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

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INTRODUCTION

The Answering Briefs filed by the University of California ("University") and the Kumeyaay Cultural Repatriation Committee ("KCRC") claim that the Ninth Circuit must affirm the District Court's decision because the tribes are a necessary party to the underlying NAGPRA case, and the tribes enjoy sovereign immunity. They argue that no other result is possible.

The District Court did not want to grant appellees' motions to dismiss. It stated that "dismissal appears to conflict with certain aspects of NAGPRA, including its enforcement provision," similar to the decision in *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977), and concluded that Congress intended this type of lawsuit to be heard. (Excerpts 22-23.) The District Court expressed concern that tribes could use sovereign immunity to prevent NAGPRA review (if a party challenged a decision favoring the tribes), but could file their own suit to challenge unfavorable decisions. (*Id*. at 23:17-25.) Given its lack of discretion in an inequitable situation, the District Court invited the Ninth Circuit to consider adopting the logic of *Manygoats* to this situation. (*Id*. at 21, no. 16.)

In *Manygoats,* the Tenth Circuit ruled that a Rule 19 motion to dismiss could be denied when a "necessary" party had sovereign immunity if proceeding with the case would not result in prejudice. *Manygoats, supra,* 558 F.2d at 558-59. Appellants do not agree that either the La Posta Band or KCRC is a necessary

party to this action, nor that the tribes have sovereign immunity under NAGPRA. Nonetheless, the *Manygoats* rationale should be adopted where appropriate so that district courts can determine "in equity and good conscience" whether and under what terms actions challenged under Rule 19 can proceed. Contrary to the University's representation, *Manygoats* remains viable.

This appeal is also about the viability of the Ninth Circuit's decision in *Bonnichsen v. United States,* 367 F.3d 864 (9th Cir. 2004), which appellees fail to distinguish. *Bonnichsen* defined what is required to comply with NAGPRA, and it applies here. The procedural maneuver used by the University – to claim tribes are necessary parties and then demand dismissal based on the tribes' alleged sovereign immunity – was not attempted in *Bonnichsen*, where the tribes intervened. If the District Court's decision is affirmed, *Bonnichsen* will lose its relevance because tribes will use this strategy to prevent any challenge to decisions that favor them.

Like *Bonnichsen*, this case involves the potential loss of remains that are a scientific treasure, as well as a regulation (43 C.F.R. § 10.11) that would award all ancient remains to the tribes, contrary to the plain language of NAGPRA and Congressional intent. Appellants ask that the District Court's decision be reversed so they can proceed with their efforts to require the University to comply with NAGPRA as written by Congress, so that these 9000 year old remains can be preserved for scientific study and research.

STANDARD OF REVIEW

The motions to dismiss filed by the University and KCRC were based upon Rules 12(b)(1), 12(b)(6), and 12(b)(7) of the Federal Rules of Civil Procedure. (Excerpts 544:8-12, 595:8-14, 634:8-14.) Motions to dismiss on Rules 12(b)(1) and 12(b)(6) grounds are reviewed *de novo*. *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).

Because all appellees based their motions to dismiss on Rule 12(b), appellants asserted in their Opening Brief that the District Court's October 9, 2012 Order should be reviewed *de novo* in its entirety. However, as noted by the University (see University Brief, p. 18), motions to dismiss under Rule 12(b)(7), based on the failure to join a party under Rule 19, use "abuse of discretion" as the general standard of review. *Pit River Home & Agric. Coop. Ass'n v. United States,* 30 F.3d 1088, 1098 (9th Cir. 2010).

Nonetheless, not all Rule 19 decisions are reviewed under the abuse of discretion standard. "To the extent that the district court's [Rule 19] determination whether a party's interest is impaired involves a question of law, we review *de novo*." *Id.*, citing *Hughes v. United States,* 953 F.2d 531, 541 (9th Cir. 1992); *see also, Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California,* 547 F.3d 962, 970 (9th Cir. 2008) (if the Rule 19 inquiry decides a

question of law, "we review that determination *de novo*."). In stating that it would be "premature" to determine whether the skeletons qualify as Native American – despite the fact that there was no evidence of a "significant relationship to a *presently existing tribe*" (as required by *Bonnichsen, supra,* 367 F.3d at 878) – the District Court based its decision on question of law. That decision should be reviewed *de novo*.

In addition, the District Court's acknowledged that it had no discretion, as a matter of law, to deny the Rule 19 motion: "[T]his Circuit has consistently dismissed actions under Rule 19 where it concludes an Indian tribe is 'necessary' yet not capable of joinder due to sovereign immunity, and therefore, this Court does not have the discretion to decide otherwise." (Excerpts 21:14-22:2 & n.16 (emphasis added).) The Rule 19 decision therefore should be reviewed *de novo*.

LEGAL ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO DECIDE APPELLANTS' SUIT.

Appellants have Article III standing because their injury is redressable. They seek the opportunity to conduct research on rare New World remains that hold a higher degree of research potential than any other remains, and that could be critical to understanding the *Homo sapiens* species. (Excerpts 774:27-775:20.) The remains date back 8977 to 9603 years ago. (*Id*. at 768:19-20.) In 2004, fewer than twelve human crania older than 8000 years had been found in the United

States. *Bonnichsen, supra,* 367 F.3d at 869 n. 6. The opportunity to increase knowledge about these people will be lost if the remains are repatriated. If not repatriated, appellants should be able to study them. (Excerpts 774-76, ¶¶ 33-36.)

A. Appellants Have Standing Under Article III Because They Will Have the Opportunity to Study the Remains if NAGPRA Does Not Apply.

The only Article III standing requirement challenged by the University is whether appellants established a likelihood that their injury will be redressed by a favorable decision. (University Brief, p. 20.) To establish redressability, appellants "need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision…. [they] must show only that a favorable decision is *likely* to redress [their injuries], not that a favorable decision will *inevitably* redress [their injuries]." *Graham v. Federal Emergency Management Agency*, 149 F.3d 997, 1003 (9th Cir. 1998) (emphasis in original) (*quoting Beno v. Shalala,* 30 F.3d 1057, 1065 (9th Cir. 1994)).

In ruling on a motion to dismiss for want of standing, "both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." *Warth v. Seldin,* 422 U.S. 490, 501 (1975). Appellants allege that although they asked to study the remains, the University has not yet granted their requests. (Excerpts 774-776, ¶¶ 33-35.) The University's policy is that human remains and cultural items normally

remain accessible for research by qualified investigators such as appellants. (*Id.*, ¶ 36.) Thus, it is highly probable that appellants will be allowed to study the remains if the University retains possession. (*Id.*, ¶ 36.) As the relief sought by appellants would redress their injury, they have Article III standing.

The University overestimates its ability to dispose of the remains, saying it "would have unfettered discretion over them." (University Brief, p. 20.) However, if NAGPRA does not apply, the University cannot give away the remains because doing so would breach its duty to maintain them as a public trust. The University's Human Remains policy states that its collection of human remains "serve valuable educational and research purposes important to the enhancement of knowledge in various disciplines," while acknowledging that the University "maintains these collections as a public trust and is responsible for preserving them according to the highest standards …." (Excerpts 791 (emphasis added).)

