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Walter Rosales & Karen Toggery

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JAMUL ACTION COMMITTEE, et al.,	)	Civ. No. 2:13-cv-001920 KJM-KLN
)	
Plaintiffs,	)	ROSALES & TOGGERY's
v.	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
	)	MOTION FOR LEAVE TO FILE
TRACIE STEVENS, Chairwoman of the	)	AMICUS CURIAE BRIEF
National Indian Gaming Commission, et al.,)	
)	
Defendants.	)	DATE: March 27, 2015
	)	TIME: 10:00 a.m.
	)	JUDGE: Hon. Kimberly Mueller
	)	COURT: 3

WALTER ROSALES and KAREN TOGGERY hereby submit the following memorandum of points and authorities in support of their motion for leave to file an amicus brief.

1. JIV's Misrepresentations Re: Rosales and Toggery's Right to Protect their Families' Remains, Funerary Objects, and Ownership of the Government's Portion of the Indian Cemetery Require Correction

The Jamul Indian Village, "JIV," has made significant misrepresentations to the Court about the half-blood community's status, and the merits of Walter Rosales and Karen Toggery's beneficial ownership of their families' human remains, funerary objects, and the cemetery property on which they lived, and which JIV has desecrated to construct a casino on land that does not qualify for Indian gambling. Unfortunately, some of these misrepresentations made their way into the Court's August 5, 2014 order in this case, before the parties had the opportunity to respond to JIV's misrepresentations. Walter and Karen's interests are being irreparably damaged by these misrepresentations.

Walter and Karen are not in privity with the Plaintiffs. Their interests in their families'

1 remains and funerary objects and in their beneficial interest in the Indian cemetery property in which
 2 they were interred, are independent of, divergent from, and adverse to, the interests of the Plaintiffs
 3 and the JIV. Neither the Plaintiffs, nor the JIV, have any legally cognizable interest in Walter and
 4 Karen's ownership and control of their families' human remains and funerary objects. Cal. Health
 5 & Safety Code, "H.S.C.," 7100; 25 U.S.C. 3002; *Christensen v. Sup. Ct.*, 54 Cal.3d 868, 896-97
 6 (1991).

7 Contrary to the JIV, the merits of Walter & Karen's beneficial ownership of the cemetery
 8 property have never been finally decided. Each and every prior action was dismissed on procedural
 9 grounds, without a final decision on the merits, usually based upon the JIV's erroneous claim to be
 10 an indispensable party with sovereign immunity. However, the Supreme Court in *Michigan v. Bay*
 11 *Mills Indian Community*, 134 S.Ct. 2024 (2014), has now ruled that a tribe is no longer a necessary
 12 or indispensable party to this action, as a matter of law, where, as here, it is adequately represented
 13 by its executive council members, who are named defendants, and are not immune for their
 14 violations of the IRA, IGRA, NEPA, NAGPRA and California's P.R.C., H.S.C. and Penal Codes.
 15 This action may now finally decide the merits as to the government's portion of the Indian cemetery,
 16 since the JIV was not under federal jurisdiction in 1934, and is no longer a necessary or
 17 indispensable party to this action, as a matter of law. *Michigan v. Bay Mills Indian Community*, 134
 18 S.Ct. 2024, 2035 (2014).

19 **2. Walter Rosales and Karen Toggery's Interests as Amicus Curiae**

20 As set forth in greater detail in the proposed amicus brief, Walter Rosales and Karen Toggery
 21 are Native American residents of San Diego County of one-half or more degree of California Indian
 22 blood, and former leaders of the half-blood Indian community, known as the Jamul Indian Village,
 23 "JIV," who until recently lived on the Indian cemetery in Jamul since the late 1800s. Walter held
 24 the ballot box as a Board Member at the election approving the community's constitution in 1981,
 25 and was elected as its chairman in 1980-81, 1997, 1999, and 2001. Karen, was elected judge and
 26 later secretary of the community in 1995-96, 1997, 1999 and 2001.

27 Walter and Karen have significant and undisputed interests in their families' human remains
 28 and funerary objects that were interred in burial sites below, on, and above the Indian cemetery on

1 which they and their families' lived for more than a hundred years.¹ Their families' remains and
 2 funerary objects are now being feloniously disinterred, desecrated and unceremoniously dumped by
 3 the Defendants in a race to illegally build a casino on the cemetery property before they are stopped
 4 and the law is enforced. More than 20 eyewitnesses have testified to the families' interment on the
 5 cemetery property, and the undeniable evidence that the Defendants have illegally disinterred and
 6 dumped Walter and Karen's families' human remains and funerary objects on a State highway
 7 project at the juncture of State Routes 11-125-905 on the Mexican border.

