JAMES McMANIS (40958)
CHRISTINE PEEK (234573)
BRANDON ROSE (269196)
JENNIFER MURAKAMI (273603)
McMANIS FAULKNER
A Professional Corporation
50 West San Fernando Street, 10th Floor
San Jose, California 95113
Telephone: (408) 279-8700
Facsimile: (408) 279-3244
Email: cpeek@mcmanislaw.com

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

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

Petitioners and Plaintiffs,

vs.

THE UNIVERSITY OF CALIFORNIA; THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; 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, inclusive,

Respondents and Defendants.

Case No. C 12-01978 (RS)

(Alameda County Superior Court Case No. RG-12-625891)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTIONS TO DISMISS FIRST AMENDED COMPLAINT UNDER FED. R. CIV. P. 12(B)(7), 12(B)(1), AND 12(B)(6)

Date: August 24, 2012
Time: 10:00 a.m.
Ctrm: 3, 17th Floor
Judge: The Hon. Richard Seeborg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

INTRODUCTION

Plaintiffs, Timothy White, Robert L. Bettinger, and Margaret Schoeninger (collectively, "plaintiffs") hereby oppose the motions of defendants, the University of California, the Regents of the University of California, Mark G. Yudof, Marye Anne Fox, and Gary Matthews, (collectively the "Regents"), and Kumeyaay Cultural Repatriation Committee ("KCRC") to dismiss with prejudice plaintiffs' Petition For Writ Of Mandamus (Code Civ. Proc., § 1085), Or In The Alternative, For Writ Of Administrative Mandamus (Code Civ. Proc., § 1094.5); First Amended Complaint For Declaratory And Injunctive Relief (Code Civ. Proc., §§ 526a, 1060) ("FAC"). In the interests of efficiency, plaintiffs submit one memorandum of points and authorities in opposition to both motions.

This is the Regents' second motion to dismiss. In their first motion to dismiss, the Regents argued that the twelve Kumeyaay tribes were necessary and indispensible parties. Further, the Regents argued, the tribes could not be joined because they enjoyed sovereign immunity, and therefore, this action had to be dismissed. Plaintiffs then amended their Complaint to add KCRC, pursuant to Rule 20 of the Federal Rules of Civil Procedure. In their second motion, the Regents disagree that KCRC may represent the tribes' interests. They continue to assert the tribes themselves must be joined, and claim that because the tribes cannot be joined, the action must be dismissed. KCRC also argues that it enjoys sovereign immunity.

Defendants' arguments lack merit. KCRC is not immune, and even if it is, it has waived its immunity by suing the Regents in the Southern District of California (the "Southern District action"), seeking relief as to the same human remains at issue here. In addition, the tribes are not necessary or indispensible parties, because their purported interests are represented adequately by KCRC or the Regents, or by allowing plaintiffs leave to amend to add tribal officials under the doctrine of *Ex parte Young*. Even as nonparties, the tribes may be enjoined under Rule 65(d) because they are acting in concert with the Regents to violate NAGPRA. Therefore, there is no risk of inconsistent obligations if this Court were to enter judgment in favor of plaintiffs. Further, the tribes are not indispensible because the public rights exception to Rule 19(b) applies.

The Regents also attack the FAC on other procedural grounds, including ripeness, standing, and incorrect party designation. These arguments also fail. All of plaintiffs' claims are ripe because the Regents have threatened to transfer the remains regardless of whether NAGPRA applies or not, and have taken affirmative steps towards this goal. Plaintiffs have standing because a judgment in their favor likely would redress the Regents' refusal to allow them to study the remains. Finally, plaintiffs correctly have sued state officials in their individual capacity under the doctrine of *Ex parte Young*. For all these reasons, plaintiffs respectfully request that this Court deny defendants' motions to dismiss.

STATEMENT OF FACTS

This case concerns the Regents' unlawful efforts to repatriate two extremely old, rare skeletons (the "La Jolla Skeletons") discovered in 1976 on University property in San Diego. (FAC, ¶ 13, attached as Exhibit A to the Declaration of Christine Peek in Opposition To Motions To Dismiss First Amended Complaint Under Fed. R. Civ. P. 12(b)(7), 12(b)(1), and 12(b)(6) ("Peek Decl.").) The bones have great scientific significance due to the age of the two skeletons, which are estimated to date back 8977 to 9603 years ago. (*Id.* at ¶ 13.) Because of their extreme age and relatively good condition, the La Jolla Skeletons represent a unique opportunity for all people to understand human origins in North America. (FAC, ¶ 13.)

In 1990, Congress passed the Native American Graves Protection and Repatriation Act ("NAGPRA"). NAGPRA defines "Native American" as follows:

> 'Native American' means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

25 U.S.C. § 3001(9). The Ninth Circuit has held that human remains must bear some relationship to a presently existing tribe, people, or culture to be considered "Native American" within the meaning of NAGPRA. *See Bonnichsen v. United States*, 367 F.3d 864, 875-76 (9th Cir. 2004). NAGPRA does not apply to remains that are not "Native American" or "Native Hawaiian." *See id.* at 875; *see also* 25 U.S.C. § 3001(9)-(10). NAGPRA's statutory scheme does not require repatriation of "culturally unidentifiable" human remains, however. *See generally* 25 U.S.C. § 3001 et seq.

NAGPRA requires those entities subject to it to compile an inventory of "Native American" human remains and cultural objects in their possession, and submit the inventory to the United States Department Of The Interior ("DOI"). 25 U.S.C. § 3003. Museums must make a "threshold determination" that culturally unidentifiable remains are "Native American" before including them on a federal inventory. (*See* 75 Fed.Reg. 12387 (response to Comment 55), attached as Exhibit U to Request for Judicial Notice in Opposition To Motions To Dismiss First Amended Complaint Under Fed. R. Civ. P. 12(b)(7), 12(b)(1), and 12(b)(6) ("RJN").)

The University has created a system-wide University Advisory Group on Cultural Repatriation and Human Remains and Cultural Items ("Advisory Group"). (FAC, ¶ 17.) The President or the President's designee has final authority to approve or disapprove determinations regarding disposition of remains and cultural items. (*Id.*, ¶ 17.)

The Kumeyaay Nation ("Kumeyaay"), a coalition of twelve Native American tribes,[1] claims to have occupied the site on which the La Jolla Skeletons were found. (*Id.*, ¶ 19.) These twelve tribes are represented by defendant, Kumeyaay Cultural Repatriation Committee ("KCRC"), a California nonprofit corporation whose status currently is reported as "suspended" on the website of the California Secretary of State. (*Id.*, ¶ 10; *see also* RJN, Exh. T.) Steven Banegas is the spokesperson for KCRC. (FAC, ¶ 27.) James Hill is the KCRC representative for the La Posta Band of Diegueno Mission Indians ("La Posta Band"). *See* Declaration of Steven Banegas in Support of Defendant's Motion to Dismiss, Docket No. 41-1, p. 10.

