No. 12-17489

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY WHITE; MARGARET SCHOENINGER,
Plaintiff-Appellants,

v.

UNIVERSITY OF CALIFORNIA, Et. Al.
Defendants-Appellelles.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ANSWERING BRIEF OF APPELLEE

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TABLE OF CONTENTS

STATEMENT OF THE ISSUES……………………………………………………1

INTRODUCTION……………………………………………………………...1

STATEMENT OF FACTS ……………………………………………………2

SUMMARY OF THE ARGUMENT……………………………………………..10

LEGAL ARGUMENT……...…………………………………………….........10

I. NAGPRA DOES NOT WAIVE TRIBAL SOVEREIGN IMMUNITY ……10

A. Congressional Abrogation of Tribal Sovereign Immunity must Be Unequivocally Expressed……………………………………..10

B. Appellants Fail to Demonstrate a Congressional Intent to Waive Tribal Sovereign Immunity Under the NAGPRA…………………...12

C. Waiver of the United States' Sovereign Immunity Cannot be Implied as a Waiver of Tribal Immunity……………………………16

II. THE DISTRICT COURT DID NOT ERROR IN DENYING APPELLANTS' REQUEST FOR DISCOVERY…..……………………………………………17

CONCLUSION………………………………………………………………...20

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases:

Amerind Risk Management Corporation v. Malaterre et. al.,
633 F. 3d 680 (8th Cir. Ct. 2011)……………………...…………10, 19

Dillie V. Council of Energy Resources Tribe,
610 F. Supp. 157 (D.D.C. 1985)………………………...………..20

Evans v. McKay, 869 F. 2d 1341, 1346 (9th Cir. Ct. 1989)…………..…………..17

Florida Paraplegic, Ass. v. Miccosukee Tribe of Indians of Florida,
166 F. 3d 1126, 1130 (11th Cir. Ct. 1999)……………………..……15

Giedosh v. Little Wound School Bd., Inc., 995 F. Supp. 1052 (D.S.D. 1997)…….20

J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Board,
842 F. Supp. 2d 1163 (D.S.D. 2012)……………………………….…..20

Kiowa Tribe Okla. V. Mfg. Techs., Inc., 523 U.S. 751 (1998)………………..….10

Pink v. Modoc Indian Health Project, Inc., 157 F. 3d. 1185 (9th Cir. 1998)…...…19

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)………………………...10, 11

Somerlott v. Cherokee Nations Distributors, Inc.,
686 F. 3d 1144 (10th Cir. Ct. 2012)………………………………..…17

Trudgeon v. Fantasy Springs Casino, 84 Cal Rptr. 2nd 65 (1999)……………….…..20

U.S. v. U.S. Fidelity & Guar. Co., 309 U.S. 506 (1940)………………………..…16

Unkeowannulack v. Table Mountain Casino,
2007 WL 4210775 (E.D. CA 2007)…………………………………20

Wichita and Affiliated Tribes of Oklahoma v. Hodel,
788 F. 2d 765 (C.A.D.C. 1986)…………………………………...…16

Statutes:

Native American Graves Protection and Repatriation Act

25 U.S.C. §3001……………………………………………………..1
25 U.S.C. §3009……………………………..…………………14, 15
25 U.S.C. §3010……………………………..………………..15
25 U.S.C. § 3013…………………...12, 13

Regulations:

43 C.F.R. §10.11………………………………………………..7
43 C.F.R. § 10.12…………………………………………………14

Legislative Reports:

Senate Report 101-473….…………………………………13, 14

H.R. 101-877, U.S. Code of Cong. & Admin. News
at 4379……………………………………….13, 15

STATEMENT OF THE ISSUES

Whether the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001*et. seq* waives Appellee, Kumeyaay Cultural Repatriation Committee's ("KCRC"), tribal sovereign immunity. Whether the district court erred in finding KCRC was an "arm of the tribe(s)" without allowing Appellants to conduct discovery.

INTRODUCTION

Appellants are University of California professors. Appellants filed a Motion for a Temporary Restraining Order and Complaint against the University of California et.al. (herein "UC Appellee") seeking to enjoin them from repatriating human remains in possession of UC Appellee to the La Posta Band of Mission Indians. The remains at issue were excavated from the University of California San Diego campus in 1976. The La Posta Band of Mission Indians is one of the KCRC's Kumeyaay tribes.

