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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * * * *

FALLON PAIUTE-SHOSHONE TRIBE, a)
 federally recognized Indian tribe,)
)
 Plaintiff,)
)
 v.)
)
 UNITED STATES BUREAU OF LAND)
 MANAGEMENT,)
)
 Defendant.)

03:04-CV-0466-LRH (RAM)

ORDER

Before the court are cross-motions for summary judgment in this matter. The Fallon Paiute-Shoshone Tribe (the "Tribe"), filed the first motion for summary judgment (#31¹). This motion was met with an opposition (#43) and cross-motion for summary judgment (#44) from the United States Bureau of Land Management ("BLM"). The Tribe filed a joint reply and opposition on the motions (#51), and BLM subsequently filed a reply to the Tribe's opposition (#58).

In addition, each side has had *amicus curiae* briefs filed on their behalf. In support of the Tribe's position, a brief has been filed by the National Congress of American Indians, the Association on American Indian Affairs, the Morning Star Institute, and the Medicine Wheel Coalition on Sacred Sites in North America (#50). In support of BLM's position, briefs have been filed by the Ethnic Minority Council of America (#35), the Friends of America's Past (#37), the Ohio Archaeological Council (#38), Doctors Harry Glynn Custred, Jr. and Andrei Simic

¹ References to (#XX) refer to the court's docket.

1 (#39), and Doctors Ives Goddard and Lyle Campbell (#40). A notice of non-opposition to these
2 *amicus* briefs has been filed by the Tribe (#42).

3 **FACTUAL AND PROCEDURAL HISTORY**

4 The heart of this matter concerns the right to possess the remains of an extremely ancient
5 habitant of Northern Nevada. On the one side, BLM seeks possession of the remains to allow for
6 further study by scientists around the world. On the other side, the Fallon Paiute-Shoshone Tribe
7 (“Tribe”) seeks possession of the remains to allow for reburial. The Tribe believes that because
8 the remains have been disturbed the spirit of their ancestor is required to wander the world in a
9 state of unrest. The importance of these remains to both sides and the story of their discovery
10 and history is necessary to place this dispute in proper context.

11 The remains in question were found in 1940 during an excavation near Fallon, Nevada, in
12 a place known as Spirit Cave. Sydney and Georgia Wheeler, working for the Nevada Parks
13 Commission, unearthed multiple burials and several associated artifacts. The most important
14 find in the excavation was the well-preserved, partially mummified body of a man now known as
15 the Spirit Cave Man. The find was removed from the cave and analyzed. Upon initial review, it
16 was believed that the Spirit Cave Man remains were between 1,500 and 2,000 years old. The
17 remains were then placed in storage in the Nevada State Museum (“Museum”), where they have
18 remained to the present.

19 The Tribe states that the Spirit Cave, where the remains were found, is located on
20 traditional tribal land and that the Tribe has long believed the area to be sacred. In fact, the Tribe
21 states that its members have often avoided the cave out of respect. At the time of the discovery
22 however, and to the present day, BLM controlled the land on which the cave sits. It is, though,
23 just a short distance from Spirit Cave to the Tribe’s reservation lands.

24 In 1990, Congress enacted the Native American Grave Protection and Repatriation Act
25 (“NAGPRA”), 25 U.S.C. §§ 3001, *et seq.* NAGPRA requires all government agencies
26 possessing Native American remains and cultural items to provide a catalogue or inventory of
27 those items with the purpose of facilitating the return of culturally affiliated remains and cultural
28 items to their related Native American tribes. The enactment of NAGPRA and the efforts to

1 inventory the Spirit Cave Man remains resulted in the current dispute.

2 As part of the inventory and identification process required by NAGPRA, radiocarbon
3 dating was authorized on the Spirit Cave Man remains. The dating, completed in 1994 or 1995,
4 showed that the initial estimate for the age of the bones, approximately 2000 years old, was
5 significantly flawed. The remains were, in fact, nearly 10,000 years old and, accordingly, were a
6 significant scientific find. The Spirit Cave Man remains were so unique that they received
7 national media coverage including a feature on the program NOVA and articles in such papers as
8 the New York Times and the Washington Post. The scientific community was also intrigued,
9 with several more requests to study the remains being made after the discovery of their age.
10 Around this same time, the Tribe began making inquiries about repatriation of the remains. As
11 early as May 1996, the Tribe requested that BLM temporarily inter the remains and cease all
12 testing. The Tribe believes that it is the caretaker of the Spirit Cave Man remains and that
13 disturbing the burial site of a deceased, such as the Spirit Cave Man, carries negative
14 repercussions.

15 The Museum completed its NAGPRA required inventory in July 1996 and listed the
16 Spirit Cave remains as unaffiliated. The inventory was provided to BLM, which put out a notice
17 that the inventory had been completed in October 1996. BLM noted, as well, that it agreed with
18 the affiliation determination and implied that notification of the determination would be followed
19 by a brief period for responses before a final determination was made. However, this procedure
20 never occurred and BLM authorized further study of the remains.

21 Results of these studies began appearing around February 1997, causing the Tribe to
22 become upset that testing of the remains continued despite their religious beliefs. Accordingly,
23 in May 1997, the Tribe requested repatriation of the remains as well as an end to further testing.
24 BLM responded, noting the previous views of the museum that the remains were unaffiliated but
25 stating that BLM would provide the Tribe with an equal opportunity to provide evidence of
26 affiliation. In September 1997, BLM requested information about the Tribe's cultural origins
27 and any other information that would not be available to BLM through its research efforts.

28 In early 1998, plans for a facial reconstruction project on the Spirit Cave Man remains

1 were made public. The Tribe objected to the project, but the reconstruction occurred despite
2 their concerns. The reconstructed face appeared on the cover of Newsweek and in other forms of
3 national media. As of this time, BLM still held the position that no determination had been made
4 regarding affiliation.

5 The Tribe turned to the NAGPRA Review Committee for assistance in November 1998
6 after seeing the results of continuing testing on the Spirit Cave remains while being told that a
7 determination of affiliation had not yet been made. However, the Review Committee was
8 unwilling to discuss the Tribe's substantive arguments. In the Committee's view, there was no
9 need for their involvement at the time because BLM had yet to make a determination on
10 affiliation.