Although the Kumeyaay have asserted that the La Jolla Skeletons are culturally affiliated with their coalition of tribes, there is insufficient evidence to support the conclusion that the

[1] The twelve tribes are as follows: La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Ewiiaapaayp Band of Kumeyaay Indians, California; Iipay Nation of Santa Ysabel, California (formerly the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation); Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Sycuan Band of the Kumeyaay Nation; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Kumeyaay are descended from the people who were buried at the site, approximately 10,000 years ago. (FAC, ¶ 19.) In addition, there is insufficient evidence to conclude that any Kumeyaay tribe actually occupied the site at the time the La Jolla Skeletons were buried there. (*Id.*, ¶ 19.) The evidence does not support a finding that there is any link between the La Jolla Skeletons and any Kumeyaay tribe, or any currently existing Native American tribe, for the following reasons, among other reasons:

- The burial pattern of the La Jolla Skeletons differs from that of the Kumeyaay as reported in early ethnographies. Before the Spanish explorers made contact with North America, the Kumeyaay cremated, rather than buried, their dead.
- Preliminary carbon and nitrogen stable isotope analysis of human bone collagen from the La Jolla Skeletons is consistent with a year-round diet of open-ocean and some nearshore marine fish or marine mammals. This contrasts with the diet of the Kumeyaay, who lived on wild plants, supplemented with more small than large game, and in some places, fish. Seasonal dependence on marine foods would produce lower values of the isotope signals than those recovered from the La Jolla Skeletons.
- The skeletal morphology of the La Jolla Skeletons does not show any link to the Kumeyaay, or any other Native American tribe. The La Jolla Skeletons have long, narrow cranial vaults and short, relatively narrow faces compared with extant Native Americans. A detailed 2007 morphological study by Professor Douglas Owsley concluded the La Jolla Skeletons were not Native American.
- Because there has been no genetic testing of the La Jolla Skeletons (because the University has not allowed any testing), there is no genetic or DNA evidence linking the Kumeyaay or any other Native American tribe to the La Jolla Skeletons.

(*Id.*, ¶ 19.)

On or about October 22, 2008, the University submitted a "Notice of Inventory Completion" and inventory to the DOI, which included the La Jolla Skeletons and various other items said to be associated with the remains. (*Id.*, ¶ 20.) The 2008 report was silent on whether the La Jolla Skeletons were "Native American" within the meaning of NAGPRA, and made no attempt to determine whether or not the La Jolla Skeletons were subject to NAGPRA. (*Id.*, ¶ 21.) The 2008 report did conclude, however, that there was insufficient evidence to conclude the remains were culturally affiliated with the Kumeyaay. (*Id.*, ¶ 21.) Because there is insufficient evidence to conclude the La Jolla Skeletons are "Native American" within the meaning of

NAGPRA, Defendants' decision to include them on the October 22, 2008 inventory was legally erroneous. (*Id.*, ¶ 22.)

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

On or about May 11, 2011, Yudof authorized UCSD to dispose of the La Jolla Skeletons under NAGPRA, subject to the certain directions and recommendation. (*Id.*, ¶ 30.) On or about December 5, 2011, defendants published, or caused to be published, in the Federal Register, a Notice of Inventory Completion: The University of California, San Diego, San Diego, CA ("Repatriation Notice"). (*Id.*, ¶ 37.) The Repatriation Notice stated that if no one else came forward and claimed the La Jolla Skeletons by January 4, 2012, the La Jolla Skeletons would be repatriated to the La Posta Band after that date. (*Id.*, ¶ 37.) The Repatriation Notice also made the following purported findings, among other findings:

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

(*Id.*, ¶ 37.)

The La Jolla Skeletons are in good enough condition that it may be possible to retrieve DNA samples and perform DNA sequencing. (*Id.*, ¶ 31.) Not only would this provide a wealth of information of interest to the general public, such sequences also could be used to assess

whether or not the remains share any genetic affiliation with modern Native American groups. (*Id.*, ¶ 31.) Fox and UCSD have authority to grant requests to study the La Jolla Skeletons, but have refused to allow any research to be conducted. (*Id.*, ¶ 32.) White, Bettinger, and Schoeninger have asked to study the La Jolla Skeletons, but the University has not granted their requests. (*Id.*, ¶¶ 33-35.) The University's policy is that remains and cultural items shall normally remain accessible for research by qualified investigators such as plaintiffs. (*Id.*, ¶ 36.) Therefore, it is highly probable that plaintiffs will be allowed to study the La Jolla Skeletons if they remain in the University's possession. (*Id.*, ¶ 36.)

LEGAL ARGUMENT

I. KCRC IS NOT ENTITLED TO SOVEREIGN IMMUNITY.

The Regents claim KCRC is not an adequate representative of any Kumeyaay tribe, because KCRC enjoys sovereign immunity. KCRC also contends it is immune, because it acts as an arm of its member tribes. In fact, tribal sovereign immunity does not extend to KCRC.

Defendants cite a variety of cases in which corporate entities or other non-tribes were found to operate as an "arm of the tribe" and therefore enjoyed the tribe's sovereign immunity.[2]

[2] *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974 (9th Cir. 2006), *vacated on other grounds in Marceau v. Blackfeet Hous. Auth.*, 519 F.3d 838 (9th Cir. 2008); *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1187 (9th Cir. 1998); *see also Ninigret Development Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21 (1st Cir. 2000); *Memphis Biofuels, LLC v. Chicksaw Nation Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009); *Amerind Management Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040 (8th Cir. 2000); *Taylor v. Alabama Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032 (11th Cir. 2001) (per curiam); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581 (9th Cir. 1998); *Weeks Construction, Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668 (8th Cir. 1986); *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10th Cir. 1986); *J.L. Ward Assoc., Inc. v. Great Plains Tribal Chairman's Health Bd.*, 2012 U.S. Dist. LEXIS 4164 (D.S.D. Jan. 13, 2012); *Giedosh v. Little Wound School Bd.*, 995 F. Supp. 1052 (D.S.D. 1997); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632 (1999); *Wright v. Colville Tribal Enterprise Corp.*, 147 P.2d 1275 (Wash. 2006); *Cash Advance and Preferred Cash Loans v. Colorado*, 242 P.2d 1099 (Colo. 2010) (en banc); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971). Most of these cases offer scant or no analysis of the factors relevant to the "arm of the tribe" question, and therefore will not be discussed in detail. In addition, many of these cases were decided under rules applicable to Title VII cases, including *Pink v. Modoc Indian Health Project*, discussed in the Regents' brief. Applying Title VII cases here risks confusion, because Title VII expressly exempts Indian tribes from the definition of "employer." *See Taylor*, 261 F.3d at 1035. 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. *See J.L. Ward Assoc., Inc. v. Great Plains Tribal Chairman's Health Bd.*, 2012 U.S. Dist. LEXIS 4164, *25 (D.S.D. Jan. 13, 2012). No such statutory exception is at issue here.

