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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER ROSALES AND KAREN TOGGERY, ESTATE OF HELEN CUERRO, ESTATE OF WALTER ROSALES' UNNAMED BROTHER, ESTATE OF DEAN ROSALES, ESTATE OF MARIE TOGGERY, ESTATE OF MATTHEW TOGGERY, APRIL LOUISE PALMER, AND ELISA WELMAS,

Plaintiffs,

v.

AMY DUTSCHKE, Regional Director, BIA; JOHN RYDZIK, Chief, Environmental Division, BIA; COUNTY OF SAN DIEGO; KENNY MEZA, CARLENE A. CHAMBERLAIN, ERICA M. PINTO; PENN NATIONAL GAMING INC., SAN DIEGO GAMING VENTURES, LLC, C.W. DRIVER, INC., AND DOES 1-10,

Defendants.

Case No. 2:15-cv-01145-KJM-KJN

SPECIALLY-APPEARING DEFENDANTS ERICA PINTO, CARLENE CHAMBERLAIN, AND KENNY MEZAS', AND DEFENDANTS SAN DIEGO GAMING VENTURES LLC, PENN NATIONAL GAMING INC., AND C.W. DRIVER, INC.S' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

FED. R. CIV. P. 8, 12(B)(1), 12(B)(5), 12(B)(6), AND 12(B)(7)

Date: September 9, 2016
Time: 10:00 am
Judge: Kimberly J. Mueller

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TRIBALLY RELATED DFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Erica Pinto, Carlene Chamberlain, Kenny Meza, San Diego Gaming Ventures LLC ("SDGV"), Penn National Gaming Inc. ("Penn"), and C.W. Driver, Inc. ("Driver") (collectively "Tribally Related Defendants") hereby move to dismiss the Second Amended Complaint ("SAC) under Fed. R. Civ. P. 8, 12(b)(1), 12(b)(6) and 12(b)(7) for failure to join a required party, meet pleading requirements, and state a claim. Pinto, Chamberlain, and Meza, who are elected Tribal officials of the Jamul Indian Village ("Tribe"), a federally recognized Indian tribe, also move to dismiss on grounds of sovereign immunity. Defendants also move to dismiss the second and third claims for relief for lack of subject matter jurisdiction because plaintiffs lack Article III standing. Finally, defendant Meza moves for dismissal under Fed. R. Civ. P. 12(b)(5) for failure to serve summons and complaint.

II. FACTUAL BACKGROUND

The Tribe's efforts to construct and operate a tribal casino under the Indian Gaming Regulatory Act ("IGRA") commenced more than two decades ago. In 1993 the Tribe adopted a Gaming Ordinance. Federal approval of the Ordinance was published in the Federal Register in 1999. *See* 64 Fed. Reg. 4722, 4723 (Jan. 29, 1999). Also in 1999, the Tribe negotiated and entered into a Tribal-State Compact with California under IGRA. The Compact was approved by the Department of the Interior on May 5, 2000, *see* 65 Fed. Reg. 31189-01 (May 16, 2000), and ratified by the California Legislature. Cal. Gov't Code § 12012.25(a)(22). In 2011, pursuant to Compact section 10.8.1 which gives the Tribe jurisdiction over environmental review for the gaming project, the Jamul General Council (the Tribe's governing body) adopted a Tribal Gaming Project Environmental Review Ordinance. Dec. of Tribal Chairwoman Erica M. Pinto ("Pinto Dec.") Ex. 4. The Tribe approved a Final Tribal Environmental Evaluation and elected to move forward with construction of a gaming facility on January 23, 2013. Pinto Dec. ¶ 12. The Tribe entered into agreements with Penn National Gaming, Inc. and its wholly owned LLC, San Diego Gaming Ventures, to develop, construct and manage the Tribe's casino. Pinto Dec. ¶ 15.

The Tribe commenced construction of its casino in 2014. Pinto Dec. ¶ 16. All construction occurred on the Tribe's federal Indian trust land on a site located on the *opposite side* of the Tribe's federal Indian trust land from the Tribe's cemetery. Pinto Dec. ¶¶ 18-21 and Ex. 8. No construction work was performed on the Tribe's cemetery. Pinto Dec. ¶¶ 20-21, Ex. 9. No human or cultural remains were found in the

course of the construction. Pinto Dec. ¶¶ 17, 28. The casino is now essentially complete. Pinto Dec. ¶ 24.

III. DISCUSSION

A. Dismissal is Warranted Because Plaintiffs Cannot Join the Jamul Indian Village

The SAC argues that the Jamul Indian Village is not a federally recognized tribe and that its lands are not Indian lands. *See* SAC ¶ 12. Plaintiffs' entire case depends on these claims. Yet plaintiffs and their attorney know, because several courts have so told them repeatedly, that they cannot raise these arguments unless the Tribe is a party to their lawsuit. *See Rosales VII*, 73 Fed. App'x. at 914; *Rosales v. United States*, 89 Fed. Cl. 565 (Ct. Fed. Cl. 2009) ("*Rosales X*"); *Rosales v. United States*, 2007 WL 4233060 (S.D. Cal. 2007) ("*Rosales IX*"); *Rosales v. CalTrans*, 2016 WL 124647, at *10 (Cal. Ct. App.). The SAC must be dismissed under Rules 12(b)(7) and 19 because the Tribe cannot be joined.

1. Rule 19 Legal Standards

A party is "required" under Rule 19(a) when it has a "legally protected interest" in the subject of the suit. *Shermoen v. U.S.*, 982 F.2d 1312, 1317 (9th Cir. 1992). A "public entity has an interest in a lawsuit that could result in the invalidation or modification of one of its ordinances, rules, regulations, or practices." *E.E.O.C. v. Peabody W. Coal Co.*, 610 F.3d 1070, 1082 (9th Cir. 2010). The Ninth Circuit includes Indian Tribes among "public entit[ies]" for purposes of this Rule 19 analysis. *Id.* A related protected Tribal interest is "the sovereign power of the tribes to negotiate compacts." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002). In addition, "a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002).

Four factors determine whether the case should be dismissed under Rule 19(b) when a required party cannot be joined. *Id.* at 1161-62. These factors weigh heavily in favor of dismissal here.

2. The Jamul Indian Village Is a Required Party Under Rule 19(a)

The SAC argues that the Tribe is not federally recognized and that its lands are not properly in trust. SAC ¶ 12. Given this direct attack on the Tribe and its lands, the Tribe has numerous fundamental interests at stake in this action, which only it can adequately represent. First and foremost, the Tribe has a fundamental interest in its very existence as a federally-recognized Indian tribe. Without being federally recognized the Tribe cannot partake in essential government programs, including housing, health care and

education. *See, e.g.*, 25 U.S.C. § 450a; 25 U.S.C. § 450f; 25 U.S.C. § 1601.

