

Marc D. Slonim  
Brian W. Chestnut  
ZIONTZ, CHESTNUT, VARNELL,  
BERLEY & SLONIM  
2101 Fourth Avenue, Ste. 1230  
Seattle, Washington 98121  
(206) 448 1230

Gordon H. DePaoli, Nev. Bar No. 195  
WOODBURN & WEDGE  
P.O. Box 2311  
Reno, Nevada 89505  
(775) 688 3000

Attorneys for Plaintiff, Fallon Paiute-Shoshone Tribe

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA

|                                      |   |                           |
|--------------------------------------|---|---------------------------|
| FALLON PAIUTE-SHOSHONE TRIBE,        | ) |                           |
| a federally recognized Indian tribe, | ) |                           |
| Plaintiff,                           | ) | No. CV-N-04-466-LRH (RAM) |
|                                      | ) |                           |
|                                      | ) |                           |
| v.                                   | ) |                           |
|                                      | ) |                           |
| UNITED STATES BUREAU OF LAND         | ) |                           |
| MANAGEMENT,                          | ) |                           |
| Defendant.                           | ) |                           |
| _____                                | ) |                           |

**THE FALLON TRIBE'S OPPOSITION TO BLM'S MOTION FOR SUMMARY  
JUDGMENT AND REPLY IN SUPPORT OF THE TRIBE'S SUMMARY  
JUDGMENT MOTION**

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The Fallon Tribe submits this combined opposition to BLM's motion for summary judgment and reply in support of the Tribe's summary judgment motion.

**I. The Court Has Jurisdiction to Review BLM's Determination and Denial of the Tribe's Repatriation Request.**

BLM argues the Court lacks jurisdiction to review BLM's determination because it does not represent final agency action. BLM Br. at 50-52. The final-agency-action requirement is derived from the APA, 5 U.S.C. § 704. Agency action is final under the APA if: (1) the agency has completed its decision-making process; and (2) the action either determines rights or obligations or occasions legal consequences. *Alaska Dept. of Env'tl. Conservation v. EPA*, 540 U.S. 461, 483 (2004); *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). We discuss each element in turn, and then discuss the principal case on which BLM relies.

**A. BLM's Decision-Making Process is Complete.**

The record demonstrates BLM's decision-making process is complete. For example: (1) BLM itself described its determination as "final" in October 2000, AAR 2228-2229; (2) BLM did not identify any internal agency appeal process through which BLM might give further consideration to its determination, *id.*; (3) although BLM suggested the Tribe could pursue the matter through the Review Committee, after the Tribe did so, BLM's Nevada State Director informed the Tribe there was nothing further he could do, *id.* at 2228, 2477, 2490; (4) after the Tribe wrote to the Secretary of the Interior and both met and corresponded with BLM's National Director, Assistant Director and other senior officials, BLM's National Director informed the Tribe there was nothing further BLM could do to address the Tribe's concerns, *id.* at 2549; (5) BLM did not dispute the Tribe's characterization of the National Director's letter as constituting "final agency action" denying the Tribe's request for repatriation of the Spirit Cave remains, *id.*

at 2554; and (6) in this litigation, BLM did not assert in its answer or in a motion filed under Fed. R. Civ. P. 12 that the Court lacks subject matter jurisdiction.<sup>1</sup>

In her letter, BLM's National Director stated there were no options to address the Tribe's concerns "at this time." AAR 2549. The Director did not explain what she meant by that, but BLM now argues the Tribe can make a *new* request for repatriation on the basis of *new* evidence in the future. *See* BLM Br. at 52, 83. However, this does not mean BLM has not completed its decision-making process on the Tribe's existing request for repatriation. As BLM stated repeatedly, that process has come to an end. Indeed, in the supplemental administrative documents filed by BLM with its brief, BLM states the Director's decision to uphold BLM's determination "was considered the best option as NAGPRA does not allow for additional steps *once the process has been completed.*" Supp. AAR 2960 (emphasis added).

BLM's argument would mean that, if a federal agency denied a license to a party, and that party could, hypothetically, re-apply for the license on the basis of new information in the future, the party could not obtain judicial review of the original denial. This is contrary to the APA definition of "agency action," which expressly includes an agency "order [or] license . . . or the . . . *denial* thereof," 5 U.S.C. § 551(13) (emphasis added), and to multiple holdings that such denials constitute final agency action.<sup>2</sup> And, it would contravene Congress's goal of providing

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<sup>1</sup> Although BLM can always raise an issue of subject matter jurisdiction, its failure to raise this issue as required by Rule 12 provides further evidence that it believed its decision was final.

<sup>2</sup> *E.g. Center for Biological Diversity v. Veneman*, 394 F.3d 1108, 1113 (9th Cir. 2005) (accepting Forest Service argument that "issuance or denial of permit" constitutes final agency action) (emphasis added); *Rhode Island v. U.S. E.P.A.*, 378 F.3d 19, 26 (1st Cir. 2004) (issuance or denial of a permit is final agency action under Clean Water Act); *Marine Shale Processors, Inc. v. U.S. E.P.A.*, 81 F.3d 1371, 1375 (5th Cir. 1996) (*permit denial* is final agency action under APA), *cert. denied*, 519 U.S. 1055 (1997).

generous opportunities for judicial review of agency action under the APA. *See Brower v. Daley*, 93 F. Supp. 2d 1071, 1081 (N.D. Cal. 2000), *aff'd*, 257 F.3d 1058 (9th Cir. 2001).

As applied to NAGPRA, BLM's argument would mean a tribe could *never* obtain judicial review of the denial of a repatriation request under 25 U.S.C. § 3005(a)(4), because there will always be a hypothetical possibility the tribe could make a new request on the basis of new information. However, Congress clearly intended to authorize judicial review of such denials. *See Bonnichsen v. United States*, 367 F.3d 864, 874 (9th Cir. 2004) (25 U.S.C. § 3013 authorizes "actions against the Secretary asserting under-enforcement of NAGPRA," *i.e.* actions for failure to repatriate Native American human remains); *see also* S. Rep. 101-473 (1990) (NAGPRA provides an avenue to bring suit "[i]n those instances in which the parties cannot reach an agreement regarding the appropriate disposition of Native American human remains").

BLM's contention that its decision-making process is not complete because the Tribe could make a new repatriation claim on the basis of new information in the future is especially inapt here. Since BLM issued its "final" determination in October 2000, the Tribe submitted substantial new information to BLM, including five expert reports that were prepared for the Review Committee, the transcript of the oral presentations the Tribe and its experts made to the Review Committee, the Review Committee's deliberations, findings and recommendation, and other materials. *See* Tribe's Br. at 96-101. There is no evidence in the record that BLM *ever* gave substantive consideration to or undertook *any* analysis of these materials. *Id.* If these materials were insufficient to prompt BLM to re-evaluate its determination, there is no reason to believe that *any* new materials the Tribe might offer in the future would do so. Indeed, as noted in the Tribe's opening brief (at 90), BLM has already taken the position that there can be no new

evidence relevant to its decision since, according to BLM, any “[a]dditional expert testimony would vary across the spectrum of opinions already presented and would not contribute additional new evidence applicable to this decision.” AAR 2039.

**B. BLM’s Determination Has Legal Consequences.**

BLM’s decision determined the rights and obligations of the parties and had legal consequences. Under NAGPRA, a federal agency is legally obligated to repatriate human remains and associated funerary objects to a tribe if it determines the remains and funerary objects are culturally affiliated with the tribe. 25 U.S.C. § 3005(a)(1), (4). However, NAGPRA does not obligate an agency to repatriate items for which it cannot determine cultural affiliation. *Id.* Thus, as BLM explained, because it determined the Spirit Cave items are not affiliated with the Fallon Tribe, it is not obligated to repatriate them to the Tribe and instead has retained ownership and control of them. *See, e.g.,* AAR 0299; *see also* BLM Br. at 11 (“[a]ffiliated remains are subject to repatriation,” but “federal agency retains possession and control of unaffiliated remains”). Under these circumstances, BLM’s determination both “determine[d] rights or obligations” and “occasion[ed] legal consequences.” *Alaska Dep’t. of Env’tl. Conservation*, 540 U.S. at 483 (internal quotations omitted).

That the Tribe might someday be able to request repatriation of the remains under regulations governing the disposition of culturally unidentifiable remains (regulations that have not yet been promulgated<sup>3</sup>) does not change the *current* legal consequences of BLM’s decision.

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<sup>3</sup> Under NAGPRA, the Review Committee is responsible for “recommending specific actions for developing a process for disposition of [culturally unidentifiable human] remains.” 25 U.S.C. § 3006(c)(5). Although the Committee made such recommendations in 2000, 65 Fed. Reg. 36462-464 (June 8, 2000), five-and-a-half years later the Secretary has yet to publish a draft or final rule to implement them.

BLM's argument (Br. at 51 n.10, 52) that the Tribe might someday obtain repatriation under as-yet-unpromulgated regulations is akin to arguing that a party cannot seek judicial review of the denial of its federal permit application because it might be able to obtain the permit in the future if the agency were to promulgate new or different regulations. We are aware of no precedent that such hypothetical regulatory changes can render an otherwise final agency action non-final.

**C. Dalton Does Not Support BLM's Argument.**

In the principal case on which BLM relies (Br. at 51), *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397 (D. Hawaii 1995), there was no agency determination that human remains were culturally unaffiliated under NAGPRA. To the contrary, the federal defendants in *Dalton* had recognized that the remains *were* affiliated with Native Hawaiians and were in the midst of an administrative process to determine to which groups it would repatriate them. The court held the plaintiffs were required to await the outcome of that *on-going* administrative process before challenging the agency's repatriation decision. *Id.* at 1405-1406. In this case, there is no on-going administrative process; BLM has *completed* its administrative process, determined that the remains at issue are not culturally affiliated with the Tribe, and, on that basis, has decided *not* to repatriate them. The *Dalton* court did not consider such circumstances, and nothing in its decision suggests the agency action here is not subject to judicial review.

**II. The Claim that the Spirit Cave Materials Are Not Native American Is Not Properly Before the Court and, In Any Event, Provides No Basis for Upholding BLM's Decision.**

**A. An Amicus Curiae Is Not Entitled To Raise A New Issue.**

The Nevada Museum, BLM, and every member of the Review Committee found that the Spirit Cave remains and associated funerary objects are Native American.<sup>4</sup> There is no evidence that anyone ever questioned the Native American status of the remains throughout the lengthy administrative proceedings in this case.

Amicus curiae Friends of America's Past did not raise this issue in the administrative process,<sup>5</sup> but now seeks to challenge these findings on the basis of the subsequent decisions in *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1134-39 (D. Or. 2002), *aff'd*, 367 F.3d 864, 875-79 (9th Cir. 2004). Although the Tribe brought these decisions to the attention of BLM and the Secretary, *see* AAR 2493-2521, 2547-2548, BLM has not changed its position that the Spirit Cave remains are Native American. *See* BLM Br. at 74-75 ("BLM agrees that Spirit Cave Man was Native American. This is therefore a non-issue in this case.").

As an amicus curiae, Friends of America's Past has no authority to interject new claims or issues into this case. *E.g.*, *Cellnet Communications, Inc. v. S.E.C.*, 149 F.3d 429, 443 (6<sup>th</sup> Cir. 1998); *Lane v. First Nat'l Bank of Boston*, 871 F.2d 166, 175 (1st Cir. 1989). This is especially true in an action for judicial review of agency action where, as here, the argument the amicus

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<sup>4</sup> *See* AAR 1925 (Museum's assertion that "the Spirit Cave remains are, indeed, Native American"); *id.* at 1986-1987 (BLM's assertion that, "because of the prehistoric age of the remains in question, they represent the remains of a Native American person as defined by NAGPRA"); *id.* at 2353-2354, 2390, 2474 (Review Committee member O'Shea confirming the "Native American origin of Spirit Cave, absolutely" and finding that the remains are culturally "related" to the Fallon Tribe); *id.* at 2388-2399 (other Committee members finding Spirit Cave remains are not only Native American, but are culturally affiliated with the Fallon Tribe).

<sup>5</sup> None of the amici claim they participated in the administrative process in this case. Moreover, unlike the plaintiff scientists in *Bonnichsen*, none of the amici claim that they have ever made a request to study the Spirit Cave remains or associated funerary objects, which have been in the custody of the Nevada Museum for the past 65 years, or that they have any intent to do so in the future.

seeks to make was not made before the agency in the administrative process. *See Nat'l Comm'n on Egg Nutrition v. FTC*, 570 F.2d 157, 160 n.3 (7th Cir. 1977). Because no one raised this issue in the administrative process, and because no *party* has raised this issue in court, it is not properly before the Court.<sup>6</sup>

**B. The Challenge to the Native American Status of the Remains Provides No Basis for Upholding BLM's Determination.**

Even if the Court were to entertain a challenge to the Native American status of the Spirit Cave remains, such a challenge would provide no basis for upholding BLM's determination. As a threshold matter, it is axiomatic that an agency decision can only be upheld, if at all, on the grounds articulated by agency. *E.g. Beno v. Shalala*, 30 F.3d 1057, 1073-74 (9th Cir. 1994). Since BLM found that the remains at issue here *are* Native American, its decision cannot be upheld on the grounds that they *are not* Native American.