11 Bringing the matter to the Review Committee, however, resulted in BLM working harder
12 to complete its affiliation decision. Accordingly, in January 1999, BLM stated that it planned to
13 make a final decision on affiliation within 45 days. The Tribe requested, and was granted, an
14 extension until June 1999 to submit additional evidence in support of affiliation. In addition, the
15 Tribe decided to retain experts to present scientific evidence in support of affiliation. In doing so
16 the Tribe sought, and received, a second extension to December 1999 in order to complete their
17 projects and provide their evidence to BLM. BLM continued to maintain that no final decision
18 on affiliation had been made. While seeking their second extension, the Tribe also requested
19 BLM inter the Spirit Cave Man remains in a Fish and Wildlife Service vault used to store other
20 Native American remains that had been previously discovered after a flood. This request was
21 denied by BLM.

22 The Tribe was able to submit its scientific evidence and a memorandum summarizing its
23 position in December 1999. As a result, BLM stated that it needed further time to review the
24 Tribe's evidence before making a decision and that the Tribe's submissions would be forwarded
25 to the Museum for review. The Museum responded to the submission in January 2000, noting
26 that it believed the remains were Native American but that it still viewed the remains as
27 unaffiliated.

28 Finally, in August 2000, BLM released a 111 page report determining that the Spirit Cave

1 Man remains were to be classified as unaffiliated. The report considered the relevant factors for
2 determining affiliation expressed in NAGPRA and its implementing regulations. According to
3 the Tribe, however, the report failed to discuss several scientific theories that had been raised by
4 the Tribe's submissions and that it also failed to adequately distinguish the scientific evidence
5 provided by the Tribe that it did consider. The paper also set a deadline of October 2000 for the
6 Tribe to present any claims to the remains or objections to the report.

7 The Tribe, after reviewing the affiliation decision paper, requested an extension to
8 respond until January 2001. BLM denied this request in October 2000 and issued a final
9 determination that the remains were unaffiliated with any present day Native American tribe.
10 BLM also referred the Tribe to the NAGPRA Review Committee, stating that the Committee
11 might be able to aid the Tribe in its continuing request to have the remains repatriated.

12 In December 2000, the Tribe requested the Review Committee consider the matter and
13 make findings concerning the affiliation of the remains and their potential repatriation to the
14 Tribe. The Tribe presented its evidence to the Committee as well as several new pieces of
15 scientific evidence that the Tribe had gained after BLM's final determination. BLM took the
16 position that the Review Committee was an advisory board only. BLM did send its
17 determination paper to the Review Committee, but chose not to attend the November 2001
18 hearing.

19 The Review Committee held its hearing and made its findings on the matter in November
20 2001. The Committee, on a 6-1 vote for each finding, determined that BLM had failed to fairly
21 and objectively consider all the available and relevant information, that the Spirit Cave Man
22 remains were in fact culturally affiliated with the Tribe, and that the remains should be
23 repatriated to the Tribe. These findings were published in the Federal Register in April 2002.

24 In December 2001, the Tribe had the Review Committee forward all of the evidence
25 before it, as well as its findings, to BLM. BLM remained committed to its position that the
26 Review Committee was an advisory board and, in April 2002, decided that there was no need to
27 respond to the Committee's findings. The Tribe contacted BLM, wondering if the agency would
28 be considering the new evidence that had been provided to the Review Committee, as well as the

1 Committee's findings. BLM's State Director noted that no further action was contemplated at
2 that level and requested the Tribe take the issue up with superiors in Washington, D.C.

3 The Tribe chose to pursue this option. In November 2002, the Tribe wrote to the
4 Secretary of the Interior, providing all the materials previously provided to BLM and the Review
5 Committee as well as several other pertinent documents. In December 2002, the Tribe received a
6 response from BLM's Acting Assistant Director for Renewable Resources and Planning. The
7 response noted that the regulations regarding unaffiliated remains were still being promulgated
8 and that it would be premature to take up the issue at that time. The Tribe objected to this
9 response, and pursued its complaints.

10 In April 2003, BLM's Director requested a meeting with the Tribe to discuss their
11 objections. The meeting occurred in Reno, Nevada in July 2003. As a result of the meeting, the
12 Tribe received a letter stating that the Director was reviewing the matter and would respond
13 when a course of action had been determined. In February 2004, the Tribe received another letter
14 stating that their concerns had been addressed and that there was no further course of action to be
15 taken at that time. This letter did not discuss the Tribe's evidence or make note of the Tribe's
16 repatriation request. The Tribe responded in March 2004, stating that it considered BLM's
17 previous letter to represent a final agency action and noting problems it had with BLM's review
18 of the decision. This was the last communication between BLM and the Tribe concerning the
19 Tribe's repatriation request and the determination of non-affiliation made by BLM.

20 The present lawsuit was filed thereafter. At this stage in the proceedings, the court is
21 faced with cross-motions for summary judgment.

22 **LEGAL STANDARD FOR SUMMARY JUDGMENT**

23 A court will grant summary judgment if the pleadings and supporting documents, when
24 viewed in the light most favorable to the non-moving party, "show that there is no genuine issue
25 as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.
26 R. Civ. P. 56(c). An issue as to any material fact is only "genuine" if the evidence regarding the
27 disputed fact is "such that a reasonable jury could return a verdict for the nonmoving party."
28 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The mere existence of a scintilla of

1 evidence in support of the plaintiff's position will be insufficient [to preclude summary
2 judgment]; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.*

3 DISCUSSION

4 The court is faced with multiple arguments for and against BLM's determination that the
5 Spirit Cave remains are unaffiliated with any present day Native American tribe. Upon review,
6 the court notes that four major arguments exist. First, BLM argues that the issue is not ripe for
7 review at this time. Second, an *amicus* brief raises the issue that the Spirit Cave Man remains
8 cannot be classified as Native American under recent Ninth Circuit precedent, necessitating
9 dismissal. Third, the Tribe makes three procedural objections under the Administrative
10 Procedures Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, regarding how BLM's review procedures were
11 handled. Finally, the Tribe attacks BLM's ultimate determination and subsequent denial of the
12 Tribe's repatriation request as arbitrary and capricious. The court now turns to these arguments.

13 I. Ripeness

14 BLM opens its motion for summary judgment arguing that the current dispute is not ripe
15 for review before this court. The doctrine of ripeness prevents courts from "entangling
16 themselves in abstract disagreements over administrative policies" and protects "agencies from
17 judicial interference until an administrative decision has been formalized and its effects felt in a
18 concrete way by the challenging parties." *Abbot Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967).
19 The determination whether a case is ripe for review is required both by Article III's "limitations
20 on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Nat'l Park*
21 *Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 808 (2003) (quoting *Reno v. Catholic*
22 *Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)).

