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16 UNITED STATES DISTRICT COURT
17 SOUTHERN DISTRICT OF CALIFORNIA

18 KUMEYAAAY CULTURAL REPATRIATION
19 COMMITTEE,

20 Plaintiff,

21 vs.

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

27 Defendants.
28

CASE NO. 12CV0912 H(BLM)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS
OR, IN THE ALTERNATIVE, TO
STAY**

[Notice of Motion and Motion filed
concurrently herewith]

Judge: Honorable Marilyn L. Huff
Courtroom: 13
Date: June 11, 2012
Time: 10:30 a.m.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Kumeyaay Cultural Repatriation Committee (“KCRC”) is an organization of 12 federally recognized Kumeyaay Indian tribes. KCRC has sued Defendants (collectively, “the University”) to recover a pair of human skeletons under the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq. (“NAGPRA”), and its implementing regulations. The University’s intention to transfer these remains in accordance with NAGPRA’s regulations was published in the Federal Register. Due to the nearly simultaneous filing of this lawsuit, which seeks to compel the transfer, and a second lawsuit that seeks to prevent it, the University faces conflicting legal obligations that have rendered it unable to effect the transfer to date.

KCRC contends that the University’s failure yet to complete the transfer violates one of the regulations promulgated pursuant to NAGPRA. But the regulation on which KCRC relies, 43 C.F.R. § 10.11, contains no deadline whatsoever for transfer of the skeletons. KCRC’s legal theory is fundamentally flawed: the University cannot have failed to comply with a deadline that does not exist. For this basic reason, the lawsuit must be dismissed.

Moreover, there is no warrant for this Court to read into the regulation a deadline the promulgating agency chose not to impose. Even were the Court to do so, however, the University cannot be found to have violated any such implied deadline. Before the University was even *permitted* by regulation to transfer the skeletons, a group of University professors threatened to sue the University to enjoin any transfer. This threat created an obligation on the University to preserve evidence relevant to that expected litigation, including the skeletons themselves. Those plaintiffs have now sued, and Judge Seeborg in the Northern District of California has issued a preliminary injunction prohibiting any transfer. Delay due to compliance with legal obligations stemming from the professors’ suit could not reasonably be held to constitute a violation of an implied NAGPRA deadline, even if one existed.

At the very least, the Court should stay this action pending the Northern District’s

1 resolution of the professors' suit. If the University prevails there, it will be free to transfer the
 2 skeletons to the La Posta Band of Diegueno Mission Indians, as it has announced it intends to do.
 3 In any event, the Court must dismiss the claims against the entity defendants, who enjoy
 4 sovereign immunity from suit.

5 **II. FACTUAL AND PROCEDURAL BACKGROUND**

6 **A. Factual and Legal Overview**

7 In 1976, Professor Gail Kennedy led an archaeological field excavation on
 8 University property in San Diego. (Compl., ECF 1, ¶¶ 1, 10.) Professor Kennedy's team
 9 discovered a pair of skeletons (the "La Jolla Skeletons" or "Skeletons"), as well as a set of other
 10 objects. (Compl. ¶¶ 1, 10, 13.) The Skeletons are currently housed at the San Diego
 11 Archaeological Center on behalf of the University. (Compl. ¶ 10.)

12 In 1990, Congress enacted NAGPRA. NAGPRA imposes various requirements on
 13 state government agencies and institutions of higher learning that receive federal funds and that
 14 hold "Native American" human remains or cultural items. For example, entities subject to
 15 NAGPRA must compile an inventory of Native American remains and cultural items, 25 U.S.C. §
 16 3003, many of which must be "repatriated" or returned to a requesting Native American tribe, §
 17 3005. Because it receives federal funding, the University is bound by NAGPRA's provisions.
 18 *See* § 3001(8).

19 KCRC asserts that, historically, Kumeyaay tribes occupied the site on which the
 20 Skeletons were found. (Compl. ¶ 28.e.)¹ Since 2000, KCRC has been requesting that the
 21 Skeletons be repatriated and recently designated the La Posta Band of Diegueno Mission Indians
 22

23 ¹ The 12 Tribes are the La Posta Band of Diegueno Mission Indians of the La Posta Indian
 24 Reservation, California; Barona Group of Capitan Grande Band of Mission Indians of the Barona
 25 Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian
 26 Reservation, California; Ewiiapaayp Band of Kumeyaay Indians, California; Iipay Nation of
 27 Santa Ysabel, California (formerly the Santa Ysabel Band of Diegueno Mission Indians of the
 28 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.