As appellants allege that they likely will be allowed to study the remains if they prevail, *Glanton ex rel. Alcoa Prescription Drug Plan v. AdvancePCS, Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006), which emphasize defendants' "broad discretion," is not persuasive. The University's discretion does not allow it to violate its duties to preserve the public trust.

Appellants do not need a statutory right to study the remains in order to have standing; they need only establish that they will have an opportunity to study them

if NAGPRA does not apply. *Bonnichsen, supra*, 367 F.3d at 871-73 (emphasis added); *see also Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1165-67 (D. Or. 2002) (concluding that if NAGPRA did not apply, appellants likely "would have been allowed to study the remains"). Although the opportunity in *Bonnichsen* arose because the Kennewick Man remains were collected under the Archaeological Resources Protection Act of 1979 ("ARPA"), there was no requirement that the "opportunity to study remains" be statutorily based, as the University implies. (*See* University Brief, p.23; *see Bonnichsen, supra,* 217 F. Supp. 2d at 1166 n. 74 ("[S]tudy is generally carried out without issuance of a formal study permit.").) Like the scientists in *Bonnichsen*, appellants do not have a permit to conduct research on the remains; they simply have the right to submit research requests that normally are granted for people in their position.

Non-binding authority from the Second Circuit cited by the University does not establish a rule that standing is denied if the relief requested is not authorized by statute. (*See* University Brief, p. 22, citing *New York Coastal Partnership, Inc. v. United States Dep't of Interior*, 341 F.3d 112, 117 (2d Cir. 2003) (noting the remedy sought was speculative where plaintiffs identified no statutory authority to support the request).) Here, appellants seek an order prohibiting the University from violating the law. NAGPRA authorizes their suit. 25 U.S.C. § 3013.

The University claims that its Human Remains policies "do not cabin the University's discretion to decide on the appropriate treatment … of *non*-'Native American' human remains." (University Brief, pp. 23-24.) The policy, however, does limit the University's discretion: it is required to maintain all collections of human remains as a public trust, and to preserve them. (Excerpts 791.)

Contrary to assertions by the University, appellants do not claim only a "generalized interest in administrative compliance with NAGPRA." (University Brief, p. 24.) Appellants also have a specific interest in compliance, in that they should be able to research the remains if NAGPRA does not apply. The University and KCRC recognize that they cannot do what they plan to do unless NAGPRA applies. (Excerpts 681, 687-689, 703-705, 726, 730-747, 751-753.) Appellants advised the University's Advisory Group that the 2010 Notice of Inventory Completion (prepared by a non-scientist without scientific input) contained "significant divergences" from the 2008 report prepared with scientific evidence, as well as the belief of most scientists that the remains do not qualify as "Native American." (*Id.* at 738-743.)

Appellants are concerned that valuable scientific resources will be lost due to non-compliance with NAGPRA, and they have filed suit to preserve those resources. Therefore, they have standing.

B. Appellants' Public Trust and First Amendment Claims Are Ripe Because the University Has Expressed Its Intent to Transfer the Skeletons Even if NAGPRA Does Not Apply.

The University argues that appellants' public trust and First Amendment claims are not ripe because they rest upon contingent future events "that may not occur as anticipated." (University Brief, p. 20, citing *Texas v. United States*, 523 U.S. 296, 300 (1995).) The dispute here is not abstract. Appellants seek to prevent the transfer of the remains under NAGPRA, or on any other basis.

Appellants' public trust and First Amendment claims are ripe. The University has indicated it would have transferred the remains to a tribe even if NAGPRA did not apply. (*See* Excerpts 635:27-28 (stating that if NAGPRA does not compel the transfer, "it would leave the University free to transfer the remains in any event"); 682-685 (2008 letter from Vice Chancellor urging repatriation based on political considerations, avoiding "cultural insensitivity," and diversity concerns); 726-735 (2010 Draft Notice of Inventory prepared by Vice Chancellor that rewrites findings of 2008 report); 745-746 (letter from President Yudof expressing his willingness to discuss proceeding outside of NAGPRA).) Regardless of whether the University has authority to act on such threats, they are sufficient to establish a case or controversy. *Cf. Jacobus v. Alaska*, 338 F.3d 1095, 1104 (9th Cir. 2003) ("While a generalized possibility of prosecution does not satisfy the ripeness requirement, a genuine threat of imminent prosecution does.").

There is no need for further factual development before appellants' claims may proceed. *Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726, 736 (1998) does not compel a different result. Even though the 2010 Draft Notice does not confer an absolute legal right on the La Posta Band, it harms appellants' and the public interest in preserving the University's research collection. This is not a case where the Court must act without benefit of a proposal. *See id.* at 736-37. Ripeness does not depend on a party's reasons for its decision, and in any event, the 2010 Draft Notice and Yudof's letter belie the claim that no decision has been made.

Courts considering ripeness must evaluate the hardship to the parties of withholding review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Dismissing appellants' public trust and First Amendment claims would waste scarce judicial resources. If appellants were to prevail on their claims alleging violations of NAGPRA, they would then immediately be forced to file another complaint and TRO application to prevent the University from transferring the remains on some other basis. Harm from the University's decision to repatriate is imminent. Appellants should not be forced to file serial lawsuits to obtain relief on claims that are ripe.

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II. WHERE THE LA POSTA BAND DID NOT ATTEMPT TO ESTABLISH A SIGNIFICANT RELATIONSHIP WITH THE REMAINS AND THE UNIVERSITY DID NOT COMPLY WITH NAGPRA REQUIREMENTS, THE LA POSTA BAND IS NEITHER A NECESSARY NOR AN INDISPENSABLE PARTY UNDER RULE 19.

The District Court found, and appellees urge here, that the tribes' sovereign immunity eclipses all other considerations in a Rule 19 determination and requires dismissal. Such an inflexible and unbalanced approach, however, is contrary to both the Rule and the case law interpreting it. Under Rule 19, the court must determine whether "in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. Proc. 19(b). "The design of [Rule 19] . . . indicates that the determination whether to proceed will turn upon factors that are case specific, which is consistent with a Rule based on equitable considerations." *Republic of the Philippines v. Pimentel*, 553 U.S. 851, 862-863 (2008). "[I]t is clear that multiple factors must bear on the decision whether to proceed without a required person." *Id.* at 863 (emphasis added); *see also*, *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968) ("Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation.").

The Court should reject the notion that tribal sovereign immunity is the cardinal factor in a Rule 19 analysis, and adopt a more balanced approach, similar

to the Tenth Circuit's reasoning in *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977). Here, as in *Manygoats*, any prejudice to the tribes by virtue of this case proceeding in their absence is significantly outweighed by the complete lack of an adequate remedy if the action were dismissed.

A. The Tribes are Not Necessary Parties Under Rule 19(a) Because Their Alleged Interest is Speculative Under *Bonnichsen*.

The District Court found that the tribes had a "sufficiently concrete and substantial interest" to qualify as a necessary party under Rule 19(a) because NAGPRA extends "rights of 'ownership' and 'control' over human remains … to qualifying tribes." (Excerpts 16:20-22.) As this finding is a question of law, the Ninth Circuit should review it *de novo*. *Cachil Dehe Band, supra,* 547 F.3d at 970.

