's determination or
7 declaring its application of NAGPRA in violation of
8 prescribed procedures, and accordingly, the plaintiff Tribe
9 is not entitled to any relief under NAGPRA, 25 U.S.C. §
10 3013, or the APA, 5 U.S.C. § 706(2). Plaintiff's Motion for
11 Summary Judgment must therefore be denied, and summary
12 judgment instead entered in favor of the government.

13 **SUMMARY OF TRIBE'S CLAIMS**

14 There are three components to the Tribe's claim in this
15 case. The first is that the United States' determination
16 concerning the Tribe's claim of repatriation of the Spirit
17 Cave Man remains and associated funerary objects was
18 arbitrary and capricious and otherwise not in accordance
19 with law. 5 U.S.C. § 706(2)(A). The second component of
20 its claim is that the United States failed to adhere to the
21 prescribed procedures in NAGPRA leading up to and following
22 its determination. 5 U.S.C. § 706(2)(D). The third
23 component of the Plaintiff's claim is that the government,
24 in rendering its decision and in applying the procedures
25 prescribed by NAGPRA, violated its duties as a trustee to
26 the Tribe.

NATIVE AMERICAN GRAVES AND REPATRIATION ACT
25 U.S.C., 3001 ET SEQ.

I. Inventories of Human Remains and Associated Funerary Objects and Consultation Required in Connection with Inventories

Under the statutory and associated regulatory provisions of NAGPRA relevant to this dispute, museums receiving federal funds and housing human remains and associated funerary objects, and federal agencies with possession or control of such remains and objects, have certain obligations with respect to the preparation of inventories of such items, notice of the inventories to, and consultation with tribes affected or potentially affected by such inventories. Provisions relevant to the instant action are summarized below.

Because the remains at issue were discovered prior to November 16, 1990, see 25 U.S.C. § 3002, the requirements dictated by 25 U.S.C. § 3003 apply. Under that statute, federal agencies, including the Department of the Interior, and more specifically, BLM, as well as each museum with possession or control over holdings or collections of Native American human remains and associated funerary objects, are to "compile an inventory of such items and, to the extent possible based on information possessed by the particular museum or Federal agency, identify the ... cultural affiliation of such item(s)." 25 U.S.C. § 3003(a). See 43 C.F.R. § 10.9(a) (adding, in part, the following to the statutory text: "[t]he purpose of the inventory is to

1 facilitate repatriation by providing clear descriptions of
2 human remains and associated funerary objects and
3 establishing the cultural affiliation between these objects
4 and present-day Indian tribes ...").

5 Inventories are to be completed subject to a particular
6 set of requirements set forth in 25 U.S.C. § 3003(b).

7 First, inventories and identifications are to be completed
8 in consultation with tribal government officials and
9 traditional religious leaders, 25 U.S.C. § 3003(b)(1)(A);
10 second, they are to be completed by not later than five
11 years after November 16, 1990, 25 U.S.C. § 3003(b)(1)(B);²
12 third, they are to be made available both during the time they
13 are being conducted and afterward to the review committee
14 established under 25 U.S.C. § 3006. 25 U.S.C. §
15 3003(b)(a)(c).

16 25 U.S.C. § 3003(d) contains specific notification
17 requirements. If any particular set of Native American
18 human remains or associated funerary objects is determined
19 to be affiliated pursuant to § 3003, then the Federal agency
20 or museum concerned shall, not later than 6 months after
21 completion of the inventory, notify the affected Indian
22 tribes. 25 U.S.C. § 3003(d)(1).

23 _____
24 ² The regulations pursuant to NAGPRA, 43 C.F.R. Part 10,
25 were not promulgated until December 4, 1995. However,
26 inventories were to be completed by November 16, 1995 under
27 those regulations. 43 C.F.R. § 10.9(f). Museums that had
made good faith efforts to complete inventories by the
deadline were entitled to request an extension of the time
requirements from the Secretary. Id.

1 If a set of remains or objects is determined to be
2 affiliated, then a notice is published in the Federal
3 Register so indicating, 25 U.S.C. § 3003(d)(3). Native
4 American individuals or groups are allowed 30 days to
5 contest the determination.

6 The published notice is to include information
7 itemizing the Native American human remains or associated
8 funerary objects and the circumstances surrounding their
9 acquisition, 25 U.S.C. § 3003(d)(2)(A); list the human
10 remains and associated funerary objects that are clearly
11 identifiable as to tribal origin, 25 U.S.C. § 3003(d)(2)(B);
12 and list the Native American human remains and associated
13 funerary objects that are not clearly identifiable as being
14 culturally affiliated with that Indian tribe, but which,
15 given the totality of the circumstances surrounding the
16 acquisition of the remains or objects, are determined by a
17 reasonable belief to be remains or objects culturally
18 affiliated with the Indian tribe. 25 U.S.C. §
19 3003(d)(2)(C). See also 43 C.F.R. § 10.9(e).

20 There is no legal requirement to publish a notice of a
21 determination that remains or objects are unaffiliated.
22 Instead, a list of unaffiliated remains is sent to the
23 National Park Service, which in turn forwards it to the
24 NAGPRA Review Committee. 43 C.F.R. 10.9(e)(6).

25 Under 43 C.F.R. § 10.9(b), the federal agency and
26 museum are required, in connection with the inventory
27

1 process, to consult with lineal descendants of individuals
2 whose remains and associated funerary objects are likely to
3 be subject to the inventory provisions of these regulations,
4 43 C.F.R. § 10.9(b)(1)(i); and Indian tribe officials and
5 traditional religious leaders from whose tribal lands the
6 remains and funerary objects originated, and that are or are
7 likely to be culturally affiliated with human remains and
8 associated funerary objects. 43 C.F.R. § 10.9(b)(1)(ii).

9 The consultation process between the federally funded
10 museum or federal agency officials, on the one hand, and
11 tribes and claimed lineal descendants, on the other, must
12 begin "as early as possible, no later in the inventory
13 process than the time at which investigation into the
14 cultural affiliation of human remains and associated
15 funerary objects is being conducted." 43 C.F.R. §
16 10.9(b)(2). The consultation may begin with a letter but
17 must be followed up with face-to-face dialogue with tribes
18 interested in continued consultation. Id.

19 During this consultation process, the museum or federal
20 agency officials are to provide certain information in
21 writing to lineal descendants and officials and religious
22 leaders representing tribes that are or are likely to be
23 culturally affiliated with the remains or funerary objects,
24 including: "a list of all Indian tribes that are, or have
25 been consulted regarding the particular human remains and
26 associated funerary objects; a general description of the
27

1 conduct of the inventory; the projected time frame for
2 conducting the inventory; and an indication that additional
3 documentation used to identify cultural affiliation will be
4 supplied upon request." 43 C.F.R. § 10.9(b)(3).

5 In the course of the inventory consultation, the museum
6 or Federal agency officials must request from the tribes to
7 which information is provided under 43 C.F.R. § 10.9(b)(3),
8 the name and address of the tribal official to act in
9 consultations in the particular matter; and recommendations
10 on how the consultation process should be conducted. 43
11 C.F.R. § 10.9(b)(4).

12 **II. Criteria for Determination of Cultural Affiliation and**
13 **Supporting Repatriation**

14 For each set of remains or objects, the federal agency,
15 in this case, BLM, has to identify cultural affiliation by
16 determining if there is a "shared group identity that may be
17 reasonably traced historically or prehistorically between a
18 present day Indian tribe or individual and an identifiable
19 earlier group." 25 U.S.C. § 3001(2); 43 C.F.R. §§ 10.2(e),
20 10.14(c). All of the following criteria must be met to
21 determine cultural affiliation between a present day tribe
22 and the human remains, funerary and other objects of an
23 earlier group:

- 24 (1) Existence of an identifiable
25 present-day Indian tribe with standing
26 under [NAGPRA]; (2) evidence of the
27 existence of an identifiable earlier
28 group; and (3) evidence of the existence
of a shared group identity that can be
reasonably traced between the present-

1 day Indian tribe and the earlier group.
2 ... Evidence to support this
3 requirement must establish that a
4 present-day Indian tribe ... has been
5 identified from prehistoric or historic
6 times to the present as descending from
7 the earlier group.

8 43 C.F.R. § 10.14(c). Under 25 U.S.C. § 3001(7), "Indian
9 tribe" is defined as "any tribe, band, nation, or other
10 organized group or community of Indians ... which is
11 recognized as eligible for the special programs and services
12 provided by the United States to Indians because of their
13 status as Indians."

14 Support for the existence of an identifiable earlier
15 group, 43 C.F.R. § 10.14(c)(2), includes:

16 evidence sufficient to (i) establish the
17 identity and cultural characteristics of
18 the earlier group; (ii) document
19 distinct patterns of material culture
20 manufacture and distribution methods for
21 the earlier group; or (iii) establish
22 the existence of the earlier group as a
23 biologically distinct population.

24 A finding of cultural affiliation is to be based upon
25 an "overall evaluation of the totality of the circumstances
26 and evidence pertaining to the connection between the
27 claimant and the material being claimed, and should not be
28 precluded solely because of gaps in the record." 43 C.F.R.
§ 10.14(d). The determination of whether a present-day
tribe is affiliated to human remains and associated funerary
objects "must be established by using the following types of
evidence: geographical, kinship, biological, archeological,
anthropological, linguistic, folklore, oral tradition,

1 historical, or other relevant information or expert
2 opinion." 43 C.F.R. §§ 10.2(d), 10.14(e).

3 Cultural affiliation of a present-day Indian tribe to
4 human remains and associated funerary objects is established
5 when, in the judgment of the agency, a preponderance of the
6 evidence shows a relationship of shared group identity. 43
7 C.F.R. § 10.14(f). Scientific certainty is not required.
8 Id. If there is no demonstrable relationship, then the
9 remains or objects are deemed unaffiliated.

10 Affiliated remains are subject to repatriation, upon
11 request by the lineal descendants or the culturally
12 affiliated tribe. The federal agency retains possession and
13 control of unaffiliated remains and continues to curate them
14 at a museum. If the determination is not contested, then
15 the agency consults with the lineal descendants or
16 affiliated tribe regarding the place and manner of
17 repatriation, and repatriates the remains or objects
18 according to their wishes. The law allows for deferred
19 repatriation of remains and objects that are "indispensable
20 for the completion of a specific scientific study, the
21 outcome of which would be of major benefit to the United
22 States." 25 U.S.C. § 3005(b); 43 C.F.R. § 10.10(c)(1).

23 Pursuant to 25 U.S.C. § 3005(a)(4) and 43 C.F.R. §
24 10.10(b)(1), a tribe may make a claim regarding human
25 remains that are determined through the inventory process to
26 be unaffiliated. The claimant must show by a preponderance

27

28 **OPPOSITION OF BLM TO TRIBE'S MOTION FOR SUMMARY JUDGMENT AND
CROSS-MOTION FOR SUMMARY JUDGMENT - PAGE 11**

1 of the evidence that the remains are culturally affiliated.
2 All relevant information, including geographical, kinship,
3 biological, archaeological, anthropological, linguistic,
4 folklore, oral tradition, historical, or expert opinion may
5 be considered. Thus, upon written receipt of the evidence
6 for such a claim, the federal agency must evaluate it with
7 the same process and criteria used in making the initial
8 determination. See 43 C.F.R. § 10.14(e). The agency may
9 affirm the original determination or make a new
10 determination. The agency retains ownership and control of
11 the remains or objects and cannot complete repatriation
12 until all claims are settled.

13 **III. The NAGPRA Review Committee**

14 25 U.S.C. § 3006(a) calls for the establishment of a
15 committee ("the Review Committee") "to monitor and review
16 the implementation of the inventory and identification
17 process and repatriation activities required under sections
18 3003, 3004 and 3005 of [Title 25]." Membership of the
19 Review Committee is comprised of 7 persons appointed by the
20 Secretary from various backgrounds and disciplines. 25
21 U.S.C. § 3006(b).

22 The Review Committee's responsibilities are broadly
23 defined and include, in pertinent part, the following: (1)
24 "monitoring the inventory and identification process ... to
25 ensure a fair, objective consideration and assessment of all
26 available relevant information and evidence," 25 U.S.C. §
27

1 3006(c)(2); (2) "upon the request of any affected party,
2 reviewing and making findings related to the identity or
3 cultural affiliation of cultural items or the return of such
4 items," 25 U.S.C. § 3006(c)(3); (3) "facilitating the
5 resolution of any disputes among [claimants] and Federal
6 agencies or museums relating to the return of [cultural]
7 items, including convening the parties to the dispute if
8 deemed desirable," 25 U.S.C. § 3006(c)(4); 43 C.F.R. §§
9 10.16(a) and 10.17; (4) "compiling an inventory of culturally
10 unidentifiable human remains that are in the possession or
11 control of each Federal agency and museum and recommending
12 specific actions for developing a process for disposition of
13 such remains," 25 U.S.C. § 3006(c)(5); 43 C.F.R. §§ 10.10(g)
14 and 10.16(a); (5) consulting with Indian tribes and museums
15 on various matters, 25 U.S.C. § 3006(c)(6); (6) "consulting
16 with the Secretary in the development of regulations to carry
17 out this chapter," 25 U.S.C. § 3006(c)(7); (7) performing
18 other related functions as assigned by the Secretary, 25
19 U.S.C. § 3006(c)(8); (8) making recommendations, if
20 appropriate, regarding future care of cultural items which
21 are to be repatriated. 25 U.S.C. § 3006(c)(9). Under 43
22 C.F.R. § 10.16(a), "[t]he Review Committee [is to] advise
23 Congress and the Secretary on matters relating to these
24 regulations and [NAGPRA]."

25 Under 43 U.S.C. § 10.17(a), "[a]ny person who wishes to
26 contest actions taken by museums, Federal agencies, [or]

27

1 tribes ... with respect to the repatriation and disposition
2 of human remains [or] funerary objects ... is encouraged to
3 do so through informal negotiations to achieve a fair
4 resolution of the matter."

5 The Review Committee may facilitate the
6 informal resolution of disputes ... among
7 interested parties that are not resolved
8 by good faith negotiations. Review
9 Committee actions may include convening
10 meetings between parties to disputes,
11 making advisory findings as to contested
12 facts and making recommendations to the
13 disputing parties or to the Secretary as
14 to the proper resolution of disputes
15 consistent with these regulations and
16 [NAGPRA].

17 43 C.F.R. § 10.17(b).

18 Despite the breadth of the Review Committee's charge
19 under NAGPRA and its regulations, it is merely an "advisory
20 committee." 43 C.F.R. §§ 10.2(c)(2) and 10.16(b). No
21 recommendation, finding, report, or other action of the
22 Review Committee is binding on any person, including a
23 Federal agency carrying out the dictates of NAGPRA. See 43
24 C.F.R. § 10.16(b).

25 **RELEVANT FACTS**

26 **I. Background on Spirit Cave Man and Associated Funerary**
27 **Objects³**

28 **A. Discovery of Spirit Cave Man by S.M. Wheeler and**
Georgia Wheeler

Spirit Cave, located in the Grimes Point/Stillwater
area, about seventy-five miles east of Reno, Nevada, was

³ All of the facts detailed in Section I are contained at
Amended Administrative Record ("AAR") 01990-01994.

1 excavated in 1940 by S. M. Wheeler and Georgia N. Wheeler.⁴
2 (Wheeler and Wheeler 1940; 1969:73-78) As described by the
3 Wheelers, the cave is a west-facing, dry rockshelter,
4 approximately twenty-five feet wide, fifteen feet deep and an
5 average of five feet high. The cave was wavecut into a beach
6 terrace of Lake Lahontan and its walls were tufa covered,
7 suggesting long periods of inundation by the lake. It was
8 filled with wind-blown sand deposits, roof-spall, and rocks
9 apparently brought in by people. There was a quarter circle
10 of rocks extending from the center of the rear wall to just
11 inside of the entrance on the north wall. There was also a
12 small chamber off of the northeast corner of the main cave.