While it may be theoretically possible for immunity to extend to agencies or corporations that function as an "arm of the tribe," tribal entities are not entitled to immunity unless, under the relevant factors, they actually are acting as an arm of the tribe. The multi-factor test requires analysis of the facts pertinent to each factor. *See Breakthrough Management Group, Inc. v. Chukchansi Gold Casino*, 629 F.3d 1173, 1187 (10th Cir. 2010) (identifying six factors).

The *Breakthrough* factors are as follows: "1) the entity's method of creation; 2) the entity's purpose; 3) the entity's structure, ownership, and management, including the level of control the tribe exercises over the entity; 4) whether the tribe intended to extend its sovereign immunity to the tribe; 5) the financial relationship between the tribe and the entity; and 6) whether the purposes of tribal immunity are served by granting immunity to the entity." *See J.L. Ward Assoc., Inc. v. Great Plains Tribal Chairman's Health Bd.*, 2012 U.S. Dist. LEXIS 4164, *36 (D.S.D. Jan. 13, 2012) (*citing Breakthrough*, 629 F.3d at 1181); *see also Cash Advance and Preferred Cash Loans v. Colorado*, 242 P.2d 1099 (Colo. 2010) (en banc) (using a variation on factors one, three, and six); *Trudgeon v. Fantasy Springs Casino*, 71 Cal.App.4th 632, 638-39 (1999) (using a variation on factors two, three, and six).

The facts currently available to plaintiffs do not establish that KCRC is acting as an arm of the tribes, under the relevant factors. Regarding the first factor, KCRC asserts that it was incorporated under tribal law. *See* Banegas Decl., Docket No. 41-1, ¶ 5 & attachments. The Banegas declaration omits the fact that KCRC also was incorporated under California law and registered with the California Secretary of State. *See* RJN, Exh. T. Its Articles of Incorporation state that it is a nonprofit public benefit corporation under California law, and also that it is dedicated to "public and charitable purposes." *See* RJN, Exh. T. These statements tend to rebut the conclusion that KCRC's sole purpose is to serve its member tribes.

Defendants argue that KCRC's purpose – repatriation of remains and cultural items to the Kumeyaay tribes – shows KCRC is an arm of the tribes and not a "mere business." *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011), cited by the Regents, does not support this argument. KCRC was not organized to produce revenue that would inure

to the benefit of the tribe and promote its financial autonomy. Similarly, *J.L. Ward* is distinguishable because KCRC's purpose is to advocate for repatriation to Kumeyaay tribes generally, not to give tribes control over the administration of a federal program for their benefit. The Regents must comply with NAGPRA regardless of the Kumeyaay's interests; there is no way KCRC could transfer control of the Regents decision-making process to the tribes.

Defendants point to the fact that the tribes fund KCRC and appoint representatives as further evidence that KCRC is an arm of the tribes. However, it appears that not all tribes have resolved to fund KCRC. *See* Banegas Decl., Docket No. 41-1, ¶ 5 & attachments. Those that did refer to "contributions," including the La Posta Band, did not promise to fund KCRC, but merely to "consider contributions and other request[s] of support from KCRC." *See* Banegas Decl., Docket No. 41-1, ¶ 5 & attachments, p. 10. Further, it is not clear exactly how the tribal representatives "represent" their respective constituencies, since no information was provided about KCRC's decision-making procedures. The Regents cite *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373, 376 (10th Cir. 1986), but this case dealt with Title VII and tribes' ability to benefit from their own energy resources. No parallel concerns are at stake here.

KCRC argues that its member tribes must have intended to extend immunity because otherwise, they would not have created KCRC. This argument is not supported by any evidence and therefore is not persuasive. Further, as discussed in section III.E below, the tribes could not avoid being joined in this action by advancing repatriation on their own behalf, because tribal officials may be joined under the doctrine of *Ex parte Young*.

The entity's financial relationship to the tribe is significant to the extent that a judgment against the entity would reach the tribe's assets. *See Runyon v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 440-41 (Alaska 2004) (fifty-six villages, which were members of nonprofit corporation, were not liable on the corporation's obligations; therefore corporation was not entitled to sovereign immunity). Even if the tribes do fund KCRC, that is not significant. Here, judgment against KCRC would not affect any tribe's assets because this is not a suit for damages. Nor would a judgment in plaintiffs' favor impose any obligations on any tribe; the

tribe just would not receive the La Jolla Skeletons. Neither KCRC nor the Regents contend that any tribe depends on KCRC for revenue to fund its activities. This factor was found to be dispositive in *Runyon*, and should also be dispositive here.

Finally, KCRC's argument that the purposes of sovereign immunity are served lacks merit. As discussed above, tribal assets are not at risk here no matter what happens, because plaintiffs are not seeking damages. Nor would allowing plaintiffs' lawsuit to proceed undermine tribal self-government or economic self-sufficiency. The tribes would remain free to form whatever associations they wish to advocate for repatriation. Such advocacy does not have anything to do with self-government or economic self-sufficiency. Cases such as *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006) and *J.L. Ward* are distinguishable, because KCRC is not operating a business, such as a casino, where the proceeds benefit the tribe, nor is KCRC giving tribes control over the administration of a federal program for their benefit.

Plaintiffs are limited in their ability to respond to defendants' immunity argument, because they lack access to documents and other information relevant to the *Breakthrough* factors. For example, defendants did not provide all documents relevant to KCRC's formation, and it remains unclear precisely what tribal laws authorized its creation. Since the Rule 19 issues in this case may be disposed of on numerous other grounds, however, the Court may not need to reach the issue of whether KCRC has sovereign immunity as an arm of the tribe at all. On the other hand, if the immunity issue turns out to be dispositive, plaintiffs request that this Court allow the parties to conduct limited discovery relevant to the *Breakthrough* factors, so that this issue may be briefed fully before any decision. *See Cash Advance*, 242 P.2d at 1102 (court of appeals compelled tribal entities to produce information relevant to immunity determination).

