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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO/OAKLAND DIVISION

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

Petitioners and plaintiffs,

vs.

THE UNIVERSITY OF CALIFORNIA; THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; MARK G. YUDOF, in his individual and official capacity as President of the University; PRADEEP K. KHOSLA,[1] in his 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; MARYE ANNE FOX; KUMEYAAY CULTURAL REPATRIATION COMMITTEE; and DOES 1-50, inclusive,

Respondents and defendants.

Case No. C12-01978 RS

REPLY MEMORANDUM IN SUPPORT OF THE UNIVERSITY'S MOTION TO DISMISS FIRST AMENDED COMPLAINT

Date: August 24, 2012
Time: 10:00 a.m.
Judge: Hon. Richard Seeborg

[1] Pradeep K. Khosla has succeeded Marye Anne Fox as Chancellor and is therefore automatically substituted as defendant in the official-capacity claims against her. Fed. R. Civ. P. 25(d).

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I. INTRODUCTION

Plaintiffs' opposition jettisons Ninth Circuit precedents as "incorrec[t]" or "offer[ing] scant or no analysis" (Opp. 6 n.2, 17), distorts Plaintiffs' own documentary evidence, purports to distinguish binding precedents on transparently meaningless grounds, repeatedly assumes victory on the merits when arguing threshold issues, and accuses the University of colluding with a tribal entity that has sued it. What the opposition does *not* do is give any reason based in relevant, governing law why this Court should allow this suit to proceed. The arguments in the University's motion still stand. The Court should grant the motion and dismiss Plaintiffs' claims with prejudice.

II. ARGUMENT

A. PLAINTIFFS' CLAIMS CANNOT PROCEED WITHOUT THE TRIBES

Plaintiffs do not dispute that joinder of the Tribes is infeasible because the Tribes enjoy immunity from suit. Plaintiffs urge instead that the Tribes are neither "necessary" nor "indispensable" parties and that, in any case, the "public rights" exception to Fed. R. Civ. P. 19 permits adjudication without the Tribes. None of these contentions has merit.

1. The Tribes Are "Necessary" Parties

a. Disposing of Plaintiffs' Claims in the Tribes' Absence Would Impair the Tribes' Ability To Protect Their Asserted Interest in the Remains

Plaintiffs do not deny that disposing of their claims in the La Posta Band's absence would threaten that Tribe's claimed interest in the Remains.[2] They argue only that the *other* Tribes have no colorable interest in the Remains. (Opp. 12-13.) Plaintiffs' argument is both wrong and ultimately irrelevant. All of the Tribes, acting through KCRC, claimed an interest in the Remains grounded in federal regulation, *see* 43 C.F.R. § 10.11(c)(1)(ii); the La Posta Band was merely designated to receive the Remains on their behalf. (*See* FAC ¶ 27 (spokesperson for KCRC requested transfer to the La Posta Band); *id.*, ¶ 37 (ultimate transfer decision made in response to

[2] That Plaintiffs dispute the *validity* of the La Posta Band's claim is irrelevant to the joinder issue. *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) ("Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party.").

request from KCRC); *id.*, Ex. B ("present-day descendants" of the tribe from whose land the Remains were removed are "the Tribes"); Decl. of Steven Banegas (ECF 41-1) ("Banegas Decl.") ¶ 13 (describing how KCRC selects one tribe to receive items transferred under NAGPRA).) It is entirely possible that, once transferred to the La Posta Band, the other Tribes would participate in a burial of the Remains or otherwise benefit from the transfer—and the Tribes might have interests that are not entirely aligned. In any event, *at least* the La Posta Band is a necessary party, and, because that Tribe is also indispensable, *see infra* at 11-12, the suit must be dismissed.

(i) KCRC Cannot Adequately Represent the Tribes' Interests

Plaintiffs contend that their suit may go forward because KCRC can adequately represent the Tribes' interests. Plaintiffs do not explain how KCRC could represent the 12 different Tribes simultaneously if a dispute developed among them (Mot. 11); Plaintiffs merely assume (as they elsewhere argue explicitly) that the La Posta Band is the only Tribe that needs representing. (*See* Opp. 13.) Because, as just explained, that assumption is faulty, Plaintiffs fail to show why the potential for a conflict of interest does not prevent KCRC from counting as an adequate representative. In any event—and even assuming that, as Plaintiffs assert, KCRC has the capacity to be sued in federal court as an unincorporated association (Opp. 14)—KCRC is an inadequate representative because it is immune from suit.