1 to take possession. (Compl. ¶¶ 13, 19 & n.2.) In 2008, the University submitted to the National
 2 Park Service a “Notice of Inventory Completion,” which listed the Skeletons and items found
 3 with the Skeletons. The inventory determined that the Skeletons and objects were “culturally
 4 unidentifiable”—meaning that their origin could not be connected to the Kumeyaay or any other
 5 tribe under the evidentiary standard set out in NAGPRA. (Compl. ¶ 14.) Until recently, if a
 6 NAGPRA-regulated entity determined Native American remains and objects were “culturally
 7 unidentifiable,” it was to hold them until the Secretary of the Interior promulgated applicable
 8 regulations. (Compl. ¶ 12.)

9 The regulation for culturally unidentifiable human remains issued in 2010. *See* 43
 10 C.F.R. § 10.11. The regulation requires that institutions in possession of culturally unidentifiable
 11 Native American remains transfer control of the remains to “(i) [t]he Indian tribe . . . from whose
 12 tribal land, at the time of excavation or removal, the humans remains were removed; or (ii) [t]he
 13 Indian tribe or tribes that are recognized as aboriginal to the area from which the human remains
 14 were removed.” § 10.11(c)(1).

15 KCRC renewed its request for the Skeletons in 2010 in light of the new regulation.
 16 (Compl. ¶¶ 16-17.) In December 2011, the University’s final Notice of Inventory Completion
 17 appeared in the Federal Register. The Notice stated that the La Jolla Skeletons are “Native
 18 American”; that approximately 25 objects found at the same site are “reasonably believed to have
 19 been placed with or near” the La Jolla Skeletons “at the time of death or later as part of the death
 20 rite or ceremony”; that “a relationship of shared group identity cannot be reasonably traced
 21 between the Native American human remains and any present-day Indian tribe”; that “the land
 22 from which the Native American human remains were removed is the aboriginal land of the
 23 Diegueno (Kumeyaay) Tribe”; that “the present-day descendants of the Diegueno (Kumeyaay)
 24 are The Tribes”; and that, pursuant to 43 C.F.R. § 10.11(c)(1), if no one else came forward to
 25 claim the Skeletons by January 4, 2012, disposition of the Skeletons would be to the La Posta
 26 Band. (Compl., Ex. 9.)

27 **B. Procedural History**

28 Before the January 4, 2012 date specified in the Notice of Inventory Completion,

1 three University of California professors (“the Professors”) threatened to sue the University to
2 enjoin it from transferring the La Jolla Skeletons and objects to the La Posta Band or any other
3 tribe. The Professors allege that they requested but were not granted permission to study the La
4 Jolla Skeletons and that each hopes to study the Skeletons in the future if the Skeletons are not
5 transferred under NAGPRA. (*White v. Univ. of Cal.*, No. C12-01978 RS (N.D. Cal.) (“*White*”)
6 Notice of Removal, Ex. 1, ECF 1-1 (“*White Compl.*”) ¶¶ 2-4, 30-32.)² As KCRC was aware, the
7 Professors and the University entered into several agreements to forestall any legal action until
8 the University had an opportunity to review the Professors’ proposed pleadings and determine
9 whether the dispute could be resolved outside of court. (Compl. ¶ 21.) The final tolling
10 agreement permitted the Professors to sue as of Monday, April 16, 2012; the Professors planned
11 to sue in the Alameda Superior Court. (*White TRO App.*, Peek Decl., ECF 11, Exs. J, K.)

12 On Friday, April 13, the court day immediately preceding expiration of the tolling
13 agreement, KCRC filed the instant suit in this Court. KCRC contends that the University’s
14 failure to consummate the transfer of the Skeletons violates NAGPRA regulations. (Compl. ¶
15 29.) KCRC seeks an order compelling the University to effect the transfer forthwith. (Compl.,
16 Prayer for Relief.)

17 On April 16, after unsuccessful efforts to resolve the matter informally, the
18 Professors sued the University in Alameda Superior Court, as planned (the “Professors’ Action”).
19 (*White Compl.*) In their suit, the Professors contend that the University has violated NAGPRA by
20 erroneously concluding that the Skeletons are “Native American.” (*Id.* ¶¶ 47-53.) Transfer of the
21 Skeletons, the Professors further urge, would breach the University’s duties to administer the
22 University as a public trust and in the public interest (*id.* ¶¶ 54-64) and would violate the
23 Professors’ First Amendment rights by depriving them of the opportunity to “receive
24 information” by studying the Skeletons (*id.* ¶¶ 65-71). The Professors also bring a claim for a
25 writ of mandamus, seeking, *inter alia*, to compel the University “to make a formal determination
26

27 ² In ruling on the University’s motion to dismiss, the Court is permitted to consider “matters of
28 public record,” including filings in other litigation. *Skilstaf, Inc. v. CVS Caremark Corp.*, 669
F.3d 1005, 1016 n.9 (9th Cir. 2012).

