No. 12-17489

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY WHITE, ROBERT L. BETTINGER, AND MARGARET SCHOENINGER

Plaintiffs-Appellants,

v.

UNIVERSITY OF CALIFORNIA, *ET AL*.

Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of California, Case No. C-12-01978 (RS)
The Honorable Richard Seeborg, United States District Judge

ANSWERING BRIEF OF DEFENDANTS-APPELLEES THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, MARK G. YUDOF, MARYE ANNE FOX, PRADEEP K. KHOSLA, AND GARY MATTHEWS

Charles F. Robinson
Karen J. Petrulakis
Margaret L. Wu
OFFICE OF THE GENERAL COUNSEL
UNIVERSITY OF CALIFORNIA
1111 Franklin Street
Oakland, CA 94607
Telephone: (510) 987-9800

Bradley S. Phillips
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071
Telephone: (213) 683-9100

Additional Counsel on Inside Cover

Dennis M. Klein
OFFICE OF THE CAMPUS COUNSEL
UC SAN DIEGO
9500 Gilman Drive, MC 0087
University Center 201
La Jolla, CA 92093
Telephone: (858) 822-1236

Michelle T. Friedland
Michael J. Mongan
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, CA 94105
Telephone: (415) 512-4000

Attorneys for Defendants-Appellees

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INTRODUCTION

This appeal concerns whether a federal court has jurisdiction over a suit regarding human remains (the "Remains") that were found buried on property owned by The Regents of the University of California (the "University"), and, if so, whether Federal Rule of Civil Procedure 19 required the suit to be dismissed. Twelve Native American tribes that are aboriginal to the land where the Remains were discovered (the "Tribes" or the "Kumeyaay Tribes") have claimed a right to take possession of the Remains under the federal Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.*, and its implementing regulations. Plaintiffs in this action, three professors at the University, claim that the remains may not be transferred to the Tribes and instead must be retained by the University so that Plaintiffs can potentially study them in the future.

Consistent with its internal policies, the University conducted a lengthy review process to determine the appropriate treatment of the Remains. That process involved an analysis of the Remains and consultation with the tribes, Plaintiffs, and other concerned individuals. The University's human-remains policies are designed to comply with the requirements of NAGPRA. (ER 791.)[1]

[1] Throughout this brief, "ER" refers to the Appellants' Excerpts of Record, and "AOB" refers to the Appellants' Opening Brief.

Ultimately, the University determined that the Remains are "Native American" for purposes of NAGPRA and that it was required to transfer them to one of the tribes under NAGPRA and its implementing regulation, 43 C.F.R. § 10.11, which expressly requires that "culturally unidentifiable" remains be given to the Indian tribes who are aboriginal to the land where the remains were discovered. (ER 800-01.) Plaintiffs brought this suit in an effort to reverse that determination and block the transfer of the Remains. They now appeal the district court's judgment dismissing their complaint without leave to amend.

This Court should affirm the district court's judgment for either of two reasons. *First*, the district court lacked jurisdiction over Plaintiffs' claims. Plaintiffs' NAGPRA-based claim is not redressable because Plaintiffs cannot show a substantial likelihood that the primary relief they seek on that claim—an order declaring that the remains are not "Native American" and thus not subject to NAGPRA or 43 C.F.R. § 10.11—would provide them with access to the remains. The University has never decided what it would do with the Remains if they were not "Native American" and NAGPRA did not require their return to the Tribes. If it did face such a decision, the University would retain ultimate discretion over the disposition of the Remains. Redressability is not established where the prospective benefits to the plaintiff from the suit would "depend on an independent actor who retains broad and legitimate discretion the courts cannot presume either to control

or to predict." *Glanton v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) (quotation marks omitted). Moreover, Plaintiffs may not manufacture redressability by requesting a permanent injunction under NAGPRA barring the University from transferring the remains to any Indian tribe, because NAGPRA plainly does not authorize such relief. Plaintiffs' remaining claims—for alleged violations of the public trust and the First Amendment resulting from the prospect that the University *might* transfer the Remains to the Tribes even if that were not required by NAGPRA—are not ripe, because they address only possible future injuries that may never come to pass. The district court should have dismissed the case based on these threshold jurisdictional defects, which it did not reach.

Second, and alternatively, the district court was correct in dismissing the complaint under Federal Rule of Civil Procedure 19, and certainly acted well within its discretion. Rule 19 requires dismissal because the twelve Kumeyaay Tribes are necessary and indispensable parties, and the Tribes cannot be joined because they enjoy sovereign immunity from suit. The Tribes are necessary because they have a legally protected interest in the Remains, by dint of their non-frivolous claim that they are entitled to the Remains under NAGPRA and 43 C.F.R. § 10.11. They are indispensable because they would be severely prejudiced if Plaintiffs' claims were adjudicated in their absence; there are no protective measures that would avert that prejudice; and any judgment obtained in their

absence would not be adequate. The district court followed a long and unbroken line of decisions from this Court in dismissing an action where an Indian tribe, entitled to sovereign immunity, is a necessary and indispensable party. *See infra* at 46-47. Moreover, the corporation formed by the Tribes to represent them in NAGPRA issues cannot act as an adequate representative in the Tribes' stead, because, among other reasons, it also enjoys sovereign immunity.

Plaintiffs' central argument on appeal is that Congress waived the sovereign immunity of Indian tribes for purposes of actions filed under NAGPRA. This contention is foreclosed by precedent and the text of NAGPRA. Courts may find a waiver of tribal sovereign immunity only where such a waiver is "unequivocally expressed in explicit legislation." *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004) (quotation marks omitted). NAGPRA does not contain any language regarding sovereign immunity, let alone an unequivocal, explicit abrogation of tribal sovereign immunity. *See* 25 U.S.C. §§ 3001-13. There is also no merit to Plaintiffs' alternative argument that they should have been permitted to conduct invasive discovery into the corporate entity created by the tribes to handle NAGPRA issues, which the district court correctly held enjoys sovereign immunity as an arm of the tribe.

At bottom, Plaintiffs' real complaint in this appeal is not about the University, the Tribes, or even the district court, but Congress. The district court's

judgment dismissing Plaintiffs' complaint without leave to amend was foreordained by legislative action. Congress gave tribes a legal claim to Native American remains when it enacted NAGPRA. Congress declined to abrogate tribal sovereign immunity with respect to suits brought under that Act. And Congress passed the Rules Enabling Act, which authorized Rule 19. Collectively, these legislative actions ensured that the suit brought by Plaintiffs here could not proceed without the participation of the Tribes. Plaintiffs' concerns are thus best addressed to the legislative branch, which "may elect to address [them] as a matter of policy." (ER 24.) As this Court has recognized, the fact that the current statutory regime "effectively denies appellants a forum in which to have some of their grievances heard" is merely "one more illustration … that Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations" involving Indian tribes is "correspondingly restrained." *Shermoen v. United States*, 982 F.2d 1312, 1320-21 (9th Cir. 1992) (quotation marks omitted).

STATEMENT OF JURISDICTION

Plaintiffs purported to bring claims in the district court pursuant to 28 U.S.C. §§ 1331 and 1367(a), 25 U.S.C. § 3013, and 42 U.S.C. § 1983. They filed their appeal from the district court's judgment pursuant to 28 U.S.C. § 1291.

As explained below, however, the district court lacked jurisdiction over Plaintiffs' suit. *See infra* at 18-25. This Court therefore lacks jurisdiction over the

appeal. *See Leu v. Int'l Boundary Comm'n*, 605 F.3d 693, 695 (9th Cir. 2010) ("We lack jurisdiction to review Schornack's non-redressable claim."); *Gates v. Deukmejian*, 987 F.2d 1392, 1409 (9th Cir. 1992) (this Court "lack[s] jurisdiction" over questions that are "not yet ripe").

STATEMENT OF THE ISSUES

A. Whether the district court lacked jurisdiction over Plaintiffs' suit because Plaintiffs' NAGPRA claim is not redressable and Plaintiffs' other claims are not ripe.

B. Whether Congress abrogated the sovereign immunity of Indian tribes when it enacted NAGPRA, a statute that contains no express statement regarding tribal sovereign immunity.

C. Whether the district court acted within its discretion in dismissing Plaintiffs' complaint under Federal Rule of Civil Procedure 19, because the Kumeyaay Tribes are necessary and indispensable parties that cannot be joined in light of their sovereign status.

D. Whether the district court acted within its discretion in denying discovery into the Kumeyaay Cultural Repatriation Committee ("KCRC") when the existing record was sufficient to establish KCRC's sovereign status.[2]

[2] An addendum of pertinent statutes and regulations is set forth *infra* at 63-79.

STATEMENT OF THE CASE AND OF THE FACTS

I. The University Determined That NAGPRA And Its Implementing Regulations Required It To Transfer The Remains To The Tribes.

This appeal involves human remains discovered in 1976 at the residence of the Chancellor of the University of California, San Diego. (ER 2.) The land where the Remains were discovered is the aboriginal land of the Diegueno (Kumeyaay) Tribe, whose present-day descendants are the twelve federally recognized Kumeyaay Tribes. (ER 800.) The Remains are currently housed at the San Diego Archaeological Center on behalf of the University. (ER 768.) They are thousands of years old. (ER 2.)

In 1990, Congress passed NAGPRA, a statute which "reflects the unique relationship between the Federal Government and Indian tribes." 25 U.S.C. § 3010. The purpose of NAGPRA was "to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony." S. Rep. No. 101-473, at 1 (1990). This special solicitude towards Indian tribes is evident on the face of the statute. For example, NAGPRA vests in tribes and their members "ownership or control" over Native American human remains and cultural items discovered on federal lands, 25 U.S.C. § 3002(a); requires repatriation of remains and objects to tribes in many circumstances, *id.* § 3005(a)(1); and mandates consultation with tribes regarding repatriation, *e.g.*, *id.* §§ 3005(a)(3). NAGPRA defines "Native American" to mean "of, or relating to, a

tribe, people, or culture that is indigenous to the United States." *Id.* § 3001(9); *see also Bonnichsen v. United States*, 367 F.3d 864, 874-76 (9th Cir. 2004) (construing the NAGPRA definition).

Because the University qualifies as a "museum" under NAGPRA, *see* 25 U.S.C. § 3001(8), it is subject to the Act's requirements regarding Native American human remains and associated funerary objects, *see, e.g.*, *id.* § 3003(a). Pursuant to its obligations under NAGPRA and the Act's implementing regulations, the University adopted a policy requiring a review of human remains in its possession or control. (ER 790-98; *see* 25 U.S.C. § 3003(a).)

KCRC is a California corporation that was established in 1997 by the Kumeyaay Tribes,[3] including the La Posta Band of Diegueno Mission Indians, a federally recognized Indian tribe. (ER 7.) It is the designated representative of the Kumeyaay Tribes for receiving notice and engaging in consultations with museums and federal agencies regarding Native American remains and artifacts. (*See* ER 546, 661-62.) In 2006, KCRC wrote a letter to the Chancellor of the University of California, San Diego requesting transfer of the Remains to the Tribes. (ER 578.)

The University engaged in a multiple-step internal process in order to fulfill its obligations under NAGPRA and determine the proper treatment of the Remains.

[3] KCRC's corporate status was suspended in 2004. (ER 760.)

