C.A. No. 12-17489

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY WHITE, ROBERT L. BETTINGER, and
MARGARET SCHOENINGER,

Plaintiffs-Appellants

vs.

UNIVERSITY OF CALIFORNIA, et al.,

Defendants-Appellees

Appeal From The United States District Court
For the Northern District of California
Honorable Richard Seeborg, Judge Presiding
Northern District of California No. C 12-01978 RS

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Who can be sued under the Native American Graves Protection and Repatriation Act ("NAGPRA"), and what showing must an Indian tribe make to obtain an ancestor's remains? The Ninth Circuit previously ruled that remains could not be repatriated unless a current tribe proved a "significant relationship" to the remains (*Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004)), while NAGPRA prevents the transfer of "culturally unaffiliated" items unless a tribe establishes affiliation by a preponderance of evidence. 25 U.S.C. § 3004(a)(4).

The resolution of this action in the court below thwarts both of these legal standards, by precluding judicial review of the transfer of two "culturally unaffiliated" 9,000-year old skeletons to a tribe that did not establish a significant relationship to them. In justifying its repatriation decision, contrary to the wishes of scientists on its faculty, the University of California relied on regulations issued by the Department of the Interior in 2010, which purport to allow the return of "culturally unaffiliated" items to a tribe under certain circumstances not present here. *See* 43 C.F.R. § 10.11.

The University used this regulation to argue that the tribes had a "legally protected interest" in the skeletons. However, the regulations not only reverse the burden of proof, they implement "age and geography" as the sole factors for disposing of unaffiliated remains, contrary to the statutory text of NAGPRA and

the Ninth Circuit's interpretation of NAGPRA. *Bonnichsen, supra,* 367 F.3d at 877-879. Moreover, the regulations contemplate that the University had made a determination that the remains in question were subject to NAGPRA in the first place (*see* 43 C.F.R. § 10.11), a condition not met here. This appeal does not challenge the Department of Interior's 2010 regulations directly. However, the University cannot use an improper, inapplicable regulation to create a "legally protected" tribal interest that undermines *Bonnichsen*.

The District Court reluctantly ruled for the University and the tribes not because of merit, but on procedural grounds. Because the court found the tribes were indispensable to the action under Rule 19 (based on an untested "legally protected interest" in 9,000-year old skeletons), and because the court also found the tribes have sovereign immunity, it concluded the action had to be dismissed. The District Court noted that this result "raises troubling questions about the availability of judicial review under NAGPRA" and that "Congress likely intended actions such as the one at bar to proceed." In characterizing its decision as "undeniably an unsatisfactory result which a higher court or other branch of government may elect to address as a matter of policy," the District Court felt it was compelled to dismiss the case.

For many reasons, dismissal is not necessary. As NAGPRA applies equally to tribes and the federal government, and mandates using the district courts to

resolve disputes, neither side has immunity. In regard to Rule 19, tribes are not a necessary party when the case can move forward on procedural issues without harm or prejudice to the tribes. Appellants ask that the Ninth Circuit reinforce its own interpretation of NAGPRA as set forth in *Bonnichsen* and reject any application of Rule 19 that would allow erroneous repatriation decisions to go unchallenged.

STATEMENT OF JURISDICTION

Pursuant to Ninth Circuit Rule 28-2.2, appellants, Timothy White, Robert L. Bettinger, and Martha Schoeninger ("Appellants"), submit the following statement of jurisdiction:

I. BASIS FOR JURISDICTION OF THE DISTRICT COURT.

The District Court has jurisdiction over Appellants' action under Article III of the United States Constitution. 28 U.S.C. §§ 1331 and 1367(a), 25 U.S.C. § 3013, and 42 U.S.C. § 1983.

II. BASIS FOR JURISDICTION OF THE COURT OF APPEALS.

This Court has jurisdiction to hear this appeal as the orders and judgment appealed from are appealed after final judgment has been entered in this action pursuant to 28 U.S.C. § 1291. *See also Munoz v. Small Bus. Admin.,* 644 F.2d 1361, 1364 (9th Cir. 1981) ("an appeal from [a] final judgment draws into question all earlier nonfinal orders and all rulings which produced the judgment.") (Excerpts 1 – 24.)

III. TIMELINESS OF APPELLANTS' APPEAL.

The District Court's final judgment was filed on October 17, 2012. (Excerpts 1.) Notice of Appeal was filed on November 6, 2012. (Excerpts 91 – 122.) Appellants' appeal is timely pursuant to 28 U.S.C. § 2107(b) and Fed. R. App. Pro. 4(a)(1)(B).

ISSUES PRESENTED

1. Whether the duties imposed on Federal agencies and Native American tribes under NAGPRA, and the jurisdiction conferred by Congress to resolve NAGPRA disputes between Federal agencies, museums, and the tribes, preclude the tribes from claiming sovereign immunity under NAGPRA.

2. Whether the District Court erred by not allowing Appellants to conduct discovery to challenge the claim of defendant, Kumeyaay Cultural Repatriation Committee ("KCRC"), that it is entitled to sovereign immunity as "an arm of the tribe" for the twelve Native American tribes that form the Kumeyaay nation.

3. Whether the District Court erred in finding that the La Posta Band was a necessary party under Rule 19 when the tribe's "legally protected interest" is speculative and uncertain.

4. Whether the tribes can be considered "indispensable" when a judgment in their absence would be minimally prejudicial, the District Court can shape relief to

lessen any prejudice, and the granting of procedural relief would not prejudice the tribes.

5. Whether the District Court erred in ruling that Appellants did not qualify for the "public rights" exception to Rule 19, given that Appellants requested relief to cure defects in the University's administrative procedures and correcting those defects would not prejudice the tribes.

STATEMENT OF THE CASE

On April 16, 2012, Appellants filed a verified Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief ("Complaint") against the University of California ("University"), the Regents of the University of California, Mark Yudof, Marye Anne Fox, and Gary Matthews ("University Defendants"), in the Alameda County Superior Court, case number RG 12-625891. (Excerpts 1058-1081.) The Complaint included causes of action for (1) violation of NAGPRA, (2) breach of public trust, and (3) violation of First Amendment rights. (*Id.* at 1073-1077.) The Complaint sought declaratory and injunctive relief to prevent the transfer of two 9,000-year old skeletons (the "La Jolla Skeletons") and 25 cultural items that had been excavated at the University of California, San Diego in 1976, and that were scheduled to be transferred to the La Posta Band of Diegueno Mission Indians (the "La Posta Band"). (*Id*. at 1058-1081.)

Before Appellants filed suit in Alameda County, they tried to resolve the dispute about the La Jolla Skeletons with the University, beginning in December 2011. (*Id.* at 871-876.) In January 2012, the parties reached a Tolling Agreement in which Appellants agreed to "refrain from filing any legal action concerning the La Jolla skeletons until [Monday], April 16, 2012." (*Id*. at 955-956.)

On April 18, 2012, Appellants filed an Ex Parte Application for Temporary Restraining Order, and supporting pleadings, to prevent transfer of the La Jolla Skeletons without a court order. (*Id.* at 1133-1331.) On April 20, 2012, University Defendants filed a Notice of Removal of Action under 28 U.S.C. § 1441, in the United States District Court, Northern District of California, San Francisco / Oakland Division, case number C12-01978. (*Id*. at 1051-1053.)

On April 24, 2012, University Defendants filed a Notice of Pendency of Other Action. (Excerpts 1048-1050.) The notice stated that another action involving the same subject matter had been filed in the United States District Court, Southern District of California, on Friday, April 13, 2012 (*Kumeyaay Cultural Repatriation Committee v. University of California, et al.*). The notice said the plaintiff in the Southern District action is the KCRC, a committee of 12 tribes, including the La Posta Band, which sought to compel University Defendants to transfer the La Jolla skeletons to the KCRC. (*Id.* at 1049.) A copy of the

Southern District complaint was subsequently filed as an exhibit to a Request for Judicial Notice in the Northern District action. (Excerpts 293-308.)

On April 25, 2012, Appellants filed an Ex Parte Application for Temporary Restraining Order and supporting pleadings in the United States District Court. (*Id.* at 848-1047.) University Defendants opposed Appellants' request. (*Id*. at 839-847.) On April 27, 2012, the District Court issued a Temporary Restraining Order, to prevent University Defendants "from changing in any manner the current condition and location of the La Jolla skeletons, and associated funerary objects." (*Id.* at 836-838.) The TRO was set for hearing on May 11, 2012. (*Id*. at 838.)

On May 7, 2012, the parties stipulated to, and the District Court ordered, the entry of a preliminary injunction that enjoined University Defendants from changing the condition or location of the La Jolla skeletons and associated objects until entry of judgment in the Northern District action. (*Id*. at 832-835.)

University Defendants filed a Motion to Dismiss Complaint on May 9, 2012, pursuant to Federal Rules of Civil Procedure 12(b)(1), (6), and (7). (*Id*. at 804-831.) On May 23, 2012, Appellants filed a Petition for Writ of Mandamus and First Amended Complaint, containing the same three causes of action. (*Id*. at 765-801.) The First Amended Complaint added the KCRC as a defendant to the first cause of action, for violation of NAGPRA. (*Id*. at 781-782.) University

Defendants withdrew their pending Motion to Dismiss on May 24, 2012. (Excerpts 763-764.)

