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11 The Kumeyaay Cultural Repatriation Committee

12 UNITED STATES DISTRICT COURT
13
14 SOUTHERN DISTRICT OF CALIFORNIA

15 KUMEYAAY CULTURAL)
16 REPATRIATION COMMITTEE)
17 Plaintiff,)

18 vs.)

19 Case No.: '12CV0912 H BLM
20 COMPLAINT FOR DECLARATORY
21 AND INJUNCTIVE RELIEF

22 THE UNIVERSITY OF CALIFORNIA; THE)
23 BOARD OF REGENT OF THE)
24 UNIVERSITY; MARK G. YUDOF, in his)
25 capacity as President University; MARYE)
26 ANNE FOX, in her capacity as Chancellor of)
27 the University of California, San Diego;)
28 GARY MATTHEWS; in his capacity as Vice)
Chancellor of the University of California, San)
Diego.)

Defendants.)

INTRODUCTION

1. The Kumeyaay Cultural Repatriation Committee ("KCRC") consists of twelve federally recognized Indian Tribes in San Diego County: the Barona Band of Mission Indians; Campo Band of Kumeyaay Indians; Ewiiapaayp Band of Kumeyaay Indians; Inaja-Cosmit Band of Mission Indians; Jamul Indian Village; La Posta Band of Mission Indians; Manzanita Band of Mission Indians; Mesa Grande Indian Reservation; San Pasqual Band of Mission

1 Indians; Iipay Nation of Santa Ysabel; Sycuan Band of the Kumeyaay Nation and the Viejas
2 Band of Kumeyaay Indians. Defendants are currently in possession of two human remains that
3 were discovered during an excavation on the grounds of the University of California, San Diego
4 in 1976. The human remains are Native American and the land from which they were removed
5 is the aboriginal lands of the Kumeyaay. ¹ Under the Native American Graves Protection and
6 Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 et seq. and its implementing regulations, 43
7 C.F.R. § Part 10, the Defendants are required to repatriate the human remains in its possession to
8 KCRC. KCRC seeks a declaration that Defendants are in violation of NAGPRA and its
9 implementing regulations and an order to repatriate the human remains immediately to KCRC.

10 **JURISDICTION**

11 2. This Court's jurisdiction is based upon 28 U.S.C § 1331 as Plaintiff's claim arises
12 under federal law. The Court's jurisdiction is also based on 25 U.S.C. § 3013 which provides
13 that the federal district court shall have jurisdiction over any action brought by any person
14 alleging a violation of this chapter (NAGPRA) and shall have the authority to issue such orders
15 as may be necessary to enforce the provisions of this chapter.

16 **VENUE**

17 3. Venue is proper in the Southern District Court of California pursuant to 28 U.S.C.
18 §1391(b) (1) and (2) in that the Defendants Chancellor Fox and Vice Chancellor Matthews reside
19 in San Diego County and the substantial part of the events giving rise to the claim occurred in
20 San Diego County.

21 **PARTIES**

22 4. Plaintiff is a tribal consortium consisting of tribal representatives from twelve
23 federally recognized tribes in San Diego County (see paragraph 1.) Each Tribe is Kumeyaay and
24 its central place of business is on the Barona Reservation, 1095 Barona Road, Lakeside,
25 California 92040. KCRC has been charged with protecting and preserving Kumeyaay human
26 remains and objects and all human remains and objects found within Kumeyaay aboriginal lands

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

1 that held by federal agencies and museums and to seek repatriation of these items on behalf of
2 the members respective Tribes.

3 5. Defendant UNIVERSITY OF CALIFORNIA (“UNIVERSITY”) is a public trust
4 established by Article IX of the California Constitution.

5 6. Defendant THE REGENTS OF THE UNIVERSITY OF CALIFORNIA
6 (“REGENTS”) is a public corporation that administers the UNIVERSITY. (Cal. Const., Art. IX,
7 § 9, subd. (a).)

