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13 UNITED STATES DISTRICT COURT

14 DISTRICT OF NEVADA

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

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

D  
C

23  
24  
25 **REPLY OF DEFENDANT UNITED STATES BUREAU OF LAND MANAGEMENT TO**  
26 **PLAINTIFF FALLON PAIUTE-SHOSHONE'S**  
27 **OPPOSITION TO BLM'S CROSS-MOTION FOR SUMMARY JUDGMENT**

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1 INTRODUCTION

2 In its Opposition to the government's Cross-Motion for Summary  
3 Judgment ("Tribe's Opp."), the Fallon Paiute-Shoshone Tribe ("the  
4 Tribe") has repeated many arguments made in its opening brief. In  
5 responding, the United States does not intend to reiterate the  
6 arguments it made previously, but only to address certain issues  
7 that may be pivotal to this Court's consideration of Plaintiff's  
8 claim for relief under the Administrative Procedure Act ("APA"), 5  
9 U.S.C. §§706(2)(A) and (D).<sup>1/</sup> These issues are as follows: (1)  
10 whether the Tribe's claims are ripe for review, and accordingly,  
11 whether this Court has jurisdiction over such claims; (2) how the  
12 Tribe's statutory obligation to establish its cultural affiliation  
13

14 \_\_\_\_\_  
15 <sup>1/</sup> To the extent not addressed in this brief, the Tribe's  
16 arguments in its Opposition regarding the following subjects were  
17 addressed by the government in its Opposition to the Tribe's Motion  
18 for Summary Judgment and Cross-Motion for Summary Judgment  
19 ("Defendant's Opp."): whether the government satisfied its  
20 consultation obligations (Tribe's Opp. at 21-32; Defendant's Opp.  
21 at 79-82); whether the deadlines set by the government were  
22 arbitrary (Tribe's Opp. at 33-6; Defendant's Opp. at 82-3); whether  
23 the government was required to participate in person in the Review  
24 Committee proceedings (Tribe's Opp. at 36-38; Defendant's Opp. at  
25 83-5); whether the government's decision that there was no  
26 demonstrable cultural affiliation of the Tribe to the remains of  
27 Spirit Cave Man was arbitrary or capricious (Tribe's Opp. at 38-48;  
Defendant's Opp. at 53-77); whether the Tribe established its  
cultural affiliation to Spirit Cave Man by a preponderance of the  
evidence (Tribe's Opp. at 48-56; Defendant's Opp. at 69-77);  
whether the APA, 5 U.S.C. §706(2)(A), requires deference to BLM's  
experts (Tribe's Opp. at 45-8; Defendant's Opp. at 64-7); whether  
the government's explanation for the February 27, 2004 letter from  
Kathleen Clark (AAR 02549) was supported by BLM's consideration of  
all relevant information (Tribe's Opp. at 56-60; Defendant's Opp.  
at 77).

1 to the disputed remains by a "preponderance of the evidence"  
2 affects this Court's application of the APA's "arbitrary and  
3 capricious" standard to the Bureau of Land Management's ("BLM's")  
4 decision; (3) whether BLM or this Court is required to accord weight  
5 and/or deference to the findings of the Native American Graves and  
6 Repatriation Act ("NAGPRA") Review Committee; and (4) whether, in  
7 the absence of any demonstrable prejudice to the Tribe, Plaintiff  
8 is entitled to any remedy under 5 U.S.C. §706(2)(D) for an alleged  
9 failure by BLM to "observe the procedure required by law." The  
10 government's arguments concerning each such issue are set forth  
11 below:  
12

13 **ARGUMENT**

14 **I. The Tribe Has Failed to Establish the Jurisdiction of This**  
15 **Court Over its Claims for Relief Under 5 U.S.C. §§706(2)(A)**  
16 **and (D)**

17 In this action, the Tribe is calling upon this Court to "hold  
18 unlawful and set aside agency action, findings and conclusions,"  
19 that were allegedly "arbitrary, capricious, an abuse of discretion,  
20 or otherwise not in accordance with law," 5 U.S.C. §706(2)(A),  
21 and/or "without observance of procedure required by law." 5 U.S.C.  
22 §706(2)(D). The action on which the Tribe bases its claim is the  
23 February 27, 2004 statement of the Director of the Bureau of Land  
24 Management ("BLM"), Kathleen Clark, that she "had reviewed all of  
25 the options to address [the Tribe's] concerns and there [was] no  
26 additional course of action appropriate to pursue at [that] time."  
27

1 AAR 02549. This letter, in essence, adopted the decision of the  
2 BLM Nevada State Director on August 15, 2000, AAR 02153, to the  
3 effect that the evidence did not support the Tribe's cultural  
4 affiliation to the human remains ("Spirit Cave Man") the Tribe  
5 sought to repatriate.