KCRC Enjoys Tribal Immunity. Plaintiffs acknowledge the "variety of cases"—including Ninth Circuit precedents—"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." (Opp. 6 & n.2.) But Plaintiffs announce that these decisions "will not be discussed in detail" because, in Plaintiffs' view, they "offer scant or no analysis of the factors relevant to the 'arm of the tribe' question." (Opp. 6 n.2.) The University cited five federal precedents specifically holding that *intertribal* entities were entitled to tribal immunity. (Mot. 8-9.) These precedents are consistent with the hornbook rule that tribal immunity extends to "intertribal councils." William C. Canby, *American Indian Law* 95 (4th ed. 2004). Plaintiffs make feeble attempts to distinguish three of the University's cases and fail to mention the other two.

In *Amerind Risk Management Corp. v. Malaterre*, 633 F.3d 680 (2011), the Eighth Circuit held that a corporation formed by three tribes to administer a self-insurance risk pool for Indian housing authorities was entitled to sovereign immunity. *Id.* at 685. Plaintiffs say that *Amerind* does not support the University's position because "KCRC was not organized to produce revenue that would inure to the benefit of the tribe and promote its financial autonomy." (Opp. 7-8.) But neither was the corporation in *Amerind*.

In *J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Board*, 842 F. Supp. 2d 1163 (D.S.D. 2012), a corporation formed by 16 tribes to communicate on their behalf with federal agencies on health matters was deemed immune. *Id.* at 1176-77. Plaintiffs assert that "*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." (Opp. 8.) There is no suggestion in *J.L. Ward*, however, that immunity is appropriate only where a tribal entity is designed "to give tribes control over the administration of a federal program for their benefit." On the contrary, *J.L. Ward* approvingly cites a case granting immunity to a tribal entity "created for the purpose of improving the general welfare of the Indian tribe." 842 F. Supp. 2d at 1176. The issue that *actually* concerned the *J.L. Ward* court was whether the purposes for which the tribal entity was formed "are closer to the functions of a tribal government than a business," *id.*—a test that KCRC most certainly passes.

The University also cited *Dille v. Council of Energy Resource Tribes*, 801 F.2d 373 (10th Cir. 1986), in which a council of 39 Indian tribes, formed to manage their collective energy resources, was held to be a "tribe" entitled to an exemption from Title VII. *Id.* at 376. Plaintiffs point out that *Dille* dealt with "tribes' ability to benefit from their own energy resources" and that "[n]o parallel concerns are at stake here." (Opp. 8.) But the court's rationale in *Dille* lay elsewhere: it was "[b]ecause the council is entirely comprised of the member tribes and the decisions of the council are made by the designated representatives of those tribes" that the entity fell "directly within the scope of the Indian tribe exemption that Congress included in Title VII." 801 F.2d at 376. This language describes KCRC's governance to a tee. (*See* Banegas Decl. ¶¶ 4, 6, 12.) Nor can *Dille* be brushed aside because it "dealt with Title VII." (Opp. 8; *see also id.* at 6

n.2 (purporting to distinguish all Title VII cases because "[n]o . . . statutory exception is at issue here").) The test for whether an entity is a Title VII "tribe" is the same as for whether it enjoys tribal immunity, as many courts have held. *See, e.g.*, *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *J.L. Ward*, 842 F. Supp. 2d at 1172-73.

Plaintiffs do not even try to distinguish *Taylor v. Alabama Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032 (11th Cir. 2001), or *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185 (9th Cir. 1998), beyond making the irrelevant point that these cases discuss Title VII. (Opp. at 6 n.2.) In *Taylor*, the Eleventh Circuit accorded immunity to an "intertribal consortium, with a Board dominated by tribal chiefs and tribe members, organized to promote business opportunities for and between tribes." *Id.* at 1034-36. In *Pink*, the Ninth Circuit held that a corporation created by two tribes to contract with the government for health services was a "tribe" under Title VII because it "served as an arm of the sovereign tribes, acting as more than a mere business." *Id.* at 1188. Plaintiffs essentially ignore these cases.