23 Generally, the determination whether an administrative action is ripe for review requires
24 evaluation of: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties
25 of withholding court consideration. *Nat'l Park Hospitality Ass'n*, 538 U.S. at 808. In addition,
26 the APA requires that the agency action for which judicial review is sought be a final action for
27 which there is no other adequate remedy in court. 5 U.S.C. § 704. An action is final when two
28 conditions are met: (1) the action marks the consummation of the agency's decision making

1 process, meaning it is neither merely tentative nor interlocutory in nature; and (2) the agency
2 action taken is one by which rights or obligations have been determined or from which legal
3 consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

4 In this case, the dispute centers around BLM's determination that the Spirit Cave Man is
5 unaffiliated with any current Native American group. This determination was made pursuant to
6 NAGPRA, 28 U.S.C. § 3001 *et seq.*, and its accompanying regulations, 43 C.F.R. § 10.1 *et seq.*
7 Accordingly, the determination is potentially subject to review under the APA because BLM is a
8 government agency making a decision with apparent legal consequences. BLM, however, argues
9 that its finding of non-affiliation is not final in that it can be reconsidered upon the introduction
10 of any new evidence and, pursuant to NAGPRA, is technically an ongoing process. As such,
11 BLM contends that no final agency action can be identified, precluding the case from being ripe
12 for review.

13 While it is true that BLM may change its determination upon the discovery of any further
14 evidence that demonstrates cultural affiliation, the difficulty in BLM's argument is that until such
15 evidence is discovered, or 43 C.F.R. § 10.11² is finally promulgated, the affiliation inquiry
16 continues in perpetuity without providing an opportunity for meaningful review by the courts.
17 NAGPRA is designed to allow for review both of over-enforcement and, more importantly to this
18 case, under-enforcement of its mandates. *See* 25 U.S.C. § 3013 (granting district courts
19 jurisdiction over "any action brought by any person alleging a violation"); *see also Bonnichsen v.*
20 *United States*, 367 F.3d 864, 874 (9th Cir. 2004) (noting that the statutory enforcement clause, 25
21 U.S.C. §3013, "applies not only to actions . . . asserting under-enforcement of NAGPRA, but

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23 ² 43 C.F.R. § 10.11 has been reserved in the Code of Federal Regulations for a regulation
24 entitled "Disposition of culturally unidentifiable human remains." It is agreed between the
25 parties that this regulation, when finally created and added to the code, would determine how the
26 Spirit Cave Man's remains would be distributed if finally classified as unaffiliated. However,
27 BLM's argument that the matter is not ripe because this regulation has not been promulgated,
28 making the affiliation inquiry potentially a perpetual exercise, cannot be accepted. When the
regulation is finally added to the code, issues such as the one debated here may well become
moot. However, the fact that a future act may moot a present dispute does not result in the
correlating finding that the present dispute is therefore not ripe for review.

1 also to actions . . . asserting over-enforcement.”). Thus, considering the interplay in this specific
2 context between NAGPRA’s authority to bring suit for under-enforcement and the APA’s
3 requirement that only final agency action be subject to review, it would appear illogical to
4 determine that a potential instance of under-enforcement could not be contested because of a
5 legislative delay which has precluded promulgation of a potentially dispositive regulation.
6 However, this illogical construct would become the rule should BLM’s actions not rise to the
7 level of a final administrative action. Accordingly, the court now turns to that inquiry.

8 To reach its determination of affiliation, BLM gathered as much evidence as it could from
9 the Museum and its scholars. It then reached, through some consultation with the Tribe, a
10 tentative determination that the remains were not affiliated with any present day Native American
11 group. After this determination, the Tribe provided its evidence for a finding of affiliation. BLM
12 did not change its determination. At that point, the Tribe had provided all of the evidence it was
13 able to gather, and in doing so, summarized the state of evidence available at the present date that
14 supported its claim of affiliation. BLM did not change its view, and informed the Tribe that its
15 previous determination would stand.

16 To say this determination is tentative in nature simply avoids the facts. At the time of this
17 decision, BLM had collected and summarized what it believed to be the state of the evidence up
18 to the present date. The Tribe had likewise done the same, seeking to compel BLM to change its
19 tentative determination. BLM, thus, had a full range of evidence, taking into account nearly
20 every conceivable scientific finding to date concerning the Spirit Cave Man. After receiving this
21 evidence, BLM upheld its determination that affiliation could not be proved by a preponderance
22 of the evidence.

23 At this point, there was no more evidence to be submitted. BLM’s prior determination of
24 non-affiliation was being upheld and, although BLM was open to further evidence, there was no
25 realistic expectation that any would surface. Considering these facts, it must be said that BLM
26 made a final determination. Its decision cannot be characterized as temporary or interlocutory in
27 nature because all relevant evidence has been considered and every interested party has had a
28 chance to present their arguments. The fact that there is a remote possibility that future evidence

1 will be discovered, which might change BLM's determination, is not enough to displace the
2 practical effect of this decision.

3 Looking at the state of BLM's decision-making process, the court is confident that the
4 action taken by BLM should be classified as final. Having considered all the evidence available
5 to the present date, the court's review would not deny BLM the opportunity to correct any
6 mistakes it may have made. *See F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980).
7 BLM had that opportunity when the Tribe provided its evidence for affiliation. Likewise, since
8 all evidence has been considered, a piecemeal review would not occur. *Id.* BLM has made its
9 determination. There is no further agency process which needs to proceed, save implementation
10 of a non-existent regulation. Thus, the court can efficiently review BLM's actions and is not
11 likely to have its review proven unnecessary by further BLM action. Finally, judicial review
12 would not delay the proceedings in this matter as there are no further proceedings contemplated
13 unless new evidence is discovered and provided to BLM. *Id.* Considering all these factors, and
14 the interplay between NAGPRA's enforcement clause and the APA, the court concludes that a
15 final administrative action has occurred.³

16
17 ³ The case of *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F.Supp. 1397 (D. Haw.
18 1995) is not to the contrary. In *Dalton*, the court faced a situation where a determination of
19 cultural affiliation had been made but multiple claims to the remains had been submitted. In a
20 discussion appropriately considered *dicta*, the court noted that the government had been properly
21 following the regulations constructed for repatriation of affiliated remains claimed by multiple
22 groups. Since the government had not yet reached a decision and because there was no undue
23 delay, the court found the repatriation issue was not ripe for review. However, the court did
24 point out that a ripe claim would exist if "a party were to make a colorable claim that a federal
25 agency or museum was not properly following NAGPRA repatriation procedures and was
26 thereby causing undue delay" even if no final agency action existed. *Id.* at 1405 n.5. The
27 gravamen for a ripe claim, according to the *Dalton* court, was a "present objection . . . that the
28 current repatriation process violates NAGPRA procedural mandates." *Id.*

25 In this case, the Tribe asserts just such an objection. According to the Tribe's claims,
26 BLM has ignored key evidence and consultation requirements mandated by NAGPRA's
27 regulations. This resulted in a finding that the Spirit Cave Man remains are not affiliated with
28 the Tribe and caused undue delay in repatriating those remains. While the court does not pass,
yet, on the legitimacy of these claims, it is of note that they fall well within the proscribed
requirements of *Dalton*.