8 7. Defendant MARK YUDOF (“YUDOF”) is an individual, who serves as President of
9 the UNIVERSITY. The President is the chief executive officer of the UNIVERSITY, governs
10 through authority delegated by the REGENTS. The President is responsible directly to the
11 REGENTS. Moreover, the President “shall serve as the guardian of the public trust, ensuring
12 legal and ethical compliance, managing system risk, and providing information regarding
13 University activities.” (See Regents Policy 1500, Statement Of Expectations Of The President Of
14 The University (March 2011) (“Regents Policy”), available at
15 <http://www.universityofcalifornia.edu/regents/policies/1500.html>.)

16 8. Defendant MARYE ANNE FOX is an individual employed by the UNIVERSITY as
17 the Chancellor of its University of California, San Diego campus (“UCSD”). The campus
18 Chancellor is the chief campus officer and executive head of all campus activities. FOX is sued
19 here in her individual and official capacities.

20 9. Defendant GARY MATTHEWS is an individual employed by the UNIVERSITY as
21 Vice Chancellor, Resource Management and Planning, at UCSD. He is sued here in his
22 individual and official capacities.

23 **SUMMARY OF FACTS**

24 10. In 1976, while excavating from the ocean-side cliffs of La Jolla, California, two
25 human remains were unearthed. Radiocarbon dating yields an age for the remains to be between
26 8977- 9603 years old. The archaeological site from where the remains were removed is identified
27 as CA-SDI-4669 aka W-12-76. The excavating was conducted as part of an undergraduate class
28 that was engaged in an archaeological field research project on the University House (aka the

1 University of California, San Diego, Chancellor's House.) The area of the excavation was well
2 known to be rich with Native American burials and artifacts and several years ago was
3 designated as a sanctified cemetery under California state law. The excavation in 1976 was led
4 by Professor Gail Kennedy. After their discovery, Professor Kennedy took the remains to the
5 University of California, Los Angeles ("UCLA".) In the years since their discovery the Native
6 American remains have been stored at numerous locations: UCLA; the San Diego Museum of
7 Man; the National Museum of Natural History; the Smithsonian Institution, San Diego State
8 University Department of Anthropology and today are stored at the San Diego Archaeological
9 Center by mutual agreement by KCRC and the UCSD.

10 11. The remains have been subjected to extensive scientific study since 1976, including a
11 multi-decade research project at the Smithsonian Institution that was led by one of world's
12 foremost forensic anthropologist, Dr Douglas Owsley. KCRC has over the years criticized the
13 treatment and disrespectful handling and study of the Native American remains, especially the
14 lacquering of the remains to preserve them.

15 12. NAGPRA was passed in 1990. Under its provisions, all federal agencies and
16 museums were required to inventory all Native American remains and objects in their
17 possession. The definition of "museum" includes institutions of higher education receiving
18 federal funding. 25 U.S.C. §3001(8) The inventorying process also requires the institution to
19 determine whether the Native American remains and objects can be culturally identified with a
20 specific tribe, if so, the remains and objects are to be repatriated to the tribe after proper
21 consultation and public notice. Up until 2010, if a museum determined Native American
22 remains and objects were "culturally unidentifiable" the museum was to continue to hold the
23 remains until the Secretary of the Interior promulgated regulations on how the remains and
24 objects should be disposed of.

25 13. Since 2000 KCRC has been requesting that the remains be repatriated. During this
26 time the Native American remains and objects were still in the possession of UCLA. After a
27 repatriation request was again made in 2006 by KCRC, the University of California, Office of
28 General Counsel determined the request should be reviewed by UCSD since the Native

1 American remains and objects were unearthed on the UCSD campus. (Exhibit 1). The Native
2 American remains were finally transferred to the UCSD in the spring of 2008.