Plaintiffs instead urge the Court to apply the Tenth Circuit's six-factor test from *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (2010). (Opp. 7.) The Ninth Circuit has not adopted this test. Even assuming it applied, however, the factors clearly would point to immunity for KCRC. (*See* KCRC Mot. To Dismiss (ECF 41) ("KCRC Mot.") at 7-8.) Plaintiffs put special weight on *Breakthrough*'s fifth prong—the financial relationship between the tribes and the entity—which they urge is "dispositive" under *Runyon v. Association of Village Council Presidents*, 84 P.3d 437, 440-41 (Alaska 2004). (Opp. 8-9.) As an initial matter, the notion that one factor is dispositive of the immunity analysis is inconsistent with the nature of the "multi-factor test," which Plaintiffs admit "requires analysis of the facts pertinent to each factor." (Opp. 7.) Indeed, the Tenth Circuit in *Breakthrough* reversed the district court for following *Runyon* and "treat[ing] the financial impact on a tribe of a judgment against its economic entities as a threshold inquiry." 629 F.3d at 1181; *see also J.L. Ward*, 842 F. Supp. 2d at 1176 (declining to follow *Runyon* and granting immunity where "[a] suit against [an intertribal entity] would not appear to affect, at least not directly, any particular tribe's fiscal resources"). In any event, Plaintiffs are wrong to say that the financial relationship

between KCRC and the Tribes cuts against KCRC's immunity. KCRC's operating budget is funded exclusively from contributions by its member tribes. (Banegas Decl. ¶ 9.) Without immunity, funds contributed by the Tribes could be subject to a legal judgment against KCRC. (*See* KCRC Mot. 8.) Plaintiffs assert that a judgment in this case "would not affect any tribe's assets because this is not a suit for damages" (Opp. 8), but whether a tribal entity is an "arm of the tribe" does not vary from case to case depending on the type of relief sought.[3]

KCRC Did Not Waive Its Immunity by Suing the University in the Southern District. Contrary to Plaintiffs' contention, KCRC did not waive its immunity by suing the University in the Southern District. As argued in the University's motion (Mot. 10-11), *Pit River Home & Agricultural Cooperative Ass'n v. United States*, 30 F.3d 1088 (9th Cir. 1994), forecloses this contention. Plaintiffs do not distinguish *Pit River*. They observe only that *Pit River* "simply did not consider the issues raised by" an earlier Ninth Circuit decision, *United States v. Oregon*, 657 F.2d 1009 (1982) (as amended). (*See* Opp. 11.) *Oregon* is the only case Plaintiffs cite that found an implied waiver of tribal immunity based on litigation conduct. But *Oregon* is manifestly distinguishable—which is likely why the *Pit River* court felt no need to discuss it.

In *Oregon*, a tribe intervened in a suit over fishing rights. The district court entered an injunction favorable to the tribe and retained continuing jurisdiction. 657 F.2d at 1011. Years later, at the request of the State of Washington—which had subsequently intervened—the court enjoined the tribe, *in the lawsuit in which the tribe had intervened*, from fishing spring chinook. The tribe objected to this injunction on immunity grounds. *Id.* at 1011-12. The Ninth Circuit rejected the tribe's argument, holding that, "[b]y seeking equity, this Tribe assumed the risk that any equitable judgment secured could be modified if warranted by changed circumstances." *Id.* at 1015.

Plaintiffs contend that, under *Oregon*, KCRC has, by filing a *separate* lawsuit, waived its immunity in this action because "[t]he main issue in this action . . . is the same in the Southern

[3] As a last resort, Plaintiffs ask for discovery on the *Breakthrough* factors. (Opp. 9.) Plaintiffs cite no federal precedent for this request. Moreover, discovery would be entirely unwarranted here, as the Court already has sufficient information from which to reach an informed decision.

District action." (Opp. 10.) But the Ninth Circuit has never extended *Oregon* to hold that a tribe's involvement in one suit waived its immunity in *a subsequent, different suit*, even when the two actions concern the same issue. To the contrary, more recent Ninth Circuit cases have made clear that *Oregon*—which the court emphasized tests the "outer limits" of implied waivers of immunity, *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 420 (9th Cir. 1989)—may not be read so broadly. "[A] tribe's waiver of sovereign immunity may be limited to the issues necessary to decide the action brought by the tribe; the waiver is not necessarily broad enough to encompass related matters, *even if those matters arise from the same set of underlying facts*." *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989) (emphasis added). *McClendon* followed the Tenth Circuit's decision in *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 539 (10th Cir. 1987). The tribe in *Jicarilla* brought suit to cancel certain leases awarded by the Department of the Interior; meanwhile, Dome Petroleum Corporation brought an independent action seeking to preserve its interest in the same leases. *Id.* at 538. The Tenth Circuit affirmed dismissal of Dome's lawsuit for lack of jurisdiction over the tribe, an indispensable party. "Although the Tribe's filing of the *Jicarilla* litigation may have waived its immunity with regard to Dome's intervention in that suit, *we cannot construe the act of filing that suit as a sufficiently unequivocal expression of waiver in subsequent actions relating to the same leases*." *Id.* at 539 (emphasis added); *see also Enter. Mgmt. Consultants, Inc. v. United States*, 883 F.2d 890, 891-92 (10th Cir. 1989) (tribe immune from suit by company even though tribe had sued company over same subject). The "main issue" in the two actions in *Jicarilla*—whether the leases would persist—was the same (just as Plaintiffs assert here), yet the tribe's initiation of the first suit did not waive its immunity in the subsequent action. The same holds true in this case.