13 On August 11, 1940, the Wheelers began excavating within
14 the arc of rocks and just over a foot below the surface
15 uncovered "a large mat, very finely twined, with a warp of
16 split tules and a weft of native hemp cord," that was wrapped
17 around "a few human bones, all that remained of some early
18 Nevadan." (Wheeler and Wheeler 1969:73) This is the burial
19 recorded as Burial #1 by the Wheelers, who collected the mat
20 and reburied the associated human remains. (Dansie 1997:5)
21 Next, the Wheelers discovered that "immediately below this
22 [Burial #1] was another large mat of tules, the warp held
23 together by rows of tule twining about 5 inches apart" and
24 this mat covered a second burial. (Wheeler and Wheeler

25
26 ⁴ Parenthetical references in this section are to papers
27 referenced in the bibliography of the Determination. AAR
02062-02092.

1 1969:73) The Wheelers recorded this burial as Burial #2, and
2 it is now known as the Spirit Cave Mummy, or Spirit Cave Man.

3 Burial #2 was buried in a pit measuring "6 feet long, 4
4 feet wide, and 3 feet 9 inches deep" that was "lined with
5 sagebrush, on which the mortuary bundle was deposited and
6 then covered with more brush. The upper part of the pit had
7 been filled with rocks that the wind eventually concealed
8 with fine sand. Later the intrusive upper burial [Burial #1]
9 was laid on the first." (Wheeler and Wheeler 1969:73) As
10 described by the Wheelers, the head of the mortuary bundle
11 [Burial #2] was "at a depth of 2 feet 4 inches and slightly
12 higher than the hips," and was "oriented 55 degrees east of
13 true north." After photographing and recording it, the
14 bundle was removed and transported to the Nevada State Museum
15 ("the Museum"), where it remains today. (NSM 1996)

16 After removing the bundle burial [Burial #2] to the
17 Museum, the Wheelers spent several days cleaning, opening,
18 and studying it. After the bundle was opened, the Wheelers
19 describe the body as follows:

20 It lay on its right side on a fur
21 blanket, the legs being semi-flexed, with
22 the knees opposite the hips. The upper
23 half was wrapped in a close twined mat of
24 the type found with the intrusive burial.
25 It was sewn together around the head. A
26 similar mat was wrapped around the
27 balance of the body and a large mat of
28 tules, 35 inches by 50 inches, was laid
over the entire bundle, the lower corners
being tied together under the feet. . . .

26 The bones of the lower portion of the
27 body were exposed but, from the hips

1 upward, it was partially mummified. The
2 scalp was complete with a small tuft of
3 hair remained. Within an hour after
4 exposure to the light and air the black
5 hair became reddish. The clothing
6 consisted of a pair of leather moccasins
7 and a breechcloth of fiber. There were no
8 other accompaniments with the burial.
9 (Wheeler and Wheeler 1969:73-74).

6 Based on their observations and expert opinions at the
7 time, the Wheelers thought that Burial #2 was "a young adult
8 male" that was "approximately 1500 to 2000 years old."
9 (Wheeler and Wheeler 1969:74) They also observed that "all
10 of these mats [bundled around Burial #2] were of types found
11 elsewhere in the caves of the Fallon area and in Lovelock
12 Cave 40 miles to the north." (Wheeler and Wheeler 1969: 73)

13 Five days after removing Burial #2, the Wheelers
14 returned to Spirit Cave to look for more burials and "against
15 the rear wall at a point about 10 feet south of the initial
16 discovery" [Burial #1 and #2] and at a depth of 24 inches
17 found "a small twined bag of split tules from beneath of
18 which protruded the edge of a close twined bag of native
19 hemp." (Wheeler and Wheeler 1969:74) The bags "lay on the
20 bottom and at the rear end of a pit 5 feet wide, 6 feet long,
21 and 2.5 feet deep which had been used for crematory purposes
22 and then filled in." (Wheeler and Wheeler 1969:74) The
23 Wheelers recorded the human remains in the two bags as
24 Cremation #1 and Cremation #2 and noted that "both were
25 definitely buried at the same time." (Wheeler and Wheeler
26 1969:75, 77-78)

1 The Wheelers concluded that "complete excavation
2 revealed that Spirit Cave had not been inhabited but the
3 shelter had been used for burial and the small inner chamber
4 for storage." (Wheeler and Wheeler 1969:75)

5 **B. Subsequent Description and Analysis**

6 **1. Radiometric Dating**

7 Based on their observations, and expert opinions, the
8 Wheelers thought that Burial #2 was, "a young adult male"
9 that was "approximately 1500 to 2000 years old." (Wheeler and
10 Wheeler 1969:74) However, a series of subsequent radiometric
11 dates (AMS C₁₄, uncalibrated) showed that this assessment was
12 in error. (Kirner et al. 1997:54-56) The weighted mean of a
13 series of dates run on hair and matting revealed that Burial
14 #2 dates to a weighted mean age of 9,415+/-25 years B. P.
15 (Tuohy and Dansie 1997:25)

16 In addition, the matting collected from Burial #1 has
17 been dated to 9,270+/-60 B.P.); and an adult female bone
18 fragment, which was assumed to be part of Burial #1 (Tuohy
19 and Dansie 1997:35), has been dated to 9300+/-70 years B.P.
20 (Tuohy and Dansie 1997:25) The cremation that the Wheelers
21 labeled as Cremation #2 has been dated to 9040+/-50 years
22 B.P.; Mr. Tuohy and Ms. Dansie (1997:25,35) assumed, but did
23 not demonstrate, that this date applies to Cremation #1 as
24 well.

25 A sub-adult male bone from the cave dated to 4640+/-50
26 years B.P.; a coiled basket fragment dated to 2,200+/-60
27

1 years B.P.; and a twined grass mat dated to 1,700+/-60 years
2 B.P. (Tuohy and Dansie 1997:25)

3 **2. Human Remains**

4 **a. Spirit Cave Man**

5 Although the Wheelers identified Burial #2 as, "a young
6 adult male," subsequent analysis and description identified
7 it as the remains of a 40-50 year old male. (Damadio 2000:5)

8 Cranial dimensions of Burial #2 were statistically
9 compared to a worldwide sample of contemporary populations
10 and this demonstrated that the remains fall outside of the
11 range of variation of any population represented in their
12 comparative sample. (Jantz and Owsley 1997:66-81)

13 **b. Cremated Remains**

14 The Wheelers assumed that the cremated human remains in
15 the two bags were from two individual burials and labeled
16 them as Cremation #1 and Cremation #2. (Wheeler and Wheeler
17 1969: 77-78) Later analysis netted differing opinions. One
18 examination suggests that Cremations #1 and #2 are the
19 remains of one individual (Owsley 1996), possibly a 25 year
20 old woman. (Tuohy and Dansie 1997:35) C.S. Larsen (1985:
21 395) suggests that there are two cremations, one of which is
22 an adult (Archaeological Human Remains ("AHUR") 773) and the
23 other of which a 25 year old woman. (AHUR 752) BLM
24 reexamined the cremations and concluded that Cremations #1
25 and #2 are the remains of one individual, most likely those
26 of a young adult female. (Damadio 2000:35)

1 **c. Additional Human Remains**

2 The Wheelers did not publish descriptions of any human
3 remains other than Burial #1, Burial #2, Cremation #1 and
4 Cremation #2. However, their field notes identified (Wheeler
5 and Wheeler 1940), and subsequent analysis confirms, at least
6 two additional sets of fragmented human remains from Spirit
7 Cave. (Owsley 1996) One set (AHUR 770) appears to include
8 fragments of the remains of a 30-35 year old female buried
9 9300+/-70 years B.P. (Tuohy and Dansie 1997:25) Based on
10 dating, Mr. Tuohy and Ms. Dansie (1997:35) assumed that the
11 woman may be Burial #1; however, the Wheelers (Wheeler and
12 Wheeler 1940) said that Burial #1 was not collected and
13 suggested that she was a different burial altogether. In
14 addition, C.S. Larsen (1985:395) noted that there are
15 fragmentary remains from additional individuals cataloged
16 under AHUR 770, but does not indicate number, age, or gender.
17 Dr. Stephanie Damadio (2000: 36) suggested a maximum of
18 fragmented remains from five individuals are included in AHUR
19 770. The other (AHUR 748) is an isolated adolescent male
20 buried 4640+/-50 years B.P. (Damadio 2000:36); (Tuohy and
21 Dansie 1997:25)

22 **3. Textiles**

23 The Wheelers observed that "all of these mats [bundled
24 around Burial #2] were of types found elsewhere in the caves
25 of the Fallon area and in Lovelock Cave 40 miles to the
26 north." (Wheeler and Wheeler 1969: 73) Subsequent analysis
27

1 identified the matting in which Burials #1 and #2 were
2 wrapped as "diamond plaited" mats unique to Spirit Cave.
3 (Tuohy and Dansie 1997:34) C.S. Fowler (1997; 2000) was, as
4 of July 2002, in the process of fully describing the matting
5 from Spirit Cave and has now redefined the "diamond plaited"
6 matting and bags as warp-faced-plain-weave textiles because
7 the diamond pattern is not made by twill plaiting. This
8 textile type is very fine and even weaving with the warp
9 woven so tightly that the weft is barely visible (hence warp
10 faced). The warp is constructed from split bulrush stems and
11 the weft from paired cords of dogbane, big sagebrush, or
12 juniper. (Fowler et al. 2000:7) Edge cords are principally
13 big sage. (Fowler et al. 2000:8) The quality and uniformity
14 of the textiles may be the result of weaving on a loom or
15 other frame. (Fowler et al. 2000:10-13) All known
16 archaeological examples of warp-faced-plain-weave textiles
17 similar to those from Spirit Cave are found in sites within a
18 few miles of Spirit Cave and date to between 9470+/-60 and
19 9040+/-50 years B.P. (Fowler et al. 2000:13-14) C.S. Fowler
20 (2000:14) notes a "typologically similar," but much less fine
21 mat from Oregon, which has been dated to 540+/- 50 years B.P.
22 It is unlikely that the Oregon mat and the Spirit Cave
23 textiles come from a continuous tradition and "there is no
24 evidence [other than the Oregon mat] that this particular mat
25 making technique continued into ethnographic times" in the
26 Great Basin. (Fowler et al. 2000:14)

27

28 OPPOSITION OF BLM TO TRIBE'S MOTION FOR SUMMARY JUDGMENT AND
CROSS-MOTION FOR SUMMARY JUDGMENT - PAGE 21

1 **II. The Inventory Process; Requests for Scientific Testing;**
2 **Consultation with the Fallon Paiute-Shoshone Tribe**

3 After the remains and other objects above were removed
4 from Spirit Cave, they were housed in the Museum, where they
5 remain to this date. The care provided by the Museum was
6 provided pursuant to a Cooperative Agreement entered into by
7 the Museum and BLM pursuant to the Federal Antiquities Act of
8 June 8, 1906, 34 Stat. 225, codified at 16 U.S.C. § 431, and
9 the Public Land Administration Act, Pub. L. 86-644, 74 Stat.
10 506, codified at 43 U.S.C. § 1361. Amended Administrative
11 Record ("AAR") 102.

12 Under NAGPRA, federal agencies, including the Department
13 of the Interior, and more specifically, BLM, as well as each
14 federally funded museum with possession or control over
15 holdings or collections of Native American human remains and
16 associated funerary objects, are to "compile an inventory of
17 such items and, to the extent possible based on information
18 possessed by such museum or Federal agency, identify the
19 geographical and cultural affiliation of such item(s)." 25
20 U.S.C. § 3003(a). See also 43 C.F.R. § 10.9(a).

21 Amy Dansie of the Museum and Dr. Pat Barker, BLM Nevada
22 State Archaeologist, met on December 13, 1994 to discuss the
23 inventory process and procedures. Ms. Dansie's notes
24 indicate that she and Dr. Barker addressed various issues
25 regarding "affiliation" for purposes of the inventory
26 process, including an archaeological theory referred to
27 "Numic Spread." AAR 00130. The Numa speaking peoples

1 include the Northern Paiute. Generally speaking, this much
2 discussed theory is that the Numic peoples expanded into the
3 area they now occupy as of some date between 500 and 3,000
4 years ago. Citing this concept, Dr. Barker suggested to Ms.
5 Dansie the liberal approach that any item older than 3,000
6 years should be listed as unaffiliated. AAR 00130. Ms.
7 Dansie and Dr. Barker acknowledged that the Numic expansion
8 concept is a "controversial topic," because it conflicts with
9 the beliefs of tribes that they have always been where they
10 now are. AAR 00130. Ms. Dansie noted that they would
11 "probably have to work out the details of this topic much
12 more thoroughly during the consultation process between BLM
13 and the Tribes." AAR 00130.

14 Dr. Barker and Ms. Dansie discussed the issue of
15 invasive scientific testing at this meeting. AAR 00132. Dr.
16 Barker indicated that approval for such testing would have to
17 be given by BLM on a burial by burial basis; no blanket
18 approval would be given. AAR 00132. Ms. Dansie, and her
19 colleague, Don Touhy, noted in January, 1996 that the
20 scientific data being sought was necessary in order to
21 determine cultural affiliation. AAR 00138. They expressed
22 concern that a request for permission from a tribe might be
23 viewed as tacit acceptance of that tribe's affiliation to the
24 remains. AAR 00138. BLM did not share this concern.

25 On March 15, 1996, in the course of the inventory
26 process, Ms. Dansie sought permission from BLM to conduct
27

1 certain scientific testing, including DNA analysis.⁵ AAR
2 0144, 00147. Following this request, Pat Barker wrote
3 several interested tribes, including the Plaintiff, AAR
4 00150, informing them of the requests for scientific studies.
5 One of the purposes of these proposed studies was to assist
6 in determining the cultural affiliation of the remains
7 because "they would contribute important data necessary to
8 address the issue of repatriation fairly and rationally."
9 AAR 00150. The Plaintiff, as well as other tribes, were
10 invited to participate in a meeting on April 23, 1996 to
11 discuss the issues relating to the proposed studies. AAR
12 00150. At the April 23, 1996 meeting between BLM, the Museum
13 and tribal representatives of the Pyramid Lake Paiute Tribe,
14 tribal representatives clearly opposed any consumptive
15 testing. AAR 00200.

16 An additional meeting between representatives of BLM,
17 the Museum and the Tribe to discuss the testing request took
18 place on May 9, 1996. AAR 00174. At the meeting, the Tribe
19 acknowledged that it had not responded to earlier
20 correspondence related to NAGPRA from federal agencies or the
21 Museum.⁶ AAR 00174. Tribal members expressed their belief

22
23 ⁵ A chronology prepared by Pat Barker and Cynthia Ellis
24 relating to requests for and testing of the Spirit Cave Man
remains is contained at AAR 00884-00898.

25 ⁶ The Museum made several efforts to get tribal
26 representatives, including representatives of the Plaintiff
Tribe, to consult with it regarding its inventory under the
27 (continued...)

1 that the age of the Spirit Cave Man was not relevant, nor was
2 its relationship to contemporary Indian populations. AAR
3 00174. The Tribe considers itself to be a caretaker of all
4 of the "old ones," and requested that they be allowed to
5 rebury the Spirit Cave Man remains as soon as possible, along
6 with other human remains housed at the Museum. AAR 00174.
7 Museum staff indicated that they did not intend to cause harm
8 to or insult Native Americans. AAR 00175. In considering
9 DNA and other consumptive tests, they were attempting to
10 establish the most likely descendants of the remains under
11 NAGPRA, and intended to repatriate any known Northern Paiute
12 affiliated remains as soon as possible. AAR 00175.

13 At this meeting, Dr. Barker reassured the Tribe that BLM
14 had not allowed any photographs or public viewing of any of
15 the remains because of the concerns expressed by Native
16 Americans. He explained, however, that the "federal
17 government was a government of laws and as such" was "trying
18 to balance the spiritual" and "scientific issues and find
19 legally defensible ways to sort through [these] issues and
20 come to a decision." AAR 00175.⁷ The Tribal Chair closed by
21

22 ⁶ (...continued)
23 grant provided to it by the United States to facilitate the
24 inventory process, 25 U.S.C. § 3008, and even offered to pay
25 the travel expenses of such representatives. AAR 00407. As
of April 16, 1997, no tribal representative had taken
advantage of that offer. AAR 00407.

26 ⁷ This view was consistent with the view expressed by Pat
Barker and Cynthia Ellis Pinto in an article cited by the
27 (continued...)