The University Defendants filed a Notice of Motion and Motion to Dismiss First Amended Complaint under Federal Rules of Procedure 12(b)(1), (6), and (7), and associated pleadings, on June 6, 2012. (*Id*. at 594-760.) By special appearance, KCRC filed a Notice of Motion and Motion to Dismiss First Amended Complaint under Federal Rule of Procedure 12(b)(1), and associated pleadings, on July 6, 2012. (*Id*. at 543-593.) Appellants filed a joint opposition to both motions to dismiss on July 23, 2012. (*Id.* at 179-542.) The University Defendants filed reply pleadings on August 9, 2012. (*Id*. at 149-178.) KCRC filed its reply brief on August 9, 2012. (*Id*. at 129-148.)

The hearing on the motions to dismiss was held on August 24, 2012. (*Id*. at 25-90.) The District Court issued its Order Granting Kumeyaay Cultural Repatriation Committee's Motion to Dismiss and Granting Regents' of the University of California Motion to Dismiss on October 9, 2012 ("Order"). (*Id*. at 2-24.) Judgment was entered on October 17, 2012. (*Id*. at 1.)

On October 25, 2012, the District Court signed a Stipulation for Injunction Pending Appeal, to enjoin University Defendants from changing the condition or location of the La Jolla skeletons and associated objects while this action is pending before the Ninth Circuit Court of Appeals, until 30 days after issuance of

the Ninth Circuit's issuance of mandate. (Excerpts 123-125.) Appellants filed their Notice of Appeal on November 6, 2012. (*Id.* at 91-122.)

STATEMENT OF FACTS

This case concerns the University's attempts to repatriate two extremely old, rare skeletons discovered in 1976 on property at the University of California, San Diego ("UCSD"). (Excerpts 768, ¶ 13.) The bones have great scientific significance due to the age of the two skeletons, which are estimated to date back 8,977 to 9,603 years ago. (*Id.*) They likely are older than the "Kennewick Man" skeleton found in 1976, the subject of federal litigation resolved in 2004. (*See Bonnichsen, supra,* 367 F.3d 864.) (*Id.* at 768, ¶ 13.) Because of their extreme age and relatively good condition, the La Jolla Skeletons present a unique opportunity for all people to understand human origins in North America. (*Id.*)

Congress passed NAGPRA in 1990. NAGPRA states that "Native American" means "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). The Ninth Circuit has held that human remains must bear a "significant relationship" to a presently existing tribe, people, or culture to be considered "Native American" within the meaning of NAGPRA. *Bonnichsen, supra,* 367 F.3d at 878. NAGPRA does not apply to remains that are not "Native American" (or "Native Hawaiian"). *Id.* at 875; *see also* 25 U.S.C. § 3001(9)-(10). NAGPRA's statutory scheme does not require repatriation of

"culturally unidentifiable" human remains, unless a tribe can establish cultural affiliation by a preponderance of the evidence. 25 U.S.C. § 3004(a)(4).

NAGPRA requires agencies and museums to compile an inventory of "Native American" human remains and cultural objects in their possession, and submit the inventory to the Department of the Interior ("DOI"). 25 U.S.C. § 3003. Museums must make a "threshold determination" that culturally unidentifiable remains are "Native American" before including them on a federal inventory. (*See* 75 Fed.Reg. 12387, at Excerpts 538.) The University of California has created a system-wide University Advisory Group on Cultural Repatriation and Human Remains and Cultural Items. (Excerpts 766, ¶ 17.)

The Kumeyaay Nation ("Kumeyaay"), a coalition of twelve Native American tribes, claims to have occupied the site on which the La Jolla Skeletons were found. (*Id.* at 770, ¶ 19.) These twelve tribes are represented by KCRC. (*Id.* at 767-768, ¶ 10.) Steven Banegas is the spokesperson for KCRC. (*Id*. at 773, ¶ 27.)

Although the Kumeyaay assert that the La Jolla Skeletons are culturally affiliated with their coalition of tribes, there is insufficient evidence to conclude that (1) the Kumeyaay are descended from the people who were buried 9,000 years ago, or (2) any Kumeyaay tribe occupied the site at the time the La Jolla Skeletons were buried. (*Id.* at 770-771, ¶ 19.) The evidence does not support a link between

the La Jolla Skeletons and any Kumeyaay tribe, or any currently existing Native American tribe, for the following reasons:

- The burial pattern of the La Jolla Skeletons differs from that of the Kumeyaay as reported in early ethnographies. Before the Spanish explorers made contact with North America, the Kumeyaay cremated, rather than buried, their dead.

- Preliminary carbon and nitrogen stable isotope analysis of human bone collagen from the La Jolla Skeletons is consistent with a year-round diet of open-ocean and some nearshore marine fish or marine mammals. This contrasts with the diet of the Kumeyaay, who lived on wild plants, supplemented with more small than large game, and in some places, fish. Seasonal dependence on marine foods would produce lower values of the isotope signals than those recovered from the La Jolla Skeletons.

- The skeletal morphology of the La Jolla Skeletons does not show any link to the Kumeyaay, or any other Native American tribe. The La Jolla Skeletons have long, narrow cranial vaults and short, relatively narrow faces compared with extant Native Americans. A detailed 2007 morphological study by Professor Douglas Owsley concluded the La Jolla Skeletons were not Native American.

- Because there has been no genetic testing of the La Jolla Skeletons (because the University has not allowed any testing), there is no genetic or DNA evidence linking the Kumeyaay or any other Native American tribe to the La Jolla Skeletons.

(Excerpts 770-771, ¶ 19.)

On October 22, 2008, the University submitted a "Notice of Inventory Completion" and inventory to the DOI, which listed the La Jolla Skeletons and other items associated with the remains. (*Id.* at 771, ¶ 20.) The 2008 report was silent on whether the La Jolla Skeletons were "Native American" within the

meaning of NAGPRA, and made no attempt to determine whether or not the La Jolla Skeletons were subject to NAGPRA. (Excerpts 771, ¶ 21.) The 2008 report concluded there was insufficient evidence to find that the remains were culturally affiliated with the Kumeyaay. (*Id.*) Because there was insufficient evidence to conclude the La Jolla Skeletons are "Native American" within the meaning of NAGPRA, the University's decision to include them on the October 22, 2008 inventory was legally erroneous. (*Id.* at 771, ¶ 22.)

In 2010, the DOI and its Secretary Ken Salazar ("Salazar") purported to promulgate a new federal regulation governing the disposition of "culturally unidentifiable" human remains that meet NAGPRA's definition of "Native American." (*Id.* at 772, ¶ 24.) Soon thereafter, Steven Banegas wrote to the UCSD campus and requested that the La Jolla Skeletons be repatriated to the La Posta Band, along with certain other objects. (*Id.* at 773, ¶ 27.)

On May 11, 2011, Defendant Yudof, President of the University, authorized UCSD to dispose of the La Jolla Skeletons under NAGPRA, subject to certain directions and recommendations. (*Id.* at 774, ¶ 30.) About six months later, on December 5, 2011, University Defendants published, or caused to be published, in the Federal Register, a Notice of Inventory Completion. (*Id.* at 776, ¶ 37.) The Notice stated that if no one else came forward and claimed the La Jolla Skeletons by January 4, 2012, the skeletons would be repatriated to the La Posta Band after

that date. (Excerpts 776, ¶ 37.) The Notice also made the following purported findings, among other findings:

- The La Jolla Skeletons are "Native American," pursuant to 25 U.S.C. § 3001(9).
- Pursuant to 25 U.S.C. § 3001(2), a relationship of shared group identity cannot be reasonably traced between the La Jolla Skeletons and any present-day Indian tribe.
- Pursuant to 25 U.S.C. § 3001(3)(A), approximately 25 objects found at the site are "reasonably believed" to have been placed with or near the La Jolla Skeletons at the time of death or later as part of the "death rite or ceremony."
- Pursuant to 43 C.F.R. § 10.11(c)(1), and based upon request from the Kumeyaay Cultural Repatriation Committee, on behalf of the 12 associated Kumeyaay tribes, disposition of the La Jolla Skeletons is to the La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California.

(Excerpts 776, ¶ 37.)

It may be possible to perform DNA sequencing on the La Jolla Skeletons. (*Id.* at 774, ¶ 31.) Not only would this research provide a wealth of information of interest to the general public, it could be used to assess whether or not the remains share any genetic affiliation with modern Native American groups. (*Id.*) Defendant Fox, the Chancellor of UCSD, and UCSD have authority to grant requests to study the Skeletons, but have refused to allow research to be conducted. (*Id.*, ¶ 32.) Appellants White, Bettinger, and Schoeninger have asked to study the skeletons, but the University has not granted their requests. (*Id.* at 774-775, ¶¶ 33-35.) The University's policy is that remains and cultural items shall normally

remain accessible for research by qualified investigators such as Appellants. (Excerpts 776, ¶ 36.) Therefore, it is highly probable that Appellants would be allowed to study the La Jolla Skeletons if they remain in the University's possession. (*Id.*)

The Kumeyaay tribes, including the La Posta Band, oppose any further research on the La Jolla Skeletons, let alone DNA testing, and they plan to bury the bones if repatriation is allowed to proceed. (*Id.* at 1040, ¶ 14.) Appellant Bettinger, a professor of Anthropology at the University of California, Davis, believes that because the La Jolla Skeletons are so old, and information about that era is so limited, it cannot reasonably be concluded that they share significant genetic or cultural features with presently existing indigenous tribes, people, or culture. (*Id.* at 1046, ¶ 3.) Professor Bettinger states that because the skeletons are so well preserved, and because they offer the opportunity to study patterns at a population level (rather than an individual level), "[n]o other set of New World remains holds such a high degree of research potential." (*Id.* at 1047:6-10.)

