Case No. 17-16967

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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, Appellants,	)
vs.	)
AMY DUTSCHKE, Regional Director, BIA; JOHN RYDZIK, Chief, Environmental Division, BIA; KENNY MEZA; CARLENE A. CHAMBERLAIN; ERICA M. PINTO; PENN NATIONAL GAMING INC.; SAN DIEGO GAMING VENTURES, LLC; and C.W. DRIVER, Appellees.	)

Appeal from the U.S. District Court for the Eastern District of California
Case No. 15-cv-1145 KJM KJN
The Honorable Kimberly Mueller

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, Plaintiffs-Appellants are individuals and are not public corporations and have no parent companies, subsidiaries or affiliates that have issued shares to the public.

Dated: January 3, 2018.

Respectfully submitted,

/s/Patrick D. Webb
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Summary of Argument and Statement of the Case

Appellants, Walter Rosales and Karen Toggery and their families' personal injury and property damage action arises from the Appellees' undeniable desecration of Appellants' Native American families' human remains and funerary objects that were illegally excavated and then dumped on a CalTrans highway construction site from February 10, 2014 through the end of 2015. This action seeks no contract or real property remedies, nor any adjudication of the recognition status of the Jamul Indian Village ("JIV"), its interest in any real property, or whether its Compact with California was violated.

Appellants' claims for damages and injunctive relief were wrongfully dismissed on August 30, 2017, pursuant to Fed. R. Civ. P., Rules 12(b)(1) and (7), based upon two false conclusions by the trial court: (1) that the JIV is a required and indispensable party to the claims for desecration, and (2) that the non-federal Appellees are somehow immune to damage claims resulting from their illegal desecration of Appellants' families' remains. The trial court did not rule on any other arguments raised in the pleadings. ER 9:17-21, 13:11-14, and 14:9-17:12.

The erroneous dismissal must be reversed, and Appellants' remaining claims must be remanded for trial because: (1) the non-party JIV has no protected interest in Appellants' remaining claims, and (2) the non-federal Appellees have

no sovereign immunity for the damages caused by their illegal desecration of Appellants' families' remains.

Contrary to the trial court's ruling, the alleged interests of the JIV are not protected interests under Fed. R. Civ. P., Rule 19. None of the remedies sought by Appellants affect the JIV, since it is not a party to this action, and cannot be ordered to pay any damages to, nor be enjoined by, Appellants, who only seek remedies against the federal and non-federal Appellees that do not affect the JIV.

The trial court erroneously held that the JIV's protected interests stemmed from Appellants' factual allegations that are undisputed matters of law, unnecessary to any award of remedies sought by Appellants, and will not be adjudicated in this action. ER 14:3-6. These allegations merely explain the historical context in which the Appellees committed the desecration of Appellants' families' remains.

None of these facts need be adjudicated for Appellants to be awarded damages and the procedural protections of the NAGPRA statutes, arising from the illegal desecration of their families' remains. None of Appellants' remedies require any adjudication as to whether: (1) the JIV was recognized as an Indian tribe under the Indian Reorganization Act in 1934, (2) the Indian cemetery from which the Appellants' families' remains were illegally excavated has ever lawfully

been proclaimed to be a reservation, or taken into trust for an Indian tribe under federal jurisdiction in 1934, or (3) whether the Compact between California and the JIV was ever violated. Hence, since these facts need not be adjudicated for Appellants to be awarded the remedies plead in the Third Amended Complaint, JIV is neither a necessary, required, nor an indispensable, party to this action.

Similarly, the erroneous dismissal of Appellants' claims against the non-federal Appellees must be reversed, because the U.S. Supreme Court and this Court hold that they have no immunity for the illegal desecration of Appellants' families' remains, which they committed in their individual capacities.

Standard of Review

"Issues of tribal sovereign immunity are reviewed *de novo*." *Pistor v. Garcia* (*Pistor*), 791 F.3d 1104, 1110 (9th Cir. 2015); *Maxwell v. County of San Diego* (*Maxwell*), 708 F.3d 1075, 1081-82 (9th Cir. 2013); *Burlington N. & Santa Fe Ry. v. Vaughn*, 509 F.3d 1085, 1091 (9th Cir. 2007), finding sovereign immunity does not extend to tribal officials acting unlawfully. However, "the issue of tribal sovereign immunity is [quasi-]jurisdictional... In other words sovereign immunity is not 'jurisdictional in the sense that it must be raised and decided by this Court on its own motion.'" *Pistor* at 1110.

"In the context of a *Rule 12(b)(1)* motion to dismiss on the basis of tribal sovereign immunity, 'the party asserting subject matter jurisdiction has the burden of proving its existence,' i.e., that immunity does not bar the suit...In resolving such a motion, '[a] district court may 'hear evidence regarding jurisdiction' and 'resolv[e] actual disputes where necessary.'" *Pistor* at 1111.

Dismissal of an action pursuant to Fed. R. Civ. Proc., Rules 12(b)(7) and 19, is reviewed for an abuse of discretion, while the underlying legal conclusions are reviewed *de novo*. *Salt River Project Agricultural Improvement and Power Dist. v. Headwaters Resources, Inc.* (*Salt River*), 2012 US. Dist. Lexis 10862, *14 (9th Cir. 2012), citing *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 969-70 (9th Cir. 2008). Moreover, "[a] district court by definition abuses its discretion when it makes an error of law." *Fox v. Vice*, 563 U.S. 826, 839 (2011); *Mercury Interactive Corp. Sec. Litig. v. Mercury Interactive Corp.*, 618 F.3d 988, 993 (9th Cir. 2010).

Statement of Facts

A. Desecration of Appellants' Families' Remains

As set forth in Appellants' Third Amended Complaint ("TAC"), ER 38, more than 20 eyewitnesses have testified to Appellants' families' interment on the U.S. government's portion of the Indian cemetery in Jamul, California, and that on

February 10, 2014, the Appellees began identifiably and illegally disinterring, removing and dumping Appellants' families' human remains and funerary objects on a CalTrans highway construction site, 20 miles away, without the knowledge and consent of Appellants and without the notice, permits, written plans, mediation, consultation, and just compensation required by the federal and state Native American Graves Protection Acts ("NAGPRA"). ER 44, 184:24-187:1, 189:11-194:22, 202:24-204:17, 207:1-212:10.

The facts alleged in the TAC are admitted at this juncture of the proceedings, since the Appellees have yet to file an answer in this action. Fed. R. Civ. P., Rule 8(b)(6). Even if they had not been admitted, they are presumed to be true on the Appellees' motions to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Newman v. Sathyavaglswaran* (*Newman*), 287 F.3d 786, 788 (9th Cir. 2002), at this stage of the proceedings, "we must 'take as true all allegations of material fact stated in the complaint."

B. Unauthorized Excavation of Remains Admitted by Appellees

This testimony is corroborated by the Counties of San Diego and Riverside Death Certificates, and the Cal. Dept. Of Health Permits for Disposition of Human Remains on the government's portion of the Indian cemetery, which may be judicially noticed and are attached to the Third Amended Complaint as Ex. K. ER

44:15-18, and 110. Long before the 2014 desecration, Appellee and one time JIV chairman, Kenny Meza admitted in the January 2003 *California Lawyer*: "All the stuff that my brother, parents, godparents, and uncles once owned has been burned and buried on this land. And when the bulldozers come, they're going to dig it all up." ER 44. Most recently Meza admitted under oath that the Appellees have known of these interments for more than 20 years, and intentionally had them excavated and removed, while he supervised the desecration. Meza Decl., ¶¶12-16, ER 33-34.