1 agreeing that the Northern Paiute tribes "needed to organize
2 to deal with rapidly developing NAGPRA repatriation issues.
3 He admitted that the Tribes had not yet come to any consensus
4 about how to deal with NAGPRA." AAR 00175.

5 On or about May 28, 1996, Jean Rivers-Council, BLM
6 Associate State Director, wrote to the Plaintiff's Tribal
7 Chairman, Alvin Moyle, thanking him for his input at the May
8 8, 1996 meeting and noted that "[i]n the spirit of
9 cooperation, I hope that we will continue to work together to
10 address the issues that were raised at this meeting." AAR
11 00181.

12 On June 14, 1996, Sandra Allen, BLM Deputy State
13 Director, wrote to the Director of the Museum, Scott Miller,
14 indicating that based on reactions of tribal representatives
15 at the April and May, 1996 meetings, BLM was still
16 considering the Museum's request for consumptive testing, but
17 that it not yet made a decision. AAR 00200. That letter
18 indicated that after BLM received the results of the
19 inventory, it could make affiliation decisions and thereafter
20 respond to the Museum's requests for further studies. AAR

21

22 ⁷ (...continued)

23 Plaintiff Tribe. Exhibits to the Fallon Tribe's Motion for
24 Summary Judgment ("Tribe's Exhibits") at Exh. D (Pat Barker
25 and Cynthia Pinto, *Legal and Ethnic Implications of the Numic
26 Expansion*), as well as with an article by Amy Dansie, AAR
27 00383 (*Amy Dansie, Should Ancient Human Remains be Available
for Study?*). These articles do not indicate bias; rather they
acknowledge that NAGPRA allows for scientific study and
requires a balancing of the interests of tribes with science
in determining affiliation.

28 OPPOSITION OF BLM TO TRIBE'S MOTION FOR SUMMARY JUDGMENT AND
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1 00201.

2 The Museum sent BLM the inventory on July 1, 1996. AAR
3 00203-00270.⁸ That inventory revealed 120 sets of remains,
4 for which the Museum staff listed 3 as affiliated and 117 as
5 unaffiliated. AAR 00298. A notice of inventory completion
6 for the 3 sets of remains determined to be affiliated was
7 sent to the National NAGPRA Office. The Departmental
8 Consulting Archaeologist then published the notice of
9 inventory completion in the Federal Register. AAR 00295.
10 That notice, which was disseminated on October 3, 1996,
11 confirmed that a "detailed inventory and assessment of the
12 human remains and associated funerary objects" in the control
13 of the Nevada State Office of BLM had been made by Museum
14 staff and BLM officials "in consultation with the Fallon Band
15 of Northern Paiute Indians" and announced the decision that
16 there was a "relationship of shared group identity which
17 [could] be reasonably traced between" the remains covered by

18
19 ⁸ According to a letter dated February 21, 1997 from Scott
20 Miller to Ann Morgan, BLM State Director, the National Park
21 Service had granted the Museum an extension on the final
22 filing of the inventory until such time as further
consultation with tribal leaders could be arranged during the
Spring of that year. AAR 00352.

23 No BLM state office met the November 16, 1995, deadline
24 in 25 U.S.C. § 3003(b)(1)(B). AAR 0459-0460. The Nevada State
25 Office did not meet it because it did not have complete
26 inventories as provided in WO IM 96-05. That IM stated that
27 "if an inventory has not progressed through consultation and
analysis to the point that an agency determination of clear
and probable affiliation has been made, it would be premature
to notify a tribe or to publish [it] in the Federal Register."
AAR 00459-00460.

1 that notice (not the Spirit Cave Man) and the Fallon Band of
2 the Northern Paiute Indians. AAR 00295.

3 BLM also undertook to review the inventory provided by
4 the Museum. It concurred with the Museum on the 3 sets of
5 affiliated remains. AAR 00295, 00298. 2 of these sets were
6 repatriated to the Northern Paiute and 1 to the Western
7 Shoshone. AAR 00459. BLM saw fit, however, to evaluate more
8 carefully the Museum's conclusion that the remaining 117 sets
9 of remains, which included the remains of Spirit Cave Man and
10 associated funerary items, were unaffiliated. AAR 00298. It
11 established a two-phase process, the first of which focused
12 on the 41 sets of remains for which there had been a request
13 by the Museum for consumptive testing. AAR 00298. The
14 second phase focused on the remaining 76 items for which
15 there were no pending claims of affiliation. AAR 00298.

16 BLM concluded that as to the 41 sets of remains covered
17 by the first phase referenced above (including the Spirit
18 Cave Man), the Museum was correct that the preponderance of
19 the available data indicated that such remains were
20 "appropriately considered to be unaffiliated, i.e., that the
21 remains predate contemporary tribal groups living in Nevada
22 and cannot reasonably be culturally or genetically affiliated
23 with any of them." AAR 00299. Consultation with tribes,
24 including the Plaintiff, regarding these 41 sets of remains,
25 which had begun on April 8, 1996, continued. AAR 00460.

26 As to the items covered by the second phase, BLM
27

1 indicated that, as of October, 1996, it had not considered
2 the evidence for a determination of affiliation of such
3 remains, "but preliminary work suggest[ed] that most of them
4 [might] be affiliated and [would] be eventually repatriated."
5 AAR 00299. BLM's consideration and analysis of the
6 affiliation questions as to the remaining 76 items was
7 deferred, however, until it reached decision on the DNA
8 testing of the 41 items covered by the first phase. AAR
9 00460.

10 On August 29, 1996, after the completion of the
11 inventory, the Museum requested permission from BLM to
12 perform consumptive testing on some of the basketry items
13 found in Spirit Cave. AAR 00282. BLM granted this
14 permission on September 3, 1996. AAR 00293.

15 In or around April, 1997, Alvin Moyle, Chair of the
16 Tribe, met with Museum Director Scott Miller. AAR 00386.
17 The purpose of that consultation meeting was to "see what
18 kind of reaction might be expected from the Tribe on
19 'unaffiliated' decisions." AAR 00386.

20 The Tribe made formal requests for repatriation on May
21 19 and 22, 1997 under 25 U.S.C. § 3003(c). AAR 00424, 00422-
22 00442. BLM Nevada State Director, Ann Morgan, acknowledged
23 receipt of the Tribe's repatriation request on June 5, 1997.
24 AAR 00446. Ms. Morgan stated that she fully intended "to
25 uphold all Federal regulations and laws governing the
26 repatriation of Native American human remains, funerary
27

1 objects and sacred objects." AAR 00446. She further noted
2 that "[t]he information in [the Tribe's] claim [would] be
3 very useful in [her] deliberations, as [would] be the
4 linguistic and oral tradition information [the Tribe was]
5 planning to send." AAR 00446.

6 On June 17, 1997, Alvin Moyle met with Ann Morgan. AAR
7 00461. At that meeting, he raised his concern that the
8 Museum had been conducting destructive scientific testing on
9 the human remains from Spirit Cave. AAR 00461. On June 23,
10 1997, Ms. Morgan wrote Mr. Moyle, indicating that BLM had not
11 approved destructive testing of the Spirit Cave Man remains
12 or any others belonging to BLM. She further indicated that
13 she had "reviewed information provided by the [Museum],
14 asserting these remains to be unaffiliated," and stated that
15 it [was] "appropriate that Native Americans have an equal
16 opportunity to present evidence they believe supports their
17 claim that the Spirit Cave material is affiliated with the
18 Fallon Paiute-Shoshone Tribe." AAR 00447. By letter dated
19 August 25, 1997, Ms. Morgan assured Mr. Moyle that she had
20 confirmed with Scott Miller, the Director of the Museum, that
21 the Museum had not and would not conduct unauthorized
22 destructive tests on remains controlled by BLM in Nevada.
23 AAR 00461.

24 One month later, on September 29, 1997, Ms. Morgan
25 provided various materials that BLM was considering in
26 determining the cultural affiliation of human remains from
27

1 Spirit Cave. AAR 00463. In that letter, Ms. Morgan
2 specifically noted:

3 It will assist us in making an
4 affiliation determination if the Tribe
5 will provide the BLM with information
6 about cultural origins or other factors
7 in establishing affiliation, that are not
8 available to us through our literary
9 research efforts. I encourage you, and
10 members of the Fallon Paiute-Shoshone
11 community, to review these documents and
12 to provide us with any additional
13 information that we should consider. At
14 your convenience, please contact Ms.
15 Cynthia Ellis-Pinto at (702) 785-6469, to
16 arrange a meeting to discuss the
17 information enclosed here and any other
18 information you want to provide.

11 AAR 00463.

12 On October 30, 1997, the Museum hosted a conference on
13 analysis of human remains. AAR 00469. Amy Dansie invited
14 Dr. Barker to this meeting. AAR 00469. Cynthia Ellis Pinto,
15 then Native America Program Coordinator for the Nevada State
16 Office of BLM, indicated that she would be attending this
17 meeting with the hope of gaining "a thorough understanding of
18 the purpose and utility of the research." AAR 00484. She
19 further indicated that she and Dr. Barker would be "advising
20 the State Director on a course of action regarding testing of
21 the remains," and that it was "critical for [her] to inform
22 the State Director about the concerns of Native Americans and
23 potential conflicts that [might] result from his decision."

24 AAR 00484. Dr. Barker did not attend this meeting.

25 On October 29, 1997, then BLM State Director, Robert
26 Abbey, met with Mervyn Wright, Chairman of the Pyramid Lake
27

1 Paiute Tribe. AAR 00518. By letter dated November 24, 1997,
2 Mr. Abbey proposed to Mr. Wright that a meeting be arranged
3 at which the parties could explore their "mutual concerns
4 about land management issues, consultation relationships, and
5 trust responsibilities." AAR 00518. "It would also be an
6 opportunity for the [BLM] to discuss our responsibilities and
7 constraints for coordination and consultation with tribal
8 governments." AAR 00518. Mr. Abbey proposed that similar
9 meetings be held involving all Northern Paiute tribal
10 governments in order to "develop a coordination and
11 consultation agreement to facilitate communication... ." AAR
12 00518.

13 Before such a meeting could be arranged, Dr. Barker was
14 invited by the Museum to attend a consultation meeting
15 between the Museum and the Northern Paiute tribal governments
16 they had arranged for November 25, 1997. AAR 00519. In
17 attendance were representatives of the Museum, BLM, and
18 various Northern Paiute tribal governments, including Alvin
19 Moyle of the Plaintiff Tribe. AAR 523. At this meeting, Dr.
20 Barker and the Museum discussed the difficulty with gathering
21 oral information from the tribes pertinent to the issue of
22 affiliation. AAR 00542-00546. Dr. Barker expressed his
23 frustration with the Tribe's repeated position that there was
24 more evidence relating to affiliation that BLM has not
25 considered, but refusal to share that information. AAR
26 00546. He noted that the government had provided information
27

1 the Tribe indicated it had not received. AAR 00559-00560.
2 Regarding the determination concerning the affiliation of the
3 Tribe to the Spirit Cave Man remains, Dr. Barker emphasized
4 that he had "been trying to build the best case possible for
5 the decision that we're going to make. We are hoping that
6 they're going to make it soon. So that when it gets to the
7 courts, whatever way it goes, we have some defense, we can
8 say, this is how we made this decision, this is what was said
9" AAR 00562-63.

10 On December 15, 1997, Museum Director Scott Miller wrote
11 Mr. Abbey, reiterating the Museum's request to conduct DNA
12 studies on the Spirit Cave Man and associated remains. AAR
13 00628-29. He stated that "In order to satisfy the
14 requirements of NAGPRA, as well as provide a solid scientific
15 basis for any BLM decisions regarding affiliation, I believe
16 we must proceed with these analyses." AAR 00629.

17 The following year, on March 13, 1998, Amy Dansie
18 responded to a letter from Melvin Brown, a Paiute, and in
19 that response, requested information on "original stories
20 from Walker Lake or other areas that might not be recorded
21 anywhere yet." AAR 00647. Mr. Brown, by letter dated March
22 13, 1998, responded cryptically: "I do have some more
23 information for you. I don't know if I want to tell you
24 though. I'll have to think about it." AAR 00650.

25 On September 28, 1998, Amy Dansie submitted her "Final
26 Project Report on NAGPRA Grants to Museums" for the Inventory
27

1 of Human Remains from non-federal lands. AAR 00685. This
2 report noted that "[d]espite several years of efforts to
3 initiate consultation, many tribes did not respond to our
4 written requests." AAR 00691. It also noted that
5 "[e]xtended efforts to develop consultation procedures for
6 the Northern Paiute tribes of Nevada were finally completed
7 with a two day meeting of representatives from most Numa
8 groups (Paiute and Shoshone)," including representatives of
9 the Plaintiff Tribes. AAR 00692. "The logistics for
10 conducting further consultations with the combined Numa group
11 were not resolved. Issues regarding cultural affiliation
12 were discussed enough to report that there is no concurrence
13 between the Numa assertions of always being in their historic
14 territories and the scientific evidence casting doubt on
15 those assertions." AAR 00692. Ms. Dansie further noted that

16 extended consultations over the entire
17 grant period with the Fallon Paiute-
18 Shoshone tribe[s] has resulted in
19 alternative affiliation considerations,
20 with the Fallon tribal representatives
21 disagreeing with the larger Numa group's
22 united assertions (or at least Mervin
23 Wright, Jr.'s version of their consensus)
24 that tribal oral history regarding other
25 people in the area is not true, being
26 lies told to white people. These stories
27 ... are still believed to be tribal
28 history by the Northern Paiute in
Lovelock and Fallon. Further compilation
of these traditional oral histories was
agreed to be the best approach to this
impasse, and the [Museum] intends to
assist the Fallon tribe in gaining grant
support to conduct such tribal history
recording efforts. We anticipate finding
a solution to the shared group identity
issue with more systematic data on

1 possible intermarriage between the other
2 group, supposedly exterminated by the
3 Paiute, and the Paiute survivors.

3 AAR 00692-00693.

4 **III. Pre-Determination Proceedings Before the NAGPRA Review
5 Committee**

5 Complaining that procedural requirements under NAGPRA
6 had not been met, the Tribe, through its archeological
7 advisor, Melvin Brewster, requested that the matter be heard
8 by the NAGPRA Review Committee at its December 10-12, 1998
9 meeting. AAR 00802. He contended, among other things, that
10 "no ... consultation has been done with the Tribe"; "requests
11 for data have been ignored by both the BLM and the [Museum]";
12 and "although new oral history and analysis of known oral
13 history are available to the BLM, the Tribe's requests for
14 honoring NAGPRA have been ignored." AAR 00802-00803.

15 On November 17, 1998, Robert Abbey wrote to Francis
16 McManamon, the Departmental Consulting Archeologist,
17 regarding the requests of tribes, including the Plaintiff,
18 that BLM's compliance with NAGPRA be discussed at the
19 upcoming Review Committee meeting. Mr. Abbey noted that

20 the BLM is gathering information to make
21 decisions regarding these remains, but
22 has not reached any conclusion about
23 their status and has not approved the
24 museum's request for destructive testing.
25 I will not make these decisions until I
26 have carefully reviewed and considered
27 the evidence, the law, the interests and
28 concerns of the museum, the Native
American community, and the benefits of
such a study to the people of the United
States. ... Therefore, I consider it
premature and inappropriate to discuss

1 the details of this case in a public
2 forum like the upcoming NAGPRA Review
3 Committee Meeting. Discussing these
4 issues with the committee before reaching
5 a decision compromises the integrity of
6 the decision process and may
7 unnecessarily politicize this important
8 decision.

9 AAR 00808.

10 On November 25, 1998, Robert Abbey met with Alvin Moyle.

11 AAR 00809. In follow up, he forwarded a duplicate packet of
12 information representing the scientific and ethnographic
13 information that would be used to make a determination of
14 cultural or lineal affiliation of the Spirit cave remains.

15 AAR 00809. Mr. Abbey urged Mr. Moyle to "provide us with any
16 additional comments or information about this issue that
17 [would] help [him] reach a decision." AAR 00809.