More fundamentally, the argument that the remains at issue here are not Native American lacks merit. NAGPRA defines "Native American" as "of, *or relating to*, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9) (emphasis added). In *Bonnichsen*, the District Court held NAGPRA requires only that there be "some relationship"

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<sup>6</sup> The Court is not obliged to address this issue in order to establish its subject matter jurisdiction. *Cf. Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993) (issue raised by amicus might be considered if it concerns court's jurisdiction). This Court has subject matter jurisdiction over this action under NAGPRA, 25 U.S.C. § 3013, the federal-question statute, 28 U.S.C. § 1331, and the Indian-tribe jurisdiction statute, 28 U.S.C. § 1362. Under NAGPRA, the Court's jurisdiction rests on the Tribe's *allegation* that BLM violated the Act, not the merits of that claim. *Cf. Bonnichsen*, 367 F.3d at 874 (court has jurisdiction under § 3013 to hear claim that NAGPRA did *not* apply to particular remains). Likewise, under 28 U.S.C. §§ 1331 and 1362, the Court's jurisdiction rests on the fact that the Tribe's claims arise under Federal law (NAGPRA and the APA), not on the merits of those claims. *See, e.g., Montana-Dakota Utils. Co. v. Northwestern Public Service Commission*, 341 U.S. 246, 249 (1951); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *Flanders v. Coleman*, 250 U.S. 223, 228 (1919).

between remains and an existing tribe, people or culture that is indigenous to the United States for the remains to be Native American. 217 F. Supp. 2d at 1136. It explained:

NAGPRA recognizes two distinct kinds of relationships: The first is the *general relationship* to a present-day tribe, people, or culture that establishes that a person or item is "Native American." The second, more narrowly defined specific relationship establishes that a person or item defined as "Native American" is also "culturally affiliated" with a particular present-day tribe.

The requirements for establishing "Native American" status under NAGPRA are *not onerous*. They may be satisfied not only by *showing a relationship to existing tribes or people*, but also by showing a relationship to a present-day "culture" that *is* indigenous to the United States. The culture that is indigenous to the 48 contiguous states is the American Indian culture, which was here long before the arrival of modern Europeans and continues today.

*Id.* at 1137-38 (some emphasis added). On appeal, the Ninth Circuit stated variously that, to be considered Native American, human remains must "bear *some* relationship to", be "relate[d] to", "bear *some significant* relationship to", bear some "special *and* significant genetic *or* cultural relationship" to, or be "connected by some special *or* significant genetic *or* cultural relationship to" a presently existing tribe, people or culture. 367 F.3d at 875-80 (emphasis added). In this case, unlike *Bonnichsen*, there is substantial evidence that the remains bear a significant genetic *and* cultural relationship to a presently existing tribe, people or culture that is indigenous to the United States. We address each of these points in turn.

**1. The Remains Have a Genetic Relationship to Contemporary Native Americans.**

Scientific analysis of the remains' hair and teeth strongly supported the proposition that the remains are genetically related to contemporary Native Americans. The hair was straight and black when the mummy was first unwrapped, exactly the color and form most common in a Northern Asian or Native American. In addition to Goodman and Martin, two FBI analysts



examined the hair and found microscopic characteristics that were consistent with Asian (Mongoloid) ancestry. Tribe's Br. at 73 & n.13.

Comparing five discrete dental traits that could be observed on the remains, Goodman and Martin (and other researchers) concluded the results were "clear" and "strongly suggest[ed]" the remains are related to contemporary Native Americans. *Id.* at 63-64.

In the paper he prepared for the Review Committee, Goodman also reported on a then-soon-to-be-published paper by Professor Christy Turner, who is widely acknowledged to be the leader in the study of human dental genetics. AAR 0992, 1902-1903. Goodman explained that Turner had analyzed the biological affiliation of the Spirit Cave remains based on Multivariate Mean Measures of Divergence, and provided a citation to a paper providing details on this methodology. *Id.* at 1902. Goodman believed the "Turner study is without doubt the most reliable study completed thus far," because it "is based on an exceptional comparative database of over 30,000 individuals and it uses data (tooth crown and root variations) that are under strong genetic control." *Id.* at 1903. A dendrogram representing the relative dental similarity of groups of individuals studied by Turner showed that ancient remains from Nevada, specifically Spirit Cave and Wizards Beach, "are most closely linked to a group of more recent Native Americans from Nevada, and then [to] eight other Native American groups." *Id.*

Turner's article, which was subsequently published by the California Academy of Sciences, states explicitly that there is a "*close dental relationship*" between the Spirit Cave and Wizards Beach crania and "recent Paiute Indians of Nevada," which "indicates dental continuity through time." Tribe's Exh. P at 125 (emphasis added). Turner was aware that, based on skull shape, suggestions had been made that the Spirit Cave and Wizards Beach crania "are less like

Native Americans and more like some Old World populations, possibly Caucasoids or Ainu.” *Id.* at 139. However, he found that, “[w]hile the teeth of these crania are very worn and not much information can be gleaned from them, nevertheless, that which can be safely scored reveal the teeth of these skulls to be *very similar to those of recent Native Americans* and unlike Ainu or Europeans (Figure 6).” *Id.* (emphasis added); *see id.* at 140 Fig. 6. Turner also identified a number of factors that could explain anomalous craniological findings, such as those for the Spirit Cave and Wizards Beach remains (*e.g.*, error arising from small sample size, unknown environmental effects, and dietary and mastication effects on facial architecture). *Id.* at 126.<sup>7</sup>

Overall, the hair and dental analyses by Goodman, Martin, Turner and others establish a significant genetic relationship between the Spirit Cave remains and contemporary Native Americans generally and the Nevada Paiute particularly. This is sufficient to establish that the remains are Native American under NAGPRA. *See Bonnichsen*, 217 F. Supp. 2d at 1136

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<sup>7</sup> Friends of America’s Past argues that craniometric measurements may indicate discontinuity between the Spirit Cave remains and contemporary Native Americans. Br. at 7-8. However, as explained in the Tribe’s opening brief, the craniometric studies of the Spirit Cave remains were inconclusive. *See* Tribe’s Br. at 61-62. Further, unlike *Bonnichsen*, the record in this case includes a critique of craniometric studies generally and the particular craniometric analysis (by Jantz and Owsley) on which Friends of America’s Past now relies. *See* Tribe’s Br. at 60-61. Thus, in this case, Goodman, Martin and Turner explain why craniometric measurements from 9,400 year old remains might not look like contemporary populations to which they are genetically and culturally related, and why the dental evidence (which was not available in *Bonnichsen*) is far more reliable in establishing genetic relationships. In its attempt to rehabilitate its preferred craniometric analysis, Friends of America’s Past relies on articles that are not in the record, does not address the specific problems with the Jantz and Owsley study, does not address the *relative* value of the craniometric and dental analyses, and engages in a wholly unwarranted attack on Dr. Goodman’s objectivity (without acknowledging the similar conclusions reached by Dr. Turner). Dr. Goodman’s peers, it should be noted, have recently elected him to be the next president of the American Anthropological Association. *See* <http://www.aaanet.org/press/an/0401ab-news4.htm> (accessed Dec. 21, 2005).

(requiring “some relationship” to contemporary Native Americans); 367 F.3d at 879 (requiring “genetic *or* cultural relationship”).

Friends of America’s Past does not dispute the fact that there was no comparable evidence in *Bonnichsen*: the remains had no hair and no analysis of the teeth had been undertaken. *See, e.g., Bonnichsen*, 367 F.3d at 882 n.24 (dental characteristic studies among those planned, but not yet conducted, on the remains). Instead, it argues: the hair is inconclusive because it could indicate affiliation with Native American population outside the United States (*e.g., in South America*)<sup>8</sup>; the Spirit Cave teeth “are so severally [*sic*] worn that it is difficult to obtain useful information from them”; Turner’s conclusions “consist solely of a single dendrogram with little explanation of the underlying data or other considerations that might affect the accuracy of his calculations”; and dental data relate to the frequency of characteristics within large populations and thus may not accurately identify the ethnical affiliations of specific individuals. *See Friends Br.* at 13-15.

However, Friends of America’s Past offers nothing but speculation to suggest that an individual buried in western Nevada with hair typical of Native Americans is more likely related to Native Americans from outside the United States than those within this country. *See Friends Br.* at 14. Moreover, Friends does not address the specific information Goodman, Martin, Turner and other researchers have been able to obtain from the teeth. That additional information could *not* be obtained does not detract from the information that *was* obtained.

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<sup>8</sup> Friends of America’s Past also refers to a finding by a county medical examiner that the hair was “typical of a Caucasian individual.” *Br.* at 13. However, at BLM’s request, an FBI analyst re-examined the hair sample that had been analyzed by the county examiner and an additional sample provided by BLM. This re-examination led to a conclusion of Asian ancestry. *See Tribe’s Br.* at 73.

Similarly, Friends of America's Past does not address the specific information provided by Goodman regarding Turner's methodology and database and does not explain why that information was insufficient to analyze Turner's findings. Its argument highlights the problems created when an amicus does not participate in the administrative process and then tries to critique the evidence for the first time in court. Neither BLM nor anyone else suggested to the Tribe during the administrative process that additional information was needed regarding the Turner study, and it is highly improper to raise such questions for the first time here. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553 (1978) (noting obligation of participants in an administrative process to structure their participation in a meaningful way before attacking the outcome in court).

Finally, the observation that dental data relate to frequency of characteristics within large populations does not address the fact that Turner specifically examined the Spirit Cave and Wizards Beach remains, and, using a database of over 30,000 individuals, found their dental traits were most closely related to recent Paiute Indians from Nevada, a finding that clearly supports the existence of a "relationship" between the Spirit Cave remains and contemporary Native Americans. None of the arguments advanced by Friends of America's Past provides any reason to doubt that conclusion. As Professor Goodman observed:

[Turner's] results are not revolutionary. Rather they conform to what might be a working hypothesis: that an ancient individual might look most like contemporary individuals occupying that same area. Indeed, this is the case. Spirit Cave Man does not bizarrely and illogically look like the Norse. Rather he looks like he is Native American and even a native of the Nevada area.

AAR 1903.<sup>9</sup>

**2. The Remains Have a Cultural Relationship to Contemporary Native Americans.**

The record also contains substantial evidence of a cultural relationship between the remains and contemporary cultures that are indigenous to the United States, evidence that was also lacking in *Bonnichsen*. The remains in this case were disinterred from the lower of two burials in Spirit Cave (Burial No. 2). The burial pit was lined with sagebrush, on which the mortuary bundle was deposited and then covered with more sagebrush and filled in with rocks. The deceased was wearing leather moccasins and a fiber breechcloth, and was lying on a rabbit-fur robe. The body was wrapped in two woven mats, and a bag was used as a head cover. A series of seven radiocarbon dates on the hair, bone and matting averaged  $9,415 \pm 25$  uncalibrated radiocarbon years ago. Dates on the bone and matting from the upper burial (Burial No. 1) averaged  $9,285 \pm 65$  years ago. Cremated remains were also found in Spirit Cave; a date on one of the bags in which they were found was  $9,040 \pm 50$  years ago. *See* Tribe's Br. at 11; Tribe's Exh. L at 2 & Table 1.

Altogether, eight textile specimens employing two primary structures (plain weave and twining) were associated with these remains from Spirit Cave. The textiles associated with Burial No. 2 comprised two warp-faced-plain-weave items (the shroud and the bag used as a head cover) and two items constructed with open plain twining with Z-twist wefts (the outermost mat and fur robe). The only textile associated with Burial No. 1 was a warp-faced-plain-weave shroud, while the textiles associated with one set of cremated remains included *both* a warp-

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<sup>9</sup> Friends of America's Past also makes reference to a study by Powell. Br. at 15. However, as we showed in our opening brief, nothing in that study contradicts Turner's conclusions. Tribe's Br. at 62, 66 & n.11.

faced-plain-weave outer bag and an inner bag constructed with open plain twining with Z-twist wefts. An additional bag constructed of close plain twining with Z-twist wefts also contained cremated remains. Tribe's Exh. L at 3-4 & Table 2.

Scientists who have studied the remains at issue found possible "string" grooves on the incisal surface of six teeth, and occupational markers on the skeleton that are consistent with activities related to walking or jogging over rough terrain for long periods, and to hunting, fishing and other subsistence activities that required squatting, lifting and carrying heavy loads. The remains contained severe bone spurs in the feet, which are particularly suggestive of someone who traveled great distances on foot. *See* Tribe's Br. at 74-75.

Examination of coprolitic and fecal material from the remains indicates that the deceased's diet included a variety of fish as well as bulrush seeds. The small size of the fish indicates they were mass-captured in a shallow water system, possibly with basketry or very fine net-mesh dip techniques. The dietary information and pollen present in the fecal material indicate both desert shrub and marsh environments were present in the area, and the people harvested and consumed resources from both environments. *See id.* at 74-76.

All of this information indicates a significant cultural relationship with contemporary Native Americans. First, as BLM acknowledged, the burial practices utilized for the oldest Spirit Cave remains, including Burial No. 2, have "several similarities" with ethnographic Northern Paiute burial practices, as described by Fowler and Liljeblad. *See* Tribe's Br. at 53-54; AAR 2028. And, while BLM disputed the point, the Tribe submitted expert evidence that burial practices documented in Spirit Cave fit comfortably within a Great Basin burial pattern that

persisted into ethnographic times, and which distinguished the people of the Great Basin from surrounding culture areas. *See* Tribe's Br. at 48-55.