That process involved consultation with the Tribes and other interested parties and input from multiple advisory groups, including a group that contained two of the Plaintiffs in this action. (*E.g.*, ER 140-48, 691, 737, 771-74.) In 2008, the UC San Diego NAGPRA Review Committee prepared a report regarding the Remains. (ER 771.) Thereafter, the University submitted a "Notice of Inventory Completion" and inventory to the United States Department of the Interior, which listed the Remains and items unearthed alongside them. (*Id.*) The 2008 Notice stated that there was not sufficient evidence to conclude that the Remains are culturally affiliated to the Kumeyaay Tribes or any other particular Tribe. (ER 691.) The record shows that the University "ma[de] a determination that the remains are 'Native American'" at that time (ER 745), which triggered the University's obligation to create the inventory, *see* 25 U.S.C. § 3003. The 2008 Notice did not explicitly reference that determination, but it was that determination that triggered submission of the Notice.

In 2010, the Department of the Interior promulgated a new regulation governing the disposition of remains that are "Native American" but "for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified." 43 C.F.R. § 10.11(a). That regulation requires "museums" to consult with all of the tribes "[f]rom whose aboriginal lands the

human remains … were removed," among others. *Id.* § 10.11(b)(2)(ii). It provides that the museum

> *must* offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:
>
> (i) The Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed; or
>
> (ii) The Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed.

Id. § 10.11(c)(1) (emphasis added). In the same year, KCRC again requested transfer of the Remains and specifically directed that they should be transferred to the La Posta Band. (ER 773.)

After the new federal regulation became effective, the University's Systemwide Advisory Group on Cultural Affiliation and Repatriation of Human Remains and Cultural Items met to discuss the status of the Remains. That review was triggered by the University's policy on human remains, which requires the Advisory Group to review any revisions to a NAGPRA inventory. (ER 793.) The Advisory Group comprised two tribal representatives and seven University professors, including two of the Plaintiffs. (ER 737.) One of the subjects addressed by the Advisory Group was whether the Remains are "Native American" under NAGPRA and this Court's decision in *Bonnichsen*, which interpreted NAGPRA. Some members took the position that the Remains are not "Native American." Others believed that the Remains are properly classified as "Native

American," a determination they believed was properly made in the 2008 Notice, which recognized that "Native Americans have lived in the San Diego region since the early Holocene or terminal Pleistocene (approximately 10,000 years ago)." (ER 740-42.) University President Mark Yudof ultimately decided to defer to the original determination that the Remains are "Native American." (ER 745.)

The University's final "Notice of Inventory Completion" appeared in the Federal Register in December 2011. (ER 800.) The 2011 Notice stated that the Remains are "Native American," that "the land from which the Native American human remains were removed is the aboriginal land of the Diegueno (Kumeyaay) Tribe," and that the "present-day descendants of the Diegueno (Kumeyaay)" are the twelve Kumeyaay Tribes. (ER 800.) Pursuant to 43 C.F.R. § 10.11(c)(1), and based upon the request from KCRC, the 2011 Notice stated that the Remains would be transferred to the La Posta Band unless another tribe came forward to claim the remains by January 4, 2012. (ER 801.)

II. Plaintiffs Sued The University To Prevent Transfer Of The Remains.

Plaintiffs are professors at the University who work in the fields of Anthropology and Integrative Biology. (ER 766.) They allege that they requested an opportunity to study the Remains but were not granted permission by the University. (ER 774-75.) Plaintiffs filed the instant action in Alameda County Superior Court on April 16, 2012. (ER 1058.) The case was removed to the

Northern District of California, and Plaintiffs then filed their First Amended Complaint (the "Complaint"). (ER 765.) The Complaint named as defendants The Regents of the University of California and three University Officials in their individual and official capacities ("Defendants"), as well as KCRC.[4] (*Id.*)

The Complaint included causes of action for (i) violation of NAGPRA, (ii) "breach of public trust," and (iii) violation of Plaintiffs' First Amendment rights. (ER 781-86.) Plaintiffs sought a variety of forms of declaratory and injunctive relief. (*See* ER 786-88.) Among other things, they prayed for a declaration that the Remains "are not 'Native American' within the meaning of NAGPRA" and that Defendants' decision to approve the transfer of the Remains to the La Posta Band was "illegal." They also sought an injunction requiring the University to set aside its decision and "prohibiting defendants from taking any action in the future to approve or implement a transfer of possession of the [Remains] to the La Posta Band of Mission Indians, or any other Native American Tribe." (ER 786-87.)

[4] The Complaint also named the "University of California" as a defendant. (ER 765.) The district court correctly dismissed the University as a party on the ground that "the 'University of California' is not a proper defendant, and … the Regents must be sued in its place." (ER 3 n.2 (citing Cal. Const. art IX, § 9(f); Cal. Gov't Code § 811.2).) To avoid confusion, the University has used Plaintiffs' original caption on this brief.

III. The District Court Dismissed Plaintiffs' Complaint Because The Tribes Were Necessary And Indispensable But Could Not Be Joined

Defendants moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1), (6), and (7). (*See* ER 594-627.) As relevant here, Defendants raised two arguments for dismissal with prejudice. First, Defendants argued that Plaintiffs lacked jurisdiction because the NAGPRA claim was not redressable (ER 622-26) and the remaining claims were not ripe (ER 619-21). Second, Defendants argued that Federal Rule of Civil Procedure 19 required dismissal, because the Tribes and KCRC were necessary and indispensable parties that could not be joined on account of their sovereign immunity from suit. (ER 607-19.) KCRC made a special appearance and moved to dismiss on the ground that it enjoyed sovereign immunity as an "arm of the tribe." (ER 543-93.)

The district court granted Defendants' and KCRC's motions to dismiss without leave to amend. (ER 24.) On the subject of sovereign immunity, the court noted that it was undisputed that the Tribes were each immune from suit. (ER 11.) After reviewing detailed information provided by KCRC about its origins and functions, the court held that KCRC was also "entitled to immunity as an 'arm' of the Kumeyaay tribes." (ER 13.) The court's decision turned on multiple factors, including that KCRC "was created by resolution of each of the 12 Kumeyaay tribes, and thus derives its power directly from their sovereign authority"; that it "is comprised solely of members of the tribes, who act on its behalf"; and "that its

purpose—to recover tribal remains, and educate the public accordingly—is core to the notion of sovereignty." (ER 12-13.)

Next, the district court held that Congress did not waive tribal sovereign immunity when it enacted NAGPRA. (ER 10-11.) It observed that "the Ninth Circuit has cautioned that 'such a waiver may not be lightly implied'" and concluded that NAGPRA did not contain a waiver because its "enforcement provision, [25 U.S.C.] § 3013, … does not expressly waive tribal immunity." (ER 11 (quoting *People v. Quechan Tribe of Indians*, 595 F.2d 1153, 1156 (9th Cir. 1979).) Relatedly, the court held that KCRC had not voluntarily waived its immunity, a holding that Plaintiffs do not challenge on appeal. (*See* ER 13-15.)

Finally, the district court held that Rule 19 required it to dismiss Plaintiffs' suit. The court's analysis proceeded in four steps. First, it held that "[e]ither the La Posta Band, or its representative the KCRC, is a 'necessary' party under Rule 19." (ER 18.) It reasoned that the Tribes had a legally protected interest in the suit under NAGPRA, which "extends rights of 'ownership' and 'control' over human remains and funerary items to qualifying tribes," and that adjudication of Plaintiffs' claims in their absence "would practically impair" that interest. (ER 16-17.) Second, the court held that joinder was not feasible because of tribal sovereign immunity. (ER 18.) Third, it applied the four-factor test set out in Rule 19(b) and held that the action should not proceed because the Tribes were

indispensable parties. It reasoned that the first three factors—prejudice, the extent to which prejudice could be lessened, and whether a judgment rendered in the Tribes' absence would be adequate, *see* Fed. R. Civ. P. 19(b)(1)-(3)—all favored dismissal. (ER 18-19.) While acknowledging that the fourth factor—whether Plaintiffs would have an adequate remedy if the case were dismissed—weighed against dismissal, the court adhered to a line of Ninth Circuit cases which "dismiss[ed] under Rule 19, regardless of whether a remedy is available, if the absent parties are Indian tribes invested with sovereign immunity." (ER 21 (collecting cases).) Fourth, the court held that the "public-rights" exception to Rule 19 "is not properly invoked where, as here, the tribe's asserted interest in the Remains will be extinguished if plaintiffs prevail." (ER 22.)

Plaintiffs filed a notice of appeal. (ER 91-92.) By stipulation of Plaintiffs and Defendants, the University is enjoined from changing the current condition and location of the Remains until after the issuance of this Court's mandate. (ER 833.)[5]

[5] In a separate action filed on April 13, 2012, KCRC sued the University in the Southern District of California and sought an order compelling the University to transfer the Remains forthwith. (ER 669.) That case was recently dismissed after the parties filed a joint motion to dismiss pursuant to Rule 41(a)(1). *See KCRC v. Univ. of California*, Case No. 3:12-cv-00912-H-BLM (S.D. Cal. June 7, 2013), Dkt. No. 18.

SUMMARY OF ARGUMENT

I. The judgment of dismissal without leave to amend should be affirmed on the ground that the district court lacked jurisdiction over Plaintiffs' claims due to lack of standing and lack of ripeness, jurisdictional issues that must be decided before considering other grounds for dismissal.

A. Plaintiffs' NAGPRA-based claim is not redressable, because Plaintiffs cannot show a substantial likelihood that the relief they seek would provide them with an opportunity to study the Remains.

B. Plaintiffs' remaining claims are not ripe, because those claims rest upon contingent future events that may never occur.

II. Congress did not waive tribal sovereign immunity with respect to suits brought under NAGPRA.

A. For Congress to abrogate tribal sovereign immunity, it must enact unequivocal and explicit statutory language accomplishing that end. NAGPRA contains no mention of such an abrogation.

B. Plaintiffs' arguments for waiver lack merit. NAGPRA does not silently abrogate tribal immunity by vesting district courts with jurisdiction "over any action brought by any person." 25 U.S.C. § 3013. The fact that the United States is subject to suit under NAGPRA pursuant to the Administrative Procedure Act does not amount to a waiver of tribal sovereign immunity. And Plaintiffs'

remaining arguments are based on considerations of policy, which have no place in the waiver analysis and are in any event not persuasive.

C. Tribal sovereign immunity will not permit Indian tribes to prevent review under NAGPRA, because this Court has held that the United States may sue Indian tribes and override their immunity. The policy concerns expressed by the district court in *dicta* are therefore unfounded.

III. The district court acted within its discretion when it dismissed Plaintiffs' suit pursuant to Rule 19.

A. The Tribes are necessary parties for purposes of Rule 19(a) because they have asserted a non-frivolous claim that they are entitled to the Remains under NAGPRA and 43 C.F.R. § 10.11.

B. The Tribes are indispensable parties for purposes of Rule 19(b). Three of the four factors bearing on "indispensable" status weigh heavily in favor of dismissal. Although Plaintiffs will not be able to litigate their claims once the case is dismissed, an unbroken line of decisions in this Circuit holds that the interests of an absent tribe in maintaining its sovereign immunity trumps this circumstance.

C. This suit does not fall within the "public-rights" exception to Rule 19, because the relief Plaintiffs' seek is not limited to the future conduct of

the administrative process and the adjudication of Plaintiffs' claims in the absence of the Tribes would substantially affect the Tribes' legal interests.

IV. The district court acted within its discretion when it denied Plaintiffs' request for invasive discovery into KCRC. The existing record was more than sufficient for the court to determine that KCRC was entitled to sovereign immunity as an arm of the Tribes.

