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8
9 UNITED STATES DISTRICT COURT

10 NORTHERN DISTRICT OF CALIFORNIA—SAN FRANCISCO/OAKLAND DIVISION

11
12) Case No. C 12-01978 (RS)
13 TIMOTHY WHITE, an individual; ROBERT)
L. BETTINGER, an individual; and) **BY SPECIAL APPEARANCE**
14 MARGARET SCHOENINGER, an individual) **DEFENDANT’S KUMEYAAY**
15) **CULTURAL REPATRIATION**
Petitioners and Plaintiffs) **COMMITTEE NOTICE OF MOTION,**
16) **MOTION TO DISMISS FIRST**
vs.) **AMENDED COMPLAINT UNDER FED.**
17) **R. CIV. P. 12(B) 1, AND MEMORANDUM**
THE UNIVERSITY OF CALIFORNIA; THE) **OF POINTS AND AUHTROITIES**
18 BOARD OF REGENTS OF THE)
19 UNIVERSITY; MARK G. YUDOF, in his)
individual and official capacity as President of) Date: August 23, 2012
20 the University; MARYE ANNE FOX, in her) Time: 1:30 p.m.
21 individual and official capacity as Chancellor) Judge: The Honorable Richard Seeborg
of the University of California, San Diego;)
22 GARY MATTHEWS; in his individual and)
23 official capacity as Vice Chancellor of the)
University of California, San Diego;)
24 KUMEYAAY CULTURAL)
25 REPATRIATION COMMITTEE and DOES)
1-50.)
26)
27 Respondents and Defendants.)

NOTICE OF MOTION AND MOTION

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2 PLEASE TAKE NOTICE that on August 23, 2012 at 1:30 p.m., in Courtroom 3, 17th Floor,
3 United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, Defendant
4 Kumeyaay Cultural Repatriation Committee (“KCRC”) by special appearance will and hereby
5 moves for an Order dismissing with prejudice Plaintiffs’ claims against KCRC in Plaintiffs’ First
6 Amended Complaint.
7

8 KCRC’s motion seeks to dismiss the Plaintiffs’ action against KCRC pursuant to Federal
9 Rules of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction over KCRC on grounds that
10 KCRC is an arm of the tribal governments that they represent and as such have tribal sovereign
11 immunity and cannot be sued without its consent. This motion is based on this Notice, the
12 accompanying Memorandum of Points and Authorities; declaration of Steven Banegas and tribal
13 resolutions attached thereto, the record in this matter, oral argument, and such other matters as may
14 be presented in connection with the hearing on the motion.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

KCRC was created by tribal law and is an arm of the tribal governments that created it. KCRC cannot be sued because it enjoys tribal sovereign immunity. KCRC has not, nor have its tribal governments that created it, waived its immunity. Plaintiffs’ action against KCRC must be dismissed for lack of subject matter jurisdiction.

II. SUMMARY OF FACTS

KCRC is a tribal consortium that was created by twelve Kumeyaay¹ tribes located in San Diego County. Each of the tribes are federally recognized and consist of: the Barona Band of Mission Indians; Campo Band of Kumeyaay Indians; Ewiiapaayp Band of Kumeyaay Indians; Inaja-Cosmit Band of Mission Indians; Jamul Indian Village; La Posta Band of Mission Indians; Manzanita Band of Mission Indians; Mesa Grande Indian Band of Mission Indians; San Pasqual Band of Mission Indians; Iipay Nation of Santa Ysabel; Sycuan Band of the Kumeyaay Nation and the Viejas Band of Kumeyaay Indians.

KCRC has been charged with protecting and preserving Kumeyaay human remains and objects and all human remains and objects found within Kumeyaay aboriginal lands that are held by federal agencies and museums (which includes institutions of higher learning) and to seek repatriation of these items on behalf of the members’ respective tribes. (Exhibit “A” and attached Tribal Resolutions).