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II. EVEN IF THIS COURT FINDS KCRC QUALIFIES FOR SOVEREIGN IMMUNITY, KCRC WAIVED ANY SUCH IMMUNITY BY SUING THE REGENTS AND INCORPORATING UNDER CALIFORNIA LAW.

A. KCRC Waived Any Immunity It May Have Had By Initiating The Southern District Action Against The Same Defendants, Under The Same Federal Law, To Obtain The Same Skeletons In Dispute In This Action.

Even if KCRC were immune from suit, it waived any such immunity by filing the Southern District action to compel the Regents to repatriate the La Jolla Skeletons. *See* RJN, Exhs. A through S. By asking the Southern District to adjudicate the rights to the La Jolla Skeletons, the KCRC unequivocally consented to a United States District Court's exercise of jurisdiction over the issue of whether the La Jolla Skeletons must be repatriated to the La Posta Band. *See United States v. Oregon*, 657 F.2d 1009, 1014-16 (9th Cir. 1981) (tribe waived immunity by intervening in prior action initiated by United States, and also by agreeing to be bound by conservation agreement that was adopted as court order). The main issue in this action – whether the Regents may transfer the remains – is the same in the Southern District action. The KCRC waived any immunity it may have had by seeking equity from the Southern District, specifically, by expressly and unequivocally asking the court to adjudicate the rights to the same remains at issue here.[3] *See id.* at 1015.

KCRC's argument that it lacks authority to waive immunity on behalf of its member tribes also fails. The issue is whether or not KCRC has waived its own immunity as an arm of tribe, assuming, for the sake of argument, that it has any immunity to waive.

Defendants' authorities holding that tribal immunity was not waived are distinguishable. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 508-09 (1991) ("*Potawatomi Tribe*"), the Oklahoma Tax Commission argued that the tribe's suit to enjoin a state tax assessment for past sales of cigarettes waived immunity for its counterclaims to enforce the assessment and enjoin future sales to non-members without collection of the tax.

[3] KCRC asserts that waiver must be not only unequivocal but also executed by the tribe per its internal policy or tribal law. KCRC MTD, 8:22-24. Although KCRC's meaning is not entirely clear, to the extent KCRC asserts immunity cannot be waived by Congress, or by a tribe's own act of intervening or bringing suit, KCRC is incorrect. *See United States v. Oregon*, 657 F.2d at 1014-16.

The court held the tribe's suit did not waive immunity for counterclaims, just because they were compulsory under Rule 13(a) of the Federal Rules of Civil Procedure. *Id.* at 509-10. The commission's authority to tax past sales effectively would have been resolved through the tribe's own suit in any event, and the commission apparently did not appeal when it lost this issue before the district court. *See id.* at 508-09. The only counterclaim not effectively resolved by the tribe's suit was the related claim to enjoin future sales. *See id.* The holding of *Potawatomi Tribe* therefore applies to "related" compulsory counterclaims, but not necessarily those where the legal issues and property in dispute are identical.[4] *See id.* at 508-10; *see also Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539-40 (10th Cir. 1987) (tribe's initiation of suit did not manifest consent to suit over subsequent issues relating to the same leases); *McClendon v. United States*, 885 F.2d 627, 629-32 (9th Cir. 1989) (no waiver for suits on "related" matters).

Here, plaintiffs and the tribe all seek prospective relief against the same defendants with regard to the same remains under the same federal law. As in *United States v. Oregon*, the KCRC has already authorized the district courts to determine the rights to the La Jolla Skeletons.

Pit River Home & Agricultural Cooperative Ass'n v. United States, 30 F.3d 1088 (9th Cir. 1994) is also distinguishable. In that case, two tribes (referred to as the "Association" and the "Council" in the opinion) disputed which was the beneficial owner of property held in trust by the United States. *Id.* at 1092. The court held that by bringing claims against the government, the Council did not waive immunity as to the Association's claims against the government, since the Association could not have brought those claims against the Council. *Id.* at 1100-01. The *Pit River* court simply did not consider the issues raised by *United States v. Oregon*, nor did it discuss that case. *See also Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890 (10th Cir. 1989) (plaintiff did not rely on *United States v. Oregon*, but only on exception unique to the Tenth Circuit). In addition, plaintiffs have requested an injunction

[4] A counterclaim is compulsory if it "arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim." Fed. R. Civ. P. 13(a)(1). Precise identity of issues and facts between the claim and counterclaim is not required, however. *See, e.g., Pochiro v. Prudential Ins. Co. of America*, 827 F.2d 1246, 1249-52 (9th Cir. 1987). Rather, the claims simply must be "logically connected." *Id.*

preventing the Regents from repatriating the La Jolla Skeletons to any tribe, ever, while the KCRC has requested an injunction compelling repatriation to it. Peek Decl., Exh. A; RJN, Exh. A. Here, as in *United States v. Oregon*, the Court must retain jurisdiction over the La Jolla Skeletons to do equity. *Compare United States v. Oregon*, 657 F.2d at 1014-16; *with McClendon*, 885 F.2d at 630-31 (distinguishing *United States v. Oregon*).

B. KCRC Waived Any Immunity It May Have Had By Incorporating Under California Law.

A tribe also may waive immunity by incorporating under state law rather than tribal law. *See Wright v. Colville Tribal Enterprise Corp.*, 147 P.2d 1275, 1280 (Wash. 2006). As noted above, KCRC opted to incorporate under California law. (RJN, Exh. T.) Although the KCRC's corporate status currently is suspended, that fact does not erase KCRC's voluntary decision to accept rights and responsibilities under California law. The Regents' authorities are distinguishable. *See American Vantage Companies. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002) (incorporation under the Indian Reorganization Act of 1934); *see also Amerind*, 633 F.3d at 682-83 (entity incorporated under federal charter and tribal law).

III. THE TRIBES ARE NOT NECESSARY OR INDISPENSIBLE PARTIES.

A. No Tribe Other Than The La Posta Band Has Even A Hypothetical Interest In The La Jolla Skeletons.[5]

To be considered "necessary," the absent party must have a legally protected interest that is more than a financial stake, and also, more than speculation about a future event. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558-59 (9th Cir. 1990); *see also Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) (interest must not be patently frivolous). Here, any claimed interest by tribes that have not made a claim, and are not designated as the proposed recipient in

[5] In making this argument, plaintiffs do not concede that the La Posta Band's purported claim is valid or enforceable. First, the La Posta Band has no valid claim because the La Jolla Skeletons are not subject to NAGPRA at all. Even assuming for the sake of argument they were subject to NAGPRA, and that 43 C.F.R. § 10.11 were (a) implicated, and (b) valid and enforceable – none of which is true – defendants have presented no evidence that the La Jolla Skeletons were removed from the aboriginal lands of the La Posta Band, specifically. *See* 43 C.F.R. § 10.11(c)(1)(i)-(ii).

the Repatriation Notice, would be patently frivolous. No evidence supports even a bare expectation by those tribes that the La Jolla Skeletons will be repatriated to them.