1. NAGPRA is Not Intended to Apply to Ancient Remains.

"The legislative history [of NAGPRA] is virtually devoid of references to material older than A.D. 1492." Ryan Seidemann, *Altered Meanings: the Department of the Interior's Rewriting of the Native American Graves Protection and Repatriation Act to Regulate Culturally Unidentifiable Human Remains*, 28 Temple Journal of Science, Technology, & Environmental Law 1, 9 n. 48 (2009). Regarding ancient remains, Senator Inouye stated, "We are also fully in concurrence with the importance of knowing how we live a thousand years or a million years ago, whatever it may be." *Id*. at 9 n. 49. In hearings on a precursor bill, in regard to "older remains, gathered for study to piece together the

millennium of our unknown beginning," Senator Melcher said, "We do not intend in any way to interfere with this study and science in the bill." *Id.* at 10 n. 59. "Congress's purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them." *Bonnichsen, supra,* 367 F.3d at 876.

2. <u>The La Posta Band's Claimed Interest in the Remains is Speculative and Not Supported by Any Evidence</u>.

The University argues that an absent party "need merely 'claim' a legally protected interest" that is not frivolous in order to meet the Rule 19(a) test for a "necessary party." (University Brief, p. 36.) "A claimed interest must be more than speculation about future events." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.,* 276 F. 3d 1150, 1155 n. 5 (9th Cir. 2002). The right to ownership and control of remains that are 8977 to 9603 years old is speculative, especially where the tribe asserting the right to ownership presents no evidence of a significant relationship. If no relationship exists between the tribe and the remains, as here, NAGPRA does not apply. *Bonnichsen, supra,* 367 F.3d at 877.

In *Bonnichsen,* despite expert testimony and a thorough administrative record about remains that were 8340 to 9200 years old, the Ninth Circuit "necessarily determine[d] that no reasonable person could conclude on this record that Kennewick Man is 'Native American' under NAGPRA." *Id.* at 880 n. 20. In that case, the Secretary of the Department of the Interior had decided that the

remains were "Native American" based solely on the age of the remains and the fact that they were found within the United States. *Id.* at 872.

In the pending action, the only rationale cited for treating the remains as "Native American" is their listing on a NAGPRA inventory in 2008. (Excerpts 704, 726, 740-42, 745.) The University admits it cannot trace a "relationship of shared group identity" between the remains and any present-day tribe. (*Id*. at 733, 752.) University officials determined that they had to repatriate culturally unaffiliated remains to a tribe only because of 43 C.F.R. § 10.11(c)(1), a regulation enacted in 2010. (Excerpts 733, 753.) This regulation, mandating the return of "culturally unaffiliated" items to Native American tribes based solely on geography and aboriginal claims, runs counter to NAGPRA's language and Congress's intent that remains "bear some relationship to a presently existing tribe." *Bonnichsen, supra,* 367 F.3d at 876.

The University notes that the "tribes have claimed an interest in the remains" and that KCRC made formal requests for repatriation. (University Brief, p. 37.) However, NAGPRA authorizes repatriation to a <u>single tribe</u> that establishes the closest cultural affiliation with the remains. *Bonnichsen v. United States,* 217 F. Supp. 2d 1116, 1141 (D. Or. 2002) (citing 25 U.S.C. § 3002(a)(2)(B)) (emphasis added); *see also Bonnichsen, supra,* 367 F.3d at 877 (remains must be repatriated to the "specific Indian tribe" to which they are most closely affiliated). "Coalition

claims are inappropriate" under NAGPRA. *Id*. at 1143. Since no specific tribe has made the necessary showing, NAGPRA does not apply (*Bonnichsen, supra,* 367 F.3d at 877) and no tribe has a "legally protected interest" in the remains.

3. There Has Been No Finding of a Significant Relationship Between the Remains and the La Posta Band.

The University failed to make the necessary finding that the remains qualify as Native American based on evidence that the remains have a "significant relationship" to a presently existing tribe. *Bonnichsen, supra,* 367 F.3d at 877. Instead, the University relied on the fact that the remains were mistakenly included on a 2008 NAGPRA inventory, a fact that does not meet the "Native American" test. Appellants asked that a peremptory writ issue directing the University to make a formal determination whether the remains qualify as Native American under NAGPRA. (Excerpts 786:9-18.) As KCRC and the individual tribes do not have a "legally protected interest" in the University's compliance with NAGPRA procedures, they are not necessary parties. *Makah Indian Tribe v. Verity,* 910 F.2d 555, 558 (9th Cir. 1990).

The University asserts that deciding whether any tribe has a legally protected interest in the remains is beyond the scope of a Rule 19(a) analysis because it would require the Court to assess the ultimate merits of the NAGPRA issue. (University Brief, p. 39.) As the Supreme Court has recognized, however, "Rule 19 cannot be applied in a vacuum, and it may require some preliminary assessment

of the merits of certain claims" to determine whether such claims are frivolous. *Pimentel, supra*, 553 U.S. at 867. Where, as here, the interest of the absent party is premised on a factually and legally erroneous claim, "a court may have leeway under both Rule 19(a)(1) defining required parties, and Rule 19(b), addressing when a suit may go forward nonetheless, to disregard the frivolous claim." *Id.*

4. 43 C.F.R. § 10.11 is an Invalid Regulation and Cannot Serve as the Legal Basis for Transferring the Remains to the La Posta Band.

Despite arguing that appellants should not be allowed to raise a legal issue about the validity of the 2010 Department of the Interior ("DOI") regulation that covers disposition of "culturally unaffiliated" remains (43 C.F.R. § 10.11), the University relies upon that regulation as the legal basis for transferring the remains to the "tribes." (University Brief, p. 37 (emphasis added).)[1] As noted previously, this regulation contravenes the plain language of NAGPRA and the findings of *Bonnichsen*. (AOB, pp. 43-47.) It requires a museum to "prove that it has right of possession," and to transfer the remains to a tribe if it cannot do so. 43 C.F.R. § 10.11(c)(1). This requirement subverts the NAGPRA requirement that a specific

[1] "Purely legal questions are one of the 'narrow and discretionary exceptions to the general rule against considering issues for the first time on appeal.'" *Fiatoa v. Keala*, 191 Fed. Appx. 551, 553 (9th Cir. 2006) (citing *Jovanovich v. United States*, 813 F.2d 1035, 1037 (9th Cir. 1987)); *see also, Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431 (9th Cir. 1992) (granting review of statutory interpretation question not raised before the district court because the issue was purely a matter of law).

tribe must establish its cultural affiliation with the remains by a preponderance of the evidence. 25 U.S.C. § 3005(a)(1), (4).

The validity of the regulation should not be critical to this appeal, because it does not permit the University to transfer remains that are not Native American to a tribe, even if the regulation were valid (which it is not). Nonetheless, a similar DOI regulation was ruled invalid because it conflicted with NAGPRA's plain language. *Bonnichsen, supra,* 367 F.3d at 877. As the 2010 regulation also conflicts with NAGPRA's plain language, and would repatriate remains based solely on geographical location (*id*. at 879), it is not binding. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989) ("[O]f course, no deference is due to agency interpretations at odds with the plain language of the statute itself."). Without 43 C.F.R. § 10.11, there is no legal justification to transfer the remains to the tribes.