Second, as discussed in our opening brief, the twining techniques used in the Spirit Cave materials were used by people in the western Great Basin from the time of the Spirit Cave burials into ethnographic times, and the key element in the textiles (Z-twist cordage wefts) remained the same throughout. Tribe's Br. at 47. Nevada Museum scientists and other scholars have noted that twined mats such as those found with the Spirit Cave remains "were used extensively in the western Great Basin dating from rather recent times to as far back as 9460 B.P.," and "twined twisted fur robes were common throughout Great Basin prehistory into the historic era, usually rabbit fur." *Id.*

Third, ethnographers have documented mats and other textiles with the distinctive plain weave among recent Native populations in the Great Basin and neighboring areas, with the Great Basin specimen dating to  $540 \pm 50$  years ago. Tribe's Exh. L at 14-16. While the scientists lack evidence of a continuous tradition from the time of the Spirit Cave burials for these textiles, the similarity between the plain-weave textiles found in Spirit Cave and those produced by recent Native American groups is notable. *Id.*

Fourth, the dietary and occupational evidence obtained from the remains demonstrates a close relationship to Native people occupying the western Great Basin at the time of contact. String grooves have been observed on the teeth of other prehistoric Great Basin remains, and have been attributed to the use of teeth to prepare string or lines from sinew and plant fibers. *See* Tribe's Br. at 74. The use of marsh and desert shrub environments as well as caves that required people to travel over large areas is consistent with oral narratives that document the ancestral

lifeways of indigenous people living in the Great Basin. *Id.* at 75. Nevada Museum scientists, in summarizing the scientific reports on the Spirit Cave remains, described the people as “lacustrine based Hunter-Gatherers . . . subsisting on the same basic food stuffs as their successors,” displaying “many similarities to the Lovelock Culture 5,000 years later,” and exhibiting a “desert marsh tradition” that may have persisted for thousands of years.” *Id.* at 33, 76.

Another scholar, Melvin Aikens, has noted that the Northern Paiute, Shoshone, and Southern Paiute who occupied the Great Basin at the time of European contact, “are well-described as highly mobile hunter-gatherers following annual harvesting cycles that carried them across hundreds of miles of altitudinally and biotically varied country in the course of a year,” and that they “routinely gathered, transported, and stored plant foods, *relying on species, and on milling and other technology, that can be followed back some 10,000 years in the archaeological record of the Great Basin desert culture.*” *Id.* at 84 (emphasis added); *see also id.* at 31 (Jennings’ Desert Culture concept emphasizes basic and pervasive unity of lifeways implied by artifacts found in sites throughout the Great Basin); 39 (Touhy’s observation that people who used Spirit Cave “formed the nascent stage for the later lakeside Archaic cultures”); 40 (Grayson’s observation that intensive use of a broad array of environments is fully characteristic of Native peoples in the Great Basin at the time of contact); 42 (Elston’s discussion of unifying characteristics throughout the Archaic period in the Great Basin, including the basic Archaic tool kit, settlement pattern, and subsistence strategy); 56-57 (Aiken’s statements that the beginnings of Desert Culture tradition like that carried by Uto-Aztecs down to the present day can be seen 11,000 years ago, and that Numic speakers are classical exemplars of the Desert Culture



tradition); 58 (Madsen and Rhodes' observation that, in western Great Basin, hunters and gatherers have operated in reasonably similar ways over thousands of years).

In short, for every available cultural indicator from Spirit Cave – including burial practices, textiles, diet, and subsistence strategy – there is a significant relationship to similar practices among Native peoples who were indigenous to the Great Basin or nearby areas at the time of contact. This provides ample evidence of a cultural relationship between the remains and “a tribe, people, or culture that is indigenous to the United States,” 25 U.S.C. § 3001(9), and thus establishes that the remains are Native American under NAGPRA. As noted above, the Nevada Museum, BLM, and every member of the Review Committee agreed with this conclusion.

As with the hair and dental evidence, Friends of America's Past does not dispute the fact that there was no comparable evidence in *Bonnichsen* – because of the manner in which the remains in that case had been discovered and the fact that they had *not* been made available for scientific study, there was no evidence of burial practices, textiles, diet or subsistence strategy associated with the remains. Friends of America's Past does not consider the evidence available in this case as a whole, and does not demonstrate it was unreasonable for BLM and the Review Committee to conclude, on the basis of this evidence, that the remains are Native American.

With respect to burial practices, Friends of America's Past argues that, as in *Bonnichsen*, only a few burials have been found from the relevant period, that there is no consistent pattern of burial practices, significant temporal gaps exist for which there is no evidence of burials, and the burial pattern described by Sprague can be found in a wide variety of geographic, linguistic and

ethnic settings. Br. at 9-10.<sup>10</sup> In this case, however, the burial practices of the very people at issue are known – the Spirit Cave burials and cremations, which are tightly linked by their location, use of distinctive textiles and dates, provide a wealth of information about these people’s burial practices. See Tribe’s Br. at 11; Tribe’s Exh. L at 2-4 & Tables 1-2. And, despite temporal gaps, it is undisputed that these practices bear a number of similarities to the burial practices of Native people – in particular, the Northern Paiute – in the Great Basin at the time of European contact. Friends of America’s Past provides no evidence that these particular practices are found in other geographic, linguistic and ethnic settings.<sup>11</sup>

With respect to textiles, Friends of America’s Past argues the type of textiles found with the Spirit Cave remains “disappeared around 8800 to 9000 years ago,” at least one other textile tradition appeared in the area between then and more recent ethnographic times, and the methods used to make the Spirit Cave textiles cannot be identified. Br. at 15-16. The first and third points relate to the plain-weave textiles, but overlook evidence of similar textiles among peoples in and near the Great Basin in the last 500 years. More importantly, these points simply ignore the textiles constructed with twining techniques and the substantial evidence that these

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<sup>10</sup> Friends of America’s Past also argues, citing the Tribe’s submission to the Review Committee, that “there is no necessary correlation between items of material culture and ethnic affiliation.” Br. at 10 (citing AAR 1775). However, the point made by the Tribe and its experts was that *changes* in material culture do not necessarily indicate changes in ethnic affiliation, since changes in material culture are often the result of human adaptation and ingenuity – not the replacement of one human group by another. This does not mean, as amicus suggests, that *similarities* in material culture are irrelevant to identifying cultural relationships under NAGPRA.

<sup>11</sup> In arguing that the general pattern described by Sprague is not unique to Nevada, Friends of America’s Past relies on materials that are not in the record in this case, and to which the Tribe and its experts have had no opportunity to respond. As discussed below, this is improper.

techniques, as well as the core element of the textiles (Z-twist wefts), survived in the Great Basin into ethnographic times. They likewise ignore the prevalence of twined fur robes throughout this period. The reference to another textile tradition is apparently a reference to Lovelock wickerware but, as the Tribe showed in its opening brief, there is substantial evidence to link the Spirit Cave remains to the people who constructed Lovelock wickerware and to link the latter with the ethnographic Northern Paiute. *See* Tribe's Br. at 33, 39-45, 76.<sup>12</sup>

Finally, with respect to diet and subsistence strategies associated with the Spirit Cave remains, Friends of America's Past argues that these characteristics are "typical of virtually all temperate climate peoples 9400 years ago and for many millennia thereafter." Br. at 16. Again, Friends of America's Past relies largely on materials that are not in the record, and to which the Tribe and its experts have had no opportunity to respond. *Id.* at 16-17. More importantly, Friends of America's Past does not address the conclusions of many scientists, which are in the record, that the indigenous people occupying the Great Basin at the time of European contact pursued essentially the same subsistence strategies in the same places as those associated with the Spirit Cave remains, used technologies that can be traced back in the archaeological record of the Great Basin to the time of the Spirit Cave remains and before, and relied on the same food sources that have been associated with the Spirit Cave remains. One can speculate that the people associated with the Spirit Cave remains are related to prehistoric Australian peoples or others from distant lands, but all of the affirmative evidence – hair, teeth, burial practices, textiles, diet, subsistence strategy and geography – indicates a significant genetic and cultural

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<sup>12</sup> Lovelock wickerware did not *replace* twining; to the contrary, twining continued to be used throughout the period in which Lovelock wickerware was developed and later abandoned. *See* Tribe's Br. at 45-47; AAR 2054.

relationship to the people who occupied the *same* lands and pursued the *same* way of life in western Nevada in the succeeding millennia, up to and including the present-day tribes and peoples who are indigenous to the area. Accordingly, there is no basis on this record for rejecting the unanimous views of the Nevada Museum, BLM and the Review Committee that the remains are Native American under NAGPRA.

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

**A. BLM Failed to Consult with the Tribe after the Tribe Retained Experts.**

In the Tribe's opening brief, we showed that BLM violated NAGPRA and the federal trust responsibility by failing to consult with the Tribe regarding the cultural affiliation of the Spirit Cave remains after the Tribe retained experts. Tribe's Br. at 105-07. As a result, BLM's determination failed to consider significant information provided by the Tribe that is relevant to the cultural affiliation of the remains. *See generally id.* at 30-90.

In June and December 1999, the Tribe specifically requested consultations so that it and its experts could better understand BLM's assessment of the evidence and engage in in-depth discussions about the complex scientific and cultural issues involved. *See id.* at 25; AAR 0860-0862, 0977-0978. BLM's former Nevada State Director had invited the Tribe to arrange such a meeting with BLM, for the specific purposes of discussing information related to the affiliation issue. AAR 0463. However, BLM's new State Director flatly rejected the Tribe's June and December 1999 requests. He stated "it is not prudent to hold the pre-decisional meetings you suggest to discuss the evidence for or against affiliation" and offered only to meet with the Tribe *after* making a decision on affiliation. Tribe's Br. at 25-26, 27; AAR 0868, 1924.

Although the State Director later agreed to a single meeting in early 2000, no BLM staff who worked on the Spirit Cave matter or who would author BLM's determination attended the meeting. Tribe's Br. at 28. BLM did not discuss its view of the evidence or describe any aspect of its analysis in the meeting, and BLM's determination itself did not claim this was a consultation meeting. *Id.* at 28, 30.

Exercising its statutory responsibility to monitor the identification process, *see* 25 U.S.C. § 3006(c)(2), the Review Committee concluded BLM failed to consult with the Tribe and failed to fairly and objectively consider all of the available relevant information. Tribe's Br. at 94-95.

BLM makes five arguments in response to this claim: (1) "the record reveals an extensive series of interactions involving the remains being inventoried by the Museum" between April 1996 and February 2004; (2) during this period BLM stated repeatedly that it desired to obtain information from the Tribe and would review any evidence the Tribe wished to submit; (3) the Tribe was inexplicably unyielding and unwilling to provide information; (4) although not required by NAGPRA, consultation continued through early 2004; and (5) the consultation meetings requested by the Tribe were improper. BLM Br. at 79-82. BLM does not address the Review Committee's findings, and the arguments it does make lack merit.

**1. BLM Had a Duty to Consult with the Tribe Regarding Cultural Affiliation Under NAGPRA.**

NAGPRA requires each Federal agency that has "possession or control" over Native American human remains and associated funerary objects to compile an inventory of such items and, to the extent possible, to "identify the geographical and cultural affiliation of such item[s]." 25 U.S.C. § 3003(a). These "inventories and identifications . . . shall be . . . completed in consultation with tribal government . . . officials." 25 U.S.C. § 3003(b)(1)(A). NAGPRA's

implementing regulations require federal agencies to begin consultation “as early as possible, no later in the inventory process than the time at which investigation into the cultural affiliation of human remains and associated funerary objects is being conducted.” 43 C.F.R. § 10.9(b)(2). Such consultation “may be initiated with a letter, but should be followed up by telephone or face-to-face *dialogue*.” *Id.* (emphasis added). And, federal agencies must seek a tribe’s own recommendations “on how the consultation process should be conducted.” *Id.* § 10.9(b)(4)(ii).

From the outset of the administrative process in this case, BLM made it clear that it – not the Nevada Museum – would bear ultimate responsibility for identifying, if possible, the cultural affiliation of the Spirit Cave remains.<sup>13</sup> Accordingly, under the plain language of the statute, BLM was responsible for consulting with tribal government officials as it attempted to identify the cultural affiliation of the remains.

**2. BLM’s Claim that There Was an “Extensive Series of Interactions Involving the Remains” Does Not Establish that It Fulfilled Its Duty to Consult with the Tribe Regarding *Affiliation* of the Remains.**

BLM’s claim that that there was an “extensive series of interactions involving the remains being inventoried by the Museum” does not demonstrate that it fulfilled its statutory responsibility to consult with officials of the Fallon Tribe regarding the cultural affiliation of the

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<sup>13</sup> See, e.g., AAR 0128 (December 1994 meeting report prepared by Nevada Museum confirming that BLM’s Pat Barker “will make decisions about the burials we have that are from BLM land”); AAR 0297-0299 (October 1996 BLM memorandum stating that, “[f]or each set of remains or objects, the BLM has to decide affiliation”); AAR 0372 (Museum policy statement assuming “federal land management agency retains legal jurisdiction over collections taken from public land, and also have [*sic*] primary responsibility for compliance with NAGPRA once the Museum has notified the agency of the results of the human remains inventory from their managed lands”); AAR 386 (March 1997 BLM memorandum stating BLM had not yet made a decision regarding certain remains, including Spirit Cave).

Spirit Cave remains. BLM cites eleven meetings in its brief (at 79).<sup>14</sup> However, the first five meetings (in 1996 and 1997) did not involve discussions between BLM and the Fallon Tribe regarding the cultural affiliation of the remains; instead, they involved other topics (such as destructive testing of the remains) and in some cases other parties (either the Museum or another tribe).<sup>15</sup> The next three meetings (in 1997, 1998 and 1999) did touch on questions of affiliation, but these discussions were clearly preliminary in nature and contemplated continued consultation.<sup>16</sup> Moreover, all of these interactions took place *before* the Tribe retained experts in the summer of 1999. Of the three remaining meetings, only one occurred during the period leading up to BLM's August 2000 determination; the final two meetings did not occur until October 2002 and July 2003, some two to three years *after* BLM issued its determination.