1 whether or not the La Jolla Skeletons are ‘Native American’ within the meaning of NAGPRA
2 before repatriating them under the alleged authority of 43 C.F.R. § 10.11.” (*Id.* ¶¶ 35-46.) The
3 Professors request, in substance, a declaration that the Skeletons are not “Native American” and
4 an injunction prohibiting the University from transferring possession of the Skeletons to the La
5 Posta Band or any other Native American tribe. (*Id.*, Prayer for Relief.)

6 On April 20, the University removed the Professors’ Action to the United States
7 District Court for the Northern District of California. (*White* Notice of Removal, ECF 1.) On
8 April 27, that court issued a temporary restraining order prohibiting the University “from
9 changing in any manner the current condition and location of the La Jolla Skeletons, and
10 associated funerary objects” (*White* TRO Order, ECF 19); the court later entered a preliminary
11 injunction on the same terms, which extends until the court enters judgment in the case (*White* PI
12 Order, ECF 23).

13 On May 9, the University moved to dismiss the Professors’ Action with prejudice.
14 In its motion, the University argues that the Professors’ Action cannot proceed without the 12
15 Kumeyaay tribes that claim an interest in the La Jolla Skeletons and that the tribes cannot be
16 joined due to tribal immunity. The University contends that the Professors’ Action therefore must
17 be dismissed under Federal Rule of Civil Procedure 12(b)(7). The University further argues that
18 the Professors’ public-trust and First Amendment claims are not ripe, because the University has
19 not considered or decided what to do with the Skeletons if NAGPRA does not require their
20 transfer; and that the Professors lack standing to pursue their NAGPRA-based claims because a
21 determination that the Skeletons are not “Native American” would not redress the Professors’
22 alleged injury, because it would not ensure them a right to study the Skeletons. Finally, the
23 University urges that the Professors cannot sue University officials in their individual capacities
24 for declaratory or injunctive relief. Argument on the motion is set for June 21, 2012. (*White*
25 MTD, ECF. 24.)

1 **III. ARGUMENT**

2 **A. KCRC Has Failed To State a Claim Because the Regulation on Which It**
 3 **Relies Imposes No Deadline for Transfer of the Skeletons**

4 There is no legal basis for KCRC's claim that the University has violated
 5 NAGPRA regulations. The regulation on which KCRC relies, 43 C.F.R. § 10.11, governs
 6 disposition of "culturally unidentifiable" human remains and associated funerary objects. As
 7 KCRC alleges, the University has treated the La Jolla Skeletons as "Native American" remains
 8 that fall within the scope of the regulation. (Compl. ¶ 28.c.) But the fact that the University has
 9 not yet transferred the Skeletons does not, as KCRC contends (Compl. ¶ 29), establish a violation
 10 of the regulation.

11 Subsection (d) of the regulation states that "[d]isposition of culturally
 12 unidentifiable human remains and associated funerary objects . . . may not occur *until at least 30*
 13 *days after* publication of a notice of inventory completion in the Federal Register." 43 C.F.R. §
 14 10.11(d) (emphasis added). Far from establishing a *deadline* for disposition of subject remains,
 15 the regulation creates a 30-day window in which transfer *cannot* occur; transfer is prohibited until
 16 "at least" 30 days after publication of a notice. Nor does any other applicable provision of
 17 NAGPRA or its implementing regulations create an obligation to transfer remains or funerary
 18 objects by any deadline.

19 The notice concerning the La Jolla Skeletons was published on December 5, 2011.
 20 The University was therefore forbidden from transferring the Skeletons before January 5, 2012, as
 21 KCRC seems to acknowledge. (Compl. ¶ 20.) Beyond that restriction, NAGPRA and its
 22 implementing regulations leave to the University's discretion the decision of when to effectuate
 23 the transfer. KCRC's claim to the contrary is without any legal foundation, and the Complaint
 24 therefore should be dismissed with prejudice. *See* Native American Graves Protection and
 25 Repatriation Act Regulations—Disposition of Culturally Unidentifiable Human Remains, 75 Fed.
 26 Reg. 12,378 (final rule with request for comments, Mar. 15, 2010) (to be codified at 43 C.F.R. pt.
 27 10) (noting that proposed rule "includes only two deadlines," neither of which pertains to
 28 transfer).