Plaintiffs somehow tease out of *McClendon*, *Jicarilla*, and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), the rule that a tribe's initiation of a lawsuit waives immunity against future claims "where the legal issues and property in dispute are identical" but not where they are merely "related." (Opp. 11.) The cases do not even come close to supporting this elusive distinction. In any event, it is not true that the "legal issues" here are "identical" to those in KCRC's lawsuit. KCRC's suit does not address whether the Remains are

subject to NAGPRA—it accepts the University's conclusion to that effect and contests only the *timing* of the transfer, which is not at issue here. Moreover, Plaintiffs allege public-trust and First Amendment claims absent from the Southern District litigation; there is no way KCRC could have waived its immunity with respect to these claims.

KCRC Did Not Waive Its Immunity by Incorporating Under State Law. Plaintiffs say that KCRC also waived its immunity simply by incorporating under California law. (Opp. 12.) The Ninth Circuit, however, has held otherwise: "[a] tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so." *Am. Vantage Cos. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002). Plaintiffs attempt to brush off *Table Mountain* as addressing only corporations organized under a federal statute, but that mischaracterizes the case. *Table Mountain* relied on *Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 658 N.E.2d 989 (N.Y. 1995), which involved an entity organized under District of Columbia law and subject to New York corporation law, *id.* at 994-95. It also cited Judge Canby's hornbook, which states that "incorporation of a tribal [entity] under *state laws* enabling corporations to sue and be sued does *not* waive immunity." William C. Canby, *American Indian Law* 94-95 (3d ed. 1998) (emphases added); *see also Smith v. Salish Kootenai College*, 434 F.3d 1127, 1129, 1133-34 (9th Cir. 2006) (relying on Title VII and tribal immunity cases to conclude that college incorporated under state law was "tribal" for tribal-court-jurisdiction purposes); *J.L. Ward*, 842 F. Supp. 2d at 1176 (incorporation under state law "militate[d] against sovereign immunity," yet immunity was warranted after balancing factors).[4] Although Plaintiffs assert that KCRC's suspended corporate status would not affect the waiver analysis, they cite no authority, and it is not clear why this would be so. If KCRC waived its

[4] Plaintiffs' citation to dictum from *Wright v. Colville Tribal Enterprise Corp.*, 147 P.3d 1275 (Wash. 2006), does not advance the ball. The tribal entities there were organized under *tribal* law and were held to be immune. *Id.* at 1277. In passing, the *Wright* court does say that incorporating under state law may waive tribal immunity. *Id.* at 1280. But the law review article it cites in support says nothing of the sort. *See* William V. Vetter, *Doing Business With Indians and the Three "S"es*, 36 Ariz. L. Rev. 169, 173 (1994). The one decision *Wright* cites—*Runyon*—rests on the financial relationship between the corporation and the tribes, not on the corporation's organization under state law. *See* 84 P.3d at 440-41; *see also supra* at 4.

immunity by "accept[ing] rights . . . under California law" (Opp. 12), then relinquishing those rights by allowing its corporate standing to lapse should work to withdraw that waiver.

(ii) The University Cannot Adequately Represent the Tribes' Interests

Plaintiffs acknowledge the "various authorities" from the Supreme Court and Ninth Circuit supporting the argument that the University cannot represent the Tribes' interests because it must operate in the interests of the California public, as distinct from the narrower interests of the Tribes.[5] (Opp. 14 & n.6.) Plaintiffs brush aside all of these cases with the bold assertion that the University has "abdicated [its] broader obligations to the public." (Opp. 14.) That accusation is baseless, and it is in any event a premature merits determination—indeed, it is the whole thrust of Plaintiffs' public-trust claim. Nor is it accurate to say that the University has "vigorously defended" the Tribes' position "at every turn" and has made, and will make, all of the arguments the Tribes would like to make. (Opp. 15.) The University, for example, moved to dismiss KCRC's Southern District complaint before that case was stayed, and has stipulated to the entry of a preliminary injunction in this case that forbids any transfer of the Remains.