18 The ongoing dispute between the Tribe and BLM came
19 before the Review Committee on December 11, 1998. In that
20 meeting, representatives of the various Northern Paiute
21 tribes made a presentation in which they stated that BLM was
22 taking too long to make a decision on affiliation, and asked
23 the Committee to direct that the Secretary of the Interior
24 demand that the BLM State Director make an immediate decision
25 on affiliation. AAR 00849, 00869. At that time, the
26 Committee noted that "they were not ready to deal with" the
27 issues presented by the various tribes. AAR 00812. "BLM has
28 to make a determination before this can become a dispute.
The committee can not be involved in a decision, they are
only involved in disputes." AAR 00812.

1 On February 8, 1999, Alvin Moyle wrote Mr. Abbey asking
2 for an extension until June 11, 1999 to present additional
3 evidence "regarding our relationship to our ancestor." AAR
4 00815. Robert Abbey agreed to the Tribe's request, stating
5 that "we have invested much time and energy in hopes of
6 understanding the perspective, knowledge, and information
7 from the Native American Community," and "[w]e have always
8 accorded equal validity to the information received from the
9 [Museum], the Native American community and scientific
10 interests." AAR 00816.

11 On April 14, 1999, the Tribe's counsel indicated that it
12 would be seeking an extension beyond the agreed-upon June 11,
13 1999 deadline. AAR 00818. It formalized that request on May
14 12, 1999, indicating that the Tribe needed "time to retain
15 experts in such fields as ethnology, archaeology,
16 anthropology, linguistics, osteology and/or genetics to
17 prepare and present relevant analyses, studies and reports to
18 [BLM] before [it made] any substantive decision on the
19 Tribe's request for repatriation." AAR 00840. The Tribe's
20 attorneys requested until December 31, 1999 to provide these
21 materials. AAR 00840. In the same letter, tribal counsel
22 requested that the remains of Spirit Cave Man be stored,
23 pending final disposition of its request for repatriation, in
24 the U.S. Fish and Wildlife Service ("FWS") vault located in
25 the Stillwater area. AAR 00841.

26 On May 18, 1999, the Tribe, its counsel and others, met
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1 at BLM's offices to discuss the Tribe's concerns about the
2 remains of Spirit Cave Man. AAR 00848-00851. Prior to
3 agreeing to an extension, Mr. Abbey and the Department of the
4 Interior Solicitor's Office asked the Tribe to provide a
5 research plan, outlining its evidence for affiliation and the
6 names and positions of the researchers. AAR 00849. The
7 Tribe agreed to provide this information by June 18, 1999.
8 AAR 00849. BLM agreed to investigate the suitability of the
9 crypt in the Stillwater area for storage of the remains. AAR
10 00849-00850, 00856.

11 On June 15, 1999, the Tribe's counsel provided Robert
12 Abbey with an outline of its research plan in support of its
13 request for additional time to submit materials bearing on
14 the Tribe's repatriation claim. AAR 00860-00862. In this
15 letter, the Tribe indicated that it would like to arrange a
16 consultation meeting during that Summer for the Tribe and its
17 consultants to meet with Mr. Abbey and his staff to better
18 understand BLM's assessment of the evidence it had collected
19 to date; another consultation meeting in the Fall in which
20 the Tribe and its consultants would make a preliminary
21 presentation to BLM of their research and analysis, and would
22 solicit BLM feedback; and another meeting following the
23 submission of the Tribe's written research report to conduct
24 a more in-depth consultation in light of the report. AAR
25 00860-00861.

26 On July 2, 1999, Robert Abbey responded to tribal
27

1 counsel and agreed not to make a final decision on the
2 affiliation of the Spirit Cave remains until December 17,
3 1999. AAR 00868. Mr. Abbey reiterated, however, that he had
4 "not made a decision on affiliation," and that it was
5 therefore not prudent to "hold the pre-decisional meetings"
6 suggested by tribal counsel "to discuss the evidence for or
7 against affiliation." AAR 00868. Mr. Abbey qualified that
8 statement by indicating that "we could meet if new
9 information is discovered in your on-going research if
10 necessary." AAR 00869. Regarding the Tribe's request to
11 have the Spirit Cave Man remains stored in FWS' vault in the
12 Stillwater area, Mr. Abbey noted that "it was his assessment
13 [that] the vault does not meet the facility requirements of
14 36 C.F.R. § 10 and cannot be used to hold federal
15 collections."⁹ AAR 00868. In closing, Mr. Abbey indicated
16 that "[i]n granting this final additional extension of
17 December 17, 1999, I am acknowledging your commitment to work
18 closely with us as we attempt to put together a complete
19 document of facts which can be used to reach a just and legal
20 position regarding the Spirit Cave remains." AAR 00869.

21 On December 16, 1999, the Tribe submitted various
22 reports to BLM pertaining to the alleged affiliation of
23

24 ⁹ The reference to 36 C.F.R. § 10 appears to have been in
25 error. The actual basis for the denial by BLM of the Tribe's
26 request to use the FWS vault was that it did not meet the
27 requirements of 36 C.F.R. § 79, concerning the curation of
28 federally-owned and administered archaeological collections.
Supplemental Amended Administrative Record ("Supp. AAR") at
02961.

1 Spirit Cave Man. AAR 0941-0942. On December 29, 1999, the
2 Tribe supplemented this submission with a memorandum and
3 additional reports. AAR 0943-01918. All of these materials
4 were in turn provided on January 5, 2000 to Dr. Marilyn
5 Nickels, BLM's Manager of Cultural and Fossil Resources and
6 Tribal Consultation, by Cynthia Ellis Pinto. AAR 01921. Ms.
7 Ellis Pinto asked that Dr. Damadio review the submissions and
8 provide her comments by February 4, 2000. AAR 01921. In the
9 interest of impartiality, the Tribe's materials were likewise
10 forwarded to the Museum for its comments by February 25,
11 2000. AAR 01926.

12 Robert Abbey responded to the Tribe's submissions on
13 January 14, 2000. AAR 01924. In that letter, he once again
14 emphasized that it would be inappropriate to "commit to
15 making a decision at this time without giving thorough and
16 careful consideration to the Tribe's submissions." AAR
17 01924. Mr. Abbey confirmed, contrary to the Tribe's
18 contention, that BLM had been consulting with the Tribe on
19 the affiliation issues since April, 1996. AAR 01924. He
20 nevertheless assured Mr. Moyle that "as promised in our
21 earlier consultations, when all the information has been
22 reviewed and considered, I will meet with you to discuss the
23 substance of the review and to inform you of my decision."
24 AAR 01924.

25 On January 3, 2000, the Tribe, through its counsel,
26 wrote the Departmental Consulting Archaeologist, Francis
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1 McManamon, to "provide him and the Review Committee with an
2 update of events surrounding the Tribe's efforts to
3 repatriate Spirit Cave Man and associated funerary objects."
4 That letter indicated that the Tribe was requesting that BLM
5 consult with the Tribe regarding the "cultural affiliation of
6 Spirit Cave Man under section 5(a) [25 U.S.C. § 3003(a)] of
7 NAGPRA." AAR 01919.

8 On March 22, 2000, Robert Abbey met with representatives
9 of the Tribe, Professor Deward Walker and then Chairman
10 Norman Harry of the Pyramid Lake Tribe to discuss the Tribe's
11 repatriation claim. AAR 01970. On April 2-4, 2000, Tribal
12 representatives appeared before the Review Committee. Also
13 in attendance at that meeting was Ms. Carla Mattix of the
14 Solicitor's Office of the Department of the Interior. When
15 asked about the pending tribal request for repatriation, Ms.
16 Mattix explained that the final decision would have to be
17 made by BLM, which was consulting with other agencies of the
18 Department of the Interior in order to make a fully informed
19 decision regarding the case. She indicated that the Bureau
20 of Indian Affairs and the Solicitor's Office were also going
21 to be reviewing the materials. AAR 01974-01975.

22 **IV. BLM's Determination in August, 2000**

23 BLM made its determination on the cultural affiliation
24 of the ancient human remains from Spirit Cave in a report
25 dated July 26, 2000 ("the Determination"). AAR 01978-02092.
26 The Determination was authored by Dr. Pat Barker, Ms. Cynthia
27

1 Ellis Pinto and Dr. Stephanie Damadio, and issued in August,
2 2000. AAR 01978, 02153. Issued in conjunction with the
3 Determination in August, 2000, was a report on the biological
4 aspects of Spirit Cave Man authored by Dr. Damadio
5 ("Biological Aspects Report"). AAR 02093-02130.

6 On August 15, 2000, Robert Abbey wrote Alvin Moyle
7 announcing his decision that

8 based on a review of the evidence from
9 the Tribe, as well as the evidence
10 gathered from other sources, the BLM
11 [had] concluded that the preponderance of
12 the available evidence demonstrates that
13 the human remains from Spirit Cave are
14 appropriately considered to be
15 unaffiliated with the Northern Paiute.
16 The remains predate contemporary Northern
17 Paiute Tribes and cannot reasonably be
18 culturally affiliated with any of them.
19 Thus, the BLM has determined that the
20 remains from Spirit Cave are unaffiliated
21 with any modern Northern Paiute
22 individual, tribe, or other group and
23 [are] therefore culturally unaffiliated
24 (unidentified).

25 AAR 02153. Mr. Abbey indicated that the Tribe could dispute
26 the determination with submission of new evidence by October
27 2, 2000. AAR 02153. BLM would then evaluate any new
28 evidence and either affirm the determination or make a new
29 determination. AAR 02153, 02160.

30 **V. Post-Determination Actions**

31 On September 21, 2000, the Tribe's counsel requested an
32 extension of the October 2, 2000 deadline for the submission
33 of new evidence until January 31, 2001. AAR 02202. In a
34 letter dated October 17, 2001, Mr. Abbey responded, restating

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1 his belief that the issue had "been deliberated thoroughly at
2 this level." He then stated that he was "therefore, denying
3 [the Tribe's] request for an extension of time and [was]
4 issuing [his] final determination of affiliation. I think it
5 is time for the Nevada BLM to close this matter so that the
6 Tribe can investigate other options." AAR 02228. Mr. Abbey
7 noted that there was "neither a specific appeal process, nor
8 a clear directive which applies to disputes of this type,"
9 but referred the Tribe to the dispute resolution provision in
10 the NAGPRA regulations, 43 C.F.R. § 10.17.

11 The position of BLM on October 17, 2000 was that no
12 other decisions would be made on the Spirit Cave Man until
13 the Secretary promulgated the regulation to address the
14 disposition of unaffiliated remains. AAR 02230. To date, no
15 regulation has been promulgated relating to the disposition
16 of unaffiliated remains. 43 C.F.R. § 10.9(e)(6) (referring
17 to the "final promulgation" of 43 C.F.R. § 10.11).

18 **VI. Review Committee Proceedings**

19 After BLM's determination, the Tribe requested review by
20 the NAGPRA Review Committee. AAR 02246. Both BLM and the
21 Tribe were invited to submit certain information to the
22 Review Committee for its consideration. AAR 02247-02250.
23 BLM responded to this request on April 12, 2001, explaining
24 that the information sought by the Review Committee's earlier
25 request was contained in the BLM reports previously submitted
26 to the Review Committee (the Determination and Biological
27

1 Aspects Report). AAR 02251. Regarding proposed solutions,
2 Mr. Abbey affirmed its position that BLM was required to
3 consider any new evidence that might arise regarding the
4 remains, and that it was committed to a continuing dialogue
5 with the Tribe. AAR 02251. Until it received new evidence,
6 however, it had no basis on which to change its
7 Determination. AAR 02251.

8 On July 13, 2001, BLM was notified that the Review
9 Committee would consider the repatriation dispute on November
10 17-19, 2001. The letter to BLM acknowledged receipt of the
11 Determination and Biological Aspects Report, and indicated
12 that October 19, 2001 was the deadline for adding or deleting
13 documents to be transmitted to the Review Committee. AAR
14 02268. The letter asked whether BLM would be represented in
15 person at the meeting. AAR 02268.

16 The Review Committee proceedings took place on November
17 17-19, 2001 in Cambridge, Massachusetts. AAR 02290-02413.
18 At those proceedings, the Tribe's experts and attorneys made
19 various presentations of their positions regarding
20 repatriation. AAR 02290-02413. The Review Committee issued
21 its findings on March 4, 2002. AAR 02424. It found that
22 "the preponderance of the evidence indicate[d] a relationship
23 of shared group identity which can be reasonably traced
24 between the present day Fallon Paiute-Shoshone Tribe and the
25 human remains and associated funerary objects from Spirit
26 Cave in Nevada." AAR 02425. The findings further stated

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1 that six out of the seven members of the Review Committee did
2 not believe that the Nevada State Office had "given fair and
3 objective consideration and assessment of all the available
4 information and evidence in this case." AAR 02426. Based on
5 its findings, the Review Committee recommended repatriation
6 of the Spirit Cave Man remains to the Tribe. AAR 02426.

7 BLM's position following the Review Committee's
8 pronouncements was that the evidence in the Determination and
9 Biological Aspects Report demonstrated "that it is not
10 possible to reasonably trace a relationship of shared group
11 identity between human remains from Spirit Cave and any
12 present-day tribe or individual," AAR 02429; that there was
13 no need "to respond to the NAGPRA Review Committee finding as
14 they have no authority under the act to make a finding of
15 affiliation," AAR 02429; and that "the Nevada State Director,
16 the decision maker in this case, remain[ed] ... available and
17 open to continuing consultation, [and] to consider[ing] any
18 additional information the Tribe might have to offer." AAR
19 02429.

20 On May 4, 2002, tribal counsel conferred with Robert
21 Abbey. AAR 02977. In that discussion, Mr. Abbey told
22 counsel that the Tribe's claim could be presented to higher
23 levels of BLM and the Department of the Interior and that he
24 would follow any direction given to him. AAR 02477.

25 On October 16, 2002, Tribal representatives, their
26 counsel, and representatives of BLM met. AAR 02485. The

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28 **OPPOSITION OF BLM TO TRIBE'S MOTION FOR SUMMARY JUDGMENT AND
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1 tribe was reminded, once again, that the State Director had
2 always been willing to examine new information. AAR 02485.
3 The Tribe indicated that it had new information, including
4 rebuttal materials to BLM's original report, new scientific
5 materials since published, and an argument for the
6 differences between the instant case and the matter involving
7 Kennewick Man. AAR 02485.

8 On November 1, 2002, the Tribe presented its further
9 arguments to Secretary Norton. AAR 02487-02521. Tribal
10 counsel submitted additional materials to the Secretary for
11 her consideration on November 7, 2002. AAR 02522-02524. The
12 BLM Acting Assistant Director for Renewable Resources and
13 Planning responded to the Tribe on behalf of the Secretary on
14 December 20, 2002. AAR 02527. That letter indicated,
15 referring to the pending promulgation of 43 U.S.C. § 10.11,
16 that "it would be premature ... to address the issues raised
17 in [the Tribe's] letter prior to the promulgation of" the
18 regulations regarding disposition of culturally
19 unidentifiable human remains. AAR 02527.

20 On April 9, 2003, Kathleen Clark, Director of BLM, wrote
21 to Donna Cossette, then Chair of the Tribe, indicating that
22 she had reviewed the letter to Secretary Norton and wanted to
23 meet with her regarding the information submitted to the
24 Secretary. AAR 02531. This meeting took place on July 13,
25 2003. AAR 02539. After that meeting, the Tribe was informed
26 that Director Clarke was evaluating all of the options, and
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1 invited to make any additional submissions to Stephanie
2 Damadio. AAR 02539. On November 12, 2003, the Tribe wrote
3 Dr. Damadio to bring her attention to various materials
4 pertaining to the dispute. AAR 02542-02543. Dr. Damadio
5 acknowledged receipt of these materials on November 28, 2003.
6 AAR 02544.

7 On February 12, 2004, the Tribe's counsel once again
8 sought the continued assistance of BLM in effecting
9 repatriation. AAR 02547-02548. On February 27, 2004,
10 Kathleen Clark wrote Alvin Moyle, indicating that she had
11 "reviewed all of the options to address [the Tribe's]
12 concerns and there is no additional course of action
13 appropriate to pursue at this time." AAR 02549.