The Regents argue that KCRC may not represent the tribes' interests because disagreements may develop among the tribes. This argument lacks merit. As NAGPRA contemplates, only one tribe has been designated as the recipient of the La Jolla Skeletons. *See* Peek Decl., ¶ 3, Exh. B (Repatriation Notice) to Exh. A (FAC); *see also* 25 U.S.C. §§ 3001(a), 3002(a), & 3005(a)(1); *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1141-43 (D. Or. 2002) (Secretary of the Interior was required to evaluate each tribe's claim individually and could not repatriate remains to a coalition of tribal claimants). No conflict exists because none of the other tribes have made competing claims, despite ample opportunity to do so.

B. The La Posta Band Is Not A Necessary Party Because KCRC May Represent The Tribe's Interests.

The La Posta Band is not a necessary party under Rule 19(b), nor is any other Kumeyaay tribe. An absent party is not a necessary party if the absent party is adequately represented. *See Shermoen*, 982 F.2d at 1318 (*quoting Makah*, 910 F.2d at 558). Even though KCRC is not a proper recipient of human remains or cultural items under NAGPRA, KCRC may represent the interests of the La Posta Band adequately in this lawsuit.

Three factors determine whether an existing party may represent an absent party: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments"; (2) "whether the party is capable of and willing to make such arguments"; and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Shermoen*, 982 F.2d at 1318 (citation and internal quotation marks omitted). Here, the Banegas Declaration and page 42758 of Volume 68 of the Federal Register establish KCRC as the authorized NAGPRA representative of the La Posta Band. See RJN, Exh. V. The tribe already has shown it can bring a lawsuit through KCRC. The interests of the La Posta Band and KCRC are clearly aligned. There can be little doubt KCRC would make all of the La Posta Band's arguments, and that the KCRC is capable of and willing to make such arguments. Moreover, there is no reason to suspect that the tribe would

offer any necessary element to the proceedings that KCRC would neglect. For all these reasons, KCRC is an adequate representative, and the La Posta Band is not a necessary party.

The Regents argue incorrectly that KCRC may not represent the La Posta Band because KCRC's corporate status has been suspended. Even an unincorporated association may sue and be sued in its own name under state law, (Cal. Code Civ. Proc., § 369.5(a)), and therefore may sue or be sued in their own name in federal court. Fed. R. Civ. P. 17(b). In addition, Rule 17(b) "allows an 'unincorporated association' to sue in federal court, regardless of its capacity to sue under the law of the state in which the court sits, when the association is suing 'for the purpose of enforcing . . . a substantive right existing under the . . . laws of the United States.'" *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 819-20 (9th Cir. 1996) (emphasis added, citing prior version of Rule 17). *In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 331 (9th Cir. 1978) does not apply, because KCRC can still sue and be sued for purposes of enforcing a right under federal law, even if its corporate status has been suspended under California law. *See* Fed. R. Civ. P. 17(b)(3)(A).

C. The La Posta Band Is Not A Necessary Party Because The Regents May Represent The Tribe Adequately.

The Regents emphasize that their broad obligations to operate in the interests of the people of California prevent them from representing the narrow interests of the La Posta Band. The Regents cite various authorities in support of this proposition.[6] These cases are not persuasive, because the Regents' conduct with respect to the La Jolla Skeletons shows they have abdicated their broader obligations to the public. Even if the Regents do not have a fiduciary obligation to the tribes (*see American Greyhound Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1023-24 & n.5 (9th Cir. 2002)), they have acted as though they do. In addition, circumstantial evidence suggests the Regents colluded with KCRC to file the Southern District action.

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[6] *Trbovich v. United Mine Works of Am.*, 404 U.S. 528, 538-39 (1972); *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001); *Forest Conserv. Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1178 (9th Cir. 2011).

To facilitate the parties' meet and confer efforts early in the case, plaintiffs provided the Regents' counsel with a copy of their draft complaint and its exhibits. Peek Decl., ¶ 5, Exh. C. Plaintiffs and the Regents also entered into a Tolling Agreement, one provision of which prohibited plaintiffs from filing an action until April 16, 2012. Peek Decl., ¶ 6, Exh. D. The KCRC filed its suit on April 13, 2012, just one court day preceding the expiration of the bar on filing. *See* Peek Decl., ¶ 6, Exh. D; *see also* RJN, Exh. A. The KCRC's descriptions of the defendants in the Southern District action appear to have been copied word for word from the draft complaint that plaintiffs provided to the Regents. *See* Peek Decl., ¶ 5, Exh. C; RJN, Exh. A. One reasonably may infer that the Regents acted to protect the La Posta Band's interests by providing KCRC a copy of the draft complaint and informing them of the deadline in the tolling agreement.

For these reasons, the Regents' argument that they cannot represent the interests of the La Posta Band lacks merit. Through their conduct in this litigation, including their very comprehensive motion to dismiss, the Regents have demonstrated they can make all of the La Posta Band's arguments, and that they are willing to make such arguments. Further, it is not correct that the Regents need only make a "minimal" showing that representation may be inadequate. The authorities they cite in support of this claim are cases supporting the right to intervene in a case, not protecting a recalcitrant defendant from being joined. *See, e.g.*, *Trbovich v. United Mine Works of Am.*, 404 U.S. 528, 538 n.10 (1972). *League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1305-06 (9th Cir. 1997) also does not help the Regents, because here, the Regents have vigorously defended the tribe's position at every turn. There is no reason to believe they cannot be counted on to do so. *See id.*

D. The Regents' Concerns About Inconsistent Obligations Are Unfounded.

The Regents make much of the theoretical chance that they would be subject to inconsistent obligations due to the Southern District action. The Regents fail to note, however, that they filed a joint motion to toll the litigation deadlines so long as the preliminary injunction in this case remains in place, and the Court ordered all deadlines tolled for one year on June 8,

2012. *See* RJN, Exhs. R & S. The Regents' concerns are also unfounded because the tribes may be enjoined here as nonparties acting in concert with the Regents to repatriate the La Jolla Skeletons, in violation of NAGPRA and the Regents' duty to administer the University as a public trust. *See* Fed. R. Civ. P. 65(d). Alternately, the tribes may be enjoined under the rule that "nonparties who interfere with the implementation of court orders establishing public rights may be enjoined, … or the rule that a court possessed of the res in a proceeding *in rem*, such as one to apportion a fishery, may enjoin those who would interfere with that custody." *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690, n. 32 (1979) (internal citations omitted), *modified by Washington v. United States*, 444 U.S. 816 (1979), *and later proceeding at United States v. Washington*, 506 F. Supp. 187, (W.D. Wash., 1980); *see also United States v. Hall*, 472 F. 2d 261, 264-66 (5th Cir. 1972) (upholding interim ex parte order against an undefined class of persons in school desegregation case).[7]