STANDARD OF REVIEW

Plaintiffs are not correct that the district court's order "is reviewed *de novo* in its entirety." (AOB 17.) The district court's determinations regarding sovereign immunity are reviewed *de novo*, *see Miller v. Wright*, 705 F.3d 919, 923 (9th Cir. 2013), but this Court "review[s] a district court's decision under Rule 19 for an abuse of discretion," *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1098 (9th Cir. 1994). Plaintiffs' argument that the district court erred when it denied their request for discovery into KCRC's sovereign status is likewise reviewed for an abuse of discretion. *See, e.g., Quinn v. Anvil Corp.*, 620 F.3d 1005, 1015 (9th Cir. 2010); *see infra* at 56-57.

ARGUMENT

I. The District Court Lacked Jurisdiction Over Plaintiffs' Suit.

The district court declined to reach Defendants' jurisdictional arguments because it concluded that Rule 19 required dismissal. (ER 23.) This Court has

held, however, that "jurisdictional issues" such as the "question[] of standing" "should be decided before reaching the Rule 19 issue." *Wilbur v. Locke*, 423 F.3d 1101, 1106 (9th Cir. 2005), *abrogated in part on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010); *see generally Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). Here, the district court lacked jurisdiction because Plaintiffs had no standing to pursue their NAGPRA-based claim and Plaintiffs' other claims are not ripe.[6]

A. Plaintiffs Lacked Standing to Pursue Their NAGPRA-Based Claim.

A plaintiff must carry the burden of "demonstrat[ing] standing for each claim he seeks to press and for each form of relief that is sought." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068-69 (9th Cir. 2011) (quotation marks and alterations omitted). The requirements of Article III standing are well established:

> The case or controversy requirement, which constitutes the irreducible minimum of standing, requires that a plaintiff show (1) that it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

[6] There was no need for Defendants to raise this argument in a cross-appeal because it merely seeks to preserve the existing judgment—which dismissed Plaintiffs' suit without leave to amend—based "on a ground properly raised below." *See S. Or. Barter Fair v. Jackson County*, 372 F.3d 1128, 1133 n.8 (9th Cir. 2004) (appellees not required to raise mootness issue in cross-appeal). Moreover, the argument goes "to the court's power to hear the case, and therefore may be raised at any time by the parties." *Id.*

Krottner v. Starbucks Corp., 628 F.3d 1139, 1141 (9th Cir. 2010) (quotation marks and citation omitted).

Plaintiffs have not carried their burden of establishing that the injury alleged in their NAGPRA claim is redressable. The injury that Plaintiffs assert is an inability to study the Remains. In Plaintiffs' words, they have been injured because they "have asked to study the La Jolla Skeletons, but the University has not granted their requests." (ER 207.) To establish standing, Plaintiffs "must show a 'substantial likelihood' that the relief sought would redress th[is] injury." *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010).

The primary relief that Plaintiffs seek is a declaration that "the La Jolla Skeletons are not 'Native American' within the meaning of NAGPRA." (ER 786 (Prayer for Relief § 2(a)).) Such relief would not, however, redress Plaintiffs' alleged injury. If the Remains are not "Native American" within the meaning of NAGPRA, the University would have unfettered discretion over them. While NAGPRA *requires* repatriation or transfer of Native American remains in certain circumstances, it does not govern disposition of remains that are determined *not* to be "Native American." *See* 25 U.S.C. § 3005 (repatriation provision of NAGPRA, which applies only to "Native American" human remains); 43 C.F.R. § 10.1(a) (stating that the NAGPRA regulations develop a process for determining rights to "Native American" human remains). Thus, even if Plaintiffs obtained this relief,

the University could *still* transfer the Remains to the Tribes or take any number of other actions that might prevent Plaintiffs from studying the Remains. Redressability is not established where, as here, the "prospective benefits" to the plaintiff from the suit would "depend on an independent actor who retains 'broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Glanton v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) (quoting *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

For similar reasons, Plaintiffs do not have standing to seek relief that would undo the University's NAGPRA decision and require it to begin a new decision-making process regarding the Remains. (*See* ER 787 (Prayer for Relief § 2(b)-(c)).) If such relief were granted, it would lead to one of two possible outcomes—neither of which would provide redress for Plaintiffs' alleged injury. First, the University might again determine that the Remains are "Native American," in which event it would be required to transfer the Remains to an Indian tribe. 43 C.F.R. § 10.11(c)(1). Second, the University might for some reason conclude that the Remains are *not* "Native American," in which event it would retain "broad and legitimate discretion" over the treatment of the Remains, as explained immediately above. *Glanton*, 465 F.3d at 1125. In neither event would the relief ensure that Plaintiffs would be allowed to study the Remains.

As an additional form of relief for their NAGPRA cause of action, Plaintiffs also sought a permanent injunction forbidding the University from transferring the Remains to any Native American tribe at any point in the future. (ER 787 (Prayer for Relief § 2(d)).) It is unclear whether Plaintiffs continue to seek this relief.[7] Even if they do, it cannot serve as the basis for Article III standing, because Plaintiffs have not pointed to anything in NAGPRA that even arguably would justify such relief. Indeed, NAGPRA contains an express savings clause which admonishes that "[n]othing in this chapter shall be construed to … limit the authority of any Federal agency or museum to … return or repatriate Native American cultural items to Indian tribes." 25 U.S.C. § 3009; *see id.* § 3001(3) (defining "cultural items" to include "human remains"). Plaintiffs may not manufacture standing by requesting relief that would theoretically redress their alleged injury, but that is not authorized by the statute under which they sue. *See, e.g.*, *N.Y. Coastal P'ship, Inc. v. U.S. Dep't of Interior*, 341 F.3d 112, 117 (2d Cir. 2003).

Comparing this case with *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004) further illuminates Plaintiffs' failure to establish redressability. The suit in *Bonnichsen* was also brought by scientists seeking to block transfer of human

[7] Plaintiffs do not mention this part of their prayer for relief in their opening brief. They focus instead on their request for "procedural relief," which they claim, wrongly, "would not prejudice" the Tribes. (AOB 47.)

remains to a Native American tribe under NAGPRA. *Id.* at 868-69, 872. But the *Bonnichsen* remains, unlike the Remains here, were found on *federal* property and excavated pursuant to a permit issued under the Archaeological Resources Protection Act of 1979 ("ARPA"), 16 U.S.C. §§ 470aa-470mm, which does not apply here. *See* 367 F.3d at 869. It was undisputed in *Bonnichsen* "that ARPA gives Plaintiffs the opportunity to study [the] remains if NAGPRA does not apply." *Id.* at 873; *see also Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1166 (D. Or. 2002) (district court order holding that, if the remains were not subject to NAGPRA, the plaintiffs "almost certainly would have been allowed to study the remains" pursuant to ARPA). For that reason, this Court held that "it is likely that Plaintiffs' injury will be redressed by a favorable decision on the NAGPRA issue." 367 F.3d at 873. Here, by contrast, there is no statute conferring on Plaintiffs the opportunity to study the Remains if NAGPRA does not apply.

Plaintiffs do not address the standing issue in their opening brief, but they argued below that the University would lack discretion over the disposition of the Remains if a court held that the Remains were not "Native American." (ER 208.) That is incorrect. Plaintiffs pointed to the University's Human Remains Policies, but nothing in those policies bars the University from transferring remains that are not Native American or compels it to make them available to Plaintiffs for study. (*See* ER 791-98.) While the "Regents Policies" quoted in Plaintiffs' Complaint

establish general expectations for the Regents and the President of the University (ER 783), they do not cabin the University's discretion to decide on the appropriate treatment—including potential disposition—of *non*-"Native American" human remains that are discovered on its lands.[8]

Finally, Plaintiffs cannot establish standing based on a generalized interest in administrative compliance with NAGPRA. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-78 (1992). Where a plaintiff raises "only a generally available grievance about government," which claims "only harm to his and every citizen's interest in proper application of the Constitution and laws, and seek[s] relief that no more directly tangibly benefits him than it does the public at large," he "does not state an Article III case or controversy.'" *Baldwin v. Sebelius*, 654 F.3d 877, 879 (9th Cir. 2011) (quoting *Lujan*, 504 U.S. at 573-74).

B. Plaintiffs' Remaining Claims Are Not Ripe.

Plaintiffs' second and third causes of action assert that Defendants "breached their duty to plaintiffs and to the public to administer the public trust" and violated Plaintiffs' First Amendment right to receive information and ideas. (ER 782-86.) These claims are best read to allege that it would somehow violate the public trust and the First Amendment for the University to transfer the Remains

[8] The full text of these policies is available on the University's website at http://regents.universityofcalifornia.edu/policies/1100.html, and http://regents.universityofcalifornia.edu/policies/1500.html.

to the Tribes *if it is not required to do so by NAGPRA*.[9] Both claims are unripe because they "rest[] upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quotation marks omitted). There is no allegation in the Complaint that the University has decided what it would do with the Remains if NAGPRA did *not* apply to them. Article III does not permit Plaintiffs to litigate possible future injuries that may never come to pass. *See, e.g.*, *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 736 (1998) ("[D]epending upon the agency's future actions … review now may turn out to have been unnecessary.").

II. The Individual Tribes And KCRC Are Entitled To Sovereign Immunity.

Indian tribes are "separate sovereigns pre-existing the Constitution" and "retain[] their original natural rights in matters of local self-government." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (quotation marks omitted). As part of these rights, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.*

[9] Plaintiffs' Complaint could not sensibly be read as asserting that a transfer that is *required* by NAGPRA would violate either California's public-trust doctrine or the First Amendment. The former assertion would fail under the Supremacy Clause. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The latter assertion would amount to a claim that NAGPRA is unconstitutional as applied to these Remains, but Plaintiffs never filed a notice pursuant to Federal Rule of Civil Procedure 5.1, which would have been required if they intended to raise such a challenge.

at 58. "Immunity from suit has been recognized by the courts of this country as integral to the sovereignty and self-governance of Indian tribes." *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004); *see also Three Affiliated Tribes of the Ft. Berthold Reservation v. World Eng'g, P.C.*, 476 U.S. 877, 890 (1986) ("The common law sovereign immunity possessed by [a] Tribe is a necessary corollary to Indian sovereignty and self-governance."). Because of this special sovereign status, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

In addition, it is "settled law" in this Circuit that corporations created by tribes may "enjoy the same sovereign immunity granted to a tribe itself." *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 725 (9th Cir. 2008). The operative question in determining whether such a corporation is entitled to sovereign immunity is "whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

The district court faithfully applied these precedents. It properly treated the Kumeyaay Tribes as entitled to sovereign immunity, "a premise that [was] not debated" by the parties. (ER 11.) The district court also correctly held that

"KCRC is entitled to immunity as an 'arm' of the Kumeyaay tribes" based on the record before it. (ER 13; *see infra* at 52-54.)

Plaintiffs do not challenge either of these determinations.[10] Plaintiffs also abandon the argument, rejected by the district court, that the Tribes or KCRC waived their immunity from suit. (ER 13-15.) On appeal, Plaintiffs' sole contention regarding sovereign immunity is that Congress waived the sovereign immunity of Indian tribes when it passed NAGPRA. (*See* AOB 18-32.) That argument is foreclosed by the statutory text and binding precedent.

A. The District Court Correctly Held That NAGPRA Does Not Waive Tribal Sovereign Immunity.

The district court's conclusion that NAGPRA does not waive tribal sovereign immunity is compelled by the statutory text. For Congress to waive tribal sovereign immunity, the "abrogation must be 'unequivocally expressed' in 'explicit legislation.'" *Krystal Energy*, 357 F.3d at 1056 (9th Cir. 2004) (quoting *Kiowa Tribe*, 523 U.S. at 759 (1998)). "Abrogation of tribal sovereign immunity may not be implied." *Krystal Energy*, 357 F.3d at 1056; *see also Santa Clara Pueblo*, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent.").

[10] Plaintiffs do argue that the district court should have permitted them to conduct discovery into KCRC, an argument which is addressed *infra* at 52-58.