1 The court thus turns to the second prong of the inquiry, whether legal consequences flow
2 from the action or whether the action determines rights or obligations. *Bennett*, 520 U.S. at 177-
3 78. In this matter, the Tribe alleges that its right to repatriation of the Spirit Cave Man's remains
4 has been denied. The court finds this allegation sufficient to meet the requirements of the second
5 prong of the present inquiry. After consideration of all available evidence, BLM has concluded
6 that the Tribe is not entitled to repatriation of the remains because no cultural affiliation has been
7 proven. Further, as no regulation defines the actions to be taken by BLM in cases where a lack of
8 affiliation exists, the court has concluded that the process should be treated as complete.
9 Allowing BLM to simply hold the bones leaves all parties in limbo. Such a result runs contrary
10 to the enforcement provision of NAGPRA. Thus, unless new evidence were to be presented to
11 BLM, the Tribe's rights to the remains, should they have any, have been determined.
12 Accordingly, BLM's determination, based on the evidence present before it, was both final and
13 determined the rights of the Tribe in relation to the Spirit Cave Man's remains.

14 Having concluded that BLM's actions in this instance constitute a final agency action, the
15 court notes that the remaining requirements under the ripeness test have been satisfied. Given
16 that there are no continuing proceedings which would be undermined by the court's review of
17 this matter, it is apparent that this matter is now fit for a judicial decision. Also, considering the
18 potential for delay in making a final determination of affiliation and the alleged spiritual beliefs
19 of the Tribe concerning disinterred bodies of tribal members, the court concludes that significant
20 hardship will face the Tribe, and, for that matter, BLM⁴ if the court withholds a determination in
21 this matter. Accordingly, the court concludes that this matter is ripe for decision. *Nat'l Park*
22 *Hospitality Ass'n*, 538 U.S. at 808.

23 2. *Status of Spirit Cave Man Remains as Native American*

24 Before reaching the APA challenges concerning BLM's determination that the Spirit
25 Cave Man remains are unaffiliated with any Native American tribe, the court notes that the
26

27 ⁴ BLM's hardship will come in the form of continuous preservation of the bones without
28 a significant opportunity for further study based on the continuing dispute over affiliation.

1 question whether the remains are Native American at all has been raised in the *amicus curiae*
2 brief filed by the Friends of America's Past (#37). The court notes that *Bonnichsen*, 367 F.3d at
3 882, strongly suggests that remains as old as the Spirit Cave Man's are not likely to be classified
4 as Native American. However, the court is not faced with making such a determination here.

5 The issue is not jurisdictional and is subject to waiver if not contested. *See Arbaugh v.*
6 *Y&H Corp.*, ___ U.S. ___, 126 S.Ct. 1235, 1245 (determining employee numerosity requirement
7 of Title VII employment action is not jurisdictional in nature and providing that "when Congress
8 does not rank a statutory limitation on coverage as jurisdictional, courts should treat the
9 restriction as nonjurisdictional in character."). Both the Tribe and BLM have stated that the
10 remains are Native American. As the issue is raised only through an *amicus* brief and the parties
11 have chosen not to contest the designation of the remains as Native American at this time, the
12 court will not entertain the request by the Friend's of America's Past to conclude that NAGPRA
13 is inapplicable to the current situation. *See* 4 Am. Jur. 2d Amicus Curiae § 7 (2006) (noting that
14 an *amicus* brief "ordinarily cannot inject new issues into a case which have not been presented by
15 the parties").

16 3. *Challenge Under the APA*

17 In challenging BLM's determination that the remains are not affiliated with a Native
18 American group, the Tribe has attacked BLM's decision-making process via the APA. Under the
19 APA, the court shall "hold unlawful and set aside agency action, findings, and conclusions found
20 to be – (A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with
21 law; . . . [or] (D) without observance of procedure required by law. . ." among others. 5 U.S.C. §
22 706(2)(A), (D). The Tribe claims both that BLM failed to observe procedures required by law
23 and that its decision was arbitrary and capricious.

24 a. *Observation of Procedures Required by Law*

25 The Tribe's allegations concerning BLM's failure to observe the procedures for
26 repatriation required by NAGPRA describe three distinct failures. First, the Tribe contends that
27 BLM failed to consult with the Tribe as required by 25 U.S.C. § 3003(b)(1)(A). Second, the
28 Tribe argues that the forty-five (45) day time limit set by BLM for the tribe to provide evidence

1 of affiliation pursuant to 25 U.S.C. § 3005(a)(4) was improper. Finally, the Tribe suggests that
2 BLM's ultimate determination failed to observe the importance of the NAGPRA Review
3 Committee formed pursuant to 25 U.S.C. § 3006.

4 To fully understand how the Tribe's arguments fit within NAGPRA's statutory
5 framework, it is helpful to sketch how NAGPRA is designed to work. As this case only deals
6 with Native American human remains that were in BLM's possession prior to NAGPRA's
7 enactment, the court will focus primarily on the procedures required for such holdings.

8 NAGPRA is in essence a dual statute enacted to facilitate the return of Native American
9 cultural items and remains to the tribes with whom those items are affiliated. One portion
10 contemplates government action when Native American remains are found post-enactment. 25
11 U.S.C. § 3002. This provision of the act attempts to quickly and efficiently return the remains by
12 designating several different groups which could be entitled to the remains. *See id.* at §
13 3002(a)(1)-(2) (providing for ownership of remains to be provided to a Native American tribe
14 whether the remains are deemed affiliated with a particular tribe or deemed unaffiliated). The
15 other portion of the statute deals with all Native American remains held by government agencies
16 prior to enactment of NAGPRA. *Id.* at §§ 3003, 3005. This latter portion of the statute is the
17 one relevant to the present dispute.