6 This Court's jurisdiction depends on whether the action on  
7 which the Tribe's claims for relief are based represented a "final  
8 agency action." See 5 U.S.C. §704. See also Idaho Farm Bureau  
9 Federation v. Babbitt, 58 F.3d 1392, 1401 (9<sup>th</sup> Cir. 1995) ("[t]he  
10 APA provides that final agency action shall be held unlawful and  
11 set aside if it is 'arbitrary, capricious, an abuse of discretion,  
12 or otherwise not in accordance with law" or if it was taken  
13 'without observance of procedure required by law.' 5 U.S.C.  
14 §§706(2) (A), (D)." (citation omitted)); Sierra Pacific Indus. v.  
15 Lyng, 866 F.2d 1099, 1105 (9<sup>th</sup> Cir. 1989). The Tribe argues that  
16 Director Clark's February 27, 2004 letter represented a "final"  
17 denial of its claim for repatriation under NAGPRA, 25 U.S.C.  
18 §3005(a)(4), ripe for review under the APA, 5 U.S.C. §§704,  
19 706(2) (A) and (D).

20  
21 In order to establish that this action is a "final agency  
22 action" that is ripe for review under the APA, the Tribe must  
23 satisfy two conditions: "[f]irst, the action must mark the  
24 'consummation' of the agency's decisionmaking process (citations  
25 omitted) ... [a]nd second, the action must be one by which 'rights  
26



1 or obligations have been determined,' or from which 'legal  
2 consequences will flow.'" Bennett v. Spear, 520 U.S. 154, 177-8  
3 (1997) (quoting Port of Boston Marine Terminal Ass'n v.  
4 Rederiaktiebolaget Translantic, 400 U.S. 62, 71 (1970)). The Tribe  
5 contends that it meets both of these tests.

6  
7 The Tribe argues, in essence, that the February 27, 2004  
8 letter from BLM Director Clark represented the "consummation" of  
9 the agency's decisionmaking process. It analogizes Director  
10 Clark's statement in that letter to the denial of a license or a  
11 permit, and contends that if its claim were not deemed ripe, "a  
12 tribe could never obtain judicial review of the denial of a  
13 repatriation request under 25 U.S.C. §3005(a)(4)." Tribe's Opp. at  
14 1-4 (emphasis added). The Tribe further maintains that "rights and  
15 obligations" have been determined by virtue of the issuance of the  
16 February 27, 2004 letter, and that "legal consequences" flow from  
17 that action because there is no statutory obligation to repatriate  
18 cultural items where there has been a determination that such items  
19 are not culturally affiliated and, therefore, as a result, BLM  
20 continues to have ownership and control over the remains. Tribe's  
21 Opp. at 4.

22  
23 In its support, the Tribe relies on statements of the court in  
24 Bonnichsen v. United States, 367 F.3d 864, 874 (9<sup>th</sup> Cir. 2004), that  
25 25 U.S.C. §3013 authorizes "actions asserting under-enforcement of  
26 NAGPRA." Tribe's Opp. at 3. The issue in Bonnichsen, and the  
27

1 context in which the above statement was made by the court, was  
2 whether the plaintiff scientists in that case had *standing* to bring  
3 an action under NAGPRA to contest the Secretary of the Interior's  
4 decision to repatriate the remains at issue to the tribal  
5 claimants, not whether the scientists' claim to prevent  
6 repatriation was ripe for review. Id. at 873-4. Standing is not  
7 at issue in this case.