Second, the Tribe has a fundamental sovereign interest in its beneficial ownership of, and governmental authority over, its federal Indian lands. *See Rosales VII*, 73 Fed. App'x. at 914-15.

Third, without Indian lands over which the Tribe exercises jurisdiction, the Tribe's Compact, Gaming Ordinance, and other related Tribal laws would effectively be invalidated and the Tribe would lose the right to operate a governmental gaming enterprise under IGRA. *See* 25 U.S.C. § 2702(3); *id.* § 2703(4); *id*. § 2710(d)(1); Compact § 4.2.

Fourth, the Tribe clearly "has an interest in [this] lawsuit that could result in the invalidation or modification of one of its ordinances, rules, regulations, or practices." *Peabody W. Coal Co.*, 610 F.3d at 1082. Plaintiffs' action could result in the invalidation or modification of the Tribe's federally approved Compact, Gaming Ordinance, and other Tribal laws, all of which are contingent upon the existence of a federally recognized tribe with federal Indian trust lands. For example, IGRA provides for tribal gaming ordinances that are "adopted by the government body of the Indian tribe having jurisdiction over such lands ...." 25 U.S.C. § 2710(d)(1)(A)(i). IGRA also requires that Tribal-State compacts be executed and implemented by "[a]ny Indian tribe having jurisdiction over the Indian lands upon which" gaming is to be conducted. 25 U.S.C. § 2710(d)(3)(A). The Tribe's Compact authorizes the Tribe to operate a gaming facility "only on [its] Indian lands ...." Compact § 4.2, Pinto Dec. Ex. 2. The Tribe's ordinances and gaming compact are thus at stake in this litigation.

Fifth, the Tribe has contractual interests that are at stake here. The Compact itself is a contract. *See Idaho v. Shoshone-Bannock Tribes*, 465 F.3d 1095, 1098 (9th Cir. 2006). Further, the Tribe entered into agreements for the management, construction and operation of its gaming facility. Pinto Dec. ¶ 15. To the extent findings made in the course of adjudicating the SAC would enjoin the Tribe from conducting construction on its federal Indian trust land, plaintiffs' action could potentially undermine the Tribe's ability to conduct gaming under the Compact and invalidate or modify the Tribe's contracts with its partners. Pinto Dec. ¶ 15; *Dawavendewa*, 276 F.3d at 1157.

Finally, the Tribe has an interest in controlling its governmental activity on its own lands. An order affecting construction activity on Tribal lands would undermine this sovereign right. These interests are paramount and render the Tribe a required party. *See, e.g., Rosales VII*, 73 Fed. App'x. at 914-15; *JAC v.*

Chaudhuri, 2014 WL 3853148 ** 16-18; *Rosales IX*, 2007 WL 4233060 *6; *Rosales v. CalTrans*, 2016 WL 124647 **10-12.

In order for this Court to adjudicate the merits of plaintiffs' claims, it would need to pass judgment on Plaintiffs' attack against the Tribe's status and the status of the Tribe's lands. SAC ¶ 12. The case depends on the Court's finding that the various statutes cited in the complaint, such as California's Health and Safety Code, apply to the land and Tribal governmental actions at issue. But in order to determine whether the statutes apply the Court would have to first determine whether the land is federal Indian land and whether the Tribe is federally recognized. Thus, fundamental Tribal interests are at issue here.

3. The Jamul Indian Village Cannot be Joined Because It Is Immune

Indian tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 at 58-59 (1978); *Puyallup Tribe v. Wash. Dept. of Game*, 433 U.S. 165, 172-173 (1977). Indian tribes are immune from suit "absent a clear waiver by the tribe or congressional abrogation." *OK Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

A waiver of tribal sovereign immunity "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo* 436 U.S. at 58-59; *Citizen Band Potawatomi*, 498 U.S. at 509. Courts may only exercise jurisdiction over a tribe pursuant to a clear statement from the tribal government "waiving [its] sovereign immunity ... together with a claim falling within the terms of the waiver." *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003).

Sovereign immunity is a jurisdictional bar irrespective of the merits of the claim. *Chemehuevi Tribe v. California Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985); *California ex rel. Dep't of Fish and Game v Quechan Tribe of Indians*, 595 F.2d 1153, 1155 (9th Cir. 1979). Sovereign immunity bars actions in tort. *See, e.g., Rosebud Sioux Tribe v. Val-U-Constr. Co. of South Dakota, Inc.*, 50 F.3d 560 (8th Cir. 1995). Because sovereign immunity is jurisdictional in nature, its recognition by the Court is not discretionary. *See Puyallup Tribe*, 433 U.S. at 172-73; *Chemehuevi Tribe*, 757 F.2d at 1052 n.6. Tribal sovereign immunity extends to Tribal agencies and subdivisions, as well as tribally-owned commercial entities. *See Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751, 755 (1998); *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974 (9th Cir. 2006).

The Jamul Indian Village is federally recognized, *see* 81 Fed. Reg. 5021 (January 29, 2016), and it has been so recognized for more than three decades. *See* 47 Fed. Reg. 53130, 53132 (Nov. 24, 1982). The U.S. Department of the Interior explains that "[t]he listed Indian entities are acknowledged to have the immunities and privileges available to federally recognized Indian tribes by virtue of their government-to-government relationships with the United States as well as the responsibilities, powers, limitations and obligations of such tribes." 81 Fed. Reg. 5019. The Tribe therefore possesses sovereign immunity from unconsented suit as a matter of law. *See Kiowa Tribe,* 523 U.S. at 754; *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). "Inclusion of a tribe on the Federal Register list of recognized tribes is generally sufficient to establish entitlement to sovereign immunity." *Larimer v. Konocti Vista Casino Resort, Marina & RV Park,* 814 F. Supp. 2d 952, 955 (N.D. Cal. 2011). *See Mulher v. Morongo Casino, Resort & Spa*, 2015 WL 3824160 (C.D. Cal. June 17, 2015); *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F. Supp. 2d 953, 957 (E.D. Cal. 2009).

In 2007 plaintiffs Rosales and Toggery alleged that the Tribe "is a tribal governmental entity of Kumeyaay Indians, recognized by the United States' Congress, governed by a Constitution adopted on May 9, 1981, pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq. and located in Jamul, California." *See* ECF 27.4, 27.5, Lawrence Dec. Ex. 1, p. 2, lines 27-29. Plaintiffs have thus admitted that the Tribe is federally recognized.