14 **ARGUMENT**

15 **I. Standard for Summary Judgment**

16 Summary judgment is appropriate where there are no
17 genuine issues of material fact. Fed. R. Civ. P. 56(c). In
18 actions brought under the APA, 5 U.S.C. § 701 et seq., the
19 Court reviews the agency's administrative record and may not
20 "find underlying facts." Wilderness Society v. Bosworth, 118
21 F.Supp.2d 1082, 1089 (D. Mont. 2000). The only issues
22 presented are issues of law, and as such, are appropriate for
23 summary judgment. Celotex v. Catrett, 477 U.S. 317, 322
24 (1986); Wilderness Society, 118 F.Supp.2d at 1089. Applying
25 the legal principles embodied in NAGPRA and the APA to the
26 facts and the law described below, summary judgment must be

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1 granted in favor of the government.

2 **II. Scope of Review Under the Administrative Procedure Act,**
3 **5 U.S.C. § 701 et seq.**

4 As noted above, the Tribe is advancing a two-pronged
5 case for review under the APA. First, the Tribe claims that
6 the determination of BLM should be set aside on the grounds
7 that it is "arbitrary, capricious ... or otherwise not in
8 accordance with law." 5 U.S.C. § 706(2)(A). Second, the
9 Tribe claims that in applying NAGPRA in this circumstance,
10 BLM failed to observe the "procedure required by law." 5
11 U.S.C. § 706(2)(D).

12 The determination of whether an agency action or
13 decision was "arbitrary or capricious" is subject to a narrow
14 and highly deferential standard of review. The court's only
15 role is to decide whether "the decision was based on a
16 consideration of the relevant factors and whether there has
17 been a clear error of judgment." Marsh v. Oregon Natural
18 Resources Council, 490 U.S. 360, 378 (1989) (citing Citizens
19 to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971),
20 overruled on other grounds by Califano v. Sanders, 430 U.S.
21 99, 105 (1977)). "This inquiry must 'be searching and
22 careful,' but the 'ultimate standard of review is a narrow
23 one.'" Marsh, 490 U.S. at 378 (citing Overton Park, 401 U.S.
24 at 416). See also Wilderness Society, 118 F.Supp.2d at 1088
25 (The plaintiff must show that there is no "'rational
26 connection between the facts found and the choice made,' or
27 that there was a clear error in judgment based on the

1 relevant factors." (quoting Motor Vehicle Mfrs. Ass'n v.
2 State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)); San
3 Carlos Apache Tribe v. United States, 272 F.Supp.2d 860, 885
4 n. 16 (D. Ariz. 2003) ("The party bringing an APA case bears
5 the burden of demonstrating that the agency's actions were
6 arbitrary and capricious." (citations omitted)). Accord
7 Native Ecosystems Council v. United States Forest Service,
8 F.3d , 2005 WL 1906996 at *3 (9th Cir. 2005).

9 In reviewing an agency action, "the APA does not empower
10 a district court to conduct a *de novo* review of the
11 administrative decision and order the agency to reach a
12 particular result." Mt. St. Helens Mining and Recovery Ltd.
13 Partnership v. United States, 384 F.3d 721, 728 (9th Cir.
14 2004). The court may not substitute its judgment for the
15 agency's. Overton Park, 401 U.S. at 416.

16 Moreover, the court should presume that BLM acted
17 lawfully and "so conclude unless [its] thorough inspection of
18 the record yields no discernible rational basis for the
19 agency's action." Davis v. EPA, 348 F.3d 772, 781 (9th Cir.
20 2003). When applied to the facts of this case, these
21 principles require that Plaintiff's Motion for Summary
22 Judgment be denied, and judgment instead entered in favor of
23 the government.

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1 **III. Applying APA Standards, the United States is Entitled to**
2 **Summary Judgment on the Claims of the Tribe Relating to**
3 **BLM's Determination Regarding the Cultural Affiliation**
4 **of the Remains of Spirit Cave Man to the Tribe**

5 **A. This Court Lacks Subject Matter Jurisdiction Over**
6 **the Substantive Facets of the Tribe's Claim Because**
7 **They are not Ripe for Review in the Absence of a**
8 **Decision to Repatriate the Remains**

9 The Tribe concedes that the applicable standard of
10 review is set forth in the APA, 5 U.S.C. §§ 706(2). It
11 argues that the Court's review under the APA must focus both
12 on the procedural facets of the government's actions, as well
13 as the substance of the determination at issue in this case.
14 While the procedural facets of this case may be ripe for
15 review, the so-called final agency action, that is the
16 statement by the BLM Director that she "had reviewed all of
17 the options to address [the Tribe's] concerns and there is no
18 additional course of action appropriate to pursue at this
19 time," AAR 2549, is not a final agency action for purposes of
20 a substantive analysis of the government's actions under the
21 APA. As the court in Nippon Miniature Bearing Corp. v.
22 Weise, 230 F.3d 1131 (9th Cir. 2000), stated:

23 [i]n order for an agency action to be
24 deemed final and reviewable under the
25 APA, at least two conditions must exist.
'First, the action must mark the
consummation of the agency's
decisionmaking process - it must not be
of a merely tentative or interlocutory
nature. And second, the action must be
one by which rights or obligations have
been determined, or from which legal
consequences flow.'

26 Id. at 1137 (quoting Bennett v. Spear, 520 U.S. 154 (1997))

1 (noting that the court lacked jurisdiction to decide the
2 plaintiff's challenge to a pre-enforcement action because the
3 case was not ripe for review under the APA, 5 U.S.C. § 704)).
4 Here, the issue of repatriation by the Plaintiff or any other
5 tribe remains open. Its rights have thus not been ultimately
6 determined, and therefore, the issue is not ripe.¹⁰

7 The issue of ripeness was addressed explicitly in Na Iwi
8 O Na Kupuna O Mokapu v. Dalton, 894 F.Supp. 1397 (D. Hawaii
9 1995). In that case, the plaintiff Native Hawaiian group
10 brought a count alleging violation of 25 U.S.C. § 3005 by
11 denying its repatriation claim. There, the court determined
12 that because the defendant Navy had not made a decision to
13 repatriate the remains, there was no final agency action to
14 challenge, and accordingly, the plaintiff's claim was not
15 ripe for review. Id. at 1405. The court further noted that
16 "[t]his is precisely the type of administrative decision to
17 which exhaustion requirements and the ripeness doctrine are
18 intended to apply." Id. at 1405-6. See also 42 C.J.S.
19 Indians § 38 (noting that NAGPRA "provides for an
20 administrative process under which a federal agency will
21 decide to whom remains should be repatriated, and until the
22 agency repatriates the remains in accordance with NAGPRA
23 provisions, there is no final agency action to challenge, and

24
25 ¹⁰ The Tribe's claim may also be mooted when the Secretary
26 promulgates 43 C.F.R. § 10.11, a regulation which will address
27 the disposition of culturally unidentified remains. See 43
C.F.R. § 10.9(e)(6).

1 thus, the issue is not ripe.”).

2 In her letter to the Tribe on February 27, 2005,
3 Kathleen Clark indicated that “there is no additional course
4 of action appropriate to pursue *at this time*.” AAR 02549.
5 The issue of repatriation therefore remains open for this
6 Tribe and for any other tribe that is able, at some point in
7 the future, to establish its right to repatriate the remains
8 at issue.

9 In addition, the promulgation of 43 C.F.R. § 10.11
10 remains in abeyance. See 43 C.F.R. § 10.9(e)(6). That
11 regulation, once promulgated, will articulate procedures for
12 the disposition of culturally unidentifiable remains. If the
13 Tribe is permanently deprived of access to or other recourse
14 respecting the remains as a result of actions taken pursuant
15 to § 10.11, then it may have a ripe claim. Until such time
16 as that regulation is promulgated and such action is taken,
17 there is no final agency action on which the Plaintiff may
18 seek review under the APA.

19 Only final agency actions may be reviewed by this Court
20 for substantive purposes under the APA. 5 U.S.C. § 704. For
21 this reason, this Court lacks subject matter jurisdiction
22 over the Tribe’s claim regarding the basis of BLM’s
23 determination concerning the evidence of cultural
24 affiliation, and that claim must therefore be dismissed.

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28 **OPPOSITION OF BLM TO TRIBE’S MOTION FOR SUMMARY JUDGMENT AND
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1 **B. In the Alternative, and Assuming this Court Holds**
2 **That BLM's Determination Regarding Repatriation**
3 **Constitutes a Final Agency Action, the Tribe has**
4 **not Shown that BLM's Determination was Arbitrary or**
5 **Capricious or Otherwise not in Accordance With the**
6 **Law**

7 The Tribe alleges that BLM's decision not to repatriate
8 was "arbitrary, capricious, and otherwise not in accordance
9 with law," 5 U.S.C. § 706(2)(A), in the following respects:
10 first, BLM was allegedly hostile to NAGPRA and prejudged the
11 status of the remains, Plaintiff's Memorandum at 110-15;
12 second, BLM allegedly failed to consider important parts of
13 the "problem" and distorted much of the evidence it did
14 consider." Plaintiff's Memorandum at 115-21; third, BLM
15 allegedly failed to provide any explanation for its
16 "decision" in February, 2004. Plaintiff's Memorandum at 121-
17 23. Plaintiff's contentions are addressed below.

18 **1. BLM was not Prejudiced Against NAGPRA or the**
19 **Plaintiff Tribe's Claim of Cultural**
20 **Affiliation and did not Prejudge the Status of**
21 **the Remains**

22 Central to the Tribe's claim is the contention that BLM
23 was prejudiced against NAGPRA and prejudged the status of the
24 remains, and accordingly, could not have rendered a fair and
25 objective Determination regarding the cultural affiliation of
26 the Spirit Cave Man remains to the Tribe.

27 It is a well-accepted principle that a government agency
28 is entitled to a "presumption of regularity." Overton Park,
401 U.S. at 415; Gifford Pinchot Task Force v. U.S. Fish &
Wildlife Svc., 378 F.3d 1059, 1071 (9th Cir. 2004); Akiak

1 Native Community v. U.S. Postal Svc., 213 F.3d 1140, 1146
2 (2000). Defendant is unaware of any exception to this
3 presumption in circumstances involving an Indian tribe. In
4 this case, the Tribe has failed to identify any facts that
5 would serve to rebut that presumption of regularity. On this
6 basis, its Motion for Summary Judgment should be denied.

7 The Tribe points to several portions of the record that
8 it claims demonstrate that BLM was prejudiced against NAGPRA
9 and the Tribe's claim of cultural affiliation; and further
10 show that BLM had "prejudged" the status of the remains as
11 unaffiliated. The discussion below addresses the most
12 salient of those accusations.

13 First, the Tribe cites an article by Pat Barker and
14 Cynthia Ellis Pinto, *Legal and Ethnic Implications of the*
15 *Numic Expansion*. Tribe's Exhibits at Exh. D. The Plaintiff
16 maintains that this article demonstrates hostility towards
17 NAGPRA. In fact, this article does nothing more than
18 describe the conflict that has played out in this very case.
19 The authors simply point out that the archaeological concept
20 of the Numic expansion is at odds with Native American
21 creation narratives, and that creation narratives are likely
22 to have added weight under NAGPRA if disputes end up in
23 court. Id. at 18-19.

24 The Tribe also argues that the suggestion made by Dr.
25 Barker in his meeting with Amy Dansie in December, 1994, that
26 items more than 3,000 years old should be listed as

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28 **OPPOSITION OF BLM TO TRIBE'S MOTION FOR SUMMARY JUDGMENT AND
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1 "unaffiliated" in the Museum's BLM inventory, AAR 00130,
2 indicates that he had prejudged the status of Spirit Cave Man
3 as unaffiliated. While this designation implicitly gave
4 weight to the Numic Expansion concept, it was a liberal
5 designation in light of the fact that some scientists
6 theorize that the current tribal occupants arrived as
7 recently as 500 years ago. AAR 00130.

8 Furthermore, this designation is entirely consistent
9 with the conclusion in Bonnichsen v. United States, 367 F.3d
10 864 (9th Cir. 2004), that "[t]he age of Kennewick Man's
11 remains, given the limited studies to date, makes it almost
12 impossible to establish any relationship between the remains
13 and presently existing American Indians." Id. at 879. Prior
14 to remand to the agency, the District Court had addressed
15 issues relating to the challenges of establishing the
16 relationship of ancient human remains to existing tribes in
17 the absence of scientific studies. Quoting the NAGPRA Review
18 Committee, the court stated that "*with specimens in the*
19 *9,000-10,000 year age range close affinity with any historic*
20 *ethnic group would be tenuous.*" Bonnichsen v. United States,
21 969 F.Supp. 628, 642 (D. Or. 1997) (emphasis in original).
22 See also general discussion at 969 F.Supp. at 641-44. In
23 light of this authority, BLM can hardly be charged with
24 having acted unfairly in suggesting that these ancient
25 remains be designated in the inventory as unaffiliated given
26 any absence to the contrary.

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1 Next, the Tribe refers to the so-called "October, 1996
2 determination." AAR 00297-00299. This document describes
3 the NAGPRA "process, current status and options" as of
4 October 17, 1996. AAR 00297. The Plaintiff claims that this
5 document indicates that BLM had made its "determination" in
6 October, 1996. In fact, this document merely reflects the
7 completion of the Museum's inventory, AAR 00203-00270, and
8 BLM's own review and assessment of that inventory. AAR
9 00297-00299. A determination that a particular set of
10 remains is unaffiliated is a prerequisite for a tribe's
11 filing a repatriation claim under 25 U.S.C. § 3005(a)(4) and
12 43 C.F.S. § 10.10(b)(1). In any event, as with the notes of
13 Dr. Barker's meeting with Amy Dansie in December, 1994, AAR
14 00130, Bonnichsen squarely supports the identification of
15 such ancient remains as "unaffiliated." 367 F.3d at 879; 969
16 F.Supp. at 641-44. Under these circumstances, it is
17 unreasonable to ascribe any guile to BLM's actions.

18 The Tribe also cites to BLM's unwillingness to house the
19 remains of Spirit Cave Man in a vault in the Stillwater area.
20 The record shows, however, that BLM investigated this
21 possibility, but rejected it on the basis that the vault did
22 not meet the appropriate requirements for federally owned
23 archeological collections under 36 C.F.R. § 79. Supp. AAR at
24 02959-02963. The denial of this request was thus entirely
25 proper under the law, and cannot demonstrate any prejudice
26 against the Tribe - especially where the Tribe had yet to
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1 establish any affiliation with the remains at issue.

2 Plaintiff's arguments fail, especially when the facts
3 upon which it relies as evidence of bias or predisposition
4 are viewed in light of the presumption of regularity. None
5 of the "facts" cited by the Tribe demonstrates prejudice or
6 prejudgment. This is readily apparent when the facts of this
7 case are compared to the unique circumstances in Bonnichsen
8 v. United States, 217 F.Supp.2d 1116 (D. Or. 2002), aff'd 367
9 F.3d 864 (9th Cir. 2004). There, the District Court held
10 that the Corps of Engineers excluded the plaintiff scientists
11 entirely from the process, and gave "secret" preferences to
12 the tribal claimants. Id. at 1133. The court also found
13 that the Corps' covering the site where the remains were
14 found suggested bias in favor of the tribal claimants and
15 indicated that it had predetermined the outcome. Id. at
16 1133-34. No facts in this record, however, support such a
17 conclusion. To the contrary, the record is replete with
18 references to BLM's persistent good faith efforts to obtain
19 information from the Tribe bearing on cultural affiliation,
20 and to incorporate that evidence into its ultimate
21 Determination. Plaintiff's claim that BLM was prejudiced
22 against the Tribe or predisposed regarding the status of the
23 remains is thus unfounded and must fail as a matter of law.