SUMMARY OF ARGUMENT

This appeal raises the following key issues: (1) whether Native American tribes or KCRC may assert sovereign immunity as a defense to a claim brought under NAGPRA; and (2) whether the tribes or KCRC should be treated as

"necessary" and "indispensable" parties in a case challenging the University's failure to comply with NAGPRA.

The universe of cases analyzing NAGPRA is limited.[1] The District Court noted that there is no case law addressing whether Native American tribes may claim sovereign immunity as a defense to claims filed under NAGPRA.

NAGPRA governs the relationship between three different types of entities: federal agencies, federally funded museums, and Native American tribes (as well as Native Hawaiian groups). It delineates duties, responsibilities, and evidentiary burdens for each in regard to the possession of human remains and cultural artifacts. NAGPRA grants jurisdiction to the United States district courts to hear "any action" alleging a violation of NAGPRA, and endows these courts with "the authority … to enforce the provisions of this Act." 25 U.S.C. § 3013. Both the requirements of NAGPRA and its legislative history demonstrate an intent to balance the interests of scientists and the tribes. Courts could not carry out their mandate to balance these interests and enforce NAGPRA if the tribes were allowed

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[1] "Judicial interpretation of NAGPRA through federal and state case law is very limited. There are thirty-five published cases pertaining to NAGPRA; twenty-two were decided or dismissed on procedural grounds, five were cases pertaining to criminal trafficking of Native remains, five cases stem from the Kennewick Man controversy, and one state case compares NAGPRA to state laws." Steve Titla and Naomi Thurston, *Repatriation Symposium: The Apache and NAGPRA*, 44 Ariz. St. L.J. 803, 807 (2012).

to assert sovereign immunity to avoid having erroneous repatriation decisions corrected by the courts.

Rule 19 of the Federal Rules of Civil Procedures provides guidelines for determining whether an absent party is so necessary and indispensable that a case should be dismissed if that party cannot be joined. To be "necessary," the absent party needs to show it has a "legally protected interest," which must be more than speculation about a future event.

The University did not meet its burden to prove that the tribes have a "legally protected interest" in the ownership and control of 9,000-year old skeletons where no evidence of a "significant relationship" was presented, and likely cannot be presented. The University's reliance on the 2010 regulations issued by the Secretary of the Interior – which require "culturally unaffiliated" remains and items to be returned to a requesting tribe if a museum or federal agency has not been granted permission by a tribe to keep them – must be addressed, even though neither the United States nor the Secretary of the Interior is a party to this action, as they were in *Bonnichsen*. The University cannot rely on a "legally protected interest" arising from a regulation that (1) contradicts the plain language and directives of NAGPRA; and (2) does not apply here, because the University never made a formal determination that the La Jolla Skeletons are "Native American" within the meaning of NAGPRA.

In analyzing the issue of whether cases must be dismissed if a necessary party has sovereign immunity, the District Court cited *Manygoats v. Kleppe*, a Tenth Circuit decision in which the court concluded that the case should proceed "in equity and good conscience" where doing so would cause no prejudice to the absent tribe. While acknowledging that the Ninth Circuit has consistently dismissed actions where a tribe with sovereign immunity is a necessary party, the District Court noted that Appellants could invite the Ninth Circuit to apply the logic of *Manygoats* to the current situation. Since such a decision would not prejudice the tribes, Appellants invite the Court to do so.

STANDARD OF REVIEW

The District Court's October 9, 2012 Order, and related October 17, 2012 Judgment, is reviewed *de novo* in its entirety. *See McGraw v. United States*, 281 F.3d 997, 1001 (9th Cir. 2002), *amended at* 298 F.3d 754; *King County v. Rasmussen*, 299 F.3d 1077, 1088 (9th Cir. 2002); *Dole Food Co., Inc. v. Watts,* 303 F.3d 1104, 1108 (9th Cir. 2002); *Madison v. Graham*, 316 F.3d 867, 869 (9th Cir. 2002); *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002).

De novo review means that the appellate court reviews the case "from the same position as the district court." *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002). "When *de novo* review is compelled, no

form of appellate deference is acceptable." *Salve Regina Coll. v. Russell,* 499 U.S. 225, 238 (1991).

A motion to dismiss without leave to amend will be affirmed only when it appears "beyond a doubt" that the complaint cannot be saved by further amendment. *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1021 (9th Cir. 2000).

Discovery orders of a district court are generally reviewed for abuse of discretion. *See Laub v. Department of the Interior*, 342 F.3d 1080, 1084, 1093 (9th Cir. 2003). However, whether information sought through discovery is relevant is an issue of law that is reviewed *de novo*. *Cacique, Inc. v. Robert Reisder & Co., Inc.,* 169 F.3d 619, 622 (9th Cir. 1999). This Court should review the District Court's denial of plaintiff's request for discovery *de novo* as the District Court based its decision on the ground that the information sought about the relationship between KCRC and the Kumeyaay tribes is not relevant or necessary.

LEGAL ARGUMENT

I. BECAUSE CONGRESS AUTHORIZED LAWSUITS BETWEEN THE UNITED STATES AND NATIVE AMERICAN TRIBES AND BALANCED THE INTERESTS OF BOTH PARTIES, NEITHER THE UNITED STATES NOR THE TRIBES ARE ENTITLED TO SOVEREIGN IMMUNITY UNDER NAGPRA.

The University Defendants argued in their motion to dismiss that both the KCRC and the tribes are entitled to sovereign immunity and may not be sued. The KCRC argued that it is entitled to sovereign immunity. The KCRC was not named as a respondent in plaintiffs' Writ Petition, and was named as a defendant in only

the first of the three causes of action, for declaratory and injunctive relief related to the University Defendants' violations of NAGPRA. (Excerpts 777-786.)

As noted by the District Court, neither party briefed the issue of legislative waiver of sovereign immunity under NAGPRA. (*Id*. at 10:21.) Nonetheless, the District Court raised this issue, and it therefore is appropriate to address it on appeal. *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1260 n.8 (9th Cir. 2010) (an argument not explicitly raised by a party is not waived where the district court nevertheless addressed the merits of the issue).

A. Congress Authorized the District Courts to Enforce NAGPRA Provisions Regarding Disputes Between Native American Tribes and Federal Agencies or Museums About the Disposition of Contested Human Remains and Cultural Items.

As the District Court noted, "NAGPRA includes an enforcement provision that creates a private right of action: '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.' *See* 25 U.S.C. § 3013; *Bonnichsen v. U.S. Dep't. of Army*, 969 F. Supp. 614, 627 (D. Or. 1997) (NAGPRA creates private right of action that provides for declaratory and injunctive relief)." (Excerpts 5:6-11 (emphasis added).) The district courts' authority to "enforce the provisions of this chapter" necessarily includes the ability to resolve disputes about ownership, disposition, and control of human remains, cultural items, funerary objects, and

sacred objects, whether "excavated or discovered on Federal or tribal lands." *See* 25 U.S.C. § 3002(a), (c), (d). Because the law applies equally to items discovered on Federal or tribal lands, and the courts must enforce those provisions equally, neither Federal nor tribal entities should be entitled to sovereign immunity.

NAGPRA imposes duties on both Federal and tribal entities. Museums and Federal agencies are required to compile an inventory of Native American human remains and associated funerary objects, as well as to identify the geographical and cultural affiliation of these items. 25 U.S.C. § 3003(a). Museums and agencies must consult with tribal leaders and supply documents as requested. 25 U.S.C. § 3003(b)(1)(A), (b)(2). Museums and Federal agencies also must provide a written summary of "unassociated funerary objects, sacred objects, or objects of cultural patrimony," in consultation with tribal leaders. 25 U.S.C. § 3004(a), (b)(1)(B).

The return of cultural items "shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items." 25 U.S.C. § 3005(a)(3). If cultural affiliation is not established, tribes "can show cultural affiliation by <u>a preponderance of the evidence</u> based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral tradition, historical, or other relevant information or expert opinion." 25 U.S.C. § 3005(a)(4) (emphasis added). Tribes also can seek the return of "sacred objects" by showing that the requestor is the

direct descendant of the person who owned it; the object was owned or controlled by the tribe; or the object was owned or controlled by a member of the tribe. 25 U.S.C. § 3005(a)(5). These provisions anticipate that there will be factual disputes regarding ownership and control of human remains and cultural items; the provisions impose a duty on the tribes to substantiate the reasons why they are entitled to a disputed item, by establishing an evidentiary burden that must be met.

The statute applies expressly to Native American tribes: it resolves disputes between the tribes and Federal agencies (or museums) about the possession and disposition of Native American remains and cultural items.[2] One provision states that if a tribe requests the return of cultural items "pursuant to this Act" and presents evidence, which if standing alone, would support a finding that the museum or Federal agency 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." 25 U.S.C. § 3005(c). NAGPRA establishes the evidentiary burdens and the legal inferences that apply when resolving disputes about Native American remains and cultural items.