NAGPRA does not contain *any* language regarding sovereign immunity, let alone an unequivocal, explicit statement abrogating tribal sovereign immunity. In NAGPRA's thirteen statutory sections, there is neither a single mention of "immunity" nor any other express statement that Indian tribes are subject to suit under the Act. *See* 25 U.S.C. §§ 3001-3013. Because the "express terms" of NAGPRA do not "reveal any intention by Congress for it to serve as a waiver of a Tribe's sovereign immunity," Plaintiffs' argument must fail. *Quechan Tribe*, 595 F.2d at 1156; *compare with Krystal Energy*, 357 F.3d at 1057 (finding waiver of tribal sovereign immunity based on explicit language that "sovereign immunity is abrogated as to" all "foreign or domestic governments").

The absence of the required textual waiver obviates any need to look to additional sources of legislative intent. Even if one were to consider the history of NAGPRA, however, it would provide only further support for the district court's decision. Nowhere in that legislative history does Congress express an intent to abrogate tribal sovereign immunity. To the contrary, the history shows that Congress enacted NAGPRA in response to requests that it fully recognize and protect tribal sovereignty. *See Hearing on S. 1021 and S. 1980 Before the S. Comm. On Indian Affairs*, 101st Cong. 54 (May 14, 1990) (testimony of Norbert Hill of the Oneida Nation) ("we, the people, the original inhabitants of this great land, are asking for nothing more than legal and religious sovereignty in the

treatment of and determination of our ancestors' remains and grave offerings"); *id.* at 181-82 (statement of the Native American Rights Fund) ("the political right of tribal governments to repatriate dead tribal members and ancestors is a fundamental attribute of tribal sovereignty," and the Fund was "concerned that this aspect of sovereignty not be abridged in the absence of an express limitation upon it by Congress").

B. Plaintiffs' Arguments for Waiver Lack Merit.

Plaintiffs' arguments that NAGPRA waived tribal sovereign immunity are meritless. *First*, Plaintiffs are mistaken when they argue that 25 U.S.C. § 3013 waives tribal immunity by vesting district courts with jurisdiction "over any action brought by any person" alleging a violation of NAGPRA. (AOB 24-28.) Section 3013 makes no mention of abrogating tribal sovereign immunity, and it therefore cannot conceivably constitute an "unequivocal[]" expression of waiver. *Krystal Energy*, 357 F.3d at 1056.

Moreover, Plaintiffs' argument that Congress somehow waived tribal sovereign immunity merely by conferring jurisdiction on district courts to hear "any action" brought under NAGPRA proves far too much. In *Santa Clara Pueblo*, the district court had allowed a suit under Title I of the Indian Civil Rights Act to proceed pursuant to then-28 U.S.C. § 1343(4), which gave "the district courts 'jurisdiction of *any civil action* authorized by law to be commenced *by any*

person … to secure equitable or other relief under any Act of Congress providing for the protection of civil rights.'" 436 U.S. at 53 & n.4 (emphasis added). The Supreme Court reversed, holding that Congress had not unequivocally expressed a waiver of tribal sovereign immunity. *See id.* at 58-59. Plaintiffs' argument would mean that *Santa Clara Pueblo* was wrongly decided. And, by Plaintiffs' logic, the general statutory grant to district courts of jurisdiction over "all civil actions" arising under any federal law would amount to a blanket waiver of tribal sovereign immunity from suit under federal statutes. 28 U.S.C. § 1331. That is as wrong as it sounds.

Second, Plaintiffs misunderstand the law when they argue, in substance, that NAGPRA must have waived tribal immunity because the *United States* is subject to suit under the Act. (AOB 30-32.) Suits concerning NAGPRA may proceed against the United States, not by virtue of any provision of that statute, but pursuant to the Administrative Procedure Act, which contains an express waiver of sovereign immunity for suits for non-monetary relief "against the United States." 5 U.S.C. § 702; *see Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011). Because Section 702 of the APA makes no mention of Indian tribes, however, it provides no basis for a waiver of tribal sovereign immunity.

Plaintiffs ignore the APA and rely on *Bonnichsen v. U.S. Department of the Army*, 969 F. Supp. 614, 627 (D. Or. 1997) as support for the argument that

"Congress effectively waived sovereign immunity for the United States when it enacted NAGPRA." (AOB 31.) But *Bonnichsen* merely quoted from *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518 (9th Cir. 1989), which held that "§ 702 of the Administrative Procedure Act ('APA') waives sovereign immunity for … any action in a Federal court seeking relief other than money damages and stating a claim based on the assertion of unlawful official action by an agency or by an officer or employee of the agency." *Id.* at 523-24 (citation and quotation marks omitted). Thus, Plaintiffs' authority shows not that Congress included a blanket waiver of federal sovereign immunity within NAGPRA, but only that courts apply § 702 of the APA in the context of NAGPRA.

Even if NAGPRA were construed, wrongly, to contain an unequivocal waiver of *federal* sovereign immunity, that would not amount to an unequivocal waiver of *tribal* sovereign immunity. Plaintiffs cite a number of cases for the principle that "[t]he common law immunity afforded Indian tribes is coextensive with that of the United States." *E.g.*, *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir. 1989). (*See* AOB 30-31.) These cases use the word "coextensive" to establish only that the doctrines of tribal sovereign immunity and federal sovereign immunity, *when they apply*, are equally robust in protecting the relevant sovereign from suit. As with the federal government, "[a]bsent 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 the Tribe." *Evans*, 869 F.2d at 1345-46. The cases do not support Plaintiffs' apparent argument: that any waiver of federal sovereign immunity silently effects a waiver of tribal sovereign immunity. Nor could they, in light of the requirement for an "express" abrogation. *See Santa Clara Pueblo*, 436 U.S. at 58.[11]

Third, Plaintiffs' remaining arguments are based on considerations of policy, which have no place in an analysis whether there has been a "clear" abrogation of tribal sovereign immunity. For example, Plaintiffs contend that 25 U.S.C. § 3013 must be read to waive tribal immunity "[i]n order to make NAGPRA effective." (AOB 24.) Elsewhere, they argue that, "[i]f one class of governmental litigants is entitled to sovereign immunity under NAGPRA [*i.e.*, federal defendants pursuant to the APA] while another class of governmental litigants is not, the statute becomes skewed and imbalanced." (AOB 26-27.) All of these arguments invite the Court to read an implied waiver of tribal sovereign immunity into NAGPRA in order to effectuate the purpose of the statute as perceived by Plaintiffs. But this Court has foreclosed precisely such an argument. "Abrogation of tribal sovereign immunity may not be implied," *Krystal Energy Co.*, 357 F.3d at 1056, even in the

[11] For example, it would be nonsensical to conclude—as Plaintiffs' argument would require—that Congress effected a *sub silentio* waiver of tribal sovereign immunity by authorizing tort suits against the federal government in the Federal Tort Claims Act. *See* 28 U.S.C. § 2671 *et seq.*

face of compelling policy arguments for doing so. *Cf. Alaska v. EEOC*, 564 F.3d 1062, 1086 (9th Cir. 2009) (rejecting argument that federal statute abrogated state sovereign immunity "because its substantive prohibitions or policy goals are similar to those of Title VII").

Plaintiffs' policy arguments—in addition to being irrelevant—are all based on the flawed premise that Congress must have intended to put Indian tribes and the federal government on equal footing with respect to immunity from suits under NAGPRA. There is no basis for that premise. In fact, the legislative history shows that NAGPRA was not intended to diminish the scope of Indian tribes' immunity from suit, but instead was enacted primarily for their benefit. As explained in the Senate committee report, the purpose of the Act "is to provide for the protection of Native American graves and the repatriation of Native American remains and cultural patrimony." S. Rep. No. 101-473, at 1 (1990); *see* H. Rep. No. 101-877, at 8 (1990) ("The purpose of [the Act] is to protect Native American burial sites…."). The House sponsor of the Act explained that "[w]hat we are saying to American Indians today, Mr. Speaker, is simply that your ancestors and their burial grounds are sacred, and will remain so." 136 Cong. Rec. E3484 (daily ed. Oct. 27, 1990).[12]

[12] Congress was particularly concerned about large "collections of Native American human remains … currently held or controlled by Federal agencies and museums" as a result of a nineteenth-century order by the Surgeon General that

C. The Policy Concerns Expressed by the District Court in *Dicta* Are Unfounded.

Plaintiffs seize on *dicta* at the end of the district court's opinion that suggest "honoring tribal sovereign immunity will permit tribes to frustrate review under NAGPRA" by refusing to waive their immunity where "a regulated entity has made a determination favorable to the tribes and decided to repatriate remains." (ER 23; *see* AOB 26.) But the district court itself recognized that this concern related to "a matter of policy," which could not affect its analysis of the legal issues raised by this litigation. (ER 24.) That is no less true on appeal.

What is more, the district court's policy concern is unfounded. The Ninth Circuit has held that "the United States may sue Indian tribes and override tribal sovereign immunity." *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986); *see also Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) ("Sovereign immunity does not apply in a suit brought by the United States."); F. Cohen, Handbook of Federal Indian Law § 7.05[1][a] (2012) ("Indian nations are not immune from lawsuits filed against them by the United States."). This precedent would enable the Secretary of Interior to override tribal immunity with respect to issues arising under NAGPRA by initiating a suit against a tribe pursuant to 25 U.S.C. § 3013.

Army field officers "send him Indian skeletons … so that studies could be performed to determine whether the Indian was inferior to the white man due to the size of the Indian's cranium." H. Rep. No. 101-877, at 9-10.

Thus, Plaintiffs and the district court are both mistaken as to the practical effect of honoring tribal sovereign immunity in the NAGPRA context. Doing so does not mean that a tribe may unilaterally foreclose judicial review of a determination in its favor by a museum. If the Secretary of Interior concludes that judicial review of such a determination is necessary in order to effectuate the purposes of the Act, this Court's precedents permit her to file suit and join issue with both the museum and the tribe. Moreover, other interested parties—such as the Plaintiffs here—are free to attempt to persuade the Secretary of the Interior to bring such a lawsuit.

III. The District Court Acted Within Its Discretion When It Dismissed The Suit Pursuant To Rule 19.

The district court was well within its discretion when it granted Defendants' motion to dismiss the complaint under Federal Rule of Civil Procedure 19. Resolving such a motion requires two separate inquiries, both of which the district court conducted properly. First, a court "must determine … whether an absent party is necessary to the action" for purposes of Rule 19(a)(1).[13] *Dawavendewa*, 276 F.3d at 1155. Second, "if the party is necessary, but cannot be joined," the

[13] Rule 19 was amended in 2007. Among other things, the amendments replaced the word "necessary" with the word "required" in subparagraph 19(a)(1). The Supreme Court has held that "the changes were stylistic only," and that "the substance and operation of the Rule both pre- and post-2007 are unchanged." *Republic of the Phillippines v. Pimentel*, 553 U.S. 851, 855-56 (2008). Throughout this brief, Defendants use the "necessary" formulation, which appears in most of this Court's cases on Rule 19.

court must decide whether, under Rule 19(b), "the party is indispensable such that in equity and good conscience the suit should be dismissed."[14] *Id.* (quotation marks omitted). The district court applied both of these inquiries correctly, and its decision is consistent with this Court's precedents.

A. The Tribes Are Necessary Parties Under Rule 19(a).

In the context of this case, the Tribes are paradigms of "necessary parties." Rule 19(a)(1) directs that a party qualifies as "necessary" to an action if it

> claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1)(B). This inquiry thus turns on whether the party has a "legally protected interest in the suit" and whether that interest "will be impaired or impeded by the suit." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) (emphasis omitted). Significantly, the "absent party need merely 'claim' a legally protected interest." *Dawavendewa*, 276 F.3d at 1155 n.5. So long as the claim is not "patently frivolous" or "fatuous," it satisfies Rule 19(a)(1). *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992).

