



# Courthouse News Service



Wednesday, August 27, 2014 Last Update: 5:05 PM PT

## 9th Circuit Rules For Repatriating Skeletons

By MATT REYNOLDS

Like [Tweet](#) [g+1](#) [ShareThis](#)

SAN FRANCISCO (CN) - The 9th Circuit on Wednesday refused to overturn the repatriation of 9,000-year-old skeletons to the Kumeyaay Indian Tribes.

In 2012, the Kumeyaay Cultural Repatriation Committee, consisting of 12 tribes in San Diego County, [sued](#) the University of California in the San Diego federal court. The tribes argued that the school was required to repatriate the remains under the Native American Graves Protection and Repatriation Act.

According to court records, the skeletons were unearthed in 1976 during an undergraduate excavation class led by Professor Gail Kennedy at the Chancellor's House at the University of California in San Diego.

Kumeyaay Indian tribes allegedly tried to secure the skeletons for more than 20 years. In the intervening time, the skeletons have been stored at UCLA, the San Diego Museum of Man, the National Museum of Natural History, and the Smithsonian Institution.

The school agreed to return the skeletons. But three scientists who wanted to study the remains sued the University in San Francisco court to prevent the university from giving them to the tribes.

Plaintiffs Timothy White, Margaret Schoeninger and Robert Bettinger argued that the defendants did not make clear that the skeletons were Native American under the Native American Graves Protection and Repatriation Act.

But U.S. District Court Judge Richard Seeborg dismissed the scientists' claims on procedural grounds. The judge agreed that the case could not move forward without defendants the Kumeyaay Repatriation Committee and the Kumeyaay tribes. Since they are "indispensable parties" who have a protected interest in the skeletons and are entitled to sovereign immunity, they could not be joined to the lawsuit and the scientists claims failed, the judge ruled.

In a [brief](#) to the court, the scientists' attorney urged the court to overturn.

Michael Reedy, of San Jose firm McManis Faulkner, contended that the Native American Graves Protection and Repatriation Act "applies equally to tribes and the federal government, and mandates using the district courts to resolve disputes, neither side has immunity."

The attorney also argued that the case could continue without prejudicing the tribes under federal rules of civil procedure.

But in a 2-1 decision, the 9th Circuit court of appeals upheld Seeborg's ruling.

"We conclude that NAGPRA [Native American Graves Protection and Repatriation Act] does not abrogate tribal sovereign immunity and that the affected tribes and their representatives were indispensable parties. Therefore, we affirm the district court's judgment," Judge Sidney Thomas wrote.

Writing that Indian tribes are allowed immunity "particularly on matters integral to sovereignty and self-governance," Thomas noted that legal action against tribes are "barred absent congressional abrogation or a clear waiver from the tribe itself."

Relying on the appeals court ruling in the 2004 case *Krystal Energy Co. v. Navajo Nation*, the judge said only "explicit legislation" could waive such immunity.

"Further, suits concerning the United States under NAGPRA are not authorized by any specific portion of that statute, but rather under the Administrative Procedure Act ('APA'), which contains an express limited sovereign immunity waiver for suits seeking non-monetary relief against the United States," Thomas added. "No court has held that the sovereign immunity waiver in the APA by the United States also serves as a general abrogation of tribal sovereign immunity."

Judge Mary Murguia dissented, however, writing that the repatriation committee was neither a necessary nor indispensable party.

Judge Stephen Trott joined Thomas and Murguia on the panel. 

[Home](#) [Back to Top](#)

[Courthouse News Service](#) [Privacy Policy](#) [Terms of Use](#) [Search](#) [RSS](#) [About Us](#)