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[2] While analyzing whether "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations," such as OSHA and ERISA, this Court noted that it had "not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them." *Donvovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113, 1115-1116 (9th Cir. 1985) (emphasis added). The Court determined that tribes are subject to laws of general applicability, as well as laws "expressly made applicable to them."

The balancing of evidentiary burdens and legal inferences must be addressed to a district court, the entity that enforces the provisions of NAGPRA. 25 U.S.C. § 3013. "Where there are multiple requests for repatriation … [and] 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 Act or by a court of competent jurisdiction." 25 U.S.C. § 3005(e) (emphasis added). Nothing in NAGPRA shall be construed to "deny or otherwise affect access to any court." 25 U.S.C. § 3009(3).

NAGPRA "reflects the unique relationship between the Federal Government and Indian tribes … and should not be construed to establish a precedent to any other individual, organization, or foreign government." 25 U.S.C. § 3010. It anticipates and authorizes lawsuits involving the tribes, museums, and/or Federal agencies about the repatriation of human remains and cultural items.[3] If either the tribes or the Federal agencies had sovereign immunity, courts would not have jurisdiction to resolve these disputes.

[3] NAGPRA does not "limit the application of any State or Federal law pertaining to theft or stolen property." 25 U.S.C. § 3009(5). NAGPRA specifically amended the law governing illegal trafficking in Native American remains and cultural items. 18 U.S.C. § 1170. The district courts thus have jurisdiction to resolve both civil and criminal issues arising from the passage of NAGPRA.

"Congress has plenary authority to limit, modify or eliminate the powers of self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.,* 523 U.S. 751, 754 (1998) (emphasis added).

Because NAGPRA expressly addresses the interests of American Indians, tribes previously argued that "only American Indians or American tribes can file suit alleging violations of NAGPRA." *Bonnichsen, supra,* 367 F.3d at 873 (9th Cir. 2004). The Ninth Circuit rejected this argument, finding that section 3013 (the enforcement provision of NAGPRA) "broadly confers jurisdiction on the courts to hear '*any action*' brought by '*any person alleging a violation*.'" *Id.,* citing 25 U.S.C. § 3013 (emphasis in decision only.)

> We hold that § 3013 does not limit jurisdiction to suits brought by American Indians or Indian tribes. "Any person" means exactly that, and may not be interpreted restrictively to mean only "any *American Indian* person" or "any Indian tribe."

Bonnichsen, supra, 367 F.3d at 874.

The plain language of NAGPRA establishes that Congress authorized district courts "to issue such orders as may be necessary to enforce the provisions of this act." 25 U.S.C. § 3013. Despite the fact that NAGPRA primarily involves

two entities with sovereign immunity – the United States and the Indian tribes – Congress designated the federal courts as the entity to enforce the law.

Given the fact that NAGPRA anticipates that "a court of competent jurisdiction" is needed to resolve disputes arising from "multiple requests for repatriation" (25 U.S.C. § 3005(e)), and imposes a "preponderance of the evidence" legal standard to establish "cultural affiliation" (25 U.S.C. § 3005(a)(4)), the statute envisions – and authorizes – lawsuits both brought by and against Native American tribes over repatriation issues. Congress specifically authorized federal lawsuits to resolve disputes under a law that governs the activities and conduct of federally funded museums, federal agencies, Indian tribes, and Native Hawaiian organizations. In order to make NAGPRA effective, Section 3013 must be read to waive the sovereign immunity of the United States and Indian tribes so that the federal courts can "enforce the provisions of this act."

B. NAGPRA Strikes a Balance Between the Interests of Scientists and Native American Tribes, a Balance That is Imperiled if Only the Tribes Have Sovereign Immunity.

In its Order granting dismissal, the District Court found "that plaintiffs like the scientists in this action unquestionably have standing to bring their claims under the enforcement provision" because "§ 3013 does not limit jurisdiction to suits brought by American Indians or Indian tribes." (Excerpts 23:11-16, citing *Bonnichsen, supra,* 367 F.3d at 874.) Congress intended that there be "judicial

review of determinations made under NAGPRA," and not just to protect the interest of Native Americans. (*Id*. at 23:6-11, citing *Bonnichsen, supra,* 367 F. 3d at 874 n. 14 (NAGPRA "was not intended merely to benefit American Indians, but rather to strike a balance between the needs of scientists, educators, and historians on the one hand, and American Indians on the other.").)[4]

The District Court noted that neither side in this action had "identified a case directly addressing whether Native American tribes may claim sovereign immunity as a defense to claims advanced under NAGPRA," but acknowledged that "[m]ultiple courts have found that the federal government's immunity is waived under NAGPRA, by operation of the law's enforcement provision, and the Administrative Procedures Act." (Excerpts 10:12-14, 11:5-7.) If the tribes have sovereign immunity under NAGPRA and the federal government does not, it

[4] "Thus, NAGPRA proves that 'the disposition and treatment of native American human remains and cultural items can be achieved in a manner that reflects respect for the human rights of native Americans, and for the values of science and public education.'" Michelle Hibbert, *Galileos or Grave Robbers? Science, the Native American Graves Protection and Repatriation Act, and the First Amendment*, 23 Am. Indian L. Rev. 425, 457 (1999) (quoting 136 Cong. Rec. at H10, 989 [comments of Rep. Rhodes]).

would create an imbalance in a landmark law that was intended to put scientists and Native American tribes on equal footing.[5]

> [H]onoring tribal sovereign immunity will permit tribes to frustrate review under NAGPRA by refusing to submit to jurisdiction where, as here, a regulated entity has made a determination favorable to the tribes and decided to repatriate remains. At the same time, tribes retain the option of waiving sovereign immunity to challenge an unfavorable determination under NAGPRA – as KCRC has done in the Southern District. In other words, invoking sovereign immunity selectively permits the tribes to claim the benefit of NAGPRA, without subjecting themselves to its attendant limitations. This is undeniably an unsatisfactory result which a higher court or other branch of government may elect to address as a matter of policy.

(Excerpts 23:21-24:1.)

NAGPRA's balanced approach is reflected in the fact that the Review Committee established by the Secretary of the Interior "to monitor and review the implementation of the inventory and identification process and repatriation activities" is composed of seven members: three from Indian tribes and Native Hawaiian organizations; three from national museum and scientific organizations; and one from a list of persons developed and consented to by the other members. 25 U.S.C. § 3006(a), (b). If one class of governmental litigants is entitled to

[5] "[NAGPRA] is a deftly calibrated equilibrium balancing the interests of the museum, scientific, and Indian communities in Native American cultural items, including human remains, funerary objects, sacred objects, and objects of cultural patrimony." Matthew H. Birkhold, *Tipping NAGPRA's Balancing Act: The Inequitable Disposition of "Culturally Unidentified" Human Remains Under NAGPRA's New Provision*, 37 Wm. Mitchell L. Rev. 2046, 2047-2048 (2011).

sovereign immunity under NAGPRA while another class of governmental litigants is not, the statute becomes skewed and imbalanced.

1. <u>Congress Delegated Enforcement of NAGPRA Provisions Solely to the United States District Courts</u>.

At the hearing on the motions to dismiss, the District Court asked counsel for University Defendants if anyone could ever contest a decision to repatriate skeletal remains to an Indian tribe, so long as the tribes had sovereign immunity under NAGPRA. Counsel replied that because the "statute specifically authorizes the Secretary of the Interior to enforce the provisions of NAGPRA," and the Secretary "can waive the sovereign immunity of the tribe," scientists could lobby the Secretary to sue the University. The Secretary "could join the tribes because the United States can waive their sovereign immunity." (Excerpts, 30:2-24.)

The District Court then asked if statutory language authorizing jurisdiction "over any action brought by any person" was limited to the Secretary of the Interior and a representative of a tribal party. Counsel responded that tribes could sue, the Secretary could sue, and private parties could sue "[i]f tribes had waived their immunity or chose to waive their immunity." (*Id.* at 31:2-22.) Counsel said scientists are "free to lobby the Secretary of the Interior," who could take action if he or she deems it appropriate, but "the fact that the tribes would otherwise have sovereign immunity would not be relevant to such an action." (*Id.* at 33:9-15.)

Sovereign immunity is relevant, and as applied in the decision below, would create a one-sided statute where Native American tribes can use NAGPRA as a sword or shield, depending upon whether they want to enforce the law or avoid a legal challenge. NAGPRA's language is straightforward: "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 Act." 25 U.S.C. § 3013 (emphasis added). NAGPRA does not mandate a two-step process where private parties must lobby the Secretary of the Interior for permission to sue a tribe, and then see if the Secretary will waive the tribe's immunity. Contrary to counsel's claim at oral argument, the sole entity authorized by Congress to enforce the provisions of NAGPRA is the United States District Court.

The following limited duties of the Secretary of the Interior are specified in NAGPRA (25 U.S.C. § 3001, *et seq.*):

- to give museums additional time for inventory work (§ 3003(c));
- to publish notices in the Federal Register (§ 3003(d)(3));
- to monitor and review implementation of policies and procedures (§ 3006(a));
- to appoint 7 members to a Review Committee (3 persons from Native American tribes or Native Hawaiian organizations, 3 persons from

museums or scientific organizations, and 1 person consented to by the other 6 members) (§ 3006(b));

- to consult with the Review Committee in developing regulations (§ 3006(c)(7));
- to ensure that members of the Review Committee have access to cultural items and scientific and historical documents (§ 3006(f));
- to establish rules and regulations for the Review Committee (§ 3006(g));
- to assess civil penalties against museums for non-compliance with NAGPRA requirements (§ 3007(a)); and
- to make financial grants to Native American tribes, Native Hawaiian organizations, and museums in regard to NAGPRA (§ 3008).