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[14] A third inquiry is whether joinder is "feasible." *See* Fed. R. Civ. P. 19(b). The district court correctly held that joinder was not feasible due to sovereign immunity. (ER 18.) Plaintiffs do not challenge that, if there is tribal sovereign immunity, joinder is infeasible.

It is beyond dispute that the Tribes have claimed an interest in the Remains. KCRC, on behalf of the Tribes, made formal requests for repatriation of the Remains pursuant to NAGPRA and 43 C.F.R. § 10.11. (*See, e.g.*, ER 474-76, 578, 773.) The Tribes' claim to the Remains is far from "frivolous." NAGPRA vests "ownership" and "control" over Native American remains in qualifying Indian tribes. *See* 25 U.S.C. § 3002(a). NAGPRA's implementing regulations require that Native American remains that are culturally unidentifiable be offered to the "tribes that are recognized as aboriginal to the area from which the human remains were removed." 43 C.F.R. § 10.11(c)(1). Here, the University determined that the Remains are "Native American," that they are culturally unidentifiable, and that "the land from which the Native American human remains were removed is the aboriginal land" of the Tribes. (ER 800.) NAGPRA and its implementing regulations therefore required that the University transfer the Remains to the Tribes, as it said it would do in its 2011 federal register notice. (ER 801.) The Tribes' claim to the Remains is thus grounded in a federal statute and a duly promulgated federal regulation.

The Tribes' legally protected interest would undeniably be "impaired or impeded" if the suit were allowed to proceed without the Tribes as parties. Their claim to ownership and control of the Remains lies at the very core of Plaintiffs' dispute with Defendants. Plaintiffs allege that the Remains are not "Native

American" and that the decision by the University to transfer the Remains to the La Posta Band was "illegal." (ER 781.) The relief Plaintiffs seek in their Complaint would not only undo the process that led to the University's decision to transfer the Remains, but also would result in a declaratory judgment that the Remains are not subject to NAGPRA and a permanent injunction prohibiting their transfer to the La Posta Band "or any other Native American tribe." (ER 786-87.) If this litigation proceeded in the Tribes' absence, it potentially could foreclose their claim to the Remains without any opportunity for them to be heard.

Furthermore, as Defendants explained in their briefing before the district court, KCRC could not serve as an "adequate[] represent[ative]" of the Tribes in their absence. *See Shermoen*, 982 F.2d at 1318. Initially, KCRC itself is not a proper party because it is immune from suit as an arm of the Tribes. *See infra* at 52-54; ER 610. Next, KCRC cannot necessarily represent all of the twelve Kumeyaay Tribes adequately because disagreements may develop among the Tribes, creating a conflict of interest for KCRC.[15] *Cf. Shermoen*, 982 F.2d at 1318 (United States cannot adequately represent numerous tribes because of "competing interests and divergent concerns of tribes"). (*See* ER 613.) Last, KCRC's corporate status has been suspended by the Secretary of State of California,

[15] Because each of the twelve Kumeyaay tribes is federally recognized as indigenous to the area where the Remains were found, the NAGPRA regulations give each of them a potential right to the Remains. *See* 43 C.F.R. § 10.11.

meaning that it cannot sue or be sued. *See Christian & Porter Aluminum Co. v. Titus*, 584 F.2d 326, 331 (9th Cir. 1978); ER 613, 667, 760. The district court correctly held that KCRC was entitled to sovereign immunity (ER 11-13) and did not reach the remaining issues, which Plaintiffs do not address in their opening brief.[16]

Plaintiffs' opening brief misunderstands the nature of the Rule 19(a)(1) inquiry. Plaintiffs contend that the Tribes have no "legally protected interest" in the Remains (AOB 36-43), but their arguments seek to litigate the ultimate *merits* of the NAGPRA issue, rather than assessing whether the Tribes have a non-frivolous *claim* to the Remains. Plaintiffs suggest that, *if* the district court reached the merits and ruled that the remains are not subject to NAGPRA, the Tribes would have no legal interest in the Remains. (*See* AOB 40-43.) This Court, however, has "rejected this kind of circularity in determining whether a party is necessary." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002). "It is the party's *claim* of a protectible interest that makes its presence necessary." *Id.* (emphasis added). And the "[j]ust adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed

[16] There is some ambiguity as to whether the district court's Rule 19 analysis rested solely on a finding that the La Posta Band was a necessary and indispensable party, or whether the court found that the balance of the Tribes and/or the KCRC were as well. (*See* ER 15-22.) Even if the holding was limited to the La Posta Band, that determination was correct and fully supports the judgment.

interest, even if the dispute is ultimately resolved to the detriment of that party." *Shermoen*, 982 F.2d at 1317. The district court was therefore correct to hold that "it would be plainly premature to reach that ultimate, disputed question to assess necessity under Rule 19." (ER 16.)

In any event, Plaintiffs' premature merits arguments are unpersuasive. *First*, Plaintiffs mistakenly argue that the Tribes have no legally protected interest in the Remains in light of *Bonnichsen*. (AOB 38-41.) That case was decided in a different legal posture and involved different facts from the instant case. It was a challenge under the APA to a determination by the Secretary of Interior that human remains discovered on federal property in Oregon were "Native American." In that context, the Court was required by the APA to "review the full agency record to determine whether substantial evidence supports the [federal] agency's decision that [the remains are] 'Native American' within NAGPRA's meaning." *Bonnichsen*, 367 F.3d at 879-80. The Court scrutinized the extensive evidence assembled by the agency regarding those particular remains—including expert opinion, testing by scientists, cranial measurements, oral histories, and detailed information regarding the history of Indian tribes on the Columbia Plateau—before it held that the decision was not supported by substantial evidence. *Id.* at 880-82. *Bonnichsen* could not possibly foreordain the result in this case, where a judicial record concerning the Remains has not yet been developed, and where the parties

would litigate the question whether the Remains are "Native American" under a preponderance-of-the-evidence standard rather than the APA's substantial-evidence standard.

Second, Plaintiffs advance a confusing challenge to 43 C.F.R. § 10.11. They initially disclaim any intent to "challenge the … regulations directly" in this appeal (AOB 2) but then launch a four-page broadside against the validity of the regulation (AOB 43-47). Whatever their intent, Plaintiffs waived any challenge to § 10.11 when they failed to raise it before the district court. *See Rothman v. Hosp. Serv. of S. Cal.*, 510 F.2d 956, 960 (9th Cir. 1975) ("It is a well-established principle that in most instances an appellant may not present arguments in the Court of Appeals that it did not properly raise in the court below."). Rather than challenging the regulation below, Plaintiffs affirmatively relied on it as controlling authority. (*See* ER 197 n.5, 204.) Because the district court has not had an opportunity to pass on the validity of § 10.11 and Plaintiffs disclaim any challenge to it, this Court should not reach the issue.

B. The Tribes Are Indispensable Parties Under Rule 19(b).

The district court was also correct when it held that the Tribes are "indispensable" parties for purposes of Rule 19(b). By its terms, the Rule sets out four factors for courts to consider in determining whether a party is indispensable. But "[w]hen the necessary party is immune from suit," as in this case, "there may

be very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994) (quotation marks omitted). Indeed, the most recent Supreme Court decision addressing Rule 19(b) held that a "case *may not proceed* when a required-entity sovereign is not amenable to suit." *Pimentel*, 553 U.S at 867 (emphasis added). The Court elaborated that, "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action *must be ordered* where there is a potential for injury to the interests of the absent sovereign." *Id.* (emphasis added).

Nevertheless, this Court to date has "directed district courts to apply the four-part test to determine whether Indian tribes are indispensable parties." *Quileute*, 18 F.3d at 1460. The district court dutifully applied that test, which comprises four factors:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
> (2) the extent to which any prejudice could be lessened or avoided by:
> (A) protective provisions in the judgment;
> (B) shaping the relief; or
> (C) other measures;
> (3) whether a judgment rendered in the person's absence would be adequate; and
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). To the extent a factor-by-factor analysis is still necessary in this Circuit in the wake of *Pimentel*, the district court's analysis was correct. It

properly held that the first three factors each favors dismissal and that the fourth presents no obstacle to dismissal where the necessary parties enjoy sovereign immunity. (ER 18-20.)

1. The Tribes would suffer prejudice from a judgment rendered in their absence.

A judgment rendered in the Tribes' absence would severely prejudice them. "The prejudice to the [Tribes] if the plaintiffs are successful stems from the same legal interests that make[] the [Tribes] a necessary party to the action." *Confederated Tribes of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991); *see also Am. Greyhound*, 305 F.3d at 1024-25 (observing that "the first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a)"). In short, the Tribes believe that they are entitled to the Remains under NAGPRA and 43 C.F.R. § 10.11, but a judgment favoring Plaintiffs obtained in the Tribes' absence would prevent that. *See supra* at 37-38. Additionally, the very privilege of sovereign immunity enjoyed by the Tribes will be "much diminished if an important and consequential ruling affecting the sovereign's substantial interest is determined … by a federal court in the sovereign's absence and over its objection." *Pimentel*, 553 U.S at 868-69.

Plaintiffs again resort to arguing that the Tribes would suffer "minimal[] prejudic[e]" because, in Plaintiffs' view, the Tribes' legal claim to the Remains

lacks merit. (AOB 47-49.) That argument is just as flawed when employed under Rule 19(b) as it was when raised with respect to Rule 19(a). As the district court recognized, Plaintiffs' "reasoning cannot be accepted, of course, because it simply assumes what plaintiffs set out to be established in this action." (ER 19; *see also id.* ("There can be no serious question that the La Posta Band's interests in the Remains may be prejudiced if these proceedings continue without them, given that plaintiffs expressly seek a judgment that they have no such claim to the Remains.").)

2. The prejudice to the Tribes cannot be avoided.

The prejudice to the Tribes cannot be averted or lessened by protective provisions in a district court judgment or by other measures.[17] The Tribes believe they are entitled to the Remains, view scientific study of the Remains as "disrespectful" to their ancestors, and perceive any further delay in transfer as a continued affront. (ER 670, 672, 678.) Plaintiffs seek to block transfer of the Remains so that they can study them. At very least, Plaintiffs would have the court delay the transfer of the Remains by requiring the University to begin its NAGPRA process anew. (ER 786.) "Any decision mollifying [Plaintiffs] would prejudice" the Tribes. *See Dawavendewa*, 276 F.3d at 1162.

[17] Importantly, the Tribes' ability to waive their immunity and intervene in the suit "is not a factor that lessens prejudice." *Confederated Tribes*, 928 F.2d at 1500.

Plaintiffs argue that the district court could "shape relief to lessen potential prejudice" to the Tribes, such as by granting relief only on "procedural and administrative matters" regarding the University's NAGPRA determination. (AOB 49-51.) There are several defects in this argument. *First*, Plaintiffs' Complaint expressly asks the Court to enjoin the University from returning the Remains to the Tribes or any other Native American tribe—relief that cannot be "shaped" to lessen the prejudice it would impose. (ER 787-88.) *Second*, to the extent Plaintiffs now disclaim that part of their prayer for relief and seek only a new process within the University regarding disposition of the Remains, such relief would still result in substantial prejudice to the Tribes. It would unwind the University's determination that the Tribes are legally entitled to the Remains under NAGPRA and 43 C.F.R. § 10.11. At best, the Tribes would face another substantial delay before the Remains were returned to them—a delay that they find repugnant to their interests and which would be secured in their "absence and over [their] objection," in a manner that would "diminish[]" their sovereign status. *Pimentel*, 553 U.S at 868-69. *Third*, as explained above, Plaintiffs lack standing to seek this more limited form of "procedural" relief, because it would not redress their alleged injury. *See supra* at 21.