However, much of Meza's declaration is disputed, the facts of which must be decided at trial. See, for e.g., ER 195-201 and 213-218. Appellants' eyewitnesses to the removal of the cremated human remains dispute Meza's claim that their were no cremated human remains, and that what was excavated was merely moved to another location on the Indian cemetery. In fact, according to Appellants' eyewitnesses, the cremated human remains were excavated, loaded in trucks, and hauled to the CalTrans' construction site for Highway 905 twenty miles away. ER 184:24-187:1, 189:11-194:22, 202:24-204:17, 207:1-212:10. Appellants are therefore entitled to have a jury determine the extent of the Appellees' admitted desecration, including excavation and removal, of the remains without notice to, or consent by, the Appellants. *Rosales v. United States*, 824 F.2d

799, 803 (9th Cir. 1987), finding where, as here, there are intertwined jurisdictional and substantive disputed facts, they "must be resolved at trial by the trier of fact," and cannot be decided on a motion to dismiss.

Appellee Erica Pinto confirms that Meza was individually responsible for the excavation of Appellants' families remains, and further claims that the illegal manner in which the remains were excavated in violation of the NAGPRA laws was not authorized by the JIV. ER 148:26-149:2, 150:14-16. Hence, Pinto and Chamberlain remain individually liable for not supervising Meza and requiring his compliance with the NAGPRA laws. There is no evidence, nor allegation, that the JIV either had any right to participate, let alone actually participated, in the illegal desecration of Appellants' families' remains. *Id*.

C. Appellants' Specific Family Members' Remains

Appellants Walter Rosales and Karen Toggery are Native Americans of one-half or more degree of California Indian blood, and former leaders of the JIV half-blood Indian community, whose families had lived on the government's portion of the Indian cemetery in Jamul, since the late 1800's. ER 184:24-185:21.

Appellant Walter Rosales is also a lineal descendant and son of Native American, Helen Cuerro, the personal representative of his mother's estate, his son's estate, his unnamed brother's estate, and owns and controls their human

remains and Native American cultural items, that were interred in burial sites at the Indian cemetery, as provided for in the NAGPRA, 25 U.S.C. §3001 et seq., Cal. Pub. Res. C.(P.R.C.) §§5097.9-5097.99 and Cal. Health & Safety C. (H.S.C.) §§7001 and 7100. ER 184:24-185:2. Walter's mother and son's cremated remains were interred in confidential locations throughout the Indian cemetery property on which the Appellants' resided. ER 196:14-23. Walter's younger brother was not cremated, but buried behind his mother's house on what is now known as San Diego County parcel No. 595-080-04. ER 185:28-186:6.

Appellant Karen Toggery was also a lineal descendant and daughter of Native American, Marie Toggery, and the personal representative of her mother's estate, as well as the mother of her son Matthew Toggery, and the personal representative of his estate, and owned and controlled their human remains and Native American cultural items, that were interred in burial sites at the Indian cemetery, as provided for in NAGPRA, P.R.C. 5097.9-5097.99 and H.S.C. 7001 and 7100.[1] ER 202:24-203:3.

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[1] Karen Toggery passed on March 16, 2017. However, even though "no statement noting death has been served, [and] a motion for substitution is not yet required," Appellees moved to substitute her son, Louis Ayhule Gomez, as the representative of her estate, and the estates of Marie and Matthew Toggery, which motion was declared moot, when the trial court dismissed her claims on August 30, 2017. ER 6 and 17-18. *Thorpe v. Borough of Jim Thorpe* 2011 U.S. Dist. Lexis 135242, *2 (M.D. Pa. 2011).

Appellant April Palmer, is the sister of Dean Rosales, and the daughter of Walter Rosales, and the granddaughter of Helen Cuerro. Appellant Elisa Welmas is the mother of Dean Rosales, and co-owns his human remains and funerary objects, along with his father, and her former husband, Walter Rosales, and is the daughter-in-law of Helen Cuerro. ER 39:18-20.

D. Public Notice of Appellants' Ownership and Control of their Families' Remains and Presentment of Claims to the Government

Before any excavation of the cemetery parcel, Appellants continuously and repeatedly put all persons, including the Appellees, the California Attorney General, the Native American Heritage Commission, the S.D. County Coroner, the Calif. Victim Compensation and Government Claims Board, the B.I.A., U.S. District Courts, and the San Diego Superior Court, on written notice of:

(A) Appellants' ownership and control, as lineal descendants, of their deceased Native American family members' human remains, and funerary objects that for more than 100 years have been inhumed, interred and deposited in burial sites at what is now the government's portion of the Indian cemetery on which they lived; and

(B) Appellants' religious preference, as lineal descendants, to leave their families' human remains and funerary objects "in place," as required by NAGPRA, 25 U.S.C. 3002, and its regulations at 43 C.F.R. 10.1-10.17, P.R.C.

5097.98, and the CEQA Guidelines, 14 C.C. R. 15126.4 (b)(3). ER 44:22-45:7, 188:2-189:10, 205:18-206:28.

On March 10, 2014, the California Victim Compensation and Government Claims Board received Appellants' claims, and on March 11, 2014, notified Appellants that the Board rejected Appellants' claims and found "that the court system is the appropriate means for resolution of these claims." ER 45:8-11. Similarly, on February 11, 2015, the federal Appellees received Appellants' written claims, and on September 23, 2015, they received Appellants' $4 million demand for damages, which is memorialized in Ex. O, ER 141, to the Third Amended Complaint, and which claims remained without final disposition, and were therefore deemed denied, on February 23, 2016, pursuant to the presentment procedures in 28 U.S.C 2675. ER 45:11-14.

E. Federal Appellees' Breach of Duties Under the Constitution, Federal and State NAGPRA Statutes and Common Law

The federal Appellees are federal land managers, and owe duties to the Appellants to exercise reasonable care to enforce the coordinated, cumulative and combined protections of Appellants' families' remains in the U.S. Constitution, particularly Amend. 1, 4, 5, and 14, NAGPRA, 25 U.S.C. §§3001-2, 3005, 3009, 3013, 43 C.F.R. 10.1-17, the American Indian Religious Freedom Act ("AIRFA"), 42 U.S.C. §1996, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C.

§2000bb-1, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §2000cc, the California Constitution, Article I, Sections 1, 3, 4, 7, 13, 19, 24 and 31, H.S.C. §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8012, P.R.C. §§5097.9-5097.99, Cal. Penal Code §§487, 622.5, and the common law, as alleged in the TAC, ER 45:20-46:2, and conceded by the trial court's order. ER 12:14-20.

The federal Appellees also owe duties not to violate the Appellants' civil rights, due to their age, ancestry and their political and religious beliefs, all of which compel enforcement of these laws against any third parties who are mutilating, desecrating, disinterring, excavating and removing Appellants' families' human remains and funerary objects from the government's portion of the cemetery, without Appellants' consent and just compensation. ER46:3-7.