Nothing in the statute authorizes the Secretary of the Interior to sue the tribes on behalf of private parties, or to waive the tribes' sovereign immunity.

Moreover, as a policy matter, requiring approval of the Secretary of the Interior to determine whether a tribe can be sued would jeopardize precedent, create conflicts of interest, and politicize legal issues. Different Secretaries could make different decisions about sovereign immunity for different tribes at different times, without the benefit of judicial consistency or precedent on the matter of who can be sued for violating NAGPRA. The Secretary could be conflicted about

whether to sue a Native American tribe if a federal agency or museum were named as a party in the same suit.

There is no legal or factual basis under NAGPRA to require a private party to obtain the approval of the Secretary of the Interior before suing a tribe, or for allowing the Secretary to waive the sovereign immunity of Native American tribes or tribal entities. "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Okla. Tax Com'n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). "Congress has always been at liberty to dispense with such tribal immunity or to limit it." *Okla. Tax Com'n, supra,* 498 U.S. at 510. NAGPRA nowhere provides the Secretary of the Interior "the liberty to dispense with tribal immunity."

2. <u>Because the Sovereign Immunity of the United States and Native American Tribes is Coextensive, and NAGPRA Balances Their Interests, Congress Would Not Have Waived the United States's Immunity While Allowing Immunity for the Tribes</u>.

"An Indian tribe's immunity is coextensive with the United State's immunity …." *Wichita & Affiliated Tribes v. Hodel,* 788 F.2d 765, 773 (D.C. Cir. 1986) (citing *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506, 514 (1940)). "The common law immunity afforded Indian tribes is coextensive with that of the United States and is similarly subject to the plenary control of Congress." *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir. 1989).

"While tribal sovereign immunity is not coextensive with that of the states, tribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States." *Somerlott v. Cherokee Nation Distribs.*, 686 F.3d 1144, 1150 (10th Cir. 2012) (internal citations omitted). "Coextensive" is defined as "having the same limits, boundaries, or scope." Webster's II New Riverside University Dictionary (1984).

In regard to the federal government's immunity under NAGPRA, the Ninth Circuit previously determined that the United States waives its sovereign immunity "with respect to all claims for nonmonetary relief against the United States which allege that a federal agency or official 'acted or failed to act in an official capacity or under color of legal authority.'" *Bonnichsen v. U.S. Dep't. of Army,* 969 F.Supp. 614, 627 (D. Or. 1997) (citing *Presbyterian Church (USA) v. U.S. Dep't. of Army,* 870 F.2d 518, 523-26 (9th Cir. 1989)). Since almost any suit against the government under NAGPRA would be based upon compliance or non-compliance with the provisions of the law, Congress effectively waived sovereign immunity for the United States when it enacted NAGPRA.

The district court in *Bonnichsen* found that an argument "can be made in favor of an implied waiver of sovereign immunity in § 3013," but found there was no need to resort to an implied waiver "since the Ninth Circuit has already decided that there is an express waiver of sovereign immunity under these circumstances."

Bonnichsen v. U.S. Dep't. of Army, supra, 969 F.Supp. at 627 n. 17. Given that tribal immunity is coextensive with the immunity of the United States, the express waiver of the United States's immunity, and the goal of NAGPRA to balance the needs of scientists with the needs of American Indians, Congress would not have waived the United State's immunity while allowing immunity for the tribes.

II. THE DISTRICT COURT ERRED BY NOT ALLOWING APPELLANTS TO CONDUCT DISCOVERY TO CHALLENGE KCRC'S CLAIM THAT IT IS ENTITLED TO SOVEREIGN IMMUNITY AS AN ARM OF THE KUMEYAAY TRIBES.

Should this Court determine that Native American tribes are entitled to sovereign immunity against suits brought under NAGPRA, it does not necessarily follow that KCRC is entitled to sovereign immunity as "an arm of the tribe," as the District Court decided. (Excerpts 11-13.) The District Court analyzed the "arm of the tribe" immunity issue by applying the six factors outlined in the "Tenth Circuit's seminal case, *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort,* 629 F.3d 1173, 1187 (10th Cir. 2010)." (Excerpts 12:5-9.) The six factors to examine are: "(1) the entity's method of creation; (2) the entity's purpose; (3) the entity's structure, ownership, and management, including the level of control the tribe exercises over the entity; (4) whether the tribe intended to extend its sovereign immunity to the tribe; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal immunity are served by granting immunity to the entity." *See J.L. Ward Assoc., Inc. v. Great Plains*

Tribal Chairman's Health Bd., 2012 U.S. Dist. LEXIS 4164, *36 (D.S.D. Jan. 13, 2012) (*citing Breakthrough, supra,* 629 F.3d at 1181).

In their opposition to the motions to dismiss, Appellants stated that they had only a limited ability to respond to the "arm of the tribe" immunity argument because they did not have access to documents or information relevant to the *Breakthrough* factors, including the formation of KCRC and the tribal laws authorizing creation of KCRC. (Excerpts 194:13-16.) Plaintiffs pointed out that facts concerning KCRC's decision-making procedures and the tribes' funding of KCRC were not fully developed. (*Id*. at 193:6-13.) In the event that the District Court was inclined to accept the immunity argument, plaintiffs sought leave to "conduct limited discovery relevant to the *Breakthrough* factors." (*Id.* at 194:18-22.) While acknowledging this request, and the fact that some "preliminary discovery might be appropriate" in other circumstances, the District Court ruled that KCRC was entitled to immunity as an arm of the tribe because of the fact that its "purpose – to recover tribal remains, and educate the public accordingly – is core to the notion of sovereignty." (*Id.* at 13:7-9.)

In weighing the *Breakthrough* factors, and impliedly denying Appellants' discovery request as not relevant, the District Court held that KCRC's "self-interested and unsupported claim" that the Kumeyaay tribes intended to extend their sovereign immunity to KCRC cannot stand. (*Id*. at 13:3-5.) The District

Court also noted that KCRC's claim that the tribes had not granted KCRC the authority to waive immunity was "inconsistent" with the fact that KCRC apparently has done so in the lawsuit filed in the Southern District of California. (Excerpts 13:5-7.) Given the fact that courts should be "extra cautious" before dismissing a suit if plaintiff would have no other alternative forum available (*Makah Indian Tribe v. Verity,* 910 F.2d 555, 560), the District Court should have granted Appellants' request for limited discovery into the *Breakthrough* factors.

Analysis of these six factors requires a balancing of the facts. It is undisputed that the facts in this action were not fully developed and were not made equally available to Appellants. Given the findings that at least one of KCRC's claims was "unsupported" and another claim was "inconsistent" with the facts, Appellants should have been provided the opportunity to explore all six factors to determine if there were other inconsistencies or unsupported claims.

The District Court did not specifically deny Appellants' request for limited discovery as "not relevant." However, by ruling that other factors are not dispositive because KCRC's purpose is "core to the notion of sovereignty" (Excerpts 13:7-9), the District Court impliedly found the other *Breakthrough* factors to be irrelevant. As noted above, in the "Standard of Review" section, the issue of whether information sought through discovery is relevant must be reviewed *de novo*. *Cacique, supra,* 169 F.3d at 622.

When tribal entities voluntarily produce information regarding their alleged immunity, they waive "sovereign immunity for the limited purpose of determining whether the tribal entities are arms of the tribe." *Cash Advance and Preferred Cash Loans v. Colorado,* 242 P.3d 1099, 1114-115 (Colo. 2010) (en banc). KCRC, by producing information to the District Court regarding its "arm of the tribe" immunity, waived sovereign immunity in regard to this issue.

In order to fully develop the record and the facts related to the important public policy issues raised by this action, this Court at a minimum should reverse the orders to dismiss and remand to the District Court with instructions to allow Appellants to conduct limited discovery on the "arm of the tribe" factors.

III. THE DISTRICT COURT ERRED IN FINDING THAT THE TRIBES WERE NECESSARY PARTIES UNDER RULE 19 WHEN THE TRIBES' "LEGALLY PROTECTED INTEREST" IS SPECULATIVE AND UNCERTAIN.

The University Defendants filed a Rule 19 motion asking the District Court to dismiss the action on the grounds that the Kumeyaay tribes are "indispensable" parties. (Excerpts 15:17-20.) The indispensable party analysis requires the district court to determine three things: (1) whether an absent party is necessary; (2) if necessary, whether the party can be joined; and (3) if the party cannot be joined, whether the party is indispensable so that in "equity and good conscience" the action should be dismissed. *Quileute Indian Tribe v. Babbitt,* 18 F.3d 1456, 1458

(9th Cir. 1994). The burden of persuasion on a Rule 19 motion for dismissal is on the moving party. *Makah, supra,* 910 F.2d at 558.

A. **The District Court Erred In Concluding That the KCRC and the La Posta Band Were Necessary Parties Because the University Defendants Did Not Prove the Tribes Were Necessary.**

The tribes would be considered "necessary" under Rule 19 if they "claim[] an interest relating to the subject of the action and [are] so situated that disposing of the action in [their] absence may: (i) as a practical matter impair or impede [their] 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). To determine if an absent party is "necessary," the court must determine "whether the absent party has a *legally protected interest* in the suit," which must be more than a financial stake and "more than speculation about a future event." *Makah, supra,* F.2d at 558 (emphasis in original).