3 14. Because the remains were now part of UCSD's collection it was required to prepare
4 a supplement to its previous inventory submitted to the National Park Service. The UCSD
5 NAGPRA Working Group studied the previous studies done on the remains and had meetings
6 with KCRC to determine what its recommendation would be to the Systemwide Advisory Group
7 on NAGPRA on the issue of cultural identification. The central issue discussed with KCRC and
8 the UCSD NAGPRA Working Group was whether the Native American human remains and
9 objects were culturally identifiable to the Kumeyaay. In 2008, after serious debate, the UCSD
10 Working Group issued its recommended Notice of Inventory Completion determining the Native
11 American remains and objects were "culturally unidentifiable" to the Kumeyaay. (Exhibit 2).
12 The Notice of Inventory Completion was submitted and approved by the University of California
13 Systemwide Advisory Group on Cultural Affiliation and Repatriation of Humna Remains and
14 Cultural Items (herein "Systemwide Advisory Group") and submitted to the National Park
15 Service. (Exhibit 3).

16 15. With no other alternative, KCRC determined it would challenge the Statewide
17 advisory Group on NAGPRA determination that the Native American human remains and
18 objects were not culturally identifiable to the Kumeyaay, before the National NAGPRA Review
19 Committee. Under NAGPRA, this Review Committee is authorized to resolve disputes
20 involving NAGPRA determinations and related matters. KCRC prepared for its challenge with
21 the help of KCRC members and experts recounting oral histories, customs and traditions, songs,
22 creation stories and Kumeyaay language that all reflect a connection and affiliation to the area
23 where the remains were discovered.

24 16. Then on May 14, 2010, the National Park Service finalized 43 C.F.R. § 10.11, the
25 long awaited regulation on how "culturally unidentifiable" Native American remains and objects
26 should be disposed of by a museum. Essentially, the regulation provides that "culturally
27 unidentifiable" Native American human remains should be repatriated to the tribe whose
28 aboriginal lands they were removed from. In light of the new regulation, KCRC requested a

1 meeting with Defendant FOX. The meeting was held on May 28, 2010 and Defendant FOX
2 stated that while she was prepared to repatriate the Native American remains and objects, the
3 ultimate decision would need to be made by the Defendant YUDOF, University of California
4 President, unless he choose to delegate the authority to her. Defendant FOX also requested that
5 KCRC's legal counsel prepare an opinion outlining KCRC's legal position based on the new
6 regulations.

7 17. KCRC's legal counsel submitted its legal opinion with supporting documentation to
8 Defendant FOX on June 11, 2010. (Exhibit 4). Months passed without any progress on KCRC's
9 latest request for repatriation. KCRC finally received a letter from Defendant MATTHEWS
10 dated October 21, 2010, addressed to "Interested Parties" in which he was seeking comments on
11 a new draft Notice of Inventory Completion which identified the human remains as Native
12 American and because they removed from the Kumeyaay's aboriginal lands they should be
13 repatriated to KCRC. The letter further stated that the comment period would close on
14 November 22, 2010. After the close of the comment period, the Notice would be submitted to
15 the Systemwide Advisory Group for their approval and then be submitted to Defendant YUDOF.
16 (Exhibit 5). There were no comments on the new draft Notice of Inventory Completion. The
17 inventory notice was then submitted to the Systemwide Advisory Group who met on March 2,
18 2011. The Systemwide Advisory Group approved the inventory notice and submitted it to
19 Defendant YUDOF. (Exhibit 6).

20 18. Not all members of the Systemwide Advisory Group voted to approve the inventory
21 and believed that UCSD should do a broader consultation to determine if there were other tribes
22 in the area that might make an aboriginal claim to the area where the remains were discovered.
23 Additionally, for the first time some members of the Group raised concerns regarding whether
24 the human remains and objects, which have been subjected to the NAGPRA process for over ten
25 years now, were Native American.

