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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA—SAN FRANCISCO/OAKLAND DIVISION

TIMOTHY WHITE, an individual; ROBERT L. BETTINGER, an individual; and MARGARET SCHOENINGER, an individual Petitioners and Plaintiffs vs. THE UNIVERSITY OF CALIFORNIA; THE BOARD OF REGENTS OF THE UNIVERSITY; MARK G. YUDOF, in his individual and official capacity as President of the University; MARYE ANNE FOX, in her individual and official capacity as Chancellor of the University of California, San Diego; GARY MATTHEWS; in his individual and official capacity as Vice Chancellor of the University of California, San Diego; KUMEYAAY CULTURAL REPATRIATION COMMITTEE and DOES 1-50. Respondents and Defendants.	Case No. C 12-01978 (RS) **BY SPECIAL APPEARANCE DEFENDANT'S KUMEYAAY CULTURAL REPATRIATION COMMITTEE REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT** Date: August 24, 2012 Time: 10:00 a.m. Judge: The Honorable Richard Seeborg

I. LEGAL ARGUMENT

A. Plaintiffs' Assertion That The Kumeyaay Cultural Repatriation Committee Is Not An Arm Of The Tribal Governments They Represent Is Incorrect.

Plaintiffs argue that the Kumeyaay Cultural Repatriation Committee ("KCRC") is not entitled to sovereign immunity because: (1) its purpose as stated in its 2001 Articles of Incorporation was dedicated to a "public and charitable purposes"; (2) KCRC was not created to produce revenue that would inure to the benefit of its Tribes nor is its purpose to control and administrator a federal program for the Tribes' benefit; (3) KCRC does not receive funding contributions from all of its Tribes; and (4) KCRC has failed to demonstrate how it represents its Tribes and its decision making process. Plaintiffs' assertion are incorrect and not supported by case law.

Plaintiffs' first argument will be addressed under subsection "C". below. Plaintiffs' second argument, that a tribal entity is not an arm of the tribe unless its purpose is to generate revenue for the tribe or the entity that controls and administers a federal program that benefits the tribe, is unsupported and gives limited review of court decisions finding an entity to be an arm of the tribe. KCRC acknowledges that tribal entities created for the two purposes presented by Plaintiffs have indeed been found to be tribal entities. However, those are not the exclusive means by which tribal entities are created. Other entities, not created for these two limited purposes, have nonetheless also been found to be tribal entities with tribal sovereign immunity. Plaintiffs' argument ignores tribal entities that were created to protect tribal natural resources, provide educational services through a college, provide housing insurance for tribal housing, to operate tribal schools and in KCRC's case to act as the Tribes' representative on repatriation under the Native American Graves Protection and Repatriation Act ("NAGPRA"). *Dille v. Council of Energy Resources Tribes*, 801 F. 2d (10th Cir. 1986) (tribal energy consortium); *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680 (8th

Cir 2011) (tribal insurance corporation); *Smith v. Salish Kootenai College,* 434 F.3d 1127 (9th Cir. 2006) (tribal college); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000) (tribally chartered college); *Giedosh v. Little Wound School., Inc.,* 995 F. Supp. 1052 (D.S.D. 1997) (school board created to operate tribal school.)

Plaintiffs' third argument, that KCRC is not an arm of its Tribes because not every members Tribe provides financial support, is likewise misplaced and lacks legal authority. In its moving papers, KCRC cited one factor a court considers in determining whether an entity is an arm of the tribe, is the financial relationship between the two. Generally the court is interested in whether the entity generates and retains revenue and property in its name and whether the tribe is liable for the debts of the entity. The factor is most common when the entity generates revenue through the operation of a tribal business. Where the entity income and property belong to the tribe and the tribal assets could be liable for the debt of the entity then the courts have found, after considering the other factors, that the entity is an arm of the government.

In this case, KCRC does not generate income for its Tribes nor does it maintain property in its name. The financial relationship between KCRC and its Tribes, for the purpose of an "arm of the government" analysis, centers on whether KCRC is independently funded or funded by the Tribes. As KCRC has presented, it is funded exclusively by its Tribes. Plaintiffs cite no authority for a requirement that the tribe must provide financial support or that all tribes belonging to a tribal consortium must finance the consortium in order for the entity to be an arm of the tribe or whether this factor is dispositive for the "arm of the government" analysis. The Ninth Circuit in *Smith v. Salish Kootenai College,* 434 F.3d 1127, 1134 (2006), found that the college was a tribal entity covered by tribal immunity even though the tribe did not fund the college.