1 **B. Even Were the Regulation Interpreted, Contrary to Its Text, To Incorporate**
2 **a Requirement That Transfer Occur Within a Reasonable Time, the**
3 **University Has Not Failed To Comply**

4 The Court should resist any temptation to read into NAGPRA or 43 C.F.R. § 10.11
5 a deadline that does not appear in the statutory or regulatory text. It is clear that, where the
6 Secretary wished to impose a deadline upon NAGPRA-regulated entities, he knew how to do
7 so—indeed, he did so in the “consultation” subsection of the very regulation upon which KCRC
8 relies. *See* 43 C.F.R. § 10.11(b)(1) (“The museum or Federal agency official must initiate
9 consultation regarding the disposition of culturally unidentifiable human remains and associated
10 funerary objects: (i) Within 90 days of receiving a request from an Indian tribe or Native
11 Hawaiian organization to transfer control of culturally unidentifiable human remains and
12 associated funerary objects . . .”). The regulation governing repatriation of *culturally affiliated*
13 remains also includes a deadline for transfer. *See* 43 C.F.R. § 10.10(b)(2) (“Repatriation must
14 take place within ninety (90) days of receipt of a written request for repatriation . . .”). There is
15 no reason for this Court to supersede the Secretary’s judgment not to impose an analogous
16 deadline governing disposition of culturally unidentifiable remains.

17 *General Motors Corp. v. United States*, 496 U.S. 530 (1990), illustrates the point.
18 As the Supreme Court there explained, the federal Clean Air Act Amendments required the
19 Environmental Protection Agency (“EPA”) to promulgate national air quality standards; within
20 nine months thereafter, each state was to submit a state implementation plan (“SIP”) to implement
21 those national standards. The EPA, in turn, was to act on each SIP within four months. *Id.* at
22 533. The States were also authorized to propose subsequent SIP revisions, and the EPA was to
23 approve such revisions if certain standards were met. *Id.* The statute did not expressly impose a
24 deadline for the EPA to act on SIP *revisions*. *Id.* at 536-37. In resisting an enforcement action by
25 the EPA regarding Massachusetts’ SIP, General Motors argued that the EPA was required, and
26 had failed, to act on the state’s proposed SIP revision within the same four-month period that
27 applied to initial SIPs. *Id.* at 535-36.

28 The Supreme Court rejected the argument, admonishing that, “since [the statute]
does not separately require the [EPA] to process a proposed revision within four months, we are

1 not free to read that limitation into the statute.” *Id.* at 537. The Court noted that “[t]he statute
2 elsewhere explicitly imposes upon the [EPA] deadlines of the kind that [General Motors] would
3 insert into” the SIP-revision provision. *Id.* “Since the statutory language does not expressly
4 impose a 4-month deadline and Congress expressly included other deadlines in the statute,” the
5 Court concluded, “it seems likely that Congress acted intentionally in omitting the 4-month
6 deadline” in the SIP-revision clause. *Id.* at 538; *see Russello v. United States*, 464 U.S. 16, 23
7 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in
8 another section of the same Act, it is generally presumed that Congress acts intentionally and
9 purposely in the disparate inclusion or exclusion.” (internal quotation marks omitted)). The
10 same result obtains here. *See United States v. Approximately 64,695 Pounds of Shark Fins*, 520
11 F.3d 976, 983 (9th Cir. 2008) (“Where an agency includes language in one section of the
12 regulation and omits it in another, it is reasonable to presume that the agency acted intentionally
13 in forgoing the language.”).

14 In any event, the University cannot be held to have failed to comply with any
15 deadline the Court might infer from NAGPRA’s scheme, such as a rule that remains must be
16 transferred within a “reasonable” time. The Professors threatened to sue the University before
17 expiration of the 30-day no-transfer period in 43 C.F.R. § 10.11(d)(1). This threat triggered the
18 University’s duty to preserve evidence relevant to the Professors’ claims, including the La Jolla
19 Skeletons. *See, e.g., In re: Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1068 (N.D. Cal.
20 2006). Cognizant of this duty, and under threat of the Professors’ litigation, the University agreed
21 to retain the Skeletons for a limited time in an attempt to settle the Professors’ claims outside
22 court. When settlement efforts failed, the Professors sued and then moved for a temporary
23 restraining order prohibiting transfer of the Skeletons. On April 27, Judge Seeborg issued an
24 order requiring the University to keep the Skeletons in the same location and condition, an
25 obligation that remains in effect today.