8  
9 The Tribe also attempts to distinguish Na Iwi O Na Kapuna O  
10 Mokapu v. Dalton, 894 F. Supp. 1397 (D. Hawaii 1995) (referred to  
11 by the Tribe as Dalton), from the facts before this Court. Tribe's  
12 Opp. at 5. In that case, the plaintiff Native Hawaiian group was  
13 attempting to compel repatriation of certain remains. It took the  
14 position that under 25 U.S.C. §§3009 and 3013, it was entitled to  
15 judicial review. The Tribe is correct that in that case there was  
16 an ongoing administrative process, but in this case too, there is  
17 also a continuing process - a process outlined explicitly in  
18 NAGPRA, 25 U.S.C. §3001 et seq., and in the regulations issued by  
19 the Secretary interpreting NAGPRA. 43 C.F.R. §10.1 et seq.

20  
21 Under 25 U.S.C. §3006(c)(5), the NAGPRA Review Committee is  
22 charged explicitly with "compiling an inventory of culturally  
23 unidentifiable human remains that are in the possession or control  
24 of each Federal agency and museum and recommending specific actions  
25 for developing a process for disposition of such remains." The  
26 NAGPRA Review Committee is likewise directed to "consult[] with the

1 Secretary in the development of regulations to carry out [NAGPRA]."  
2 25 U.S.C. §3006(c)(7). Thus, the statutory framework itself  
3 involves the promulgation, over a period of time, of regulations to  
4 carry out NAGPRA's purposes.

5 The regulations promulgated by the Secretary pursuant to  
6 NAGPRA speak directly to the disposition of culturally  
7 unidentifiable remains such as those of the Spirit Cave Man. See 43  
8 C.F.R. §10.10(g) ("The Review Committee is responsible for  
9 compiling an inventory of culturally unidentifiable human remains  
10 in the possession or control of each museum and Federal agency,  
11 and, for recommending to the Secretary specific actions for  
12 disposition of such human remains."); 43 C.F.R. §10.16(a) (The  
13 Review Committee's responsibilities include "compiling a record of  
14 culturally unidentifiable remains that are in the possession or  
15 control of museums and Federal agencies and recommending actions  
16 for their disposition."). The NAGPRA regulations direct the  
17 further promulgation of a regulation, specifically reserved for  
18 codification at 43 C.F.R. §10.11, that "will set forth procedures  
19 for disposition of culturally unidentifiable remains of Native  
20 America origin." 43 C.F.R. §10.9(e)(6) (referring to the  
21 promulgation of 43 C.F.R. §10.11).<sup>2/</sup>  
22  
23

24 \_\_\_\_\_  
25 <sup>2/</sup> Under 43 C.F.R. §10.9(e)(6), museums and federal agencies are  
26 required to retain possession of culturally unidentifiable human  
27 remains of Native American origin (including those of Spirit Cave  
Man) pending promulgation of 43 C.F.R. §10.11 "unless legally  
(continued...)

1 The regulatory process outlined in NAGPRA and its associated  
2 regulations is ongoing. In fact, as the Tribe notes, Tribe's Opp.  
3 at 4 n.3, the preparation of the relevant regulations has already  
4 begun. See Recommendations Regarding the Disposition of Culturally  
5 Unidentifiable Native Remains, 65 Fed. Reg. 36,462-03 (June 8,  
6 2000). Those recommendations actually cite as an "appropriate  
7 repatriation solution" the possibility of returning to a Tribe  
8 "human remains that are determined to be culturally unidentifiable"  
9 where such remains were recovered from tribal or aboriginal land.  
10 65 Fed. Reg. at 36,463 (Paragraphs C.2.a and C.2.b). If the  
11 culturally unidentifiable remains of Spirit Cave Man are ultimately  
12 provided to the Tribe, on whose lands these remains were found,  
13 then the Tribe's claim for repatriation will be satisfied and  
14 effectively extinguished. Thus, until the regulation contemplated  
15 by the statute is promulgated, and unless, pursuant to that  
16 regulation, the remains are not returned to the Tribe, there is no  
17  
18  
19  
20

21 \_\_\_\_\_  
22 <sup>2/</sup> (...continued)

23 required to do otherwise, or recommended to do otherwise by the  
24 Secretary." The Tribe takes issue with the failure of the  
25 Secretary to provide it with the remains of Spirit Cave Man  
26 pursuant to the above provision following BLM's August, 2000  
27 determination. Tribe's Opp. at 57. Under 43 C.F.R. §10.9(e)(6),  
however, the Secretary had the discretion to provide the remains to  
the Tribe or to continue to maintain custody over them. The  
Secretary's decision not to return the remains pursuant to this  
provision cannot, therefore, be deemed a violation of such  
regulation.