KCRC is an outgrowth of tribal leaders’ and members’ concerns over the repatriation efforts, or lack thereof, under the 1990 Native American Graves Protection and Repatriation Act (“NAGPRA”) in San Diego, County. For example, the tribes were repeatedly being given

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

1 inconsistent and confusing notices from the University of California (“UC”) Defendants on their
2 NAGPRA compliance. One tribe would be provided a notice while another would not. A tribe
3 would contact UC Defendants on a NAGPRA issue only to be told that UC Defendants were
4 consulting with another Kumeyaay tribe. In light of this, the tribes determined that there should be
5 one united voice on NAGPRA matters and all Kumeyaay tribes needed to be at the consultation
6 table. The tribes also found that one NAGPRA notice going to KCRC ensured that all the tribes
7 were notified and engaged. The formation of KCRC has met all of the tribes’ needs for conformity
8 on NAGPRA issues.
9

10
11 KCRC was officially formed by Tribal Resolutions from each of its member tribes
12 beginning in 1997. (Exhibit “A” and attached Tribal Resolutions). The stated purpose of KCRC is
13 to ensure that tribal interests are fully protected under NAGPRA and to further public understanding
14 of the importance of preservation of Indian culture and values. KCRC is the designated tribal entity
15 to receive notice and engage in consultation under NAGPRA and for ensuring that federal agencies
16 and museums in possession of ancestral remains, artifacts, and sacred materials repatriate to the
17 proper Kumeyaay tribe. (Exhibit A and attached Tribal Resolutions).
18

19 KCRC tribal representatives are appointed by their respective tribe to sit on the Committee.
20 The manner and method of selecting a tribe’s representative is left to the respective tribe. For
21 example, some representatives are appointed by the tribe’s Tribal Council, where others are elected
22 from the tribal membership. A tribal representative can only be removed from KCRC by his or her
23 tribe. If a Tribal Chairperson or Spokesperson attends a KCRC meeting, he or she is authorized to
24 vote on behalf of his or her tribe on KCRC business. (Exhibit “A”).
25

26 Each KCRC representative reports directly to their tribe on the work and activities of KCRC.
27 A tribe may withdraw from KCRC at any time. KCRC’s operating budget is funded exclusively
28 from contributions from member tribes. (Exhibit “A”).

1 KCRC holds monthly meetings on each member's reservation on a rotating basis. Meeting
2 minutes are taken and approved at the next meeting so that members may share them with their
3 tribe. KCRC cannot act under NAGPRA without clear direction from the member tribes'
4 representative who is acting with authority from his or her tribe. KCRC's authority may be
5 withdrawn, limited or expanded by its member tribes. (Exhibit "A").
6

7 When a federal agency or museum notifies KCRC regarding repatriation of Native American
8 remains or artifacts, the member tribe who is geographically closest to the location where the
9 remains or artifacts were found will act as the tribe for repatriation with the assistance of KCRC. If
10 said tribe is not prepared to accept the remains or artifacts, KCRC will, by consensus and permission
11 of the tribe, designate an alternate tribe to accept the remains or artifacts. (Exhibit "A"). The La
12 Posta Band of Mission Indians has been designated by KCRC to accept the human remains at issue
13 in the present case.
14

