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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

The Navajo Nation, Plaintiff, vs. The United States Department of the Interior, et al., Defendants.	NO. CV-11-8205-PCT-PGR **RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

On April 2, 2012, Defendants filed a Motion to Dismiss the Navajo Nation's Complaint, alleging that the case should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), because the Court lacks subject matter jurisdiction over Plaintiff's claims, pursuant to Fed. R. Civ. P. 12(b)(6), because Plaintiff has failed to state a claim for

which relief can be granted, and pursuant to Fed. R. Civ. P. 12(b)(7), because Plaintiff has failed to join an indispensable party under Rule 19. For the reasons stated below, Defendants' arguments are without merit and its Motion to Dismiss should be denied.

ARGUMENT

I. THE NATION OWNS ALL ARCHAEOLOGICAL RESOURCES IN ITS LANDS, INCLUDING HUMAN REMAINS.

A. ARPA Recognizes the Nation's Ownership of the Remains and Objects.

The Archaeological Resources Protection Act (ARPA), P.L. 96-95, 16 U.S.C. §§ 470aa-470mm (2012), was enacted in 1979 to protect archeological resources on Indian lands and public lands, and to foster increased cooperation between governmental authorities, as well as other parties.[1] 16 U.S.C. § 470aa(b). Accordingly, ARPA provides that any regulations promulgated by the Secretary of the Interior for the "ultimate disposition" of archeological resources *from Indian lands* "shall be subject to the consent of the Indian or Indian tribe *which owns or has jurisdiction over such lands*," even when removed with a federal permit under other federal law, such as the Antiquities Act.[2] 16 U.S.C. § 470dd (emphasis added).

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[1] "Archeological resources" include any material remains of past human life or activities, including, but not limited to, *graves and skeletal materials*, and various cultural objects. 16 U.S.C. § 470bb (1); 43 C.F.R. § 7.3. "Indian lands" means lands held in trust for tribes or subject to a restriction against alienation imposed by the United States. 16 U.S.C. § 470bb (4).

[2] Resources removed prior to 1979 are thus within the scope of the Act. *See also* 16 U.S.C. 470aa(b). The Antiquities Act has been held to be unconstitutionally vague by the Ninth Circuit Court of Appeals. *See United States v. Diaz*, 499 F.2d 113, 115 (9th Cir. 1974).

In 1984, uniform regulations ("Uniform Regulations") were promulgated in accordance with Sections 5 and 10(a) of the ARPA. 49 Fed. Reg. 1016, 1016 (Jan. 6, 1984); *see* 16 U.S.C. §§ 470dd and 470ii. The Uniform Regulations specify that "[a]rchaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources." 43 C.F.R. § 7.13(b) (2011). The Native American Graves Protection and Repatriation Act ("NAGPRA") P.L. 101-601, 25 U.S.C. §§ 3001 *et seq*., was enacted in 1990. The Uniform Regulations were subsequently amended in 1995, in part to "provid[e] guidance to Federal land managers about the disposition of Native American human remains and other 'cultural items', as defined by NAGPRA." 60 Fed. R. 5256, 5256 (Jan. 26, 1995). The amendments did not affect subsection 7.13(b), *see id.* at § 7.13(b) (2011); *see also* 49 Fed. R. at 1032, but merely added subsection 7.13(e), which directs the federal land manager to use NAGPRA procedures for disposing of archaeological resources "that have been excavated, removed, or discovered *on public lands*," 43 C.F.R. § 7.13(e) (emphasis added). There is no authority in § 7.13 for the federal land manager to use NAGPRA for disposition of archeological resources taken from Indian lands, which remain the property of the Indian landowner. *Id.* at § 7.13(b). On the contrary, using the NAGPRA process for resources from Indian lands was specifically rejected as violating ARPA. *See* 60 Fed. R. at 5258 (In response to comment to add procedures for disposing of archeological resources from Indian lands, the drafters state that "[a]rchaeological resources excavated or removed from Indian lands remain the property of the Indian or

Indian tribe having rights of ownership over such resources, and who, as stated in ARPA, determine the appropriate treatment.")