Plaintiffs launch the brazen accusation that the University "colluded with KCRC to file the Southern District action." (Opp. 14.) This is not a "reasonabl[e]" inference from the facts. (Opp. 15.) The University's Notice of Inventory Completion announced that transfer of the Remains to the La Posta Band could proceed after January 4, 2012 absent objection by another tribe. (FAC, Ex. B.) But on December 20, 2011, Plaintiffs threatened to sue the University if the transfer was effected (ECF 11 at 48); Plaintiffs forwarded their draft complaint on January 3, 2012 (ECF 44-3 at 1) and the University agreed not to transfer the Remains until April 30 in an effort to avoid litigation (ECF 11 at 85-86). Plaintiffs knew that the transfer's delay caused a

[5] As the University explained in its motion, even a "minimal" showing that representation is not adequate renders the "adequate representation" exception inapplicable. (Mot. 8.) Plaintiffs dispute that the minimal-showing standard applies, noting that it comes from the intervention, not joinder, context. (Opp. 15.) The Ninth Circuit has explained, however, that, "[i]n assessing an absent party's necessity under Fed. R. Civ. P. 19(a), the question whether that party is adequately represented parallels the question whether a party's interests are so inadequately represented by existing parties as to permit intervention of right under Fed. R. Civ. P. 24(a)." *Shermoen*, 982 F.2d at 1318 (citing a Rule 24 case for the standard applicable under Rule 19).

"dispute" between the University and the Tribes. (ECF 11 at 88.) The notion that it was somehow inappropriate for the University to inform the Tribes of the threatened lawsuit and the tolling agreement, which explained the reason for the delay, is unfounded. Nor do Plaintiffs cite any agreement or legal principle requiring confidentiality to support their suggestion that it was inappropriate to provide the Tribes with a copy of Plaintiffs' draft. At its core, the suggestion that the University "colluded" with KCRC *to have KCRC sue the University*—forcing the University to defend two actions at once and incur the costs of preparing two motions to dismiss—is outright absurd.

b. Disposing of Plaintiffs' Claims in the Tribes' Absence Would Subject the University to a Substantial Risk of Inconsistent Obligations

Plaintiffs contend that the University faces no risk of inconsistent obligations in the Tribes' absence because all deadlines in KCRC's Southern District suit have been tolled for one year. (Opp. 15-16.)[6] The tolling order does not eliminate the risk of inconsistent obligations. KCRC's case was put on hold, not dismissed. If Plaintiffs prevail here, and then KCRC prevails in the Southern District when that case becomes active again, the University will be simultaneously required and forbidden to transfer the Remains to the Tribes. Even putting aside KCRC's suit—indeed, even if KCRC were joined here—the University also remains subject to suit by all of the Tribes, including the La Posta Band (*see* Mot. 14 n.8).

Plaintiffs' last-ditch argument that the Tribes may be enjoined in this suit under Fed. R. Civ. P. 65(d) "as nonparties acting in concert with the Regents" is nonsense. (Opp. 16.) First of all, the Tribes are *not* "acting in concert" with the University. *See supra* at 8-9; *see also* 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2956 (2d ed. 2012) (rule covers only "nonparties who . . . are guilty of aiding or abetting or acting in concert with a named defendant or his privy in violating the injunction"). Second, the Tribes may not be enjoined because they are immune. Rule 65(d) does not trump sovereign immunity. *See In re Estate of Ferdinand*

[6] The University did not, as Plaintiffs allege, "fail to note" the Southern District's tolling order (Opp. 15)—that order was not issued until June 8, 2012, *after* the University filed its motion to dismiss in this case.

Marcos Human Rights Litig., 94 F.3d 539, 544-48 (9th Cir. 1996) (rejecting, based on immunity, attempt to enjoin nonparty foreign nation under Rule 65(d)).

c. Plaintiffs Cannot Sue Tribal Officials as an End-Run Around Tribal Immunity

Citing the rule that "sovereign immunity does not extend to tribal officials acting beyond the scope of their authority, in violation of federal law," Plaintiffs urge that they could join individual tribal officials to represent the La Posta Band's interests. (Opp. 16.) The Ninth Circuit has twice rebuffed precisely such a "ploy hatched by [plaintiffs] attempting to circumvent tribal sovereign immunity." *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1160 (9th Cir. 2002). In *Dawavendewa*, the plaintiff argued that his suit could proceed, notwithstanding the absence of a necessary-party tribe, because it "could be sustained against tribal officials." *Id.* at 1159. The plaintiff's argument, the court pronounced, "strikes us as an attempted end run around tribal sovereign immunity." *Id.* at 1160. Circuit precedents extending *Ex Parte Young*, 209 U.S. 123 (1908), to tribal officials—the same precedents Plaintiffs cite here (Opp. 16)—did not "insinuat[e] that a plaintiff may circumvent the barrier of sovereign immunity by merely substituting tribal officials in lieu of the Indian Tribe." 276 F.3d at 1160. Drawing on *Shermoen*, which rejected a similar scheme, the court instructed that "a suit is against the sovereign" if, *inter alia*, it would "interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting." *Id.* (internal quotation marks omitted). "[I]f the relief sought will operate against the sovereign, the suit is barred." *Id.* The court noted that the plaintiff's complaint "specifie[d] no action by tribal officials performed in contravention of constitutional or federal statutory law," and that "[o]nly when faced with the possible dismissal of his suit did [the plaintiff] seek to join tribal officials." *Id.* at 1160, 1161. Even if the plaintiff alleged "some wrongdoing" on the part of tribal officials, the court concluded, his "real claim" was against the tribe itself. *Id.* at 1161.

