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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 11-08205-PCT-PGR

REPLY BRIEF IN SUPPORT OF MOTION
TO DISMISS

The Federal Defendants hereby file this reply brief in further support of their Motion to Dismiss. Plaintiff has failed to identify a final agency action or unlawful inaction under the Administrative Procedure Act (APA). If this Court were to find that Plaintiff has identified an agency action or inaction that can be challenged under the APA, Plaintiff's claim is barred by the statute of limitations because it accrued in 1996, when Plaintiff became aware that NPS intended to follow the NAGPRA repatriation process. In addition, Plaintiff's takings claim must be dismissed because the Tucker Act provides a process for obtaining just compensation, and Plaintiff must avail itself of that process first. And finally, all the statutes and regulations indicate that in situations like this involving human remains and funerary objects, NAGPRA's provisions apply.

ARGUMENT

I. THERE HAS BEEN NO FINAL AGENCY ACTION OR UNLAWFUL INACTION UNDER THE APA.

Plaintiff argues that the NPS's actions in repatriating remains from CACH pursuant to NAGPRA "without the Nation's consent" rather than immediately returning them represent an "unlawfully withheld" final agency action. *See* Compl. ¶¶ 8, 63; Resp. to Defs.' Mot. to Dismiss ("Pl. Resp.") at 8. This is untenable, first, because NPS is in the midst of the repatriation process and its actions are not final. Second, even if these actions were considered final, Plaintiff's argument rests on a flawed interpretation of ARPA.

The "action" Plaintiff challenges is reviewable under the APA only if it constitutes "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. Section 704 specifies that agency action is not final if the agency provides administrative process for addressing the given claim. 5 U.S.C. § 704; *Darby v. Cisneros*, 509 U.S. 137, 146 (1993) (noting that agency action is not final for purposes of Section 704 until "an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule"); *Stock W. Corp. v. Lujan*, 982 F.2d 1389, 1393-94 (9th Cir. 1993) (noting the "jurisdictional nature of the administrative appeal requirement"). NAGPRA provides for an administrative process under which the agency will decide to whom remains should be repatriated. *See, e.g.*, 25 U.S.C. § 3005 (general repatriation process). This process has not yet

1 concluded; therefore there has not yet been a final agency action. *See Na Iwi O Na Kupuna O*
 2 *Mokapu v. Dalton*, 894 F.Supp. 1397 (D. Hawaii 1995).

3 Further, to the extent Plaintiff challenges agency “inaction,” this is also not reviewable
 4 because Plaintiff fails to assert the withholding of a discrete, nondiscretionary duty. The APA
 5 defines “agency action” to include failure to act, and thus allows for review of inaction under
 6 § 706(1). However, a “claim under § 706(1) can proceed only where a plaintiff asserts that an
 7 agency failed to take a *discrete* agency action that it is *required to take*.” *Norton v. SUWA*,
 8 542 U.S. 55, 64 (2004) (emphasis in original); *Defs. of Wildlife v. Tuggle*, 607 F. Supp. 2d
 9 1095, 1099 (D. Ariz. 2009). To satisfy that standard, Plaintiff must identify a discrete agency
 10 action in 5 U.S.C. § 551(13) and demonstrate that the action is legally required. *SUWA*, 542
 11 U.S. at 61–63. Section 706(1)’s “limitation to *required* agency action rules out judicial
 12 direction of even discrete agency action that is not demanded by law.” *Id.* at 65.

13 Plaintiff argues that 16 U.S.C. § 470dd creates a legally required duty to take discrete
 14 action. It does not. Plaintiff excerpts a section of this provision that suggests otherwise. Pl.
 15 Resp. at 9. But read as a whole—including the parts Plaintiff omitted—it is clear that 16
 16 U.S.C. § 470dd creates no nondiscretionary duties applicable here. Instead, the section states
 17 that “[t]he Secretary of the Interior *may promulgate regulations* providing for . . . the
 18 ultimate disposition” of archaeological resources and “[a]ny *exchange or ultimate*
 19 *disposition under such regulation* of archaeological resources excavated or removed from
 20 Indian lands shall be subject to the consent of the Indian or Indian tribe which owns or has
 21 jurisdiction over such lands.” 16 U.S.C. § 470dd (emphasis added). But no regulations have
 22 been promulgated under this section that address the “exchange or ultimate disposition” of
 23 such resources.¹

24 Plaintiff argues that the Uniform Regulations are those that the Secretary passed
 25 pursuant to 16 U.S.C. § 470dd. Pl. Resp. at 8-9. But the Uniform Regulations do not address
 26 ultimate disposition of archaeological resources, and specifically state that the Secretary may
 27 promulgate such regulations addressing the ultimate disposition of archaeological resources.