18 For remains held by government agencies prior to NAGPRA's enactment, each federal
19 agency is required to "compile an inventory of such [remains] and, to the extent possible based
20 on information possessed by such museum or Federal agency, identify the geographical and
21 cultural affiliation of such [remains]." *Id.* at § 3003(a). Cultural affiliation must only be proven
22 by a preponderance of the evidence, not by scientific certainty, and such a finding should not be
23 precluded merely because there are gaps in the historical record. 43 C.F.R. § 10.14(d), (f). In
24 making the determination of affiliation, three things must be proven: (1) the existence of an
25 identifiable present-day tribe; (2) evidence of the existence of an identifiable earlier group; and
26 (3) evidence of the existence of a shared group identity that can be reasonably traced between the
27 present day tribe and the earlier group. *Id.* at § 10.14(c). The types of evidence to be considered
28 in this determination are geographical, kinship, biological, archeological, anthropological,

1 linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion. *Id.*
2 at § 10.14(e).

3 The applicable statutes and implementing regulations show that, while consultation is
4 required with any Native American tribe to whom the remains may likely be repatriated, the
5 decision at this stage is driven primarily by the government agency holding the remains. *See* 25
6 U.S.C. § 3003(a) (requiring that inventory be compiled by the government agency having
7 “control over holdings or collections of Native American human remains” from the “information
8 possessed” by that agency); *Id.* at § 3005(a)(4) (providing Native American tribes an opportunity
9 to demonstrate affiliation if initial determination does not result in finding of affiliation); 43
10 C.F.R. § 10.9(b) (requiring consultations be started early in the inventory process but defining
11 them more in the way of providing the information used to determine affiliation to the interested
12 tribes rather than mandating the agency receive specific affiliation information from the Native
13 American tribes involved). Thus, while consultation is mandated by NAGPRA, at this stage in
14 the proceedings the agency is required primarily to share its scientific findings with the tribes and
15 ensure that the interested tribes are fully apprised of how the government agency is reaching its
16 decision. The statutory scheme thus appears to contemplate an initial determination based upon
17 the evidence that the government already has, which can later be supplemented if an interested
18 tribe objects to the government’s findings.

19 When this initial review of the remains held by an agency results in a finding that the
20 remains are affiliated with a Native American tribe, the remains are to be repatriated
21 expeditiously upon request. 25 U.S.C. § 3005(a); 43 C.F.R. § 10.10(b). When the remains are
22 deemed unaffiliated, however, the process is not considered complete. After a finding of non-
23 affiliation, interested Native American tribes are permitted to provide their own evidence, both
24 scientific and cultural, in an attempt to demonstrate affiliation. 25 U.S.C. § 3005(a)(4)
25 (mandating that unaffiliated human remains be repatriated to Native American tribes which can
26 show “cultural affiliation by a preponderance of the evidence” based on multiple factors). It is at
27 this stage that the statute begins to contemplate the introduction of competing scientific studies
28 on behalf of the interested Native American tribes. *See id.* (Evidence may be based upon

1 “geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral
2 traditional, historical, or other relevant information or expert opinion.”). It is then the
3 government agency’s job to weigh the competing evidence for affiliation and update its findings
4 accordingly. Remains subsequently deemed affiliated must be repatriated, *id.*, while remains that
5 continue to be classified as non-affiliated are subject to the provisions of 43 C.F.R. § 10.11,
6 which has yet to be promulgated.

7 Thus, the general statutory scheme for dealing with remains such as those involved in the
8 present case is as follows. First, the government agency completes, while engaging in
9 appropriate consultation with interested Native American tribes, a study of the remains using the
10 scientific evidence it has available along with the cultural and traditional evidence provided by
11 the tribes. This process is completed openly, with the tribes having full access to the
12 government’s process and procedure. When the government’s evidence cannot demonstrate
13 affiliation, interested Native American tribes are given an opportunity to provide their own
14 scientific evidence as well as any further relevant cultural or traditional evidence in an attempt to
15 demonstrate by a preponderance of the evidence that the remains are in fact affiliated with their
16 tribe. The government should then review that evidence and update its findings accordingly. If
17 the remains are then found to be affiliated, they should be repatriated. If not, the remains are
18 effectively placed in the care of the government until such time as an appropriate regulation for
19 their permanent placement is promulgated.

20 When problems arise in this process, the statutory scheme contemplates initial assistance
21 from a review committee comprised of neutral appointed experts. 25 U.S.C. § 3006. This
22 committee is charged with overseeing the identification and affiliation process and with
23 facilitating the resolution of disputes between interested Native American tribes and the Federal
24 agencies complying with NAGPRA. *Id.* at § 3006(c). The findings made by this committee are
25 expressly made admissible in court by section 3006(d) when an action is brought to enforce
26 NAGPRA. However, the findings and conclusions of the Review Committee are merely
27 advisory and are not considered binding on any party. 43 C.F.R. § 10.16(b). Despite this
28 advisory role, though, the applicable statutes and regulations show that the Review Committee

1 plays an integral role in facilitating the resolution of disputes arising under NAGPRA.

2 Having summarized NAGPRA's intended process and its dispute resolution mechanisms,
3 the court now turns to the Tribe's contentions that BLM failed to adhere to the procedures
4 delineated above.

5 I. Consultation

6 The Tribe contends that BLM failed in its duty to consult with the Tribe in two distinct
7 ways. First, the Tribe argues that BLM failed to consult in any manner after the tribe retained
8 experts to present their opinions on the affiliation issue. Second, the Tribe states that BLM failed
9 to adhere to the consultation requirements of 43 C.F.R. § 10.9(b)(4)(ii). In response, BLM notes
10 that it held several meetings with the Tribe and states that it believes these meetings satisfied its
11 consultation requirements.

12 The focus of the Tribe's argument on this point is the fact that once the tribe retained its
13 experts, it believes BLM completely shut it out of the decision making process. The Tribe does
14 note, however, that prior to the retention of its experts there were at least some meetings that
15 touched on the affiliation issue and would be considered consultation. After considering the
16 Tribe's arguments and the evidence supporting them, the court concludes that BLM did not
17 violate its duty to consult with the Tribe regarding affiliation.

18 The statutory and regulatory scheme outlined previously demonstrates that the initial
19 decision on affiliation was ultimately that of the government agency having possession of the
20 remains. The regulations on consultation further demonstrate that the process is not designed to
21 foster an academic debate on the issue of cultural affiliation, but rather to aid the government
22 agency in compiling the necessary cultural data needed to reach its decision and to work on an
23 agreement with interested Native American tribes regarding how the overall process should
24 work. For example, 43 C.F.R. § 10.9(b)(4), the main regulatory provision contested by the Tribe
25 in this argument, requires the government agency to "request, as appropriate" information from
26 interested parties which includes "recommendations on how the consultation process should be
27 conducted." These recommendations concerning the consultation process, however, are limited
28 to information such as names and contact information for lineal descendants of the remains, 43

1 C.F.R. § 10.9(b)(4)(ii)(A), and names and contact information of religious leaders who would
2 have information about the remains and their associated funerary objects. *Id.* at §
3 10.9(b)(4)(ii)(B). Thus, the type of information sought to be gained from the consultation
4 process is not that which would ignite a full academic debate on affiliation, but rather the type of
5 information that only the interested tribes could provide regarding the remains such as their
6 connection to current descendants and their relation to the burial practices of the interested tribe.

