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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

The Navajo Nation,  
Plaintiff,

vs.

The United States Department of the  
Interior, et al.,  
Defendants.

No. CV-11-08205-PCT-PGR

ORDER

Pending before the Court is the defendants' Motion to Dismiss (Doc. 13). Having considered the parties' memoranda in light of the relevant record, the Court finds that the motion should be granted to the extent that the Court finds that this action is barred at this time by the doctrine of sovereign immunity.<sup>1</sup>

Background

This action stems from the long-standing desire of the plaintiff, the Navajo Nation, to obtain the immediate repatriation of 303 sets of human remains and other

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No party has asked for oral argument and the Court concludes that oral argument would not aid the decisional process.

The Court notes that it has intentionally discussed only those arguments raised by the parties that the Court considers to be necessary to the resolution of the pending motion.

1 associated cultural objects removed by the National Park Service (“NPS”) from the  
2 Canyon de Chelly National Monument (“the Monument”), which is a unit of the NPS  
3 located within the exterior boundaries of the Navajo Reservation; the human remains  
4 and cultural objects at issue are currently being held by the NPS at its Western  
5 Archeology Conservation Center in Tucson, Arizona. The plaintiff’s complaint  
6 names as defendants the United States Department of the Interior, Kenneth Salazar,  
7 in his official capacity as the Secretary of the Department of the Interior, the NPS,  
8 Jonathan B. Jarvis, in his official capacity as the Director of the NPS, and Tom O.  
9 Clark, in his official capacity as the Superintendent of the Monument. The complaint,  
10 which seeks the immediate return of the human remains and cultural items through  
11 the plaintiff’s requests for declaratory and injunctive relief, alleges violations of the  
12 Treaty of 1850 and the Treaty of 1858 (Count One)<sup>2</sup>, breach of fiduciary duty (Count  
13 Two)<sup>3</sup>, violation of the Archaeological Resources Protection Act (Count Three)<sup>4</sup>,  
14 violation of the Constitution (Count Four)<sup>5</sup>, and violation of the Administrative

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17 Count One alleges that the NPS violated the treaties by interfering with the  
18 plaintiff’s self-government and sovereignty and by violating its religious, cultural and  
19 spiritual practices.

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21 Count Two alleges that the NPS breached its special fiduciary duty to the  
22 plaintiff by failing to guard and protect the plaintiff’s resources inside the Monument.

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24 Count Three alleges that the NPS has violated the Archaeological  
25 Resources Protection Act, 16 U.S.C. § 470aa *et seq.*, by attempting, without the  
26 plaintiff’s consent, to dispose of human remains and cultural objects taken from the  
27 plaintiff’s tribal lands prior to the enactment of the Native American Graves  
28 Protection and Repatriation Act.

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30 Count Four alleges that the defendants’ actions violate the Fifth  
31 Amendment of the Constitution to the extent that the Court determines that the  
32 Antiquities Act of 1906, or the Canyon de Chelly Monument Act, or the Native

1 Procedure Act (Count Five)<sup>6</sup>.

2 As set forth in the complaint, the Navajo Reservation was established by  
3 treaty in 1868; included within the reservation boundaries are the Canyon de Chelly  
4 and its tributary Canyon del Muerto, both of which have extraordinary cultural and  
5 historical significance to the Navajo people. In 1930, the Navajo Nation Council  
6 approved the establishment of the Monument; the Monument was authorized by  
7 Congress in 1931, see 16 U.S.C. §§ 445-445b, and was formally established by  
8 presidential proclamation in 1933. Specifically included within the Monument are all  
9 lands within Canyon de Chelly and Canyon del Muerto. The legislation authorizing  
10 the creation of the Monument provides in part that “[n]othing herein shall be  
11 construed as in any way impairing the right, title, and interest of the Navajo Tribe of  
12 Indians which they now have and hold to all lands and minerals, including oil and  
13 gas, and the surface use of such lands for agricultural, grazing, and other purposes,  
14 except as defined in section 445b of this title[.]” 28 U.S.C. § 445a. The legislation  
15 further provides that the NPS “is charged with the administration of [the Monument],  
16 so far as it applies to the care, maintenance, preservation and restoration of the  
17 prehistoric ruins, or other features of scientific or historical interest within the area[.]”

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19 American Graves Protection and Repatriation Act transferred title to the  
20 archaeological resources in the Monument to the United States.