1 "final agency action" on which to seek judicial review under 5  
2 U.S.C. §§706(2)(A) and (D).<sup>3/</sup>

3 The Tribe's request for review under the APA, 5 U.S.C.  
4 §§706(2)(A) and (D) is unripe and, depending on the terms of 43  
5 C.F.R. §10.11 once promulgated, potentially moot. Therefore, this  
6 Court is without jurisdiction to consider the Tribe's claims in  
7 this action.

8  
9 **II. This Court's Assessment under 5 U.S.C. §706(2)(A) of Whether**  
10 **BLM's Decision was "Arbitrary or Capricious" Must Incorporate**  
11 **the Underlying Requirement that the Totality of Evidence**  
12 **Demonstrate the Tribe's Cultural Affiliation to the Remains at**  
13 **Issue by a "Preponderance of the Evidence"**

14 Even assuming the ripeness of the Tribe's claim for relief  
15 under 5 U.S.C. §706(2)(A) on the basis that BLM's decision was  
16 "arbitrary or capricious," that claim must fail because BLM  
17 properly weighed the evidence before it concerning the cultural  
18 affiliation of the Tribe to Spirit Cave Man applying the  
19 "preponderance of the evidence" standard set forth in 25 U.S.C.  
20 §3005(a)(4) and 43 C.F.R. §10.10(b). In its Opposition, the Tribe  
21 takes issue with the government's position that the Tribe failed to  
22 establish cultural affiliation to the remains at issue by a  
23 "preponderance of the evidence." Tribe's Opp. at 48. The Tribe

---

24 <sup>3/</sup> Importantly, the Tribe is not seeking to "compel agency action  
25 unlawfully withheld or unreasonably delayed." See Na Iwi, 894 F.  
26 Supp. at 1406 n. 5 (referring to APA claims under 5 U.S.C. §706(1),  
27 and distinguishing such claims from claims to "hold unlawful and  
set aside agency action" under 5 U.S.C. §706(2)).

1 maintains that this issue is not properly before this Court because  
2 it invites a review of the merits of the Tribe's repatriation  
3 claim. Tribe's Opp. at 48. The government's intention, however,  
4 is not to invite a de novo review of the facts, but rather to  
5 ensure that the Tribe's underlying burden of proof is considered in  
6 assessing whether BLM's decision was arbitrary or capricious. If  
7 this Court were to ignore the underlying preponderance of the  
8 evidence standard, the effect would be to impose on BLM a more  
9 burdensome standard than is contemplated by NAGPRA, 25 U.S.C.  
10 §3005(A)(4) and 43 C.F.R. §10.10(b), and thereby to distort the  
11 "arbitrary or capricious" standard of review in 5 U.S.C.  
12 §706(2)(A). A proper evaluation under 5 U.S.C. §706(2)(A) of the  
13 decision by BLM requires consideration of the underlying standard  
14 of proof.

16 Case authority supports the government's position that a  
17 court, on review under the APA, should take into consideration the  
18 underlying standard of proof. In On-Line Careline, Inc. v. America  
19 Online, Inc., 229 F.3d 1080 (Fed. Cir. 2000), the APA standard of  
20 review was the "substantial evidence" standard in 5 U.S.C.  
21 §706(2)(E). At issue in On-Line Careline was whether the  
22 defendant-appellee had abandoned its trademark. The court  
23 concluded that the decision of the U.S. Patent and Trademark Office  
24 Trademark Trial and Appeal Board that the plaintiff-appellant had  
25 not satisfied its underlying burden (which required rebutting a  
26

1 presumption of validity of a service mark registered by the  
2 defendant-appellant), was supported by substantial evidence. Id.  
3 at 1087-8.