The "legally protected interest" claimed by the tribes, and accepted by the District Court, is the possession and ownership of the skeletal remains. (*See* Excerpts 609:19-21; *see also* Excerpts 16:20-22.) In their motion, the University defendants stated only that the tribes "have an obvious interest in the La Jolla Remains" because they are "the designated recipients in the University's Notice of Inventory Completion." (*Id.* at 609:19-21.) The Notice of Inventory Completion

is based upon compliance with NAGPRA and "pursuant to 43 C.F.R. § 10.11." (Excerpts 800-801.) For tribes to make an ownership claim under NAGPRA – the stated purpose of KCRC (*id.* at 631:6-8) – the remains must qualify as "Native American." "NAGPRA requires that human remains bear a significant relationship to a *presently existing* tribe, people, or culture to be considered Native American." *Bonnichsen, supra,* 367 F.3d at 878 (emphasis in original).

A one-sentence conclusory offer of proof, based solely on the Notice of Inventory and a questionable DOI regulation, is insufficient evidence of a "legally protected interest" when entitlement to remains under NAGPRA requires a party to establish a "significant relationship" between a presently-existing tribe and remains at issue. The University here offered no evidence of a relationship, let alone a significant relationship, between the La Posta Band and the 9,000-year old skeletons that warranted treatment of the skeletons as "Native American."

Because no showing was made that the La Posta Band had a significant relationship to the La Jolla Skeletons, its alleged "legally protected interest" is simply "speculation about a future event." *Makah, supra,* 910 F.2d at 558. The Rule 19 motion to dismiss should have been denied for insufficient evidence.

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1. Given the Age of the La Jolla Skeletons, and the Unchallenged Scientific Evidence Showing That the Skeletons are Not Native American, the Tribes' "Legally Protected Interest" is Speculative and Uncertain.

The La Posta Band was designated by the University to be the recipients of the La Jolla Skeletons, pursuant to NAGPRA. The main goals of NAGPRA are "to respect the burial traditions of modern-day American Indians and to protect the dignity of the human body after death." *Bonnichsen, supra,* 367 F.3d at 876, citing H.R.Rep. No. 101-877, U.S. Code Cong. & Admin. News at 4367, 4369 (1990). These purposes are not served "by requiring the transfer to modern American Indians of human remains that bear no relationship to them." *Id*. at 876.

The human remains in *Bonnichsen* (the "Kennewick Man") were estimated to be between 8,340 and 9,200 years old. *Id*. at 869. The shape of the face and skull differed from those of modern American Indians. *Id*. at 870. Experts concluded that the remains "were unlike those of any known present-day population, American Indian or otherwise." *Id.*

Nonetheless, the Secretary of the Interior decided that the remains were "Native American" within the meaning of NAGPRA, and were culturally affiliated with present-day Indian tribes. *Bonnichsen, supra,* 367 F.3d at 872. This decision was based "solely on the age of the remains and the fact that the remains were found within the United States." *Id.* Designating remains as "Native American," based solely on geography and age, is an "extreme interpretation" that contradicts

the language used in NAGPRA. *Id*. at 878. The law was enacted "with modern-day American Indians' identifiable *ancestors* in mind." *Id.* at 879, citing H.R.Rep. No. 101-877, U.S.Code Cong. & Admin.News at 4367, 4372 (1990) (emphasis in original). "Human remains that are 8,340 to 9,200 years old and that bear only incidental genetic resemblance to modern-day American Indians … cannot be said to be the Indians' 'ancestors' within Congress's meaning." *Id*. at 879.

> Congress enacted NAGPRA to give American Indians control over the remains of their genetic and cultural forbearers, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture. The age of Kennewick Man's remains, given the limited studies to date, makes it almost impossible to establish *any* relationship between the remains and presently existing American Indians. At least no significant relationship has yet been shown. We cannot give credence to an interpretation of NAGPRA advanced by the government and the Tribal Claimants that would apply its provisions to remains that have at most a tenuous, unknown, and unproven connection, asserted solely because of the geographical location of the find.

Bonnichsen, supra, 367 F.3d at 879 (emphasis in original).

The *Bonnichsen* opinion set aside the Secretary's determination that Kennewick Man's remains were Native American, under NAGPRA, on the ground that the definition was "arbitrary" or "capricious" under the Administrative Procedure Act because it was based on "inadequate factual support." *Bonnichsen, supra,* 367 F.3d at 879. Due to a lack of substantial evidence, "no reasonable

person could conclude on this record that Kennewick Man is 'Native American' under NAGPRA." *Bonnichsen, supra,* 367 f.3d at 880 n. 20.

There was no evidence showing that the remains were "connected by some special or significant generic or cultural relationship to any presently existing indigenous tribe, people, or culture." *Id*. at 880. One of the experts for the Secretary noted that "the available evidence is insufficient either to prove or disprove cultural or group continuity dating back earlier than 5,000 B.C." *Id*. at 881. "The age of Kennewick Man's remains … makes it almost impossible to establish *any* relationship between the remains and presently existing American Indians." *Id.* at 867.

When evaluating a motion to dismiss under Rule 12(b)(6), the court must accept all material allegations in the complaint as true, even if doubtful, and construe them in the light most favorable to the non-moving party. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). Appellants allege in their Complaint that scientists estimate the La Jolla bones to "date back 8,977 to 9,603 years ago" (similar in age to the remains of the Kennewick Man). (Excerpts 768, ¶ 13.) Appellants further allege there is insufficient evidence to conclude that the Kumeyaay are descended from the people who were buried at the La Jolla site almost 10,000 years ago, based on the facts that the Kumeyaay cremated their dead before Spanish explorers came to North America, and the skeletal morphology of

the La Jolla skeletons does not show any link to the Kumeyaay, or any other Native American tribe. (*Id.* at 770-71, ¶ 19.) Two experts who have studied the La Jolla skeletons (Professor Owsley of the Smithsonian Institution[6] and Philip Walker) concluded that they were not Native American. (*Id.* at 773, ¶ 28.)

These findings and allegations, which the Court must accept as true, were not challenged by the University. In its motion, the University made no attempt to show that the 9,000-year old skeletons have a "significant relationship" to the La Posta Band or any other existing tribe. The alleged "legally protected interest" of the La Posta Band is therefore speculative.

2. The Notice of Inventory Completion Contradicts Allegations in the First Amended Complaint and Admits That the Remains Do Not Meet the NAGPRA Definition of Native American.

The University's Rule 19 motion refers to the Notice of Inventory Completion as evidence of the tribes' "obvious interest" in the remains. (Excerpts 609:19-21.) The Notice states summarily that the remains are "Native American," but does not explain why. (Excerpts 800.) The Notice admits that "a relationship of shared group identity cannot reasonably be traced between the Native American human remains and any present-day Indian tribe." (*Id.*) (Emphasis added.) This admission violates NAGPRA's requirement that to treat the remains as "Native American," there must be proof of a "significant relationship" between the remains

[6] Dr. Owsley sought to bring the Kennewick Man remains to the Smithsonian Institution for further study. *Bonnichsen, supra,* 367 F.3d at 870.

and a present-day tribe. Thus, after characterizing the remains as "Native American," the Notice establishes that the remains do not meet the NAGPRA standard for Native American.

The Notice then states that "[e]vidence indicates that the land from which the Native American human remains were removed is the aboriginal land of the Diegueno (Kumeyaay) Tribe," and identifies the present-day descendants of the Diegueno as the Kumeyaay tribes. (Excerpts 800.) The University thereby designates the remains as "Native American" based on solely on geography and age factors that have been disapproved by Ninth Circuit law. *Bonnichsen, supra,* 367 F.3d at 878.

In assessing the Rule 19 motion, the District Court noted that plaintiffs "may be correct" that the tribes have "no valid claim to the remains," and that the tribes' claim "has not yet been tested." (Excerpts 16:17-26.) The District Court should have gone further, and compared the University's Rule 19 claim about the tribes' "legally protected interest" to allegations in the First Amended Complaint stating that the remains are not Native American. (*see* Excerpts 773, ¶ 28), which identifies the scientists who made this determination.) The District Court had a duty to accept Appellants' allegations as true, and to construe them in the light most favorable to Appellants. *Twombly, supra,* 550 U.S. at 570. It did not do so.

By accepting the University's claims about the tribes' "legally protected interest," the District Court improperly discounted plaintiffs' allegations that the remains are not Native American. The Notice of Inventory upon which the University relies as proof of the tribes' "legally protected interest" shows that the remains do not meet NAGPRA's definition of "Native American." The Notice concedes that "a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian tribe." (Excerpts 800.) Because this "legally protected interest" is speculative and self-contradictory, the District Court should have denied the Rule 19 motion to dismiss.

B. The University Cannot Rely on the 2010 DOI Regulations, Which Contradict NAGPRA and *Bonnichsen*, to Establish the Tribes' "Legally Protected Interest" in the La Jolla Skeletons.