Upon enactment, ARPA thus recognized the existing federal rule that archaeological resources from Indian lands, including human remains, are part of the land, and belong to the Indian landowner.[3] *See Attakai v. U.S.*, 746 F.Supp. 1395, 1409 (D.Ariz. 1990) (ARPA and its regulations "*recognize* that ownership of these resources are in the Tribes on whose reservation these resources are located . . . Archaeological resources on Indian lands belong to the Indians.") (emphasis added); *see also United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 116-117 (1938) (resources are constituent part of land belonging to the tribe); *see also Black Hills Institute of Geological Research, Inc., v. Williams*, 967 F.2d 737, 742 (8th Cir. 1993) (tangible item taken from soil of Indian trust land restricted Indian "land" for purposes of federal law).

Where ARPA expressly defines archaeological resources to include graves and human skeletal materials, 16 U.S.C. § 470bb (1); 43 C.F.R. § 7.3, and recognizes that such resources are the "property" of the tribal landowner, 43 C.F.R. § 7.13(b), the rule recognized in ARPA and *Attakai* also preempts any purported common law property

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[3] This was clearly the opinion of the Department of the Interior. *See* 60 Fed. R. 1016, 1024 (Jan. 6, 1984) ("Among the relatively few comments on [§ 7.13] several pertained to tightening or loosening the *ownership* provisions. Paragraphs (a) and (b) have an *information* function; ownership is not subject to regulation under the Act") (emphasis added); *see also* Exhibit "A", Letter from Bennie C. Keel, Departmental Consulting Archaeologist, Department of the Interior, to Dr. William M. Bass, Head, Department of Archaeology, University of Tennessee (Feb. 13, 1985), *reprinted in* Proceedings: Conference on Reburial Issues 3-15 (P. Quick ed. 1985) (general rule is that archaeological resources, including remains, belong to the landowner).

doctrine for ownership of human remains on tribal lands.[4] *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 669-670 (1974) (federal law preempts state property doctrines); *c.f. Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 788-89 (1952) (federal law preempts common law where "a statutory purpose to the contrary is evident.").

Without comment, Defendants cite to a single regulation, 25 C.F.R. § 262.8(a), for the proposition that ownership and right of control over the disposition of human remains and funerary objects from Indian lands "shall be in accordance with . . . [NAGPRA]." Def.'s Mot. Dismiss 4, 9, 13, 14. However, that regulation is inapposite and expressly does *not* apply to NPS. *See* 25 C.F.R. § 262.1 (25 C.F.R. § 262 applies *only* to the Bureau of Indian Affairs, not some generic "federal land manager" as Defendants assert). Moreover, this regulation is invalid where it is clearly inconsistent with the Uniform Regulations and directly contradicts the plain language of ARPA. *See* 16 U.S.C. 470ii (agency level ARPA regulations must be consistent with Uniform Regulations); *see* 16 U.S.C. § 470dd (disposition under regulation of archaeological resources from Indian lands "shall" require Indian landowner consent); *see Rodriguez v. Smith*, 541 F.3d 1180, 1189 (9th Cir. 2008) (regulations conflicting with clear language of statute invalid).

Where the remains and objects are "archaeological resources" and came off of Navajo "Indian lands," as defined by ARPA, the remains and objects at issue are

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[4] Defendants cite to Anglo-American common law generally for the proposition that "corpses" or "bodies" are not owned, but provide no authority for such a federal common law rule applicable here. *See* Def.'s Mot. Dismiss 15 (citing, *e.g.*, *Evanston Ins. Co. v. Legacy of Life*, 645 F.3d 739, 741 (5th Cir. 2011) (Texas common law rule)).

therefore the property of the Nation and the ultimate disposition of such remains and objects may only be determined by the Nation.

B. This Rule Is Consistent with the Nation's Treaty Rights.

Since 1868, the Navajo Nation has held recognized title to Canyon de Chelly and all its resources, including the remains and objects at issue. Treaty of 1868, June 1, 1868, art. 2, 15 Stat. 667 (hereinafter Treaty of 1868). The Treaty of 1868 defines the boundaries of the original Navajo reservation and specifically provides that Canyon de Chelly "is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians . . . ." Treaty of 1868. The language "use and occupation" recognizes the title of the Navajo Nation to the lands and resources located on or under those lands. *See Shoshone Tribe*, 304 U.S. at 116-17. Indian "land" includes tangible objects buried in the soil of the land. *See Black Hills Institute*, 967 F.2d at 742. Recognized title is a true property right subject to the 5th Amendment to the Constitution. *See Miami Tribe of Okla. v. U.S.*, 146 Ct. Cl. 421, 175 F. Supp. 926, 936 (Ct. Cl. 1959); *see also United States v. Sioux Nation*, 448 U.S. 371, 421-424 (1980). Tribes retain all rights not expressly given to the U.S. in treaties. *United States v. Winans*, 198 U.S. 371, 381 (1905).