24 **2. BLM Considered all of the Relevant Factors and**
25 **Evidence in Making its Determination**

26 The Tribe maintains that the Determination was arbitrary
27 and capricious because BLM allegedly failed to consider

1 important parts of the "problem" and distorted much of the
2 evidence it did consider. In making its case, the Tribe
3 presents this Court with a lengthy and confusing description
4 of its own theories and its own view of how those theories
5 establish its right to repatriate the remains of Spirit Cave
6 Man. Plaintiff's analysis, however, should be focused not on
7 its own theories, but on the decision itself, because this
8 Court's review turns on the question of whether there was a
9 rational basis for BLM's determination, not on whether the
10 Tribe has convinced this Court of the merit of its theories.
11 This Court is not entitled to substitute its own judgment for
12 that of the agency's, Overton Park, 401 U.S. at 416, even if
13 it disagrees with the agency's conclusions. In rendering a
14 decision subject to review under the APA, an agency "must
15 examine the relevant data and articulate a satisfactory
16 explanation for its action, including a 'rational connection
17 between the facts found and the choice made.'" Motor Vehicle
18 Mfrs., 463 U.S. at 43 (quoting Burlington Truck Lines v.
19 United States, 371 U.S. 156, 168 (1962)). This Court's
20 charge on review is to determine whether BLM's decision "was
21 based on a consideration of the relevant factors and whether
22 there has been a clear error of judgment." Id. The record in
23 this case demonstrates that BLM gave consideration to all of
24 the relevant factors, and that there is a rational connection
25 between the facts found and described in BLM's Determination
26 and its conclusion that the evidence does not support the

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1 Tribe's claim of cultural affiliation with the ancient human
2 remains from Spirit Cave.

3 NAGPRA is explicit about the factors relevant to a
4 decision on a repatriation claim by a tribe and the standards
5 by which BLM must evaluate that evidence. Under 25 U.S.C. §
6 3005(a)(4), a Tribe must show "cultural affiliation by a
7 preponderance of the evidence based upon geographical,
8 kinship, biological, archaeological, anthropological,
9 linguistic, folkloric, oral traditional, historical or other
10 relevant information or expert opinion." Even a cursory
11 review of the Determination reveals a careful and thoughtful
12 analysis of all of the factors referenced in the statute.
13 BLM's Determination addresses each of the subject matters
14 specified in the statute cited above in detail and
15 articulates conclusions that are supported by the evidence
16 referenced in that report.

17 A significant portion of BLM's analysis is devoted to
18 archaeological issues. BLM determined that the
19 archaeological record relating to textile manufacture in the
20 western Great Basin shows more evidence of change through
21 time that it does of continuity. AAR 02005. Continuity is
22 mainly manifest in simple mats and blankets that were made by
23 all groups in the Great Basin in recent generations and all
24 groups associated with textiles in the archaeological record.
25 The evidence for discontinuity includes sophisticated warp-
26 faced-plain weave decorated textiles found in Spirit Cave and

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1 other nearby sites that disappear from the archaeological
2 record around 8,800 years ago. AAR 02005, 02041.

3 There is at least one intervening tradition, called
4 Lovelock Wickerware, in the area between about 3,000 and
5 1,000 years ago, that is different from both Spirit Cave and
6 Northern Paiute textiles. AAR 02000, 02041. In addition,
7 specific styles of twined seed beaters, triangular winnowing
8 trays, conical carrying baskets, hats, and bowls are limited
9 to ethnographic Numic speaking peoples. AAR 02003-04. Also,
10 flat coiled circular parching trays, common throughout the
11 archaeological record are not found among the Northern Paiute
12 or other Numic speakers. AAR 02000, 02004. In summary, the
13 textile evidence shows that the textiles of the Numic
14 speakers are not related to previous developments in the
15 Great Basin, and despite certain gross attributes of
16 construction with pre-Numic groups, the complex whole of the
17 Numic traditions cannot be connected to earlier traditions.

18 Similarly, burial practices for the modern Northern
19 Paiute cannot be linked to those practices documented from
20 the early Holocene. C.S. Fowler (1989 and 1992) describes
21 modern burial practices for the Northern Paiute that are not
22 similar to those inferred from the direct burial evidence
23 from Spirit Cave. AAR 02008, 02028-30. The semiflexed
24 textile wrapped inhumation and double-bagged cremation, both
25 in complex textiles that disappear from the archaeological
26 record around 8,000 years ago, are not characteristic of

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1 ethnographic (i.e., modern) burials. AAR 02008, 02028-30.
2 They are also distinct from intervening burial practices that
3 include 2,000 year old bundle burials from Elephant Mountain
4 Cave, mixed burials and cremations from Lovelock Cave, about
5 3,400 years ago, and 400 mixed burials from the Stillwater
6 Marsh burial population, dated to between 1,250 and 650 years
7 ago. AAR 02006-11, 02029.

8 There have been at least three distinct burial
9 traditions among the diverse groups living in the western
10 Great Basin between the time when people were buried in
11 Spirit Cave, more than 9,000 years ago, and when the Northern
12 Paiute occupied the area in ethnographic times. AAR 02010-
13 02011. None of these groups buried their dead in a manner
14 that is similar to either the Northern Paiute or to the
15 ancient people buried in Spirit Cave. AAR 02006-02011.
16 Thus, the evidence relating to burial practices does not, as
17 a whole, support cultural affiliation of the Spirit Cave Man
18 remains to the Northern Paiute. AAR 02011, 02041-02042.

19 The culture history of the Western Great basin
20 throughout the last 10,000 years also shows significant
21 cultural diversity and cultural adaptation though time in
22 response to environmental and demographic changes, and little
23 evidence of continuity. AAR 01995-99, 02040.

24 Viewing the evidence relating to textiles, AAR 02001,
25 02004-05, 02011-12, settlement and subsistence systems, AAR
26 01998, 02012; burial practices, AAR 02006-09, 02011, 2030;

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1 anthropology, AAR 02029-30, 02032-38; linguistics, AAR 02011,
2 02027, 02055, 02059-60; and geography, AAR 02026, 02056-57,
3 the evidence shows that there are at least two distinct
4 groups living in the western Great Basin at any given time.
5 There is no indication, however, as to which group may have
6 produced descendant groups and which did not. In some
7 periods, including historic times (i.e., after first
8 contact), the evidence shows several groups. The limited
9 evidence of generic cultural continuity reflects similar
10 adaptations to similar marsh environments rather than
11 genealogical cultural transmission of specific adaptations,
12 artifacts, and practices from parent to descendant groups
13 over the last 10,000 years. AAR 1995-2000.

14 The consensus among Great Basin archaeologists,
15 linguists, and ethnographers is that the expansion of Numic
16 speaking peoples across the Great basin occurred during the
17 last several thousand years. (Madsen and Rhode 1994) AAR
18 02013. The archaeological evidence shows a late period
19 association of ceramics, bow and arrow technology, intensive
20 upland resource procurement, decreased residential mobility,
21 increased territoriality, alpine villages, highly specialized
22 intensive small game and plant procurement, and settlement
23 patterns characteristic of modern people, such as the
24 Northern Paiute, and different from earlier people, such as
25 those living around Spirit Cave at the end of the Ice Age.
26 AAR 02011-13, 02039-40. The consensus among linguists

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28 **OPPOSITION OF BLM TO TRIBE'S MOTION FOR SUMMARY JUDGMENT AND
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1 supports this archaeological theory, in that the relatively
2 limited diversity among Numic speakers in the Great Basin
3 implies recent occupation of the region. AAR 02011-13.
4 Except for J.A. Goss (1977), who argues for an assumption
5 unsupported by evidence that Numic Speakers have always
6 occupied the Great Basin (i.e., the "assumption of logical
7 simplicity" referred to above), AAR 1784-87, J.H. Hill (2000)
8 and W.R. Miller (1986), and other linguists, argue for an
9 expansion sometime after Numic became a distinct language
10 family in the Uto-Aztecan language family between 5,000 and
11 3,500 years ago. AAR 02066-68. Simply put, the weight of
12 the evidence shows that Numic did not exist as a distinct
13 language before 5,000 years ago, and thus, could not have
14 been spoken by any earlier peoples. AAR 02011-13, 02026-28.

15 The remaining lines of evidence mentioned in NAGPRA, 25
16 U.S.C. § 3005(a)(4) (kinship/genealogy, AAR 02024, 02042;
17 geography, AAR 02025-26, 02042; descriptive linguistics, AAR
18 02026-28, 02042; anthropology, AAR 02043; folklore/oral
19 tradition, AAR 02030-38; history, AAR 02038-39, 02043; and
20 expert testimony, AAR 02039-43), cannot be projected into the
21 past more than a few generations before first contact with
22 whites in 1820. The evidence on these subjects offers no
23 means of determining which of these groups, if any, died out,
24 migrated away, or survived to have descendants who became the
25 historic occupants of the region. AAR 02042-43.

26 Finally, other than the last 1,000 years or so, there is
27

1 simply no evidence showing details of social or political
2 organization, territorial boundaries, kinship patterns,
3 religious beliefs, or world view. AAR 02039-40. The
4 preponderance of available evidence shows more cultural
5 diversity than homogeneity, more change than continuity, more
6 similarity from adaptation to similar environments than from
7 genealogical cultural transmission. AAR 01995-2000.

8 BLM plainly considered all of the factors it was
9 required to consider under NAGPRA, 25 U.S.C. § 3005(a)(4), in
10 reaching the conclusions set forth in its Determination, and
11 articulated a sound basis for its decision. There is a
12 rational connection between the facts found by BLM and its
13 decision regarding cultural affiliation. The evidence
14 relating to each of those factors amassed to date simply does
15 not support a finding of cultural affiliation of the ancient
16 human remains from Spirit Cave with the Northern Paiute or
17 any other contemporary group. The Tribe has failed to
18 establish its cultural affiliation with those remains by a
19 preponderance of the evidence, and accordingly, its Motion
20 for Summary Judgment must be denied.

21 **3. Deference is due to BLM and its Experts'**
22 **Determination**

23 The Determination at issue was drafted by experts in
24 their respective fields, and relies in large part on an
25 analysis of opinions and theories espoused by other experts.
26 "When specialists express conflicting views, an agency [has]
27 the discretion to rely on the reasonable opinions of its own

1 experts, even if, as an original matter, a court might find
2 contrary views more persuasive." Wilderness Society, 118
3 F.Supp.2d at 1089 (citing Greenpeace Action v. Franklin, 982
4 F.2d 1342, 1350 (9th Cir. 1992), opinion amended and
5 superseded on denial of reh'g, 14 F.3d 1324 (9th Cir. 1992)).
6 In determining whether there is a rational basis for an
7 agency's decision that is "based on complex scientific or
8 technical analysis," it is especially appropriate to defer to
9 the agency. Davis, 348 F.3d at 781 (citing Nat'l
10 Petrochemical & Refiners Ass'n v. EPA, 287 F.3d 1130, 1135
11 (D.C. Cir. 2002) (per curiam)); New York v. EPA, 852 F.2d
12 574, 580 (D.C. Cir. 1988) ("[a]cceptance or rejection of a
13 particular air pollution model and the results of it are
14 interpretations of scientific evidence" to which the court
15 must reasonably defer).

16 Although the Tribe acknowledges this general principle,
17 it indicates that in this instance no deference is due to the
18 government's experts because the findings "do not involve
19 specialized expertise of the agency that made the decision."
20 Plaintiff's Memorandum at 103. The authorities relied on by
21 the Plaintiff do not stand for that broad proposition,
22 however.

23 Sternberg v. Sec'y, Dept of Health and Human Svcs, 299
24 F.3d 1201, 1205 (10th Cir. 2002) is inapposite here. In that
25 case, the issue was whether the interpretation by the
26 Department of Health and Human Services ("HHS") of a
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1 sentencing agreement was entitled to deference in an action
2 involving HHS's decision to exclude the plaintiff physician
3 as a healthcare provider in the Medicare program. The court
4 reasoned that no deference was due because "[t]he agreement
5 [did] not involve HHS specialized expertise," nor "deal with
6 arcane subject matter and did not contained specialized
7 terminology." Id. at 1205. The court noted, moreover, that
8 there was "no evidence that HHS routinely review[ed]
9 sentencing or plea agreements." Id.

10 The determination made by BLM's experts in this case was
11 integral to the directives embodied in NAGPRA. This is in
12 sharp contrast to the interpretation of the sentencing
13 agreement in Sternberg that was, at best, peripheral to the
14 responsibilities of HHS in rendering decisions regarding
15 physicians providing Medicare services. It is plain that HHS
16 did not routinely interpret sentencing agreements in
17 addressing issues relating to the exclusion of physicians
18 from the Medicare program. Moreover, the Tribe can hardly
19 dispute that the determination in this case dealt "with [an]
20 arcane subject matter," and "contained specialized
21 terminology" on which only experts primarily in the fields of
22 archaeology and anthropology could opine.

23 The Plaintiff also relies on Bonnichsen, 969 F.Supp.
24 628, 643-44 and n. 12. There, the issue was whether
25 deference was due to the Corps of Engineers' interpretation
26 of regulations relating to the disposition of "culturally
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1 unidentifiable human remains" - not its application of NAGPRA
2 in making its decision regarding repatriation, nor the
3 factual bases for its repatriation decision.

4 Bonnichsen, and the cases to which it cites, call into
5 question the extent of "Chevron deference" due to a federal
6 agency carrying out NAGPRA's dictates that is not the agency
7 charged with promulgation of regulations under NAGPRA. Id.
8 at 643-44. The principle of "Chevron deference," articulated
9 in Chevron v. Natural Resources Defense Council, 467 U.S.
10 837, 842-44 (1984), is that deference is to be given to an
11 agency's interpretation of a statute that it administers.
12 The issue here - that is whether deference is due to the
13 agency's experts' determination on a repatriation claim, is
14 wholly distinct from the question of the extent of deference
15 to which BLM is entitled under principles of Chevron
16 deference.

17 For all of the above reasons, BLM's experts' opinions
18 regarding the evidence supporting cultural affiliation of the
19 remains of Spirit Cave Man and associated funerary objects,
20 are thus due the usual deference accorded to agency experts
21 performing responsibilities with which they are charged.

22 **4. BLM had no Obligation to Defer to the Review**
23 **Committee's Findings**

24 The Tribe argues that even if an advisory decision is
25 not binding, it should be accorded deference if reasonable
26 and harmonious with the language and purpose of the involved
27 statute. Such a requirement would conflict with the

1 "advisory" nature of the Review Committee, 43 C.F.R. §
2 10.2(c)(2), and the principle that deference is due to the
3 final agency decision, and not to non-final deliberative
4 views on the issues. In any event, the cases cited by the
5 Plaintiff for this proposition do not apply to the facts
6 present here.

7 In EEOC v. Exxon, 202 F.3d 755 (5th Cir. 2000), the
8 issue before the court was whether former government
9 attorneys could testify as experts for the oil company in
10 litigation alleging that the defendant's policy of barring
11 rehabilitated substance abusers from safety-sensitive
12 positions was in violation of the Americans with Disabilities
13 Act. There, the Justice Department was trying to block the
14 testimony of the former government attorneys, citing an
15 advisory letter from the Office of Government Ethics
16 interpreting a regulatory exception. The court rejected
17 DOJ's view, noting that the advisory letter contained no
18 statutory authority or explanation for its position, id. at
19 758, and found the letter contrary to a reasonable
20 interpretation of a key regulatory term. Id. On this basis,
21 the court permitted the former government attorneys to
22 testify.

23 Mary P. v. Illinois Bd. of Educ., 919 F.Supp. 1173 (N.D.
24 Ill. 1996), also cited by the Tribe, is likewise inapposite
25 here. In that case, the question involved how much weight an
26 advisory note to a regulation and a letter written by the
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1 Assistant Secretary of the agency, interpreting a statute
2 should be given in interpreting and applying relevant statute
3 and regulation. The court noted that "[a]dvisory notes or
4 commentary are 'akin to an agency's interpretation of its own
5 legislative rules [which] must be given 'controlling weight
6 unless ... plainly erroneous or inconsistent with the
7 regulation.'" Id. at 1179 (citation omitted). The court
8 found that interpretive letters were due the same deference.

9 The facts before this Court, however, do not involve the
10 question of how much weight should be assigned to an agency's
11 own interpretation of its statutes and regulations, as
12 reflected in advisory notes and letters. The question is
13 instead whether deference is due to the findings of a
14 statutorily created body whose findings are, by statutory and
15 regulatory definition, advisory and non-binding. To do
16 otherwise, would turn Chevron deference on its head.
17 Moreover, in calling for deference to the Review Committee's
18 findings, the Tribe is asking this Court to alter the plain
19 meaning of the pertinent statutes and regulations. That
20 position is legally unsupportable.