26 Even if there were a deadline (which there is not), the University’s failure to
27 transfer the La Jolla Skeletons under these circumstances could not constitute a violation of
28 NAGPRA or its regulations. Indeed, granting the relief KCRC requests would place the

1 University under irreconcilably conflicting legal obligations—an order from the Northern District
 2 forbidding transfer and one from this Court requiring it. Neither NAGPRA nor its regulations
 3 justify, let alone require, such a conflict, and this Court should be loath to create one. KCRC’s
 4 Complaint should be dismissed.

5 **C. KCRC’s Claim Against The Regents Is Barred by Sovereign Immunity**

6 KCRC’s claims against the entity defendants are barred by sovereign immunity. It
 7 is firmly settled that The Regents of the University of California³ is an arm of the State of
 8 California for Eleventh Amendment purposes. *See, e.g., Armstrong v. Meyers*, 964 F.2d 948,
 9 949-50 (9th Cir. 1992). Because The Regents is an arm of the state, it has sovereign immunity
 10 from all claims brought by individuals in federal court, absent The Regents’ consent, which has
 11 not been given here. *See Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982); *see also*
 12 *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (“[T]his Court has consistently held that an
 13 unconsenting State is immune from suits brought in federal courts by her own citizens as well as
 14 by citizens of another State.”). Accordingly, the Court lacks jurisdiction over the claims against
 15 the entity defendants.

16 **D. If the Court Is Disinclined To Dismiss, It Should Stay the Case Pending a**
 17 **Decision in the Professors’ Action**

18 While Plaintiffs’ failure to state a claim justifies dismissal, if the Court is
 19 disinclined to dismiss the claims against the official defendants outright, it should stay the case
 20 pending the Northern District’s resolution of the Professors’ Action. As long as that litigation
 21 persists, the University will remain under both a duty to preserve relevant evidence and a specific
 22 court order to retain the Skeletons as well. After that action is resolved, this Court could consider

23 ³ The Regents of the University of California was erroneously sued as “The University of
 24 California” and “The Board of Regent of the University.” The Ninth Circuit has explained that,
 25 “[u]nder Rule 17(b) of the Federal Rules of Civil Procedure, [a governmental entity’s] capacity to
 26 be sued in federal court is to be determined by the law of [the State].” *Streit v. County of Los*
 27 *Angeles*, 236 F.3d 552, 565 (9th Cir. 2001) (internal quotation marks omitted). Under section 945
 28 of the California Government Code, “[a] public entity may sue and be sued.” Section 811.2 of
 the Government Code defines a “public entity” to include “the state, the Regents of the University
 of California, the Trustees of the California State University and the California State University, a
 county, city, district, public authority, public agency, and any other political subdivision or public
 corporation in the State.” Under Article IX, § 9(f) of the California Constitution, The Regents is
 the entity authorized to “sue and to be sued” on behalf of the University of California.

1 the timing question, if necessary, in light of the Northern District’s decision. If the University
2 prevails in the Professors’ Action, the University will be free to transfer the Skeletons to the La
3 Posta Band as contemplated by the Notice of Inventory Completion, and such transfer would
4 likely moot this case, conserving the resources of both the parties and the Court. These are
5 appropriate circumstances for the issuance of a stay. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254
6 (1936) (a court has broad discretion to issue a stay as part of its inherent power “to control . . . its
7 docket” in the interest of “economy of time and effort for itself, for counsel, and for litigants”).⁴

8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court should dismiss KCRC’s Complaint with
10 prejudice or, in the alternative, stay the case pending a final district court decision in the
11 Professors’ Action.

12 DATED: May 11, 2012

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20 CALIFORNIA; MARK G. YUDOF; MARYE
21 ANNE FOX; GARY MATTHEWS

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25 ⁴ *See also Levya v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979) (“A trial
26 court may, with propriety, find it is efficient for its own docket and the fairest course for the
27 parties to enter a stay of an action before it, pending resolution of independent proceedings which
28 bear upon the case.”); *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (stay may be
appropriate to further “the orderly course of justice measured in terms of the simplifying or
complicating of issues, proof, and questions of law which could be expected to result from a
stay”).

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CERTIFICATE OF SERVICE

I, Michelle Friedland, hereby certify that on this 11th day of May, 2012, the foregoing document was filed with the Clerk of the Court for the United States District Court for the Southern District of California by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

DATED: May 11, 2012

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