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<sup>14</sup> As noted above, NAGPRA's implementing regulations require federal agencies to begin consultation "as early as possible, no later in the inventory process than the time at which investigation into the cultural affiliation of human remains and associated funerary objects is being conducted." 43 C.F.R. § 10.9(b)(2). In this case, BLM and Nevada Museum officials began discussing affiliation of the Spirit Cave and other remains in December 1994 (if not sooner), *see* AAR 0128-0132, and by October 1996 the Museum had determined, and BLM staff had agreed, that the remains were unaffiliated. *Id.* at 0297-0299. BLM cites no evidence of *any* consultation with the Tribe regarding the affiliation of the Spirit Cave remains during this period.

<sup>15</sup> *See* AAR 0200, 0298 (May 1996 meeting to discuss "consumptive analyses"); AAR 0174 (May 1996 meeting convened by Fish and Wildlife Service to address Tribe's concerns over the Museum's treatment of the remains); AAR 0386 (March 1997 plan by Museum to meet with Tribe to discuss how the Tribe would react to "unaffiliated" decision); AAR 0461 (June 1997 meeting at which Tribe expressed concern about destructive scientific testing of the remains); AAR 0518 (October 1997 introductory meeting between new BLM Nevada State Director and Pyramid Lake Tribe).

<sup>16</sup> *See* AAR 0519-0619 (November 1997 meeting among BLM and Nevada Museum staff and multiple tribal representatives, involving broad ranging discussion of NAGPRA issues and only incidental reference to Spirit Cave); AAR 0809 (November 1998 meeting between BLM State Director and Fallon Tribal Chairman in which BLM agreed to provide literature and correspondence relating to Spirit Cave and invited Tribe to submit additional information); AAR 0848-0851 (May 1999 meeting between BLM and Tribe in which Tribe requested additional time to retain experts and submit additional information).

The fact that BLM initiated consultation with the Tribe *before* the Tribe had retained experts does not excuse its failure to continue consultation *after* the Tribe retained experts. In the spring and summer of 1999, BLM insisted to the Tribe it had not yet made a determination regarding the cultural affiliation of the remains, and specifically agreed to give the Tribe additional time to work with experts and submit expert reports. *See* Tribe's Br. at 24-26. Nothing in NAGPRA (which requires that the identification of cultural affiliation be "*completed* in consultation" with tribal officials) or its implementing regulations (which requires that initiation of consultation be *followed* with telephonic or face-to-face dialogue) suggests that an agency can suspend consultation with a tribe under such circumstances. *See* AAR 2385 (Review Committee member O'Shea noting that "there is an obligation for continued consultation, and that I think is where BLM has failed").

The single meeting BLM reluctantly agreed to in early 2000 did not satisfy its statutory obligations to consult with the Tribe after the Tribe retained experts. As noted above, BLM did not claim this was a consultation meeting, and the meeting did not involve substantive discussion or consideration of the evidence with BLM scientists. NAGPRA – and the federal trust responsibility – required more.

Although Congress did not define what it meant by "consultation with tribal government . . . officials" in NAGPRA, that requirement cannot be reduced merely to providing tribal officials an opportunity to submit comments or information. Under normal rules of statutory construction, an undefined term or phrase should be given its "ordinary or natural meaning." *United States v. Alvarez-Sanchez*, 511 U.S. 350, 357 (1994); *Bonnichsen*, 367 F.3d at 875. Webster's New Collegiate Dictionary (1977) defines "consultation" as "the act of consulting or



conferring.” It defines “consult” as “to have regard to: consider” and “to deliberate together: confer,” and it defines “confer” as “to come together to compare views or take counsel: consult.” Thus, in its ordinary meaning, “consultation with tribal government . . . officials” involves the exchange and consideration of views, not merely an opportunity for a tribe to submit comments. Indeed, had Congress intended the latter, it could have employed familiar statutory language to give tribal officials an opportunity to comment on affiliation questions.<sup>17</sup> By eschewing such language, and instead mandating “consultation with tribal government . . . officials,” Congress required more than a single meeting at which an agency simply listened to tribal comments without discussing its views or indicating how it would take a tribe’s views into consideration.

This interpretation is supported by NAGPRA’s legislative history. According to the House Report:

The term “consultation”, wherever it appears in the bill, means a process involving the open discussion and *joint deliberations* with respect to potential issues, changes, or actions by all interested parties.

H.R. Rpt. No. 101-877 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4367, 4375 (emphasis added).

The requirement that federal agencies consult with, and not merely solicit comments from, tribal governments makes sense given “the unique relationship between the Federal Government and Indian tribes,” 25 U.S.C. § 3010, a relationship that does not exist between the government and the general public. Moreover, this interpretation of NAGPRA is consistent with, and reinforced by, the regulatory requirements that federal agencies engage in “dialogue” with tribal officials and solicit their recommendations “on how the consultation process should

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<sup>17</sup> See, e.g., 5 U.S.C. § 553(c) (Administrative Procedure Act requirement to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation”).

be conducted.” 43 C.F.R. § 10.9(b)(2), (b)(4)(ii).<sup>18</sup> Both of these requirements contemplate a considered exchange of information and ideas, not merely the submission of tribal comments. This reading of NAGPRA is also consistent with and supported by the federal trust responsibility and the Indian canons of construction. *See* Tribe’s Br. at 7-10.<sup>19</sup> Accordingly, the single meeting BLM reluctantly held with the Tribe in early 2000 did not satisfy its obligation to consult with the Tribe under NAGPRA.

Lastly, BLM does not explain how the final two meetings, which took place two to three years *after* it issued its “final determination,” can satisfy its obligation to consult with the Tribe in the process of making that determination. These post-determination meetings led to no further analysis or consideration by BLM of the Tribe’s evidence. *See* Tribe’s Br. at 96-101.

**3. BLM’s Failure to Consider a Wide Range of Relevant Evidence Provided by the Tribe Confirms Its Failure to Consult with the Tribe as Required by NAGPRA.**

BLM’s failure to consult with the Tribe as required by NAGPRA is confirmed by the fact that its determination completely fails to address a wide range of relevant information provided

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<sup>18</sup> There is no evidence that BLM ever solicited the Tribe’s recommendation on how the consultation process should be conducted, as required by § 10.9(b)(4)(ii). When the Tribe made such a recommendation in June 1999, BLM rejected it without proposing any alternative.

<sup>19</sup> BLM’s attempt to avoid the trust responsibility by claiming no trust asset is involved here, Br. at 89, is unavailing. Because NAGPRA’s consultation requirement is “specifically aimed” at protecting tribal interests, it triggers the federal trust obligation to carry out the consultation in good faith, and in a manner that is protective of tribal interests. *Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 574 (9<sup>th</sup> Cir. 1998); *Yankton Sioux Tribe v. U.S. Army Corps of Eng’s*, 209 F. Supp. 2d 1008, 1023 (D.S.D. 2002); *see also* Tribe’s Br. at 8-10. Further, because, as BLM concedes, the remains at issue here were disinterred from the Tribe’s aboriginal lands and are Native American, the determination of their cultural affiliation involves a matter that goes to the heart of the trust responsibility. *See* 25 U.S.C. § 3010. The strength of the Tribe’s interest in the remains is indicated by the fact that, had they been discovered after 1990, NAGPRA would have vested ownership and control of them in the Tribe. *See* 25 U.S.C. § 3002(a)(2)(C)(1).

by the Tribe and its experts. BLM's claim that it expressed a desire to obtain information from the Tribe and a willingness to review such information may be an accurate description of what BLM *said*, but it is not an accurate description of what BLM *did*. *See, e.g.*, Tribe's Br. at 31 (failure to address Desert Culture concept), 33 (failure to address Museum's finding that Spirit Cave remains are "culturally quite distinctive and identifiable as an archaeological culture"), 33-34 (failure to address meaning of term "group" in NAGPRA or to consider whether early Holocene occupants of the western Great Basin comprised an identifiable group), 34-35 (failure to consider fact that prehistoric changes in material culture were staggered over time; failure to consider evidence of ground stone processing equipment in the early Holocene), 35-36 (failure to address Elston's and Grayson's views on culture change), 37 (failure to address Horting's analysis of coiled basketry or Grayson's view regarding the rise in abundance of grinding stones in the middle Holocene), 38-39 (failure to address views of Grayson, Fagan, Connelly, Fowler, Cannon, and Aikins suggesting environmentally induced movements explain Great Basin occupational patterns over time), 39 (failure to address links identified by Touhy, Dansie and others between Spirit Cave remains and later lakeside cultures in the Great Basin, including Lovelock Culture), 40 (failure to address continuity in housing and in use of broad array of environments throughout late Holocene), 41 (failure to address archaeological evidence for Numic presence in the central Great Basin throughout the late Holocene), 42 (failure to address unifying elements throughout the Archaic (*i.e.*, middle and late Holocene) period, including basic Archaic toolkit, settlement pattern and subsistence strategy), 43-45 (failure to consider Grosscup's finding that there is a "great similarity" between Northern Paiute and Lovelock cultures), 45-46 (failure to address theoretical problems with claim that textile changes imply

differences in ethnicity, or to consider evidence that explains appearance and disappearance of Lovelock wickerware), 46 (failure to address Connelly, Fowler and Cannon's finding of a "remarkable degree of continuity" in basketry forms and structures throughout the Holocene in the northern Great Basin), 47 (failure to address significance of distinct western basketry region within the Great Basin, fact that people of western Great Basin have used twining techniques since the time of the Spirit Cave burials, and other evidence of continuity in textile manufacturing techniques and uses), 48 (failure to address evidence of coiling in prehistoric Northern Paiute communities), 50 (failure to consider textile evidence in asserting Spirit Cave burials and cremations were performed by different groups), 51 (failure to address Korboli's finding that Spirit Cave, Fish Cave, and Lovelock Cave burials all exhibited the same burial custom), 52 (failure to address Ferguson's findings that some archaeological data suggest there is a cultural continuum between Lovelock Culture and Northern Paiute, and that Northern Paiute have stronger cultural relationship to human remains from Lovelock Cave than any other Native American group; failure to consider decision of the National Museum of the American Indian to repatriate Lovelock remains to a contemporary Paiute group), 59 (failure to consider Brooks and Brooks' conclusion that Stillwater Marsh skeletal remains over the past 3,000 years reveal a relatively homogenous people with no evidence of population replacement or migration), 59-61 (failure to address problems with craniometric analyses, as discussed by Goodman and Martin), 66-67 (failure to consider Turner's study finding "close dental relationship" between Spirit Cave remains and recent Paiute Indians of Nevada), 68-70 (failure to consider O'Rourke's conclusion based on DNA evidence that geographic patterns in modern Native American populations arose over 2,000 years ago and have been relatively stable since then), 70-71 (failure to consider

Kaestle's findings supporting a biological link between modern Native inhabitants of western Nevada and ancient Nevada populations), 74-76 (failure to address biological evidence regarding lifestyle and environment of Spirit Cave remains), 78 (failure to address Tribe's belief that it is the caretaker for all the old ones in its aboriginal territory), 80 (failure to address Kroeber's analysis of Numic origins), 80-81 (failure to address linguists' total rejection of glottochronology, the theory on which the Numic expansion hypothesis is based), 81 (failure to address archaeological criteria for finding prehistoric migration), 81-82 (failure to address conflicts between Numic expansion hypothesis and archaeological record), 82 (failure to address Kaestle's admixture hypothesis), 85-88 (failure to address Great Basin Culture Area, Northern Paiute and *Toidikadi* ethnography, and Uto-Aztecan origin stories), 96-101 (failure to consider any information the Tribe presented to the Review Committee or the Committee's findings and recommendation).

The extraordinary range of information that BLM failed to consider is compelling evidence of its failure to consult with the Tribe as required by NAGPRA.

**4. The Tribe Was Neither "Inexplicably Unyielding" Nor Unwilling to Provide Information to BLM.**

BLM's claim that "the Tribe was, at several points in the process, inexplicably unyielding and unwilling to provide the type of information that would necessarily have bearing on an affiliation decision," BLM Br. at 80, is both unsubstantiated and unavailing. BLM first cites two documents in which Nevada Museum staff complained about difficulties consulting with certain tribes, but then acknowledges that the Museum successfully established a consultation protocol with the tribes. Moreover, in the documents on which BLM relies, the Museum reports that it had "extended consultations over the entire grant period with the Fallon Paiute-Shoshone tribes,"

and makes no suggestion that the Fallon Tribe was either “unyielding” or “unwilling to provide” information. AAR 0692-0693. The only other documents BLM cites in support of this claim comprise correspondence between a Museum scientist and Melvin Brown. BLM Br. at 80. Although BLM asserts Mr. Brown is “a Paiute Indian,” it does not claim he is either a member or representative of the Fallon Tribe, and to our knowledge he is neither. BLM provides no evidence that the Tribe was even aware of this correspondence, let alone that it was somehow responsible for Mr. Brown’s conduct.