In the underlying action, Appellants argued that the human remains are not "Native American," as defined under NAGPRA and therefore the remains cannot and should not be repatriated under NAGPRA regulations. This argument is advanced even though the UC Appellee has at all times treated the human remains as "Native American" since the passage of NAGPRA. In response to Appellants' complaint, the UC Appellee filed a motion to dismiss for failure to join an

indispensable party, KCRC, and because KCRC has tribal sovereign immunity and cannot be joined the case must be dismissed. Appellants amended their complaint and named KCRC as a defendant. KCRC also filed a motion to dismiss for lack of subject matter jurisdiction invoking tribal sovereign immunity since it is an "arm of the tribe(s)" that created it. The lower court granted both motions to dismiss. Appellants have appealed the lower court's dismissal of their case.

STATEMENT OF FACTS

KCRC is a tribal consortium that was created by twelve Kumeyaay[1] tribes located in San Diego County. (Excerpt p. 545.) Each member tribe is federally recognized, KCRC consists of: the Barona Band of Mission Indians; Campo Band of Kumeyaay Indians; Ewiiaapaayp Band of Kumeyaay Indians; Inaja-Cosmit Band of Mission Indians; Jamul Indian Village; La Posta Band of Mission Indians; Manzanita Band of Mission Indians; Mesa Grande Indian Band of Mission Indians; San Pasqual Band of Mission Indians; Iipay Nation of Santa Ysabel; Sycuan Band of the Kumeyaay Nation and the Viejas Band of Kumeyaay Indians. *Id.*

KCRC is charged with protecting and preserving all Kumeyaay human remains and objects. Also, KCRC is responsible for all such items found within Kumeyaay aboriginal lands held by federal agencies and museums (including

[1]The term "Kumeyaay" is a commonly used tribal name that refers to the Indian Tribes in most parts of San Diego County and south in Baja California, Mexico, who share a common language, with varying dialects. Other terms used to refer to these same Tribes include Diegueno, Ipai, and Tipai.

institutions of higher learning) and to seek repatriation of these items on behalf of KCRC's respective tribes. *Id.*

KCRC is an outgrowth of tribal concerns over repatriation efforts, or lack thereof, in San Diego County under the 1990 NAGRPA. For example, the tribes were repeatedly being given inconsistent and confusing notices from UC Appellee on their NAGPRA compliance. One tribe would be provided a notice while another would not. (Excerpt pp. 545-546.) A tribe would contact UC Appellee on a NAGPRA issue for example only to be told that UC Appellee was consulting with another Kumeyaay tribe. In light of this, the tribes determined that there should be one united voice on NAGPRA matters and all Kumeyaay tribes needed to be at the consultation table. The tribes also found that with one NAGPRA notice going to KCRC it was ensured that all the tribes were notified and engaged. *Id.* The formation of KCRC met the tribes' needs for conformity on NAGPRA issues.

KCRC was officially formed by Tribal Resolutions from each of its member tribes beginning in 1997. (Excerpt p. 557 ¶4 and pp.559-576.) A Tribal Resolution has the effect of legislation for each tribe and is a binding and official act of the tribal government. The stated purpose of KCRC is to ensure that tribal interests are fully protected under NAGPRA and to further public understanding of the importance of preservation of Indian culture and values. (Excerpt p. 557 ¶5.)

KCRC is the designated tribal entity to receive notice and engage in consultation under NAGPRA, ensuring that federal agencies and museums in possession of ancestral remains, artifacts, and sacred materials repatriate those items to the proper Kumeyaay tribe. *Id.* KCRC tribal representatives are appointed by their respective tribe in a manner and method determined by each tribe. For example, some representatives are appointed by the tribe's Tribal Council, where others are elected from the tribal membership. A tribal representative can only be removed from KCRC by his or her tribe. If a Tribal Chairperson or Spokesperson attends a KCRC meeting, he or she is authorized to vote on behalf of his or her tribe on KCRC business. (Excerpt p.557 ¶ 6.)

Each KCRC representative reports directly to their tribe on the work and activities of KCRC. A tribe may withdraw from KCRC at any time. KCRC's operating budget is funded exclusively by its member tribes. (Excerpt p. 557 ¶7 and ¶9.)