7 The Tribe does not contest BLM's information gathering practice, but rather its failure to
8 extend the scope of the consultation to allow the Tribe to present scientific evidence which
9 would refute BLM's initial determination. This is not the purpose of the initial consultation
10 requirement, and therefore no violation of NAGPRA can be found in BLM's failure to comply
11 with the Tribe's requests at this stage.

12 The court is aware that the NAGPRA Review Committee found that BLM wholly failed
13 to consult with the Tribe when it reviewed the matter. While this evidence, as noted above, is
14 admissible, it is not binding on the court. It is possible to see why the Review Committee would
15 reach such a conclusion. However, given the purposes of the initial consultation requirements,
16 BLM's failure to continue meetings and consultations with the Tribe after it retained experts and
17 sought to introduce that evidence into BLM's decision-making process is not an error under the
18 statute.

19 ii. 45-day Deadline

20 The Tribe next argues that BLM imposed a 45-day deadline to respond to its final
21 determination of non-affiliation that was without statutory or regulatory support and against the
22 procedures of law required by NAGPRA. BLM responds by setting forth three reasons why the
23 45-day deadline was not improper. First, BLM states that it had been asking the Tribe to provide
24 information regarding repatriation since April, 1996. Second, BLM claims that the Tribe had
25 repeatedly criticized BLM for its delay in the proceedings yet waited until 1999 to retain experts
26 and seek an extension. Finally, BLM notes that its finding of non-affiliation requires it to
27 continue to accept and consider evidence provided by the Tribe.

28 The court notes that an agency has the freedom to "fashion [its] own rules of procedure

1 and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous
2 duties.” *FCC v. Pottsville*, 309 U.S. 134, 143 (1940). This authority allows for agencies such as
3 BLM to set deadlines as needed in order to ensure the timely and proper disposition of matters
4 before it. Thus, the issue before the court is whether the 45-day deadline was improperly short as
5 a matter of law given the extensive time spent by BLM to reach a determination of non-
6 affiliation.

7 The court, however, need not reach a decision on this issue. As the decision to uphold the
8 non-affiliation finding is deemed arbitrary and capricious below, any potential procedural error
9 surrounding when materials needed to be submitted is moot because BLM will once again be
10 required to acknowledge and consider the evidence heretofore presented by the tribe when
11 upholding or reversing its previous determination.⁵

12 iii. Review Committee

13 The Tribe also contends that BLM did not observe the procedures required by law in this
14 matter by failing to properly engage in the proceedings of, and consider the recommendations
15 made by, the Review Committee. The Review Committee was first brought into this matter in
16 November, 1998. At that time, the Review Committee determined that, as no decision on
17 affiliation had been made by BLM, their involvement would be premature and declined to
18 consider the matter. The Review Committee was next consulted in October, 2000. A hearing
19

20
21 ⁵ The court notes that this issue is the only of the three procedural issues which is
22 rendered moot by the finding of an arbitrary and capricious decision on the Tribe’s repatriation
23 request. If BLM had not followed the statutory consultation requirements, the remand might well
24 have required BLM to begin the entire decision making process anew. If the following inquiry
25 regarding interactions with the Review Committee discovered an error BLM might well be
26 required to change its determination to comply with the Review Committee findings without
27 further chance for analysis by BLM. However, even if an error were found concerning the 45-
28 day deadline, no additional action would be required by BLM. This is because the remand based
on an arbitrary and capricious decision already requires BLM to consider the full range of
evidence before it: evidence which includes all of the Tribe’s evidence to date. BLM will, of
course, be expected to set a reasonable deadline for any additional evidence that may exist, but
that deadline would not be affected by any decision regarding the previous deadline and its
relation to the affiliation determination process.

1 was held in which the Tribe presented evidence not previously considered by BLM, and BLM
2 provided its previous determination to the committee but did not attend the hearing. The
3 committee decided in November 2001, on a 6-1 vote in all matters, that BLM had not engaged in
4 proper consultation with the Tribe, that the remains of the Spirit Cave Man were in fact culturally
5 affiliated with the Tribe, and that the remains should be repatriated.

6 BLM took the position that the Review Committee had no authority to issue binding
7 decisions regarding affiliation and did not change its position on affiliation. However, the matter
8 was then passed up the chain of command where it was to be reviewed by higher ranking BLM
9 officials. The Tribe contends that BLM's refusal to reconsider its position upon the Review
10 Committee's findings and its choice not to participate in the proceedings themselves failed to
11 adhere to the procedures required by NAGPRA. The court disagrees.

12 The Review Committee is responsible for "reviewing and making findings related to" the
13 cultural affiliation of remains and the return of those remains when requested to do so by an
14 affected party. 25 U.S.C. § 3006(c)(3)(A)-(B). The Review Committee is also charged with
15 "facilitating the resolution of any disputes" between Native American tribes and government
16 agencies. *Id.* at § 3006(c)(4). However, the regulations promulgated demonstrate that the
17 Review Committee is merely an advisory board whose determinations, while persuasive, are not
18 binding on either the Native American tribes or any government agency. 43 C.F.R. § 10.16(b).
19 Neither party has contested the advisory role of the Review Committee nor alleged that its
20 determinations should be binding on the parties. Thus, the court is faced with determining what
21 level of participation in and consideration of the Review Committee's actions is mandated by
22 NAGPRA.

23 The court concludes that, under the facts of this case, BLM has complied with the
24 minimum participation requirements NAGPRA imposes on parties when dealing with the
25 Review Committee. It is not disputed that BLM failed to attend the Review Committee hearing
26 in which the Tribe presented its evidence for affiliation. However, nothing in the statutes or
27 regulations involved here mandate actual physical presence at the hearing. The Review
28 Committee's work as an advisory board means that it does not have to have both parties

1 physically present before it in order to properly review the evidence and make a recommendation
2 on action. BLM did not altogether shun its obligations to the Review Committee, either. BLM
3 provided its full decision, which included the reasoning behind its findings to the Review
4 Committee, as its statement on why its decision was proper. It was BLM's choice whether to
5 further defend its position at this stage or simply rely on its previous work. BLM's choice to rely
6 on its previous work was not unreasonable and certainly did not fail to observe the procedures
7 required by NAGPRA.