15 KCRC engaged the University of California system on the repatriation of the human remains
16 in dispute beginning in 2000, when the remains were housed at the University of California, Los
17 Angeles. The remains were later transferred to the University of California, San Diego ("UCSD").
18 In 2006, KCRC made a formal request for repatriation to UCSD. (Exhibit "B"). That same year the
19 UCSD NAGPRA Working Group issued a recommended Notice of Inventory Completion that
20 identified the human remains as "culturally unidentifiable" to the Kumeyaay. (Exhibit "C"). The
21 recommendation was submitted and approved by the University of California's Systemwide
22 Advisory Group on Cultural Affiliation and Repatriation of Human Remains and Cultural Items
23 (herein "Systemwide Advisory Group") and then submitted to the National Park Service ("NPS").
24 (Exhibit "D"). At the time such a finding under NAGPRA resulted in the human remains remaining
25 in the possession of the UC Defendants because NPS had no regulation on the disposition of Native
26 American remains that were determined to be "culturally unidentifiable."
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1 In May of 2010 NPS finally issued the long awaited regulation on how “culturally
 2 unidentifiable” remains should be treated. (43 C.F.R. §10.11). Under the new regulation “culturally
 3 unidentifiable” human remains are to be repatriated to the tribe whose aboriginal lands the remains
 4 were removed from. In this case the remains were removed from Kumeyaay aboriginal lands.
 5 Again, KCRC notified Defendant Chancellor Marye Anne Fox UCSD and requested repatriation
 6 under the new regulation. After further consultation with KCRC, UCSD agreed that the remains
 7 should be repatriated to the La Posta Band of Mission Indians as agreed upon by KCRC. The final
 8 Notice of Inventory Completion was filed with the NPS and published in the Federal Register on
 9 December 5, 2011 for a period of 30 days. On the eve of the expiration of the Federal Register
 10 notice, UC Defendants were informed that Plaintiffs were preparing to file a Temporary Restraining
 11 Order to bar UC Defendants from repatriating the remains to the La Posta Band of Mission Indians.
 12

13 In an attempt to explore possible alternative resolution of the conflict without litigation, the
 14 Plaintiffs and UC Defendants entered several tolling agreements. The efforts of the UC Defendants
 15 failed. Out of frustration, KCRC sued the UC Defendants in the Federal District Court of Southern
 16 California for violating NAGPRA and requesting immediate repatriation. (See UC Defendants’
 17 “Declaration of John M. Rappaport in Support of Motion to Dismiss First Amended Complaint,
 18 Exhibit “A”). The Southern California federal action is under a tolling agreement reached between
 19 the KCRC and UC Defendants. Plaintiffs have amended their complaint in this action and have now
 20 added KCRC as a Defendant.
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25 III. LEGAL ARUGMENT

26 A. Plaintiffs’ Complaint Must be Dismiss Because KCRC is Immune from Suit

27 1. Tribal Sovereign Immunity

1 It is well settled federal law that federally recognized Indian tribes have sovereign immunity
2 from suit unless such immunity is expressly waived by the tribe or Congress. See *Kiowa Tribe of*
3 *Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998). It is further settled federal
4 law, that when a tribe creates an entity to carry out activities, regardless of whether the activities are
5 commercial or governmental, the entity is immune if it functions as an arm of the tribe. *Cook v. AVI*
6 *Casino Enterprises*, 548 F. 3d 718 (9th Cir. 2008), *Allen v. Gold Country Casino*, 464 F. 3d1044
7 (9th Cir. 2006), *Marceau v. Blackfeet Housing Authority*, 455 F. 3d 974 (9th Cir. 2006), *Ninigret*
8 *Dev. Corp. v. Narragansett Indian Wetomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000). Tribal
9 sovereign immunity is a jurisdictional doctrine and where such immunity is found the court must
10 dismiss for lack of subject matter jurisdiction. *Memphis Biofuels, LLC v. Chickasaw Nation*
11 *Industries, Inc.*, 585 F.3d 917 (6th Cir. 2009).