KCRC officials have done nothing that could possibly be said to have violated federal law. Plaintiffs seem to imply that the tribal officials somehow violated federal law by requesting transfer of the Remains under NAGPRA and/or causing KCRC to file its lawsuit. (*See* Opp. 16

("by attempting to enforce NAGPRA in a manner that is illegal").) That implication is frivolous. *Cf. Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006) (First Amendment's Petition Clause protects "those who petition any department of the government for redress"). In any event, *Dawavendewa* and *Shermoen* foreclose Plaintiffs' legal theory. All Plaintiffs can say is that these binding cases "appear incorrectly to discount the doctrine of *Ex parte Young*"—an argument that defeats itself. (Opp. 17.) The relief Plaintiffs seek clearly would operate against the sovereign—certainly Plaintiffs would not claim victory if, say, Steven Banegas were restrained but other tribal officials remained free to pursue the transfer. Indeed, that Plaintiffs suggest that *any* tribal official could stand in for the Tribes (Opp. 16) proves that their real claim is against the Tribes themselves and is thus squarely precluded by *Dawavendewa* and *Shermoen*.

2. The Tribes Are "Indispensable" Parties Without Which Plaintiffs' Claims Must Be Dismissed

Plaintiffs' indispensability arguments are specious. Plaintiffs argue that the La Posta Band (ignoring the other Tribes) is not indispensable because its claimed interest in the Remains fails on the merits; because it can be adequately represented by KCRC, the University, or tribal officials; and because the Tribes may be enjoined as nonparties under Fed. R. Civ. P. 65(d). (Opp. 17-18.) The first premise puts the cart before the horse; the remaining ones are, as demonstrated above, simply wrong. *See supra* at 2-11.

Plaintiffs also complain that, if the action is dismissed, they "and the public" will have no remedy to protect the Remains. (Opp. 18.) Plaintiffs ignore the cases holding that sovereign immunity outweighs any prejudice to frustrated plaintiffs. (Mot. 17.) Prejudice to "the public" is not part of the calculus. *See* Fed. R. Civ. P. 19(b)(4). In any event, NAGPRA empowers the Secretary of the Interior to protect the public interest by assessing penalties for NAGPRA violations and suing to recover them, 25 U.S.C. § 3007; if a tribe is a necessary party to such an enforcement suit, it may be joined notwithstanding tribal immunity, *see United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986) ("[T]he United States may sue Indian tribes and override tribal sovereign immunity.").

Plaintiffs are also wrong in asserting that the "public rights" exception to indispensability applies. (Opp. 19-20.) First, the exception does not apply where, as here, the absent parties' interests "could be significantly affected." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311-12 (9th Cir. 1996); *accord Clinton v. Babbitt*, 180 F.3d 1081, 1091 (9th Cir. 1999). Plaintiffs seem to suggest that the Tribes have no rights at stake because the University failed to comply with NAGPRA (Opp. 20); again Plaintiffs assume success on the merits, which is improper at this threshold stage. Second, the public-rights exception is appropriate only to the extent a suit seeks "prospective injunctive relief" requiring administrative authorities "to follow statutory procedures *in the future*." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 & n.6 (9th Cir. 1990) (emphasis added); *see id.* at 559 ("To the extent that the Makah seek relief that would affect *only* the future conduct of the administrative process, the claims . . . are reasonably susceptible to adjudication without the presence of other tribes." (emphasis added)); *see also Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1026 (9th Cir. 2002). Plaintiffs' suit, however, is entirely backward-looking, challenging the substance of the University's transfer decision with respect to the Remains and the procedures that were followed in reaching that decision. Under *Makah*, such retrospective claims concerning the University's transfer decision may not be adjudicated in the absence of the Tribes.