Thus, notwithstanding the Tribe's fundamental interests in this lawsuit, the Tribe cannot be joined because it is immune from suit.

4. Dismissal is Necessary under Rule 19(b)

Dismissal is necessary under the four factors of Rule 19(b). *First*, all of the fundamental Tribal interests noted above would be severely prejudiced by an adverse judgment. *Second*, it is not possible to lessen this prejudice to the Tribe. Plaintiffs seek relief that would require the Court to make findings about the Tribe's very existence and the status of its lands. *See* SAC ¶ 12. Plaintiffs also seek an order that could potentially halt or otherwise directly affect construction on the Tribe's land. SAC pp. 16-17. Such findings and orders would undermine every one of the interests outlined above. This prejudice cannot be lessened without joining the Tribe. *Third*, a judgment rendered in the Tribe's absence would not be adequate because only the Tribe has authority over construction (and related activity) on its Indian

lands. Yet the tribe is not a party. *Fourth*, although plaintiffs will not have an alternate forum following dismissal, "Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity." *Confed. Tribes of Chehalis Indian Res. v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) (citations omitted). *See Chadhuri*, 2014 WL 3853148 * 18. Here, the Tribe's interest in its sovereign immunity far outweighs the lack of an alternative forum. Dismissal is therefore warranted.

5. Plaintiffs Are Collaterally Estopped from Re-litigating Whether the Tribe is Required in an Action Attacking the Tribe's Status and Lands

Plaintiffs argued that the Tribe is not federally-recognized, that it does not possess sovereign immunity, and that its lands are not Indian lands, repeatedly in earlier lawsuits, all of which have been dismissed. *See Rosales v. CalTrans*, 2016 WL 124647, at *11 fn. 13, *13; *Rosales VII*, 73 Fed. App'x at 914; *Rosales X*, 89 Fed. Cl. at 586; *Rosales IX*, 2007 WL 4233060. In each of those cases plaintiffs were told that they cannot raise such claims without joining the Tribe, and that they cannot join the Tribe due to its sovereign immunity.

Plaintiffs are collaterally estopped from again adjudicating the question of whether they may raise these identical claims without joining the Tribe. "[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Dodd v. Hood River County*, 59 F.3d 852, 863 (9th Cir. 1995). Collateral estoppel "bars the relitigation of issues actually adjudicated in previous litigation between the same parties." *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

Here, all three criteria for collateral estoppel are met. *Id.* First, the issue at stake – whether plaintiffs may assert that the Tribe is not federally recognized and/or its lands are not federal Indian lands without joining the Tribe – is identical in *all* of the litigation cited above. Second, the issue was actually litigated in the prior cases. Third, it in fact proved critical to the courts' resolution of each of the previous cases. *See Rosales IX*, 2007 WL 4233060 *5-6; *Rosales X*, 89 Fed. Cl. at 573-74, 580-85; *Rosales VII*, 73 Fed. App'x. at 914-15; *Chaudhuri*, 2014 WL 3853148 **17-18; *Rosales v. Caltrans*, 2016 WL 124647, at * 6-12. Accordingly, when plaintiffs again ask the court to determine whether the Tribe is a tribe and whether its lands are Indian lands they are estopped from arguing that the Tribe is not required under Rule 19.

B. The Complaint Should Be Dismissed As to Defendants Pinto, Chamberlain, and Meza Because They, As Tribal Officials, Are Immune from Suit

1. The Tribal Official Defendants Possess Sovereign Immunity

"[T]ribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority." *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir. 1983). *See Marceau*, 455 F.3d at 974; *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985). Erica Pinto is Chairwoman of the Tribe and its Executive Committee (also known as the Tribal Council), and at all times relevant to the complaint has served as a duly elected member of the Executive Committee. Pinto Dec. ¶ 1. Carlene Chamberlain is, and at all times relevant to the complaint has been, a duly elected member of the Executive Committee/Tribal Council. Pinto Dec. ¶ 27. Kenny Meza is currently Vice-Chairman of the Executive Committee/Tribal Council, a position to which he was elected on June 20, 2015. Pinto Dec. ¶ 26. All actions taken by these Tribal governmental officials with regard to construction of the Tribe's federally-authorized gaming facility were taken in their official capacities under applicable law. *See* Pinto Dec. ¶¶ 5-7, 11, 15; 25 U.S.C. § 2710(d)(1)(A); Compact § 4.2.

Attempting to circumvent these Tribal officials' sovereign immunity, plaintiffs have named them as defendants in their "individual capacities." SAC ¶ 11. But none of these officials acted in their individual capacities when they took action to approve and effect construction of the Tribe's casino. The complaint should be dismissed under Rule 12(b)(1) because the actions at issue were, and could only have been, taken by the Tribe acting by and through its Tribal officials in their official capacities. *See Chaudhuri*, 2014 WL 3853148 ** 13-15; *Rosales v. CalTrans*, 2016 WL 124647, at *13. Indeed, the injunctive remedy plaintiffs seek could only apply to Tribal government defendants acting in their official capacities as officers of the Tribe. It does not and cannot apply to them in their individual capacities because they lack authority to take any action on behalf of the Tribe when they act in their individual capacities. *See*, e.g. *Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 2012); *White Mountain Apache Tribe*, 779 F.2d at 480. Even in their official capacities, the Tribal official defendants can only act collectively as the Executive Committee, carrying out the General Council's directives. *See* Pinto Dec. ¶¶ 5-7. Accordingly, defendants Pinto, Chamberlain, and Meza possess sovereign immunity from this suit.

That the actions at issue here were official actions, taken in defendants' official capacities and authority, is further evidenced by the statutes that authorized them. IGRA authorizes tribes to "regulate

gaming activity on Indian lands…", 25 U.S.C. § 2701(5) and provides that "the Indian tribe will have the sole proprietary interest and responsibility for" its Indian gaming, 25 U.S.C. § 2710(b)(2)(A); § 2702(2). IGRA also provides that Indian tribes may "exercis[e] regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction" as long as such regulation is consistent with IGRA. *Id.* at 2713(d). Federal law thus vests the Tribe, acting through its officials, with authority to own, construct and regulate the construction of its gaming facility. Actions that officials take as Tribal government officials pursuant to IGRA are within the scope of their official authority.