21 <sup>6</sup>

22 Count Five alleges that the NPS is in violation of the Administrative  
23 Procedure Act by acting contrary to its obligations under the Treaties of 1850 and  
24 1868, by breaching its fiduciary duty to the plaintiff by attempting to dispose of its  
25 property without its consent, by unlawfully withholding agency action required by  
26 the Archaeological Resources Protection Act, *i.e.* by failing to coordinate with the plaintiff  
and obtain its consent in the disposition of human remains and cultural objects taken  
from the plaintiff’s tribal lands, by acting contrary to the plaintiff’s rights under the  
Fifth Amendment to the Constitution, and by acting in excess of its statutory authority  
under the Native American Graves Protection and Repatriation Act.

1 28 U.S.C. § 445b.

2 The complaint alleges that since the establishment of the Monument, the NPS  
3 has dug up and carried off human remains and cultural objects from Canyon de  
4 Chelly and Canyon del Muerto, all without seeking or obtaining the consent of the  
5 plaintiff, and contrary to the spiritual, religious and cultural practice of the Navajo  
6 people. In approximately 1996, the NPS began an inventory of these human  
7 remains and cultural objects in its collection pursuant to the Native American Graves  
8 Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. § 3001 *et seq.*, despite the  
9 demands by the Navajo Nation Historic Preservation Department that these items  
10 had to be returned to the plaintiff because they are the property of the plaintiff  
11 inasmuch as they were removed from the plaintiff’s original treaty lands. The NPS,  
12 over the plaintiff’s repeated objections, has recently begun a cultural affiliation  
13 process pursuant to NAGPRA in order to repatriate the human remains and cultural  
14 objects at issue to either the Navajo, Hopi, Zuni, or potentially some other tribe; the  
15 plaintiff is participating in the NAGPRA process in order to protect its rights, while  
16 continuing to object to the process. On August 9, 2011, the Navajo Nation  
17 Department of Justice sent a written notice to Superintendent Clark of the plaintiff’s  
18 intent to sue the NPS unless the NAGPRA process was immediately ceased and  
19 arrangements were made to return the human remains and cultural objects to the  
20 plaintiff. In a responsive letter dated September 7, 2011, Superintendent Clark  
21 stated that it was the position of the NPS that the repatriation of the human remains  
22 and cultural objects could not be made prior to the completion of the tribal  
23 consultation and cultural affiliation process mandated by NAGPRA.

24 Discussion

25 The defendants, which seek the dismissal of this action in its entirety on a  
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1 variety of grounds, initially argue that the adjudication of this action is barred  
2 pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction due to the bar  
3 of sovereign immunity. See F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994) (“Absent  
4 a waiver, sovereign immunity shields the Federal Government and its agencies from  
5 suit.”) The defendants assert, without contravention by the plaintiff, that all of the  
6 plaintiff’s claims must rely on the limited waiver of the United States’ sovereign  
7 immunity set forth in the Administrative Procedure Act (“APA”). See 5 U.S.C. § 702.  
8 The defendants’ position is that sovereign immunity has not been waived for any of  
9 the plaintiff’s claims because there has not been any final agency action or unlawful  
10 inaction for purposes of the APA.<sup>7</sup>

11 A. Final Agency Action

12 When a claim is brought pursuant to the general review provisions of the  
13 APA<sup>8</sup>, sovereign immunity is waived when the challenged federal agency action  
14 constitutes a “final agency action for which there is no other adequate remedy in a  
15 court[.]” 5 U.S.C. § 704. The plaintiff, which bears the burden of establishing that its  
16 claims are now justiciable, argues that the final agency action that is reviewable  
17 under the APA is the NPS’ decision, as set forth in Superintendent Clark’s letter of

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19 The Court notes that the plaintiff does not argue that its constitutional  
20 claims, whether individually raised or imbedded in its APA claim, are exempt from  
21 the limitations on the waiver of sovereign immunity imposed by 5 U.S.C. § 704.  
22 See Gallo Cattle Co. v. U.S. Dept. of Agriculture, 159 F.3d 1194, 1198 (9<sup>th</sup> Cir.  
1998) (Court concluded that the “final agency action” requirement imposed by §  
704 is a limitation on the waiver of sovereign immunity granted by § 702).

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24 The Court notes that neither party argues that the agency action in  
25 question is made reviewable by specific authorization in a substantive statute.  
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1 September, 2011, whereby the NPS rejected the plaintiff's demand for the  
2 immediate return the human remains and cultural objects at issue to it based on the  
3 NPS' opinion that it was legally required to complete the NAGPRA process before  
4 repatriation could occur notwithstanding the plaintiff's non-consent to that process.  
5 The defendants argue that there has not yet been a reviewable final agency action.  
6 The Court agrees with the defendants.