E. At A Minimum, Plaintiffs Can Join Tribal Officials In This Action Under The Doctrine Of *Ex Parte Young*.

Even more importantly, plaintiffs can join individual tribal officials to represent the La Posta Band's interests, in the event this Court finds that neither KCRC nor the Regents can represent them. In cases seeking prospective relief, sovereign immunity does not extend to tribal officials acting beyond the scope of their authority, in violation of federal law. *See Arizona Pub Serv. Co. v. Aspaas*, 77 F.3d 1128, 1133-34 (9th Cir. 1996); *Burlington N.R.R. v. Blackfeet Tribe*, 924 F.2d 899, 901-02 (9th Cir. 1991), *overruled on other grounds as stated in Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). In such circumstances, individual tribal members do not have immunity. *See United States v. Oregon*, 657 F.2d at 1013, n. 8.

Such a suit would be authorized here because the actions of Steven Banegas and James Hill violate NAGPRA, by attempting to enforce NAGPRA in a manner that is illegal. Again, the La Posta Band is not a necessary party if Banegas, Hill, or another tribal official were joined in

[7] For these reasons, and because there are a number of possible representatives for the La Posta Band in this action, *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459 (9th Cir. 1994), *Confederated Tribes v. Lujan*, 928 F.2d 1496 (9th Cir. 1991), and *Broussard v. Columbia Gulf Transmission Co.*, 398 F.2d 885 (9th Cir. 1968), impose no barrier to relief here.

this action, because such individuals may be counted on to make all arguments on behalf of the tribe, having demonstrated their capability and willingness to do so through their participation in KCRC. Unlike in *Shermoen* and *Dawavendewa v. Salt River Project Agricultural Improvement and Power District*, 276 F.3d 1150, 1160-61 (9th Cir. 2002), which also appear incorrectly to discount the doctrine of *Ex parte Young*, relief will not require affirmative action by any tribe, or dispose of unquestionably sovereign property. At a minimum, plaintiffs should be given the opportunity to amend their complaint to add Banegas or Hill as tribal officials.[8]

F. The La Posta Band Is Not Indispensible Under The Rule 19 Factors.

If the Court rejects the preceding arguments and finds the La Posta Band is a necessary party, the following four factors determine whether the La Posta Band is indispensible under Rule 19(b), assuming no other exception applies: (1) the extent to which a judgment rendered in the tribes' absence would prejudice the tribes or existing parties; (2) the extent to which any prejudice could be lessened or avoided; (3) whether a judgment rendered in the tribes' absence would be adequate; and (4) whether plaintiffs would lack an adequate remedy if the action were dismissed. Fed. R. Civ. P. 19(b). Defendants cite cases in which tribes were held to be indispensible parties because preexisting settlement agreements or other contract rights were implicated in some way.[9] None of these cases control, because a judgment in plaintiffs' favor will not impair any contract rights.

Here, the tribes would not be prejudiced by a ruling in their absence. The majority cannot claim a nonfrivolous interest in the La Jolla Skeletons, and even the La Posta Band's claimed interest is contingent on a finding that NAGPRA applies in the first place, which it does

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[8] Alternately, the Regents could have protected themselves against any potential prejudice by bringing their own third-party claim for prospective relief against Banegas and Hill under Rule 14 of the Federal Rules of Civil Procedure. *See EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1074, 1080-87 (9th Cir. 2008). Their failure to do so further suggests collusion, and reinforces the conclusion that the Regents may represent the tribe adequately.

[9] *See, e.g.*, *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002); *Manybeads v. United States*, 209 F.3d 1164 (9th Cir. 2000); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996); *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989); *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975); *Enterprise Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890 (10th Cir. 1989); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537 (10th Cir. 1987).

not. Any supposed prejudice could be lessened by joining or impleading a party to represent the tribe's interests, as discussed above in sections III.B, III.C, and III.E. As discussed above in section III.D, judgment rendered in the tribe's absence would be adequate. Because the tribes may be enjoined as nonparties under Rule 65(d), or the rule applicable to court orders establishing public rights, or the rule that a court possessed of the res in a proceeding *in rem* may enjoin those who would interfere with its custody, the social interest in avoiding multiple suits is not implicated. The relief sought here does not depend on compliance by the tribes, but by the Regents. *See Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986).

Finally, if the action is dismissed, plaintiffs and the public lack any remedy against the willful destruction of a national treasure, which would deprive future generations – almost certainly more technologically advanced – of any opportunity to study these rare human remains. A ruling in defendants' favor would mean that, effectively, no one could ever challenge a tribe's unlawful attempt to repatriate remains that are not subject to NAGPRA or affiliated with the tribe, unless the tribe voluntarily intervened in the litigation. This is inconsistent with Congress' intent that district courts shall have jurisdiction to resolve disputes over NAGPRA violations, expressed in 25 U.S.C. § 3013.

Na Iwi O Na Kupuna O Mokapu v. Dalton, 894 F. Supp. 1397, 1405 (D. Haw. 1995), cited by defendants, is not controlling. In *Na Iwi*, the plaintiff Hui Malama initially believed it was the only claimant to the remains at issue, but later discovered there were fourteen other claimants. *Id.* at 1405. After making this discovery, Hui Malama informally withdrew its claim for violation of NAGPRA for failure to return the remains, effectively rendering that claim moot. *Id.* The district court nevertheless addressed the claim, reasoning that Hui Malama had not formally withdrawn it, defendants had moved for summary judgment on it, and the issue of whether the federal government could represent the interests of any claimant would arise again. *Id.* Rejecting the idea that the government could represent all the competing claimants, the court remarked with virtually no analysis that the other claimants were indispensible. *Id.* Here, there are no competing tribal claimants and a number of possible ways to ensure the La Posta Band

may be heard, so this reasoning does not apply. In addition, *Na Iwi* is distinguishable because the court did not address the public rights exception, discussed in the next section below.

G. Neither The La Posta Band Nor KCRC Are Indispensible Because The Public Rights Exception Applies.

The La Posta Band and KCRC are not indispensible parties because this lawsuit transcends plaintiffs' private interests and seeks to vindicate important public rights. Traditional joinder rules are relaxed in proceedings dedicated to the protection and enforcement of public rights. *See Connor v. Burford*, 848 F.2d 1441, 1458-62 (9th Cir. 1988), *disapproved on other grounds as noted in Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417, 1422, n.3 (9th Cir. 1989), *rev'd sub nom Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330 (9th Cir. Or. 1992) ; *see also Am. Greyhound*, 305 F.3d at 1025-26 (recognizing exception).