28 ¹ DOI is currently developing such regulations, and they will appear at 36 C.F.R. Part 79.

43 C.F.R. §7.13(c). Regulations governing custody of archaeological resources from Indian lands *generally* appear at 25 C.F.R. § 262.8. But these regulations explicitly except out remains, providing that “Ownership and right of control over the disposition of [remains and funerary objects] shall be in accordance with the order of priority provided in [NAGPRA].” 25 C.F.R. §262.8. Accordingly, the Secretary has not promulgated regulations addressing “the ultimate disposition” of archaeological resources under 16 U.S.C. § 470dd.

And even if regulations governing the ultimate disposition of remains had been promulgated, they would not apply here as there clearly has not yet an “ultimate disposition.”² Therefore, this section is inapplicable and does not provide a “nondiscretionary” duty required for jurisdiction under the APA. As such, there has been no final agency action taken or withheld that can be reviewed under the APA.

II. PLAINTIFF’S CLAIMS WERE BROUGHT OUTSIDE THE STATUTE OF LIMITATIONS.

If this Court finds that there was a final agency action, however, Plaintiff’s claims are barred because they were brought outside the applicable limitations period. Plaintiff has known that the United States intends to repatriate the remains pursuant to NAGPRA for more than six years and its claims are time-barred by 28 U.S.C. §2401(a).

Plaintiff argues it did not know that NPS was complying with NAGPRA’s repatriation provisions instead of simply returning the remains to Plaintiff under their interpretation of ARPA until September 7, 2011.³ Resp. at 9-10. However, as early as June 26, 1996, Plaintiff sent a letter to NPS objecting to the NAGPRA process and citing the Monument Act to argue it owned the remains from CACH, just as it does here. *See* Mattix

² For this same reason, any injury to Plaintiff depends upon the remains being repatriated to another Tribe. Even if Plaintiff is correct in its interpretation of ARPA, Compl. ¶¶ 54–55, any injury based upon NPS’s alleged noncompliance would not manifest until NPS “ultimate[ly] disposed” or repatriated the remains to someone other than the Plaintiff and/or did not consult Plaintiff in such a disposition. Thus the injury is speculative rather than certain, demonstrating lack of standing. *See* Mot. to Dismiss at 10-11. And for the same reason the case is not ripe; if the remains are repatriated to Plaintiff this suit will be moot. *See id.* at 11-12.

³ To the extent that Plaintiff relies on the September 7, 2011, letter from NPS as final agency action under the APA, that argument must fail as the letter does not meet any of the categories identified at 5 U.S.C. § 551(13). *See* *SUWA*, 542 U.S. at 64.

Decl. (attached), Exh. 1.⁴ The letter concludes that NPS “has no authority to treat these items other than as Navajo Nation property.” NPS superintendent Anna Marie Fender replied to Plaintiff in an August 14, 1996, letter, explaining that pursuant to NAGPRA, NPS seeks to repatriate the remains under NAGPRA and is therefore undertaking consultation with tribes (1) from whose lands the remains originated *and* (2) that are, or are likely to be, culturally affiliated with the remains. *See* Mattix Decl., Exh. 2. The letter reiterates that NPS “will handle any requests for repatriation in strict accordance with the NAGPRA and its implementing regulations.” *Id.*

A cause of action generally accrues when a plaintiff has knowledge of its injury. *Shiny Rock Mining Corp. v. U.S.*, 906 F.2d 1362, 1364 (9th Cir. 1990) (quoting *Acri v. Int’l Ass’n of Machinists*, 781 F.2d 1393, 1396 (9th Cir. 1986)). And “for purposes of determining when the statute of limitations begins to run, the ‘proper focus’ must be ‘upon the time of the [defendant’s] acts, not upon the time at which the *consequences* of the acts [become] most painful.’” *Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (citing *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)).