12 As case law demonstrates tribes create entities to carry out a wide range of tribal activities.
13 Tribal entities have been established to: operate tribal casinos and other businesses, administer tribal
14 housing programs, provide health care to members, manage energy interests, and operate tribal
15 colleges. In this case, KCRC was created to address repatriation of human remains and artifacts
16 under NAGPRA. See, *Cook v. AVI Casino Enterprises*, 548 F. 3d 718 (9th Cir. 2008) (casino
17 management entity), *Allen v. Gold Country Casino*, 464 F. 3d 1044 (9th Cir. 2006) (casino
18 management entity), *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 585 F.3d 917 (6th
19 Cir. 2009) (tribal corporation to manage biofuel refining), *Breakthrough Management Group, Inc. v.*
20 *Chukchansi Gold Casino & Resort*, 629 F. 3d 1173 (10th Cir. 2010) (casino), *Wright v. Colville*
21 *Tribal Enterprise*, 147 P.3d 1275 (Wash. 2006) (tribal corporation to conduct tribal commercial
22 enterprises), *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App.4th 632(App. 4th Dist. 1999) (casino
23 management entity), *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971)
24 (tribal timber company), *Marceau v. Blackfeet Housing Authority*, 455 F. 3d 974 (9th Cir.

1 2006)(tribal housing authority), *Ninigret Dev. Corp. v. Narragansett Indian Wetomuck Housing*
 2 *Authority*, 207 F.3d 21 (1st Cir. 2000) (tribal housing authority), *Dillon v. Yankton Sioux Housing*
 3 *Authority*, 144 F. 3d 581 (8th Cir. 1998) (tribal housing authority), *Weeks Const. , Inc. v Oglala*
 4 *Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986) (tribal housing authority), *Pink v. Modoc*
 5 *Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998) (health clinic), *J.L. Ward Associates, Inc.*
 6 *v. Great Plains Tribal Chairmen’s Health Board*, 2012 WL 113866 (D. S.D. 2012) (tribal health
 7 board), *Southern Indian Health Council, Inc. v San Diego Medical & Office Employees Independent*
 8 *Union*, 290 NLRB No. 56 (1988) (tribal consortium health clinic), *Dille v. Council of Energy*
 9 *Resources Tribes*, 801 F. 2d (10th Cir. 1986) (tribal energy consortium), *Amerind Risk Management*
 10 *Corp. v. Malaterre*, 633 F. 3d 680 (8th Cir 2011) (tribal insurance corporation), *Smith v. Salish*
 11 *Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (tribal college), *Hagen v. Sisseton-Wahpeton*
 12 *Community College*, 205 F. 3d 1040 (8th Cir. 2000) (tribally chartered college), *Giedosh v. Little*
 13 *Wound School., Inc.*, 995 F. Supp. 1052 (D.S.D. 1997) (school board created to operate tribal
 14 school).
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18 In each of these cases the courts determined that the tribal entity charged with carrying out a
 19 tribal activity was acting as an arm of the tribe and were covered by the tribe’s immunity.

20 2. Arm-of-the-Tribe Analysis

21 In determining whether a tribal entity is an arm of the tribe for purposes of tribal immunity,
 22 case law teaches that the courts look at multiple factors. The Tenth Circuit in *Breakthrough*
 23 *Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F. 3d 1173, 1181 (10th Cir.
 24 2010) surveyed federal court precedents on the factors employed by the various Circuit Courts to
 25 determine a tribal entity’s legal status for purposes of immunity. The Court found that the most
 26 common factors include:
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- a. The method of creation;

- 1 b. The purpose of the entity;
- 2 c. The entity's structure, ownership, and management, including the amount of control
- 3 the tribe has over the entity;
- 4 d. Whether the tribe intended the entity to have tribal immunity;
- 5 e. The financial relationship between the tribe and the entity;
- 6 f. Whether the purpose of tribal immunity is served by granting immunity to the
- 7 entity.

8 Application of these factors clearly demonstrates that KCRC is a tribal entity that functions
9 as an arm of the tribes it represents. First, KCRC was created under tribal law with each of the
10 member tribes passing tribal resolutions establishing KCRC as the tribes' designated representative
11 to act on NAGPRA matters on the tribes' behalf. (Exhibit "A" and attached Tribal Resolutions).