7 NAGPRA, which was enacted by Congress subsequent to the enactment of  
8 Archaeological Resources Protection Act ("ARPA"), in part to specifically protect  
9 tribal burial sites and rights to items of tribal cultural significance, including Native  
10 American remains, funerary objects, sacred objects, and objects of cultural  
11 patrimony, 25 U.S.C. § 3001(3); 43 C.F.R. § 10.1(b), sets forth in relevant part a  
12 complex repatriation process through which lineal descendants and culturally  
13 affiliated tribes can recover human remains and cultural objects removed from tribal  
14 lands when those remains and objects were in the "procession or control" of federal  
15 agencies as of NAGPRA's effective date, November 16, 1990.<sup>9</sup> 25 U.S.C. §§ 3003-  
16 3004; Pueblo of San Ildefonso v. Ridlon, 103 F.3d 936, 938 (10<sup>th</sup> Cir.1996).  
17 Notwithstanding that the plaintiff does not raise any independent NAGPRA claim in  
18 its complaint and argues that ARPA, not NAGPRA, controls the disposition of the  
19 human remains and cultural items at issue, the Court concludes for purposes of the  
20 pending motion that NAGPRA is applicable to this action.

21 The gist of the plaintiff's argument regarding NAGPRA's non-applicability is  
22 that NPS has never had lawful possession or control over the items as they remain  
23 the plaintiff's property. For purposes of NAGPRA, a federal agency has

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26 The plaintiff alleges in its complaint that the NPS removed the remains and  
objects at issue from Navajo Nation tribal lands before the enactment of NAGPRA.

1 “possession” if it has “physical control of human remains, funerary objects, sacred  
2 objects, or objects of cultural patrimony with a sufficient legal interest to lawfully treat  
3 the objects as part of its collection[,]” and it has “control” over such items if it has “a  
4 legal interest ... sufficient to lawfully permit [it] to treat the objects as part of its  
5 collection[.]” 43 C.F.R. § 10.2(a)(3)(I) and (ii). The defendants argue, and the Court  
6 agrees, that the statute establishing the Monument provides the NPS with “legal  
7 interest” over the human remains and cultural objects removed from the Monument  
8 sufficient to meet NAGPRA’s possession or control requirement because the statute  
9 specifically grants the NPS broad authority to administer the Monument “so far as  
10 it applies to the care, maintenance, preservation and restoration of the prehistoric  
11 ruins, or other features of scientific or historical interest within the area[.]” 28 U.S.C.  
12 § 445b.

13 In order for the NPS’ action at issue to constitute final agency action for APA  
14 judicial review purposes, the action must mark the consummation of the NPS’  
15 decision-making process, *i.e.* the action must not be merely tentative or interlocutory  
16 in nature, and it must be one by which rights or obligations have been determined  
17 or one from which legal consequences will flow. Bennett v. Spear, 520 U.S. 154,  
18 177-78 (1997). At the very least, the first finality factor has not been met here. The  
19 NPS’ position set forth in Superintendent Clark’s letter, whether it be its decision not  
20 to immediately return the human remains and cultural objects to the plaintiff or its  
21 decision that it is legally required to comply with the NAGPRA repatriation process,  
22 does not constitutes the culmination of the NPS’ decision-making process regarding  
23 the ultimate disposition of the human remains and cultural objects. All the NPS in  
24 effect did through the letter was to deny the plaintiff interim relief; the reviewable final  
25 agency action will come when the NPS completes its NAGPRA review process and  
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1 determines to whom the human remains and cultural objects should be repatriated.  
2 See Ecology Center, Inc. v. United States Forest Service, 192 F.3d 922, 925 (9<sup>th</sup>  
3 Cir.1999) (Court noted that steps taken leading to an agency action do not constitute  
4 the required final agency action); Na Iwi O Na Kupuna O Mokapu v. Dalton, 894  
5 F.Supp. 1397, 1405 (D.Hawai'i 1995) (Court concluded that because the federal  
6 defendant had not yet made a decision in accordance with the NAGPRA provisions  
7 regarding the repatriation of human remains, there was no final agency action to  
8 challenge under the APA.) If the NAGPRA process results in a final NPS  
9 determination that some or all of the human remains and cultural objects should not  
10 to be repatriated to the plaintiff, because, for example, the NPS determines that the  
11 items are culturally affiliated with some other tribe notwithstanding the geographical  
12 location where they were found, which is purely speculative at this time, then the  
13 plaintiff may challenge that decision under the APA. See 5 U.S.C. § 706(2)  
14 (providing in part that a reviewing court may hold unlawful and set aside agency  
15 action found to “arbitrary, capricious, an abuse of discretion, or otherwise not in  
16 accordance with law,” or “contrary to constitutional right,” or “in excess of statutory  
17 jurisdiction, authority,” etc. )

#### 18 B. Unlawfully Withheld Action

19 The plaintiff further argues that the Court has jurisdiction over this action  
20 because the NPS' decision not to immediately return the human remains and cultural  
21 objects to the plaintiff and to proceed with an ultimate disposition determination for  
22 those items without the plaintiff's consent in violation of ARPA is judicially reviewable  
23 pursuant to 5 U.S.C. § 706(1), which permits the Court to “compel agency action  
24 unlawfully withheld[.]” The Court disagrees.