This exchange shows that as early as 1996, Plaintiff was on notice that rather than simply returning remains originating from CACH, NPS intended to comply with the NAGPRA repatriation process—a process that involves repatriating based on cultural affiliation, rather than only property of origin. *See* Mot. to Dismiss at 4-5. Even if the *consequences* of this action were not manifested until later, Plaintiff nonetheless had sufficient knowledge to initiate a suit in 1996. For this reason, if the Court finds that there was final agency action, this suit is time barred under 28 U.S.C. §2401(a).

III. THIS COURT LACKS JURISDICTION TO HEAR PLAINTIFF’S TAKINGS CLAIM BECAUSE NO TAKING HAS YET OCCURRED.

Plaintiff argues that this Court has jurisdiction to hear Plaintiff’s takings claim and to

⁴ When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court may consider evidence outside of the complaint 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).

1 grant declaratory relief if it finds that an Act of Congress took Plaintiff's property interest in
2 the remains at issue here. Because a suit for compensation could lie, no taking has yet
3 occurred, and this Court lacks jurisdiction to hear this claim.

4 A "property owner has no claim against the Government for a taking" if the
5 government "has provided an adequate process for obtaining compensation, and if resort to
6 that process yields just compensation." *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (quoting
7 *William Cty. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1995)). The
8 Tucker Act, 28 U.S.C. § 1491, provides that the United States Court of Federal Claims has
9 exclusive jurisdiction to hear any claim against the United States seeking damages in excess
10 of \$10,000 based on the Constitution, a statute, a regulation, or an express or implied-in-fact
11 contract. *See* 28 U.S.C. § 1491(a)(1). Takings claims against the federal government are
12 thus "premature until the property owner has availed itself of the process provided by the
13 Tucker Act." *Id.*

14 Plaintiff seeks a declaration that *if* the NAGPRA, ARPA or the Monument Act
15 transferred title of the remains from Plaintiff to the United States, they are unconstitutional
16 takings. Compl., Claim for Relief, ¶ e. Such relief was directly addressed and rejected in
17 *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281 (9th Cir. 1997). In that case, the Ninth Circuit
18 considered whether it could declare that a statute violated the takings clause, even though
19 the Tucker Act provided an avenue for obtaining compensation for those whose property
20 had been taken by operation of the statute. The court concluded that it could not do so
21 because a compensation remedy is available through a Tucker Act claim. *Id.* at 1286
22 (citations omitted). In reaching this conclusion, the court acknowledged that Supreme Court
23 precedent on the matter is inconsistent. *Id.* at 1286 n. 6. But the court relied upon the
24 holdings of several clear cases, including *Ruckelshaus v. Monsanto, Co.*, 467 U.S. 986
25 (1984), that "[e]quitable relief is not available to enjoin an alleged taking of private property
26 for a public use, duly authorized by law, when a suit for compensation can be brought
27 against the sovereign subsequent to the taking." *Id.* at 1016 (citation omitted). Consistent
28 with this caselaw, in the view of the Ninth Circuit, declaring that an act of the government is

1 an uncompensated taking is a logical impossibility until the property owner has attempted to
 2 obtain compensation.

3 Plaintiff does not specifically address *Bay View*, but instead cites *Babbitt v. Youpee*,
 4 519 U.S. 234 (1997) and *Hodel v. Irving*, 481 U.S. 704 (1987). These cases both concerned
 5 a provision of the Indian Land Consolidation Act (ILCA) that entirely eliminated Indian
 6 landowners' ability to leave fractional interests in property to their successors. In *Youpee*,
 7 plaintiffs sought to enjoin enforcement of ILCA, arguing that it violated the takings clause.
 8 The Supreme Court agreed and affirmed an injunction against enforcement of ILCA—
 9 without any discussion of how this relief interacted with the Tucker Act, and without any
 10 reference whatsoever to subject matter jurisdiction.