21 **5. The Tribe's Analysis Does not Establish**
22 **Cultural Affiliation to the Spirit Cave Man**
23 **Remains by a Preponderance of the Evidence**

24 Plaintiffs' analysis focuses on the evidence it is
25 attempting to persuade this Court BLM should have accorded
26 more weight. The Tribe is plainly - and improperly -
27 attempting to sweep this Court into a *de novo* review of the

1 facts. The record, in any event, demonstrates that the Tribe
2 has failed to establish cultural affiliation with the Spirit
3 Cave Man remains.

4 The Tribe fails to establish cultural affiliation
5 because its theories are grounded in generalities which, by
6 definition, conflict with the statutory bases for
7 establishing cultural affiliation. Essential to and at the
8 foundation of the Tribe's claim that the evidence supports
9 its repatriation claim is its proposed definition of "group,"
10 for purposes of the determination of whether there is a
11 "shared *group* identity that may be reasonably traced
12 historically or prehistorically between a present day Indian
13 tribe or individual and an identifiable earlier *group*." 25
14 U.S.C. § 3001(2) (emphasis added); 43 C.F.R. §§ 10.2(e),
15 10.14(c).

16 The Tribe contends that because NAGPRA fails to define
17 "shared group identity" or "identifiable earlier group,"
18 under Indian canons of construction, see County of Yakima v.
19 Yakima Indian Nation, 502 U.S. 251, 269 (1992), these terms
20 should be defined liberally in favor of the Tribe to mean
21 "the occupants of the western Great Basin as a whole."
22 Tribe's Memorandum at 43. The absence of a specific
23 statutory definition of these terms, however, does not make
24 them ambiguous. An unambiguous statute may not be construed
25 differently to favor tribes. See Bonnichsen, 267 F.3d at 878
26 n. 18.

1 The definition of "shared group identity" was addressed
2 in Bonnichsen, 217 F.Supp.2d at 1147-48. The court inferred
3 from 43 C.F.R. § 10.14(c)(3), that at a minimum, the group
4 must have "remained relatively intact through the years." It
5 added:

6 [t]he statutory language also implies
7 that the members must perceive themselves
8 as part of a group and function as such.
9 There must be at least some common
10 elements of language, religious, customs,
11 traditions, morals, arts, cuisine and
12 other cultural features; a common
13 perspective on the world and the group's
14 role in it; and shared experiences that
15 are part of the group's perception of its
16 history . . . This commonality
17 distinguishes the group and its members
18 from other groups, and legitimizes the
19 present-day group's authority to
20 represent the interests of deceased
21 members.

22 Id.

23 Support for the existence of an "identifiable earlier
24 group," 43 C.F.R. § 10.14(c)(2), requires:

25 evidence sufficient to (i) establish the
26 identity and cultural characteristics of
27 the earlier group; (ii) document distinct
28 patterns of material culture manufacture
and distribution methods for the earlier
group, or (iii) establish the existence
of the earlier group as a biologically
distinct population.

29 Thus, both terms ("shared group identity" and "identifiable
30 earlier group") assume and encompass distinctive qualities.
31 The Tribe proposes, however, that these terms be construed in
32 a manner that, in essence, strips them of their hallmark:
33 that is, the genuine distinctiveness of the predecessor
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1 group.

2 The authorities relied on by the Tribe do not support
3 its broad definition of "group" in the context of NAGPRA.
4 For example, the Tribe cites to the case of Thompson v.
5 United States, 122 Ct. Cl. 348, 1952 WL 5988 (1952). In that
6 case, the court held that the petitioners, "Indians of
7 California," were entitled to present their claims to the
8 Indian Claims Commission. The issue was fundamentally one of
9 jurisdiction. 1952 WL 5988 at *5. More significantly, that
10 decision turned on a federal statute, the Act of May 18,
11 1928, 45 Stat. 602, "permitting the 'Indians of California'
12 to sue the United States for all claims of whatsoever nature
13 the 'Indians of California' may have against the United
14 States by reason of lands taken from them by the United
15 States without compensation" Id. at *4.

16 The Tribe also relies on Northern Paiute Nation et al.
17 v. United States, 183 Ct. Cl. 321, 393 F.2d 786, 791-92
18 (1968). In that case, the Court of Claims affirmed the
19 determination of the Indian Claims Commission that the
20 Northern Paiute had standing as a group to seek recovery
21 under Sections 2 and 10 of the Indian Claims Commission Act,
22 60 Stat. 1049. The Tribe ignores, however, the ultimate
23 determination by the ICC and the Claims Court that although
24 the entire Northern Paiute Nation had standing to sue, not
25 all groups within the Nation were entitled to recover,
26 because certain groups did not have aboriginal title to land.

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1 393 F.2d at 791-92. This conclusion undermines the Tribe's
2 definition of group based on its relationship to a geographic
3 area.

4 The Tribe's strained and overly broad geography-based
5 definition of "group" would, in application under NAGPRA,
6 lead to indefensible readings of the statute and associated
7 regulations because it would not require evidence of any
8 distinctive qualities that tie the members of the earlier
9 group to one another other than geographic commonality. In
10 other words, under the Tribe's proposed definition, there
11 would be no need to demonstrate anything other than a shared
12 geographic base in order to establish an "earlier
13 identifiable group" and a "shared group identity" - and
14 ultimately, to establish cultural affiliation. This broad
15 definition would, in effect, render cultural, biological, or
16 other actual differences between groups living in the same
17 area insignificant because a common geographic base would be
18 the only factor defining a "group" under the statute.

19 This type of flawed logic permeates all of the Tribe's
20 theories in support of cultural affiliation. For instance,
21 the Tribe relies in large part on Professor Roderick
22 Sprague's theories on burial practices in the Great Basin.
23 AAR 1102-66. Professor Sprague's theory is that Great Basin
24 burial practices are not characterized by similarity, but
25 rather by a range of different burial practices, including
26 "inhumation and soil and rocky areas mixed with cremation."

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1 These practices, he contends are distinctive in what they
2 lack, that is certain practices seen in areas outside of the
3 Great Basin. In other words, what makes the Great Basin
4 burial practices the same is the commonality of difference.
5 Because the burial practices seen in Spirit Cave fit within
6 Professor Sprague's broad description of Great Basin burial
7 practices, he concludes that the Spirit Cave remains are
8 affiliated with the modern Fallon Paiute-Shoshone Tribe. AAR
9 1118. In its Determination, BLM addressed, but reasonably
10 rejected Professor Sprague's theory. AAR 02005-06, 02010-11.

11 Apart from the generality of the Tribe's conclusions,
12 much of its analysis is not relevant to a determination of
13 cultural affiliation because it is directed at the conclusion
14 that Spirit Cave Man was Native American, and not at the
15 cultural affiliation of these remains with the Tribe. One
16 example is the Tribe's reliance on the work of Christy Turner
17 and others regarding dental morphology. Tribe's Memorandum
18 at 63-7. Turner has identified a common dental pattern in
19 Native North Americans and Northeastern Asians, which he
20 describes as "Sinodonty." AAR 00990-92. The Tribe further
21 notes, citing Professors Alan Goodman and Debra Martin that
22 "the dental evidence strongly suggests that Spirit Cave Mummy
23 is biologically related to North Asians and Native Americans.
24 The chance of a European have the [particular traits
25 described] may be close to nil." AAR at 01900-02. BLM
26 agrees that Spirit Cave Man was Native American. This is

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28

1 therefore a non-issue in this case.

2 The Plaintiff Tribe attempts to close the gap between
3 the dental evidence supporting Native American status and
4 affiliation with the Northern Paiute by relying on a recent
5 study by Christy Turner. Tribe's Exhibits at Exh. P (as
6 amended). Turner concludes that the teeth from the skulls of
7 early Holocene remains in Nevada, including Spirit Cave
8 Man's, are "very similar to those of recent Native Americans
9 and unlike Ainu or Europeans," the groups with which cranial
10 studies most closely linked these remains. Exh. P. at 139.
11 The Tribe's experts noted that Turner's study found that
12 ancient remains from Nevada, specifically Spirit Cave and
13 Wizards Beach, are most closely linked to a group of more
14 recent Native Americans from Nevada, and then eight other
15 Native American groups." AAR 01903. This single study deals
16 in probabilities; it does not prove affiliation, however, and
17 when viewed against the backdrop of the "totality" of the
18 evidence, fails to show that it is more likely than not that
19 Spirit Cave Man was culturally affiliated with the Northern
20 Paiute.

21 In relying on Christy Turner's theories, the Tribe
22 overstates the significance of certain types of biological
23 data in determining cultural affiliation. Analyses of the
24 biological anthropology of Spirit Cave Man (general skeletal
25 observations, cranial metric and non-metric analysis, and
26 dental analysis) are considered by BLM because they can

27

28 **OPPOSITION OF BLM TO TRIBE'S MOTION FOR SUMMARY JUDGMENT AND
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1 provide general scientific information, e.g., a means to
2 assess general biological distance or affinity of a skeleton.
3 AAR 02096. These types of analyses, however, do not permit
4 specific affiliation of one individual to a group for several
5 reasons. First, no single individual or small group of
6 individuals is likely to possess the entire suite of traits
7 that appear to define the population. There is always
8 variation within any population. Second, there is the
9 problem of inter- and intra-observer error, that is, no
10 single researcher makes measurements or observations in the
11 same exact manner each time, and no two individuals make
12 measurements or observations in the same exact manner on the
13 same material. Finally, statistics, as used in biological
14 sciences, is the sampling of populations (many individuals).
15 AAR 02194. Statistical models can generally associate one
16 population or group to another population or group, but
17 cannot be relied upon to associate one individual to another
18 individual or population or group. AAR 02104.

19 The Tribe's theory of cultural affiliation - when
20 distilled to its essence - requires that this Court accept
21 the notion that the Tribe has exclusively occupied the
22 western Great Basin "for time immemorial." The evidence
23 simply does not support that proposition. Plaintiff's theory
24 of cultural affiliation, which rests on generalities, rather
25 than specific and distinctive cultural or biological markers,
26 and on speculation, conflicts with the express dictates of
27

1 NAGPRA. The Tribe's Motion for Summary Judgment should
2 therefore be denied, and summary judgment instead be entered
3 in favor of the United States.

4 **6. The Explanation for BLM's Determination was**
5 **Contained in its Determination**

6 Finally, the Tribe maintains that BLM's decision was
7 "arbitrary and capricious" because it did not identify the
8 bases for its statement in the letter dated February 27, 2004
9 that "there is no additional course of action appropriate to
10 pursue at this time." AAR 2549. The Tribe maintains that in
11 order for this "final decision" of BLM to stand, that
12 decision must have identified an explanation for this
13 decision. This contention ignores that the so called "final
14 decision" of February 24, 2004, was nothing more than a
15 statement confirming that BLM continued to stand behind the
16 Determination. As noted above, the Determination more than
17 adequately satisfies the requirement that it articulate a
18 rational connection between the record facts and the
19 conclusions made.

20 In any event, Defendant has supplemented the record with
21 a memorandum dated February 24, 2004, Supp. AAR 02959-02963,
22 thoroughly explaining all of the government's considerations
23 leading up to its letter of February 27, 2004.

24 **C. In Carrying out NAGPRA's Terms in Response to the**
25 **Tribe's Repatriation Claim, BLM Adhered in all**
26 **Respects to Procedures Required by Law**

27 As the Tribe notes, there is also a procedural component
28 to its claim under NAGPRA and for which it is seeking review

1 under the APA. As noted by the court in Na Iwi, the Tribe's
2 claim of alleged procedural lapses by BLM in fulfilling the
3 requirements of NAGPRA may merit relief of this Court even in
4 the absence of a decision to repatriate the remains, "[i]f a
5 party were to make a colorable claim that a federal agency or
6 museum was not properly following NAGPRA repatriation
7 procedures and was thereby causing undue delay, judicial
8 intervention might be warranted in the absence of a final
9 agency action." 894 F.Supp. at 1406 n. 5.

10 In this case, the Tribe complains that BLM failed to
11 observe the procedures required by law in the following
12 respects: (1) BLM allegedly failed to consult with the Tribe
13 after the Tribe retained experts; (2) BLM allegedly set an
14 arbitrary deadline for the Tribe to submit a "§ 3005(a)(4)
15 claim" in response to BLM's August 2000 determination; and
16 (3) BLM failed to participate in the "statutory review and
17 dispute-resolution process." Plaintiff's Memorandum at 105-
18 10. Based on these allegations, it is apparent that the
19 Tribe's complaint regarding BLM's adherence to procedure is
20 not grounded in alleged "undue delay" as referred to in Na
21 Iwi. Nevertheless, assuming this Court finds that the
22 government's alleged procedural lapses are ripe for or
23 otherwise subject to review under NAGPRA and the APA, 5
24 U.S.C. § 706(2)(D), the Tribe's claim must still fail based
25 on the record evidence. For the reasons articulated below,
26 the Tribe cannot establish any failure by BLM or the
27

1 government generally to comply with the statutory and
2 regulatory requirements of NAGPRA. On this basis, its claim
3 must be denied, and BLM's determination upheld until such
4 time as BLM makes a decision to repatriate the remains of the
5 Spirit Cave Man and the associated funerary objects to the
6 plaintiff Tribe or to some other tribe eligible for relief
7 under NAGPRA.

8 **1. BLM Fulfilled its Consultation Obligations**

9 Inventories are to be completed in consultation with
10 tribal government officials and traditional religious
11 leaders. 25 U.S.C. § 3003(b)(A). In this case, the record
12 reveals an extensive series of interactions involving the
13 remains being inventoried by the Museum between tribal
14 officials, BLM and the Museum beginning in April, 1996. AAR
15 00200. Face-to-face meetings were thereafter held in May,
16 1996, AAR 00174; approximately April-May, 1997, AAR 00386;
17 June, 1997, AAR 00461; October, 1997; AAR 0018; November,
18 1997, AAR 00519; November, 1998, AAR 00809; May, 1999, AAR
19 00848-00851; and March, 2000, AAR 01970. After the
20 Determination in August, 2000, BLM officials met with the
21 Tribe and its counsel in October, 2002, AAR 02485, and July
22 13, 2003, AAR 02539.

23 Throughout the period from April, 1996 to February,
24 2004, BLM communicated with the Tribe repeatedly in writing
25 or telephonically, always reiterating its desire to obtain
26 information from the Tribe bearing on the affiliation
27

1 decision, and its willingness to review any evidence the
2 Tribe's wished to submit in support of its claim of
3 affiliation. See e.g., AAR 00150, 00181, 00446, 00447,
4 00461, 00463, 00518, 00809, 01924, 02153, 02228, 02477,
5 02527, and 02539.

6 Notwithstanding BLM's and the Museum's repeated
7 communications and requests for information, the Tribe was,
8 at several points in the process, inexplicably unyielding and
9 unwilling to provide the type of information that would
10 necessarily have bearing on an affiliation decision. The
11 Museum reported, for instance, that it had made several
12 efforts to get tribes, including the Plaintiff Tribe, to
13 consult with it regarding its inventory, but to no avail.
14 AAR 00407, 00691. The Museum had even offered to pay the
15 travel expenses of tribal representatives. AAR 00407.
16 Attempts to establish consultation protocols for the Northern
17 Paiute tribes was also a challenge, but eventually were
18 successful after a two-day meeting with Numa speaking groups.
19 AAR 00692.

20 In March, 1998, Ms. Dansie had responded to a letter
21 from Melvin Brown, a Paiute Indian, and requested in that
22 response "original stories from Walker Lake or other areas."
23 AAR 00647. Mr. Brown responded that he did have some
24 information for her, but didn't know if he wanted to tell it
25 to her. AAR 00650. Similarly, at the meeting that took place
26 on November 25, 1997 with various representatives of Northern
27

1 Paiute tribes, BLM officials expressed their frustration that
2 the Tribe would not - despite BLM's repeated requests -
3 provide it with information relevant to the affiliation
4 issue. AAR 00546.