NAGPRA, 25 U.S.C. §§3009 and 3013, 25 C.F.R. 1.4(b), 43 C.F.R. 10.1(b)(3), 10.15, and 10.17, along with H.S.C. §8012 and P.R.C. §5097.95, also provide that all state and federal government agencies shall cooperate and coordinate in carrying out their duties under the U.S. and California Constitutions, NAGPRA, H.S.C. P.R.C., and Penal Codes, and save these remedies to the Appellants without preemption, and create a private right of action in Appellants for their violation. ER 45:15-19.

The federal Appellees also owe Appellants the highest fiduciary and common law trust duty, and general trust responsibility for management of Indian affairs and their human remains and funerary objects, based upon the comprehensive nature of Title 25 of the United States Code and its regulations, and the fact that the federal Appellees control, supervise and manage the land on which Appellants' families' remains were interred, as held in *United States v. Creek Nation,* 295 U.S. 103, 109-10 (1935), *Seminole Nation v. United States,* 316 U.S. 286, 295-300 (1942), *Mitchell v. United States*, (*Mitchell II*) 463 U.S. 206 (1983)*, Minn. Chippewa Tribe v. United States*, 14 Cl. Ct. 116, 130 (Ct. Cl.1987), *Coast Indian Cmty. v. United States*, 550 F2d 639, 652 (Ct. Cl. 1977), and the liability of federal employees acting in their personal capacity as held in *Bivens v. Six Unknown Named Agents* (*Bivens*), 403 U.S. 388 (1971). See also, *Quechan Indian Tribe v. United States* (*Quechan*), 535 F.Supp.2d 1072, 1110 (S.D. Cal. 2008). ER 46:3-7.

All of the federal and non-federal Appellees both intentionally and negligently breached their respective duties to Appellants under the federal and state NAGPRA statutes and common law by failing to protect the interests of, and prevent personal injury to, the Appellants, by:

(a) conducting and facilitating the intentional excavation, commingling and removal of Appellants' families' human remains and funerary objects from Federal lands to non-cemetery state property, without the Appellants' consent, just compensation, required permits, written plans of action, notice to the coroner, from the land owners and managers, or court order in violation of 16 U.S.C. §740aa and cc, 18 U.S.C. §§1957, 1962, 25 U.S.C. §3002(c), 43 C.F.R. 10.3(b)(1), H.S.C. §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8558, 8560, 8580, 103060, P.R.C. §§5097.5, 5097.7, 5097.98, 5097.99, and Penal Code §§457 and 622.5;

(b) failing to compel the U.S. landowner to cease all activity in the area of the identification of Appellants' families' human remains and funerary objects in any state of inhumation, cremation, decomposition or skeletal completeness on Federal lands, and failing to make a reasonable effort to certify, protect "in place," stabilize and cover the items identified before resuming such activity, and failing to provide notice to, consultation and mediation with, and a written plan of action for disposition and repatriation to, and obtain written consent from, the lineal descendants, including the generally accepted cultural standards, traditional treatment, care, and handling, place and manner of delivery of Appellants' families' human remains and funerary objects, as required by 25 U.S.C. 3002(d)

and 43 C.F.R. 10.2(f), 10.2(g)(4), 10.3(b), 10.4(b), 10.4(c), (d) and (e), 10.5, 10.6 and 10.10, P.R.C. §§5097.94, 5097.98, 5097.99, 5097.993, 21083, 14 Cal. Code Regs. 15064.5(e) and 15126.4(b)(3);

(c) failing to obtain the required permits from the Deputy Commissioner of Indian Affairs at the BIA, the County coroner, and Superior Court, as required by 16 U.S.C. 470aa and cc, 43 C.F.R. 10.3(b) and 10.4(d)(1)(v), H.S.C. §§7054.6, 7055, 7500, 8580, and 103060, and P.R.C. §§5097.98-.99;

(d) failing to transfer physical custody of the human remains and funerary objects, to the lineal descendants, following traditional customs and practices, and failing to publish the required notices of the proposed disposition in a newspaper of general circulation in the area in which they were identified, and send a copy of the notice to the Manager of the National NAGPRA Program, as required by 43 C.F.R. 10.6;

(e) failing to follow the directives of the National Center for Cultural Resources and the National NAGPRA Program and the lineal descendants' preferences to preserve the Native American human remains and funerary objects "in place," as set out in Exs. L and M to the Third Amended Complaint, ER 118 and 123;

(f) failing to reinter Plaintiffs' families' remains with appropriate dignity in a location not subject to further and future subsurface disturbance, as required by P.R.C. §5097.98(e) and (f);

(g) failing to repatriate the lineal descendants' human remains and funerary objects as they have requested, as required by 25 U.S.C. §3005, 43 C.F.R. 10.10, and H.S.C. §§8011, 8015-16, P.R.C. §5097.991,and failing to publish notice of such repatriation, as is regularly published in the Federal Register, see for e.g., 64 Fed. Reg. 56,219, 69 Fed. Reg. 4315, 69 Fed. Reg. 4316, and Ex. N to the Third Amended Complaint. ER 46:8-47:14, and 128.

F. Federal Appellees' Final Agency Actions

The federal Appellees have taken the following final agency actions, which are beyond the scope of the Secretary's authority, unsupported by substantial evidence, an abuse of discretion, arbitrary, capricious, null and void, and otherwise not in accord with the law: (a) the February 10, 2014, failure to take action, and breach of fiduciary trust duty, to prevent the illegal disinterment and removal of Plaintiffs' families' human remains and funerary objects from the government's portion of the Indian cemetery; (b) the April 10, 2013 publication of the erroneously proposed Indian Lands Decision, required and requested under 25 C.F.R. 559.1, ER 274; and (c) the July 1, 2013 Approval of the first site-specific

Gaming Ordinance, required under 25 C.F.R. 522.2(i), all without a sufficient NEPA required Supplemental Environmental Impact Statement (SEIS), concerning Appellants' rights as the lineal descendants in their families' remains, as expressly promised, and without Appellants' consent. ER 47:15-23, and 276.

G. Federal Appellees Violations of Appellants' Constitutional Rights under the 1st, 4th, and 5th Amendments

The federal Appellees thereby also violated Appellants' Constitutional rights under the First, Fourth, and Fifth Amendments to the ownership, control and free exercise of the right to bury their families' remains according to their religion, which requires that their dead not be disinterred, trucked and dumped on state property. Appellees thereby interfered with the Appellants' ability to observe the commands and practices of their faith, when these Appellees allowed the disinterment of Appellants' families' remains in violation of the commands of their religion not to allow them to be so desecrated. Appellees thereby gave a forbidden preference to the individual non-federal Appellees religious belief in the disinterment and removal of the families' remains without the Appellants' consent. ER 47:24-48:3.