The Compact similarly vests the Tribe, acting through its officials, with authority to establish a casino on its Indian lands, § 4.2, to license Tribal gaming facilities, § 6.4.2(a), and to adopt building and safety codes governing casino construction, § 6.4.2(b). The Tribal Gaming Agency inspects and certifies the casino for occupancy, § 6.4.2(c), and conducts on-site regulation and investigations and can impose sanctions for non-compliance with the Compact. §§ 7, 10. In short, the Compact grants the Tribe, acting through its officials, authority over construction, operation and regulation of its casino. Tribal officials are authorized by the Compact to take such actions on behalf of the Tribe.

Tribal law also authorizes the Tribe to engage in, and control, construction of its casino. Gaming Ordinance section 12 creates Tribal standards for "the construction and maintenance of any Gaming Facility." Pinto Dec. Ex. 6. The Tribal Gaming Project Environmental Review Ordinance establishes the procedure for environmental review relating to construction and delegates authority to the Executive Committee (referred to as the Tribal Council) to "take all action required under this Ordinance and to comply with the Compact," and provides that "[t]he Tribal Council makes a final decision as to whether and under what conditions to proceed with an on-Reservation [casino] project. The determination of the Tribal Council is final and conclusive." Pinto Dec. Ex. 4. In Resolution 2013-03 the Tribe elected to proceed with construction of the casino, Pinto Dec. Ex. 5, and under the Tribe's Constitution, the Executive Committee was required to take action, on behalf of the Tribe, to do so. *See* Pinto Dec. ¶¶ 5-7. In accordance with this legal authority the Executive Committee entered into agreements with Penn, SDGV and Driver for the construction and operation of a gaming facility. Pinto Dec. ¶ 15. Thus, the actions the Tribal officials took relating to construction of the Tribe's casino were official actions taken within the scope of their authority under applicable law.

The Tribe's officials possess sovereign immunity from suit for actions taken within their official capacities and scope of authority. *See Snow*, 709 F.2d at 1321; *Marceau*, 455 F.3d at 974; *Hardin*, 779 F.2d at 479-80; *Davis*, 398 F.2d at 84; *Imperial Granite Co.*, 940 F.2d at 1271. Thus, as a matter of federal law, officials Pinto, Meza, and Chamberlain are immune from this unconsented suit. The complaint against them should be dismissed with prejudice.

C. The Complaint Should Also Be Dismissed Because It Fails to Meet Pleading Standards or State A Claim upon Which Relief May be Granted

1. The Complaint Fails to Describe the Acts Allegedly Leading to the Harms Alleged and Should Be Dismissed Under Rules 8 and 12(b)(6)

The complaint is unintelligible. It cites statutory provisions relating to intentional discovery and disinterment of human remains but fails to allege that any remains identifiable as human remains were ever found by any defendant. The complaint mentions actions supposedly taken on "the government's portion of the cemetery," SAC ¶¶ 12, 26, but fails to explain what or where that may be. No construction has occurred on the Tribal cemetery, which remains undisturbed. Pinto Dec. ¶¶ 18-21. Tribal construction *has* occurred on the Tribe's federal Indian trust land, on the opposite end of the Tribal trust lands from the cemetery. *Id.* There, the Tribe has essentially completed its construction of a Tribal gaming facility. Pinto Dec. ¶ 24. But the casino site is not on the cemetery site. Thus, the SAC fails to provide a coherent account of who allegedly did what, where, and under what circumstances. Absent an allegation that a defendant actually found any human remains and a description of when and where that occurred, the SAC's allegations are too vague to discern. The SAC fails to meet the Rule 8 pleading standards. It also fails to state any coherent claim. It should be dismissed with prejudice.

2. The Complaint Fails to Link the Tribally Related Defendants to Any Wrong that would Entitle Plaintiffs to Redress

The complaint does not contain a "short and plain statement of the claim showing that the pleader is entitled to relief" against the defendants. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). It does not even rise to the level of "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* The SAC fails to plead any specific facts relating to the Tribally Related Defendants that would allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Though the SAC alleges vaguely that they "caused the disinterment and removal" of purported remains, the SAC does not

state what particular actions these defendants may have taken to cause this outcome, does not allege that they ever found any human remains, and does not state where they took their allegedly unlawful actions, or how. In fact, the SAC is completely silent as to these defendants in explaining what occurred.

Further, the SAC alleges that the Tribal officials acted *in their individual capacities* in a way that caused plaintiffs harm. SAC ¶ 11. But the SAC does not specify any action that these defendants could have taken in an individual capacity. As noted above, any action Tribal officials may have taken relating to construction of the Tribal casino could only, by definition, have been taken in their capacities and authority as officers of the Tribal government. *See Chaudhuri*, 2014 WL 3853148 **14-15; *Rosales v. Caltrans, Supra*. The complaint should be dismissed because it fails to allege any act that could have been taken by Tribal officials in their individual capacities. *See, e.g., Dengler v. Wingett,* 2003 WL 21439220, n.1 (N.D. Cal. 2003); *Cauchi v. Brown,* 51 F. Supp. 2d 1014, 1018 (E.D. Cal. 1991).

3. None of the Statutory Provisions Plaintiffs Cite Supports Their Claims

a. Plaintiffs Are Estopped from Re-litigating Whether the Statutes They Cite Apply

As in the SAC, plaintiffs claimed in two previous state court actions that the Tribe's construction on its Indian lands violated the California Environmental Quality Act ("CEQA"), California Native American Graves Protection and Repatriation Act ("CANAGPRA"), the California Constitution, provisions from the California Health & Safety Code, the California Public Resources Code, and the California Penal Code. *Rosales v. Caltrans,* 2016 WL 124647; *Rosales v. California,* No. GIC 878709 (S.D. Sup. Ct. 2007). And in their previous federal case defendants claimed – as they do here – that the Tribe's construction on Indian trust lands violated the federal NAGPRA. *Rosales IX,* 2007 WL 4233060 (S.D. Cal. 2007).