As it did in its Motion to Dismiss, the University likely will claim that the 2010 issuance, by the Secretary of the Interior, of regulations governing "culturally unaffiliated" remains meets NAGPRA's definition of "Native American." (*See* Excerpts 605:11-17, citing 43 C.F.R. § 10.11(c).) The University's Notice of Inventory Completion states that disposition of the La Jolla Skeletons to the La Posta Band is being made "[p]ursuant to 43 C.F.R. § 10.11." (Excerpts 801.)

Under the 2010 regulation, museums and Federal agencies that are unable to prove a "right of possession" to "culturally unidentifiable human remains" must offer to transfer control of the remains to Indian tribes and Native Hawaiian

organizations, based on which tribe owns the tribal land from which the remains were excavated or removed, or which tribes are recognized as aboriginal to the area from which the remains were removed. 43 C.F.R. § 10.11(c)(1). To establish a "right of possession" to unassociated funerary and sacred objects, the museum or Federal agency must show that possession was obtained with "the voluntary consent of an individual or group that had authority of alienation." 43 C.F.R. § 10.10(a)(2).

43 C.F.R. § 10.11(c) contradicts provisions of NAGPRA. If cultural affiliation of human remains and funerary objects is not established through NAGPRA's inventory process, a tribe can request that these items be returned, but the tribe has the burden to "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." 25 U.S.C. § 3005(a)(4).

NAGPRA puts the burden on a tribe to establish cultural affiliation by a preponderance of the evidence. The 2010 DOI regulation shifts the burden to the museum or Federal agency, which must prove that they have a right to maintain possession. If they cannot do so, the remains must be transferred to the tribe that has, or at one time had, possession of the land where the remains were found.

Under NAGPRA, if a tribe or a known lineal descendant requests the return of unassociated funerary or sacred objects under NAGPRA, the tribe or descendant must present evidence that would support a finding that a museum or Federal agency did not have the right of possession. If they do so, the agency or museum is required to return the objects – unless it overcomes the inference by proving it has a right to the objects. 25 U.S.C. § 3005(c). Again, the tribe or descendant has the burden to make a preliminary evidentiary showing as to the objects. The 2010 regulation purports to abolish that requirement and to require the museum or agency to prove a "right of possession" to keep whatever culturally unaffiliated objects it already has.

A similar attempt to revise NAGPRA through regulations was rebuffed in *Bonnichsen*. The Secretary of the Interior at that time issued a regulation that changed the definition of "Native American," and argued that the federal courts had to defer to the regulatory definition. *Bonnichsen, supra,* 367 F.3d at 877. The Ninth Circuit held that because the statutory definition was unambiguous, no deference was owed to the Secretary's contrary interpretation. *Id.* In addition, because the regulation "conflict[ed] with NAGPRA's plain language," it was held to be invalid. *Id.* at 877-878.

Finally, 43 C.F.R. § 10.11(c) imposes "age and geography" as the factors for determining which tribes are entitled to possession of culturally unaffiliated remains and objects, an interpretation of NAGPRA that *Bonnichsen* rejected:

> Under the Secretary's view of NAGPRA, all graves and remains of persons, predating European settlers, that are found in the United States would be 'Native American' in the sense that they presumptively would be viewed as remains of a deceased from a tribe 'indigenous' to the United States, even if the tribe had ceased to exist thousands of years before the remains were found, and even if there was no showing of any relationship of the remains to some existing tribe indigenous to the United States.

Bonnichsen, supra, 367 F.3d at 878.

For the same reasons that the Ninth Circuit rejected the Secretary's attempt to revise NAGPRA's definition of "Native American," it should not accept the claim that the 2010 regulation gives the La Posta Band a "legally protected interest" in the La Jolla Skeletons:

> We cannot give credence to an interpretation of NAGPRA advanced by the government and the Tribal Claimants that would apply its provisions to remains that have at most a tenuous, unknown, and unproven connection, asserted solely because of the geographical location of the find.

Bonnichsen, supra, 367 F.3d at 879.

43 C.F.R. § 10.11(c) purports to require museums and Federal agencies to transfer control of culturally unidentifiable remains and objects to tribes based on whether the tribe owned the land when the remains were removed, or whether the tribe is recognized as "aboriginal to the area" from which the remains were

removed (if the land is not currently owned by a tribe). This is repatriation based solely on the geographical location of the find, and it is contrary to NAGPRA's purposes and provisions. 43 C.F.R. § 11.10(c) does not justify return of the La Jolla Skeletons to the La Posta Band, and does not give them a "legally protectable interest."

IV. THE TRIBES ARE NOT INDISPENSABLE BECAUSE A JUDGMENT RENDERED IN THEIR ABSENCE WOULD BE MINIMALLY PREJUDICIAL, THE DISTRICT COURT CAN SHAPE RELIEF TO LESSEN PREJUDICE, AND THE GRANTING OF PROCEDURAL RELIEF WOULD NOT PREJUDICE THEM.

Should this Court decide that the tribes are not entitled to sovereign immunity under NAGPRA or are not necessary parties under Rule 19, the case could be decided without further analysis of the "indispensable party" factors. *Quileute, supra,* 18 F.3d at 1458. However, if the tribes are held to be necessary parties that are entitled to sovereign immunity, the Court must determine whether the tribes are indispensable so that in "equity and good conscience" the action should be dismissed. *Id.*

A. <u>The Tribes Are Not Indispensable Parties Because a Judgment Rendered in Their Absence Would Be Minimally Prejudicial</u>.

Four factors determine whether the La Posta Band is indispensable under Rule 19(b): (1) the extent to which a judgment rendered in the tribes' absence would prejudice the tribes or existing parties; (2) the extent to which any prejudice could be lessened or avoided; (3) whether a judgment rendered in the tribes'

absence would be adequate; and (4) whether plaintiffs would lack an adequate remedy if the action were dismissed. Fed. R. Civ. P. 19(b). As the District Court stated, "An 'indispensable party' is 'one who not only has an interest in the controversy, but has an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'" (Excerpts 18:28-19:3, citing *EEOC v. Peabody W. Coal Co.,* 610 F.3d 1070, 1078 (9th Cir. 2010).)

As to the first factor, the District Court ruled 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." (Excerpts 19:7-9.) However, given the Ninth Circuit's rulings in *Bonnichsen* about the difficulty, if not impossibility, of establishing a "significant relationship" between the remains and a present-day existing tribe, the tribes' interests in the remains are entirely speculative:

- "Human remains that are 8,340 to 9,200 years old and that bear only incidental genetic resemblance to modern-day American Indians … cannot be said to be the Indians' 'ancestors' within Congress's meaning." *Bonnichsen, supra,* 367 F.3d at 879.

- "The age of Kennewick Man's remains … makes it almost impossible to establish *any* relationship between the remains and presently existing American Indians." *Bonnichsen, supra,* 367 F.3d at 867.
- One of the experts for the Secretary noted that "the available evidence is insufficient either to prove or disprove cultural or group continuity dating back earlier than 5,000 B.C." *Id*. at 881.

No court can yet decide whether or not the tribes have a "significant relationship" to the La Jolla Skeletons. However, the similarity of the facts and issues in this matter to *Bonnichsen* demonstrate that the prejudice of a judgment in the absence of the tribes may be so minimal that they are not indispensable.

B. <u>The Tribes Are Not Indispensable Parties Because the District Court Can Shape Relief to Lessen Potential Prejudice and to Avoid Dismissal</u>.

As to the second "indispensable" factor, the extent to which prejudice could be lessened or avoided, "Rule 19(b) directs a district court to consider the possibility of shaping relief to accommodate these four interests," such that courts should consider modifying judgments as an alternative to dismissal. *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 111-112 (1968); *see also Makah, supra,* 910 F.2d at 560 ("[The] *shaping of relief* to lessen prejudice may weigh against dismissal. The Supreme Court has encouraged shaping relief to lessen dismissal."). (Emphasis in original.)

District courts have the authority to postpone deciding motions, including Rule 19 motions, until further information is available. Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial, § 9:172, p. 9-61 (The Rutter Group 2013), citing *Ilan-Gat Engineers, Ltd. v. Antigua Int'l Bank,* 659 F.2d 234, 241 (D.C. Cir. 1981). If the information needed can be obtained by discovery, "the court may postpone deciding the motion until discovery is closed." Schwarzer, *supra,* § 9:173, p. 9-61. The District Court could allow limited discovery to both sides on the issue of whether the remains qualify as Native American, and then conduct a hearing on that issue before deciding the Rule 12 and Rule 19 motions.

If there are procedural claims to which absent tribes are not necessary, those claims can be separated from other claims and should not be dismissed. *Makah, supra,* 910 F.2d at 559. Appellants' first cause of action alleges that the University Defendants violated NAGPRA by approving transfer of the La Jolla Skeletons to the La Posta Band without adequately determining whether the remains qualify as Native American under NAGPRA. (Excerpts 781, ¶ 52.) The First Amended Complaint asks the District Court to issue a writ of mandamus directing the University Defendants "to make a formal determination whether or not the La Jolla Skeletons are 'Native American' within the meaning of NAGPRA," and not to

transfer possession of the La Jolla Skeletons until and unless this determination is made. (Excerpts 786:7-18.)

The issues of whether the University Defendants violated NAGPRA, what must be done to comply with NAGPRA, and whether the remains qualify as Native American, are procedural and administrative matters that will not necessarily lead to a final judgment. The district court has authority to grant relief on procedural claims that can be decided without the tribes as parties. *Makah, supra,* 910 F.2d at 559.