Plaintiffs' lawsuit seeks to enforce the public's right to administrative compliance with the requirements of NAGPRA, and the public's interest in preservation of the public trust that is the University. NAGPRA requires the Regents to determine whether or not items are subject to NAGPRA before placing them on a federal inventory. 25 U.S.C. § 3003; 43 C.F.R. §§ 10.9, 10.11; *see also* RJN Exh. U. The public has an interest in enforcing this requirement, especially where an unlawful application of NAGPRA threatens to cut off a source of public knowledge such as the La Jolla Skeletons. In general, the public has an interest in preserving knowledge of, and the ability to study, humanity's collective history in North America.

Ninth Circuit cases declining to apply the public rights exception are distinguishable. *See, e.g., American Greyhound Racing, Inc.*, 305 F.3d at 1025-26 (plaintiffs' interest in defeating competition from Indian gaming predominated); *Kescoli v. Babbitt*, 101 F.3d 1304, 1311-12 (9th Cir. 1996) (litigation implicated private rights and threatened tribal rights under existing lease agreements and tribal sovereignty); *Shermoen*, 982 F.2d at 1319 (litigation threatened tribal rights under existing Settlement Act). Here, although plaintiffs' individual research interests are sufficient to ensure they will vigorously litigate the case on behalf of the public, the purpose of the lawsuit is to enforce compliance with the law to protect the public's interest in learning our common history. No existing legal entitlement will be threatened. The Repatriation Notice does

not grant an absolute entitlement, but contemplates that others may make competing claims to the La Jolla Skeletons. *See* RJN, Exh. W. Further, no tribe could have a legal entitlement to the La Jolla Skeletons absent the Regents' compliance with NAGPRA, including the requirement that the Regents determine whether the remains are subject to NAGPRA. Because the public rights exception applies here, the tribes and KCRC are not indispensible parties.

IV. PLAINTIFFS' PUBLIC TRUST AND FIRST AMENDMENT CLAIMS ARE RIPE.

The Regents argue that plaintiffs' public trust and First Amendment claims are not ripe because they involve "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." *Dodd v. Hood River County*, 59 F.3d 852, 860 (9th Cir. 1995). As an initial matter, the Regents' authorities are inapplicable, because plaintiffs' public trust and First Amendment claims are not phrased as direct appeals of an agency action. *See Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 669-71 (9th Cir. 2005). The appropriate standard is whether there is a substantial controversy between parties with adverse legal interests, of sufficient immediacy to warrant relief. *See id.* at 671. Here, the dispute between plaintiffs and the Regents is not abstract or hypothetical. Plaintiffs' FAC seeks relief against the transfer of the La Jolla Skeletons under NAGPRA, or on any other basis.

Even if the Regents' authorities did apply, the Regents are incorrect that this case is not ripe. The Regents' decision to transfer the La Jolla Skeletons is not contingent on any future event, including whether or not the transfer would violate NAGPRA. The Regents have indicated that they would have transferred the La Jolla Skeletons to a tribe even if NAGPRA did not apply. *See* RJN, Exh. 7 (letter from defendant Yudof) to Exh. P, pp. 1-2 (mentioning twice the possibility that the University could proceed outside of NAGPRA). The Regents concede in their brief that they may transfer the remains even if NAGPRA does not apply. These threats 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."); *see also Stormans, Inc. v. Selecky*, 586 F. 3d 1109, 1123-24 (9th Cir. 2009).

There can be no doubt that the Regents have made a final decision to transfer the remains, by whatever means they believe are available to them. To the extent the Court finds it necessary for plaintiffs to amend their FAC to make this clear, plaintiffs respectfully request leave to do so. Since the Regents already have made their decision, this is not a case where the Regents must take additional steps before the controversy is ripe. Therefore, *Texas v. United States*, 523 U.S. 296, 300 (1998), on which the Regents rely, is distinguishable. Because the Regents' decision is final (*see Bonnichsen v. United States*, 969 F. Supp. 2d 614, 621-22 (D. Or. 1997), *Association of Medical Colleges v. United States*, 217 F.3d 770, 782 (9th Cir. 2000), cited by the Regents, is also distinguishable.

There is no need for further factual development before plaintiffs' 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 Repatriation Notice does not confer an absolute legal right on the La Posta Band, it nonetheless inflicts practical harm on plaintiffs' research interests, and the public's interest in maintaining the La Jolla Skeletons as part of the University's research collection. This is not a case where the Court must act without the benefit of a specific proposal. *See id.* at 736-37. Ripeness does not depend on the Regents' reasons for their decision, and in any event, the Repatriation Notice and Yudof's letter belie the Regents' statement 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), *abrogated on other grounds in Califano v. Sanders*, 430 U.S. 99, 105 (1977). Withholding consideration of plaintiffs' public trust and First Amendment claims will waste scarce judicial resources. In the likely event that plaintiffs prevail on their claims alleging violations of NAGPRA, they would then immediately be forced to file another complaint and TRO application to prevent the Regents from transferring the La Jolla Skeletons on some other purported basis. This arrangement merely would provide defendants another opportunity to transfer the La Jolla Skeletons without the hindrance of judicial oversight. It does not matter that plaintiffs would not be required to change their

behavior. The point is that the harm from the Regents' decision to repatriate is already imminent. Plaintiffs respectfully request that this Court decline the Regents' invitation to resolve this dispute through serial lawsuits.

V. PLAINTIFFS HAVE STANDING UNDER ARTICLE III.

To establish Article III standing, plaintiffs must show (1) they have suffered an "injury in fact" that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of defendants; and (3) it is likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). To establish redressibility, plaintiffs "'need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision…. [P]laintiffs "must show only that a favorable decision is *likely* to redress [their injuries], not that a favorable decision will *inevitably* redress [their injuries]."'" *Wilbur v. Locke*, 423 F.3d 1101, 1108 (9th Cir. 2005) (emphasis in original) (*quoting Graham v. Federal Emergency Management Agency*, 149 F.3d 997, 1003 (9th Cir. 1998), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (2010)); *see also Ibrahim v. Dep't of Homeland Sec.*, 669 F.3d 983, 993 (9th Cir. 2012) (though plaintiff's future ability to obtain a visa was uncertain, plaintiff did not have to show removal of her name from the No-Fly List would guarantee her a visa, to have standing to challenge placement on the No-Fly List).