4 In this case, the decision of the BLM director represented a  
5 determination that the weight of the evidence, i.e., a  
6 preponderance of the evidence, militated against a determination of  
7 cultural affiliation of the Tribe to the remains of Spirit Cave  
8 Man. In evaluating that decision of BLM, this Court - like the  
9 court in On-Line Careline - should apply the relevant standard  
10 under the APA (in this case, the "arbitrary or capricious"  
11 standard, 5 U.S.C. §706(2)(A)), with due regard for the underlying  
12 burden of the Tribe to establish its cultural affiliation to the  
13 remains at issue by a "preponderance of the evidence." Applying  
14 the proper standard, it is evident that the Tribe cannot satisfy  
15 its burden in this proceeding under the APA. Therefore, summary  
16 judgment should be entered for the Defendant.

17  
18 **III. In Addressing Tribal Claims for Repatriation, Neither BLM nor**  
19 **this Court is Required to Defer or Accord any Weight to the**  
20 **Findings and Conclusions of the NAGPRA Review Committee**

21 In the same way the Tribe seeks to ignore the underlying  
22 burden of establishing cultural affiliation by a preponderance of  
23 the evidence, it is seeking to minimize the weight of BLM's  
24 decision by suggesting that both BLM and this Court must defer to  
25 the findings and conclusions of the NAGPRA Review Committee ("the  
26 Committee"). The applicable standard under the APA, that is, the  
27

1 "arbitrary or capricious" standard, 5 U.S.C. §706(2)(A), is, by  
2 definition, highly deferential to BLM's decision. The Tribe's  
3 argument in favor of deference to the Committee, rather than to  
4 BLM's decision, turns the "arbitrary or capricious" standard of  
5 review on its head, and effectively argues for a higher standard of  
6 review (e.g., substantial, or even clear and convincing evidence).  
7 The Plaintiff's argument thus defies logic and circumvents the  
8 applicable APA standard of review. The Tribe, in any event, finds  
9 no support in the law for its position.  
10

11 The NAGPRA statutes and regulations are explicit as to the  
12 Committee's limited role and the effect of its findings. Under 25  
13 U.S.C. §3006(c)(3), "upon the request of any party," the Committee  
14 is responsible for "reviewing and making findings related to ...  
15 the identity or cultural affiliation or cultural items, or ... the  
16 return of such items." The records and findings of the Committee  
17 made pursuant to the above statutory provision "may be admissible  
18 in any action brought under [25 U.S.C. §3013]." 25 U.S.C. §3006(d)  
19 (emphasis added). See also 43 C.F.R. §10.16(b).  
20

21 The Committee also acts as a mediator. Under 43 C.F.R. §10.17  
22 ("Dispute Resolution"), the Committee

23 may facilitate the informal resolution of disputes  
24 relating to these regulations among interested parties  
25 that are not resolved by good faith negotiations. Review  
26 Committee actions may include convening meetings between  
27 parties to disputes, making advisory findings as to  
contested facts, and making recommendations to the  
disputing parties or to the Secretary as to the proper  
resolution of disputes consistent with these regulations



1 and the act.

2 43 C.F.R. §10.17(b). See also 25 U.S.C. §3006(c)(4); 43 C.F.R.  
3 §10.16(a).

4 Notwithstanding the breadth of responsibilities given to the  
5 Committee, the pertinent regulations are explicit that its role is  
6 only "advisory," 43 C.F.R. §§10.2(c)(2), 10.16(b), and that its  
7 recommendations, findings, reports and other actions are "advisory  
8 only and not binding on any person." 43 C.F.R. §10.16(b).

9 The advisory nature of the Committee and the non-binding  
10 effect of its findings and conclusions is further underscored by  
11 NAGPRA's legislative history. The Senate's Select Committee on  
12 Indian Affairs specifically noted that "the findings of the review  
13 committee shall not be binding on the parties but that the review  
14 committee shall be an advisory committee which makes  
15 recommendations to the Secretary and helps facilitate the  
16 resolution of disputes regarding the provisions of [NAGPRA]." SEN.  
17 RPT. NO. 101-473, at 12 (1990). Commenting on the draft NAGPRA  
18 legislation, the Department of Justice stated that:  
19

20 the [draft] bill would not accord binding legal force to  
21 the committee's review. Indeed, section 6(b)(5) states  
22 that the [review] committee shall not have authority to  
23 transfer "legal title" to any protected object. Should  
24 Congress intend otherwise, section 6(a)(2) of the bill  
25 would need to be amended to conform the procedures for  
26 appointment of the review committee to the Constitution's  
27 Appointments clause. See U.S. Const., Art. II, § 2, cl.  
2; Buckley v. Valeo, 424 U.S. 1, 126, 141 (1976)  
(officials exercising "significant authority pursuant to  
the laws of the United States" must be appointed pursuant  
to the Appointments Clause).