26 19. On May 11, 2011, by way of letter from the Defendant YUDOF to Defendant FOX,
27 the President authorizes her to dispose of the Native American remains and objects with the
28 following direction and recommendations:

- 1 a. Re-analyze the funerary objects to determine whether they are true funerary objects;
- 2 b. Revise the “Notice of Inventory Completion” to acknowledge that given the age of the
- 3 remains there is some division among experts on the matter of whether they meet the definition
- 4 of “Native American”;
- 5 c. Do a broader consultation with tribes in the region that may have occupied the area
- 6 where the remains were recovered, such as the Chumash and the Takik-speakers;
- 7 d. If there were no competing tribal claims, the “Notice of Inventory Completion” should
- 8 be submitted to the National Park Service for filing in Federal Register and after the public
- 9 comment period was concluded, the Native American remains and objects may be repatriated to
- 10 the La Posta Band of Diegueño Mission Indians.² (Exhibit 7).

11 20. As directed by the Defendant YUDOF, Defendants FOX and MATTHEWS again

12 contacted the California Native American Heritage Commission to determine if there were other

13 tribes in the area that might have a claim to the Native American human remains and objects.

14 The Commission again confirmed that the Kumeyaay were the “Most Likely Descendants”

15 (“MLD”) for the area where Native American human remains and objects were found. (Exhibit

16 8). Satisfied that there were no other tribes in the area that could claim the Native American

17 human remains and objects, the Notice of Inventory Completion was submitted to the National

18 Park Service. The Notice was published in the Federal Register on December 5, 2011, and

19 became final on January 5, 2012. (Exhibit 9).

20 21. The day before the close of the comment period, KCRC’s legal counsel was notified

21 that three University of California professors were prepared to file a Temporary Restraining

22 Order in state court seeking to enjoin UCSD from repatriating the Native American remains and

23 objects to KCRC. The professors and UCSD entered several agreements whereby both sides

24 agreed to stay any action until UCSD could have an opportunity to review the Professors’

25 pleadings and also see if the case could be mediated. The professors have informed UCSD that

26

27

28 ² KCRC had previously identified the La Posta Tribe to actually take possession of the Native American human remains once UCSD was prepared to repatriate.

1 they are no longer interested in pursuing mediation. At this time, KCRC is unaware of whether
2 the Professors have filed their case against UCSD in state court.

3 **FIRST CAUSE OF ACTION**

4
5 **[Violation of the Native American Graves Protection and Repatriation Act and
Regulation 43 C.F.R. § 10.11]**

6 23. KCRC realleges each of the allegations set forth in paragraphs 10-22 above and
7 by this reference, incorporates each such allegation herein as if set forth in full.

8 24. NAGPRA was enacted to safeguard the rights of Native Americans by protecting
9 tribal burial sites and rights to items of cultural significance to Native Americans. When initially
10 passed, the Secretary of the Interior was to promulgate regulations within 12 months. To meet
11 this deadline and not delay implementation of the Act, the Secretary reserved certain sections of
12 the regulations for later consideration. One section reserved was 43 C.F.R. § 10.11 "Disposition
13 of culturally unidentifiable human remain."

14 25. Under §3006 of NAGPRA a Review Committee was established to monitor and
15 review the implementation of the inventorying and identification process and repatriation
16 activities under the Act. Specifically, under §3006(c)(5) the Review Committee was charged
17 with compiling an inventory of culturally unidentifiable human remains that are in the possession
18 and/or control of each Federal agency and museums and recommend specific actions for
19 developing a process for disposition of such remains.

20 26. What process should be developed to dispose of culturally unidentifiable human
21 remains was very controversial and it took ten years to issue a final regulation. After extensive
22 public review, on May 14, 2010, the Secretary finalized 43 C.F.R. § 10.11.

23 27. Under 43 C.F.R. §10.11, Native American human remains must be repatriated when
24 the museum determines: (1) they are "culturally unidentifiable" through the inventory process
25 under §10.9; (2) the remains are in the "possession" and/or under the "control" of the museum;
26 and (3) the museum does not have the "right of possession."
27
28

1 28. As outlined by KCRC in its legal opinion to Defendant FOX in 2010, (see Exhibit 4),
2 the Native American human remains and objects should be repatriated to KCRC for the
3 following reasons:

4 a. The human remains in question are in the "possession" of Defendants. The regulations
5 define "possession" as having physical custody of remains with a sufficient legal interest to
6 lawfully treat the objects as part of its collection for purposes of these regulations. Defendants
7 clearly control the location and treatment of the human remains and funerary objects in question.