These acts also substantially burdened Appellants' exercise of religion in violation of NAGPRA, 25 U.S.C. 3001 *et seq.*, AIRFA, 42 U.S.C. §1996, RFRA, 42 U.S.C. §2000bb-1, and RLUIPA, 42 U.S.C. §2000cc, without furtherance of a

compelling governmental interest in the least restrictive means of furthering any compelling governmental interest. They also violated H.S.C. §§8558, 8560, 8580, and P.R.C. §§5097.9, 5097.94, 5097.97, by interfering with the free expression and exercise of Native American religion, failing to investigate Appellants' claims that a sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property has been irreparably damaged, and violated H.S.C. 8301.5(d), by not keeping the graves and surrounding grounds tended, adorned, and embellished according to the desires and beliefs of the decedent's family. There is no clear and convincing evidence that the public interest and necessity require otherwise. See, for e.g., *Quechan Indian Tribe v. United States* (*Quechan*), 535 F.Supp.2d 1072, 1100, 1104-08, 1109-10, 1117-22 (S.D. Cal. 2008). ER 48:4-13.

The federal Appellees thereby also deprived Appellants of their exclusive personal property rights to possess, control, dispose, and prevent the disinterment, removal and violation of their families' remains, without due process of law required by the U.S. and California Constitutions, when the federal Appellees allowed them to be dug up, trucked and dumped on state property without Appellants' consent, a pre-deprivation trial, and just compensation. ER 48:14-18.

H. All Appellees' Violation of Federal and State NAGPRA Statutes and Conversion of Appellants' Families' Remains

All of the Appellees have negligently and/or intentionally, and unlawfully disinterred, removed, taken possession and converted to their own use, personal property which Appellants own and have a right to use, occupy and quietly enjoy, without the knowledge, permission or consent of the Appellants, including, but not limited to, the Appellants' families' human remains and funerary objects in violation of the federal and state NAGPRA statutes and common law. 48:14-18 and 49:14-50:1.

I. Action Should be Remanded to Determine Appellants' Damages and Remaining Remedies

Appellants have demanded that Appellees return said personal property to Appellants, but Appellees and each of them, have refused and continue to refuse to return said personal property. As a result of Appellees' wrongful conversion of Appellants' property, Appellants have suffered both general and consequential damages believed to be in excess of $4 million, including but not limited to the damage to reputation, property, physical and bodily injury, including but not limited to, anxiety, humiliation, shock, emotional distress, mental anguish and related mental and physical injury. ER 49:18-50:1.

These acts and final agency actions have caused and resulted in the illegal desecration, disinterment, excavation, and removal of the Appellants' families' human remains and funerary objects from the government's portion of the Indian cemetery and dumping them on non-cemetery state property without Appellants' knowledge and consent, thereby causing severe personal, physical and bodily injury, including severe emotional distress, and irreparable damage to the Appellants and their personal property and Native American human remains and funerary objects, each in an amount in excess of $4 million. ER 48:19-25.

These acts have also caused substantial emotional distress and personal injury and irreparable damage to, and interference with, the Appellants' free expression and exercise of Native American religion as provided in the United States and the California Constitutions, and has caused and shall further cause severe and irreparable damage to the Appellants' Native American sanctified cemetery, place of worship, religious or ceremonial site, and sacred shrines, also in an amount in excess of $4 million. ER 48:26-49:3.

Such acts have unduly interfered with the Appellants' civil rights to due process and equal protection of the laws. Appellants have been greatly and irreparably damaged by reason of Appellees' infringement and violation of these civil rights, and have suffered general and consequential damages proximately

caused by the Defendants' also in an amount in excess of $4 million. ER 49:4-9.

While Appellants were originally entitled to injunctive relief to prevent further desecration of their families' remains at the outset of this action in 2015, given the delay in ruling on the motions to dismiss, the Appellees' illegal excavation and removal of the Appellants' families remains to the CalTrans highway construction site has been completed, and can no longer, as a practical matter, be enjoined as they should have been at the outset of this action. ER 148:25, 150:3. Hence, the Appellants' remedies have been reduced to monetary damages and an injunction to maintain their families' remains "in place," in order to compensate the Appellants for their severe emotional distress as a result of the desecration and conversion of their families' remains, since they cannot, as a practical matter, be retrieved from the highway that has also been completed and in which they are now interred.

Based upon these admitted facts, the trial court's dismissal of Appellants' claims must be reversed and remanded, since the JIV is neither a necessary, required, nor an indispensable party to this action, and since the non-federal Appellees have no immunity from Appellants' personal injury claims arising from the illegal desecration of their families' remains.

Argument

1. The Jamul Indian Village is Neither a Necessary, Required, nor an Indispensable Party, to this Action

A decision in favor of Appellants on any of the three causes of action in the Third Amended Complaint will neither impair nor impede any protected interest of the JIV. Not only has the JIV made no claim for any protected interest in the Appellants' families' remains, which is the subject matter of this action, but as a matter of law, any such claim would be "patently frivolous," per the terms of both the federal and state NAGPRA statutes, 25 U.S.C. 3002(a), 43 C.F.R. 10.2(d)(1), HSC 7100, as held in *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992), since the JIV has no lawful right, title, interest or control over, or in, Appellants' families' remains. *White v. Univ. of California*, 765 F.3d 1010, 1016 (9th Cir. 2014), "NAGPRA contains, among other things, an 'ownership' provision...The provision generally vests ownership and control over the cultural items in the lineal descendants of a deceased Native American;" *Bonnichsen v. United States* (*Bonnichsen*), 367 F.3d 864, 875 (9th Cir. (2004), "NAGPRA vests 'ownership or control' of newly discovered Native American human remains in

the decedent's lineal descendants..."[2]

Where, as here, the lineal descendants are still alive, no tribe has any right, title, interest or control over the Native American's human remains or funerary objects. "The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990 shall be (with priority given in the order listed)–(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American..." 25 U.S.C. 3002(a).

Similarly, H.S.C. 7100(a) provides:

> The right to control the disposition of the remains of a deceased person, the location and conditions of interment, and arrangements for funeral goods and services to be provided, unless other directions have been given by the decedent pursuant to Section 7100.1, vests in, and the duty of disposition and the liability for the reasonable cost of disposition of the remains devolves upon, the following in the order named: ...(3) The sole surviving competent adult child of the decedent...

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[2] "...NAGPRA was enacted with two main goals; to respect the burial traditions of modern-day American Indians and to protect the dignity of the human body after death. NAGPRA was intended to benefit modern American Indians by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors' graves...," citing H.R. Rep. No. 101-877, U.S. Code Cong. & Admin. News at 4367, 4369 (1990)...NAGPRA was also intended to protect the dignity of the human body after death by ensuring that Native American graves and remains be treated with respect. See S. Rep. No. 101-473, at 6 (1990). H.R. Rep. No. 101-877, U.S. Code Cong. & Admin. News at 4367, 4372 (1990) ("some Indian representatives testified that the spirits of *their ancestors* would not rest until they are returned to their homeland..."). *Bonnichsen* at 876-77.