The Superior Court dismissed both actions, finding the 2014 case to be "barred by *res judicata*." *Rosales v. CalTrans,* 2014-10222, Judgment at p. 1, lines 25-27 (S.D. Sup. Ct., July 10, 2014), Lawrence Dec. Ex. 5, *aff'd Rosales v. CalTrans*, 2016 WL 124647. *See also id.* Order (S.D. Sup. Ct., June 17, 2014), Lawrence Dec. Ex. 4. The Superior Court also found that it "lack[ed] subject matter jurisdiction to decide [the] case, which at its core is a dispute about tribal lands and whether specified conduct taken by the Jamul Indian Village was or was not in keeping with tribal customs." *Rosales v. CalTrans,* 2014-10222, Superior Court Judgment at p. 1, lines 22-24, ECF 27 (Lawrence Dec. Ex. 5). It further found that Rosales and Toggery "lack[ed] standing to bring an action under Chapter 1.75 of the [California] Public

Resources Code [i.e., CANAGPRA] since section 5097.9 reserves enforcement of this chapter for the Native American Heritage Commission." *Id.* pp. 1:27-2:1. Finally, it held that "the statute of limits bars Plaintiff's cause of action under" CEQA. *Id.* p. 2:1-2. The California Court of Appeal affirmed the Superior Court's judgment. *See Rosales v. CalTrans*, 2016 WL 124647.

In *Rosales IX* plaintiffs alleged, as they do again here, that the Tribe's construction on its Indian lands was disturbing human remains of their ancestors in violation of NAGPRA. *Rosales IX*, 2007 WL 4233060 at *2. The federal District Court held that absent an actual discovery of cultural items, NAGPRA's provisions relating to the inadvertent discovery of such items does not apply. Since plaintiffs failed – as they do here – to allege the actual discovery of such items, they had failed to state a claim. *Id.* at *9. The court also held that the land at issue is "tribal land" under NAGPRA, and thus that NAGPRA's provisions relating to "federal lands" did not apply. *Id.* Plaintiffs failed to prosecute their appeal.

In short, plaintiffs previously cited the same state statutes they cite here, and were told by both California and federal courts that those statutes do not apply and, further, that they cannot serve as a predicate for a tort claim as alleged here. Accordingly, plaintiffs are estopped from frivolously raising these issues yet again.

b. The Statutory Provisions Underlying the Complaint are Inapplicable and Accordingly Plaintiffs Fail to State a Claim

i. Amendments 1, 4, 5, and 14 of the United States Constitution Do Not Apply

The limitations on governmental authority found in Amendments 1, 4, 5 and 14 of the U.S. Constitution, SAC at ¶¶ 31, 50(a), and prayer for relief, apply to the Federal and State governments. They do not apply to private parties like Tribally Related Defendants under the circumstances alleged here. *Civil Rights Cases*, 109 U.S. 3, 11 (1883); *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374 (1995); *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 186 (2nd Cir. 2005).

Further, the limitations on governmental authority found in the cited amendments to the U.S. Constitution do not apply to the Tribe or its officials acting on its behalf. *Santa Clara Pueblo*, 436 U.S. at 56 ; *Native American Church v. Navajo Tribal Council*, 272 F.2d 131 (10th Cir. 1959); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958). *See also Martinez v. Southern Ute Tribe*, 249 F.2d 915, 919 (10th Cir. 1957); *Groundhog v. Keeler*, 442 F.2d 674, 678 (10th Cir. 1971).

ii. The Native American Graves Protection and Repatriation Act Does Not Apply

Plaintiffs cite the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§3001 *et seq*., 43 CFR 10.1-17, at SAC ¶¶ 28(B), 30, 31, 33, 48-50. These provisions are unavailing as a foundation for either a tort action or an injunctive remedy against the defendants because the Act does not apply under the circumstances alleged in the complaint. NAGPRA does not authorize an award for monetary damages. *Castro Romero v. Becken,* 56 F.3d 349 (5th Cir. 2001). Further, NAGPRA applies to federal agencies and museums, creates a review committee authorized to oversee its implementation, and imposes obligations on all three. None of these obligations applies to any of the defendants.

Even if the Tribally Related Defendants were covered entities under NAGPRA, which they are not, the SAC still fails to plead the facts necessary for NAGPRA to apply. Section 3002(c), on which plaintiffs rely extensively, applies to the *planned, intentional, archaeological* removal or excavation of items that are identifiable as cultural items. *See* 43 C.F.R. § 10.2(g)(3). When, as here, an excavation is not conducted with the intent of removing cultural items, section 3002(c) does not apply. *Yankton Sioux Tribe v. U.S. Army Corps of Engineers,* 83 F. Supp. 2d 1047, 1056 (D.S.D. 2000); *see also San Carlos Apache Tribe v. U.S.*, 272 F. Supp. 2d 860, 888 (D. AZ. 2003); 43 C.F.R. § 10.2(d) (defining the objects covered under NAGPRA). Here, the Tribe's excavation on its federal Indian trust land was conducted in the course of construction of a Tribal governmental gaming facility and with the intent of constructing that facility. *See* Pinto Dec. ¶ 22. Here, there was no *intentional archaeological excavation or removal* of identifiable remains. Section 3002(c) is inapplicable.

Moreover, NAGPRA in general, and section 3002(c) in particular, do not apply because the types of remains they cover are not alleged to have been present here.[1] The SAC is vague as to the nature of the material allegedly at issue and nowhere alleges that anyone found remains that are actually recognizable as such. The complaint may create the impression, but does not actually state, that skeletal remains were intentionally dug up and thrown off the land. But a closer reading of the complaint shows that this impression, while artfully crafted, is outright wrong and misleading. Exhibit K indicates that plaintiffs' deceased relatives' remains were *cremated*, and that their ashes were scattered at an unspecified location. *See* SAC Ex. K, ECF 50-1, p. 57 of 89. (The SAC fails to allege that human remains were ever found

[1] To the extent plaintiffs' craftily-worded complaint raises any question about the fact that no remains have ever been found, material submitted in the related case of *JAC v. Chaudhuri,* No. 2:13-cv-01920 at ECF 83-2, Ex. A. pp. 3-4 at ¶¶ 1-7, is instructive. *See also* Pinto Dec. ¶¶ 17, 28.

because, given the nature of remains allegedly at issue, no such remains could have been found.) Absent any allegation that human remains were actually found and recognized as such, it is impossible for anyone to have intentionally planned their archaeological removal. NAGPRA §3002(c) is inapplicable.

Section 3002(d), dealing with the *unintentional* removal of remains, applies only upon actual discovery of such remains. As the District Court explained to plaintiffs and their counsel eight years ago, "[a]ll courts to consider this issue have held an inadvertent discovery does not occur when an agency is placed on notice of likely or certain discovery, but that ***discovery must be "actual***." *Rosales IX*, 2007 WL 4233060 at *9 (emphasis added). "[I]nadvertent discovery" is "the unanticipated encounter or detection of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on the surface of Federal or tribal lands pursuant to section 3 (d) of the Act." 43 C.F.R. §10.2(g)(4). *San Carlos Apache* held that NAGPRA duties and obligations are triggered "only when and if" an actual discovery occurs. *San Carlos Apache*, 272 F. Supp. 2d at 893. But here plaintiffs do not allege that any such actual discovery of identifiable remains occurred. (And, in fact, there has not been any such discovery. Pinto Dec. ¶¶ 17, 28; Meza Dec. filed as an exhibit in related case *JAC v. Chaudhuri*, No. 2:13-cv-01920, ECF 83-2, ex. A., p. 5 ¶ 12-20.) Accordingly, plaintiffs fail to state a claim under section 3002(d). And none of the Act's other provisions apply to any of the defendants.