11 These cases are anomalous and distinguishable. Indeed, other courts have addressed
 12 these cases and recognized that “[t]hough the Supreme Court has granted declaratory and
 13 injunctive relief for a limited number of Takings Clause claims . . . it has also made clear
 14 that these cases are exceptional and limited to their facts. Those cases, moreover, involved
 15 regulatory takings, not physical takings.” *Fideicomiso De La Tierra Del Cano Martin Pena*
 16 *v. Fortuno*, 604 F.3d 7, 19 n.10 (1st Cir. 2010), cert. denied, 131 S. Ct. 1600 (2011) (citing
 17 *Youpee* and *Hodel*); *Gordon v. Norton*, 322 F.3d 1213, 1216-17 (10th Cir. 2003) (addressing
 18 *E. Enters. v. Apfel*, 524 U.S. 498 (1998) and noting that *Eastern Enterprises* recognized that
 19 a Tucker Act remedy is available for physical takings). The Ninth Circuit recently affirmed
 20 that “a ‘takings claim is premature until [plaintiffs] have availed themselves of the process
 21 provided by the Tucker Act.” *In re N.S.A. Telecomms. Records Litig.*, 669 F.3d 928, 932-33
 22 (9th Cir. 2011) (quoting *Bay View*, 105 F.3d at 1285) (collecting cases, noting agreement in
 23 nearly all Circuits on this point). The same result should apply here; and the persuasive logic
 24 in *Bay View* and the Supreme Court cases it relies upon should govern in this case, rather
 25 than the “exceptional” situation that existed in *Youpee*.

26 **IV. NAGPRA, NOT ARPA, APPLIES TO THE REMAINS IN THIS CASE.**

27 Contrary to Plaintiff's assertions, NAGPRA, not ARPA, controls here. NAGPRA was
 28 passed after ARPA, and addresses a narrow subset of the articles ARPA addresses. Indeed,

1 NAGPRA was passed to address circumstances just like those of this case. When read
 2 together, NAGPRA, ARPA, and their implementing regulations make clear that when there
 3 is an intersection, NAGPRA's specific procedures control over the general ARPA
 4 provisions.

5 **A. NAGPRA is Applicable**

6 NAGPRA is a more specific statute than ARPA, dealing specifically with disposition
 7 of human remains. It was also passed later in time. Both of these factors counsel in favor of
 8 an interpretation finding NAGPRA applicable here. *See FDA v. Brown & Williamson*
 9 *Tobacco*, 529 U.S. 120, 133 (2000) (“[T]he meaning of one statute may be affected by other
 10 Acts, particularly where Congress has spoken subsequently and more specifically to the
 11 topic at hand.”) (citations omitted); *U.S. v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)
 12 (more specific statute controls).

13 All Department of the Interior (DOI) regulations indicate that NAGPRA provisions
 14 control over ARPA provisions. ARPA's regulations state that NAGPRA governs disposition
 15 of remains originating from NPS land. 43 C.F.R. §§ 7.3(a)(6), 7.13(e). After NAGPRA was
 16 passed, DOI amended the Uniform Regulations to provide “guidance to Federal land
 17 managers about the disposition of Native American human remains and other ‘cultural
 18 items’, as defined by NAGPRA.” 60 Fed. R. 5256, 5256 (Jan. 26, 1995).⁵ ARPA's uniform
 19 regulations explicitly reference NAGPRA and provide that NAGPRA controls:

20 For the disposition following lawful removal or excavations of Native
 21 American human remains and “cultural items”, as defined by the Native
 22 American Graves Protection and Repatriation Act (NAGPRA; Pub.L. 101–
 23 601; 104 Stat. 3050; 25 U.S.C. 3001–13), the Federal land manager is referred
 24 to NAGPRA and its implementing regulations.

25 43 C.F.R. § 7.3(a)(6). Thus the ARPA regulations contemplate disposition of remains
 26 occurring pursuant to NAGPRA—the more specific, more recently passed statute that
 27 speaks directly to disposition of remains such as those here.

28 ⁵ NAGPRA applies to these remains whether the land is considered public land, Indian land, or a hybrid. *See* 25
 U.S.C. § 3005 (stating that when items were in the possession and control of a Federal agency or museum prior to
 NAGPRA's passage, land ownership does not dictate entitlement to remains), 43 C.F.R. § 7.13(e) (defining
 “public lands” to include lands “administered by the United States as part of the national park system),

1 Plaintiff argues that the Bureau of Indian Affairs (BIA) regulations that confirm the
2 application of NAGPRA to Indian lands do not apply to this case because the land is
3 managed by NPS instead of the BIA. While Plaintiff is correct that these regulations provide
4 guidance specifically to BIA officials, the regulations again show that every time it is
5 addressed, NAGPRA controls over ARPA. It is also notable that this case presents an
6 unusual situation where a federal land manager other than BIA is managing Indian land.