3. A judgment in the Tribes' absence would not be adequate.

The "adequacy" factor in Rule 19(b)(3) "refers to the public stake in settling disputes by wholes, whenever possible"—in other words, the "social interest in the efficient administration of justice and the avoidance of multiple litigation." *Pimentel*, 553 U.S. at 870 (quotation marks omitted). Allowing this suit to proceed in the Tribes' absence would disserve that interest profoundly. As in *Pimentel*, the Tribes "would not be bound by the judgment in an action where they were not parties." *Id.* at 871. If the Plaintiffs prevailed, the Tribes could simply bring a new suit against the University to re-litigate whether the Remains are "Native American."

4. Dismissal is required even if Plaintiffs would lack an adequate remedy.

In this case—as in numerous suits in which this Circuit has affirmed dismissal under Rule 19—it cannot be gainsaid that Plaintiffs will lack an adequate legal remedy of their own once the case is dismissed for lack of joinder of indispensable parties.[18] But, because "this result is a common consequence of sovereign immunity, and the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interests in litigating their claims," this Court

[18] To be sure, Plaintiffs would not be without any recourse. They could still petition the Secretary of Interior to initiate a suit regarding the Remains on behalf of the United States, naming the Tribes and thereby overriding their sovereign immunity. *See supra* at 34-35.

has "regularly held" that this factor is no obstacle to dismissal in cases where a necessary party enjoyed tribal sovereign immunity. *Am. Greyhound*, 305 F.3d at 1025; *see, e.g.*, *Dawavendewa*, 276 F.3d at 1162 (collecting cases); *Manybeads v. United States*, 209 F.3d 1164, 1166 (9th Cir. 2000); *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996); *Pit River*, 30 F.3d at 1102 (9th Cir. 1994); *Shermoen*, 982 F.2d at 1319; *Confederated Tribes*, 928 F.2d at 1500; *Makah*, 910 F.2d at 560. Even where a plaintiff's claim involved the invocation of a constitutional right "fundamental in our structure of government," the sovereign immunity of the absent tribe still trumped the plaintiff's lack of an adequate remedy. *Manybeads*, 209 F.3d at 1166. Defendants are not aware of any case involving a necessary-party sovereign where this Court held that dismissal was inappropriate because of the lack of an adequate remedy for the plaintiff.

This result is consistent with the essence of sovereign immunity. The doctrine makes sovereign entities immune from suits. It should not be surprising, then, that in some cases "[s]overeign immunity may leave a party with no forum for its claims." *Makah*, 910 F.2d at 560. As the Supreme Court recently observed in a case involving a foreign sovereign, "[d]ismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution

of their claims. But that result is contemplated under the doctrine of … sovereign immunity." *Pimentel*, 553 U.S. at 872.

This Court should not adopt the approach of *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977). (*See* AOB 52-54.) As the district court noted, *Manygoats* is the "sole exception" to the judicial consensus that a plaintiff's lack of an adequate remedy under Rule 19(b)(4) is trumped by the sovereign immunity of an absent tribe. (ER 21.) It involved a suit brought by members of the Navajo Tribe against the Secretary of Interior to enjoin an agreement under which the Navajo Tribe allowed Exxon to mine uranium on tribal lands. The plaintiffs argued that the Secretary had relied on an inadequate environmental impact statement. Based on a cursory analysis of the Rule 19 issues, the Tenth Circuit held that the case could proceed. *Manygoats*, 558 F.2d at 559. It reasoned that dismissal "would produce an anomalous result," because "[n]o one, except the Tribe, could seek review of an environmental impact statement covering significant federal action relating to leases or agreements for development of natural resources on Indian lands." *Id.*

Manygoats is conclusory in its application of Rule 19 and has not been adopted by this Court in the thirty-six years since it was decided. To the contrary, this Court has instead stressed that "the tribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interests in litigating their claims." *Am. Greyhound*, 305 F.3d at 1025. Moreover, the Tenth Circuit in *Manygoats*

emphasized that, if the environmental impact statement at issue were found inadequate, that would "not necessarily result in prejudice to the Tribe" because the "only result will be a new EIS for consideration by the Secretary." 558 F.2d at 558. In contrast, the Plaintiffs here seek injunctive relief including a permanent bar on the University transferring the Remains to any Native American tribe at any point in the future. (ER 787 (Prayer for Relief §§ 2(d), 3(d), 4(c)).)

Further, *Manygoats* may no longer be good law in the Tenth Circuit, because it is squarely at odds with the Supreme Court's holding that a "case *may not proceed* when a required-entity sovereign is not amenable to suit." *Pimentel*, 553 U.S at 867 (emphasis added). A district court within the Tenth Circuit, while dismissing a case under Rule 19 on different grounds, recently noted that *Pimentel* was "more persuasive and authoritative" than *Manygoats*. *Center for Biological Diversity v. Pizarchik*, 858 F. Supp. 2d 1221, 1228 n.9 (D. Colo. 2012).

C. This Case Does Not Fall Within the Public-Rights Exception.

This Court has occasionally relaxed the requirements of Rule 19 in cases "narrowly restricted to the protection and enforcement of public rights." *Connor v. Burford*, 848 F.2d 1441, 1449 (9th Cir. 1988) (quotation marks and emphasis omitted). But the "public-rights" exception does not apply here, because Plaintiffs' claims are focused on their narrow dispute with the University over access to the

Remains, and because the relief they seek would destroy the legal entitlements of the absent Tribes. (*See* ER 22-24.)

The public-rights exception is reserved for cases that "transcend the private interests of the litigants and seek to vindicate a public right," such as "establishing for all the principle of separation of powers." *Am. Greyhound*, 305 F.3d at 1026 (quoting *Kescoli*, 101 F.3d at 1311). This case, by contrast, addresses the research interests of three professors. Plaintiffs' claims are "private one[s] focused on the merits of [their] dispute rather than on vindicating a larger public interest." *Kescoli*, 101 F.3d at 1311.

Moreover, even where "some of the interests [plaintiffs] seek to vindicate" are public rights, the public rights exception "is an acceptable intrusion upon the rights of absent parties only insofar as the adjudication does not destroy the legal entitlements of the absent parties." *Shermoen*, 982 F.2d at 1319 (quotation marks omitted). In *Kescoli*, for example, this Court held that the public-rights exception was not available because the legal interests of absent tribes in lease agreements "could be significantly affected" and the suit was "not limited to merely requiring [an agency] to comply with procedural obligations in the future." 101 F.3d at 1310, 1311-12. Likewise, in this case, Plaintiffs' suit would substantially affect the legal interests of the Tribes. The order that Plaintiffs seek, directing that the Remains are not "Native American," would extinguish the Tribes' entitlement to

the Remains under NAGPRA and 43 C.F.R. § 10.11. *Cf. Makah*, 910 F.2d at 559 (applying public-rights exception where "[t]he absent tribes would not be prejudiced").

Plaintiffs attempt to re-cast this dispute as one involving "the public's right to administrative compliance with NAGPRA, and the public's interest in preservation of the public trust (through the University)." (AOB 54-55.) If that argument were sufficient to satisfy the public-rights exception, the exception would swallow Rule 19. "Almost any litigation … can be characterized as an attempt to make one party or another act in accordance with the law." *Am. Greyhound*, 305 F.3d at 1026. To be eligible for the public-rights exception, a suit must "seek relief that would affect only the future conduct of the administrative process," such as "enforc[ing] the duty of" an agency "to follow statutory procedures in the future." *Makah*, 910 F.2d at 559 & n.6. Plaintiffs' suit, however, is backward-looking. Plaintiffs seek to undo a decision that the University has already made concerning the legal status of the Remains, challenging both the substance of that decision and the procedures that were followed in arriving at it. (*See* AOB 41-43.) The public-rights exception is not available for this type of suit. *See Kescoli*, 101 F.3d at 1312 ("Contrary to *Makah*, the present litigation is not limited to ensuring an agency's future compliance with

statutory procedures and is not one in which the risk of prejudice to the [tribes] is nonexistent or minimal.").

IV. The District Court Acted Within Its Discretion In Denying Invasive Discovery Into KCRC.

The district court did not err when it decided the question of KCRC's sovereign status based on the existing record, rather than authorizing invasive discovery into the details of KCRC's origins, structure, and purpose. A district court "has wide latitude in controlling discovery, and its rulings will not be overturned in absence of a clear abuse of discretion." *White v. City of San Diego*, 605 F.2d 455, 461 (9th Cir. 1979) (quotation marks omitted). The court acted well within its discretion when it ruled that "it is sufficiently clear on the current record that the KCRC is acting as an extension of the tribe" and therefore was entitled to sovereign immunity under this Circuit's rule that "tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself." (ER 12 (quoting *Cook*, 548 F.3d at 725).)

The district court rested its determination on evidence in the record submitted by KCRC. That evidence established the following salient facts about KCRC, among others:

- It "was created by resolution of each of the 12 Kumeyaay tribes, and thus derives its power directly from their sovereign authority."
- It is "comprised solely of members of the tribes, who act on its behalf."

- It "designates the particular tribe to receive remains under NAGPRA."
- It is funded exclusively by voluntary contributions from the tribes.

(ER 12.)

These characteristics mirror the attributes of other tribal entities that have previously been treated as an "arm of the tribe" by this Court. In *Cook*, for example, the Court reversed denial of a motion to dismiss because it concluded that a corporation was an arm of the Fort Mojave Tribe. It based this decision on the facts that "the Tribe created [the corporation] pursuant to a tribal ordinance and intergovernmental agreement," it was "wholly owned and controlled by the Tribe," a majority of its board of directors were required to be Tribe members, and the Tribe enjoyed the benefits of the corporation. 548 F.3d at 721, 726. Similarly, *Allen* held that a tribal casino created by a compact between the Tyme Maidu Tribe and the State of California, which was owned and operated by the tribe and yielded benefits for the Tribe, enjoyed sovereign immunity. *See* 464 F.3d at 1046-47. *Allen* was also decided at the motion-to-dismiss stage. *Id.* at 1046. And, in *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006), the Court held that a nonprofit tribal college enjoyed sovereign immunity where it was created by the Confederated Salish and Kootenai Tribes, the tribes exercised "some control" over it, its directors were members of the tribes, and it served the educational needs of the tribes. *Id*. at 1134-35.

Like the tribal corporations in *Cook*, *Allen*, and *Smith*, KCRC was created by the Kumeyaay Tribes, is run by members of the Tribes, and is designed to benefit the Tribes. If anything, KCRC lies even closer to the "core of the notion of sovereignty" (ER 13) than the corporations in those cases. KCRC was established to "protect human remains and artifacts under NAGPRA and ensure that repatriation of such remains and artifacts are appropriately made to a Kumeyaay tribe." (ER 551.) By contrast, the casinos in *Cook* and *Allen* were created with a commercial, profit-seeking purpose in mind. The benefits provided by KCRC inure exclusively to the Kumeyaay Tribes, unlike those of the college in *Smith*, where a majority of the students and faculty were not members of the tribe. *See* 434 F.3d at 1134. In view of this precedent and the evidence about KCRC that was already before the district court, the court's decision to treat KCRC as an arm of the Tribes without further discovery was not an abuse of discretion.