Plaintiffs also fail to state a claim under NAGPRA because they fail to plead the basic facts necessary to establish standing under that Act. Because they cannot and do not allege that any identifiable cultural items were found on the Tribe's land during construction, they also cannot allege the facts – delineated at 43 C.F.R. 10.14(b) – necessary to establish that they are the "lineal descendants" of any individual deceased whose *clearly identified* remains were removed. NAGPRA does not apply.

iii. AIRFA, RFRA and RLUIPA Do Not Apply

The SAC cites these inapplicable statutes at ¶¶ 36, 52. The AIRFA policy statement plaintiffs cite, 42 U.S.C. § 1966, applies only to the federal government, and in any case, the "American Indian Religious Freedom Act (AIRFA) is a policy statement and does not create a cause of action or any judicially enforceable individual rights." *U.S. v. Mitchell*, 502 F.3d 931 (9th Cir. 2007), *certiorari denied*, 553 U.S. 1094. The Religious Freedom Restoration Act, held partially unconstitutional, similarly applies only to the federal government. 42 U.S.C. § 2000bb-1(a); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751

(2014). Further, even if RFRA applies, it protects Tribal religion as practiced and interpreted by the Tribe, and not the made-up religion plaintiffs allege in their SAC. *See* Meza Dec., filed as an exhibit in related case *JAC v. Chaudhuri,* at ECF 83-2, ex. A., p. 3-4 ¶¶ 10-11, (stating that under Tribal customary practice and religious belief ashes of human remains are not considered sacred); Carrico Dec. filed as an exhibit in related case *JAC v. Chaudhuri,* at ECF 83-2, ex. E., p. 4-5 ¶¶11-12 (same). Finally, RLUIPA applies only to prisoner and land use cases, neither of which is at issue here. 42 U.S.C. § 2000cc.

iv. Article I, Sections 1-4, 7, 13, 19, 24, and 31 of the California Constitution Do Not Apply

Plaintiffs cite the California Constitution, Art. I §§ 1-4, 7, 13, 19, 24 and 31, but these provisions do not apply. SAC ¶¶ 31, 50. The Supreme Court has long held that state civil regulatory law does not apply to Indian Tribes on their Indian trust lands in California. *See, e.g., California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 208 (1987); *Bryan v. Itasca County,* 426 U.S. 373, 390 (1976). Given that the Tribe's construction activities occurred on the Tribe's federal Indian trust land, the California constitutional provisions plaintiffs cite, all of which are regulatory/civil in nature, are inapplicable.

Further, as with the U.S. Constitution, any limitations on government authority found in the cited sections of the California Constitution apply to State and local government entities, but not to private parties like the Tribally Related Defendants. *See, e.g., Golden Gateway Center v. Golden Gateway Tenants Assn.* 26 Cal. 4th 1013 (2001); *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.,* 24 Cal. 3d 458, 468 (1979); *Jones v. Kmart Corp*., 17 Cal. 4th 329, 333 (1998). Defendants are private and Tribal parties, acting on federal Indian trust land, and as such the provisions plaintiffs cite impose no direct obligations on them under the circumstances here.

Moreover, some of the State Constitutional provisions plaintiffs cite are facially inapplicable, and the remaining provisions do not allow a private right of action for damages. For example, Article I sections 3, 13, 24 and 31 are facially inapplicable and the SAC fails to explain how or why they are cited. Article I, sections 1-2 and 7, do not provide a private right of action for damages. *See, e.g., Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079 (E.D. Cal. 2012); *Katzberg v. Regents*, 29 Cal. 4th 300, 329 (2002); *DeGrassi v. Cook*, 29 Cal. 4th 333, 335 (2002); *Clausing v. San Francisco Unified School Dist*., 221 Cal. App. 3d 1224, 1237 fn. 6 (1990); *Gates v. Superior Court,* 32 Cal. App. 4th 481, 516 (1995).

Accordingly, plaintiffs' causes of action predicated on the California Constitution fail to state a

claim against any of the Tribally Related Defendants.

v. The California Environmental Quality Act Does Not Apply

CEQA, Cal. Pub. Resources Code §§ 21000-21177, and its regulations, cited in the SAC at ¶¶ 28, 33 49, 50(B) and (E), and prayer for relief, does not apply for several reasons. First, California's civil regulatory law does not apply to Indian Tribes on their federal Indian trust lands. *Cabazon*, 480 U.S. 202 at 208; *Bryan*, 426 U.S. at 390. *See also* 28 U.S.C. § 1360(b). Given that the Tribal construction at issue occurred on the Tribe's federal trust land, CEQA – a civil regulatory statute – is inapplicable.

CEQA also does not apply because it is expressly preempted, and superseded, by California law and the Tribal-State Compact. The California Legislature exempted tribal compacts and on-reservation environmental impacts from CEQA in deference to tribal sovereignty. *See* Cal. Gov't Code § 12012.25(g). And the Tribal-State Compact, in which the State and the Tribe expressly agreed to an environmental review process governed by Tribal law, superseded CEQA by establishing an alternative process. *See* Compact section 10.8; Pinto Dec. Ex. 2. The Tribe has followed that process to the letter, as explicitly confirmed by the California Governor's office. *See* Pinto Dec. Ex. 7.

Further, CEQA applies to California state and local public agencies, but not to private companies like SDGV, Penn or Driver or to individuals like Pinto, Chamberlain or Meza. *See Quechan Indian Tribe v. U.S.*, 535 F. Supp. 2d 1072, 1108 (S.D. Cal. 2008). It also does not apply to Indian tribes or their officers acting on their tribal lands.