KCRC holds monthly meetings on each member tribe's reservation on a rotating basis. Meeting minutes are taken and approved at the next meeting so that members may share them with their tribe. KCRC cannot act under NAGPRA without clear direction from the member tribes' representative who is acting with authority from his or her tribe. KCRC's authority may be withdrawn, limited or expanded by its member tribes. (Excerpts p. 557 ¶10.)

When a federal agency or museum notifies KCRC regarding repatriation of Native American remains or artifacts, the member tribe who is geographically closest to the location where the remains or artifacts were found will act as the tribe for repatriation with the assistance of KCRC. If said tribe is not prepared to accept the remains or artifacts, KCRC will, by consensus and permission of the tribe, designate an alternate tribe to accept the remains or artifacts. (Excerpt p. 558 ¶ 13.) The La Posta Band of Mission Indians was designated by KCRC to accept the human remains at issue in the present case.

The UC Appellee established a policy in 2001 to implement the provisions of NAGPRA. (Excerpt pp. 240-247.) The policy established the "University Advisory Group on Cultural Affiliation and Repatriation of Human Remains and Cultural Items ("Advisory Group")" which is responsible for, among other things, reviewing campus decisions regarding potential cultural affiliation, repatriation and reporting its findings and recommendations to the UC President. (Excerpt p. 241.) The policy further provided that each campus with "Native American" remains and associated funerary objects in its possession is required to complete inventories of such remains and items. In preparation of the inventories, the policy provides the campus should draw upon the best available academic expertise and consult with tribal representatives. (Excerpt p. 242.) All final inventories are submitted to the

Advisory Group and to the President, and upon approval are made available to federal agencies, Native American lineal descendants and tribes. *Id.*

In 2006, KCRC made a formal request to the Appellee, University of California San Diego ("UCSD"), for repatriation of the human remains at issue. (Excerpt p.578.) UCSD representatives held a consultation with KCRC on January 24, 2008 and Appellant Schoeninger was the spokesperson on behalf of UCSD. (Excerpt p. 140.) Appellant Schoeninger informed KCRC the inventory of the remains at issue was almost completed and that members of her committee, the UCSD NAGPRA Working Group, were evaluating the evidence on cultural affiliation. *Id.* Later the UCSD NAGPRA Working Group issued a recommended "Notice of Inventory Completion" that identified the human remains as "culturally unidentifiable" to the Kumeyaay. (Excerpt p.579-589.) The inventory was submitted to the Advisory Group, approved by the UC President, and submitted to the National Park Service ("NPS"), the federal agency responsible for implementing NAGPRA.

The state of the law at the time UC Appellee submitted its inventory to NPS was that "culturally unidentifiable" human remains were to remain with the federal agency or museum in the possession of the agency or museum, until such time NPS issued regulation addressing the final disposition such remains.

In May of 2010 NPS issued the long awaited regulation on the final disposition of "culturally unidentifiable" remains. 43 C.F.R. §10.11. Under the new regulation, "culturally unidentifiable" human remains are to be repatriated to the tribe whose aboriginal lands the remains were removed from. In this case, it is undisputed that the remains were removed from Kumeyaay aboriginal lands. Under the new regulation, KCRC again notified UC Appellee Chancellor Marye Anne Fox and requested repatriation. After further consultation with KCRC, UC Appellee agreed that the remains should be repatriated to the La Posta Band of Mission Indians as agreed upon by KCRC. A new draft inventory was prepared and submitted to the Advisory Group, of which Appellants Schoeninger and Bettinger were members. (Excerpt p. 508.) On March 2, 2011 the Advisory Group held a meeting to discuss the new proposed inventory and repatriation of the remains to La Posta Band of Mission Indians. Appellant Schoeninger had requested that the Advisory Group convene an in person meeting to discuss the latest inventory. Prior to the meeting members submitted comments on the inventory with 4 supporting the submission of the inventory to NPS, 1 opposed and 3 undecided. *Id.* At the meeting Appellant Schoeninger for the first time raised the issue of whether the remains were "Native American." From the minutes from the meeting, legal counsel to the Advisory Group stated:

> Submission of the previous UCSD inventory would seem to indicate that a determination had been made that the remains in question are Native American remains [and] determined to be CUI, but also noted that several Advisory Group members have raised a question about whether the remains were appropriately determined to be Native American. She suggested that be part of the group's discussion. (Excerpt p. 510.)