5. The University Should Be Required to Make the Findings Necessary Under NAGPRA Before Transferring the Remains.

Requiring the University to make a formal determination regarding whether NAGPRA applies is not a "kind of circularity." (University Brief, p. 39, citing *Am. Greyhound Racing, Inc. v. Hull,* 305 F.3d 1015, 1024 (9th Cir. 2002).) The

University is required by law to make this determination, and to follow the test outlined in *Bonnichsen* (whether remains are Native American, whether a specific tribe has established a significant relationship). Its failure to demand that a specific tribe present evidence showing a significant relationship to the remains violates NAGPRA and should result in issuance of a writ requiring the University to comply. It is not "circular" to order the University to do what the law requires.

Requiring the University to make a formal NAGPRA determination under *Bonnichsen* does not impair the interest of KCRC or the La Posta Band. They can participate in the NAGPRA proceedings, as they previously did. (Excerpts 682-89, 703-05, 726-35 (including distribution list to 30 tribal representatives), 737-47.) If the remains are found not to be Native American, and the tribes believe the findings are incorrect, they can file suit, as they did in the Southern District of California.[2] But neither the La Posta Band nor KCRC has a "legally protected interest" when they did not attempt to establish a significant relationship to the remains. Treating the remains as Native American simply because they were listed on NAGPRA inventory notices (Excerpts 745) is legally erroneous.

Bonnichsen applies here. Although the Administrative Procedures Act was a factor in *Bonnichsen* and is not here, both the Army Corps of Engineers and the

[2] Appellees recently stipulated to dismiss *KCRC v. Univ. of California*, Case No. 3:12-cv-00912-H-BLM (S. D. Cal.). (University Brief, p.15, n. 5; KCRC Brief, p. 9, n. 2.)

University had a legal duty to determine whether NAGPRA applied (and both failed to comply with the statute). Both groups of scientists had the opportunity to request the right to study the remains. Both groups of scientists were thwarted by DOI regulations that ran counter to the plain language of NAGPRA and to Congressional intent. Both situations involved the possibility that invaluable research resources could be lost forever if the remains were repatriated to a tribe for burial. Both dealt with remains that were about 9000 years old. *Bonnichsen* applies to this case and must be upheld.

6. The Tribes Do Not Seek to Be Heard or to Participate in Adjudication, But to Prevent Appellants From Doing So.

The University argues that if litigation proceeded in the tribes' absence, "it potentially could foreclose their claim to the remains without any opportunity for them to be heard." (University Brief, p. 38.) It states that the "just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest …." (*Id.* at pp. 39-40, citing *Shermoen v. United States,* 982 F.2d 1312, 1317 (9th Cir. 1992).) The tribes, however, are not asking to be heard or to participate in an adjudicated claim; they are seeking to be joined as interested parties and to have the case dismissed based upon their sovereign status specifically to keep the scientists from being heard in a court of law.

B. The Tribes Are Not Indispensable Parties Under Rule 19(b).

The University contends 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 sovereign." (University Brief, p. 42, citing *Pimentel,* 553 U.S. at 867.) As shown above, the claims of the La Posta Band are frivolous because the tribe made no attempt to establish a "significant relationship" to the remains.

As to the four factors considered in applying Rule 19(b), they do not support a finding that the La Posta Band is an "indispensable party."

1. The La Posta Band Would Not Suffer Prejudice From a Judgment Rendered in Its Absence.

As shown above, the La Posta Band is not a necessary party to the question of whether the University complied with NAGPRA. The tribe may be interested and can be involved, as it was previously, but its alleged interest in the remains is separate from legal requirements. The tribe would not be prejudiced by a judgment in its absence requiring the University to comply with NAGPRA.

The University claims that the La Posta Band is entitled to the remains under NAGPRA and 43 C.F.R. § 10.11, but the University failed to follow NAGPRA procedures in deciding whether the remains are Native American, and 43 C.F.R. § 10.11 is invalid because it contravenes the plain language and intent of NAGPRA. Requiring compliance with NAGPRA does not prejudice the La Posta Band. Even

if the University were to determine that the remains are not Native American, the La Posta Band would not be prejudiced. It could file suit under NAGPRA, as it did with other tribes in the Southern District.

2. Any Potential Prejudice to the La Posta Band Can Be Lessened by Shaping Relief to Avoid Dismissal.

The first step in any NAGPRA proceeding is determining whether the remains qualify as Native American. *Bonnichsen, supra,* 367 F.3d at 875. The University should be required to make that formal determination, consistent with *Bonnichsen*. Although a decision "mollifying" plaintiffs could prejudice a tribe that needed to provide employment and income (*see Dawavendewa, supra,* 267 F.3d at 1162), there is no prejudice in delaying a lawsuit to achieve compliance with NAGPRA. Although the tribe may find delay "repugnant" (University Brief, p. 45), transferring the remains in violation of NAGPRA would be worse.

The University mistakenly claims that the limited procedural relief outlined by appellants in their Opening Brief would not address appellants' injuries. (University Brief, p. 45.) Appellants allege that the remains should not have been listed in the 2008 or 2010 inventories, and the University should have made specific findings under NAGPRA before agreeing to repatriate them. (Excerpts 771, ¶ 22; 773, ¶ 28; 777, ¶ 41.) As appellants specifically requested issuance of a writ requiring the University to make formal determinations about the remains

before they are transferred (*id.* at 786:11-18), NAGPRA compliance is an integral element of the relief sought.

3. A Judgment Rendered in the Absence of the La Posta Band Would Be Adequate.

Given the age of the remains, the speculative nature of the La Posta Band's claim, and the failure to present any evidence, issuing a writ that requires the University to comply with NAGPRA procedures – without the involvement of La Posta Band or KCRC as a party – would be adequate and would not prejudice the tribes. The La Posta Band can participate in the University's formal proceedings. If the remains are not Native American, the University cannot use NAGPRA to repatriate the remains and would be subject to its public trust obligations under the Human Remains policy. (Excerpts 240.) It is not yet known whether another lawsuit would follow, so it is speculative to say there may be multiple lawsuits. What is certain is that the University must comply with NAGPRA before any remains are transferred. Absent tribes are not prejudiced because all tribes have an equal interest in a lawful administrative process. *Makah, supra,* 910 F.2d at 559.

4. The Ninth Circuit Should Adopt the Reasoning of *Manygoats* and Not Require Dismissal if the Relief Sought Would Not Be Prejudicial to the Absent Sovereign.

Appellants have no adequate remedy without this lawsuit, as the District Court acknowledged, a factor that strongly disfavors a Rule 19 dismissal. (Excerpts 20:6-21:1.) The University and KCRC stipulated to dismiss the related

case about the remains that was filed in the Southern District of California, leaving the Northern District case as appellants' only hope for preserving the scientific value of the remains.

The University claims that the lack of an adequate remedy should not preclude dismissal where a tribe's interest in maintaining its sovereign immunity outweighs a plaintiff's interest in litigating his or her claims. (University Brief, pp. 46-47.) Appellants disagree that the tribes have sovereign immunity under NAGPRA and that the tribes are a necessary party. However, even if appellants do not prevail on these arguments, the District Court decision can still be reversed.