8 Walter Rosales is also a lineal descendant and son of Native American, Helen Cuero, the
 9 personal representative of his mother's estate, the Estate of Helen Cuero, his son's estate, the Estate
 10 of Dean Rosales, his unnamed brother's estate, the Estate of Walter Rosales' Unnamed Brother, and
 11 a lineal descendant with ownership and control of their human remains and Native American cultural
 12 items, as set forth in Public Resources Code, "P.R.C.," 5097.9-5097.99, H.S.C. 7001, 7100, and the
 13 Native American Grave Protection Act ("NAGPRA"), 25 U.S.C. 3001-3002(a)(1), and its
 14 regulations. 25 C.F.R. 10.2(b)(1)-10.17.

15 Karen Toggery is also a lineal descendant and daughter of Native American, Marie Toggery,
 16 and the personal representative of her mother's estate, the Estate of Marie Toggery, as well as the
 17 mother of her son Matthew Toggery, and the personal representative of the Estate of Matthew
 18 Toggery, and a lineal descendant with ownership and control of their human remains and Native
 19 American cultural items, as set forth in P.R.C. 5097.9-5097.99, H.S.C. 7001, 7100, and the
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21
 22 ¹ "[B]urial site' means any natural or prepared physical location, whether originally below,
 23 on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture,
 24 individual human remains are deposited." 25 U.S.C. 3001(1). California law further protects lawfully
 25 interred cremations. "'Human remains' or 'remains' means the body of a deceased person, regardless
 26 of its state of decomposition, and cremated remains," H.S.C. 7001, since "'interment' means the
 27 disposition of human remains...in the case of cremated remains, by inurnment, [or] placement below,
 28 on, or above the surface of the earth," in a cemetery, H.S.C. 7009, and constitutes a protected "burial
 site," H.S.C. 8012, which is defined as the "process of placing human remains in a grave," H.S.C.
 7013, which is further defined as "a space of earth in a burial park, used or intended to be used, for
 the disposition of human remains," H.S.C. 7014, which in turn is defined as "a tract of land for the
 burial of human remains in the ground, used, or intended to be used, and dedicated, for cemetery
 purposes." H.S.C. 7004.

1 NAGPRA, 25 U.S.C. 3001- 3002(a)(1), and its regulations. 43 C.F.R. 10.2(b)(1)-10.17.

2 The interments of Walter and Karen's families' remains and funerary objects are further
3 corroborated by the Cal. Dept. Of Health Permits for Disposition of Human Remains, San Diego and
4 Riverside County Death Certificates, and the San Diego Rural Fire Prot. Dist. Daily Logs of the
5 cremated funerary objects. NOL Exs. K and L.

6 As set forth in Rosales and Toggery's proposed amicus brief, their interests in the further
7 protection of their families' remains, funerary objects, and the sacred site of the government's
8 portion of the Indian cemetery are being significantly damaged by the Defendants' desecration in
9 violation of the Cal. P.R.C., H.S.C. and Penal Codes, as well as their violations of NAGPRA and
10 NEPA. Because Rosales and Toggery have been before a number of federal and state courts, they
11 want to make sure that this Court has the benefit of their unique knowledge, personal experiences
12 and expertise with these issues, in an effort to prevent this Court from being misled by the JIV's
13 misrepresentations in its amicus brief, as has they have experienced in other courts.

14 **3. The Court Should Exercise its Discretion and Grant Rosales & Toggery Leave to file**
15 **their Proposed Amicus Curiae Brief.**

16 To prevent any further misrepresentations by the JIV to the Court, and to prevent any further
17 prejudice to Walter and Karen's interests in protecting their families' remains and funerary objects,
18 Walter & Karen seek leave to file the amicus curiae brief lodged in this action. "Generally, courts
19 have exercised great liberality in permitting an amicus curiae to file a brief in a pending case.... There
20 are no strict prerequisites that must be established prior to qualifying for amicus status; an individual
21 seeking to appear as amicus must merely make a showing that his participation is useful to or
22 otherwise desirable to the court." *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991),
23 quoting *United States v. Louisiana*, 751 F.Supp. 608, 620 (E.D.La.1990).

24 Federal courts retain broad discretion to permit the appearance of amicus curiae. *See*
25 *Gerritsen v. de fa Madrid Hurtado*, 819 F.2d 1511, 1514 (9th Cir.1987). "District courts frequently
26 welcome amicus briefs from non-parties ... if the amicus has unique information or perspective that
27 can help the court beyond the help that the lawyers from the parties are able to provide." *Sonoma*
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1 *Falls Developers, L.L.C. v. Nev. Gold & Casinos, Inc.*, 272 F.Supp.2d 919, 925 (N.D. Cal. 2003).

2 In addition, participation of amicus curiae is appropriate where legal issues in a case have potential
3 ramifications beyond the parties directly involved. *Id.*

4 **4. Conclusion**

5 For all of these reasons, Walter Rosales and Karen Toggery respectfully request that the
6 Court grant them leave to file the amicus brief submitted herewith.

7 Date: February 11, 2015

WEBB & CAREY

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9 /s/Patrick D. Webb
Patrick D. Webb, Esq.
Attorneys for Walter Rosales & Karen Toggery
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