BLM’s current, unsupported claim that the Tribe was “inexplicably unyielding” contrasts with what BLM itself said during the administrative process. For example, in a September 1997 letter to the Tribe’s Chairman regarding the Spirit Cave remains, BLM’s outgoing Nevada State Director stated that she had “enjoyed the opportunity to work with” the Tribe on that issue and hoped for “a continuation of the excellent government-to-government relationship between the tribes and BLM.” AAR 0463. One year later, in December 1998, BLM’s new State Director wrote to the Tribal Chairman acknowledging that the treatment of the Spirit Cave remains was “an exceedingly emotional and sensitive issue” for the Tribe, and expressing appreciation for the Chairman’s “willingness to discuss this issue.” AAR 0809; *see also* AAR 2340 (comments of Review Committee member James Bradley, commending tribal chairman for persistence in presenting what “must be an incredibly difficult issue for you”), 2372 (comments of Review Committee member Garrick Bailey, finding that the Tribe “followed procedure” and “acted in good faith,” but BLM did not).

In short, BLM's claim that the Tribe was "inexplicably unyielding" is not supported by the record and provides no justification for BLM's refusal to consult with the Tribe after the Tribe retained experts.

**5. The Tribe's Consultation Request Was Not Improper.**

Finally, BLM argues that the Tribe's request for consultation was improper. BLM Br. at 81-82. As discussed above, the Tribe specifically requested consultation meetings with BLM to better understand BLM's assessment of the evidence and to engage in in-depth discussions of the complex scientific and cultural information pertinent to BLM's determination. See AAR 0860-0861. The Tribe stated its purpose in requesting these meetings was to engage in "open, substantive and informed discussion of the issues presented by the Tribe's repatriation request." *Id.* at 0861.

BLM now argues that "[w]hat the Tribe was in essence proposing was not a series of consultation meetings, but instead, meetings that would direct a particular outcome to the determination." BLM Br. at 81. In addition, through its discussion of *Bonnichsen*, 217 F. Supp. 2d at 1133, BLM implies that the Fallon Tribe was seeking to obtain secret advance copies of reports and to engage in secret meetings with BLM. BLM Br. at 82. The Tribe, however, made no such proposals. It did not seek to "direct a particular outcome to the determination," but only to consult with BLM so that both parties would better understand the evidence at hand. And it did not seek advance copies of BLM reports or to meet in secret; to the contrary, it made its consultation proposal in writing and as a matter of public record. See AAR 0860-0861.<sup>20</sup>

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<sup>20</sup> BLM's comparison of the meetings proposed by the Tribe and the circumstances in *Bonnichsen* is not fair. In *Bonnichsen*, 217 F. Supp. 2d at 1133-35, the court was troubled by a series of actions that showed the Government was biased, including: covering the site where the

In rejecting the Tribe's request to consult, BLM's State Director did not contend the Tribe was trying to "direct a particular outcome" or to engage in secret meetings; instead, he made it plain he simply was not willing to discuss evidence "for or against affiliation" before making a decision. AAR 0868. BLM's post hoc mischaracterization of the Tribe's request for consultation meetings cannot justify BLM's refusal to consult with the Tribe. *See Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 156 (1991) (court cannot affirm agency action by accepting post-hoc rationalizations by counsel not grounded in the administrative record).

Notably, BLM makes no attempt to defend the bases on which the State Director's actually denied the Tribe's consultation request. It is hard to imagine what Congress had in mind when it directed federal agencies to identify the cultural affiliation of Native American remains in consultation with tribal government officials if it did not envision discussions of the evidence "for or against affiliation." The only explanation suggested in the record for BLM's unwillingness to consult after the Tribe retained experts is that it was unwilling to discuss the scientific evidence with other scientists who might challenge BLM's predetermined position – an unwillingness that likewise explains its refusal to participate in the Review Committee's meeting. This unwillingness to discuss the evidence violated BLM's obligation to consult with the Tribe under NAGPRA and breached the federal trust responsibility.

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remains at issue were discovered; holding secret meetings with the tribal claimants; allowing only the tribal claimants (and no other member of the public) the opportunity to respond to expert reports in the record; refusing to clarify to the scientists the issues it was considering; and refusing to allow the scientists to review the administrative record before the record was closed and a final decision was made. In contrast, the Fallon Tribe was simply suggesting a method to carry out NAGPRA's specifically mandated consultation requirements, and no effort was made to hide the Tribe's proposal.



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

In the Tribe's opening brief, we showed that BLM violated NAGPRA by setting a 45-day deadline for the Tribe to submit a claim for repatriation of culturally unidentified human remains in response to BLM's August 2000 determination, and then rejecting the Tribe's request for additional time to submit such a request. Tribe's Br. at 29, 90-91, 107-09. Given BLM's insistence that it had made no decision regarding the cultural affiliation of the Spirit Cave remains in the period leading up to August 2000, *see id.* at 19-20, 22-23, 25-26, the determination BLM issued in that month necessarily represented its initial determination, under 25 U.S.C. § 3003(a), that it was not possible to identify the cultural affiliation of the remains in the inventory process. However, as BLM itself recognized, 25 U.S.C. § 3005(a)(4) allows a tribe to seek repatriation of remains for which cultural affiliation has not been identified in the inventory process – and imposes no deadline on when such a claim may be made. *See* Tribe's Br. at 29, 90-91, 107-08.

BLM's imposition of an arbitrary deadline for the Tribe to submit such a claim in this case, and its rejection of the Tribe's request for additional time to do so, had real consequences. As we have shown, after imposing its deadline and issuing a "final" determination in October 2000, BLM failed to consider *any* of the substantial new materials submitted by the Tribe in support of its repatriation request. *See* Tribe's Br. at 92-101.

In its response, BLM argues it "had been asking the Tribe to provide it with relevant information since April, 1996," that the Tribe had criticized BLM for a delay in making its determination and had complained about this to the Review Committee, that BLM granted two requests by the Tribe for additional time to submit information from its experts in 1999, that the

August 2000 determination was issued over four years after the consultation process began, and that, “[u]ntil a decision is made to repatriate the remains at issue, BLM must remain open to the submission of new evidence, and therefore, continues to do so.” BLM Br. at 82-83.<sup>21</sup>

BLM’s response identifies *no* statutory or regulatory basis for the deadline it imposed on the Tribe to seek repatriation under § 3005(a)(4), nor does it identify *any* harm to the agency or the public that would have resulted from accommodating the Tribe’s request for additional time to submit such a claim. However long it took to complete the initial inventory and identification process, NAGPRA expressly authorizes a tribe to make a claim for the repatriation of human remains and associated funerary objects whose cultural affiliation is not identified in that process, and places no time limit on such a claim.

Moreover, in this case, the Tribe *could not* have responded to BLM’s analysis until it received BLM’s determination in August 2000. This was the first time BLM disclosed the full

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<sup>21</sup> BLM’s claim that it “had been asking the Tribe” for information regarding the cultural affiliation of the remains since April 1996, and its implied claim that the Tribe’s failure to respond was the reason for the delay in BLM’s initial identification of the remains’ cultural affiliation, is misleading. First, the document it cites in support of this proposition is a letter from BLM to the Tribe requesting that the Tribe participate in a meeting to discuss the Museum’s request “to conduct various studies on the human remains presently curated by the BLM at the Museum.” AAR 0150. The letter does not refer specifically to the Spirit Cave remains, does not seek information on the cultural affiliation of those (or any other) remains, and instead suggests that the proposed testing itself “will contribute important data necessary to address the issue of repatriation fairly and rationally.” *Id.* Second, there is little in the record to suggest that, until the Tribe requested additional time in early 1999, BLM was delaying its identification in the hopes of obtaining information from the Tribe; to the contrary, the record suggests that BLM was deferring its initial identification to give the Museum as much time as possible to study the remains, all the while assuring the Tribe that the remains would eventually be repatriated. *See* Tribe’s Br. at 12-24.

range of evidence on which it was relying,<sup>22</sup> and the first time it disclosed its *analysis* of the evidence to the Tribe. We showed that the Tribe's request for additional time to respond to BLM's determination was reasonable in light of these and other circumstances, *see* Tribe's Br. at 90-91, 108, and BLM makes no showing to the contrary.

Finally, BLM's claim that, despite setting an October 2000 deadline, it remained open to the submission of new evidence, suffers from two serious problems. First, if, as BLM now apparently concedes, NAGPRA required BLM to consider new evidence after October 2000, there was no basis for imposing an October 2000 deadline for the Tribe to submit such information in the first place. Second, as discussed above, BLM in fact did *not* consider new evidence submitted by the Tribe. There is simply no evidence in the record that BLM gave any substantive consideration to or engaged in any analysis of the evidence submitted by the Tribe during the Review Committee process, the Review Committee's findings or deliberations, or the materials the Tribe submitted to BLM thereafter. *See* Tribe's Br. at 92-101. BLM's failure to consider or analyze these materials was consistent with the State Director's stated reason for rejecting the Tribe's request for additional time to respond to BLM's determination, namely, "that this issue has been deliberated thoroughly at this level." AAR 2228. Despite its protestations to the contrary, BLM was not willing to and did not consider any new information after its October 2000 deadline.

Under these circumstances, BLM's establishment of a 45-day deadline for the Tribe to submit a claim under § 3005(a)(4), and its rejection of the Tribe's request for additional time to

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<sup>22</sup> *See* AAR 2272-2279 (listing 71 sources cited in the determination that had not previously been identified by BLM).

submit such a claim in response to BLM's initial determination, was not in accordance with procedure required by law.

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

In the Tribe's opening brief, we showed that BLM failed to participate in the statutory review and dispute-resolution process in the following respects: (1) before issuing its determination, BLM refused to meet with the Review Committee to discuss the inventory process or the Tribe's concerns regarding that process, claiming it would be "premature and inappropriate" to do so; (2) after issuing its determination, BLM refused to attend the Committee's meeting at which the Spirit Cave remains would be discussed, claiming its determination did "not appear to be subject to reconsideration"; (3) after the Committee published its findings and recommendations, BLM refused to respond on the grounds that the Committee has "no authority under the Act to make a finding of cultural affiliation"; and (4) BLM gave no consideration to the extensive materials submitted to the Committee, the proceedings before the Committee, the Committee's deliberations, or the Committee's findings or recommendation. *See* Tribe's Br. at 22-23, 92, 94, 96-97, 99-101.

These failures were inconsistent with BLM's representations to the Tribe that the Review Committee could assist the Tribe if it wished to engage in informal negotiations to contest BLM's decision, and that the Committee could convene meetings between the parties, make advisory findings as to contested facts, and make recommendations as to the proper resolution of the dispute. Tribe's Br. at 91-92; *see also* AAR 2368 (Review Committee member O'Shea noting inconsistency between BLM *statements* suggesting Tribe bring Spirit Cave issue to the Committee, and its *actions* in failing to attend the Committee's meeting). More fundamentally,

BLM's failures completely undermined the statutory review and dispute-resolution process established by Congress. Tribe's Br. at 109-110.

In its response, BLM argues that it had no obligation to appear in person at the Review Committee's meeting, and that it responded in writing to the specific questions posed by the Committee. BLM Br. at 83-85. BLM claims that this was all that was required because NAGPRA's implementing regulations merely "encourage" parties to seek the informal resolution of disputes with the assistance of the Review Committee, and provide only that the Committee "may" facilitate such informal resolutions. *Id.*, citing 43 C.F.R. § 10.17(a), (b).

This response misses the mark. First, BLM makes no mention of the *statutory* provisions that established the Review Committee "to monitor and review the implementation of the inventory and identification process and repatriation activities" under NAGPRA, required agencies to make their inventories available to the Committee "both during the time they are being conducted and afterward," and authorized the Committee: (1) to monitor the inventory and identification process "to ensure a fair, objective consideration and assessment of all available relevant information and evidence"; (2) to review and make findings related to the cultural affiliation and return of cultural items; and (3) to facilitate the resolution of disputes between tribes and federal agencies. 25 U.S.C. §§ 3003(b)(1)(C), 3006(a), (c); *see also* S. Rpt. 101-473 (Review Committee serves the "very important function" of facilitating resolution of disputes over the determination of cultural affiliation).

BLM does not explain how the Review Committee can carry out these "very important" statutory functions where, as here, an agency refuses to participate in dispute-resolution meetings and refuses to respond to, or even consider, the findings or recommendations of the Committee.

Because of BLM's approach, the Committee's effort to monitor the inventory process to ensure fair consideration of all available evidence was rendered meaningless, its finding regarding cultural affiliation was useless, and it was deprived of any ability to attempt to facilitate a resolution to the dispute. This is plainly contrary to Congress's expressed intent in establishing the Review Committee.

Second, BLM makes no attempt to defend the grounds on which BLM officials actually refused to attend the Committee's meeting or consider the Committee's findings and recommendation, namely, that the Committee had no authority to review a cultural affiliation determination or make a finding regarding the cultural affiliation of Native American remains. These grounds, which are set forth repeatedly in the record, *see, e.g.*, AAR 2251, 2286-2287, 2428-2429, are contrary to the express provisions of the Act. *See* 25 U.S.C. § 3006(c).

Third, BLM makes no reference to its suggestions to the Tribe that the Tribe seek the assistance of the Review Committee. BLM thus makes no attempt to reconcile its decision not to participate in the Review Committee's meetings with its prior statements that the Tribe could contest BLM's decision through informal negotiations with the assistance of the Committee. Its inconsistent approach was arbitrary and capricious and devoid of any rational explanation.