> The absent tribes would not be prejudiced because all of the tribes have an equal interest in an administrative process that is lawful. … Since we hold that the absent tribes are not necessary to the Makah's procedural challenges, we conclude that those claims should not have been dismissed.

Makah, supra, 910 F.2d at 559.

Whether or not the University violated NAGPRA in failing to examine the evidence and decide whether the La Jolla Skeletons qualified as "Native American" before placing them on an inventory is a procedural issue that does not require the tribes to participate as parties. They can provide witnesses or experts to assist the University, but requiring the University to comply with NAGPRA by examining the evidence and deciding whether the remains qualify as Native American will not cause prejudice to the tribes. This is true because the University must perform this analysis and make this determination regardless of whether the

evidence favors a particular tribe, or no tribe at all. No particular tribe is necessary for purposes of determining whether the University complied with NAGPRA before placing the La Jolla Skeletons on its inventory, because all parties have an equal interest in the University's compliance with federal law.

C. The Ninth Circuit Should Adopt the Reasoning of *Manygoats*, Which Does Not Require Rule 19 Dismissal for a Necessary Party With Sovereign Immunity if the Relief Sought Would Not Result in Prejudice to the Absent Party.

While acknowledging that the fourth "indispensability" factor – "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder" – strongly disfavors dismissal, the District Court noted that it could not find a case "in which litigation proceeded without a party deemed 'necessary,' yet entitled to sovereign immunity." (Excerpts 20:6-7, 20:22-21:1.) The District Court identified Ninth Circuit cases involving absent tribes that were entitled to sovereign immunity, each of which was dismissed. (*Id.* at 21:2-7.) An exception was a Tenth Circuit case, *Manygoats v. Kleppe,* 558 F.2d 556 (10th Cir. 1977), which reversed a Rule 19 dismissal order by the district court on a dispute involving the adequacy of environmental impact statements that assessed the impact of uranium mining on Indian lands. The Tenth Circuit reasoned as follows:

> Dismissal of the action for nonjoinder of the Tribe would produce an anomalous result. No one, except the Tribe, could seek review of an environmental impact statement [EIS] covering significant federal action … on Indian lands. … The controlling test of Rule 19(b) is whether in equity and good conscience the case can proceed in the

> absence of the Tribe. … In equity and good conscience the case can and should proceed without the presence of the Tribe as a party.

Manygoats, supra, 558 F.2d at 559.

The decision specifically notes that the inadequacy of the EIS "does not necessarily result in prejudice to the Tribe. The only result will be a new EIS for consideration by the Secretary." *Id*. at 558. In support of its holding that district courts have the authority to grant relief on procedural claims when absent tribes are not prejudiced by resolution of those claims, the Ninth Circuit cited to the *Manygoats* ruling that an absent tribe was "necessary but not indispensable to procedural challenge." *Makah, supra,* 910 F.2d at 559 n. 6.

While acknowledging that "there is strong case to be made that the same result [as *Manygoats*] should apply here," the District Court stated it did not have the discretion to make a ruling contrary to previous Ninth Circuit opinions. (Excerpts 21:27-22:2.) The District Court added that "[p]laintiffs may, of course, elect to appeal this order, and invite the Ninth Circuit to consider whether the logic of *Manygoats* ought to be adopted in present circumstances. That decision, however, is properly reserved to the Court of Appeals." (*Id.* at 22 n. 16.)

Appellants therefore ask that the Ninth Circuit adopt the sound reasoning of *Manygoats*, previously approved as supporting authority for *Makah*. Both cases noted that Rule 19 dismissal is not needed for absent parties who are necessary, but

would not be prejudiced by the outcome of claims that proceed without them. The difference is that the absent tribe in *Manygoats* was entitled to sovereign immunity.

The Rule 19 motions to dismiss in both *Manygoats* and *Makah* were denied because the absent tribes would not be harmed by moving forward. As *Manygoats* states, "The requested relief does not call for any action by or against the Tribe." *Manygoats, supra,* 558 F.2d 558-559. *Makah* narrowed the relief sought, and separated out procedural claims that would not prejudice the absent tribes. *Makah, supra,* 910 F.2d at 559. As the *Manygoats* approach is rational and does not minimize the policies or protections of the sovereign immunity doctrine, the Ninth Circuit should adopt its logic.

V. THE DISTRICT COURT ERRED IN RULING THAT APPELLANTS DO NOT QUALIFY FOR THE "PUBLIC RIGHTS" EXCEPTION TO RULE 19 WHEN APPELLANTS SEEK TO CURE DEFECTS IN ADMINISTRATIVE PROCEDURES AND CORRECTING THOSE DEFECTS WILL NOT PREJUDICE THE TRIBES.

The District Court rejected Appellants' request to apply the public rights exception to Rule 19, stating that although the public rights exception applies to cases alleging defects in administrative procedures, or seeking to enforce future compliance with statutory procedures (citing *Makah*), "it appears doubtful that this case is properly characterized as vindicating 'public rights.'" (Excerpts 22:14-20.)

This case, however, is about public rights, because Appellants are trying to enforce the public's right to administrative compliance with NAGPRA, and the

public's interest in preservation of the public trust (through the University). NAGPRA requires the University to determine whether or not items are subject to NAGPRA before placing them on a federal inventory. 25 U.S.C. § 3003; 43 C.F.R. §§ 10.9, 10.11 (s*ee also* Excerpts 538). The public has an interest in enforcing this provision, especially where ignoring it threatens to cut off access to a unique and valuable source of public knowledge: two 9,000-year old skeletons. The public has an interest in preserving knowledge of, and the ability to study, human history in North America.

Appellants challenge the University's improper issuance of deficient inventory notices in 2008-2011, its failure to make formal findings, its unwillingness to consider evidence or conduct a hearing, its lack of guidelines and procedures for complying with NAGPRA, and the lack of evidence to support its findings. (Excerpts 772-780, ¶¶ 22, 28, 37, 46-47.) These challenges to the University's actions demonstrate that the purpose of the lawsuit is to enforce statutory compliance and to protect the public's interest in history, science, and research. In addition, the District Court found that the "plaintiffs and the public interest are threatened with profound harm in this case." (Excerpts 3:16-18.)

Although the District Court was mistaken about the public rights aspect of Appellants' case, it made the decision not to apply the exception because "the public rights doctrine is not properly invoked where … the tribe's asserted interest

in the remains will be extinguished if plaintiffs prevail." (Excerpts 22:20-22.) Appellants strongly disagree.

The La Posta Band has no interest in remains that are not "Native American" within the meaning of NAGPRA. If the writ petition proceeding moves forward, the University will have to explain and justify its conduct. The KCRC and the Kumeyaay tribes can assist the University by providing expertise or witnesses. They can supply evidence to support their position and to assert their interest in the remains, without having to be a party to the legal proceeding.

The tribe's "asserted interest in the remains" will not be extinguished if (1) the writ petition is granted and the University is ordered "to make a formal determination whether or not the La Jolla skeletons are 'Native American' within the meaning of NAGPRA;" or (2) the University is prevented from transferring possession of the remains to the La Posta Band until and unless a formal determination is made that the remains are Native American. (Excerpts 786:9-18.) The writ petition simply seeks an order requiring the University to comply with NAGPRA and with its own policies and procedures. The result of the writ proceeding will be that the University's conduct, in classifying the remains as "Native American," is either affirmed or set aside. The tribes can choose at that time whether to participate in any subsequent legal proceedings.

As "there is no legally protected interest in particular agency procedures," and because complying with lawful administrative procedures causes no prejudice to absent parties (*Makah, supra,* 910 F.2d at 558-559), moving forward with the writ petition would not extinguish the tribe's asserted interest. That interest is premised on the remains correctly being classified as "Native American," and published in the Notice of Inventory Completion. As the University did not identify any scientific or historic evidence to support this classification, the District Court should review what the University did and determine whether that was sufficient to comply with NAGPRA.

The public rights exception applies here, such that the tribes and KCRC are not necessary parties. At a minimum, they are not necessary parties to a proceeding on the writ petition. Appellants ask that the District Court decision be reversed, and the matter be remanded so that the District Court can determine whether the University Defendants complied with administrative law and statutory procedures. Doing so will not prejudice the tribes, who are not necessary to procedural challenges. *Makah, supra,* 910 F.2d at 559 n. 6.

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CONCLUSION

For the reasons set forth herein, Appellants ask that this Court reverse the District Court's order dated October 9, 2012, which granted the KCRC motion to dismiss and the University Defendants' motion to dismiss, and resulted in the entry of Judgment on October 17, 2012.

Dated: May 20, 2013

McMANIS FAULKNER

/s/ Michael Reedy
MICHAEL REEDY

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TIMOTHY WHITE, ROBERT L. BETTINGER, and MARGARET SCHOENINGER

STATEMENT OF RELATED CASES

Appellants are not aware of any cases pending in this Court that would be deemed related pursuant to Ninth Circuit Rule 28-2.6. As noted above, there is a related case pending in the United States District Court, Southern District of California: *Kumeyaay Cultural Repatriation Committee v. University of California, et al.,*case no. 12-CV-0912H-BLM.

Dated: May 21, 2013

McMANIS FAULKNER

/s/ Michael Reedy
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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(c) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 12-17489

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 13,647 words.

Dated: May 20, 2013

McMANIS FAULKNER

/s/ Michael Reedy
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