Plaintiffs suggest that the district court's analysis was incomplete because there was no discovery on certain factors identified by the Tenth Circuit as potentially relevant to the "arm of the tribe" inquiry in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010). (AOB 33.) That decision, of course, was not binding on the district court. Moreover, the Tenth Circuit emphasized that there is no particular "threshold determination" to be used in deciding the issue of sovereign immunity, but that

courts in that Circuit should instead "look to a variety of factors when examining the relationship between the economic entities and the tribe, including but not limited to" the factors seized on by Plaintiffs here. *Id.* at 1181.

In any event, the district court *did* consider all six factors identified in *Breakthrough*. (ER 12.) Plaintiffs complain that the record contained insufficient information regarding "the formation of KCRC," "KCRC's decision-making procedures," and "the tribes' funding of KCRC." (AOB 33.) But the record contained more than enough information on those issues for the district court to resolve the question of KCRC's sovereign status. The record showed that KCRC was created under tribal law for the purpose of protecting human remains and artifacts under NAGPRA, and it included the signed resolutions of each of the twelve Kumeyaay tribes authorizing KCRC's creation. (ER 557, 559-76.) The record contained the declaration of a 15-year member of KCRC, who explained how the Tribes were represented on KCRC, how KCRC conducts its meetings, and how it made decisions regarding repatriation of Native American remains and artifacts. (ER 557-58.) And the record established that "KCRC's operating budget is funded exclusively from contributions from its member tribes." (ER 557.)

This was adequate information for the district court to resolve the sovereign immunity question. While Plaintiffs now argue that the court should have allowed discovery into the minutest details of these issues (AOB 33), this Court has

previously rejected that sort of argument, *see Allen*, 464 F.3d at 1046 (rejecting the "contention that the district court erred in failing to scrutinize the nature of the relationship between the Tribe and the Casino" because it "fail[ed] to accord sufficient weight to the undisputed fact that the Casino is owned and operated by the Tribe"). What is more, although Plaintiffs complain that they lacked detailed information about "the tribes' funding of KCRC" (AOB 33), this Court recognized in *Smith* that this factor is not a *sine qua non* of sovereign status: the college at issue there enjoyed sovereign immunity "even though the Tribes d[id] not fund" it, 434 F.3d at 1134.

Plaintiffs also neglect to mention that even in *Breakthrough* the Tenth Circuit "conclude[d] that the district court did not abuse its discretion in its denial of jurisdictional discovery." 629 F.3d at 1191. *Breakthrough* held that, because of "concerns about burdening the potentially sovereign party with discovery," the party challenging the denial of discovery has "the burden of demonstrating a legal entitlement to jurisdictional discovery … and the related prejudice flowing from the discovery's denial." *Id.* at 1189 n.11. There, as here, the district court did not abuse its discretion by denying discovery, because the tribe had already introduced sufficient information for the court to conduct the "arm of the tribe" analysis, and because the plaintiff offered only a "conclusory assertion that jurisdictional discovery was necessary" while failing to identify "what specific documents it

would have sought in discovery." *Id.* at 1188, 1190; *see also Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) ("The denial of Boschetto's request for discovery, which was based on little more than a hunch that it might yield jurisdictionally relevant facts, was not an abuse of discretion.").

Plaintiffs misidentify the standard of review that applies to the district court's denial of discovery. (AOB 18.) Plaintiffs are not correct that *Cacique, Inc. v. Robert Reiser & Co.*, 169 F.3d 619 (9th Cir. 1999), requires *de novo* review here. *Cacique* held only that the threshold question of whether there is a legal issue in the case to which a discovery request is relevant is subject to *de novo* review. *Id.* at 622. But the district court here never held that information about KCRC's formation, decision-making process, or funding sources was not relevant to the sovereign immunity question. To the contrary, it expressly recognized the relevance of this information when it applied all six *Breakthrough* factors before deciding that KCRC was entitled to sovereign immunity. (*See* ER 12.) The court's conclusion that the existing record was sufficient to support its decision and that no further discovery was necessary may "not be overturned in absence of a clear abuse of discretion." *White*, 605 F.2d at 461.

Finally, even if the district court had abused its discretion in denying discovery into KCRC, that would not provide a basis for reversal. The district court still would be required to dismiss the case under Rule 19 if it authorized

discovery and concluded, based on the fruits of that discovery, that KCRC was not entitled to sovereign immunity. That is because the individual Tribes themselves clearly have an interest in the Remains and are therefore "necessary" parties under Rule 19(a).[19] And the district court properly held that the La Posta Band, at very least, is "indispensable" under Rule 19(b). (*See* ER 18-22.) Moreover, as Defendants argued below, even if KCRC were not immune from suit, it could not serve as an adequate representative of the Tribes because of the possibility of divergent interests between the Tribes and the suspension of KCRC's corporate status. *See supra* at 38-39. Thus, Rule 19 would require the district court to dismiss Plaintiffs' Complaint regardless of whether KCRC is entitled to sovereign immunity.

[19] *See also* ER 16 ("[T]here can be little serious question that the La Posta Band, at least, claims 'an interest relating to the subject of the action,' and that adjudication of plaintiffs' claims in its absence would practically impair its ability to defend its asserted interest in the Remains.").

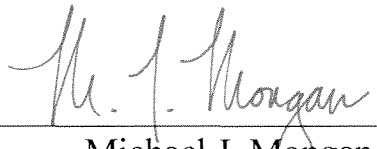
CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court dismissing Plaintiffs' Complaint without leave to amend.

DATED: July 19, 2013

MUNGER, TOLLES & OLSON LLP
Bradley S. Phillips
Michelle T. Friedland
Michael J. Mongan

OFFICE OF THE GENERAL COUNSEL
UNIVERSITY OF CALIFORNIA
Charles F. Robinson
Karen J. Petrulakis
Margaret L. Wu
Dennis M. Klein

By: 
Michael J. Mongan

Attorneys for Defendants-Appellees

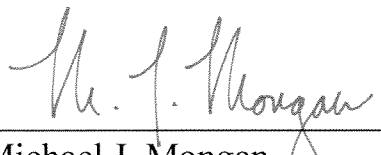
STATEMENT OF RELATED CASES

Defendants-Appellees are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 13,989 words.

Dated: July 19, 2013



Michael J. Mongan

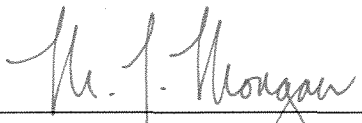
CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2013, I caused to be electronically filed the foregoing Answering Brief of Defendants-Appellees The Regents of the University of California, Mark G. Yudof, Marye Anne Fox, Pradeep K. Khosla, and Gary Matthews with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I caused to be mailed the foregoing document by Federal Express (overnight delivery) to the following non-CM/ECF participants:

Jennifer Murakami
Brandon Clark Rose
McManis Faulkner
50 W. San Fernando Street
San Jose, CA 95113

Dated: July 19, 2013



Michael J. Mongan

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

28 U.S.C. § 3001. Definitions

For purposes of this chapter, the term--
(1) “burial site” means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.
(2) “cultural affiliation” means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.
(3) “cultural items” means human remains and--
(A) “associated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.
(B) “unassociated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,
(C) “sacred objects” which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and
(D) “cultural patrimony” which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such

Native American group at the time the object was separated from such group.
(4) “Federal agency” means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.
(5) “Federal lands” means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C.A. § 1601 et seq.].
(6) “Hui Malama I Na Kupuna O Hawai'i Nei” means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.
(7) “Indian tribe” means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.]) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
(8) “museum” means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.
(9) “Native American” means of, or relating to, a tribe, people, or culture that is indigenous to the United States.
(10) “Native Hawaiian” means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.
(11) “Native Hawaiian organization” means any organization which--
(A) serves and represents the interests of Native Hawaiians,
(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and
(C) has expertise in Native Hawaiian Affairs, and shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.
(12) “Office of Hawaiian Affairs” means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.
(13) “right of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of

cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 3005(c) of this title, result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to 28 U.S.C. 1491 in which event the "right of possession" shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.
(14) "Secretary" means the Secretary of the Interior.
(15) "tribal land" means--
(A) all lands within the exterior boundaries of any Indian reservation;
(B) all dependent Indian communities; [FN2]
(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

28 U.S.C. § 3002. Ownership

(a) Native American human remains and objects
The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)--
(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or
(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony--
(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;
(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or
(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the

Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe--
(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or
(2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.
(b) Unclaimed Native American human remains and objects
Native American cultural items not claimed under subsection (a) of this section shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 3006 of this title, Native American groups, representatives of museums and the scientific community.
(c) Intentional excavation and removal of Native American human remains and objects
The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only if--
(1) such items are excavated or removed pursuant to a permit issued under section 470cc of Title 16 which shall be consistent with this Chapter;
(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;
(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b) of this section; and
(4) proof of consultation or consent under paragraph (2) is shown.
(d) Inadvertent discovery of Native American remains and objects
(1) Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990, shall notify, in writing, the Secretary of the Department, or head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to the Alaska Native

Claims Settlement Act of 1971 [43 U.S.C.A. § 1601 et seq.], the appropriate corporation or group. If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture, the person shall cease the activity in the area of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection. Following the notification under this subsection, and upon certification by the Secretary of the department or the head of any agency or instrumentality of the United States or the appropriate Indian tribe or Native Hawaiian organization that notification has been received, the activity may resume after 30 days of such certification.
(2) The disposition of and control over any cultural items excavated or removed under this subsection shall be determined as provided for in this section.
(3) If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the Secretary of any department (other than the Department of the Interior) or the head of any other agency or instrumentality may be delegated to the Secretary with respect to any land managed by such other Secretary or agency head.
(e) Relinquishment
Nothing in this section shall prevent the governing body of an Indian tribe or Native Hawaiian organization from expressly relinquishing control over any Native American human remains, or title to or control over any funerary object, or sacred object.

28 U.S.C. § 3003. Inventory for human remains and associated funerary objects

(a) In general
Each Federal agency and each museum which has possession or control over holdings or collections of Native American human remains and associated funerary objects shall compile an inventory of such items and, to the extent possible based on information possessed by such museum or Federal agency, identify the geographical and cultural affiliation of such item.1
(b) Requirements
(1) The inventories and identifications required under subsection (a) of this section shall be--
(A) completed in consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders;
(B) completed by not later than the date that is 5 years after November 16, 1990, and

(C) made available both during the time they are being conducted and afterward to a review committee established under section 3006 of this title.
(2) Upon request by an Indian tribe or Native Hawaiian organization which receives or should have received notice, a museum or Federal agency shall supply additional available documentation to supplement the information required by subsection (a) of this section. The term “documentation” means a summary of existing museum or Federal agency records, including inventories or catalogues, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American human remains and associated funerary objects subject to this section. Such term does not mean, and this chapter shall not be construed to be an authorization for, the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects.
(c) Extension of time for inventory
Any museum which has made a good faith effort to carry out an inventory and identification under this section, but which has been unable to complete the process, may appeal to the Secretary for an extension of the time requirements set forth in subsection (b)(1)(B) of this section. The Secretary may extend such time requirements for any such museum upon a finding of good faith effort. An indication of good faith shall include the development of a plan to carry out the inventory and identification process.
(d) Notification
(1) If the cultural affiliation of any particular Native American human remains or associated funerary objects is determined pursuant to this section, the Federal agency or museum concerned shall, not later than 6 months after the completion of the inventory, notify the affected Indian tribes or Native Hawaiian organizations.
(2) The notice required by paragraph (1) shall include information--
(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;
(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and
(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances

surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.
(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.
(e) Inventory
For the purposes of this section, the term “inventory” means a simple itemized list that summarizes the information called for by this section.