B. PLAINTIFFS' PUBLIC-TRUST AND FIRST AMENDMENT CLAIMS ARE NOT RIPE

Plaintiffs' ripeness argument rests on a fallacy wrought from blatant distortion of documentary evidence: that the University has "made a final decision to transfer the remains, by whatever means," even if NAGPRA does not apply. (Opp. 20-21.) There is no evidence that the University or the San Diego campus ever made a decision about what to do if NAGPRA does not apply. For the contrary assertion, Plaintiffs cite the Notice of Inventory Completion and a letter written by President Yudof. The Notice was issued *pursuant to NAGPRA* and by its nature has no application if NAGPRA does not govern. The Yudof letter actually shows the *opposite* of what Plaintiffs claim: "*If* the remains are not Native American," President Yudof wrote, "they would not be covered by NAGPRA, and *the campus could make a determination* about retention or

disposition of the remains outside of the NAGPRA process." (ECF 45-16, Ex. 7 (emphasis added); *see id.* (mentioning "the *possibility* of proceeding outside of NAGPRA" (emphasis added)).) Even if Chancellor Fox, on behalf of the San Diego campus, had come to a tentative, unspoken conclusion about the Remains (of which Plaintiffs have also shown no evidence), Chancellor Khosla, who recently replaced her (Supp. Decl. of John M. Rappaport, Exs. A & B), might disagree. *Cf. Spomer v. Littleton*, 414 U.S. 514, 520-21 & n. 9 (1974) (where suit for injunctive relief is based on past behavior by former official, plaintiff must demonstrate controversy exists with new official after substitution). Because no decision has been made about how to proceed if NAGPRA does not apply, Plaintiffs' claims rest upon "contingent future events that may not occur as anticipated, or indeed may not occur at all," and thus are not ripe. *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted); *accord In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009).[7]

C. PLAINTIFFS LACK STANDING TO PURSUE CLAIMS BASED ON NAGPRA

Plaintiffs contend that they have standing (and can show redressability) because "it is highly probable that plaintiffs will be allowed to study the La Jolla Skeletons if they remain in the University's possession." (Opp. 22.) Even assuming this contention is true, its premise is not—a

[7] Plaintiffs' other ripeness arguments are easily dispatched. First, *Principal Life Insurance Co. v. Robinson*, 394 F.3d 665, 669-71 (9th Cir. 2005), cited by Plaintiffs, is inapplicable. As the Ninth Circuit later made clear, *Principal* held only that *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), does not apply to "private contract disputes" because those disputes do not involve "judicial entanglement" in political decisions, "allocation of authority" between the judicial and political branches, or the risks of "wide-ranging and remote adverse consequences" that stem from governmental decisions. *Coleman*, 560 F.3d at 1006 (holding that *Abbott does* apply to private disputes governed by the Bankruptcy Code rather than by contract) (internal quotation marks omitted). Plaintiffs here seek judicial review, under the Constitution and state law, of a state decision that Plaintiffs themselves say "has consequences for many members of the general public." *Principal*, 394 F.3d at 670. Second, Plaintiffs' cases about threats of prosecution (Opp. 20) are inapposite. Those cases permit plaintiffs to challenge a law when there is a genuine threat that a penalty will be applied to them. *See, e.g., Jacobus v. Alaska*, 338 F.3d 1095, 1104 (9th Cir. 2003). Plaintiffs do not face the threat of prosecution under NAGPRA. Third, Plaintiffs assert that "[w]ithholding consideration of plaintiffs' public trust and First Amendment claims will waste scarce judicial resources." (Opp. 21.) This is not the type of "hardship" cognizable under *Abbott*. *See Principal*, 394 F.3d at 670 (hardship element not met absent showing that "withholding review would result in 'direct and immediate' hardship and would entail more than possible financial loss" (internal quotation marks omitted)). In any case, it is not clear why it would save judicial resources to resolve the public-trust and First Amendment claims sooner rather than later (if they become ripe at all).

determination that NAGPRA does not apply would *not* require the University to retain the Remains. The University would remain free to transfer the Remains in its discretion; it does not, as Plaintiffs seem to suggest (Opp. 23), need specific authorization to cede the Remains. *See* Cal. Const. art. IX, § 9(f) ("The Regents of the University of California shall be vested with the legal title and the management and disposition of the property of the university and of property held for its benefit."). Plaintiffs assert that transferring the Remains would violate the public trust, but again they get ahead of themselves, assuming victory on a claim that, as just explained, is not yet ripe. *See supra* at 12-13. Plaintiffs cite the University Human Remains policy, implying that it somehow requires the University to retain the Remains if NAGPRA does not apply. Their reliance on the policy's "public trust" language (Opp. 23) simply restates their public-trust claim, which is not ripe; their reliance on language in the policy stating that remains and cultural items "shall normally remain accessible for research" (ECF 25, Ex. A, at 7) is misplaced because that language does not apply unless the Remains *are* Native American and therefore subject to NAGPRA. (*See id*. at 1 ("[T]his policy pertains to Native American . . . human remains and 'cultural items.'").) The policy is therefore irrelevant to the University's decisions about the Remains if, as Plaintiffs contend, they are not subject to NAGPRA.