7 Further, Plaintiff cites the final rule amending the Uniform Regulations, but that
8 document does not support Plaintiff's argument that using the NAGPRA process for
9 resources from Indian lands was specifically rejected as violating ARPA. *See* Pl. Resp. at 3
10 (citing 60 Fed. Reg. at 5258). Instead, the Federal Register notice states that it uses "the
11 term 'cultural items', as defined in NAGPRA, . . . to distinguish material remains that are to
12 be treated under NAGPRA and its implementing regulations." 60 Fed. Reg. at 5257. Thus,
13 the Federal Register notice's statement that "[a]rchaeological resources excavated or
14 removed from Indian lands remain the property of the Indian or Indian tribe having rights of
15 ownership over such resources, and who, as stated in ARPA, determine the appropriate
16 treatment" does not include NAGPRA cultural items. In fact, the preceding sentences
17 explain that "[w]hen Native American human remains and other 'cultural items', as defined
18 by NAGPRA, are returned to lineal descendants or culturally affiliated Indian tribes, then
19 these items are no longer the responsibility of the United States," and the notice explicitly
20 states that federal land managers are "referred to the requirements in NAGPRA and its
21 implementing regulations." Consequently, the BIA regulations show that NAGPRA controls
22 over ARPA. It would be anomalous, to say the least, for NAGPRA to control over ARPA in
23 all cases except where the federal land manager over Indian land is someone other than the
24 BIA.

25 If the Court finds ambiguity about which statute applies, however, DOI's
26 interpretation should be given deference. *See U.S. v. Mead Corp.*, 533 U.S. 218, 227-28
27 (2001) (noting that "considerable weight should be accorded to an executive department's
28 construction of a statutory scheme it is entrusted to administer" (citation omitted)); *see also*

1 *Barnhart v Walton*, 535 U.S. 212, 222 (2002) (noting “the interstitial nature of the legal
2 question, the related expertise of the agency, the importance of the question to
3 administration of the statute, the complexity of that administration and the careful
4 consideration the agency has given the question over a long period of time”).

5 **B. NPS Properly has “Possession” or “Control” over the Remains.**

6 Under the Monument Act, NPS is charged with “preservation” of ruins and other
7 objects of “scientific or historical interest” at CACH. *See* 47 Stat. 2448 (the “Monument
8 Act”), 16 U.S.C. § 445b (2006). This mandate requires exercising control over remains,
9 removing them from CACH, and housing them elsewhere. Thus, NPS has legal possession
10 and control over the remains at issue, sufficient to treat them as part of their collection.
11 Therefore NAGPRA’s “possession” and “control” provisions are not a bar to the Act’s
12 applicability here.

13 NAGPRA requires an agency to exercise “possession” or “control” over remains. 25
14 U.S.C. §§ 3003 (a), 3004 (a), and 3005 (a)(1) - (2). “The term ‘possession’ means having
15 physical custody . . . with a sufficient legal interest to lawfully treat the objects as part of its
16 collection” and “[t]he term ‘control’ means having a legal interest . . . sufficient to
17 lawfully permit the museum or Federal agency to treat the objects as part of its collection . .
18 . . .” 43 C.F.R. §§ 10.2(a)(3)(i) and (ii). Here, NPS has possession and control over the
19 remains at issue.

20 NPS is explicitly charged with “preservation” and “maintenance” of the broad category
21 of “prehistoric ruins or other features of scientific or historical interest within [CACH].”
22 Indeed, one of the primary purposes of the Monument Act was to preserve the
23 archaeological and historical items, such as remains, within CACH. *See* H.R. Rep. No. 71-
24 2397, at 1 (1931). Preservation of these remains necessarily entails removing them from
25 CACH because exposed human remains are at great risk due to erosion, wildlife and
26 livestock tramping, and human visitation and illegal collection. And if remains are removed,
27 they must be held in a collection of some kind. Here the remains are being held at the
28 Western Archaeological Conservation Center (“WACC”) in Tucson, Arizona.

1 This explicit mandate from Congress represents a sufficient “legal interest” for NPS to
 2 lawfully treat the remains at issue as part of its collection. NAGPRA, a statute specifically
 3 tailored to this circumstance, controls, and NPS properly has the “possession” and “control”
 4 over the objects to invoke it. NAGPRA thus applies.