Plaintiffs place emphasis on *Runyon ex.rel. B.R. v. AVCP*, 84 P. 3d 437 (Alaska 2010) which found dispositive the fact that because the tribe would not be liable for the debts of the defendant,

the defendant was not a tribal entity and could not claim tribal sovereign immunity. Plaintiffs argue that because the KCRC Tribes' assets are not subject to KCRC debts, this factor alone should be dispositive on finding KCRC is not a tribal entity. In *J.L. Ward Associates Inc., v. Great Plains Tribal Chairmen's Health*, 842 F. Supp. 2d 1163 (D.S.D. 2012) the court was faced with the same argument as advanced by Plaintiffs and held:

> However, in *Breakthrough Mgmt.v. Chukchansi Gold Casino,* 629 F. 3d 1173, 1186-87 (10th Cir. 2010) the court specifically refused to apply the *Runyon* "real party in interest" test when determining whether a tribal casino and an entity owned and operated by the casino were entitled to sovereign immunity." *Id.*at 1175. The lower court had applied the *Runyon* test and on appeal the Tenth Circuit reversed on the grounds that the lower court had applied the incorrect legal standard when it "treated the financial impact on a tribe of a judgment against its economic entities as a threshold inquiry. Our precedent demonstrates that there is no threshold determination to be made in deciding whether economic entities qualify as subordinate economic entities entitled to share in a tribe's immunity." *Id.* at 1175

The Tenth Circuit then applied the multi-factor test and looked to: method of creation; purpose; structure, ownership, management, degree of tribal control over the entity; tribal intention to extend immunity to the entity; financial relationship between the entity and the tribe; and whether the purpose of tribal immunity would be served by granting the entity immunity. Similarly, the financial relationship between KCRC and its Tribes is not in and of itself dispositive of its status as a tribal entity.

Plaintiffs' fourth claim, that they are unaware of how KCRC "represents" the Tribes or its decision making process, is disingenuous. Plaintiffs Bettinger and Schoeninger are aware that KCRC is the authorized contact for repatriation of Kumeyaay remains and has represented the Tribes during consultation with the University of California, San Diego ("UCSD') regarding the La Jolla remains. Plaintiff Schoeninger, when she sat as Chair of the UCSD NAGPRA Working Group, interacted and consulted with KCRC on the La Jolla remains and understands that KCRC represents the 12 Kumeyaay Tribes on repatriation. (Exhibit A) Plaintiffs are well aware that Defendants Foxx and Matthews have met with and consulted with KCRC on the La Jolla remains. Plaintiffs' Exhibit

6, attached to Request for Judicial Notice in Opposition to Dismiss First Amended Complaint Under Fed. R. Civ. P. 12(b) (7), 12(b) (1) and 12(b) (6), is the March 2, 2011 meeting and summary report of the UC Systemwide Advisory Group on Cultural Affiliation and Repatriation of Human Remains and Cultural Items. Both Plaintiffs Bettinger and Schoeninger were members of the Group at the meeting on March 2, 2011. The meetings specifically addressed the La Jolla remains and repatriation to the KCRC. Plaintiff Schoeninger provides the Group with an overview of the consultation with KCRC by UCSD on the La Jolla remains. Plaintiffs' own documents refute their argument that they are unaware of how KCRC represents it Tribes on repatriation matters.

Finally, Plaintiff s attempt to distinguish several cases cited by KCRC in which the courts applied the multiple factor test to a tribal entity and found that it was an arm of the tribe because the cases involved Title VII discrimination claims and the tribal exemption under Title VII. Plaintiffs caution that "Applying Title VII cases risk confusion, because Title VII expressly exempts Indian tribes from the definition of "employer." … In Title VII cases, whether a tribal entity may reap the benefits of the tribe's immunity is considered for purposes of determining whether the statutory exception applies. … No such exception is at issue here."