In analyzing this issue, the District Court noted the Tenth Circuit opinion in *Manygoats, supra,* 558 F.2d at 557-58, which held that although a tribe was an interested party and a sovereign, it was not "indispensable" where the case could proceed in the absence of the tribe. (Excerpts 21:14-25.) The District Court stated that "there is a strong case to be made that the same result should apply here," but it could not rely on an out-of-circuit decision to do so. (*Id*. at 20:26-28.)

The University argues that *Manygoats* may no longer be good law in the Tenth Circuit, claiming it is "squarely at odds with the Supreme Court holding" in *Pimentel*. (University Brief, p. 49.) The University also cites a recent Tenth Circuit decision, *Center for Biological Diversity v. Pizarchik,* 858 F. Supp. 2d

1221, 1228 n. 9 (D. Colo. 2012), stating that decision found *Pimentel* more persuasive than *Manygoats.* (University Brief, p. 49.)

A more recent case from the same court, however, distinguished *Pimentel* and found the analysis of *Manygoats* to control.[3] *Diné Citizens Against Ruining Our Env't v. United States Office of Surface Mining Reclamation & Enforcement*, 2013 U.S. Dist. LEXIS 1401 (D. Colo. January 4, 2013). At issue in the case was the expansion of strip mining at the Navajo Mine, which is owned and operated by an entity of the Navajo Nation. Plaintiffs sued the regulatory body that approved the expansion of the mine for failure to comply with the National Environmental Protection Act ("NEPA"), seeking declaratory and injunctive relief to prevent the expansion of the mine. The tribal entity operating the mine intervened in the case, and then moved to dismiss for failure to join the Navajo Nation.

Beginning its Rule 19 analysis, the court found that the Navajo Nation was not a party to the lawsuit and could not be joined because of tribal sovereign immunity. The court, however, went on to state that:

> Turning these jurisdictional truths to its advantage, the Tribe asserts it is additionally an indispensable party under FRCP 19 so that the action must be dismissed in its entirety. <u>By this logic, virtually all public and private activity on Indian lands would be immune from any</u>

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[3] The court in *Diné Citizens* acknowledged *Pizarchik*, but found that in addition to not being binding authority, it was distinguishable on the ground that the *Pizarchik* court declined to consider the public rights exception. *Diné Citizens Against Ruining Our Env't v. United States Office of Surface Mining Reclamation & Enforcement*, 2013 U.S. Dist. LEXIS 1401, *17-18 n. 4 (D. Colo. January 4, 2013).

> oversight under the government's environmental laws. This is neither the intent nor the import of Indian sovereign immunity.

Id. at *6 (emphasis added).

The Najavo Nation advanced the same argument that the University makes here: that, in light of *Pimentel*, sovereign immunity must be given cardinal weight in the indispensability calculus of Rule 19(b). *Id.* at *10. In rejecting this argument, the court found *Pimentel* "wholly distinguishable" and "entirely unpersuasive" to the case at bar. *Id.* Importantly, the court found that "unlike this case and *Manygoats*, which both involve challenges to federal respondents' compliance with procedural obligations imposed by federal law, *Pimentel* involved a dispute over property (money) to which the absent party claimed a legal entitlement." *Id.* at *12 (emphasis added). The court went on to find that unlike the case at bar, the *Pimentel* plaintiffs had an alternative forum to adjudicate their claims. *Id*. at *13. The *Pimentel* court considered this a factor in dismissing the plaintiffs' complaint, going as far as to suggest that if there was an unreasonable delay in the alternative forum, the plaintiffs could seek relief in federal court. *Id*.

Lastly, the court distinguished *Pimentel* on the ground that it involved issues of foreign sovereign immunity, which raised comity concerns between co-equal sovereigns. *Id*. Tribal sovereign immunity, the court found, does not raise such concerns because the comity interests associated with tribal sovereign immunity are "tempered . . . by the interest in full application of federal . . . law." *Id.* at *14.

Having distinguished *Pimentel*, the court applied the Rule 19(b) factors and determined that, as in *Manygoats*, the factors weighed in favor of proceeding in the absence of the tribe. *Id.* at *18. With respect to prejudice to the tribe, the court held that the factor weighed in favor of denying dismissal because the plaintiffs' requested relief would not necessarily prejudice the tribe. *Id*. "If it is determined on the merits of [plaintiffs'] challenge that the Federal Respondents must complete an [environmental impact study], or otherwise remedy their NEPA analysis, no prejudice will necessarily result to the Tribe, because the requested relief does not call for any action by or against the Tribe." *Id.* at *18. Finally, the court found the fact that the plaintiffs did not have an alternative forum to dispute the adequacy of the NEPA analysis "weigh[ed] crushingly against dismissal." *Id.* at *19.

Manygoats not only remains good law in the Tenth Circuit, it has been distinguished from *Pimentel*. The sound reasoning of *Manygoats* should be adopted by the Ninth Circuit and applied to this matter.

C. <u>Appellants Qualify for the Public-Rights Exception to Rule 19</u>.

The University argues that the "public-rights" exception does not apply here because appellants' claims are narrowly focused and the relief sought would destroy the "legal entitlements" of the absent tribes. (University Brief, pp. 49-50.) Appellants' claims are not private; they allege that because of the "extreme age and relatively good condition" of the remains, the remains "represent a unique

opportunity for all people to understand human origins in North America." (Excerpts 768:24-25 (emphasis added).) Appellants want to study the remains in order to advance "understanding of the colonization of California and Western North America, and of the New World generally." (*Id.* at 775:2-3.) They allege that the remains "present a unique opportunity to study patterns at a population level rather than an individual level," which would enable scientists "to apply the results of the studies in a wide variety of other contexts." (*Id.* at 775:10-14.) "No other set of New World remains holds such a high degree of research potential." (*Id.* at 775:13-14.) Appellants do not seek access to the remains solely for their own benefit, but for the benefit of all interested scientists and to advance knowledge and understanding about the origins of human life on this continent.

The relief sought by appellants – requiring the University to comply with NAGPRA, at a minimum – would not destroy the "legal entitlements of the absent tribes." (University Brief, p. 50.) If the University is required to comply with NAGPRA, that result harms no one. If the remains are found not to be Native American, the "absent tribe" would have no legal entitlement. If the remains are found to be Native American, the tribe would benefit if it can establish that it had a significant relationship with the remains. Compliance with NAGPRA does not destroy any "entitlements." To the contrary, the tribes seem to be claiming an

entitlement (to the repatriation of the remains) based on procedures that violated the requirements of NAGPRA, including 43 C.F.R. § 10.11.

III. THIS COURT SHOULD ADOPT THE RATIONALE OF *MANYGOATS V. KLEPPE* BECAUSE THE PLAIN LANGUAGE OF NAGPRA SHOWS THAT CONGRESS INTENDED THE DISTRICT COURTS TO RESOLVE DISPUTES INVOLVING NATIVE AMERICAN TRIBES.