Appellants' families' human remains and funerary objects are, as a matter of law, treated as personal property, not real property, under the exclusive control of Appellants as the next of kin. 25 U.S.C. 3001(13), 3002; H.S.C. 7001, 7100; P.R.C. 5097.9-5097.994. The JIV has no right, title or interest in the Appellants' families' remains, while Appellants are the living lineal descendants. "[T]he next of kin...have property rights in the body which will be protected, and for a violation of which they are entitled to indemnification," *Christensen v. Superior Court* (*Pasadena Crematorium of Altadena*)(*Christensen*), 54 Cal.3d 868, 890, 896-977 (1991), citing *O'Donnell v. Slack*, 123 Cal. 285, 287-290 (1899), finding "the next of kin have property rights in the body, possession and control of the body exclusive of others;" see also, *Sinai Temple v. Kaplan*, 54 Calliope.3d 1103, 1110 (1976), and *Newman v. Sathyavaglswaran* (*Newman*), 287 F.3d 786, 790-94 (9th Cir. 2002). There, as here, the Appellees "did not merely 'take a single strand from the bundle of property rights: [they] chopped through the bundle, taking a slice of every strand." *Newman*, 798. "[T]he group of rights inhering in...the right to possess, use and dispose of" the body as property rights "were codified in H.S.C. 7100." *Newman*, 788, 793-94.

Hence, contrary to the trial court's erroneous conclusion, without citation to any admissible evidence or authority, the JIV has never had a protected interest in

the subject matter of this action, since it has no property interest in the Appellants' families' remains, and since Appellants are their families' living lineal descendants.

Moreover, not only did the trial court fail to notice that Appellants established that the JIV was not a necessary, required nor indispensable party for the same reasons in this Court's *Salt River Project Agricultural Improvement and Power Dist. v. Headwaters Resources, Inc.* (*Salt River*), 2012 US. Dist. Lexis 10862, *14 (9th Cir. 2012), but it violated its' precedent: (1) JIV has no protected interest in this action, particularly since Appellants only seek remedies against the non-federal Appellees, and not the JIV; (2) the JIV is represented by the Appellee executive council members; and (3) no party is subject to any inconsistent obligations. Compare, ER 243-245, with ER 9:16-17.

Moreover, contrary to the trial court's reliance on *White*, this Court only found the Kumeyaay Cultural Repatriation Committee to be a necessary and indispensable party there, because the two skeletons were more than 8000 years old, and there were no "culturally identifiable" living lineal descendants. "If lineal descendants cannot be identified, then [and only] then the provision vests ownership in the tribe on whose land the remains were discovered (if they were discovered on tribal lands), or in the tribe having the closest 'cultural affiliation'

with the remains (if they were discovered on non-tribal federal lands). §3002(a)(2)(A)-(B).” *White* at 1016.

Here, the trial court erroneously found three sentences in the TAC to be the JIV’s protected interest, which would allegedly be affected by an award of damages and injunctive relief in favor of Appellants: “Here, plaintiffs allege (1) the JIV is not a federally recognized tribe, (2) the land at issue in the suit—the Jamul Indian Cemetery—is not Indian Land, and (3) non-federal defendants’ actions violated section 10.8.3(c) of the Compact between the Tribe and the State of California, TAC ¶¶ 12, 33.” ER 14:3-6.

However, Appellants need not seek, and do not seek, adjudication of these factual allegations, since they are established undisputable matters of law and record, and are unnecessary to an award of damages or injunctive relief to the Appellants. Contrary to the trial court’s ruling, Appellants do not challenge the JIV’s identity as a recognized tribe, nor the extent of its interest in the Jamul Indian Cemetery, nor the terms of any contract or Compact.

Moreover, whether the JIV was a federally recognized tribe in 1934, whether the Jamul Indian Cemetery is Indian land or not, and whether the JIV compact with California has been violated, are not predicate facts that must be adjudicated to determine Appellants’ entitlement to damages and injunctive relief

from a violation of their First, Fourth and Fifth Amendment rights, and the federal and state NAGPRA statutes, or the conversion of their families' remains. Neither an award of damages, nor the limited, requested injunctive relief, will impair or impede any protected interest of the JIV.

Damages are sought from the Appellees, not the JIV. Agents who commit torts remain independently liable therefor, particularly here, where Appellants elect to hold only the agents liable, and not the principal. Rest.2d Agency § 360; *McNeill v. State Farm Life Ins. Co.*, 116 Cal. App.4th 597, 603 (2004); 3 Witkin, Summary 10th (2005) Agency & Employment §199, p. 252; 3 Witkin, Cal. Proc. 5th (2008) Actions, §150, p.231.

Similarly, the limited injunctive relief requested, merely calls for compliance with the federal and state NAGPRA regulations, including consultation with the Appellants, a written plan of action for disposition, repatriation, and maintenance of the remains where they now lie "in place," and will have no affect on the JIV, as it requires no action by, nor against, any protected interest of the JIV, just as was found in *Thorpe v. Borough of Jim Thorpe* (*Thorpe*), 2011 U.S. Dist. Lexis 135242, *10 (M.D. Pa. 2011). Neither an award of damages, nor the limited injunctive relief requested, will have any affect on whether the JIV is a recognized tribe, or whether the JIV has any interest in the

Jamul Indian Cemetery.

Moreover, Appellants do not seek, and are prohibited from seeking, any remedy under the JIV's Compact with California, since only patrons are permitted to seek remedies for personal injuries arising on the property, and only the parties to the Compact may seek to enforce the agreement. § 12.5, 13.0, and 18.1; See, http://www.cgcc.ca.gov/documents/compacts/amended_compacts/Jamul_Compact_2016.pdf. Appellants seek no remedy under contract law. Thus, neither the Compact, nor its parties, are at issue in this action.

Similarly, as in *Quechan Ind. Tribe v. United States*, 535 F.Supp.2d 1072, 1100 (S.D. Cal. 2008), Appellants' tort "claims do not rise and fall on the ownership of land." It is not relevant to Appellants' remedies whether the JIV is lawfully in possession of the Jamul Indian Cemetery, since title to the land from which the Appellants' families' remains were illegally removed is 100% held by the United States, and therefore expressly subject to NAGPRA. 25 U.S.C. 3001(5), and 3002(a); ER 68.

As noted above, as a practical matter, since the excavation, removal and re-interment of the Appellants' families' remains beneath the CalTrans highway was completed at the end of 2015, the requested injunctive relief will not compel the JIV to do anything, nor cause any affect upon JIV's now quarter-blood

community. Contrary to the trial court's long delayed and erroneous conclusion, Appellants do not now seek to enjoin any excavation, construction or governmental activities on the cemetery, since the excavation and construction have now been completed. ER 150:3. Nor would any damage award or injunction maintaining Appellants' families' remains "in place," where they are now interred beneath a CalTrans highway impair any compact renegotiation by the JIV, which was completed in September 2016. See, http: //www.cgcc.ca.gov/documents /compacts/amended_compacts/Jamul_Compact_2016.pdf.

Contrary to the trial court's erroneous finding, ER 16: 23-24, "an order prohibiting further disinterment and removal of plaintiffs' families' remains and funerary objects," will not prejudice any JIV interest, since Appellants' families' remains are now interred beneath a CalTrans highway twenty miles from the cemetery and are not within the control of the JIV. A judgment in favor of Appellants will simply have no impact whatsoever on whatever sovereignty has been granted to the now quarter-blood JIV Indian community.

In fact, the 3 allegedly protected interests identified by the trial court are unnecessary to, and will not be affected by, an adjudication of Appellants' remedies for the Appellees' torts. Appellants' remedies are not predicated on any of these three facts. As noted above, these facts were plead merely to provide the

historical context in which the Appellees violated their respective duties to prevent the desecration of the Appellants' families remains.