Plaintiffs' argument misses the point of the cases cited by KCRC. The Ninth Circuit in *Smith v. Salish Kootenai College,* 434 F. 3d 1127, 1133 (2006) was presented with the question of whether a college on the Kootenai reservation was a tribal entity for purposes of a civil action brought in tribal court. The court found it "useful to look to analogous case outside the area of civil jurisdiction, where courts have been called upon to identify tribal entities." The court specifically looked to *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998), a Title VII case, and other authorities, to determine the college was a tribal entity.

Also, in *J.L. Ward Associates Inc., v. Great Plains Tribal Chairmen's Health Board,* 842 F. Supp. 2d 1163 (D.S.D. 2012) the court, when determining whether a tribal health board consortium was a tribal entity, turned to several Title VII cases for guidance, finding:

> These Title VII cases do not directly concern whether an organization formed by a group of tribes is entitled to the tribe's sovereign immunity, but the discussion in the cases is instructive. Indeed the Eighth Circuit has cited one of these Title VII cases in its discussion about whether a college was entitled to sovereign immunity. *Hagen*, 205 F.3d at 1043 (citing *Pink*); *see also Cash advance& Pref. Cash Loans v. State*, 242 P.3d 1099, 1109 (Colo. 2010) (explaining that the line of Title VII cases dealing with the "Indian tribe exemption" "is instructive with respect to the facts relevant to the determination whether a tribal entity is closely enough associated with the tribe to be entitled to the tribe's immunity." ; *Runyon ex rel. B.R. v. AVCP*, 84 P. 3d 437, 440 (Alaska 2004)(citing *Pink* for the proposition that "tribal status similarly may extend to an institution that is the arm of multiple tribes, such as a joint agency formed by several tribal governments)."

It is clear that the Court may rely on cases involving the Title VII "Indian tribe exemption" to determine whether KCRC is a tribal entity and entitled to tribal sovereign immunity.

B. KCRC Did Not Waive Its Immunity By Filing A Federal District Court Case In The Southern District of California Against The University Defendants In The Current Case.

Plaintiffs assert that KCRC "unequivocally consented" to **a** district court's exercise of jurisdiction over the same issue of whether the La Jolla remains must be repatriated to the La Posta Band. Plaintiffs cite *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981) for support of their argument. Plaintiffs' argument is contrary to well established federal law and *United States v. Oregon* is inapposite to this case.

KCRC acknowledges that filing a law suit can waive sovereign immunity for limited purposes. In an action filed by the tribe for monetary relief, the tribe's immunity is waived as to any claims for recoupment or set-off that arise from the action being sued upon and do not exceed the tribe's claim. *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1344 (10th Cir. 1982). In a quiet title action, a tribe's immunity is waived for defendant's counterclaims to quiet title because the issues

raised by defendant's claim for quiet title are the same as in plaintiff's quiet title action. *Rupp v. Omaha Indian Tribe*, 45 F. 3d 1241 (8th Cir. 1995). In the current case, KCRC has not filed an action for monetary relief or quiet title and as such has not waived its immunity.

Plaintiffs' rely on *United States v. Oregon*, *supra.* for their argument that by filing an action in the Federal District Court for Southern California seeking repatriation of the La Jolla remains, KCRC has waived its immunity and may be joined in any court, anywhere, and by any plaintiff if the suit involves the repatriation of the La Jolla remains. The *Oregon* case does not stand for this broad proposition.

In *Oregon,* the Yakima Tribe intervened into protracted litigation brought by the United States against the state of Oregon. The litigation was initiated to establish and protect treaty fishing rights of all the tribes occupying the Columbia River Basin. In a ruling in favor of the United States, the court enjoined Oregon from enforcing fishing regulations and issued a decree that established a procedure for promulgating future state regulations. The court expressly retained jurisdiction over the case in order to expedite enforcement of its decree. Washington State was not an original party, but intervened as of right and agreed to be bound by the decree of the court. Over the ensuing years both Yakima and Washington successfully sought modifications to the Oregon district court's original decree.

The original parties and all interveners eventually signed a conservation agreement regarding the future management of the fishery and that any issues that could not be resolved through the negotiation provisions of the agreement would be submitted to the Oregon district court for resolution. Three years after the conservation agreement was signed, Washington sought an injunction from the court against any Yakima tribal fishing for spring Chinook salmon due to their low numbers. The court granted the injunction and banned all Yakima fishing. Yakima appealed the injunction and argued that only Congress could waive its immunity and alternatively that it had

not waived its immunity. The court rejected the tribe's first argument and found that the only issue before the court was whether Yakima had consented to the suit.