Here, plaintiffs alleged that they have asked to study the La Jolla Skeletons, but the University has not granted their requests. (FAC, ¶¶ 33-35.) Further, plaintiffs alleged that the University's policy is that remains and cultural items shall normally remain accessible for research by qualified investigators such as plaintiffs. (*Id.*, ¶ 36.) Therefore, it is highly probable that plaintiffs will be allowed to study the La Jolla Skeletons if they remain in the University's possession. (*Id.*, ¶ 36.) These allegations are sufficient to show the declaratory and injunctive relief plaintiffs seek would likely redress their injury. One reasonably may infer that plaintiffs' requests were denied because of the Regents' unlawful acts in furtherance of repatriation, and that if the Regents were ordered to stop violating the law and refrain from repatriating the La

Jolla Skeletons, plaintiffs' study requests would be granted. Because plaintiffs can establish Article III standing, they do not need to rely on California Code of Civil Procedure section 526a.

The Regents effectively concede plaintiffs can establish the first two elements, disputing only the third, redressibility. The Regents mischaracterize the nature of plaintiffs' suit in making this argument. Plaintiffs assert that repatriation is not authorized under NAGPRA or any other law, not merely that repatriation is not required under NAGPRA. In other words, if NAGPRA does not apply, no law permits defendants to give the La Jolla Skeletons to any tribe, because doing so would breach the Regents' duties to maintain the University as a public trust.

The Regents overestimate their discretion to dispose of the La Jolla Skeletons, which they insinuate they may do for no reason at all (*see* Regents' Motion, p. 22:2-6), contradicting their earlier ripeness argument. The Human Remains policies specifically acknowledge that the University "maintains these collections as a public trust and is responsible for preserving them according to the highest standards while fulfilling its mission to provide education and understanding about the past and present through continued teaching, research and public service." Peek Decl., ¶ 3, Exh. A (Policies) to Exh. A (FAC), p. 1. The FAC permits the inference that the Regents routinely grant study requests if NAGPRA is not implicated. Therefore, cases such as *Glanton ex rel. Alcoa Prescription Drug Plan v. AdvancePCS, Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006), which emphasize defendants' "broad discretion," are not persuasive. Similarly, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345-46 (2006) does not control. That case considered whether plaintiffs had standing as taxpayers, a theory on which plaintiffs here need not rely. The Regents' discretion simply does not extend to violating their duties under the Human Remains policies and their duties to preserve the public trust.

Plaintiffs do not need a statutory right to study the remains in order to have standing. *Bonnichsen v. United States*, 367 F.3d 864, 872-73 (9th Cir. 2004) imposes no such requirement. The *Bonnichsen* court merely observed that the plaintiffs had an opportunity to study the skeletons under the federal statute at issue. *See id.* at 871-73; *see also Bonnichsen*, 217 F. Supp. 2d at 1165-67 (concluding that but for defendants' assumption that NAGPRA applied, plaintiffs

almost certainly would have been allowed to study the remains, "based upon evidence that study requests like those made by Plaintiffs are routinely granted") (emphasis added). Plaintiffs' allegations here support the same conclusion. Plaintiffs need only show that redressibility is *likely*, not that it is *inevitable*. Non-binding authority from the Second Circuit cited by the Regents does not establish a contrary rule. *See New York Coastal Partnership, Inc. v. United States Dep't of Interior*, 341 F.3d 112, 117 (2d Cir. 2003) (plaintiffs sought to compel specific affirmative action by defendants in an area where defendants had substantial discretion). Here, plaintiffs seek an order prohibiting defendants from violating the law, which would likely redress plaintiffs' injuries.

The *Bonnichsen* cases already have resolved the standing issue in favor of professors in a similar factual context, and redressibility simply is not speculative here. Therefore, cases such as *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-45 (1976) (hospitals' denial of service could not be traced to tax code), *Warth v. Seldin*, 422 U.S. 490, 507 (1975), *Linda S. v. Richard D.*, 410 U.S. 614, 618 (1973), cited by the Regents,, do not control. It is reasonable to infer, and the Regents do not contest, that defendants' NAGPRA violations are the reason plaintiffs' study requests were denied. *Mayfield v. United States*, 599 F.3d 964, 972-73 (9th Cir. 2010) also is inapplicable, since plaintiffs have not bargained away their right to injunctive relief. Since the University's usual policy is to permit study of remains and cultural items, it is *likely* that a judgment in plaintiffs' favor would redress their injuries. The Regents' argument to the contrary lacks merit and should be rejected.

VI. PLAINTIFFS CAN SEEK DECLARATORY AND INJUNCTIVE RELIEF AGAINST DEFENDANTS IN THEIR INDIVIDUAL CAPACITIES.

Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), a plaintiff may seek declaratory and injunctive relief against state officials in their individual capacities to enjoin continuing violations of the United States Constitution or federal law. *See id.* at 159-61; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270-79 (1997). By violating federal law, state officials are stripped of their official or representative capacity, and may be sued personally. *Ex parte Young*, 209 U.S. at 160. Plaintiffs' suit against Yudof, Fox, and Matthews is proper under

the doctrine of *Ex parte Young*, because plaintiffs allege that these defendants have acted and continue to act in violation of NAGPRA and the United States Constitution. Nothing in *Kentucky v. Graham*, 472 U.S. 159, 165-66 (1985) precludes seeking relief against defendants in their individual capacities.

Plaintiffs also sued these defendants in their official capacities, which is permissible because the University has waived any Eleventh Amendment immunity it may have had by removing this action. *Lapides v. Bd. Of Regents of Univ. System of Georgia*, 535 U.S. 613, 619-20 (2002). Even if the Regents were correct that plaintiffs must seek declaratory and injunctive relief in an official capacity action, plaintiffs have done so. *Wolfe v. Strankman*, 392 F.3d 358, 360, n.2 (9th Cir. 2004) does not require dismissal of any claims, because plaintiffs did bring an official capacity action. The Regents appear to misread *American Civil Liberties Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1341-42 (5th Cir. 1981). That court held suit could be brought against defendant officials in their personal capacity within the meaning of *Ex parte Young*, "yet still be 'official' enough to require automatic substitution [of successor officials] under Appellate Rule 43(c)(1) and Civil Rule 25(d)(1)." *Id.* The Regents' argument to the contrary is baseless.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court deny defendants' motions to dismiss in their entirety.

DATED: July 23, 2012

McMANIS FAULKNER

/s/ Christine Peek
CHRISTINE PEEK

Attorneys for Plaintiffs,

TIMOTHY WHITE,
ROBERT L. BETTINGER, and
MARGARET SCHOENINGER