C. The Monument Act Did Not Abrogate the Nation's Property Rights.

The Monument Act expressly provides that "[n]othing herein shall be construed as in any way impairing the right, title, and interest of the Navajo Tribe of Indians which they now have and hold to all lands and minerals, including oil and gas, and the surface use of such lands for agricultural, grazing, and other purposes, except as defined in section 445b of this title." 16 U.S.C § 445a . Section 445b of the Act charges NPS only with "administration" of the Monument and "the *care, maintenance, preservation and*

restoration of the prehistoric ruins, or other features of scientific or historical interest within the area . . . ." *Id.* at § 445b (emphasis added). Courts must "give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams v. Taylor*, 529 U.S. 420, 431 (2000) (internal quotation marks and citations omitted). "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S., 759, 767-68 (1985). By the Act's plain language, Congress did not alter or extinguish the Navajo Nation's recognized title to the Monument and its resources, or give such title to NPS.

D. NAGPRA Is Therefore Inapplicable.

NAGPRA is therefore inapplicable. As Defendants recognize, in order to apply NAGPRA, NPS must have "possession" or "control" of the items as defined under NAGPRA. *See* 25 U.S.C. §§ 3003 (a), 3004 (a), and 3005 (a)(1) - (2); *see* Def.'s Mot. Dismiss 4-5. "The term 'possession' means having physical custody . . . *with a sufficient legal interest to lawfully treat the objects as part of its collection* . . . ." and "[t]he term 'control' means having *a legal interest . . . sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection* . . . ." 43 C.F.R. §§ 10.2(a)(3)(i) and (ii) (emphasis added). In other words, NPS must have a legal right to claim the remains and objects at issue as "theirs"—"mere custody" is not sufficient. Here, where all of the remains were removed from the Monument without the Nation's consent, Compl. 16, 21-22, Defendants do not have possession or control. Defendants are "merely acting as custodian while trying to determine the proper recipient for the

remains." Def.'s Mot. Dismiss 15. Being a "mere custodian" is not sufficient to apply NAGPRA.

II. THIS COURT HAS JURISDICTION TO HEAR PLAINTIFF'S CLAIMS.

A. There is Final Agency Action Reviewable under the APA.

The final decisions by the National Park Service (NPS), stated in its September 7, 2011 letter, that (1) NPS will proceed without the Nation's consent in ultimately disposing of remains and objects taken from Navajo Indian lands, and (2) NPS will not return the Nation's property as requested, *see* Exhibit "B", are final agency action "unlawfully withheld" or final agency action constituting "denial of relief" under ARPA and the Treaty of 1868, and are thus agency actions reviewable by this Court pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §§ 500 *et seq*. Where "there is no other adequate remedy in a court," 5 U.S.C. § 704, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute," is entitled to judicial review of the final agency action, and may petition the court for injunctive or mandamus relief thereof. 5 U.S.C. § 702. Agency action includes both the failure of an agency to act and denial of relief. 5 U.S.C. §§ 551(13), 701(b)(2). "[T]he reviewing court shall . . . compel agency action unlawfully withheld . . . ," 5 U.S.C. § 706(1), where "an agency failed to take a *discrete* agency action that it is *required to take*," either by statute or applicable agency regulations, *Norton v. SUWA*, 542 U.S. 55, 64-65 (2004).

Here, NPS has refused to take a legally required discrete action. Congress provided that the Secretary of the Interior "*may* promulgate regulations" for disposition

of archaeological resources from Indian lands, which the Secretary did, *see* 49 Fed. R. at 1016, but that "ultimate disposition . . . *shall* be subject to the consent of the Indian or Indian tribe which owns or has jurisdiction over such lands." 16 U.S.C. § 470dd (emphasis added). "'Shall' means shall." *Brower v. Evans*, 257 F.3d 1058, 1067, n. 10 (9th Cir. 2001) (citations omitted). Where, as here, Congress uses both "may" and "shall" in the same statutory provision, "shall" imposes a mandatory obligation. *See Sauer v. U.S. Dept. of Educ.*, 668 F.3d 644, 651 (9th Cir. 2012).