The court concluded that Yakima's intervention caused it to become a party to the suit and to be bound by all future decrees of the court. Further, "[b]y successfully intervening, a party 'makes himself vulnerable to complete jurisdiction by the federal court on the issues in litigation between the intervener and the adverse party.'" *Id.* at 1014.

Contrary to Plaintiffs' assertion, *Oregon* does not hold that KCRC's filing of an action in one court waived its immunity to be joined as a defendant in another court. The rule under *Oregon* is that if a tribe voluntarily intervenes in a pending law suit, thereby becoming a party and then participates as a party, it cannot later invoke sovereign immunity to bar a claim against it by a party in the case. Here, KCRC has not intervened in the Plaintiffs' case and thus waived its immunity.

C. KCRC Did Not Waive Its Immunity By Incorporating Under State Law.

KCRC's nonprofit corporate status has been suspended for 8 years. As such KCRC cannot operate or act as a corporation. KCRC never operated or held itself out as a nonprofit corporation even when it was in good standing

Nonetheless, even if the KCRC was an active nonprofit corporation, it does not equate that it is not an arm of the Tribes. Courts have found that a tribal entity that is organized as a nonprofit corporation does not in and of itself mean the entity is not an arm of the tribal government. Most instructive is the *Smith v. Salish Kootenai College,* 434 F.3d 1127 (9th Cir. 2006), where the court was determining whether the tribal college was a tribal government entity. The college had been incorporated under tribal law in 1997 and a year later was incorporated under state law. The court's analysis acknowledged the state incorporation but also focused on the other multi-factor test to conclude that the college was a tribal entity. The court found that the Tribal Council appointed the

college's board of directors, all of whom must be members of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Tribal Council may remove a member from the board. The Confederated Tribes created the college and continued to exercise control over the institution. The court also noted that the college was located on the Flathead Reservation, thirty-four percent of the students were tribal members and forty percent of the faculty were Indian.

Similarly, KCRC was created by tribal resolutions back in 1997, four years before they sought incorporating as a nonprofit. As provided in the Declaration of the Spokesman for KCRC, Steven Banegas, the Tribes appoint and can remove KCRC's representatives, KCRC representatives report directly to their respective Tribe, KCRC representatives are all Native American, and their meetings are held on their respective tribal reservations on a rotating basis. (Exhibit A attached to KCRC' Motion to Dismiss Plaintiffs' First Amended Complaint) KCRC is also funded by its respective Tribes. Clearly, KCRC, under factors relied upon in the *Smith* case, is an arm of the Tribes that created it and its suspended state non-profit corporate status does not defeat this tribal status. *See also*, *J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Board,* 842 F. Supp.2d 1163 (D.S.D. 2012)(state incorporated tribal health board determined to be a tribal entity for purposes of sovereign immunity); *Giedosh v. Little Wound School Bd. Inc.*, 995 F. Supp. 1052 (D.S.D. 1997)(school board incorporated under state law found to be a "tribe" for purposes of the Title VII tribal exemption); *Ransom v. St. Regis Mohawk Educ. and Community Fund, Inc.*(86 N.Y. 2d 553, 658 N.E. 2d 989 (N.Y. 1995)(state incorporated tribal organization that provided education and health services to tribal members determined to be a tribal entity covered by sovereign immunity); *Huron Potawatomi, Inc. v. Stinger*, 227 Mich. App. 127, 574 N.W. 2d 706 (Mich. Ct. App. 1997) (state incorporated tribe still retained its sovereign immunity from suit).

II. CONCLUSION

KCRC is a tribal entity that has not waived its immunity by filing a separate and independent action in another federal district court or by incorporating as a non-profit under California law. KCRC's Motion to Dismiss the Plaintiffs' First Amended Complaint should be granted.

CALIFORNIA INDIAN LEGAL SERVICES

DATED: August 9, 2012

_/s/ Dorothy Alther_____
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CERTIFICATE OF SERVICE

I certify that on August 9, 2012 I filed the foregoing ***By Special Appearance Defendant's Kumeyaay Cultural Repatriation Committee Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss First Amended Complaint,*** via the Court's CM/ECF system, and that I served opposing counsel by the same means.

/s/ Dorothy Alther
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