5 The Tribe is complaining that despite the well
6 documented efforts of BLM and the Museum to consult with it
7 on the affiliation issue, BLM violated NAGPRA by failing to
8 "consult" with the Tribe after it hired outside experts.
9 Plaintiff's Memorandum at 105-07. As the summary above
10 shows, however, this is incorrect. The Tribe retained its
11 outside experts in approximately June, 1999. AAR 00860-
12 00862. Though not required by NAGPRA, consultation continued
13 through early 2004. AAR 02549.

14 When the Tribe notified BLM of the identity of its
15 experts and its research plans, it proposed three
16 "consultation" meetings: the first during the Summer for the
17 purpose of understanding BLM's assessment of the evidence it
18 had collected to date; the second in the Fall in which the
19 Tribe and its experts would make a presentation of their
20 preliminary position, and would elicit comments from BLM; and
21 the third following the Tribe's submission of its report.
22 AAR 00860-00861. What the Tribe was in essence proposing was
23 not a series of consultation meetings, but instead, meetings
24 that would direct a particular outcome to the determination.
25 The tribe, in essence, was asking for BLM's acquiescence in
26 this effort, and not merely consultation.

27

28 **OPPOSITION OF BLM TO TRIBE'S MOTION FOR SUMMARY JUDGMENT AND
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1 This is precisely the type of conduct between tribes and
2 the government that was deemed improper in Bonnichsen, 217
3 F.Supp.2d at 1133. In that case, the court found the
4 decision was not unbiased and the process was not fair
5 because, among other things, the government secretly
6 furnished the tribal claimants with advance copies of
7 reports, id.; and secretly met with tribal claimants during
8 the decision making process to discuss the mental impressions
9 of the decision makers and the potential weaknesses in the
10 claims. Id. BLM's obligations to consult with the Tribe in
11 this action did not require BLM to meet with the Tribe in
12 order to allow it to check in on the decisional process and
13 to craft or conform expert opinions to meet the concerns
14 expressed by BLM.

15 **2. The Deadline Established by BLM for the**
16 **Submission of New Evidence Following its**
17 **Initial Determination was not Contrary to the**
Procedures Established by NAGPRA or its
Regulations

18 The Tribe also complains that BLM allegedly set an
19 arbitrary deadline for the Tribe to submit a claim under 25
20 U.S.C. § 3005(a)(4). This argument is meritless because it
21 ignores that BLM had been asking the Tribe to provide it with
22 relevant information since April, 1996. AAR 00150.
23 Moreover, the Tribe itself had repeatedly criticized BLM for
24 a delay in making its determination. AAR 00849, 00869. In
25 fact, the Tribe complained to the Review Committee that BLM
26 was taking too long to make its determination, and insisted
27

1 that the Committee tell the Secretary of the Interior to
2 direct the BLM State Director to make an immediate decision.
3 AAR 00849, 00869.

4 It was not until approximately 1999 that the Tribe
5 determined that it needed to retain experts in order to
6 establish its cultural affiliation with the Spirit Cave Man
7 remains. AAR 00840. BLM granted the Tribe two requests for
8 extensions, the first until June 11, 1999, AAR 00815, and the
9 second until December 17, 1999. AAR 00868. The
10 Determination was not issued until August 15, 2000. AAR
11 02153. This was over four years after the consultation
12 process began. Throughout this process, BLM remained open to
13 the submission of new evidence supporting repatriation. AAR
14 02251, 02485, 02539. Until a decision is made to repatriate
15 the remains at issue, BLM must remain open to the submission
16 of new evidence, and therefore, continues to do so. On these
17 facts, the Tribe's claim that BLM violated the procedures
18 prescribed by NAGPRA in setting the October 2, 2000 deadline
19 for the submission of additional evidence must fail.

20 3. **BLM Had no Obligation to Participate in Person**
21 **in the Review Committee Proceedings in**
November, 2001

22 Finally, the Tribe maintains that BLM did not adhere to
23 the procedures required by NAGPRA because it did not
24 participate, in person, in the Review Committee proceedings
25 in November, 2001. There is no authority for this
26 contention.

27

1 When notified of the Review Committee proceedings, BLM
2 responded to the specific questions posed to it. AAR 02251.
3 BLM was asked whether it would appear in person at the
4 proceedings. AAR 02268. The fact that it was questioned
5 regarding its attendance means that there was no assumption
6 that BLM was required or expected to attend. Nothing in the
7 Review Committee procedures that were in place during the
8 relevant period indicates that there was an expectation, let
9 alone a requirement, that a representative of a party appear
10 in person at the proceedings. AAR 02242-02245.

11 43 C.F.R. § 10.17 states only that

12 any person who wishes to contest actions
13 taken by museums, Federal agencies,
14 Indian tribes or Native Hawaiian
15 organizations with respect to the
16 repatriation and disposition of human
17 remains, funerary objects, sacred objects
18 or objects of cultural patrimony is
19 encouraged to do so through informal
20 negotiations to achieve a fair resolution
21 of the matter. The Review Committee may
22 aid in this regard as described below.
23 (Emphasis added).

24 43 C.F.R. § 10.17(a). 43 C.F.R. § 10.17(b) states, in
25 pertinent part, that "[t]he Review Committee may facilitate
26 the informal resolution of disputes relating to these
27 regulations among interested parties that are not resolved by
28 good faith negotiations." (Emphasis added). Nothing in the
above provisions requires that a federal agency or a "party"
participate at all, let alone in person, in Review Committee
proceedings. Indeed, the Plaintiff's argument conflicts with
the intrinsic nature of a body whose charge includes

1 facilitating resolution of disputes, and issuance of non-
2 binding opinions.

3 In any event, the record demonstrates that BLM did
4 participate to the extent it was called upon to do so by the
5 Review Committee. It responded to the requests for written
6 submissions by relying on its Determination and the
7 Biological Aspects Report. AAR 02251. BLM responded to all
8 of the questions posed to it. AAR 02251. The Tribe's
9 position that BLM was required to participate in the
10 proceedings in person is therefore unfounded.

11 **IV. BLM Fulfilled its Trust Responsibilities to the Tribe by**
12 **Complying with the Statutory and Regulatory Requirements**
of NAGPRA

13 The Tribe claims that in carrying out its
14 responsibilities under NAGPRA, the United States violated its
15 duties to the Tribe as a trustee. The United States does not
16 question that it has a "general trust relationship" with the
17 Indian people, including the plaintiff Fallon Paiute-Shoshone
18 Tribe. See Lincoln v. Vigil, 508 U.S. 182, 195 (1993);
19 United States v. Mitchell, 463 U.S. 206, 225 (1983).

20 However, without an unambiguous declaration by Congress which
21 clearly outlines the extent of the trust, it is only a
22 limited one. Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476
23 (D.C. Cir. 1995).

24 While it is true that the United States
25 acts in a fiduciary capacity in its
26 dealings with Indian tribal property,
27 United States v. Cherokee Nation of
Oklahoma, 480 U.S. 700, 707 (1987), it is
also true that the government's fiduciary

1 responsibilities necessarily depend on
2 the substantive laws creating those
3 obligations. United States v. Mitchell,
4 463 U.S. 206 (1983) (Mitchell II);
5 United States v. Mitchell, 445 U.S. 535,
6 542 (1980) (Mitchell I). We agree with
7 the district court that an Indian tribe
8 cannot force the government to take a
9 specific action unless a treaty, statute
10 or agreement imposes, expressly or by
11 implication, that duty. "Without an
12 unambiguous provision by Congress that
13 clearly outlines a federal trust
14 responsibility, courts must appreciate
15 that whatever fiduciary obligation
16 otherwise exists, it is a limited one
17 only." National Wildlife Fed'n v.
18 Andrus, 642 F.2d 589, 612 (D.C.
19 Cir.1980).

20 Id. at 1482.

21 The Tribe, citing to Morongo Band of Mission Indians v.
22 FAA, 161 F.3d 569 (9th Cir. 1998), argues for the proposition
23 that the United States' trust duties in connection with
24 NAGPRA are broader than the duties of the government spelled
25 out explicitly in NAGPRA.¹¹ The Ninth Circuit held in
26 Morongo that in the absence of specific duties placed on the
27 government with respect to Indians, the government's trust
28 responsibility is discharged by compliance with generally
applicable statutes and regulations. Id. at 574. Plaintiffs
misconstrue this authority, however, suggesting that because

¹¹ In rendering its determination, BLM "recognize[d] its
fiduciary responsibility to engage in fair dealing in
conducting any government to government transaction with" the
Tribe, but noted that "the primary impetus for consultation
and the duty to decide cultural affiliation . . . does not
arise from a trust responsibility owed by the [f]ederal
government to [the Tribe]," but rather from the requirements
of NAGPRA. AAR 01985.

1 NAGPRA is a statute meant to benefit Indians - a contention
2 which the United States does not dispute - the government's
3 responsibilities in carrying out the dictates of NAGPRA more
4 expansive than the terms of NAGPRA itself. No legal
5 authority supports that proposition.

6 NAGPRA outlines all of the government's
7 responsibilities to tribes that may have an interest in human
8 remains and funerary items covered by NAGPRA, including,
9 *inter alia*, the terms of its consultation obligations and the
10 bases on which it is to render decisions on repatriation
11 claims. To suggest that the government's trust duties in
12 carrying out NAGPRA's terms are distinct from or more
13 expansive than the terms of the statutory and regulatory
14 provisions themselves is tantamount to reading into the law
15 duties never intended to be imposed on the government under
16 NAGPRA. Cf., *Bonnichsen*, 217 F.Supp.2d at 1136 ("When
17 interpreting statutes, courts do not assume that Congress
18 intended to create odd or absurd results.").

19 The standards by which the government is to be judged
20 are outlined in NAGPRA itself. NAGPRA plainly does not
21 create conventional fiduciary "trust duties." Even if it
22 did, Plaintiffs cannot establish a breach of those "trust
23 duties" under NAGPRA. "(T)he fiduciary relationship springs
24 from the statutes and regulations which 'define the contours
25 of the United States' fiduciary responsibilities.'" *Pawnee*
26 *v. United States*, 830 F.2d 187, 192 (Fed. Cir. 1987) (quoting
27

1 United States v. Mitchell, 463 U.S. 206, 224 (1983)).

2 Therefore, the government must be held to have fulfilled its
3 duties as a trustee to the Tribe if it complied with the
4 statutory and regulatory requirements of NAGPRA. See Pawnee,
5 830 F.2d at 192; Shoshone-Bannock Tribes, 56 F.3d at 1482.

6 Neither Morongo Band nor any other binding authority suggests
7 otherwise.

8 In fact, government agencies only incur specific
9 judicially enforceable trust duties toward particular Indian
10 tribes when required by statute to manage or operate Indian
11 lands or resources. Mitchell, 463 U.S. at 226 (specific
12 duties defined by statute and regulation). Compare United
13 States v. Mitchell, 445 U.S. 535, 545 (1980) (general limited
14 trust). The elements of this type of common law trust are a
15 trustee (the United States), a beneficiary (the Indian
16 allottees), and a trust corpus (the Indian property, lands or
17 funds being managed). Mitchell, 463 U.S. at 225. See, e.g.,
18 Inter Tribal Council of Arizona, Inc. v. Babbitt, 51 F.3d
19 199, 203 (9th Cir. 1995). Morongo Band itself relied on
20 Mitchell, 463 U.S. at 225, noting that the "main reasons" for
21 the Court's statements in Mitchell regarding the general
22 trust relationship between the United States and the Indian
23 people "were the specific obligations placed on the
24 government by statutes and regulations, and the fact that the
25 government 'assume[d] such elaborate control over forests and
26 property belonging to Indians.'" Morongo, 161 F.3d at 574.

1 See also Gros Ventre Tribe v. United States, 344 F.Supp.2d
2 1221, 1227 (D. Mont. 2004). To suggest that the United
3 States operates as a trustee of tribal property under NAGPRA
4 is to assume a conclusion that cannot be reached in the
5 absence of a determination under NAGPRA that the human
6 remains or funerary objects at issue do, in fact, belong to a
7 tribe, that is that they are "trust assets." The terms of
8 NAGPRA applicable to these facts do not support that
9 position.¹²

10 Cases in which the actions of federal agencies vis-a-
11 vis tribes have been judged against the "most exacting
12 fiduciary standards," Plaintiff's Memorandum at 9 (citing
13 Seminole Nation v. United States, 316 U.S. 286, 297 (1942)),
14 are cases involving management of trust assets, or management
15 of property in a manner directly impacting trust assets.
16 Plainly, that law is not applicable here. As the discussion
17 above demonstrates, BLM adhered to all of the pertinent
18 requirements of NAGPRA, and accordingly, fulfilled its trust
19 duties to the Tribe in this instance. Plaintiffs' claim that
20 there was a breach of the United States' trust
21 responsibilities therefore has no merit.

22

23

24

25 ¹² Because the remains and funerary objects at issue in
26 this case were discovered prior to November 16, 1990, the
27 provisions in 25 U.S.C. § 3002 respecting ownership do not
apply.

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1 **V. In the Event this Court Determines that BLM Violated**
2 **NAGPRA or its Trust Duties, the Appropriate Remedy is**
3 **Remand to BLM for Further Consideration**

4 As argued above, the record does not support the Tribe's
5 claim that the determination should be held unlawful based on
6 a failure to comply with the procedures required under NAGPRA
7 or because, as the Tribe claims, the determination was
8 arbitrary and capricious. Nevertheless, if this Court
9 determines that BLM's determination or actions in carrying
10 out NAGPRA were unlawful, then the appropriate remedy is
11 remand to BLM for further consideration of the facts.

12 Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44
13 (1985) ("If the record before the agency does not support the
14 agency action, if the agency has not considered all relevant
15 factors, or if the reviewing court simply cannot evaluate the
16 challenged agency action on the basis of the record before
17 it, the proper course, except in rare circumstances, is to
18 remand to the agency for additional investigation or
19 explanation."). See also Nat'l Wildlife Federation v. United
20 States Army Corps of Engineers, 132 F.Supp.2d 876, 895 (D.
21 Or. 2001) (ruling that remand to the agency was the proper
22 course where underlying decision determined to be arbitrary
23 and capricious).

24 In the event this Court determines in this matter that
25 BLM did render a decision that was arbitrary or capricious or
26 acted without observance of required procedures, the case for
27 remand is even stronger because this Court is not authorized

1 to "'find' underlying facts," Wilderness Society, 118
2 F.Supp.2d at 1089, and may not substitute its judgment for
3 BLM's. Overton Park, 401 U.S. at 416. NAGPRA places on the
4 Plaintiff Tribe the obligation to demonstrate cultural
5 affiliation by a preponderance of the evidence, and on the
6 federal agency, the responsibility to determine whether that
7 proof has been satisfied. 25 U.S.C. § 3005(a)(4). Unless
8 and until BLM reviews and considers the facts on remand,
9 there can be no determination that the Tribe has satisfied
10 that burden.

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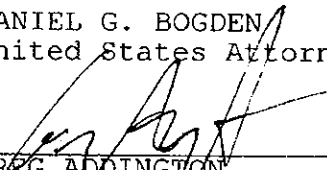
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CONCLUSION

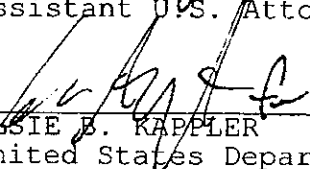
For all of the foregoing reasons, the government respectfully asks that the Tribe's motion for summary judgment be denied, and summary judgment instead be entered in its favor. In the alternative, and in the event this Court finds merit in Plaintiff's positions under the APA, 5 U.S.C. §§ 706(2)(A) and/or 706(2)(D), the government asks that the matter be remanded to BLM for further consideration.

Respectfully submitted,

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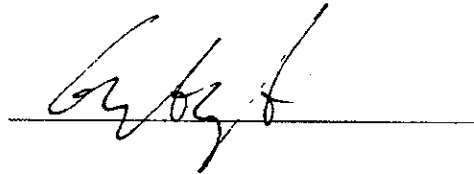
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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing
OPPOSITION OF UNITED STATES BUREAU OF LAND MANAGEMENT TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT and CROSS-MOTION IN
FAVOR OF SUMMARY JUDGMENT was made by sending a copy of same
by first-class mail to the below addressees on November 17,
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