Hence, the JIV is not a necessary party to this action, under Fed. R. Civ. Proc., Rule 19(a)(1), since: (1) the court can "accord complete relief among existing parties," (2) the JIV has no protected interest "relating to the subject matter of the action that would as a practical matter be impaired or impeded," and (3) no "existing party is subject to incurring double, multiple, or otherwise inconsistent obligations," just as was found in *Thorpe v. Borough of Jim Thorpe* (*Thorpe*), 2011 U.S. Dist. Lexis 135242, *10 (M.D. Pa. 2011), "Jim Thorpe's lineal descendants and affiliated tribes are not necessary parties to this action under *Rule 19(a)(1)(B)(I)*;" *Salt River Project Agricultural Improvement and Power Dist. v. Headwaters Resources, Inc.* (*Salt River*), 2012 US. Dist. Lexis 10862, *14 (9th Cir. 2012).

> In sum, we hold that (1) the Navajo Nation is not a necessary party under Rule 19(a)(2)(A) because the plaintiffs seek relief only against the current Navajo officials; (2) the Navajo nation is not a necessary party under Rule 19(a)(1)(B)(I) because the officials adequately represent the tribe's interests, and (3) the Navajo Nation is not a necessary party under Rule 19(a)(1)(B)(ii) because its absence will not risk subjecting the plaintiffs to inconsistent obligations.
>
> Indeed, a contrary holding would effectively gut the *Ex parte Young* doctrine. That doctrine permits actions for ...relief against state or tribal officials in their official capacity to enjoin them from violating

> federal law, without the presence of the immune State or tribe. *See Ex parte Young*, 209 U.S. 123 (1908). Id., at 1181.

See also, *Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999), holding that the Lac Courte Orielles Band of Lake Superior Chippewa Indians was not a required or indispensable party to an action alleging that the federal defendants had failed to follow the administrative procedures for Secretarial elections.

As in *Thorpe*, Appellants/Plaintiffs "do not seek to enjoin the Defendants to return the remains directly to them, but rather to comply with the NAGPRA procedures about repatriation...[Fn 2] This language demonstrates that the appropriate recipient of the remains will not be determined by the Court, but rather the NAGPRA repatriation procedure...43 C.F.R. § 10.10(b)(1). Because the Defendants would have consulted with all tribes and lineal descendants as part of compliance with 43 C.F.R. § 10.9(b)(1), those parties would all have notice and opportunity to make their own repatriation requests to the Defendants. Thus, their interests will not be impaired or impeded by their absence in this action and they are not necessary under *Rule 19(a)(1)(B)(i)*." *Thorpe* at*11.

"Further, neither Jim Thorpe's lineal descendants nor his affiliated tribes are necessary parties under *Rule 19(a)(1)(B)(ii)*... [that] they may be subject to double,

multiple or inconsistent obligations...is erroneous, given that NAGPRA states that after repatriation of human remains to a party, all claims by any other party are 'irrevocably waived,' 43 C.F.R. § 10.15. Under this regulation, if the Defendants repatriated the item to the Plaintiffs, no additional lineal descendants or tribes would have a claim against the Defendants. Additionally, NAGPRA dictates the appropriate procedure for if additional lineal descendants or tribes made competing claims against the Defendants prior to any repatriation...dispute resolution should first be attempted via informal negotiations, but there is also a Review Committee that will facilitate the resolution of disputes under the statute. 43 C.F.R. § 10.17. Thus, ...NAGPRA ensures that the [Defendants] will never be subject to double, multiple or inconsistent obligations. Therefore, Jim Thorpe's other lineal descendants and tribes are not necessary parties under *Rule 19(a)(1)(B)(ii)*. Because joinder of additional parties is not necessary, Defendants' motion to dismiss on these grounds will be denied." *Thorpe* at *12-13; see also, *Salt River*, at *13-14, finding "no risk" that the parties "could be subject to inconsistent obligations in the absence of [the tribe]," since the "complaint seeks an injunction only against the named officials," and not the tribe; "Thus, the [tribe] is not a necessary party under *Rule 19*. The district court's order dismissing the case is reversed."

Even if the JIV had a protected interest in the Appellants' families' remains, which it doesn't, pursuant to 25 U.S.C. 3002(a), it would still not be an indispensable party under Fed. R. Civ. Proc., Rule 19(b), because a judgment in favor of the Appellants will not prejudice the JIV, will be adequate as to the existing parties, and since the Appellants would have no adequate remedy if the action were dismissed for non-joinder. *Thorpe,* at *10; *Salt River* at *14.

Moreover, JIV would also not be an indispensable party, since, as a matter of law, it is adequately represented by the Appellee executive council members. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2035 (2014). As found in *Salt River*: (1) "the officials' interests are aligned with the tribe's interests;" (2) "there is no reason to believe the official defendants cannot or will not make any reasonable argument that the tribe would make if it were a party;" (3) "there is no indication that the tribe would offer any necessary element to the action that the official defendants would neglect." *Salt River* at *12-13.

For all of these reasons, the trial court's dismissal pursuant to Fed. R. Civ. Proc., Rules 12(b)(7) and 19, must be reversed, and the action remanded.

2. The Non-Federal Appellees Have No Sovereign Immunity for their Illegal Desecration and Conversion of Appellants' Families' Remains.

In dismissing Appellants' action against the non-federal Appellees for lack of subject matter jurisdiction due to sovereign immunity under Fed. R. Civ. P., Rule 12(b)(1), the trial court erroneously failed to follow the Supreme Court and this Court's holdings that tribal employees have no sovereign immunity from individual personal capacity suits for wrongful actions taken under color of law, in the course of their official duties. *Lewis v. Clarke* (*Lewis*), 137 S. Ct. 1285, 1292 (2017); *Hafer v Melo*, 502 U.S. 21, 30-31 (1991); *Oklahoma Tax Comm. v. Citizen Band of Potawatomi Tribe of Okla*., ("*Oklahoma Tax Comm.*"),498 U.S. 505, 514 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978); *Puyallup Tribe, Inc. v. Dept. of Game of State of Wash.* ("*Puyallup*"), 433 U.S. 165, 172 (1977); *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015); and *Maxwell v. County of San Diego*, 708 F.3d 10075, 1087 (9th Cir. 2013). Pursuant thereto, the non-federal Appellees have no sovereign immunity for the damages caused by their violation of the federal and state NAGPRA statutes and conversion of Appellants' families' remains in their personal capacity.

Here, the non-federal Appellees were, in fact, sued in their individual capacities, because they were alleged to have acted illegally in excess of their

authority in desecrating and converting Appellants' families' remains in violation of the federal and state NAGPRA statutes. ER 40:15-21, 41:7-20. "[A]llegations of acts outside an officer's authority are by definition individual capacity claims....suits over plainly unlawful acts are individual capacity suits by definition..." *Maxwell* at 1989, citing *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985) (overruled on other grounds, 474 U.S. 9).