1 SEN. RPT. NO. 101-473, at 22.

2 Appointments to the Committee are made by the Secretary of the  
3 Interior. See 25 U.S.C. §3006. In contrast, appointments made  
4 pursuant to the Constitution's Appointments clause are made by the  
5 President, and are subject to the advice and consent of the Senate.  
6 U.S. Const., art. II, §2, cl. 2 (the President "shall nominate, and  
7 by and with the Advice and Consent of the Senate, shall appoint ...  
8 Officers of the United States, whose Appointments are not herein  
9 otherwise provided for ..."). As noted by the Court in Buckley  
10 v. Valeo, and cited by the Department of Justice in its comments on  
11 the draft NAGPRA bill, officials exercising "significant authority  
12 pursuant to the laws of the United States" must be appointed  
13 pursuant to the Appointments Clause. SEN. RPT. NO. 101-473, at 22  
14 (citing Buckley, 424 U.S. 1, 126, 141 (1976)). It is axiomatic,  
15 therefore, that the actions of a committee comprised of officials  
16 named pursuant to the Appointments Clause would have considerably  
17 more force than actions of a committee, such as the NAGPRA Review  
18 Committee, whose members are not named by the President and subject  
19 to the advice and consent of the Senate, but who are appointed by  
20 the Secretary of the Interior for advisory purposes.  
21

22  
23 One "committee" that is comprised of persons named by the  
24 President pursuant to the Appointments clause is the Council for  
25 Environmental Quality ("CEQ"). See 42 U.S.C. §4342 ("The [CEQ]  
26 shall be composed of three members who shall be appointed by the  
27

1 President to serve at his pleasure, by and with the advice and  
2 consent of the Senate."). In contrast to the Committee, CEQ is not  
3 an "advisory committee" within the meaning of the Federal Advisory  
4 Committee Act ("FACA"), 5 U.S.C. App. 2, §3(2)(C)(i), which  
5 excludes from the definition of "advisory committee" any committee  
6 "that is composed wholly ... of officers or employees of the United  
7 States." Moreover, CEQ's defined roles do not include mediation.  
8 See 42 U.S.C. §4344 ("Duties and Functions"); 40 C.F.R. §1515.2(b).  
9 In contrast to the NAGPRA regulations, 43 C.F.R. §10.16(b), there  
10 is no statutory or regulatory authority explicitly declaring that  
11 the advice, determinations or actions of CEQ are "non-binding."  
12

13 These distinctions between the Committee and CEQ are not  
14 trivial. They bear directly on the question of whether CEQ's  
15 decisions and actions have legal force in the eyes of the courts.  
16 These critical differences between CEQ and the Committee described  
17 above explain the decisions of the Court in the cases cited by the  
18 Tribe, see Andrus v. Sierra Club, 442 U.S. 347, 358 (1979), Warm  
19 Springs Dam Task Force v. Gribble, 417 U.S. 1301, 1310 (1974), to  
20 defer to decisions of CEQ on issues within its bailiwick. Given  
21 the significant distinctions between the Committee and CEQ,  
22 however, those cases provide no support for the proposition that  
23 BLM and/or this Court are obligated to defer to the findings and  
24 conclusions of the Committee.  
25

26 In sum, the Tribe's insistence that BLM was required to lend  
27

1 weight to the non-binding findings and conclusions of the  
2 Committee, or that this Court, in reviewing the decision of BLM,  
3 must defer to the same non-binding findings and conclusions of the  
4 Committee, finds no support in any legal authority. The Tribe's  
5 position simply cannot be squared with the plain language of NAGPRA  
6 and its associated regulations. A non-binding decision is exactly  
7 that. Therefore, there is no basis under 5 U.S.C. §706(2)(A) for  
8 setting aside a decision by BLM that did not defer or accord weight  
9 to the Committee's findings and conclusions.  
10