The Advisory Group discussed the issue with several members agreeing that:

> In the earlier Notice of Inventory involving these remains, that UCSD and the advisory group had implicitly concluded that the remains were Native American (by filing a Notice at all and going through the process of denying cultural affiliation) and expressly stating both that the land was aboriginal to the Kumeyaay (not mentioning any other group), and that "Native Americans have lived in the San Diego region since early Holocene or terminal Pleistocene (approximately 10,000 years ago.) (Excerpt p. 511.)

The Advisory Group could not reach a consensus on the issue of whether the remains were Native American "with no clear majority/minority positions emerging, except on the issue of additional consultation and re-analysis of the funerary objects." *Id.* The Advisory Group's recommendations were submitted to the President and were later included in his letter to UC Appellee Chancellor Marye Anne Fox, who complied with the recommendations. (Excerpt pp. 516-518.) None of the Advisory Group's recommendations included a redetermination that the human remains were "Native American."

The final Notice of Inventory Completion was filed with the NPS and published in the Federal Register on December 5, 2011, followed by a 30 day comment period. (Excerpts pp. 522-524.) On the eve of the expiration of the

Federal Register notice, UC Appellees were informed that Appellants were preparing to file a Temporary Restraining Order to enjoin UC Appellees from repatriating the remains to the La Posta Band of Mission Indians.

In an attempt to explore possible alternative resolution of the conflict without litigation, the Appellants and UC Appellee entered several tolling agreements. The efforts of the UC Appellees failed. After months of delay and out of frustration, KCRC sued the UC Appellees in the Federal District Court of Southern California for violating NAGPRA and requested immediate repatriation. Immediately after KCRC's filing, Appellants filed their Motion Temporary Restraining Order. An injunction was issued enjoining the UC Appellees from repatriating the remains. In light of injunction, KCRC and UC Appellees stipulated to a stay of the case in the Southern District Court. [2]

UC Appellee filed a motion to dismiss for failure to join KCRC, an indispensable party and because KCRC could not be joined because of tribal sovereign immunity, the case must be dismissed. In response, Appellants joined KCRC as a defendant. KCRC filed a motion to dismiss for lack of subject matter jurisdiction claiming tribal immunity as an "arm of the tribe(s)." The lower court granted both motions to dismiss and Appellants has appealed to this Court.

[2] On June 5, 2013 KCRC and UC Appellees stipulated to a dismissal of the case without prejudice.

SUMMARY OF ARGUMENT

NAGPRA does not waive tribal sovereign immunity. The district court correctly determined that KCRC is an "arm of the tribe(s)" that created it and there was no need for discovery to further demonstrate KCRC tribal status.

LEGAL ARGUMENT

I. NAGPRA DOES NOT WAIVE TRIBAL SOVEREIGN IMMUNITY

A. Congressional Abrogation of Tribal Sovereign Immunity must be Unequivocally Expressed

A plaintiff bears the burden of proving that either Congress or the party asserting immunity has expressly and unequivocally waived immunity. *Amerind Risk Management Corporation v. Malaterre et. al.*, 633 F. 3d 680 (8th Cir. 2011). Federally recognized Indian tribes have long been recognized as possessing common-law immunity from suits traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Kiowa Tribe Okla. V. Mfg. Techs., Inc.*, 523 U.S. 751 (1998). Tribal immunity is not absolute, however. Congress may abrogate it thereby authorize suit against Indian tribes. *Santa Clara Pueblo*, 436 U.S. at 58. Such abrogation must be "unequivocally expressed," *id.*, in "explicit legislation." *Kiowa Tribe*, 523 U.S. at 759. Abrogation of tribal sovereign immunity may not be implied. *Santa Clara Pueblo*, 436 U.S. at 58. The Supreme Court has found that when considering a congressional waiver of tribal

immunity, a court must be "cautious that we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 61.

The argument that NAGPRA waives tribal immunity was not raised by the Appellants in the lower court. Instead, they argued it had been waived: (1) by KCRC's filing suit against the UC Appellees in the Federal District Court of Southern Court; and (2) KCRC's failed attempt to incorporate as a state nonprofit. Neither theory was advanced by Appellants in their opening brief and they properly dismissed as groundless by the lower court.