Moreover, Appellants make no claims against the non-federal Appellees arising from any official acts of the JIV. Approval, payment, and supervision of construction does not require illegal desecration and removal of Appellants' families' remains. State and federal NAGPRA regulations should have been followed by the non-federal Appellees during any lawful construction, but they weren't. There simply is no authority allowing the JIV to disinter and remove Appellants' families' remains in violation state and federal NAGPRA regulations.

As noted above, the JIV has no right, title or interest in Appellants' families' remains, and thus, is not alleged to have taken any official act with regard to Appellants' families' remains. The JIV steadfastly maintains that it did not excavate Appellants' families' remains, nor truck them and re-inter them beneath CalTrans' highway, ER 150:14-16, and Appellants have not alleged that

JIV violated the NAGPRA statutes.

Rather, Appellants have only alleged that the illegal desecration was bought, paid for, and supervised by the individual and corporate non-federal Appellees, outside any official capacity of the JIV. ER 40:15-21, 41:7-20, 42:3-13, 45:20-46:2, 56:8-47:14, 49:14-17, 189:11-192:13, 193:20-194:22, 207:1-210:3, 210:14-212:10. They have been sued in their individual capacity, for acts that did not involve any JIV policy or discretionary function. The non-federal Appellees have no right or authority to dig up Appellants' families' remains and remove them from federal property, whether beneficially owned by the JIV or not, without Appellants' consent and without abiding by state and federal NAGPRA regulations.

Therefore, since the non-federal Appellees, who have admitted to having dug up and otherwise supervised the illegal excavation of Appellants' families' remains from federal property, were not acting within any authority on behalf of the JIV, they have no sovereign immunity for their illegal acts. These actions were only committed by the individuals in excess of any official authority. *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2035 (2014). In addition, since these Appellees have filed no responsive pleading denying these facts, they remain admitted under Fed. Rules Civ. P., Rule 8(b)(6), and these Appellees remain liable

for illegally desecrating and removing Appellants' families' remains from the federal property and failing to reinter them with the dignity pursuant to the permits and written plans of action required by the state and federal NAGPRA regulations.

"Nor does [] immunity extend to members of the tribe just because of their status as members. ...When tribal officials act outside the bounds of their lawful authority, however, most courts would extend the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to allow suits against the officials..." *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 40 Cal.4th 239, 248 (2006).

Appellants' claims against the non-federal Appellees are not vague or ambiguous, contrary to the trial court's finding, ER 12:21. Appellants have specifically alleged that Appellees, Meza, Chamberlain and Pinto, supervised the illegal excavation, removal and re-interment of the Appellants' families' remains, that was intentionally paid for by Penn National and its subsidiary, and performed by men and equipment supplied by C.W. Driver. TAC ¶¶11, 13, 14, 26, 27, 33 and 42, ER 40:15-21, 41:7-20, 44:10-22, 46:8-47:14, 49:14-17. "A supervisor is liable for a subordinate's constitutional violations 'if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them.'" *Maxwell* at 1086, citing *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

Contrary to the trial court's erroneous finding, Appellants did allege that the non-federal Appellees excavated and removed "specific Indian remains," including Walter Rosales' brother, mother and son's human remains, and Karen Toggery's mother and son's funerary objects. ER 39:1-14, 44:10-22, 46:9-14, 184:24-185:2- 185:22-187:1, 189:11-194:22, 202:24-203:3, 203:21-204:17, 207:1-212:10. Thus, the trial court erred in dismissing Appellants' specific claims without leave to amend, contrary to the holding in *Winnemem Wintu Tribe v. United States DOI*, 725 F. Supp. 2d 1119, 1145 (E.D. Cal. 2010).

Contrary to the trial court's erroneous statement, ER 13:7, Appellants have alleged that Meza, Chamberlain and Pinto, were acting outside their capacities as JIV officials, since the JIV has no right, title or interest to take any action with regard to Appellants' families' remains, and since their desecration of Appellants' families' remains violated federal and state NAGPRA statutes and constituted a conversion under common law. ER 40:15-21, 46:8-47:14, 49:14-17. "Because [Plaintiffs] allege that these Defendants exceeded their authority under federal law, the Tribes' arguments [as to any alleged sovereignty] are without merit." *Evans v. Shoshone-Bannock LUPC*, 736 F.3d 1298, 1307, fn. 10 (9th Cir. 2013).

Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is

plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). In reviewing a motion to dismiss for sufficiency of the stated claim, a court must "accept the complaint's allegations as true," and draw all reasonable inferences in favor of the non moving party. *Albright v. Oliver*, 510 U.S. 266, 268 (1994); *Navajo Nation v. USDOI* , 819 F.3d 1084, 1088, fn. 7 (9th Cir. 2016); *Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn,* 373 U.S. 746, 753 n.6, (1963). The complaint may be dismissed only if "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hoover v. Ronwin*, 466 U.S. 558, 587, (1984).[3]

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[3] Moreover, where, as here, the jurisdictional facts are disputed and coextensive with the merits of Appellants' claims, a motion to dismiss cannot be adjudicated without a trial. Disputed and "intertwined jurisdictional facts must be resolved at trial by the trier of fact." *Rivas v. Napolitano*, 714 F.3d 1108, 1113 (9th Cir. 2011). "[I]f the jurisdictional issue and substantive claims are so intertwined that resolution of the jurisdictional question is dependent on factual issues going to the merits, the district court should employ the standard applicable to a motion for summary judgment and grant the motion to dismiss for lack of jurisdiction only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. Otherwise, the intertwined jurisdictional facts must be resolved at trial by the trier of fact." *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987), citing *Augustine v. United States.*, 704 F.2d 1074, 1077 (9th Cir. 1983). "To the extent that the jurisdictional facts are disputed... the

The Supreme Court holds that "sovereign immunity 'does not erect a barrier against suits to impose individual and personal liability.' *Hafer v Melo*, 502 U.S. 21, 30-31 (1991); see *Alden v. Maine*, 527 U.S. 706, 757 (1996). 'Personal capacity suits...seek to impose individual liability upon a government officer for actions taken under color of [] law.' *Hafer* at 25; see also *id.*, at 27-31; cf. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (19710. 'Officers sued in their personal capacity come to court as individuals.' *Hafer* at 27, and the real party in interest is the individual, not the sovereign.'" *Lewis v. Clarke,* 137 S. Ct. 1285, 1292 (2017). It is not a mere pleading device. *Hafer* at 27.

As here, the facts in *Lewis* arose from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit was brought against a tribal employee operating a vehicle within the scope of his employment on state lands, and the judgment would not operate against the tribe. Similarly, Appellants'

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parties should be allowed to conduct discovery for the limited purpose of establishing jurisdictional facts before the claims can be dismissed." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992). Here, the infringement of Appellants' First, Fourth and Fifth Amendment rights and private rights of action for violation of the federal and state NAGPRA statutes and common law establish both jurisdiction and the merits of Appellants' claims. Therefore, the JIV's lack of interest in Appellants' families' human remains, and the Court's subject matter jurisdiction under Rule 12(b)(1) and (7), may not be adjudicated without a jury trial of these intertwined facts.

claims against the non-federal Appellees here are not a suit against them in their official capacity. Just as in *Lewis*, "'It is simply a suit against [Defendant] to recover for his personal actions, which will not require action by the sovereign or disturb the sovereign's property.' *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949)[4]...tribal sovereign immunity is simply not in play... the Gaming Authority's immunity does not, in these circumstances, bar suit against Clarke." *Lewis* at 1292.