11 **IV. The Tribe Suffered no Prejudice as a Result of BLM's Decisions**  
12 **not to Participate in the Committee Proceedings in Person or**  
13 **to Prepare a Written Decision Evaluating the Committee's**  
14 **Findings and Conclusions and, Therefore, is not Entitled to**  
15 **any Remedy under 5 U.S.C. §706(2)(D) Based on an Alleged**  
16 **Failure of BLM to "Observe the Procedure Required by Law"**

17 5 U.S.C. §706 provides that in making determinations under  
18 that statutory provision, "the court shall review the whole record  
19 or those parts of it cited by a party, and due account shall be  
20 taken of the rule of prejudicial error." Applying this basic  
21 principle, BLM's decision may not be set aside on the grounds that  
22 it failed to "observe the procedure required by law," 5 U.S.C.  
23 §706(2)(D), because even if this Court determines that BLM was  
24 required under the pertinent statutory and regulatory provisions to  
25 participate in person in the Committee proceedings, BLM's non-  
26 participation was not prejudicial to the Tribe. See Intercargo  
27 Ins. Co. v. United States, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It  
is well settled that principles of harmless error apply to the

1 review of agency proceedings," and that "the harmless error rule  
2 [has been] incorporated in the judicial review section of the  
3 Administrative Procedure Act."); Cummins Engine Co. v. United  
4 States, 83 F. Supp. 2d 1366, 1378 (Ct. Int'l Trade 1999) ("Under  
5 the rule of prejudicial error, or harmless error analysis, the  
6 Court will not overturn an agency's action if the procedural error  
7 complained of was harmless."). See also Gifford Pinchot Task Force  
8 v. U.S. Fish and Wildlife Service, 378 F.3d 1059, 1071 (9th Cir.  
9 2004).

10  
11 Here, the Tribe cites as "error" BLM's decision not to  
12 participate in person in the Committee proceedings. Tribe's Opp.  
13 at 36-8. Contrary to the Tribe's allegations, BLM did fully comply  
14 with the Committee's request that the agency submit the documents  
15 and materials upon which BLM had relied in determining that the  
16 Tribe had not established cultural affiliation to Spirit Cave Man.  
17 See Defendant's Opp. at 83-5. Moreover, neither NAGPRA nor its  
18 implementing regulations specify a strict process or set of  
19 procedures to be followed by the Committee or parties during  
20 dispute resolution efforts under 43 C.F.R. §10.17(b). BLM's  
21 providing the Committee with documents relied upon by its Nevada  
22 State Director in finding no cultural affiliation of the Tribe to  
23 Spirit Cave Man, and BLM Director Kathleen Clark's February 27,  
24 2004 letter to the Tribe upholding the State Director's August 15,  
25 2000 decision, complied with all legal requirements of NAGPRA and  
26

1 its regulations, and accordingly, the Tribe's claim for relief  
2 under 5 U.S.C. §706(2)(D) must fail.

3 Even if BLM had an additional role or responsibility in  
4 connection with the Committee process, however, the Tribe is unable  
5 to show that it was prejudiced by BLM's actions because the  
6 Committee's ultimate findings and conclusions as a result of its  
7 proceedings were, as a matter of law, not binding on BLM. 43  
8 C.F.R. §10.16(b). If BLM was not legally required - under any  
9 circumstances - to accept the Committee's findings and conclusions,  
10 and/or to heed its suggestions, then its decision not to  
11 participate in person in the Committee's proceedings and subsequent  
12 decision not to prepare a written decision evaluating the  
13 Committee's findings and conclusions, could not, as a matter of  
14 law, be deemed prejudicial to the Tribe. Therefore, the Tribe is  
15 not entitled to any relief under 5 U.S.C. §706(2) and summary  
16 judgment must be entered in favor of the government.  
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1 CONCLUSION

2 For all of the above reasons, and the reasons previously  
3 stated by the United States in its opening brief, the United  
4 States respectfully asks that this Court enter summary judgment  
5 in its favor.  
6

7 Respectfully submitted,

8 DANIEL G. BOGDEN  
9 United States Attorney

10 /s/ Greg Addington

11 

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12 /s/ Elsie B. Kappler

13 

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22 Dated: April 11, 2006  
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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing REPLY OF TO THE TRIBE'S OPPOSITION TO BLM'S CROSS-MOTION FOR SUMMARY JUDGMENT was made by sending a copy of same to the below addressees on April 11, 2006 in the manner indicated.

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