NPS' refusal to carry out its mandatory duty under ARPA is thus a discrete action required by law and reviewable by this Court as agency action unlawfully withheld under 16 U.S.C. § 706(1). *See Norton v. SUWA*, 542 U.S. at 64-65. NPS' refusal to return property of the Nation upon petition for relief also constitutes discrete final agency action reviewable by this Court.[5] *Id.* at 62-63; 5 U.S.C. §§ 551(13), 701(b)(2).

B. The Nation's Claims Are Not Time Barred.

The Nation's claims are also not time barred by the six year statute of limitations at 28 U.S.C. § 2401(a). The Nation's claims do not arise under NAGPRA, *see* Def.'s Mot. Dismiss 10, but under ARPA, the Treaties of 1850 and 1868, the Monument Act, and the U.S. Constitution, *see* Compl. ¶¶ 49-59. Accordingly, the Nation's claims only

[5] The final decision by NPS that it has jurisdiction under NAGPRA is also reviewable by this Court as a discrete action by NPS that affects the Nation's rights. *See Sackett v. E.P.A.*, 132 S.Ct. 1367, 1371-72 (2012) (final decision by agency that it has jurisdiction over parties and property under federal statute is final agency action reviewable by the district court under the APA).

"accrued" upon notice to the Nation by NPS in its September 7, 2011 letter that it would *not* comply with ARPA or return the Nation's property as recognized by ARPA and the Treaty of 1868. Prior to August 9, 2011, the Nation never petitioned the agency for return of its property, and was denied, and never got formal notice from NPS that it would not comply with ARPA. This action was thus begun only a few months after final agency action, well within the six year statute of limitations. The U.S. mistakenly relies on the draft NAGPRA inventory initiated by NPS around 1995 or 1996 and the Nation's stated objection to it at that time, *see* Compl. ¶ 24, for the purported inference that by generating within its own agency a draft inventory of the Canyon de Chelly "collection," NPS thus "clearly asserted possession or control," the Nation thereby had notice of an adverse property claim, and the Nation thereafter sat on its claim, to its detriment, *see* Def.'s Mot. Dismiss 10; *see* Compl. ¶ 24.

As a threshold matter, no party, and certainly not the tribe's trustee, *see* Section III.B, *infra*, can acquire property rights in tribal trust property by prescription. *See Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir. 1991) (citations omitted). In any case, the 1995 draft inventory that the U.S. relies on as a "clear assertion" of a legal interest adverse to the Nation was entirely abandoned by NPS, was never finalized, completed or published pursuant to NAGPRA, and after languishing in the drawers of the NPS bureaucracy for over a decade was finally withdrawn from even internal administrative consideration in 2007, some 12 years later. *See* Exhibit "C", May 2, 2012 Declaration of Dr. Alan Downer, Program Manager,

HPD.[6] Moreover, from 1996 until 2009, the various superintendents who managed the Monument never claimed to have possession or control of the remains and objects taken from the Monument, but all agreed that the Monument was the Nation's lands, NPS was managing the Nation's resources, and resources from the Monument in NPS' custody remained the property of the Nation. *Id.*

As late as October, 2009, NPS indicated in internal correspondence that NAGPRA inventory work for the Monument was delayed because of the "Navajo Nation issue regarding ownership of collections." *Id.* It was not until an April 26, 2010 email, at the earliest, that the Nation got official notice from NPS, upon advice from its solicitors, that it had "possession and control" for purposes of NAGPRA, well within the six year statute of limitations for filing these claims.[7] *Id.*

C. The Nation Has Standing to Bring Its Claims.

Defendants' sole argument that the Nation lacks standing to bring its claims is that the NAGPRA process has not been completed. *See* Def.'s Mot. Dismiss , 10-11.

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[6] As Defendants correctly note, *see* Def.'s Mot. Dismiss 5, when deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court is not restricted to the facts in the complaint, but "may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction," without converting the motion to dismiss into a motion for summary judgment. *See McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988).

[7] In an April 26, 2010 email to Dr. Downer, Dr. Cyd Martin, Park NAGPRA Program Manager, responding to discussions with Dr. Downer concerning applicability of NAGPRA to Monument resources, related that she had recently sought and gotten legal advice from Department of the Interior solicitors and they advised that NPS had "possession and control" of items from the Monument, and in its collection, for purposes of NAGPRA. *See* Exhibit "C". This "ultimate decision" of the solicitors was also conveyed to HPD staff at a June 22, 2011 meeting with NPS. *Id.*

None of the Nation's claims against Defendants arise under NAGPRA, but rather from failure of NPS to comply with ARPA, and from NPS' refusal to return the Nation's treaty property as recognized by ARPA. These are "injuries in fact" that are concrete and particularized, actual and not hypothetical, traceable directly to Defendants' actions, and redressable by the Court through the relief requested by the Nation in its complaint. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). The Nation thus has standing to bring its claims.