Finally, plaintiffs failed to exhaust their administrative remedies under CEQA, and the statute of limitations in § 21167.4 bars them from doing so now. They also failed to follow the mandatory procedure of § 21177. *Corona-Norco Unified School Dist. v. City of Corona*, 17 Cal. App. 4th 985, 997 (1993) ; *Friends of Roeding Park v. City of Fresno*, 848 F. Supp. 2d 1152, 1165 (E.D. Cal. 2012) (terms of § 21167.4 are "mandatory"). Here, plaintiffs fail to allege that they complied with these requirements. Thus, they lack a right of action and fail to state a claim.

vi. The General Provisions of the California Health and Safety Code Do Not Apply

Plaintiffs repeatedly cite sections 7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7100 and 7500 of the California Health and Safety Code ("HSC"). SAC ¶¶ 30, 31, 33, 36. None of these provisions applies. The HSC's regulation of the handling of human remains on lands within California's regulatory

jurisdiction are inapplicable because state civil regulatory law does not apply to Indian Tribes on their federal Indian trust lands in California. *See, e.g., Cabazon,* 480 U.S. at 208; *Bryan v. Itasca County*, 426 U.S. at 390; 28 U.S.C. § 1360(b). Here, the construction that plaintiffs claim violated their rights occurred on the Tribe's federal Indian trust land. Pinto Dec. ¶ 19. Plaintiffs concede that the actions at issue occurred on "the government's" land, SAC ¶ 9, on "federal or tribal land," SAC ¶¶ 33, and their exhibits prove that the land is actually owned by the federal government and held in trust under the Indian Reorganization Act. SAC Exhibit D p. 1. Thus, under *Cabazon* and *Bryan v. Itasca* the Health & Safety Code provisions plaintiffs cite do not apply.

Further, the provisions do not apply on their own terms. Section 7050.5 applies, if at all, only upon the discovery or recognition of human remains, which pre-condition – as explained above – has not been alleged here and cannot be alleged since no remains have ever been found. *See* HSC § 7050.5(a) (requiring knowledge, wanton disturbance, or willful removal of remains – none of which can have existed absent any identifiable remains); *id.* § 7050.5(b) (addressing the proper procedure *upon "discovery or recognition*" of human remains, thereby indicating that subsection (a) relates to actions that are improper *upon discovery or recognition* of human remains). *See also* Pinto Dec. ¶¶ 17, 28; Meza Dec. filed as an exhibit in *JAC v. Chaudhuri,* ECF 83-2, ¶¶ 12-20.

HSC § 7052 prohibits "commission of an act of sexual penetration of remains known to be human," and "willful mutilation, disinterment, or removal from place of interment of remains known to be human," none of which plaintiffs have alleged here (and which plaintiffs cannot allege because no such identifiable remains were ever found). Absent an allegation that identifiable remains were found, no "willful" (or other) act with regard to such remains can be alleged. Similarly, plaintiffs fail to allege the facts necessary to show that there was an "interment" here (defined in § 7009) or that "mutilation" occurred, and thus concomitantly fail to allege the facts necessary to show a "mutilation, disinterment or removal from place of interment." Plaintiffs thus fail to, and cannot, allege the basic facts necessary for §7052 to apply.

HSC § 7054 applies to the disposition of cremated remains following cremation. Here, plaintiffs allege that they had control over the cremated remains following cremation, so that the section at issue would have applied, if at all, to them. Sections 7054.6 and 7054.7 would also have applied, if at all, to plaintiffs as the individuals with alleged control over the cremated remains following cremation and/or to

the entity performing the cremation. Section 7055 does not apply to cremated remains, and plaintiffs do not allege the removal of any non-cremated remains. Section 7500 applies only to removal from a "cemetery," which is a defined term. The Tribal trust land at issue here does not qualify. *See id.* § 7003 and definitions of terms used therein. And finally, section 7100 relates to disposition upon death, which is allegedly long past and not at issue.

Plaintiffs also cite sections of the HSC dealing with the dedication of cemeteries. SAC ¶¶ 36, 50. These obviously do not apply because State regulatory law is inapplicable on Indian trust land. Further, the Tribe's construction occurred on its federal Indian trust land, not in the cemetery. Pinto Dec. ¶¶ 18-19.

vii. The California Native American Historical, Cultural, and Sacred Sites Provisions Do Not Apply

Plaintiffs rely on various provisions of the California Public Resources Code ("PRC"), § 5097.9 *et seq.*, dealing with the Native American Heritage Commission. *See, e.g.,* SAC ¶¶ 28-31, 33, 36, 48-50, among others. These provisions do not apply. First, State civil regulatory law does not apply to Indian Tribes on their federal Indian trust lands. *Cabazon,* 480 U.S. 202 at 208; *Bryan,* 426 U.S. at 390; 28 U.S.C. § 1360(b). Second, the Native American Historical, Cultural, and Sacred Sites statutes do not confer a private right of action. Only the Attorney General may commence an abatement action on behalf of the public under this statute. PRC § 5097.9; *see Native American Heritage Com. v. Board of Trustees,* 51 Cal. App. 4th 675, 681-682 (1996).

In addition, none of the individual provisions plaintiffs cite applies. Sections 5097.5, 5097.7, and 5097.9, SAC ¶¶ 31,33, 36, 48-50, explicitly apply to actions taken on "public lands," defined as "lands owned by, or under the jurisdiction of, the state, or any city, county, district, authority, or public corporation, or any agency thereof." PRC § 5097.5(b). But plaintiffs admit that the land at issue here is owned by the federal government and held in trust under the IRA. *See* ECF 1, Complaint ¶¶ 47, 53; SAC ¶ 33. Similarly, §§ 5097.94 and 5097.97 impose obligations on the Native American Heritage Commission; they do not apply to private parties. *See Quechan,* 535 F. Supp. 2d 1072, 1108.

The other sections plaintiffs cite, 5097.98 and 5097.99, SAC ¶ 33, 48-50, also do not apply. First, to the extent these sections purport to regulate the Tribe's use of, and Tribal activities on, Indian lands, they are preempted. *See Cabazon,* 480 U.S. at 208; *Bryan,* 426 U.S. at 390. In addition, section 5097.98 describes a process that applies once a coroner notifies the Commission of the discovery of Native

American Remains, after remains are actually found and reported to the commission. That did not occur here. Plaintiffs do not allege that any cremated remains were ever *actually found* by anyone or that the commission was notified of any such discovery.