8 The court also finds no error in BLM's failure to reconsider its decision purely on the
9 basis of an adverse ruling by the Review Committee. As noted, the Review Committee is an
10 advisory board, although its decisions could be given substantial weight should a dispute reach
11 the courts. There is, however, nothing in the statutes or regulations which compels a government
12 agency to follow the directives of the Review Committee. Further, this court is not interested in
13 reading into the statute a mandate to reconsider a previous decision made by a government
14 agency based solely on the views of the Review Committee when there is an adequate
15 mechanism for further review. Namely, interested tribes may seek to prove affiliation by a
16 preponderance of the evidence when a finding of non-affiliation is made.

17 It is important to note that the court does not conclude that the Review Committee
18 findings carry no weight or are insignificant in the overall scheme of NAGPRA. As will be seen
19 below, the Review Committee findings are indeed relevant when determining whether a
20 government agency's determination of non-affiliation is arbitrary or capricious. However, this
21 value of the Review Committee's findings does not create an independent duty for government
22 agencies to review or amend their findings merely because the Review Committee has disagreed
23 with them. The impetus for review comes from the interested Native American tribe's right to
24 present evidence to prove affiliation, not from the Review Committee's ability to provide
25 advisory findings and opinions in the matter. As such, the court cannot conclude that BLM failed
26 to adhere to the procedures required by NAGPRA when it chose not to participate in the Review
27 Committee proceedings or when it chose not to review its prior decision based purely on the
28 adverse opinion of the Review Committee.

1 **b. Decision as Arbitrary and Capricious**

2 Substantively, the Tribe attacks BLM's determination that the Spirit Cave Man remains
3 are not affiliated to any present day Native American tribe by claiming that decision is arbitrary
4 and capricious. The APA allows a court to overturn an agency's decision when the contested
5 "agency action, findings, and conclusions [are] found to be . . . arbitrary, capricious, an abuse of
6 discretion or otherwise not in accordance with the law" 5 U.S.C. § 706(2)(A). In
7 *Bonnichsen v. United States*, 969 F.Supp. 628, 644 (D. Or. 1997) (*Bonnichsen I*)⁶, the court,
8 citing to *Northwest Motorcycle Association v. United States Department of Agriculture*, 18 F.3d
9 1468, 1471 (9th Cir. 1994), and *Mt. Diablo Hospital v. Shalala*, 3 F.3d 1226, 1232 (9th Cir.
10 1993), summarized when an agency decision will be considered arbitrary and capricious.
11 According to *Bonnichsen I*, the agency decision must be based on a consideration of the relevant
12 factors. Further, the failure of an agency to gather or to consider relevant evidence may result in
13 the decision being set aside. Finally, in considering the relevant evidence, an agency must
14 "articulate a satisfactory explanation of its action including a rational connection between the
15 facts found and the choice made." *Bonnichsen I*, 969 F.Supp. at 644.

16 The Tribe attacks BLM's decision on the aforementioned grounds. Specifically, the Tribe
17 contends that the scientific evidence it provided to BLM prior to its final determination was not
18 properly considered in BLM's position paper. Further, the Tribe contends that BLM did not
19 consider the findings of the Review Committee when its final decision was contested through the
20 statutory review process. Finally, the Tribe contends that BLM failed to consider the scientific
21 evidence that was first provided to the Review Committee after BLM's final determination of
22 _____

23 ⁶ The court cites to the District Court opinions in the *Bonnichsen* line of cases,
24 recognizing that several issues were appealed and multiple orders were eventually entered.
25 However, as the *Bonnichsen* line of cases represent the primary, and most complete, prior
26 treatment of issues arising under NAGPRA, the court finds all aspects of that case which have
27 not been overturned on appeal persuasive. For this particular issue, the court notes that the
28 *Bonnichsen* court summarized the considerations surrounding an allegation that an agency
decision is arbitrary and capricious. While an appeal was taken, this issue, and the court's views
on this matter, were not contested at the appellate level. Thus, the court finds the *Bonnichsen*
court's analysis on the arbitrary and capricious issue instructive in this matter.

1 non-affiliation.

2 The court first recalls that BLM was under no obligation to accept the Tribe's scientific
3 evidence prior to making its own initial determination regarding affiliation. As noted above, the
4 statute contemplates a gathering of information available to BLM for the purpose of making an
5 internal determination on affiliation. However, BLM chose to accept the Tribe's initial offering
6 of scientific evidence.⁷ As such, it appears improper to the court to conclude that, despite having
7 the Tribe's scientific evidence and a premature request for repatriation, BLM was under no
8 obligation to fairly consider the Tribe's submissions. However, the court need not determine
9 whether BLM properly considered this evidence, as the process of determining affiliation finally
10 concluded with a finding of non-affiliation.

11 At the point of BLM's finding that the remains were not affiliated with a present day
12 Native American tribe, the Tribe's request for repatriation became ripe. In the process of that
13 dispute, the Tribe turned to the Review Committee to review BLM's determination and to help
14 settle the matter. As part of those proceedings, the Tribe provided previously unknown scientific
15 evidence to the Committee.

16 In reviewing the post-Review Committee proceedings in this matter, the court finds that
17 BLM did not fairly and adequately consider the evidence provided by the Tribe and the Review
18 Committee's findings. When the matter was returned to BLM, it responded by claiming that the
19 Committee's findings were merely advisory and not binding. While this statement is no doubt
20 accurate, it avoids the fact that a repatriation request was pending, which necessitated a thorough
21 review of the evidence, including the basis for the Committee's findings. Rather than conduct
22 that review, BLM passed the issue up the chain of command. While there are factual
23 implications which suggest that the evidence was reviewed to some extent, there is no
24

25 ⁷ As noted previously, the procedural position of this case is fairly muddled. The Tribe
26 entered its request for repatriation prior to a final decision on affiliation. BLM entered tentative
27 findings of non-affiliation but later backed off those findings to further research the issue. BLM
28 then accepted the scientific evidence the Tribe presented prior to making its final determination
on affiliation. The court has taken account of both the actual procedure and the expected
procedure in determining whether an error exists.

1 overarching determination by BLM which explains the reasons for its actions and determinations.
2 This demonstrates error, for an agency must, despite being given great leeway in exercising its
3 discretion, “cogently explain why it has exercised its discretion in a given manner.” *Motor*
4 *Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 43 U.S. 29, 48-
5 49 (1983).