Because of their immunity from suit, Native American tribes generally cannot be made an involuntary party to a lawsuit. *Manygoats, supra,* 558 F.2d at 557-58. At times however, dismissing an action for nonjoinder of a tribe can "produce an anomalous result," in that a tribe can control who enforces federal law affecting them. *Id*. at 559. Tribes can use their immunity to avoid compliance with laws that apply to them, "which is neither the intent nor the import of Indian sovereign immunity." *Diné Citizens, supra,* 2013 U.S. Dist. LEXIS 1401 at *6.

A. **NAGPRA Was Not Enacted to Protect Tribal Sovereignty.**

The University overreaches by asserting that Congress enacted NAGPRA to protect tribal sovereignty. (University Brief, p. 28.) The University simply recites statements made by tribal spokespersons in support of their requests to support repatriation. (*Id.* at 28-29.) It cites no legislative history stating that NAGPRA is based on the need to acknowledge or recognize tribal sovereignty. Moreover, the 1990 Senate legislative history of NAGPRA (S. Rep. No. 101-473) does not discuss or mention tribal sovereignty.

B. *Santa Clara Pueblo* is Distinguishable Because the Statute Referenced by the University is Not Specifically Applicable to the Tribes.

The University argues that the enforcement provision in NAGPRA is equivalent to language rejected in *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 53 & n. 4 (1978). (University Brief, pp. 29-30.) In *Santa Clara Pueblo,* however, the Supreme Court held that Congress exercised its authority to limit the tribes' powers of self-government when it passed the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303, which imposed specific restrictions on tribal governments and authorized habeas petitions. *Santa Clara Pueblo, supra,* 436 U.S. at 57-58. The Supreme Court was not willing to expand this partial abrogation of sovereign immunity to a more general statement that tribes could not deny equal protection of the law or deprive any person of liberty or property without due process of law, as stated in 25 U.S.C. § 1302. *Id.* at 58-59.

The Supreme Court did not rule that statutory language giving "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" was inadequate, as the University implies. (University Brief, pp. 29-30, citing *Santa Clara Pueblo, supra,* 436 U.S. at 53 and n. 4 (emphasis in original).) The language referenced by the University was contained in 28 U.S.C. § 1343, the statute governing district court jurisdiction over civil actions (not

written specifically for Indian tribes), which the district court and appellate court relied upon in conjunction with 25 U.S.C. § 1302(8). *Santa Clara Pueblo, supra,* 436 U.S. at 53-55. The lower courts used the "authorized by law" language in the general civil jurisdiction statute to abrogate tribal sovereign immunity for civil suits under the Indian Civil Rights Act. *Id*. The Supreme Court focused on the language in 25 U.S.C. § 1302 – not the language in 28 U.S.C. § 1343 – to find there was no waiver of immunity for civil actions in the Indian Civil Rights Act. *Id.* at 58-59. Unlike the Indian Civil Rights Act, NAGPRA contains specific language stating that the district court has jurisdiction over "any action brought by any person alleging a violation" of NAGPRA.

C. A Policy Argument is Appropriate Where the Interpretation Urged by Appellees Would Severely Imbalance Enforcement of NAGPRA.

The federal government's sovereign immunity under NAGPRA is abrogated because the suits filed against the government are for non-monetary relief under the Administrative Procedures Act ("APA"). (University Brief, p. 30, citing 5 U.S.C. § 702.) Given that NAGPRA requires resolution of issues involving cultural affiliation, repatriation of cultural items, the right to possess those items, and the character of those items – all involving non-monetary relief – it can be presumed that Congress knew it was waiving sovereign immunity for the United States when it enacted NAGPRA. However, since the statute addresses the rights

and responsibilities of a limited number of entities (Indian tribes, Native Hawaiian organizations, federally funded museums, and the federal government) and authorizes the District Court to resolve disputes between them, NAGPRA waived the sovereign immunity of all parties.

In response to appellants' argument that the sovereign immunity of the tribes is coextensive with that of the United States, appellees duck the issue. They admit that the United States has no sovereign immunity under NAGPRA because of the APA, but assert that tribes are still entitled to sovereign immunity. KCRC claims that "coextensive" immunity only refers to "similarities between each sovereign's immunity." (KCRC Brief, p. 16.) The University claims, without citation to authority, that "coextensive" means only the doctrines of tribal and sovereign immunity are "equally robust in protecting the relevant sovereign" when they apply. (University Brief, p. 31.) As "coextensive" is defined as "having the same limits, boundaries, or scope" (*see* Webster's II New Riverside University Dictionary (1984)), it presumably should mean that the coextensive sovereign immunity of the United States and the tribes has the same scope and limits.

Appellees interpret language stating that nothing in the statute shall be construed to "limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes" (25 U.S.C. § 3009(4)) as evidence that Congress intended the tribes to maintain sovereign immunity under NAGPRA.

However, another provision states that nothing in NAGPRA shall be construed to "deny or otherwise affect access to any court." 25 U.S.C. § 3009(3). Because the plain language states that nothing in NAGPRA can be construed to deny or affect access to any court, the provision about procedural and substantive rights (§ 3009(4)) cannot be construed to deny access to the courts.

D. As NAGPRA Authorizes Lawsuits to Resolve Disputes, the Ninth Circuit Should Adopt the *Manygoats* Rationale That a Party is Not Indispensable When a Case Can Proceed in its Absence.

The District Court raised the issue of legislative waiver of tribal sovereign immunity, noting that no case has considered the matter in depth. (Excerpts 10-11.) The plain language of NAGPRA shows that Congress intended plaintiffs to be able to use the district courts to resolve disputes in which one or more Native American tribes claims an interest in the remains. 25 U.S.C. §§ 3005(e), 3013.

The legislative history states that if the parties cannot resolve a dispute, "any person may bring an action in Federal court alleging a violation of this Act." S. Rep. No. 101-473, at 15. This provision is intended to allow any person (including tribes and museums) to bring a cause of action for violations of NAGPRA. *Id.*; *see also* 43 C.F.R. § 10.2(a)(5) (defining "person" to include any "Indian tribe"). The legislative history states, "The Committee intends the Federal District Court to be the forum for a dispute between the parties regarding a determination of cultural

affiliation, right of possession, or the character of an article or object in the possession of a museum or Federal agency." *Id.* (Emphasis added.)

KCRC alleges that because tribes have no responsibilities, enforcement of NAGPRA is aimed exclusively at museums and federal agencies. (KCRC Brief at 14.) The Ninth Circuit previously rejected a variation of this argument, in which tribes argued that only they could file suit for violations of NAGPRA. *Bonnichsen, supra,* 367 F.3d at 873-74 (holding that NAGPRA does not limit jurisdiction to suits brought by Indian tribes). Moreover, tribes have responsibilities under NAGPRA: if they contest the issue of cultural affiliation, they must establish their claim by a preponderance of the evidence to succeed. 25 U.S.C. § 3005(a)(4). A party could dispute whether a tribe met its burden of proof in regard to cultural affiliation, could allege that a museum had sufficiently established its right of possession, or could dispute whether the item was actually Native American.