Section 5097.99 applies to remains taken from a "grave or cairn." Since plaintiffs do not allege the existence of either a grave or a cairn here, as those terms are defined in the statute, plaintiffs fail to allege, and cannot prove, even the most basic predicate facts necessary for the section to apply.

viii. The California Native American Graves Protection Act Does Not Apply

Plaintiffs' reliance on CANAGPRA, Cal. Health & Safety Code §§ 8010 *et seq.*, is also unavailing. SAC ¶¶ 30, 31, 33, 36, 50. First, state civil regulatory law like CANAGPRA does not apply to Indian Tribes on their federal Indian trust lands. *See Cabazon*, 480 U.S. at 208; *Bryan v. Itasca County*, 426 U.S. at 390; 28 U.S.C. § 1360(b). HSC §§ 8558, 8560, and 8580, cited at SAC ¶ 33, 36 and 50, apply only to "dedicated" cemeteries. Plaintiffs do not allege that the land at issue was ever "dedicated" as a cemetery, as that term is defined in HSC § 8551. Nor can they, since the land is federal Indian trust land.

The other provisions plaintiffs cite do not apply to private parties. They apply only to museums, state agencies, and the Native American Heritage Commission. HSC § 8013. CANAGPRA also does not apply because it expressly vests in the Commission the power to intervene on behalf of tribes for repatriation of human and cultural remains and creates no private right of action. HSC §§ 8012(c), 8015. And CANAGPRA provides an explicit dispute resolution procedure which must be followed before action may be taken in court. HSC § 8016(j). Plaintiffs do not allege that they took any such action.

ix. California Penal Code Sections 457, 487, 622.5 Do Not Apply

Penal Code section 457, SAC ¶ 33, 50, is irrelevant. It deals with psychiatric examination.

The "grand theft" statute of section 487, SAC ¶¶ 31, criminalizes the theft of certain types of property valued at certain specified amounts. The complaint fails to allege the facts underlying grand theft. It does not specify which particular property was allegedly taken, by whom, or its value. Further, injunctive/declaratory relief is not generally available to enforce penal laws. Cal. Civ. Code § 3369.

Finally, section 622.5, SAC ¶¶ 31, 33, 50, is irrelevant. It applies to actions taken on "private lands" or "any public park or place," but federal Indian trust lands are neither. It is also irrelevant because it deals with the willful destruction of archaeological remains. No such remains were ever found, or even

alleged to have been found, by defendants, and thus could not have been willfully destroyed by them.

4. Plaintiffs Fail to State a Claim for Conversion

State law governs the elements of a conversion respecting property. *Petralia v. Jercich,* 238 F.3d 1202, 1206 n. 16 (9th Cir. 2001), *cert. denied*, 533 U.S. 930 (2001). In California, conversion has three elements: (1) ownership or right to possession of property, (2) wrongful disposition of the property right of another, and (3) damages. *G.S. Rasmussen & Assoc. v. Kalitta Flying Service,* 958 F.2d 896, 906 (9th Cir.1992), *cert. denied*, 508 U.S. 959 (1993). "A claim for conversion of physical property requires plaintiff to demonstrate that defendants wrongfully obtained possession over a specific piece of property." *Meridian Project Systems, Inc. v. Hardin Const. Co. LLC,* 2006 WL 1062070 *2 (E.D. Cal. 2006)(citation omitted); s*ee also G.S. Rasmussen,* 958 F.2d. at 904.

Here, plaintiffs fail to allege the basic facts necessary to establish conversion. They do not explain the "specific piece of property" allegedly converted. *Meridian, supra.* Their only allegations in this regard are vague references to some (undisclosed amount of) cremated ash allegedly scattered at undisclosed outdoor locations years ago. *See* SAC Exhibit K, which includes the only reference in plaintiffs' papers to any particular remains. Plaintiffs fail to identify, or even to allege the existence of, any specific property, with reasonable accuracy, that could have been the subject of conversion.

Further, "where a statute creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is exclusive." *Rojo v. Kliger,* 52 Cal.3d 65 (1990) (citations omitted). *See also Green v. Party City Corp*., No. CV-01-09681, 2002 WL 553219, *4 (C.D.Cal. Apr. 9, 2002). Here, plaintiffs' conversion claim rests on alleged violations of statutes – like NAGPRA, CANAGPRA, and CEQA – that contain comprehensive and detailed remedial schemes. The claim is thus preempted.

D. <u>Plaintiffs Lack Article III Standing</u>

The Court also lacks subject matter jurisdiction because plaintiffs lack standing under U.S. Const. Art. III, which requires that a plaintiff allege injury "likely to be redressed by a favorable judicial decision." *Lexmark Int'l Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377, 1386 (2014). Plaintiffs bear the burden of establishing standing. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

The order plaintiffs seek, essentially enjoining construction-related activities on the Tribe's lands,

SAC 16:22-27, 17:13-18, would not redress plaintiffs' alleged injuries because the defendants would have no power to comply. The Jamul Indian Village is a federally recognized tribe. As such, it exercises "inherent sovereign authority." *Okla. Tax. Comm'n,* 498 U.S. at 509. "[U]nless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Bay Mills,* 134 S.Ct. at 2030. Plaintiffs' allegations do not identify any law abrogating the Tribe's authority to perform construction activities on its lands. The Tribe's authority to perform construction and excavation on its lands would remain intact, and the Tribe could proceed with construction and excavation, regardless of any order the Court might issue.

Only Indian tribes have the right to regulate and control gaming activities on Indian lands. 25 U.S.C. § 2701(5). If sued in their official capacities, the Tribal official defendants are protected by the Tribe's immunity. In their individual capacities, they have no right or authority to regulate the tribe's gaming-related construction and/or excavation activities. *See Chaudhuri,* 2014 WL 3853148 ** 13-15. Penn, Driver and SDGV have no right to regulate or control construction or excavation on Tribal lands. Thus, any order the Court may issue to these defendants would fail to redress plaintiffs' alleged injuries. Plaintiffs therefore lack the redressability element of Article III standing.

E. Plaintiffs Did Not Serve Defendant Meza; Dismissal is Warranted Under Rule 12(b)(5)

This Court required plaintiffs to serve Mr. Meza within 7 days of filing any amended complaint. *See* Order at ECF 47. Plaintiffs filed their first amended complaint on May 20, 2016. They filed a second amended complaint on May 23, 2016. They never served Meza. Plaintiffs' complaint should be dismissed with prejudice.

IV. CONCLUSION

For the reasons stated above, the Tribally Related Defendants respectfully request that the Court grant their motion to dismiss this action with prejudice.

Dated: June 30, 2016

Law Office of Frank Lawrence

By: \s\
Frank Lawrence

Attorneys for Specially-Appearing Defendants Erica Pinto, Carlene Chamberlain, and Kenny Meza and Defendants San Diego Gaming Ventures LLC, Penn National Gaming Inc., C.W. Driver, Inc.