6 In this matter, there is no cogent explanation why BLM chose to deny the repatriation
7 request. There is no weighing of the competing evidence, nor is there an explanation why the
8 Tribe’s evidence is not sufficient or the Review Committee’s findings are not persuasive. While
9 the court can understand how the difficult procedural morass that this proceeding became could
10 make it difficult for BLM to properly execute its administrative duties, this failure cannot be
11 excused. The Committee reviewed all the materials before it, including BLM’s submissions, and
12 concluded that the remains were affiliated and should be repatriated to the Tribe. The Committee
13 then forwarded all this information to BLM for its consideration. It was then incumbent upon
14 BLM to reconsider its view on affiliation based on the Tribe’s repatriation request, the findings
15 of the Review Committee, and the evidence provided to BLM by the Tribe.⁸ While the court has
16 held that the Review Committee’s findings are not binding on either BLM or the court, the
17 relevant statutes do make those findings relevant and persuasive, necessitating their review upon
18 a request for repatriation. Accordingly, the court finds that BLM’s decision not to repatriate the
19 Spirit Cave Man remains is arbitrary and capricious and must be vacated.

20 In its briefing, BLM has made several arguments amounting to a belief that its decision
21 cannot be improper because it has the right to rely on its experts if it so chooses. The court does
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24 ⁸ The court has held that no review was necessary based on the Review Committee
25 findings only. However, in this analysis the court is considering the fact that the Tribe had made
26 a valid repatriation request. The repatriation request, coupled with the Review Committee
27 findings, the prior evidence submitted by the tribe and the new evidence submitted by the Tribe
28 at the Review Committee hearing is the basis for BLM’s required review. Thus, the court is not
contradicting its prior determination when noting that the Review Committee findings were
relevant in BLM’s need to review the evidence post-hearing based on the Tribe’s pending request
for repatriation.

1 not quarrel with this statement. *See, Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378
2 (1989) (providing that when “specialists express conflicting views, an agency must have
3 discretion to rely on the reasonable opinions of its own qualified experts even if, as an original
4 matter, a court might find contrary views more persuasive.”). However, the ability to believe
5 whichever expert BLM chooses to believe, as long as sufficient evidence supports those findings,
6 does not leave BLM free to ignore other competing views by failing to recognize their existence
7 and refusing to describe the reasons why they were not accepted. *See, id.* (noting in the context
8 of supplementing an Environmental Impact Statement that “courts should not automatically defer
9 to the agency’s express reliance on an interest in finality without carefully reviewing the record
10 and satisfying themselves that the agency has made a reasoned decision based on its evaluation of
11 the significance - or lack of significance - of the new information.”). While BLM’s final
12 statement may be a recognition that competing theories exist and that it believes the theory
13 adopted is the more appropriate of the two, this ability to choose between competing theories
14 cannot be used to wholly avoid discussion of that competing theory. Thus, on remand, BLM is
15 reminded that it must present cogent reasons for its findings, even when it is essentially choosing
16 between two competing theories.

17 CONCLUSION

18 From the information before the court, it is clear that NAGPRA can be a surprisingly
19 difficult statute to implement properly. BLM, charged with making a final determination of
20 affiliation, was faced with a mountain of scientific and cultural evidence on both sides of the
21 issue. It is therefore no surprise that it chose to act cautiously and methodically to reach a final
22 decision on affiliation. However, this process became muddled by the Tribe’s request for
23 repatriation. While BLM should have simply made its determination, then moved to considering
24 the Tribe’s evidence for repatriation, the two issues blurred.

25 BLM received the cultural evidence it was supposed to gather in the inventory stage.
26 However, it also received a good deal of scientific evidence which was more appropriately
27 considered at the repatriation request stage. BLM then proceeded to issue its determination
28 report, taking into account some of the scientific evidence while apparently ignoring the rest.

1 The Tribe's repatriation request then became ripe, but BLM felt it had considered the evidence
2 presented by the Tribe. Thus, rather than review its findings based on the Tribe's evidence and
3 request for repatriation, BLM referred the matter to the Review Committee.

4 Despite this referral, however, BLM adopted the position that the Review Committee's
5 findings were merely advisory and failed to act upon their release. With a repatriation request
6 pending, scientific evidence presented on behalf of the Tribe and specific findings from the
7 Review Committee opposed to BLM's initial determination, some explanation why BLM's
8 initial determination was correct was required. Instead, the issue was passed up the chain of
9 command and lost. The final decision, that no further course of action was available, wholly
10 failed to meet the requirements placed on BLM by NAGPRA's authorization of a repatriation
11 request by the Tribe and the APA's standards for determining whether an agency decision was
12 arbitrary and capricious.

13 The court finds that BLM made a final agency determination on affiliation in this matter.
14 There is no error, however, in the procedures employed by BLM in making its initial
15 determination of non-affiliation. Instead, the error arose when BLM dismissed the evidence
16 provided by the Tribe in support of its repatriation request, including that evidence which arose
17 through the Review Committee proceedings, without fully explaining the reasons behind its
18 actions. NAGPRA requires BLM to fully and fairly consider this evidence and to uphold or
19 reverse its determination of non-affiliation based on a reasoned and coherent discussion of the
20 evidence and BLM's reasons for believing or disbelieving it. This discussion never occurred,
21 necessitating a finding that BLM's determination was arbitrary and capricious.

22 The court notes, however, that this order does not determine that BLM's initial
23 determination of non-affiliation is wrong and should not be read to mandate a finding of
24 affiliation by BLM. The issues surrounding the age of the remains and the competing theories of
25 population migration in the area make BLM's determination difficult to reach at best. Further,
26 the *Bonnichsen* cases and their impact on defining historical remains as Native American make
27 BLM's job that much more difficult. The order merely states that BLM was presented with a
28 valid repatriation request and a significant amount of scientific and cultural evidence, as well as

1 specific findings by the Review Committee, that required BLM to do more than simply state that
2 the evidence had been reviewed and no further action was available at the time. BLM needs to
3 compare its findings with the evidence and explain why its determination is, or is not, still the
4 most correct finding available.

5 It is therefore ORDERED that the Tribe's Motion for Summary Judgment (#31) is
6 GRANTED in part as set forth herein;

7 It is further ORDERED that BLM's Cross-Motion for Summary Judgment (#44) is
8 DENIED;

9 The *amicus* briefs filed in this matter (#35, 37, 38, 39, 40 & 50) have been considered by
10 the court in reaching its decision.

11 The matter is remanded to BLM for further proceedings consistent with this ORDER.

12 The Clerk shall enter judgment accordingly.

13 DATED this 21st day of September, 2006.

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LARRY R. HICKS
United States District Judge