"[T]he United States Supreme Court has repeatedly stated that tribal immunity generally 'does not immunize the individual members of the Tribe.'" *Puyallup Tribe, Inc. v. Dept. of Game of State of Wash.* ("*Puyallup*"), 433 U.S. 165, 172 (1977). "As an officer of the Pueblo petitioner is not protected by tribe's immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978). "We have never held that individual agents or officers of a tribe are not liable for damages..." *Oklahoma Tax Comm. v. Citizen Band of Potawatomi Tribe of Okla.*,

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[4] "According to *Larson*, suits that charge federal officials with unconstitutional acts are not barred by sovereign immunity...if a federal official, acting pursuant to a constitutional statute, commits an unconstitutional act, he cannot be acting on behalf of the government because his actions go beyond the scope of his authority and are *ultra vires*. *Id*. Any claim making such constitutional allegations is not barred by sovereign immunity and will be within the jurisdiction of the federal court. *Id*., at 701-02...If an employee of the United States acts completely outside his governmental authority, he has no immunity." *United States v. Yakima Tribal Court*, 806 F.2d 853, 859 (9th Cir. 1986).

("*Oklahoma Tax Comm.*"),498 U.S. 505, 514 (1991). "The Supreme Court has held that tribal immunity also does not preclude actions against tribal officials based on their official actions *in circumstances where immunity would not bar actions against other government officials." Turner v. Martire*, 82 Cal. App.4th 1042, 1052 (2000), citing Cohen, *Handbook of Federal Indian Law*, (1982 ed.) 328, italics in original. "[N]ot all individuals associated with a tribe are entitled to immunity." *Turner*, 1049. "[T]he United States Supreme court has never endorsed the extension of tribal immunity to individuals." *Turner*, 1051.

Similarly, this Circuit holds: "As a general matter, individual or 'personal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of ... law,' and that were taken in the course of his official duties...An officer sued in his individual capacity...cannot claim *sovereign* immunity from suit, 'so long as the relief is sought not from the [government] treasury but from the officer personally'....tribal defendants sued in their *individual* capacities for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties." *Pistor* at 1111, citing *Maxwell* at 1089.

"Following this rule, *Maxwell* held that two paramedics employed by a tribe (the Viejas Band) who allegedly had provided grossly negligent care to a shooting

victim were not entitled to tribal sovereign immunity from a state tort action brought against them in their individual capacities." *Pistor* at 1113, citing *Maxwell* at 1081.

"Normally, a suit like this one–brought against individual officers in their individual capacities–does not implicate sovereign immunity. The plaintiff seeks money damages not from the state treasury but from the officer[s] personally. [citation] Due to the essential nature and effect of the relief sought, the sovereign is not the real, substantial party in interest." *Maxwell* at 1087-88. "We conclude that the Viejas Fire paramedics do not enjoy tribal sovereign immunity because a remedy would operate against them, not the tribe." *Maxwell* at 1087.

"In short, our tribal sovereign immunity cases do not question the general rule that individual officers are liable when sued in their individual capacities...We therefore hold that sovereign immunity does not bar the suit against the Viejas Fire paramedics as individuals. The Viejas Band is not the real party in interest. The Maxwells have sued the Viejas Fire paramedics in their individual capacities for money damages. Any damages will come from their own pockets, not the tribal treasury," as here. *Maxwell* at 1089.

"Tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law. *Burlington N. & Santa*

Fe Ry. Co. v. Vaughn, 509 F.3d 1085, 1092 (9th Cir. 2007), quoting *Burlington N. R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), overruled on other grounds by *Big Horn Cnty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000). As noted previously, because [Plaintiffs] allege that these Defendants exceeded their authority under federal law, the Tribes' arguments [as to any alleged sovereignty] are without merit." *Evans v. Shoshone-Bannock LUPC*, 736 F.3d 1298, 1307, fn. 10 (9th Cir. 2013).

See also, *Native Am. Distrib. Co. v. Seneca-Cayuga Tobacco Co*., 546 F.3d 1288, 1296 (10th Cir. 2008), "The general bar against official-capacity claims... does not mean that tribal officials are immunized from individual-capacity suits *arising out of* actions they took in their official capacities...;" *Boisclair v. Sup. Ct.,* 51 Cal.3d 1140, 1157-58 (1990), "the agent of a sovereign may be liable when he acts 'in excess of authority or under an authority not validly conferred,'" citing *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 691 (1949); *Turner v. Martire*, (2000) 82 Calliope.4th 1042, 1049-55, "Where an officer of a sovereign acts beyond his or her delegated authority, his or her actions are considered individual and not sovereign actions." *Turner*, at 1055. When an officer acts beyond delegated authority, "[t]he officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign

has forbidden. Therefore, immunity does not attach to such conduct." *Id.*, citing *Larson* at 689.

"[I]t remains '[t]he general rule that individual officers are liable when sued in their individual capacities.' *Maxwell* at 1089. So long as any remedy will operate against the officers individually, and not against the sovereign, there is 'no reason to give tribal officers broader sovereign immunity protections than state or federal officers.' *Id*. The principles reiterated in *Maxwell* foreclose the tribal defendants' claim to tribal sovereign immunity in this case." *Pistor* at 1113. "By its essential nature, an individual or personal capacity suit against an officer seeks to hold the officer personally liable for wrongful conduct taken *in the course of her official duties.*" *Pistor* at 1114.

"Even if the Tribe agrees to pay for the [individual] tribal defendants' liability, that does not entitle them to sovereign immunity: 'The unilateral decision to insure a government officer against liability does not make the officer immune from that liability.' *Maxwell*, at 1090." *Pistor* at 1114.

The *Lewis* Supreme Court has subsequently made this the law of the land, stating: "The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab... We hold that an indemnification provision cannot as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak."

Lewis at 1293-94. "[T]ribal sovereign immunity is...simply not present when the claim is made against those employees in their individual capacities." *Lewis* at 1295. Sovereign immunity cannot be conferred by contract upon agents who act beyond their delegated authority by failing to obey the law; such actions "are considered individual and not sovereign actions." *Turner v. Martie,* 82 Calliope.4th 1042, 1049, 1055 (2000).

Conclusion

Therefore, just as in *Maxwell*, this Court should "reverse the district court's granting of the [Appellees'] motion to dismiss for lack of subject matter jurisdiction due to tribal sovereign immunity and remand for further proceedings." *Maxwell* at 1090.

The trial court's erroneous dismissal must be reversed, and Appellants' remaining claims must be remanded for trial because: (1) non-party JIV has no protected interest in Appellants' remaining claims, and is therefore neither a necessary, required or indispensable party to this action, and (2) the non-federal Appellees have no sovereign immunity for the personal injury damages caused by their illegal desecration of Appellants' families' remains.

Dated: January 3, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and a 14-point font and contains 10,174 words.

Dated: January 3, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with Clerk of the Court for the United States Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on January 3, 2018.

I certify that Counsel for all the parties in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 3, 2018.

Respectfully submitted,

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