12 Second, the purpose of KCRC is stated in the resolutions that created it; namely that KCRC
13 is to protect human remains and artifacts under NAGPRA and ensure that repatriation of such
14 remains and artifacts are appropriately made to a Kumeyaay tribe.
15

16 Third, KCRC is completely controlled and a creation of the Kumeyaay tribes in southern
17 California. (Exhibit "A" and attached Tribal Resolutions) Tribes can withdraw from KCRC at any
18 time, the tribes elect their representative to KCRC and only the tribe can remove their representative.
19 Elected tribal officers may attend any KCRC meeting and are deemed to be the tribe's representative
20 for purposes of conducting KCRC business. KCRC representatives report directly to their respective
21 tribe. (Exhibit "A").
22

23 Fourth, under NAGPRA regulations repatriation may only be made to a "tribe." 43 C.F.R.
24 §§10.10(1) and 10.11(b) (i). If the member tribes that created KCRC did not intend to cover KCRC
25 with their immunity they surely would not have created it, but instead would advance repatriation on
26 their own behalf to ensure that their tribal immunity could not be challenged. This is clearly not the
27 case and KCRC member tribes most assuredly intended KCRC to be an arm of the tribe for purposes
28

1 of immunity. As a general matter tribes intend all of its entities, departments, agencies, corporations,
 2 committees and boards to be under the tribe's immunity when tribal funds are used to finance the
 3 entity's activities.

4 Fifth, there is a direct financial relationship between KCRC and the member tribes, as the
 5 tribes fund KCRC.
 6

7 Sixth, there are two purposes served by finding KCRC a tribal entity and thus covered by
 8 tribal immunity: (1) without immunity tribal funds could be subject to a legal judgment against
 9 KCRC; and (2) denying KCRC tribal immunity would undermine tribal cultural autonomy and tribal
 10 self-determination by ignoring the KCRC member tribes their rights as sovereigns to organize and
 11 determine the best approach for exercising their rights under NAGPRA. These purposes for tribal
 12 sovereign immunity have been long recognized by the courts and been the basis for finding a tribal
 13 entity enjoys the benefit of the tribe's immunity. *Breakthrough Management group, INC. v.*
 14 *Chukchansi Gold Casino & Resort*, 629 F. 3d 1173, 1195 (10th Cir. 2010), *Allen v. Gold Country*
 15 *Casino*, 464 F. 3d 1044, 1047(9th Cir. 2006), *J.L. Ward Associates, Inc. v. Great Plains Tribal*
 16 *Chairmen's Health Board*, 2012 WL 113866 (D.S.D. 2012).
 17
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19 20 21 **B. The KCRC Member Tribes Have not Waived KCRC's Immunity**

22 Tribal immunity can only be waived if it is unequivocal, expressed and executed by the tribe
 23 per its internal policy or tribal law. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*,
 24 523 U.S. 751 (1998). In the current case KCRC does not and has not been granted the authority to
 25 waive its respective tribes' sovereign immunity. Nor have any of the KCRC member tribes waived
 26 their immunity to allow KCRC to be sued. As such, KCRC has retained its sovereign immunity and
 27 the plaintiffs' case must be dismissed.
 28

IV. CONCLUSION

1 Plaintiffs' case against KCRC must be dismissed because as an arm of the tribes that it
2 represents it has tribal sovereign immunity. Neither KCRC nor any of its member tribes has waived
3 their sovereign immunity.
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5
6 CALIFORNIA INDIAN LEGAL SERVICES

7 DATED: July 6, 2012

/s/ Dorothy Alther

8 Dorothy Alther
9 Attorney for Defendant
10 Kumeyaay Cultural Repatriation Committee
11 dalther@calindian.org
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CERTIFICATE OF SERVICE

I certify that on July 6, 2012 I filed the foregoing *By Special Appearance Defendant's Kumeyaay Cultural Repatriation Committee Notice of Motion and Motion to Dismiss First Amended Complaint, Memorandum of Points and Authorities*, via the Court's CM/ECF system, and that I served opposing counsel by the same means.

/s/ Dorothy Alther
DOROTHY A. ALTHER
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Attorney for Defendant