Without briefing, the lower court nonetheless in its dismissal order provides a limited discussion on the issue of whether NAGPRA is a congressional waiver of tribal sovereign immunity. Ultimately, the lower court concluded there is no waiver the tribal immunity under NAGPRA because there is no clear expression to do so and there is no legislative history supporting a waiver. The lower court further found that although NAPGRA makes provision for enforcement of violations of NAGPRA, the lower court found that the enforcement provisions are limited to the failure of those obligations applicable to federal agencies and museums receiving federal funds.

Seizing upon the lower court's congressional waiver discussion, Appellants, for the first time, devote a considerable amount of their Opening Brief to the issue and argue that such a congressional waiver is provided for under NAGPRA.

Appellants cite to no "unequivocally expressed" waiver in NAGPRA or legislative history to support their argument. This is because none exists.

B. Appellants Fail to Demonstrate a Congressional Intent to Waive Tribal Sovereign Immunity Under the NAGPRA

In support of their congressional waiver of tribal sovereign immunity argument, Appellants focus on 25 U.S.C. § 3013, which provides that "The United States district court shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter." Appellants, without cited authority, assert that by allowing "any person" to sue for a violation of NAGPRA, it necessarily includes an action against a tribe. Appellants' argument is misplaced and unsupported.

First, Appellants fail to cite to any provision under NAGPRA creating violations on the part of tribes. The Act places no affirmative duty or obligation on a tribe to implement the provision of NAGPRA. A tribe is not charged with: (1) determining if human remains are "Native American"; (2) if the remains are "culturally affiliated"; (3) whether the appropriate institution has properly consulted with the affected tribe; (4) whether the notice provisions of NAGPRA have been complied with; or (5) whether there has been proper repatriation. As found by the lower court, the enforcement provisions are limited to the failure of

those obligations applicable to federal agencies and museums receiving federal funds.

Secondly, the legislative history on § 3013 demonstrates that there was no congressional intent to waive tribal immunity. This section appeared in Senate Report 101-473 and its purpose was described as follows:

> In those instances in which the parties [Federal agencies, museums, and the affected Indian tribe or Native Hawaiian organizations] cannot reach an agreement regarding the appropriate disposition of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony, the amendment provides that any person may bring an action in Federal court alleging a violation of this Act. The Committee intends this section to provide an avenue after review of the [NAGPA Advisory] committee for a party; including an Indian tribe, Native Hawaiian organization, museum, or agency, to bring a cause of action in the Federal district court alleging a violation of this Act. The Committee intends the Federal District Court to be a forum for disputes between the parties *regarding a determination of cultural affiliation, right of possession, or character of an article or object in the possession of a museum or Federal agency.*" *(Emphasis added)* S.Rept. 101-473, p. 15.

The bill as presented in House Report 101-877 did not contain an enforcement section. An amendment to the bill was made on October 25, 1990 to include the current enforcement section found in NAGPRA.

As seen from the Senate Report, there is no mention of a waiver of tribal immunity. The legislative history of § 3013 shows instead that a tribe was included within the meaning of "any person" and federal actions would be available for alleged violations of a determination made regarding "cultural

affiliation, right of possession, or the character of an article or object in the possession of a museum or Federal agency." None of these listed NAGPRA determinations are made by a tribe however, Congress clearly could not have intended to waive tribal immunity for violations the tribe is not responsible for.

Further, NAGPRA regulation 43 C.F.R. § 10.12, "Civil Penalties" is written exclusively for civil penalties against "museums," which includes institutions of higher learning, for failure to comply with NAGPRA requirements. Nothing in the regulations mention civil penalties against a tribe and none of the violations outlined under the regulation are implementation or responsibilities of a tribe under NAGPRA. These admissions demonstrate that the enforcement of NAGPRA and the enforcement provisions are aimed at federal agencies and museums, not tribes.