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

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

In the Tribe's opening brief we showed that, in addition to the procedural violations discussed above, BLM officials: demonstrated hostility to NAGPRA; sought to delay repatriation of remains held by the Nevada Museum and to facilitate scientific testing of those remains without notice to Indian tribes; prejudged the status of the Spirit Cave remains; repeatedly misled

the Tribe about the status of BLM's decision-making with respect to the remains; participated in a publicity campaign to promote further study of the remains and generate opposition to their repatriation; failed to disclose to the Tribe that BLM had authorized measuring, photographing and copying the remains; and unreasonably rejected the Tribe's request to move the remains to the vault utilized by the Tribe and the United States Fish and Wildlife Service (FWS) as an interim storage facility. Tribe's Br. at 12-26, 111-14. These actions demonstrated bias and prejudgment that violated NAGPRA's requirement that agencies *fairly* and *objectively* consider all available evidence in making cultural affiliation and repatriation decisions, contravened the federal trust responsibility, and were arbitrary and capricious under the APA. *Id.* at 110-11.

BLM responds only to four of the instances of bias and prejudgment documented by the Tribe. First, we showed that the principal authors of BLM's determination had written an article in which they complained that NAGPRA represents an "anti-science social trend[]" that allows claimants to dispose of human remains "as if they were personal property." Tribe's Br., Exh. D at 16-17. In response, BLM cites another part of the article in which these BLM officials explained that the Numic expansion hypothesis was at odds with certain creation stories. BLM Br. at 54. This, however, does not diminish the authors' anti-NAGPRA statements, or change the fact that they were unhappy that, in their view, NAGPRA "linked control of the archaeologic record with Native American groups who were in place in ethnographic times . . . [which] will have major consequences for future archaeologic research." Tribe's Br., Exh. D at 16.

Second, we showed that, in a December 1994 meeting, one of the same BLM officials instructed the Nevada Museum to list any human remains more than 3,000 years old as "unaffiliated." AAR 0130. In response, BLM argues this was a "liberal" directive because some

scientists believe the Numic expansion occurred only 500 years ago, and that it was consistent with the subsequent decisions in *Bonnichsen* and the Review Committee's preliminary comments regarding ancient remains. BLM Br. at 55-56. BLM misses the point. Under NAGPRA, determinations of cultural affiliation are to be based on an objective assessment of *all* available evidence. Directing that a determination of cultural affiliation for multiple sets of remains be based on a single, highly controversial scientific hypothesis before considering *any* of the evidence pertaining to particular remains was improper, and effectively prejudged the status of the remains at issue in this case. The subsequent *Bonnichsen* decisions provide no justification for this approach, since they were based on the *particular* facts pertaining to the remains at issue in that case, and do not hold that remains more than 3,000 year old can *never* be culturally affiliated under NAGPRA. The Review Committee comments on which BLM relies, which addressed ancient remains in general, illustrate this point: when the Committee considered the *particular* facts relating to the remains at issue here, it found the remains were culturally affiliated with the Fallon Tribe.

Third, we showed that in its October 1996 status report BLM stated it had reviewed the Museum's inventory and "determined" 41 sets of remains, including the Spirit Cave remains, were unaffiliated, but later removed all references to this determination from its status reports and insisted it had made no such determination. Tribe's Br. at 17-18. BLM argues the October 1996 report "merely reflects" BLM's "review and assessment" of the Museum's inventory, but BLM does not deny it made its own determination in October 1996. BLM Br. at 56. Indeed, BLM goes on to acknowledge that this "determination" was a prerequisite to the tribe's filing of a repatriation claim under 25 U.S.C. § 3005(a)(4). *Id.* However, what BLM does not – and



cannot – explain, is why it insisted to the Tribe and the Review Committee for the next three years that it had made *no* such determination.

Fourth, we showed that in 1996 and 1999 BLM unreasonably denied the Tribe's request to temporarily inter the remains in the Stillwater vault. Tribe's Br. at 16, 26. FWS, a FNAS archaeologist, and, ultimately, the Nevada Museum itself all supported the Tribe's request, *see id.* at 16, 22, and a FWS archaeologist familiar with the vault specifically found that the vault met the regulatory criteria for curatorial facilities. *Id.* at 26. In contrast, the record indicates BLM had no independent information about the vault when it denied the Tribe's request in 1996, *id.* at 16,<sup>23</sup> and does disclose the grounds on which BLM concluded the vault was inadequate in 1999. *Id.* at 26. BLM now points to a *February 2004* supplemental administrative record document prepared in its Washington office that purportedly explains the basis for BLM's position, BLM Br. at 56; Supp. AAR 2961, but BLM does not deny that it provided no such explanation to the Tribe, and made no attempt to reconcile its assessment of the vault with that of the FWS and other federal and state agencies.<sup>24</sup>

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<sup>23</sup> The most likely explanation for BLM's 1996 denial was that moving the remains to the vault would have interfered with the scientific studies of the remains that BLM had encouraged the Museum to conduct without notice to the Tribe. *See* Tribe's Br. at 13-14.

<sup>24</sup> The February 2004 document – which was first disclosed to the Tribe when BLM filed it with its summary judgment motion – provides further evidence of BLM's bias. For example, it baldly asserts that the remains are "priceless" to the public at large, but does not acknowledge the extensive scientific study, photography, reproduction and documentation of the remains that has already occurred, and does not mention the importance of the remains to the Tribe, whose core religious and cultural beliefs were violated by the remains' disinterment, study and public display. Supp. AAR 2960. Similarly, BLM claims the scientific community has "great interest" in the remains, but does not mention that there are no pending requests to study the remains, and that many scientists have supported the Tribe's efforts to repatriate them. *Id.*

Instead of seriously contesting the many examples of bias and prejudgment set forth by the Tribe, BLM argues it is entitled to a “presumption of regularity.” BLM Br. at 53-54. However, the cases it cites demonstrate this presumption does “not . . . shield [BLM] . . . from a thorough, probing, in-depth review” of the record. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *see also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1065 (9th Cir. 2004) (APA review must be “searching and careful”). Moreover, in *none* of the cases cited by BLM was there any evidence of bad faith, bias, or prejudgment. Nevertheless, the cases make clear that, if there is such evidence of impropriety, it should be considered. *Overton Park*, 401 U.S. at 420 (lower court can inquire into “bad faith or improper behavior” of agency that made decision); *Gifford Pinchot*, 378 F.3d at 1071 (presumption of regularity applies “unless rebutted by evidence in the record”).

Finally, BLM argues that the facts supporting the court’s finding of bias in *Bonnichsen* are more egregious than the facts supporting the Tribe’s allegations of bias and prejudgment in this case. BLM Br. at 57. We do not quarrel with the proposition that the facts in this case and in *Bonnichsen* are not the same. However, in both cases, there is substantial evidence that the agencies had a predetermined position long before they actually considered the available evidence, and that they failed to comply with NAGPRA’s substantive and procedural requirements in adhering to their predetermined positions throughout the administrative process.

Agency decisions motivated by bad faith and bias are arbitrary and capricious and should be overturned. *See* Tribe’s Br. at 110-11. Based on the many – and largely undisputed – examples of BLM’s bias and prejudgment in this case, BLM’s decision should be set aside as arbitrary and capricious.

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

In the Tribe's opening brief, we showed that BLM's determination failed to address substantial evidence and expert opinion that support the Tribe's claim that the Spirit Cave remains and associated funerary objects are culturally affiliated with the Tribe within the meaning of NAGPRA, and distorted much of the evidence it did consider. We summarized the issues, evidence and expert opinions BLM failed to address in Part III.A.3 above. For examples of evidence BLM distorted, see Tribe's Br. at 35-36 (misuse of sources that reject proposition that changes in material culture mean people occupying the western Great Basin in the early Holocene died out or migrated away), 38-39 (misuse of evidence regarding population movements in the middle Holocene to imply "significant cultural discontinuity," where evidence suggests only movement to better-watered locations), 40-42 (misuse of sources in an effort to rebut Grayson's finding that the archaeological record over past 4,000 to 5,000 years "look[s] very much as if it could have been created by people living much the way some Great Basin native people lived when Europeans first encountered them"), 43 (claim that there "is *nothing* in the culture history of the Late Holocene to show that cultural materials and practices similar to historic native peoples appear in the archaeological record until about 1,000 years B.P.," despite substantial evidence, in the very sources on which BLM relies, to the contrary), 50 (claim that Spirit Cave burials and cremations were performed by different groups, despite compelling textile evidence to the contrary), 50-52 (selective use and distortion of Ferguson's report for the National Museum of the American Indian), 54-55 (mischaracterization of Stillwater Marsh burial practices), 56-58 (mischaracterization of scholarly views of Numic expansion hypothesis, including misstatement of alleged "consensus"), 68, 70-71 (distortion of Kaestle's DNA study),

72 (selective and misleading quotation from Kaestle's serum albumin study), 88-89 (misuse of Sai'dukai legends); *see generally* Tribe's Br. at 115-21.

These substantial omissions and distortions are the hallmark of an arbitrary and capricious agency decision, *see* Tribe's Br. at 115,<sup>25</sup> and contravene NAGPRA's explicit requirement for "fair, objective consideration and assessment of all available relevant information and evidence." 25 U.S.C. § 3006(c)(2). Remarkably, BLM's response does not address *any* of these omissions or distortions. BLM does not claim any of the omitted issues, evidence or expert opinions were actually considered by it, and does not dispute our showing that, in significant respects, BLM seriously distorted the evidence on which it did rely. Nor does BLM make any attempt to show that the multiple omissions and distortions were immaterial to its decision. We address the arguments BLM does make below, and show they lack merit.

**1. The Tribe's Brief Properly Focused on BLM's Decision.**

BLM first argues that the Tribe's brief improperly focused on the Tribe's "own theories and its own view of how those theories establish its rights to repatriate the remains"; BLM claims that, instead, the Tribe should have focused on BLM's "decision itself, because this Court's review turns on the question of whether there was a rational basis for BLM's determination, not on whether the Tribe has convinced the Court of the merit of its theories." BLM Br. at 58. The problem with this argument is that the Tribe's brief *did* focus on BLM's decision; we devoted over 60 pages to a section-by-section analysis of the decision, identifying issues and evidence BLM failed to address and evidence that it distorted. Tribe's Br. at 28-90.

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<sup>25</sup> *See also Bonnichsen v. United States*, 969 F. Supp. 628,644 (D. Or. 1997) (depending on the circumstances, agency's failure to consider relevant evidence may be grounds for setting aside decision).

That BLM has chosen not to respond to our analysis of its decision should not obscure the fact that the Tribe has built its case on a thorough analysis of BLM's own decision.<sup>26</sup>

**2. BLM's Discussion of the Statutory Factors Was Insufficient.**

BLM next argues that its decision should be upheld because it discussed each of the factors listed in 25 U.S.C. § 3005(a)(4). BLM Br. at 58-64. It is not enough, however, merely to address each of the statutory factors without considering all of the relevant evidence and fairly presenting the evidence that is considered, as required both by NAGPRA and the APA. BLM's summary does not address the omissions and distortions in its determination, and thus provides no basis for upholding its decision. *Cf.* BLM Br. at 59-64 *with* Tribe's Br. at 30-90.

**3. Deference to Agency Expertise Does Not Sustain BLM's Decision.**

BLM also argues that deference is due to the opinions of its experts. BLM Br. at 64-67.

However,

“[t]he deference accorded an agency's scientific or technical expertise is not unlimited.” *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (citing *Defenders of Wildlife v. Babbitt*, 958 F.Supp. 670, 679 (D.D.C.1997)). Deference is not owed when “the agency has completely failed to address some factor consideration of which was essential to [making an] informed decision.” *Id.* (quoting *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir.1993) (internal citations omitted)).

*Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798-99 (2005); *see also* *Brower*, 257 F.3d at 1067 (“presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned”). Here, the multiple omissions and distortions in BLM's decision make deference to the agency's alleged expertise inappropriate.

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<sup>26</sup> For affirmative statements of the Tribe's position that it is culturally affiliated with the Spirit Cave remains, *see* AAR 1685-1760, 2295-2335.

Moreover, deference to agency expertise is even less appropriate in this case because of agency bias and prejudgment (discussed above), and because of the Review Committee's findings and recommendation. As to the latter point, we noted in the Tribe's opening brief that in *Bonnichsen* the court found that the Review Committee, *not* multiple individual agencies that sometimes administer NAGPRA, possesses special agency expertise regarding "the interpretation and *implementation* of NAGPRA." 969 F. Supp. at 643 (emphasis added).

BLM seeks to distinguish this holding on the grounds that it only declined to defer to an individual agency's legal interpretation of NAGPRA and its implementing regulations, and not to such an agency's "determination on a repatriation claim." BLM Br. at 67. However, the determination in this case necessarily involved BLM's understanding of the statutory and regulatory requirements for establishing "cultural affiliation" and "shared group identity" — matters as to which BLM apparently concedes it is *not* entitled to deference.

Moreover, the specific agency actions at issue in *Bonnichsen* involved not just statutory and regulatory interpretation, but a determination on a repatriation claim. *Bonnichsen*, 969 F. Supp. at 637 (challenged decisions included, *inter alia*, determinations that remains at issue were Native American and that there is a relationship of shared group identity between the remains and contemporary tribes). Although the court discussed its reasons for not giving deference to an individual agency's interpretation of NAGPRA and its implementing regulations, its opinion was not limited to those matters, but extended to agency "implementation" and "administration" of the statute as well. *See id.* at 643. The court's rationale for giving more deference to the Review Committee than to the individual agency was that the agency was not "solely responsible for *administering* [the] statutory scheme," and that, "[w]ith multiple agencies separately interpreting

and *administering* the statute . . . there is a potential for inconsistent interpretations.” *Id.* (emphasis added). This rationale applies fully to the type of determination involved in this case.