The tribes, museums, and federal government have their rights, interests, and responsibilities defined by NAGPRA. No party should be allowed to evade its responsibilities by using the statute as both sword and shield. The Ninth Circuit should adopt the rationale of *Manygoats* to prevent these types of "anomalous results," and to allow NAGPRA cases to proceed "in equity and good conscience" without the tribe where doing so would not result in prejudice to the tribe.

/ / /

E. <u>NAGPRA Balances the Interests of Tribes and Museums</u>.

Congress is not required "to utter the magic words 'Indian tribes' when abrogating tribal sovereign immunity." *Krystal Energy Co. v. Navajo Nation,* 357 F.3d 1055, 1061 (9th Cir. 2004) (finding Congressional abrogation of tribal immunity under 11 U.S.C. § 106(a), citing *Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 76 (2000)). In *Kimel*, the Supreme Court held that Congress expressed its intent to abrogate the sovereign immunities of the states in regard to the Age Discrimination Enforcement Act ("ADEA") by (1) enacting a provision for enforcement; (2) authorizing suits against an employer (including a public agency) in any federal or state court; and (3) defining "public agency" to include a government or political subdivision of a State. *Kimel, supra,* 528 U.S. at 73-74. The intent in *Kimel* to abrogate sovereign immunity "did not appear in terms on the face of the ADEA." *Krystal Energy, supra,* 357 F.3d at 1058.

Similarly here, sovereign immunity is not abrogated on the face of NAGPRA. However, the statute grants jurisdiction to the District Court to resolve disputes between the tribes, federal agencies, and museums. 25 U.S.C. § 3013. It authorizes the District Court to resolve competing repatriation claims by the tribes. *Id*. at § 3005(e). It makes admissible in federal court all findings and records of the committee that tries to resolve disputes between tribes and museums. *Id*. at § 3006(d). Given the closed universe of entities (tribes, museums, and the federal

government) and the limited non-monetary issues raised under NAGPRA, Congress abrogated sovereign immunity for both sides by granting jurisdiction to the District Court "over any action brought by any person alleging a violation of this Act." *Id*. at § 3013.

The goal of NAGPRA is "to strike a balance between the interest in scientific examination of skeletal remains and the recognition that Native Americans, like people from every other culture around the world, have a religious and spiritual reverence for the remains of their ancestors." 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). NAGPRA maintains that balance by treating the parties equally in federal court.

IV. APPELLANTS SHOULD BE ALLOWED TO CONDUCT DISCOVERY REGARDING KCRC'S CLAIM THAT IT IS ENTITLED TO SOVEREIGN IMMUNITY AS AN ARM OF THE KUMEYAAY TRIBES.

The University makes the unusual claim that KCRC would not be an adequate representative of the tribes, despite its asserted status as an "arm of the tribes." (University Brief, p. 38.) The University states that KCRC cannot represent all twelve Kumeyaay tribes because disagreements may develop, despite the fact that KCRC requested, "on behalf of the tribes," that the remains be transferred to the La Posta Band. (*Id.*; *see also* Excerpts 753.) It acknowledges

that KCRC's corporate status has been suspended by the State of California. (*Id*. at pp. 38-39.) In addition, KCRC and the University stipulated to dismissal of the Southern District lawsuit that KCRC filed to seek repatriation of the remains at issue in this action. (*Id*. at 15 n. 5.)

The District Court ruled that it could not accept KCRC's "unsupported" claim that the tribes intended to extend their sovereign immunity to KCRC. (Excerpts 13:3-5.) It noted that KCRC's claim that the tribes had not granted KCRC the authority to waive immunity was inconsistent with KCRC's filing of the lawsuit in the Southern District. (*Id*. at 13:5-7.)

Given these contradictory positions and the uncertainty they create about the role of KCRC, appellants' request for discovery into the relationship between KCRC and the tribes is relevant and should have been granted. KCRC's purpose may be "core to the notion of sovereignty" (*id.* at 13:7-9), but it is uncertain what is at the core of the relationship between KCRC and the tribes.

Both the University and KCRC cite cases in which courts accepted the charter documents and affidavits of tribes in order to make legal determinations about claims made by the tribes and tribal agents. However, those cases do not involve situations where the claims made were unsupported by the evidence or inconsistent with other claims, as here. In that situation, limited discovery should be allowed.

CONCLUSION

For the reasons noted here and in the Opening Brief, appellants ask that the District Court's order granting appellees' motions to dismiss be reversed, and that the case be remanded to the District Court with appropriate guidance.

Dated: August 30, 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 8,809 words.

Dated: August 30, 2013

McMANIS FAULKNER

/s/ Michael Reedy
MICHAEL REEDY

Attorneys for Appellants,
TIMOTHY WHITE, ROBERT L. BETTINGER, and MARGARET SCHOENINGER

9th Circuit Case Number(s) 12-17489

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Signature (use "s/" format)

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Attorneys for Plaintiffs/Appellants,
TIMOTHY WHITE,
ROBERT L. BETTINGER,
AND MARGARET SCHOENINGER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TIMOTHY WHITE, an individual; ROBERT L. BETTINGER, an individual; and MARGARET SCHOENINGER, an individual,

Plaintiffs,

vs.

MARK G. YUDOF, in his individual capacity; MARYE ANN FOX, in her individual capacity; GARY MATTHEWS, in his individual capacity; UNITED STATES DEPARTMENT OF THE INTERIOR; KEN SALAZAR, in his official capacity as Secretary of the Department of the Interior; and DOES 1-50, inclusive,

Defendants.

Case No.: 12-17489

DC No. C 12-01978 RS
(N.D.Cal., San Francisco)

APPELLANT'S MOTION TO EXCEED TYPE VOLUME LIMITATION FOR REPLY BRIEF; DECLARATION OF MICHAEL REEDY

Circuit Rule 32-2

MOTION TO EXCEED TYPE VOLUME LIMITATION OF REPLY BRIEF

Pursuant to Ninth Circuit Rule 31-2.2(b), appellants, Timothy White, Robert L. Bettinger, and Margaret Schoeninger (collectively, "Appellants"), hereby move this Court for an order allowing them to file their Reply Brief, served and filed herewith, which exceeds the type volume limitation set forth in Federal Rules of Appellate Procedure, rule 32(a)(7)(B)(ii). The Reply Brief contains 8,809 words.

1 This Motion is based on this Motion, the Memorandum of Points and
2 Authorities in support thereof, and the Declaration of Michael Reedy.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 Pursuant to Rule 32(a)(7)(B)(i) & (ii), a reply brief may only contain 7,000
5 words. Under Ninth Circuit Rule 28-4, in cases involving multiple parties, a party
6 responding to multiple briefs is routinely entitled to an additional 1,400 words by
7 simply filing a Notice under Rule 28-4, "if no previous extension of the filing
8 deadline or enlargement of size" for filing a brief responding to multiple briefs has
9 been obtained. On July 22, 2013, Appellants were granted a streamlined request to
10 extend time to file the Reply Brief. Therefore, they do not qualify for the routine
11 extension granted when responding to multiple briefs.