28 U.S.C. § 3004. Summary for unassociated funerary objects, sacred objects, and cultural patrimony

(a) In general
Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.
(b) Requirements
(1) The summary required under subsection (a) of this section shall be--
(A) in lieu of an object-by-object inventory;
(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and
(C) completed by not later than the date that is 3 years after November 16, 1990.
(2) Upon request, Indian Tribes1 and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

28 U.S.C. § 3005. Repatriation

(a) Repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums
(1) If, pursuant to section 3003 of this title, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.
(2) If, pursuant to section 3004 of this title, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.
(3) The return of cultural items covered by this chapter shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.
(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 3003 of this title, or the summary pursuant to section 3004 of this title, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) of this section and, in the case of unassociated funerary objects, subsection (c) of this section, such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.
(5) Upon request and pursuant to subsections (b), (c) and (e) of this section, sacred objects and objects of cultural patrimony shall be expeditiously returned where--
(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;
(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this chapter.

(b) Scientific study

If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

(c) Standard of repatriation

If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this chapter and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

(d) Sharing of information by Federal agencies and museums

Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

(e) Competing claims

Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this chapter, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this chapter or by a court of competent jurisdiction.

(f) Museum obligation

Any museum which repatriates any item in good faith pursuant to this chapter shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state1 law that are inconsistent with the provisions of this chapter.

28 U.S.C. § 3006. Review Committee

(a) Establishment
Within 120 days after November 16, 1990, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 3003, 3004 and 3005 of this title.
(b) Membership
(1) The Committee1 established under subsection (a) of this section shall be composed of 7 members,
(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;
(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and
(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).
(2) The Secretary may not appoint Federal officers or employees to the committee.
(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.
(4) Members of the committee established under subsection (a) of this section shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of Title 5.
(c) Responsibilities
The committee established under subsection (a) of this section shall be responsible for--
(1) designating one of the members of the committee as chairman;
(2) monitoring the inventory and identification process conducted under sections 3003 and 3004 of this title to ensure a fair, objective consideration and assessment of all available relevant information and evidence;
(3) upon the request of any affected party, reviewing and making findings related to--

(A) the identity or cultural affiliation of cultural items, or
(B) the return of such items;
(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;
(5) compiling an inventory of culturally unidentifiable human remains that are in the possession or control of each Federal agency and museum and recommending specific actions for developing a process for disposition of such remains;
(6) consulting with Indian tribes and Native Hawaiian organizations and museums on matters within the scope of the work of the committee affecting such tribes or organizations;
(7) consulting with the Secretary in the development of regulations to carry out this chapter;
(8) performing such other related functions as the Secretary may assign to the committee; and
(9) making recommendations, if appropriate, regarding future care of cultural items which are to be repatriated.
(d) Admissibility of records and findings
Any records and findings made by the review committee pursuant to this chapter relating to the identity or cultural affiliation of any cultural items and the return of such items may be admissible in any action brought under section 3013 of this title.
(e) Recommendations and report
The committee shall make the recommendations under paragraph2 (c)(5) of this section in consultation with Indian tribes and Native Hawaiian organizations and appropriate scientific and museum groups.
(f) Access
The Secretary shall ensure that the committee established under subsection (a) of this section and the members of the committee have reasonable access to Native American cultural items under review and to associated scientific and historical documents.
(g) Duties of Secretary
The Secretary shall--
(1) establish such rules and regulations for the committee as may be necessary, and
(2) provide reasonable administrative and staff support necessary for the deliberations of the committee.
(h) Annual report
The committee established under subsection (a) of this section shall submit an annual report to the Congress on the progress made, and any barriers encountered, in implementing this section during the previous year.

(i) Termination
The committee established under subsection (a) of this section shall terminate at the end of the 120-day period beginning on the day the Secretary certifies, in a report submitted to Congress, that the work of the committee has been completed.

28 U.S.C. § 3007. Penalty

(a) Penalty
Any museum that fails to comply with the requirements of this chapter may be assessed a civil penalty by the Secretary of the Interior pursuant to procedures established by the Secretary through regulation. A penalty assessed under this subsection shall be determined on the record after opportunity for an agency hearing. Each violation under this subsection shall be a separate offense.
(b) Amount of penalty
The amount of a penalty assessed under subsection (a) of this section shall be determined under regulations promulgated pursuant to this chapter, taking into account, in addition to other factors--
(1) the archaeological, historical, or commercial value of the item involved;
(2) the damages suffered, both economic and noneconomic, by an aggrieved party,1 and
(3) the number of violations that have occurred.
(c) Actions to recover penalties
If any museum fails to pay an assessment of a civil penalty pursuant to a final order of the Secretary that has been issued under subsection (a) of this section and not appealed or after a final judgment has been rendered on appeal of such order, the Attorney General may institute a civil action in an appropriate district court of the United States to collect the penalty. In such action, the validity and amount of such penalty shall not be subject to review.
(d) Subpoenas
In hearings held pursuant to subsection (a) of this section, subpoenas may be issued for the attendance and testimony of witnesses and the production of relevant papers, books, and documents. Witnesses so summoned shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

28 U.S.C. § 3008. Grants

(a) Indian tribes and Native Hawaiian organizations
The Secretary is authorized to make grants to Indian tribes and Native Hawaiian organizations for the purpose of assisting such tribes and organizations in the repatriation of Native American cultural items.
(b) Museums
The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 3003 and 3004 of this title.

28 U.S.C. § 3009. Savings provision

Nothing in this chapter shall be construed to--
(1) limit the authority of any Federal agency or museum to--
(A) return or repatriate Native American cultural items to Indian tribes, Native Hawaiian organizations, or individuals, and
(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this chapter;
(2) delay actions on repatriation requests that are pending on the date of enactment of this chapter;
(3) deny or otherwise affect access to any court;
(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; or
(5) limit the application of any State or Federal law pertaining to theft or stolen property.

28 U.S.C. § 3010. Special relationship between Federal government and Indian tribes and Native Hawaiian organizations

This chapter reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.

28 U.S.C. § 3011. Regulations

The Secretary shall promulgate regulations to carry out this chapter within 12 months of November 16, 1990.

28 U.S.C. § 3012. Authorization of appropriations

There is authorized to be appropriated such sums as may be necessary to carry out this chapter.

28 U.S.C. § 3013. Enforcement

The United States district courts 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.

43 C.F.R. § 10.11

(a) General. This section implements section 8(c)(5) of the Act and applies to human remains previously determined to be Native American under § 10.9, but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified.
(b) Consultation.
(1) The museum or Federal agency official must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects:
(i) Within 90 days of receiving a request from an Indian tribe or Native Hawaiian organization to transfer control of culturally unidentifiable human remains and associated funerary objects; or
(ii) If no request is received, before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects.
(2) The museum or Federal agency official must initiate consultation with officials and traditional religious leaders of all Indian tribes and Native Hawaiian organizations:
(i) From whose tribal lands, at the time of the removal, the human remains and associated funerary objects were removed; and
(ii) From whose aboriginal lands the human remains and associated funerary objects were removed. Aboriginal occupation for purposes of this section may be recognized by a final judgment of the Indian Claims Commission or the United States

Court of Claims, or by a treaty, Act of Congress, or Executive Order.
(3) The museum or Federal agency official must provide the following information in writing to all Indian tribes and Native Hawaiian organizations with which the museum or Federal agency consults:
(i) A list of all Indian tribes and Native Hawaiian organizations that are being, or have been, consulted regarding the particular human remains and associated funerary objects;
(ii) A list of any Indian groups that are not federally-recognized and are known to have a relationship of shared group identity with the particular human remains and associated funerary objects; and
(iii) An offer to provide a copy of the original inventory and additional documentation regarding the particular human remains and associated funerary objects.
(4) During consultation, museum and Federal agency officials must request, as appropriate, the following information from Indian tribes and Native Hawaiian organizations:
(i) The name and address of the Indian tribal official to act as representative in consultations related to particular human remains and associated funerary objects;
(ii) The names and appropriate methods to contact any traditional religious leaders who should be consulted regarding the human remains and associated funerary objects;
(iii) Temporal and geographic criteria that the museum or Federal agency should use to identify groups of human remains and associated funerary objects for consultation;
(iv) The names and addresses of other Indian tribes, Native Hawaiian organizations, or Indian groups that are not federally-recognized who should be included in the consultations; and
(v) A schedule and process for consultation.
(5) During consultation, the museum or Federal agency official should seek to develop a proposed disposition for culturally unidentifiable human remains and associated funerary objects that is mutually agreeable to the parties specified in paragraph (b)(2) of this section. The agreement must be consistent with this part.
(6) If consultation results in a determination that human remains and associated funerary objects previously determined to be culturally unidentifiable are actually related to a lineal descendant or culturally affiliated with an Indian tribe or Native Hawaiian organization, the notification and repatriation of the human remains and associated funerary objects must be completed as required by § 10.9(e) and § 10.10(b).
(c) Disposition of culturally unidentifiable human remains and associated funerary objects.

(1) A museum or Federal agency that is unable to prove that it has right of possession, as defined at § 10.10(a)(2), to culturally unidentifiable human remains must offer to transfer control of the human remains to Indian tribes and Native Hawaiian organizations in the following priority order:
(i) The Indian tribe or Native Hawaiian organization from whose tribal land, at the time of the excavation or removal, the human remains were removed; or
(ii) The Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains were removed. Aboriginal occupation may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or a treaty, Act of Congress, or Executive Order.
(2) If none of the Indian tribes or Native Hawaiian organizations identified in paragraph (c)(1) of this section agrees to accept control, a museum or Federal agency may:
(i) Transfer control of culturally unidentifiable human remains to other Indian tribes or Native Hawaiian organizations; or
(ii) Upon receiving a recommendation from the Secretary or authorized representative:
(A) Transfer control of culturally unidentifiable human remains to an Indian group that is not federally-recognized; or
(B) Reinter culturally unidentifiable human remains according to State or other law.
(3) The Secretary may make a recommendation under paragraph (c)(2)(ii) of this section only with proof from the museum or Federal agency that it has consulted with all Indian tribes and Native Hawaiian organizations listed in paragraph (c)(1) of this section and that none of them has objected to the proposed transfer of control.
(4) A museum or Federal agency may also transfer control of funerary objects that are associated with culturally unidentifiable human remains. The Secretary recommends that museums and Federal agencies transfer control if Federal or State law does not preclude it.
(5) The exceptions listed at § 10.10(c) apply to the requirements in paragraph (c)(1) of this section.
(6) Any disposition of human remains excavated or removed from Indian lands as defined by the Archaeological Resources Protection Act (16 U.S.C. 470bb (4)) must also comply with the provisions of that statute and its implementing regulations.
(d) Notification.
(1) Disposition of culturally unidentifiable human remains and associated funerary objects under paragraph (c) of this section may not occur until at least 30 days after publication of a

notice of inventory completion in the Federal Register as described in § 10.9.
(2) Within 30 days of publishing the notice of inventory completion, the National NAGPRA Program manager must:
(i) Revise the Review Committee inventory of culturally unidentifiable human remains and associated funerary objects to indicate the notice's publication; and
(ii) Make the revised Review Committee inventory accessible to Indian tribes, Native Hawaiian organizations, Indian groups that are not federally-recognized, museums, and Federal agencies.
(e) Disputes. Any person who wishes to contest actions taken by museums or Federal agencies regarding the disposition of culturally unidentifiable human remains and associated funerary objects should do so through informal negotiations to achieve a fair resolution. The Review Committee may facilitate informal resolution of any disputes that are not resolved by good faith negotiation under § 10.17. In addition, the United States District Courts have jurisdiction over any action brought that alleges a violation of the Act.