BLM also argues that no deference is owed to the Review Committee’s findings because they are “advisory and non-binding.” BLM Br. at 67-69. The *Bonnichsen* court considered and rejected this argument. *Bonnichsen*, 969 F. Supp. at 643 n.13. Among other factors, the court noted that “the United States Fish and Wildlife Service often acts in a consulting role when fulfilling its responsibilities under the Endangered Species Act and other statutes, but that does not diminish the deference given to that agency’s findings and recommendations.” *Id.* In this case, Congress directed that the Review Committee be comprised of members nominated by the scientific and museum community as well as Native organizations; directed that it monitor the inventory and identification process “to ensure a fair, objective consideration and assessment of all available relevant information and evidence”; authorized it to make findings regarding the identity and cultural affiliation of cultural items; and specifically provided that its findings would be admissible in an action such as this. 25 U.S.C. § 3006(b)-(d). Under these circumstances, the fact that the Committee’s decisions are not *binding* on federal agencies does not mean they are not entitled to deference from the Court.

There is nothing unusual about this result. Before the President, by executive order, directed the Council on Environmental Quality (“CEQ”) to issue binding regulations under the National Environmental Policy Act (“NEPA”), the Supreme Court held a CEQ determination regarding the adequacy of an environmental impact statement was “entitled to great weight.” *Warm Springs Dam Task Force v. Gribble*, 417 U.S. 1301, 1309-10 (1974) (Douglas, J., in chambers), *cited with approval*, *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979). The Court

relied on CEQ's statutory authority to "review and appraise" government activities to determine whether they were contributing to achievement of NEPA's policy and to make recommendations to the President with respect thereto. *Warm Springs*, 417 U.S. at 1310; *Sierra Club*, 442 U.S. at 358. Because this statutory authority is closely analogous to the Review Committee's statutory authority, *Warm Springs* and *Sierra Club* indicate that the Review Committee's determinations should likewise be given "great weight." 417 U.S. at 1310.

**4. BLM's Argument that the Tribe Failed to Establish Cultural Affiliation by a Preponderance of the Evidence Is Not Properly Before the Court and, In Any Event, Lacks Merit.**

Finally, engaging in precisely the type of argumentation it previously insisted was improper, BLM asks the Court to review the Tribe's repatriation claim on the merits and conclude that the Tribe failed to establish cultural affiliation with the Spirit Cave remains by a preponderance of the evidence. To do so, the Court must substitute itself for the agency as the decision maker, and override the specific finding of the Review Committee that the Tribe established cultural affiliation by a preponderance of the evidence. Because, as we have shown above, BLM's decision was made without observance of procedure required by law and was arbitrary and capricious, its decision should be set aside and the matter remanded to the agency; the Court need not and should not engage in a *de novo* determination of the Tribe's claim.

Further, much of BLM's argument regarding the merits of the Tribe's position concerns the meaning of the phrases "shared group identity" and "identifiable earlier group" as they are used in NAGPRA. See BLM Br. at 70-73. Although the Tribe carefully set forth its position on the meaning of these phrases in the administrative process, see, e.g., AAR 1699-1702, 2300-2302, BLM did not address the matter either in its determination or anywhere else in the



administrative record. BLM's current view of the meaning of these phrases rests entirely on post hoc argumentation of counsel. (The same is true of BLM's current views regarding Professor Turner's latest research; BLM never addressed Professor Turner's research in the administrative process, and must now resort to counsel's post hoc arguments in an effort to minimize its significance. *See* BLM Br. at 75.) However, such post hoc arguments can provide no basis for upholding BLM's administrative determination. *See Martin*, 499 U.S. at 156.<sup>27</sup>

Even if the Court were to entertain BLM's invitation to review the merits of the Tribe's claim that it is culturally affiliated with the Spirit Cave remains, BLM's argument would lack merit. BLM's principal claim is that the Tribe's position is based on an interpretation of the term "group" that requires *only* geographic commonality. *See, e.g.*, BLM Br. at 73. However, this is a distortion of the Tribe's position. In claiming it is culturally affiliated with the Spirit Cave

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<sup>27</sup> This problem is endemic to the briefs submitted by amici curiae Ohio Archaeological Council, Ethnic Minority Council of America, Doctors Custred and Simic, Doctors Goddard and Campbell, and Friends of America's Past. Perhaps recognizing the weaknesses in BLM's decision, amici make no attempt to confine their submissions to the grounds articulated by BLM or the evidence in the administrative record, but freely offer their own views and supporting evidence to the Court. This approach is not consistent with the applicable standards of review and thus can provide no basis for sustaining BLM's determination. *See Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (Supreme Court has "consistently expressed the view that ordinarily review of administrative decisions is to be confined to 'consideration of the decision of the agency . . . and of the evidence on which it was based.'"); *Nat'l Wildlife Fed'n v. U.S. Army Corp. of Engineers*, 384 F.3d 1163, 1178 n.19 (9th Cir. 2004) (court cannot consider an expert report that is not part of the record); *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450-51 (9th Cir. 1996) (post-decision information -- such as the materials submitted by the amici here -- may not be advanced as a new rationalization for sustaining an agency's decision); *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 379 F. Supp. 2d 1071, 1090-91 (N.D. Cal. 2005) (courts "may not consider information created during the litigation 'that was not available at the time the [agency] made its decision.'"). Amici should not be permitted to evade these settled rules by submitting new evidence and expert opinions in the guise of amicus briefs.

remains, the Tribe relied on archaeological, anthropological, biological, linguistic and oral tradition evidence, in addition to geography. *See generally* AAR 1703-1760.

On the merits, the real difference between the parties lies not over whether geography itself can establish cultural affiliation, but over whether differences in individual characteristics between smaller groups of people preclude the existence of larger identifiable groups. In its submission to the Review Committee, the Tribe began its discussion of cultural affiliation by discussing the concept of culture areas. AAR 1703. As the Tribe explained, “[a]nthropologists group sets of peoples in ‘culture areas’ based on similarities in such things as the nature of their subsistence pursuits, their sociopolitical organization, their material manufactures, and their religion.” *Id.* This concept – which is *not* based solely on geography – has special significance in the Great Basin: “The Great Basin Culture Area is a spatial grouping of peoples who, at the time of European contact, were far more similar to one another than they were to peoples in adjacent culture areas.” *Id.* Indeed, while “large-scale groupings of people based on cultural similarities do not often coincide well with groupings independently derived from considerations of linguistic relationships, the Great Basin is one place where the match between language and culture was nearly, though not quite, perfect,” since, with one exception, nearly all of the native peoples of the Great Basin were Uto-Aztecan speakers. *Id.* at 1704.

There were, of course, many different “groups” within the Great Basin at the time of contact – individual families, bands, and so on. Nevertheless, the longstanding recognition of the Great Basin Culture Area shows that it is possible to recognize a larger identifiable group, based not only on geography, but on such factors as subsistence pursuits, sociopolitical organization, material manufactures, religion, and linguistics. It is the Tribe’s position that, where the

evidence is sufficient to identify such a group, it can comprise an earlier identifiable group and provide the basis for a relationship of shared group identity with a contemporary tribe under NAGPRA.<sup>28</sup>

Although BLM never directly addresses the distinction between larger groups and smaller subgroups – either in the administrative record or in its summary judgment brief – it implicitly assumes that the existence of smaller subgroups precludes the existence of larger groups within the meaning of NAGPRA. BLM’s discussion of the textile evidence illustrates this point. It argues “the archaeological record relating to textile manufacture in the western Great Basin shows more evidence of change through time that [*sic*] it does of continuity.” BLM Br. at 59. However, BLM dismisses the evidence of continuity precisely because it suggests the presence of a larger identifiable group: as BLM puts it, “[c]ontinuity is mainly manifest in simple mats and blankets that were made by *all* groups in the Great Basin in recent generations and *all* groups associated with textiles in the archaeological record.” *Id.* (emphasis added). Notably, as BLM appears to concede, the textiles it cites as evidence of discontinuity – warp-faced-plain-weave textiles found in Spirit Cave and other nearby sites, and Lovelock wickerware, *id.* at 59-60 – were made by people who *also* made simple twined mats and blankets. Whether or not the makers of warp-faced-plain-weave textiles and Lovelock wickerware constituted distinct

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<sup>28</sup> The identification of a larger earlier group with which particular remains were associated might lead to competing claims for repatriation from several contemporary tribes. However, NAGPRA has an explicit provision to address this. See 25 U.S.C. § 3005(e). Moreover, in this case there are no competing claims. See Tribe’s Br. at 24 & n.5, 97 (discussing supporting resolutions from the Nevada Inter-Tribal Council and the National Congress of American Indians). The claim by amicus Ethnic Minority Council of America (Br. at 12-14) that the Zuni Tribe opposes the Fallon Tribe’s repatriation claim is erroneous; it is based on a misreading of a 1989 Zuni resolution and was made without consulting with the Zuni Tribe. See Tribe’s Exh. X.

families, bands or other subgroups, and whether or not such subgroups “died out” or simply stopped making these particular textiles for other reasons,<sup>29</sup> the evidence as a whole suggests they were part of a larger group, all of whose members shared other textile manufacturing techniques and other cultural characteristics. *See, e.g.*, AAR 1731-1740 (discussing relation of Spirit Cave remains to early Holocene occupants of the Great Basin), 1746-1749 (discussing relation of Lovelock people and Northern Paiute).<sup>30</sup>

The issue, then, is whether such larger groups can form the basis for a relationship of “shared group identity” under NAGPRA, or whether the possible presence of smaller subgroups, such as those hypothesized by BLM, precludes a finding of cultural affiliation. In the Tribe’s opening brief, we showed that NAGPRA’s definition of cultural affiliation as “a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe . . . and an identifiable earlier group,” 25 U.S.C. § 3001(2), does not require a showing of shared “tribal” or “band” identity with an earlier identifiable “tribe” or “band” of Indians. Tribe’s Br. at 6. Instead, the NAGPRA definition encompasses broader groups and requires only that a present-day tribe demonstrate a *reasonable connection* with such a group. *Id.* In support of our position, we examined the ordinary meaning of the term group (which is not defined in NAGPRA), the interpretation of a similar phrase in the Indian Claims

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<sup>29</sup> See AAR 1747-1748 n.11 for a discussion of possible explanations for the appearance and disappearance of Lovelock wickerware.

<sup>30</sup> BLM’s treatment of the burial-practices evidence is similar. It dismisses evidence of a Great Basin burial pattern documented in the archaeological and ethnographic record, which distinguishes Great Basin burials from those in adjoining culture areas, precisely because it suggests the existence of a broad Great Basin group. *See* BLM Br. at 73-74.

Commission Act ("ICCA"), NAGPRA's language, legislative history and implementing regulations, and applicable canons of construction. *Id.* at 5-8.<sup>31</sup>

BLM does not explicitly disagree with our contention that NAGPRA does not require a showing of shared "tribal" or "band" identity with an earlier identifiable "tribe" or "band" of Indians.<sup>32</sup> Moreover, despite the basic rule that "courts generally give words not defined in a statute their "ordinary or natural meaning,"" *Bonnichsen*, 367 F.3d at 875, BLM does not address the ordinary or natural meaning of the term group, and makes no attempt to show that it is limited to tribes or bands of Indians. Nor does BLM address the other statutory language or legislative history on which we relied.<sup>33</sup>

BLM does attempt to distinguish the ICCA cases we cited. *See* BLM Br. at 72-73.<sup>34</sup> However, in *Thompson v. United States*, 122 Ct. Cl. 348, 1952 WL 5988 (1952), although the

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<sup>31</sup> The Tribe's interpretation is also consistent with the overall structure and purpose of NAGPRA. Since the Act was designed to provide for the repatriation of Native American remains and funerary objects, and since it requires a threshold determination that such items are Native American, it should be construed in a manner that facilitates the repatriation of items that have satisfied that threshold requirement.

<sup>32</sup> Amicus Ethnic Minority Council of America argues that the "earlier group" must be "something on the scale of a modern tribe," Br. at 8, but does not explain why Congress chose to define cultural affiliation as a relationship of "shared group identity" with an "earlier identifiable group," not a relationship of "shared tribal identity" with an "earlier identifiable tribe." The statute on which it relies uses the phrases "tribal origin" and "culturally affiliated" separately and does not equate them. 20 U.S.C. § 80q-9(b), (c).

<sup>33</sup> BLM argues that the Indian canon does not apply here because NAGPRA is unambiguous. BLM Br. at 70. However, it makes no showing that NAGPRA unambiguously precludes the identification of larger groups as proposed by the Tribe.

<sup>34</sup> BLM does not deny that the NAGPRA phrases "shared group identity" and "identifiable earlier group," 25 U.S.C. § 3001(2), are similar to the ICCA phrase "identifiable group of American Indians." When Congress uses a judicially interpreted phrase from an earlier statute in a new statute, it is presumed to have adopted the judicial interpretation of that phrase. *E.g.*, *Sutton v.*

court *discussed* a prior jurisdictional act authorizing the Indians of California to sue the United States, it *held* that the Indians of California were an “identifiable group of American Indians” within the meaning of the ICCA, which was the statute at issue in that case. In *Northern Paiute Nation v. United States*, 7 Ind. Cl. Com. 322 (1959), *aff’d*, 393 F.2d 786, 183 Ct. Cl. 321 (1968), some *individual Northern Paiute bands* lacked aboriginal title to the land and therefore could not recover, but *the Northern Paiute as a whole* were “an identifiable group of American Indians” within the meaning of the ICCA. This distinction supports the Tribe’s argument here that NAGPRA does not require a relationship of shared group identity with an identifiable earlier tribe, band, family or other subgroup, but instead encompasses a relationship of shared group identity with broader identifiable groups. As *Northern Paiute Nation* shows, the presence of individual bands or other subgroups does not detract from the existence of a larger group.