25 An APA claim under § 706(1) is viable only if the federal agency has failed to  
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1 take a discrete agency action that it is legally required to take. Norton v. Southern  
2 Utah Wilderness Alliance, 542 U.S. 55, 64 (2004). The plaintiff, which contends that  
3 only it has the right to determine the ultimate disposition of the human remains and  
4 cultural objects inasmuch as they constitute archaeological resources under ARPA  
5 that were removed from Navajo “Indian lands,” asserts that the mandated discrete  
6 action at issue is the refusal of the NPS to comply with ARPA by returning the  
7 remains and cultural objects to the plaintiff.

8           The Court agrees with the defendants that ARPA does not require that the  
9 NPS immediately repatriate the human remains and cultural objects to the plaintiff.  
10 Assuming that ARPA even applies to this action<sup>10</sup>, the portion of ARPA relied on by  
11 the plaintiff, 16 U.S.C. § 470dd, does not create an immediate nondiscretionary  
12 repatriation duty on the part of the NPS. The statute provides in relevant part that  
13 the Secretary of the Interior may promulgate regulations providing for the ultimate  
14 disposition of archaeological resources removed from public lands or Indian lands,  
15 and that any ultimate disposition pursuant to such regulations of archaeological  
16 resources “excavated or removed from Indian lands shall be subject to the consent  
17 of the Indian or Indian tribe which owns or has jurisdiction over such lands.” The  
18 Secretary of the Interior has promulgated limited regulations under ARPA dealing  
19 with the custody of archaeological resources. See 43 C.F.R. § 7.13. While these  
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22           ARPA was enacted in 1979 for the purpose of protecting archaeological  
23 resources and sites on federal public lands and Indian lands. Under ARPA, an  
24 “archaeological resource” means “any material remains of past human life or  
25 activities which are of archaeological interest,” which includes “graves, human  
26 skeletal remains[.]” 16 U.S.C. § 470bb(1). But in order for any item to be protected  
under ARPA, such item must be “at least 100 years of age.” *Id.* The Court notes that  
the plaintiff nowhere specifically alleges in its complaint that any of the 303 sets of  
human remains and other cultural objects at issue are at least 100 years old.

1 regulations provide in part that “[a]rchaological resources excavated or removed  
2 from Indian lands remain the property of the Indian or Indian tribe having rights of  
3 ownership over such resources,” § 7.13(b), they more specifically provide that the  
4 Secretary may promulgate regulations providing “for the ultimate disposition of  
5 archaeological resources, and for standards by which archaeological resources  
6 shall be preserved and maintained, when such resources have been excavated or  
7 removed from public lands and Indian lands.” § 7.13(c). The defendants state, and  
8 the plaintiff does not dispute, that while implementing regulations are being  
9 developed, no regulations have been promulgated to date under ARPA specifically  
10 addressing the ultimate disposition of archaeological resources excavated or  
11 removed from Indian lands.<sup>11</sup> Since 16 U.S.C. § 470dd, the portion of ARPA relied  
12 on by the plaintiff, does not specifically provide a nondiscretionary repatriation duty  
13 on the part of the defendants in the absence of any controlling regulation, the Court  
14 concludes that there has not been any withheld agency action that is reviewable  
15 under the APA at this time. Therefore,

16 IT IS ORDERED that the defendants’ Motion to Dismiss (Doc. 13) is granted  
17 to the extent that this action is dismissed in its entirety as barred by the sovereign  
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20 As the defendants note, the regulations that the Secretary of the  
21 Interior has promulgated under ARPA that specifically deal with the disposition of  
22 Native American human remains and cultural objects excavated or removed from  
23 public lands or Indian lands provide for disposition pursuant to the dictates of  
24 NAGPRA. See 43 C.F.R. § 7.13(e) (dealing with such items removed from public  
25 lands); 25 C.F.R. § 262.8(a) (dealing with such items removed from Indian lands  
26 under the control of the Bureau of Indian Affairs, which is the agency having  
control over the vast majority of Indian lands.) While neither regulation governs  
here, they support the defendants’ contention that the NAGPRA process is  
appropriate for determining the disposition of the human remains and cultural  
objects at issue.

1 immunity of the United States. The Clerk of the Court shall enter judgment  
2 accordingly.

3 DATED this 12<sup>th</sup> day of February, 2013.

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6 Paul G. Rosenblatt  
United States District Judge

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