D. The Action Is Ripe.

For the same reason, the action is also ripe. NPS has refused to comply with ARPA and the Treaty of 1868. *See* Compl. ¶¶ 30-34. Its refusal is final for NPS, is not reviewable within the agency, and therefore this action is ripe for adjudication. This case is inapposite to *Na Iwi*, where the claims were brought pursuant to §§ 3003, 3005, and 3010 of NAGPRA and there was no final repatriation decision by the agency. *See Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1403-04 (D. Hawaii 1995).

III. THE NATION'S COMPLAINT STATES CLAIMS FOR WHICH RELIEF CAN BE GRANTED.

A. The Nation's Complaint States a Claim for Violation of Article Two of the Treaty of 1868.

The Defendants' sole objection to count one of the complaint is that the Nation allegedly did not cite any specific provisions of the treaties of 1850 and 1868 it claims were violated. Def.'s Mot. Dismiss 12. To the contrary, the Nation cited and discussed both treaties in ¶¶ 6-11 of its complaint, incorporated by reference into count one at ¶ 49. Indeed, the Nation specifically quotes article two of the Treaty of 1868 at ¶ 9,

where the Nation and the U.S. agreed that Canyon de Chelly was part of the Navajo Reservation and that "the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians." Compl. 9; Treaty of 1868. As discussed at Section I.B, *supra*, the language "use and occupation" recognizes the title of the Navajo Nation to the lands and resources located on or under those lands. *See*, *e.g.*, *Shoshone Tribe*, 304 U.S. at 116-17. The Nation therefore specifically identified the section of the Treaty of 1868 recognizing the property rights of the Nation. As NPS has refused to return remains and objects taken from the Monument, as stated in ¶¶ 30-34 of the complaint, the Nation's count alleging violation of the Nation's property rights, recognized and affirmed by the Treaty of 1868, properly states a claim.

B. The Nation's Complaint States a Claim for Violation of the United States' Fiduciary Duty to the Nation.

Similarly, the United States' sole objection to count two is that the Nation failed to cite a treaty or "specific, applicable, trust-creating statute or regulation" that the United States violated. Def.'s Mot. Dismiss, 13 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009)). Again, to the contrary, the Nation cited and discussed article two of the Treaty of 1868, the specific provision of the Treaty where the United States recognized the Nation's property rights to Canyon de Chelly. The paragraphs discussing the treaty and its violation were incorporated by reference under count two in ¶ 52 of the complaint. Moreover, the Nation cited and discussed the statute establishing the Canyon de Chelly National Monument at ¶¶ 12-15 of its complaint. At ¶ 15, the Nation quotes language that specifically creates a trust

mandating that the National Park Service care and maintain the Nation's archaeological resources, including the remains and objects at issue in this case. *See* Section I.B., *supra*. Under the clear language of the Treaty, the United States recognized the property rights of the Nation, and assumed the obligation to protect such rights. Under the clear language of the Monument Act, the National Park Service assumed the obligation to care, maintain, preserve, and restore the remains and objects. Removal of the remains and objects without consent and refusal to return them upon demand is patently inconsistent with those obligations. Under either theory, the Nation's complaint therefore states a claim for breach of fiduciary duty.

C. The Nation's Complaint States a Claim for Violation of ARPA.

As discussed at Section II.A, *supra*, pursuant to ARPA, the NPS has a mandatory obligation to obtain the Nation's consent for ultimate disposition of archaeological resources from tribal lands, which remain the property of the Nation. 16 U.S.C. § 470dd; 43 C.F.R. § 7.13(b); *see Attakai*, 746 F.Supp. at 1409; *see Sauer*, 668 F.3d at 651 ("shall" imposes mandatory obligation). The only support Defendants have for their assertion that "the federal land manager shall follow the NAGPRA process, as NPS is currently doing. Therefore, NPS has not violated ARPA," *see* Def.'s Mot. Dismiss 14, is a wholly inapposite and invalid regulation, *see* discussion at Section II.A, *supra*. Where NPS has refused to comply with ARPA disposition requirements, and to return the Nation's property as recognized under ARPA, *see* Compl. ¶ 34, incorporated into count three at ¶ 54 of the complaint, the Nation has properly stated a claim for violation of ARPA.