BLM also cites passages from the District Court’s decision in *Bonnichsen* and NAGPRA’s implementing regulations for the propositions that the earlier identifiable “group must have ‘remained relatively intact through the years’” and must have “distinctive qualities.” BLM Br. at 71 (citing *Bonnichsen*, 217 F. Supp. 2d at 1147-48; 43 C.F.R. § 10.14(c)(2)). The Tribe does not quarrel with these propositions. However, as the regulation makes clear, these “distinctive qualities” need not be based on religion, worldview, or other philosophical views (factors on which BLM relied in its determination), but can encompass other “cultural characteristics,” “patterns of material culture manufacture and distribution methods,” or evidence of a “biologically distinct population.” 43 C.F.R. § 10.14(c)(2). Moreover, the regulation does

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*Providence St. Joseph Medical Center*, 192 F.3d 826, 834-35 (9th Cir. 1999). That Congress had the ICCA in mind when it enacted NAGPRA is suggested by its explicit reference to Indian Claims Commission judgments in § 3002(a)(2)(C).

not limit proof of the existence of an earlier identifiable group even to these factors, stating that such proof “may include, but is not necessarily limited to,” such factors. *Id.* And, none of these factors limit an earlier group to a particular tribe, band or other subgroup, but allow for the identification of broader groups that possess such distinctive qualities.

Finally, BLM claims that the Tribe’s interpretation of NAGPRA’s requirement of cultural affiliation would “lead to indefensible readings of the statute and associated regulations because it would not require evidence of any distinctive qualities that tie the members of the earlier group to one another other than geographic commonality.” BLM Br. at 73. However, as we have explained, in arguing that NAGPRA’s requirement of a relationship of “shared group identity” is not limited to shared tribal or band identity, but can encompass broader groups, the Tribe is *not* arguing that such groups can be identified by geography alone. For example, in arguing that the early Holocene inhabitants of the western Great Basin comprised an identifiable group, the Tribe relied not only on geography, but on the shared artifacts, clusters of tools, and technology associated with the Desert Culture concept; the Great Basin stemmed point tradition with its distinctive artifacts (stemmed projectile points, lanceolate points with concave bases, crescents, flake and core tools, and stone implements) that has been documented from about 11,200 to 7,500 years ago; the lake and marsh adaptations of these people (described as the Western Pluvial Lakes Tradition); their common diet and subsistence activities; and the evidence from Spirit Cave itself, including evidence regarding diet, subsistence strategy, textiles and other material culture, and genetic affiliation. *See* AAR 1731-1740.

Similarly, in arguing that there is a relationship of shared group identity between the Tribe and the early Holocene occupants of the western Great Basin, the Tribe relied on evidence

of long and *overlapping* periods of continuity in textiles, stone tools for processing plants, lacustrine adaptations, houses, lithic technology, and other archaeological traits. *See id.* at 1740-1746. The Tribe also presented: a detailed study of the archaeological record to demonstrate the close relationship in material culture, subsistence strategy and economy between the Lovelock people and the Northern Paiute; archaeological and ethnographic evidence of burial practices from the time of the Spirit Cave remains to the recent past; and a variety of linguistic, biological oral tradition and ethnographic evidence. *Id.* at 1703-1731, 1746-1760; *see also id.* at 2389 (comments of Review Committee member James Bradley, noting that the Tribe “presented *very interesting and diverse* evidence,” including geographic, archaeological, oral-tradition and biological evidence) (emphasis added).

In short, BLM’s mischaracterization of the Tribe’s position as being based on geography alone provides no basis for rejecting the Tribe’s claim or upholding BLM’s decision. Rather, it underscores the basic problem with BLM’s approach – its failure to fairly consider all of the available evidence and information provided by the Tribe.

**C. BLM Provided No Explanation for Its February 2004 Decision.**

In the Tribe’s opening brief, we showed there was no explanation in the record for decisions embodied in the BLM Director’s February 27, 2004, letter (AAR 2549). In particular, we showed that there was no explanation for the Director’s decisions: (1) not to assemble an independent team to review the available information in light of the Review Committee’s findings and recommendation, as the Director had indicated in her meeting with the Tribe; (2) not to conduct an internal BLM review of the new materials the Tribe provided to the Review Committee and subsequently to BLM; (3) not to review all of the evidence in light of the Review



Committee's finding that BLM had failed to fairly and objectively consider the evidence in its initial determination; (4) not to follow the Review Committee's recommendation and repatriate the Spirit Cave remains and funerary objects to the Tribe; (5) not to pursue the Tribe's suggestion and seek a Secretarial recommendation to repatriate the remains under 43 C.F.R. § 10.9(e)(6); and (6) not to pursue a regional repatriation solution as suggested by the dissenting member of the Review Committee. Tribe's Br. at 121-23.

BLM now argues the explanation for its February 2004 decision is found in the August 2000 determination, since the February 2004 decision "was nothing more than a statement confirming that BLM continued to stand behind the Determination." BLM Br. at 77. However, after BLM issued its August 2000 determination, the Tribe had submitted substantial new materials to the Review Committee and BLM, the Review Committee found that BLM failed to fairly consider the evidence and that the remains were culturally affiliated with the Tribe, the Committee's majority recommended repatriation of the remains and its dissenting member suggested a regional repatriation solution, and the Director herself had proposed to conduct an independent review. Because BLM's August 2000 determination can provide no explanation for BLM's failure to consider evidence, findings, recommendations and options that were presented *after* August 2000, it provides no explanation for BLM's February 2004 decision.

Alternatively, BLM contends that a February 24, 2004, memorandum "thoroughly explain[s] all of the government's considerations leading up to its letter of February 27, 2004."

*Id.*<sup>35</sup> However, the document fails to provide a reasoned explanation for the Director's February 27 decisions.

First, the February 24 memorandum states the appointment of an internal or external review team to review BLM's decision was rejected because "it questions the original decision and the decision maker; sets precedent for overturning past and future NAGPRA decisions; and/or, could result in a recommendation that is not supportable under the law." Supp. AAR 2961. Put another way, BLM was unwilling to review the new evidence submitted by the Tribe and the Review Committee's findings and recommendation because it might lead to a change in its decision. This is not a reasonable basis for failing to consider evidence under NAGPRA and was arbitrary and capricious under the APA.

Second, the February 24 memorandum rejects the Review Committee's recommendation that the remains be repatriated on two grounds: (1) that there "is no requirement to respond to the NAGPRA Review Committee finding, which is only advisory in nature"; and (2) their rationale

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<sup>35</sup> The provenance of this memorandum is disturbing. In March 2004, the Tribe submitted a FOIA request to BLM for "any and all records related to Director Clarke's February 27 determination, including all record relied upon in making that determination." AAR 2551. BLM responded on May 13, 2004, producing seven pages of responsive documents, but not the February 24 memorandum. *Id.* at 2557 – 2559I. BLM stated it was withholding 21 pages under the deliberative process exemption, including "a memorandum from a staff employee to his supervisor describing options for conducting BLM business." *Id.* at 2557. After the Tribe filed this action, the parties engaged in a lengthy process to assemble the administrative record; again, BLM did not produce the February 24 memorandum. However, after reviewing the Tribe's motion, BLM has unilaterally supplemented the administrative record "based on the recent location" of the February 24 memorandum and other documents. Nov. 16, 2005 Certification of Amy L. Lueders, ¶ 2. This assertion strains credulity. It requires one to believe that BLM was unable to locate the February 24, 2004, memorandum in searching for documents responsive to the Tribe's March 3, 2004, FOIA request or in the extensive process of assembling the administrative record, but then mysteriously came upon it while preparing its response to the Tribe's motion. It is more likely that BLM made a strategic decision to withhold the document from the Tribe under a deliberative process claim, and has now decided to produce it in an attempt to plug an obvious hole in the record.

for repatriation was not clearly founded in the evidence or the law. Supp. AAR 2959 (emphasis in original); *see also id.* at 2961. As discussed above, BLM's belief that it could simply ignore the Review Committee is contrary to NAGPRA and the trust responsibility. And, the memorandum provides no explanation whatsoever for its conclusory assertion that the Committee's findings and recommendation were not supported by the evidence or the law, and thus fails to provide a reasoned explanation under the APA.<sup>36</sup> Indeed, since BLM never reviewed the full range of evidence before the Committee, it was in no position to reach such a conclusion.

Third, the February 24 memorandum rejects repatriation under 43 C.F.R. § 10.9(e) on the grounds that "the Secretary would need a sound basis for invoking this provision and it would be highly controversial," the Secretary had "expressed no interest in invoking this provision," and the *Bonnichsen* decision "may make this provision moot regarding ancient remains." Supp. AAR at 2961. However, the memorandum does not address the bases articulated by the Tribe for invoking this regulation, *see* Tribe's Br. at 98, explain the Secretary's disinterest, or explain why *Bonnichsen*, which involved remains that could not be identified as Native American, would be an impediment to repatriating Native American remains under this regulation.

Finally, the February 24 memorandum nowhere addresses the regional repatriation solution suggested by the dissenting member of the Review Committee. In sum, BLM's effort to

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<sup>36</sup> *See, e.g., Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) (agency must "provide an explanation that will enable the court to evaluate [its] rationale at the time of the decision"); *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 965 (9th Cir. 2005) (agency must supply satisfactory explanation of the basis for its decision, including a rational connection between the facts found and the choice made); *Beno*, 30 F.3d at 1074-75 n.45 ("Secretary's conclusory letter" is an insufficient explanation for agency's decision); *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1478 (9th Cir. 1994) (agency explanation must be sufficient to permit judicial review).

supplement the record in order to provide an explanation for its failure to review the evidence submitted by the Tribe to the Review Committee, its failure to consider the Review Committee's findings and recommendation, and its failure to pursue other options to address the Tribe's concerns is unavailing.

**V. CONCLUSION.**

For the reasons set forth here and in the Tribe's opening brief, the Court should grant the Tribe's motion for summary judgment and deny BLM's motion. It should hold unlawful and set aside BLM's determination that the Spirit Cave remains and associated funerary objects are not culturally affiliated with the Fallon Tribe and its decision not to repatriate those items to the Tribe. The Court should then remand this matter to BLM for further action consistent with its opinion. The Court may find it helpful to invite supplemental briefing from the parties to address the precise scope of the remand after issuing its decision on the pending summary judgment motions. Such briefing could, for example, address measures to assure that the remand proceedings are not tainted by the bias and prejudgment evident in the record, and measures to assure that the Review Committee is able to fulfill its statutory functions and that its views are given due consideration.

Date: January 31, 2006.

Respectfully submitted,

ZIONTZ, CHESTNUT, VARNELL,  
BERLEY & SLONIM

By: /s/ Marc D. Slonim  
Marc D. Slonim

By: /s/ Brian W. Chestnut  
Brian W. Chestnut

WOODBURN & WEDGE

By: /s/ Gordon H. DePaoli (per Telephonic  
Authorization)  
Gordon H. DePaoli

Attorneys for Plaintiff, Fallon  
Paiute-Shoshone Tribe

**CERTIFICATE OF SERVICE**

I certify that on January 31, 2006, I electronically filed the foregoing **Fallon Tribe's Opposition to BLM's Motion for Summary Judgment and Reply in Support of The Tribe's Summary Judgment Motion** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following via their respective email addresses:

Gregg Addington, Asst. U.S. Attorney  
greg.addington@usdoj.gov  
judy.farmer@usdoj.gov  
joanie.silvershield@usdoj.gov

Elsie B. Kappler, Trial Attorney  
elsie.kappler@usdoj.gov

William E. Peterson  
wep@morrislawgroup.com  
hwl@morrislawgroup.com

I further certify that I served a true, correct and complete copy of the foregoing on the following non-CM/ECF participants via First Class mail, postage prepaid at the following addresses:

Richard M. Donaldson  
Montgomery, McCracken, Walker  
& Rhoads, LLP  
300 Delaware Avenue, No. 750  
Wilmington, DE 19801

Clementine Berger  
2800 Cottage Way, Room E-1712  
Sacramento, California 95825-1890

Alan C. Tonetti, Trustee  
Ohio Archaeological Council  
P.O. Box 82012  
Columbus, Ohio 43202

Alan L. Schneider  
1437 S.W. Columbia Street, No. 200  
Portland, Oregon 97201

Paula A. Barran  
Barran Liebman, LLP  
601 S.W. Second Avenue, No. 2300  
Portland, Oregon 97204-3159

Dr. Ives Goddard  
1709 34th Street N.W.  
Washington, D.C. 20007-2308

Dr. Lyle Campbell  
Dept. of Linguistics  
University of Utah  
255 S. Central Campus Drive  
Salt Lake City, UT 84112-0492

Dr. Harry Glynn Custred, Jr.  
Dept. of Anthropology  
California State University  
148 Los Cerros Avenue  
Walnut Creek, California 94598

Dr. Andrei Simic  
Department of Anthropology  
University of Southern California  
3601 Watt Way GFS 120  
Los Angeles, California 90089

Linda A. Bowman  
540 Hammill Lane  
Reno, Nevada 895111

Dated this 31st day of January, 2006.

/s/ Brian W. Chestnut