Appellants' congressional waiver argument is further undermined by other provisions of NAGPRA and its legislative history. Section 3009 of NAGPRA, the "Saving Clause", provides :

> "Nothing in the chapter shall be construed to----
>
> 4. limit *any procedural or substantive rights* which may otherwise be secured to individuals or *Indian tribes* or Native American organizations. *[Emphasis added]*

Senate Report 101-473 explains that this section "provides nothing in the Act shall be construed …to limit any procedural rights of secured to a Native American or an Indian tribe or Native Hawaiian organization." S. Rept. 101-473, p. 19-20 The

House Report similarly states that § 3009 "… [T]his section provides that this Act does not intend to … limit any rights of individuals, Indian tribes, or Native Hawaiian organizations." H.R. 101-877, U.S. Code of Cong. & Admin. News at 4379.

Tribal immunity is both a procedural and substantive right of all federally recognized tribes. Congress has made clear that NAGPRA shall not be construed to limit the tribe's right to immunity.

Finally, § 3010 of NAGPRA, "Special relationship between Federal government and Indian tribes and Native Hawaiian organizations," provides that NAGPRA "reflects the unique relationship between the Federal Government and Indian tribes and Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government." This section reaffirms that the federal government has a trust responsibility to Indian tribes. The federal government and courts have long respected a tribe's natural rights and "this respect for the inherent autonomy Indian tribes enjoy has been particularly enduring where tribal immunity from suit is concerned." *Florida Paraplegic, Ass. v. Miccosukee Tribe of Indians of Florida,* 166 F. 3d 1126, 1130 (11th Cir. 1999).

In sum, the legislative history suggests NAGPRA is not a waiver of tribal sovereign immunity, which has been invoked by KCRC and is a bar to Appellants' law suit.

C. Waiver of the United States' Sovereign Immunity Cannot be Implied as a Waiver of Tribal Immunity

Appellants' argue, for the first time, because tribal immunity is co-extensive with the United States, NAGPRA's waiver of the United States' immunity should be seen as an implied waiver of tribal immunity. Appellants' argument is unsupported as seen from the numerous cases cited above holding that a congressional waiver of tribal sovereign immunity must be expressed and unequivocal.

Further, Appellants have misconstrued the cases cited in support of their argument. While these cases do state that tribal immunity is coextensive with the United States' immunity, the courts were drawing upon the similarities between each sovereign's immunity. *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F. 2d 765 (C.A.D.C. 1986)("An Indian tribe's immunity is coextensive with the United States' immunity, and neither loses that immunity by instituting an action, even when the defendant files a compulsory counterclaim."); *U.S. v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506 (1940)(in a suit initiated by the United States on behalf of an Indian Nation, the Nation, like the United States, was not subject to

cross claims filed by the defendant); *Evans v. McKay*, 869 F. 2d 1341, 1346 (9th Cir. 1989)("common law immunity afforded Indian tribes is coextensive with the United States and *is similarly subject to the plenary control of Congress.[Emphasis added]* Absent express waiver, consent by the Tribe to suit, or congressional authorization for such a suit, a federal court is without jurisdiction to entertain claims advanced against a Tribe. [citation omitted] Moreover, a waiver of sovereign immunity must be "unequivocally expressed."); *Somerlott v. Cherokee Nations Distributors, Inc.*, 686 F. 3d 1144 (10th Cir. 2012)(tribal immunity, like the United States' sovereign immunity, will not extend to sub-entities incorporated as a distinct legal entity separate from the tribe.)

None of the cases cited by the Appellants stand for the proposition that a waiver of the United States' immunity can be read or implied to be a waiver of tribal immunity. The cases stand for the proposition that courts will, in some circumstances, look to traditional common law principles of the United States' sovereign immunity to assist in defining tribal sovereign immunity. There is no escaping the overriding majority of cases make clear, including many of the cases cited by Appellants, that a congressional waiver of tribal immunity must be an "unequivocally expressed" waiver.

II. THE DISTRICT COURT DID NOT ERROR IN DENYING APPELLANTS' REQUEST FOR DISCOVERY.

Appellants seek a remand of this case in order to conduct discovery on the factual assertions that KCRC is an "arm of the tribe." Discovery will provide no further evidence on how: (1) KCRC is formed; (2) KCRC's purpose to receive notice of Kumeyaay remains and artifact under NAGPRA; (3) how KCRC representatives are appointed or removed; or (4) how KCRC is funded.