5 **V. OTHER TRIBES CANNOT BE JOINED WITHOUT THEIR CONSENT.**

6 Plaintiff’s complaint must also be dismissed because the Hopi, Zuni, and twenty-
 7 seven other potentially culturally affiliated Tribes participating in the NAGPRA process
 8 have an interest in the outcome of the process. Plaintiff’s argument that the case should
 9 proceed because the United States could join tribes pursuant to FRCP 14 or 22 should be
 10 rejected because neither rule is appropriately applied in this situation and a ruling that the
 11 case could proceed would severely undercut tribal sovereign immunity.

12 Neither Rule 14 nor Rule 22 is appropriate here. Rule 14 allows a party to bring in a
 13 third-party defendant only if the third-party defendant “is or may be liable to [the original
 14 defendant] for all or part of the [original plaintiff’s] claim against [the original defendant].”
 15 Impleader, therefore, can occur only in circumstances where, if the original plaintiff were to
 16 succeed on the claim that is already in the action, the original defendant will have a right to
 17 recover some or all of that liability from someone not yet a party. *U.S. v. One 1977*
 18 *Mercedes Benz*, 708 F.2d 444, 452 (9th Cir. 1983).

19 Here, even if Plaintiff were to prevail, the United States could not recover any
 20 liability from the other tribes. There is no right to seek contribution for violation of
 21 NAGPRA, and indeed Plaintiff does not even allege that it could recover contribution from
 22 the United States. Plaintiff’s Complaint seeks declaratory and injunctive relief only. *See*
 23 *Compl.*, Prayer for Relief. And the other tribes would not be liable to the United States.
 24 Those tribes are not wrongdoers, but are interested parties purely on the basis of their
 25 potential cultural affiliation with the remains. Rule 14 is simply inapplicable here.

26 Similarly, Rule 22(a)(2) should not apply, as it provides that “[a] defendant exposed
 27 to *similar liability* may seek interpleader through a crossclaim or counterclaim.” (emphasis
 28 added). But, here, other tribes would not be “similarly” liable to the United States under

1 NAGPRA on the basis of their potential cultural affiliation, and the United States would not
2 have a cross-claim or counterclaim to assert against other tribes. Interpleader under Rule
3 22, therefore, is not applicable here.

4 In *Peabody*, the Ninth Circuit held that the United States could be brought in to a suit
5 through Rule 14, despite its sovereign immunity. *Peabody* involved a suit by the EEOC
6 challenging a tribal preference provision in a coal mining lease held by Peabody. DOI
7 required the lease provision at issue. The court held that the Secretary of the Interior was a
8 required party who could not be joined because the EEOC could not file suit against the
9 Secretary, but noted that if the EEOC prevailed against Peabody, Peabody could seek relief
10 against the Secretary to prevent enforcement of the lease provision. *EEOC v. Peabody W.*
11 *Coal Co.*, 610 F.3d 1070, 1083-84 (9th Cir. 2010). Thus, the court allowed the case to
12 proceed because Peabody could file a third-party complaint against the Secretary under Rule
13 14(a). The circumstances of the case at bar are quite different. NPS would have no right of
14 recovery or claim against the other tribes, even were Plaintiff to prevail. And notably,
15 *Peabody* did not address tribal sovereign immunity in the Rule 14 context. *Peabody* simply
16 does not apply here.

17 Finally, if suits in which a tribe is a necessary party could proceed simply because the
18 United States is also a party, then tribal sovereign immunity would be significantly
19 curtailed. See *California v. Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979)
20 (“Sovereign immunity involves a right which courts have no choice, in the absence of a
21 waiver, but to recognize.”). Such a result would go against many years of Ninth Circuit
22 caselaw holding that “a plaintiff’s interest in litigating a claim may be outweighed by a
23 tribe’s interest in maintaining its sovereign immunity.” *Confederated Tribes of Chehalis v.*
24 *Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456,
25 1460 (9th Cir. 1994) (noting that U.S. cannot properly represent one tribe in intertribal
26 conflicts without compromising trust obligations owed to all tribes).

27 CONCLUSION

28 For the foregoing reasons and for the reasons stated in Federal Defendants’ Motion to
Dismiss, the Federal Defendants request that this Court dismiss Plaintiff’s Complaint.

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2 Respectfully submitted this 21st day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012 I filed the foregoing REPLY BRIEF IN SUPPORT OF 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 21st day of May, 2012.

s/ Karmen Miller
Karmen Miller, Paralegal Specialist