D. The Nation Is Entitled to Declaratory or Injunctive Relief for an Unconstitutional Taking.

Pursuant to the Treaty of 1868 and as recognized by ARPA, the Nation holds title to the remains and objects at issue here, and its title to such remains and objects cannot be extinguished by the federal government without providing, or assuming an obligation to provide, just compensation. *See* discussion at Section II, *supra*; *see, e.g.*, *Sioux Nation*, 448 U.S. at 421-424. This Court also has jurisdiction to hear the Nation's 5th Amendment takings claims and to the extent it determines that NAGPRA, the Monument Act, or the Antiquities Act took the Nation's property without compensation, to grant declaratory relief. *See Babbitt v. Youpee*, 519 U.S. 234, 243-44 (1997) (declaratory relief available for unconstitutional taking under federal statute); *see also Hodel v. Irving*, 481 U.S. 704, 718 (1987). At ¶¶ 56-59 of the complaint, the Nation thus properly states a claim under the 5th Amendment to the Constitution.

IV. IF REQUIRED, HOPI AND ZUNI NATIONS MAY BE JOINED.

Assuming the Hopi and Zuni tribes are required parties under Rule 19(a), "in equity and good conscience" this case should be allowed to proceed. *See* Fed. R. Civ. P. 19(b). The Nation's claims all derive from the property interest the Nation has in these remains and objects that the U.S., its trustee, has denied. The case is therefore solely between the U.S. and the Nation, and does not involve the rights of other tribes. Put another way, other tribes are not required, as they have no interest in Navajo treaty lands or the property rights deriving from them. They thus have no interest that is impaired or impeded by this case or that leaves the U.S. at a "substantial risk of

incurring double, multiple, or otherwise inconsistent obligations[.]" *See* Fed. R. Civ. P. 19(a)(1)(B). Assuming the tribes are required under Rule 19(a), the Nation agrees their joinder by the Nation is not feasible under Rule 19(b), due to their sovereign immunity.

However, though the Nation cannot join the other tribes, Defendants can join them as third-party defendants under Rule 14(a) or 22(a)(2) of the Rules of Civil Procedure. Indian tribes have no sovereign immunity against the U.S., and Defendants can join them. *See E.E.O.C. v. Peabody Western Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005). Defendants can file complaints seeking declaratory and/or injunctive relief by claiming that NAGPRA does not apply and that the tribes have no claim under that statute. Alternatively, and consistent with their view that that they are "merely acting as custodian while trying to determine the proper recipient for the remains," Def.'s Mot. Dismiss 15, Defendants can file an interpleader action under Rule 22(a)(2) as the stakeholder seeking to establish the rightful owner of the remains and objects. When required parties can be joined as third-party defendants under Rule 14, in "equity and good conscience" the case should not be dismissed. *See E.E.O.C. v. Peabody Western Coal Co.*, 610 F.3d 1070, 1086-87 (9th Cir. 2010) ("The courts of appeals that have addressed the question are unanimous in holding that if an absentee can be brought into an action by impleader under Rule 14(a), a dismissal under Rule 19(b) is inappropriate.").[8] Further, impleader or interpleader resolves Defendants' stated concern that they may be subject to multiple or inconsistent obligations if the other

[8] A third party defendant may be joined under Rule 14 for declaratory or injunctive relief. *See E.E.O.C.*, 610 F.3d at1086-87.

tribes are not joined. Def.'s Mot. Dismiss 16; FRCP 19(b)(2)(c) (factor under "equity and good conscience" prong of rule that considers whether "other measures" may be taken to avoid prejudice to existing parties); 22(a)(1),(2) (authorizing joinder of parties where their claims "may expose" plaintiff or defendant "to double or multiple liability"). Regardless, as they can be joined under either theory, this case should proceed under Rule 19(b).

CONCLUSION

For all the reasons stated above, the Defendants' Motion to Dismiss should be denied.

Dated this 2nd day of May, 2012.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 2nd, 2012, I filed the foregoing **Response to Defendants' Motion to Dismiss** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

DATED this 2nd day of May, 2012.

/s/ William Gregory Kelly
William Gregory Kelly
Attorney for Plaintiff