Finally, Plaintiffs' attempt to paper over the dispositive differences between this case and *Bonnichsen v. United States*, 367 F.3d 864 (9th Cir. 2004), is not successful. The remains in *Bonnichsen* were subject to the Archaeological Resources Protection Act of 1979 ("ARPA"). ARPA regulations "govern the disposition of archaeological resources" subject to the Act. 16 U.S.C. §470dd. Those regulations require the government to preserve ARPA resources. *See* 36 C.F.R. § 79.5 ("[M]anagement and preservation of . . . collections"). The regulations further mandate that ARPA resources "*shall* be made available to qualified professionals for study." 36 C.F.R. § 79.10(b) (emphasis added). ARPA does not apply to the Remains at issue here, so, unlike the government in *Bonnichsen*, the University is not subject to ARPA's regulations, and Plaintiffs have no legal right under ARPA, or any other statute, to study the Remains.[8]

[8] For related reasons, Plaintiffs lack standing to bring *any* claim against former Chancellor Fox because, now that she is no longer part of the University's administration, she lacks authority to redress any of Plaintiffs' alleged injuries. *See Easter v. Am. W. Fin.*, 381 F.3d 948, 961-64 (9th

D. PLAINTIFFS CANNOT SEEK DECLARATORY AND INJUNCTIVE RELIEF AGAINST UNIVERSITY OFFICIALS IN THEIR "INDIVIDUAL" OR "PERSONAL" CAPACITIES

The University does not dispute that Plaintiffs are permitted under *Ex parte Young* to sue the University officials for declaratory and injunctive relief in their "official" capacities. Nor does the University dispute that certain *damages* claims are permitted against state officers in their "individual" or "personal" capacities (but Plaintiffs do not seek damages). Plaintiffs may not, however, sue the officials for declaratory and injunctive relief in their "individual" or "personal" capacities. *See Wolfe v. Strankman*, 392 F.3d 358, 360 n.2, 365 (9th Cir. 2004) ("The individual defendants were also sued in their personal capacities, but the declaratory and injunctive relief Wolfe seeks is only available in an official capacity suit."); *see also Brown v. Montoya*, 662 F.3d 1152, 1161 n. 5 (10th Cir. 2011) ("Section 1983 plaintiffs may sue individual-capacity defendants only for money damages and official-capacity defendants only for injunctive relief.").[9] Allowing such claims would make no sense, as University officials could provide meaningful relief only in their *official* capacities.

III. CONCLUSION

For the foregoing reasons, the claims against the University in Plaintiffs' First Amended Complaint should be dismissed with prejudice.

Cir. 2004) (holding that plaintiffs lacked standing to sue some, but not all, defendants, and dismissing those defendants from case); *Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) (en banc) ("Because these defendants have no powers to redress the injuries alleged, the plaintiffs have no case or controversy with these defendants that will permit them to maintain this action in federal court."). Fox may also be dismissed as an improper party under Fed. R. Civ. P. 21. *See Hispanic Coal. on Reapportionment v. Legislative Reapportionment Comm'n*, 536 F. Supp. 578, 584 (E.D. Pa. 1982) (defendants dismissed where they were "clearly without authority or power to effect any of the relief sought"), *aff'd*, 459 U.S. 801 (1982).

[9] There is dictum in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), which Plaintiffs cite (Opp. 24), referring to *Young* suits as individual-capacity actions. *See* 521 U.S. at 269. There is no suggestion, however, that the Court intended to part from its repeated teaching that, where it matters, *Young* suits are *official-capacity* actions. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 690 (1978) (*Young* "held that, although prohibited from giving orders directly to a State, federal courts could enjoin state officials in their official capacities."). Subsequent appellate decisions citing *Coeur d'Alene* reinforce the Court's longstanding rule. *See, e.g.*, *Ameritech Corp. v. McCann*, 297 F.3d 582, 586-87 (7th Cir. 2002) ("[A] case may proceed under the *Young* exception only when a state official is sued in his official capacity.").

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