The lower court's ruling that KCRC is an "arm of the tribe" is supported by 12 tribal Resolutions that established KCRC as the tribal committee designated to act as the official contact for federal agencies and museums (higher learning institutions that receive federal funding) to receive notices required under NAGPRA. Further, the Resolutions identify the purpose of KCRC as one of protecting and seeking repatriation of Kumeyaay remains and artifacts on behalf of the Kumeyaay tribes. A sworn Declaration was submitted from KCRC's Chairperson, who has held that position since the inception of KCRC, declared that; (1)each member tribe appoints and removes its tribal representative to KCRC; (2) a Tribal Chairman or Spokesperson who attends a KCRC meeting acts as the tribe' KCRC representative and may vote on KCRC matters on behalf of his or her respective tribe; (3) KCRC representatives report directly to his or her respective tribe; (4) a tribe may withdraw from KCRC at any time; (5) KCRC is funded

exclusively by its respective tribes; (6) monthly meetings are held on each reservation on a rotating basis; (7) meeting minutes are kept and provided to each KCRC representative to share with his or her tribe; (8) KCRC cannot act on NAGPRA matters without clear authorization from its member tribes; and (9) when contacted under NAGPRA regarding human remains and/or artifacts, the tribe in closest proximity to the discovery will act as the tribe for repatriation with the assistance of KCRC. If said tribe is unable to repatriate the remains or artifacts, KCRC will, with the consensus and permission of the tribe, designate an alternative tribe to repatriate the remains and/or artifacts. The lower court had sufficient evidence before it to support its determination that KCRC is an "arm of the tribe(s)" and no further discovery is necessary.

Additionally, a review of cases where a court determination was made on whether an entity was an "arm of the tribe" shows that the determination is most often made on submission of the entity's formation documents and affidavits or declaration from the entity's officers. *Amerind Risk Management Corp. v. Malaterre,* 633 F. 3d. 680 (8th Cir. 2011)(court looked to Section 17 corporate charter, submitted as an exhibit to determine purpose of Amerind and if it was an arm of the tribe that incorporated it.); *Pink v. Modoc Indian Health Project, Inc.*, 157 F. 3d. 1185 (9th Cir. 1998)(on a motion to dismiss for lack of subject matter jurisdiction, court found health clinic was formed under tribal law as an

"organization for charitable, educational, and scientific purposes and such other related to these purposes" by two federally recognized tribes. Also, defendant demonstrated that its Board of Directors consisted of 2 representatives from each of the tribes and was organized to control a collective enterprise and therefore falls within the scope of the Indian tribes exemption of Title VII); *Giedosh v. Little Wound School Bd., Inc.*, 995 F. Supp. 1052 (D.S.D. 1997)(based on affidavits and organizational documents from defendant, court found that the school was an "Indian Tribe" for purposes of exemption from Title VII and ADA and other claims brought by plaintiff.); *Dillie V. Council of Energy Resources Tribe*, 610 F. Supp. 157 (D.D.C. 1985)(based on formation documents and organizational structure found defendant to be a tribal agency exempt for Title VII); *Trudgeon v. Fantasy Springs Casino,* 84 Cal Rptr. 2nd 65 (1999)(review of formation documents provided purpose and ownership of the Casino, and selection and removal of Board of Directors, the court concluded that plaintiff's action was barred by tribal immunity); *J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Board,* 842 F. Supp. 2d 1163 (D.S.D. 2012)**,** (review of formation documents and affidavits from defendant, defendant found to be a tribal entity entitled to tribal immunity); *Unkeowannulack v. Table Mountain Casino*, 2007 WL 4210775 (E.D. CA 2007)(court found, based on declarations submitted by defendant, their motion to dismiss should be granted as they were found to be

an “arm of the tribe”.) The lower court acted in conformity with this case precedent.

CONCLUSION

The lower court properly dismissed Appellants’ case for lack of subject matter jurisdiction. The lower court determining that there was sufficient evidence, without discovery, that KCRC is an “arm of tribe(s)” and enjoys tribal sovereign immunity. Neither KCRC nor NAGPRA has waived tribal sovereign immunity.

DATE: July 19, 2013 CALIFORNIA INDIAN LEGAL SERVICES

_/s/ Dorothy Alther____________________
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Kumeyaay Cultural and Repatriation Committee

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,718 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on July 19, 2013 I filed the foregoing **Answering Brief with the Court**, via the Court's CM/ECF system, and that I served opposing counsel by the same means.

/s/ Dorothy Alther
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