8 b. Defendants have determined that the human remains are "culturally unidentifiable."
9 Although KCRC disputes this finding and firmly believes the Native American human remains
10 and objects are Kumeyaay; for purposes of 43 C.F.R. §10.11, the human remains will be treated
11 as "culturally unidentifiable."

12 c. The human remains are "Native American." At the outset it must be stressed that
13 NAGPRA is only concerned with Native American remains, thus if the human remains are not
14 Native American they do not come within the provisions of NAGPRA. Since the passage of
15 NAGPRA, Defendants have treated the human remains and objects in this case to be Native
16 American and engaged the NAGPRA process. By their own actions of submitting inventories to
17 the National Park Service addressing the human remains and objects in this case, Defendants
18 have necessarily determined that the human remains and objects in this case are "Native
19 American." Additionally, Defendants have engaged their own NAGPRA Working Groups both
20 at UCSD and the NAGPRA Systemwide Advisory Group. Since 2000 to the present, Defendants
21 have had numerous interactions with the NAGPRA Designated Federal Officer regarding the
22 disposition of the Native American human remains and objects in this case. These actions,
23 coupled with consultation meetings with KCRC regarding the disposition of the human remains
24 and objects, clearly demonstrate that Defendants have and continue to treat the human remains
25 and objects in this case as "Native American."

26 d. Defendants cannot prove that they have a "right of possession" to the remains. This
27 term is defined in NAGPRA and means that the museum's original acquisition of the Native
28 American human remains was obtained with the full knowledge and consent of the next of kin or

1 the official governing body of the appropriate culturally affiliated tribe. 25 U.S.C. § 3001(13)
2 The new regulations require this same level of proof of the museum or federal agency in order to
3 show "right of possession." Defendants did not acquire the human remains or objects with the
4 consent of the next of kin or from KCRC.

5 e. The Native American human remains and objects were found in the aboriginal lands of
6 the Kumeyaay. In 2002, the state of California, via Assembly Joint Resolution 60, proclaimed
7 that the Kumeyaay aboriginal lands extended from the Pacific Ocean to Baja Mexico, and
8 includes CA-SDI-4669. Additionally, the Systemwide Advisory Group's "Notice of Inventory
9 Completion" concedes that the remains were found in the aboriginal lands of the "Ipai-Tipai"
10 which are the Kumeyaay. (see footnote 1.). Further, in a final Notice of Inventory Completion,
11 Defendants reference "U.S. Serial Set, number 4015, 56th Congress, 1st Session at 788-789 that
12 provides a Schedule of Indian Land Cessions, on or about January 7, 1852 that the Diegueno
13 (Kumeyaay) ceded claims to an area that included what is now San Diego and the ceded area is
14 referred to as "Number 310" on the "California 1" designation of cession map."

15 29. Since the finalization of 43 C.F.R. §10.11, the Defendants have agreed with KCRC
16 that the two human remains at issue are Native American and meet all of the criteria under the
17 regulations, which is evidenced by the now final "Notice of Inventory Completion" that was
18 filed in the Federal Register. Defendants' failure to transfer the Native American human remains
19 and objects to KCRC is being done in violation of 43 C.F.R. § 0.11. The Defendants should be
20 ordered to comply with NAGPRA regulations and transfer the Native American human remains
21 and objects to KCRC.
22
23

24 **PRAYER FOR RELIEF**

25 Pursuant to the forgoing Complaint, KCRC prays that this Court award the following
26 relief:
27
28

1 1. A Declaration that the Defendants are in violation of NAGPRA and its implementing
2 regulations;

3 2. An Order that the Defendants shall repatriate the Native American human remains and
4 objects in this case to the KCRC; and

5 3. Award reasonable attorney fees, attorney expenses and costs and any other relief the
6 Court deems appropriate.

7
8 DATE 4/13/12

CALIFORNIA INDIAN LEGAL SERVICES

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10
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