12 Ninth Circuit Rule 32-2 allows a party to make a motion to exceed the type-
13 volume limitation "upon a showing of diligence and substantial need." Such a
14 motion must be filed on or before the briefs due date and must be accompanied by
15 a declaration stating in detail the reasons for the motion. (9th Cir. Rule 32-2.)
16 Such a motion must also be accompanied by a single copy of the brief; and a
17 certification as required by Circuit Rule 32-1 as to word count. *Id*. Appellants
18 have included this certification with their Reply Brief.

19 Appellants request that this Court allow them to file their Reply Brief,
20 exceeding the type-volume limitation, because it was prepared in response to two
21 separate Appellees' briefs, which contain both separate and overlapping issues that
22 require different responses.

23 The University of California's ("University") Answering Brief, which was
24 filed after the University was granted a streamlined request for more time, is 59
25 pages long and contains 13,989 words, as well as citations to 55 cases. In addition,
26 the University's Answering Brief raises new issues regarding the District Court's
27 jurisdiction, based on challenges to Appellant's Article III standing and the
28 ripeness of two causes of action. These issues took up 7 pages of briefing.

1 The Kumeyaay Cultural Repatriation Committee's ("KCRC") Answering
2 Brief, which also was filed after KCRC was granted a streamlined request for more
3 time, is 21 pages long and contains 4,718 words, as well as 11 additional cases not
4 discussed in the University's Answering Brief.
5 Moreover, the issues raised by this appeal and in the Answering Briefs
6 present novel legal issues, some of which have not been addressed previously by
7 other courts. These issues include (1) whether Native American tribes are entitled
8 to sovereign immunity under the Native American Graves Protection and
9 Repatriation Act ("NAGPRA") when the federal government is not; (2) whether a
10 Native American tribe can be considered to have a "legally protected interest" in
11 human remains, pursuant to NAGPRA, when it has not presented any evidence that
12 it has a "significant relationship" to the remains; (3) whether the University's
13 decision to repatriate "culturally unaffiliated" human remains to a tribe can be
14 validated when that decision is based upon a regulation (43 C.F.R. § 10.11) that
15 conflicts with NAGPRA requirements to establish cultural affiliation first; (4)
16 whether the Ninth Circuit should adopt the rationale of *Manygoats v. Kleppe*, 558
17 F.2d 556 (10th Cir. 1977), in regard to Rule 19 issues involving necessary parties
18 who have sovereign immunity; and (5) whether Appellants' request that the
19 University comply with NAGPRA's procedural requirements qualifies as a public-
20 rights exception under Rule 19 of the Federal Rules of Civil Procedure.
21 In addition, the underlying issues arise from human remains that date back
22 8977 to 9603 years, which have been characterized as holding a higher degree of
23 research potential than any other human remains in the United States, will be made
24 available for research purposes, or repatriated to a Native American tribe for
25 burial. This is an important and consequential case with great precedential value.
26 It addresses significant legal, cultural, and scientific issues that likely will arise
27 again.
28

In preparing this Reply Brief on behalf of three professors who seek to preserve the remains for scientific study, Appellants' counsel needed to address and respond to every issue raised by the University and by KCRC. They tried but were unable to do so in 7,000 words or less. As an example, the section in the Reply Brief responding to the University's challenge of jurisdiction and standing totals 1,462 pages, which covers most of the 1,809 words that exceed the 7,000 word limit. In reply to the 80 pages and over 18,700 words contained in the Answering Briefs, Appellants seek to file a 38-page brief with 8,809 words.

For these reasons, Appellants request that this Court grant their motion to exceed the type volume limitation and file their Reply Brief, which currently contains 8,809 words.

Dated: August 30, 2013

McMANIS FAULKNER

/s/ Michael Reedy
MICHAEL REEDY

Attorneys for Appellants,
TIMOTHY WHITE, ROBERT L. BETTINGER, and MARGARET SCHOENINGER

DECLARATION OF MICHAEL REEDY

I, Michael Reedy, declare:

1. I am an attorney licensed to practice before the United States District Court for the Northern District of California and the United States Court of Appeals for the Ninth Circuit. I am a partner at the law firm of McManis Faulkner, attorneys of record for appellants, Timothy White, Robert L. Bettinger, and Margaret Schoeninger. I make this declaration in support of Appellants' motion to exceed the type volume limitation.

1 2. Appellants request that this Court allow them to file their Reply Brief,
2 exceeding the type-volume limitation, because it was prepared in response to two
3 separate Appellees' briefs, which contain both separate and overlapping issues that
4 require different responses.
5 3. The University's Answering Brief, which was filed after the
6 University was granted a streamlined request for more time, is 59 pages long and
7 contains 13,989 words, as well as citations to 55 cases. In addition, the
8 University's Answering Brief raises new issues regarding the District Court's
9 jurisdiction, based on challenges to Appellant's Article III standing and the
10 ripeness of two causes of action. These issues took up 7 pages of briefing.
11 4. KCRC's Answering Brief, which also was filed after KCRC was
12 granted a streamlined request for more time, is 21 pages long and contains 4,718
13 words, as well as 11 additional cases not discussed in the University's Answering
14 Brief. Thus, the two Answering Briefs total 80 pages, containing more than 18,700
15 words.
16 5. Moreover, the issues raised by this appeal and in the Answering Briefs
17 present novel legal issues, some of which have not been addressed previously by
18 other courts. These issues include (1) whether Native American tribes are entitled
19 to sovereign immunity under NAGPRA when the federal government is not; (2)
20 whether a Native American tribe can be considered to have a "legally protected
21 interest" in human remains, pursuant to NAGPRA, when it has not presented any
22 evidence that it has a "significant relationship" to the remains; (3) whether the
23 University's decision to repatriate "culturally unaffiliated" human remains to a
24 tribe can be validated when that decision is based upon a regulation (43 C.F.R. §
25 10.11) that conflicts with NAGPRA requirements to establish cultural affiliation
26 first; (4) whether the Ninth Circuit should adopt the rationale of *Manygoats v.*
27 *Kleppe*, 558 F.2d 556 (10th Cir. 1977), in regard to Rule 19 issues involving
28 necessary parties who have sovereign immunity; and (5) whether Appellants'

request that the University comply with NAGPRA's procedural requirements qualifies as a public-rights exception under Rule 19 of the Federal Rules of Civil Procedure.

6. In addition, the underlying issues arise from human remains that date back 8977 to 9603 years, which have been characterized as holding a higher degree of research potential than any other human remains in the United States, will be made available for research purposes or repatriated to a Native American tribe for burial. This is an important and consequential case with great precedential value. It addresses significant legal, cultural, and scientific issues that likely will arise again.

7. In preparing this Reply Brief on behalf of three professors who seek to preserve the remains for scientific study, we needed to address and respond to every issue raised by the University and by KCRC. We tried but were unable to do so in 7,000 words or less. As an example, the section in the Reply Brief responding to the University's challenge of jurisdiction and standing totals 1,462 pages, which covers most of the 1,809 words that exceed the 7,000 word limit. In reply to the 80 pages and over 18,700 words contained in the Answering Briefs, Appellants seek to file a 38-page brief with 8,809 words.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Dated: August 30, 2013

/s/ Michael Reedy
MICHAEL REEDY

9th Circuit Case Number(s) 12-17489

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

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CERTIFICATE OF SERVICE
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I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) /s/ Elena K. Schneider

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